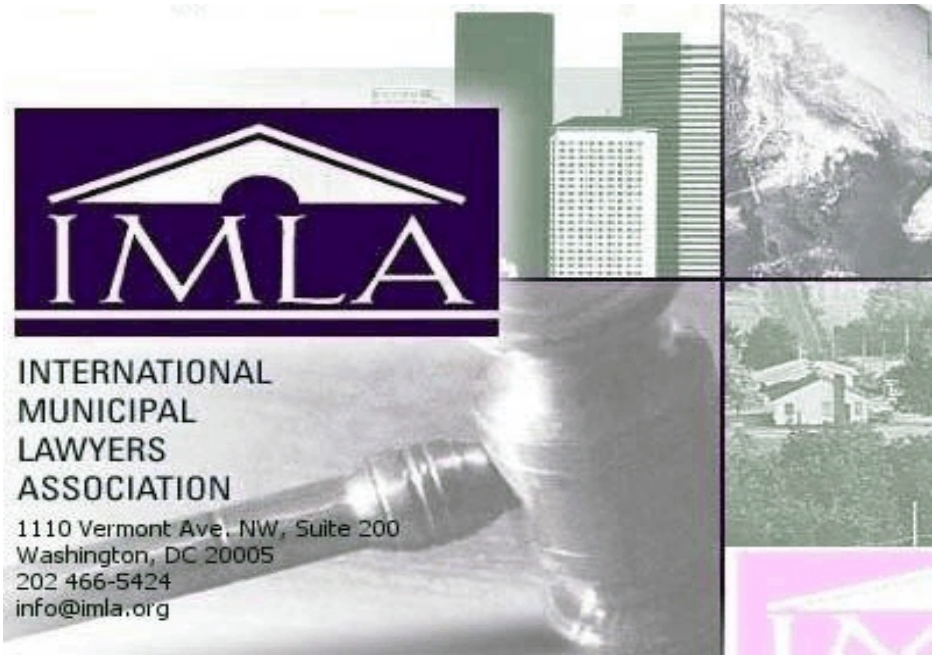

2006 Annual Report of the Land Development, Planning and Zoning Section

Section Officers:
Neil R. Shortlidge, Chair
Stinson Morrison Hecker LLP
Overland Park, Kansas

Barbara A. Adams
Village Attorney Kenilworth, IL
Holland & Knight, LLP
Chicago, Illinois

David A. Basil, Recorder
County Attorney
Carroll County, Georgia

I. INTRODUCTION

The report is intended primarily as general guidance for municipal attorneys regarding land use and development decisions over the past 12 months. The report is organized to provide groupings of cases and simplified by facts and holdings to orient the practitioner and give quick meaning to different viewpoints, applications, and theories.

In 2005-2006, the courts seem to weigh evenly on property owner rights when reviewing municipal land use regulation. A fair number of cases summarized in this year's annual report deal with takings issues and seem to direct local regulatory agencies to rethink their concept of "common sense," at least what the particular jurist believes to be common sense.

II. ACKNOWLEDGMENTS

Many thanks to those who assisted and helped make this report possible this year. Your efforts are gratefully acknowledged. Special thanks are due the able assistance of Neil R. Shortlidge, (Chairman), Stinson Morrison Hecker, Overland Park, Kansas; Barbara Adams, Village Attorney Kenilworth, IL, Holland & Knight, LLP, Chicago, Illinois; Daniel J. Curtin, Jr., Bingham McCutchen, LLP, Walnut Creek, CA; Dana Maine, Freeman Mathis & Gary, Atlanta, GA; and the many others who, via e-mail, provided leads.

Our goal remains to provide IMLA members with resources that will facilitate their practices, and the Section solicits your continued input to reach this objective.

s/David Basil
Carrollton, Georgia
August 15, 2006

TABLE OF CONTENTS

PAGE NO.

I. ACCESSORY USES

A. ***Pennsylvania:*** **Landing Strip Not Accessory Use**. *Risker v. Smith Township Zoning Hearing Board*, 886 A.2d 727 (Pa. Commw. Ct. 2005). 1

B. ***Connecticut:*** **Planning and Zoning Commission Lacked Authority to Determine That Keeping Fewer Than Five Dogs an Accessory Use and Keeping of More Dogs Illegal.** *Graff v. Zoning Board of Appeals of Town of Killingworth*, 894 A.2d 285 (Conn. 2006). 1

II. ADULT ENTERTAINMENT AND ADULT USES

A. FEDERAL COURT DECISIONS

1. **Substantial Governmental Interest:** 2

(a) **Adult-Oriented Business Must Cast Direct Doubt on the Rationale Supporting a City's Ordinance By Showing that the Evidence Relied Upon Does Note Support the Ordinance, or by Supplying Contradictory Evidence**. *Heideman v. South Salt Lake City*, No. 04-4199, 165 F. App'x 627 (10th Cir. 2006) 2

(b) **City's Enactment of Ordinance Prohibiting Nudity and Sexual Conduct in Alcohol-Serving Establishments was Based Upon Anecdotal Evidence and Unreliable Data Did Not Justify the Burdens on Erotic Expression.** *Daytona Grand, Inc. v. City of Daytona Beach, Fla.*, 410 F. Supp. 2d 1173 (M.D. Fla. 2006) 2

(c) **Town, Which Did Not Consider Negative Secondary Impacts Until After Prohibiting Nude Dancing, Did Not Show a Substantial Governmental Interest Unrelated to Suppression of Expression.** *White River Amusement Pub, Inc. v. Town of Hartford,* 412 F. Supp. 2d 416 (D. Vt. 2005). 3

(d) **Narrowly Tailored to Serve Substantial Government Interest:**

(1) **Local Regulation Pertaining to a Ban on Nudity in Public Places Where Liquor Is Sold Was Overbroad and Facially Unconstitutional.** *Odle v. Decatur County, Tenn.*, 421 F.3d 386 (6th Cir. 2005). 3

(2) **Ordinance Banning Nude Dancing Was Overbroad and Unconstitutional.** *Jo-Bet, Inc. v. City of Southgate,* 415 F. Supp. 2d 725 (E.D. Mich. 2006). 4

2. **Prior Restraint:** 5

(a) **Licensing:** 5

(1) **Adult Use Ordinance Providing for a Temporary License While Appeal of Denial Is Pending Provides for Prompt Judicial Review and Is Valid.** *Deja Vu of Cincinnati, LLC v. Union Township Board of Trustees,* 411 F.3d 777 (6th Cir. 2005). 5

(2) **Judicial Review Process Satisfies First Amendment's Procedural Safeguard Requirement.** *Odle v. Decatur County, Tenn.*, 421 F.3d 386 (6th Cir. 2005). 6

(3) **140 Days for Decision and Appeal on Application Before Applicant Can Seek Judicial Review Is Unreasonable.** *Fantasyland Video, Inc. v. County of San Diego,* 373 F. Supp. 2d 1094 (E.D. Cal. 2005). 6

(b) **Zoning: Requiring a Conditional Use Permit for an Adult Business is a Prior Restraint and Can Be Challenged Facially.** *Blue Moon Entertainment, LLC v. City of Bates City, Mo.,* 441 F.3d 561 (8th Cir. 2006). 7

3. **Constitutionality of Ordinances: Enforcement of State Regulations Prohibiting "Any Lewdness Or Immoral Activity" Was Not Overbroad or Vague.** *181 S. Inc. v. Fischer*, No. 05-1882 (3d Cir. 2006). 7

4. **Recreational Dancing Is Not Protected by First Amendment, and Ban on Lewd Dancing Is Not Arbitrary.** *Willis v. Town of Marshall, N.C.,* 426 F.3d 251 (4th Cir. 2005). 8

B. STATE COURT DECISIONS

1. **Substantial Governmental Interest:** 8

(a) **Narrowly Tailored to Serve Substantial Government Interest:**

(1) ***Texas.* "No Touch" Rule Held Unconstitutional - Not Narrowly Tailored to Prevent Secondary Adverse Effects.**

State v. Howard, 172 S.W.3d 190 (Tex. App. 2005). 9

(2) ***Oregon.*** **Ordinance Requiring Nude Dancers Be at Least Four Feet from Patrons Violates State Constitution Because Broad Exceptions for Acceptable Non-Obscene Entertainment.** *City of Nyssa v. Dufloth,* 121 P.3d 639 (Or. 2005). 9

(3) ***Oregon.*** **State Law Against Live Sex Shows Violates State Constitution.** *State v. Ciancanelli,* 121 P.3d 613 (Or. 2005). 9

(4) ***New York.*** **Ordinance Imposing Percent of the Accessible Floor Area for Adult Use Known as the 60/40 Rule Remanded for Factual Finding Whether 60/40 Rule Is Narrowly Tailored.** *The People Theatres of N.Y., Inc. v. City of New York*, 2005 NY Slip Op 09575 (N.Y. 2005) 10

2. **Content-Neutral Regulations:** 10

(a) ***Hawaii.*** **Ordinance Requiring Viewing Area of a Panoram Booth To Be Visible Within Business Was Not a Violation of Privacy and Reasonable Time, Place, and Manner Restrictions To Reduce Illegal Activity "Related" to Drug Dealing and Prostitution.** *Janra Enterprises, Inc. v. County of Honolulu,* 113 P.3d 190 (Haw. 2005). 10

(b) ***California.*** **Enforcement of No-Touch, Six-Foot Separation and Resulting Suspension of Establishment Permit for Violations Are Not Prior Restraints, but Valid Time, Place, and Manner Regulations.** *Krontz v. City of San Diego,* 136 Cal. App. 4th 1126 (Cal. Ct. App. 2006) 11

3. **Prior Restraint:** ***North Carolina.*** **Zoning and Procedure: Applicant SOB Must Challenge Constitutionality of Ordinance While Seeking Variance; Board's Denial of Variance for Nonconforming Adult Bookstore Based on the Express Terms and Conditions of the Zoning Ordinance Was Not Arbitrary and Capricious.** *321 News & Video, Inc. v. Zoning Board of Adjustment,* 619 S.E.2d 885 (N.C. Ct. App. 2005) 12

4. **Attorney Fees:** ***California.*** **Cabaret Entitled Under Sec. 1983 to Recover Damages for Period It Was Shut Down, as Obtaining Injunctive Relief to Enforce Unconstitutional Ordinance Violated First Amendment.** *Manta Management Corporation v. City of San Bernardino,* 44 Cal. Rptr. 3d 35 (Cal. Ct. App. 2006). 12

III. CIVIL RIGHTS

A. U.S. SUPREME COURT DECISION

Due Process Requires the Government to Provide Adequate Notice (Impending Tax Sale or Property Forfeiture). *Jones v. Flowers,* 126 S. Ct. 1708 (2006). . 14

B. FEDERAL COURT DECISIONS

1. **Equal Protection Claims** 14

(a) **Class-Of-One Claims:** 14

(1) **Class-of-One Claim Fails From Lack of Evidence.** *Aida Food and Liquor, Inc. v. City of Chicago*, 439 F.3d 397 (7th Cir. 2006). 14

(2) **Equal Protection Claim Under the Class-of-One Fails under Theory of Taxation and Assessment.** *Jicarilla Apache Nation v. Rio Arriba County,* 440 F.3d 1202 (10th Cir. 2006). 15

(3) **Development Plan Denied Despite Meeting All Technical Requirements; Court Grants Permit But Denies Class of One Claim From Lack of Evidence.** *Maulding Development, LLC v. City of Springfield*, No. 05-1626 (7th Cir. 2006) 15

(b) **Equal Protection Claim Fails With Special Assessment Where All Similarly Situated Are the Same**. *Creason v. City of Washington*, 435 F.3d 820 (8th Cir. 2006). 16

(c) **Plaintiff Fails to Prove Racial Discrimination But Official Immunity is Denied Where No Effort to Correct and Maintain "Incompetently Constructed Ditch."** *Wilson v. Northcutt,* 441 F.3d 586 (8th Cir. 2006). 16

(d) **Village Acted in Good Faith By Following Village Attorney's Advice and Did Not Violate Equal Protection in Denying Permit** *Bernard v. Village of Hinsdale,* 411 F. Supp. 2d 965 (N.D. Ill. 2006). 17

(e) **Gun Ordinance Restricting Locations for Firearms Dealerships Did Not Violate Dealer's Equal Protection As There Was No Obligation To Ensure Availability of Reasonable Alternatives.**

Koscielski v. City of Minneapolis, 435 F.3d 898 (8th Cir. 2006). 17

2. **Due Process Claims:** 17

(a) **County Commissioner's Denial of Rezoning Application Was an Executive, Not Legislative, Decision and Not Subject to Due Process Protections.** *Lewis v. Brown,* 409 F.3d 1271 (11th Cir. 2005). 17

(b) **City Showed No Rational Basis for Refusing to Reconnect Utilities to Houses Seaward of the Public Beach Line Because of a Tropical Storm.** *Mikeska v. City of Galveston*, 451 F.3d 376 (5th Cir., June 06, 2006). 18

(c) **When Taken As a Whole, Defendant City's Conduct Was Harsh But Not So Extreme As To "Shock the Conscience."** *Development Group, LLC v. Franklin Township Bd. of Supervisors,* No. 05-1055, 162 F. App'x 158 (3d. Cir. 2006). 18

(d) **Health Code Violator Not Denied Due Process When Restaurant Temporarily Shutdown and Inspector Entitled to Qualified Immunity Because His Conduct Did Not Violate Any Clearly Established Statutory or Constitutional Right.** *Camuglia v. City of Albuquerque*, 448 F.3d 1214 (10th Cir. 2006). 19

(e) **Lead-Based Paint Poisoning Prevention Act Did Not Confer Personal Federal Rights "Rights-Creating" Approach Set Forth in *Gonzaga Univ. v. Doe*, 536 U.S. 273 (2002).** *Johnson v. City of Detroit,* 446 F.3d 614 (6th Cir. 2006). 19

(f) **Sand and Gravel Operator Stated Claim for Substantive Due Process Where He Facially Attacked the Downzoning Zoning Ordinance at Issue Based Upon Arbitrary and Irrational Conduct.** *County Concrete Corporation v. Township of Roxbury*, 442 F.3d 159 (3d. Cir. 2006) 20

(g) **Federal Court Properly Abstains Under Younger Doctrine While State Court Action Pending.** *Ebiza, Inc. v. City of Davenport,* No. 3:06-CV-00039-JEG, 2006 WL 1516019 (S.D. Iowa 2006) 20

3. **Fourth Amendment: Administrative Warrants For Public Health Inspections Did Not Violate Fourth Amendment.** *Dawson v. City of Seattle*, 435 F.3d 1054 (9th Cir. 2006) 21

C. STATE COURT DECISIONS

1. **Equal Protection Claims: *California.* Ordinance Allowing Large Department Stores to Sell Furniture but Prohibiting Furniture Sales in Smaller Stores Was Unconstitutional.** *Hernandez v. City of Hanford,* 40 Cal. Rptr. 3d 905 (Cal. Ct. App. 2006); ***Petition fo Review Granted,*** 2006 Cal. LEXIS 8364; 2006 Daily Journal DAR 9241 22

IV. COMPREHENSIVE PLAN

A. ***Florida.* Comprehensive Plan in Existence on Date of Issuance of Building Permit Controls in Challenges to Proposed Development's Consistency with Plan.** *Lake Rosa v. Board of County Commissioners,* 911 So.2d 206 (Fla. Dist. Ct. App. 2006) 23

B. ***Nebraska.* Ordinance Allowing Rezoning and Resolution Amending the Comprehensive Development Plan Were Lawful.** *Smith v. City of Papillion,* 705 N.W.2d 584 (Neb. 2005) 23

C. ***Montana.* Rezonings Must Substantially Comply with Growth Plan.** *Citizen Advocates for a Livable Missoula, Inc. v. City Council of Missoula,* 130 P.3d 1259 (Mont. 2006) 23

V. CONDEMNATION

A. FEDERAL COURT DECISIONS

Condemnation Notice Fell Short of Due Process. *Brody v. Village of Port Chester,* 434 F.3d 121 (2d. Cir. 2005) 25

B. STATE COURT DECISIONS

1. ***Maryland.* Municipalities May Condemn an Individual Blighted or Deteriorated Dwelling That Is Not in a Slum or Blighted Area.** *City of Frederick v. Pickett,* 897 A.2d 228 (Md. 2006) 25

2. ***Pennsylvania.* Home Rule City Could Condemn Property for a Public Golf Course Under Third Class City Code in the Absence of Any Superceding and Uniform, Statewide Statute Precluding the Taking.** *In Re Condemnation by the City of Coatesville,* 898 A.2d 1186 (Pa. Commw. Ct. 2006) 26

3. ***Virginia.* Property Owner Entitled to Notice Affording It Chance to Bring Property into Compliance with Authority's Standards.** *Norfolk*

Redevelopment and Housing Authority v. C and C Real Estate, Inc., 630 S.E.2d 505 (Va. 2006) 27

4. ***Wisconsin.*** **Proposed Condemnee Entitled to Litigation Expenses When State Failed to Negotiate in Good Faith Before Making Jurisdictional Offer.** *The Warehouse II, LLC v. State of Wisconsin Dep't of Transportation,* 715 N.W.2d 213 (Wis. 2006) 27

5. ***Texas.*** **In Failing to Specify What the Alleged Public Use of Tract, City Hasn't Shown That There Are Any.** *Whittington v. City of Austin,* 174 S.W.3d 889 (Tex. App. 2005) 27

VI. EMINENT DOMAIN

A. FEDERAL COURT DECISIONS

1. **Railroad May Go Forward with Federal Preemption Challenge to Eminent Domain Statutes**. *Dakota, Minnesota & Eastern Railroad Corp. v. Rounds,* 422 F. Supp. 2d 1073 (S.D.S.D. 2006) 28

B. STATE COURT DECISIONS

1. ***Georgia.*** **County Ordinance Is Unconstitutional Infringement on Power Company's Powers of Eminent Domain.** *Forsyth County v. Georgia Transmission Company,* Nos. S06A0421 and S06A0422, 2006 WL 1724357 (Ga. 2006) 28

2. ***Ohio.*** **Economic Benefit to Community Alone Does Not Justify Government Taking of Private Property; Use of Term "Deteriorating Area" as Standard for Invoking Eminent Domain Is Overly Vague and Therefore Void.** *City of Norwood v. Horney*--- N.E.2d ----, 2006 WL 2096001, 2006-Ohio-3799 (Ohio Jul 26, 2006) (NO. 2005-0227, 2005-1210, 2005-1211, 2005-0228) 28

3. ***Oklahoma.*** **County's Use of Eminent Domain Power Was Statutorily Unauthorized.** *Board of County Commissioners of Muskogee County v. Lowery,* 136 P.3d 639 (Okla. 2006) 28

4. ***Pennsylvania.*** **Redevelopment Authority's Condemnation of Private Property in Blighted Area for Transfer to Religious Organization to Construct School Violates Establishment Clause.** *In Re Redevelopment Authority of City of Philadelphia*, 891 A.2d 820 (Pa. Commw. Ct. 2005) 29

5. ***Indiana.*** **Owners Waived Objections to Taking by not Filing Within**

Statutory Period. *Hass v. State,* 843 N.E.2d 994 (Ind. Ct. App. 2006) . 29

VII. FAIR HOUSING ACT

A **Substance Abuse Facility Would Have Been Protected by Fair Housing Act.** *Lakeside Resort Enterprises, LP v. Board of Supervisors of Palmyra Township,* No. 05-1163 (3d Cir. 2006) 30

VIII. GROWTH MANAGEMENT

A. ***Minnesota.*** **Removal of a Property from Metropolitan Urban Service Area Was Not Arbitrary and Did Not Constitute a Taking.** *Concept Properties, LLP v. City of Minnetrista,* 694 N.W.2d 804 (Minn. Ct. App. 2005) 31

B. ***Oregon.*** **Measure 37, Requiring Government to Compensate for Reductions in Market Value or Waive Land Use Regulations, Is Valid.** *MacPherson v. Department of Administrative Services,* 130 P.3d 308 (Or. 2006) 31

IX. NONCONFORMING USES

A. ***Colorado.*** **As Statute Precludes Zoning Measures That Terminate Through Amortization Without Compensation Nonconforming Property Uses That Were Lawful at Their Inception, City Could Not Zone Nude Dancing Facility Out of Its Existing Location.** *JAM Restaurant, Inc. v. City of Longmont,* No. 04CA1705, 2006 WL 408315 (Colo. Ct. App. 2006) 33

B. ***Vermont.*** **Building's Parking Lot Is Not a Nonconforming Structure Whose New Use Is Grandfathered from Current Zoning Regulations.** *In re Korbet,* 868 A.2d 720 (Vt. 2005) 33

C. ***Virginia.*** **(First Impression) - Residential Nonconforming Use in One Part of Commercially Zoned Building Does Not Extend Nonconforming Use Throughout the Entire Building.** *Patton v. City of Galax,* 609 S.E.2d 41 (Va. 2005) 33

D. ***Oregon.*** **Proof of Nonconforming Use Requires Both Proof of Uninterrupted Use and Proof That the Use Was Lawful at Its Inception.** *Aguilar v. Washington County,* 120 P.3d 514 (Or. Ct. App. 2005) 34

X. PREEMPTION

A. STATE COURT DECISIONS

1. ***Georgia.*** **Statute Prohibiting Transportation of Waste Across County or State Lines Without Consent of Originating and Receiving Counties Impairs the Free Flow of Interstate Commerce and Violates the Commerce Clause.** *Fulton County v. City of Atlanta,* 629 S.E.2d 196 (Ga. 2006) 35

2. ***New Hampshire.*** **Wood Cogeneration Facility's Use of Construction and Debris Woodchips Did Not Require a New Variance, Where Initial Variance Imposed No Conditions on Type of Chips Used and State Air Emissions Standards Preempted Local Government Control.** *Bio Energy LLC v. Town of Hopkinton,* 891 A.2d 509 (N.H. 2005) 35

3. ***New Jersey.*** **Rail Carrier Is Exempt from Solid Waste Management Act.** *Town of Kearny v. New Jersey Rail Carriers, LLC,* 2005 WL 2363101 (N.J. 2005) 36

4. ***New Mexico.*** **Under Home Rule Powers, City Had Authority to Prohibit Drilling of Well and This Authority Was Not Preempted by Existing State Law.** *Smith v. City of Santa Fe,* 133 P.3d 866 (N.M. Ct. App. 2006) 36

5. ***Pennsylvania.*** **Municipal Grading Permit Requirement Is Not Preempted by State Oil and Gas Act.** *Commonwealth v. Whiteford,* 884 A.2d 364 (Pa. Commw. Ct. 2005) 36

XI. RELIGIOUS LAND USE AND INSTITUTIONALIZED PERSONS ACT (RLUIPA)

A. FEDERAL COURT DECISIONS

1. **What is a Substantial Burden? - Finding Against the Local Government:** 38

(a) **Church Need Not Show the Absence of Alternative Parcels on Which It Could Build to Show Substantial Burden.** *Sts. Constantine & Helen Greek Orthodox Church, Inc. v. City of New Berlin.* 396 F.3d 895 (7th Cir. 2005) 38

(b) **Church's Proposed Construction of Religious School Is Exercise of Religion and Protected by RLUIPA from Township's Denial of Special Use Permit.** *Living Water Church of God v. Charter Township of Meridian,* 384 F. Supp. 2d 1123 (W.D. Mich. 2005)38

2. **What is a Substantial Burden? - Finding For the Local Government:**

(a) **Substantial Burden on Religious Exercise, Justifying RLUIPA Claim, Did Not Exist Where Village Did Not Completely Deny**

Church's Application for Expansion. *Cathedral Church of the Intercessor v. Incorporated Village of Malverne,* 353 F. Supp. 2d 375 (E.D.N.Y. 2005). 39

(b) **Denial of Permit to Allow Church to Operate 100-Child Public Day Care Center in Residential Area Did Not Violate Constitutional Rights or RLUIPA.** *Grace United Methodist Church v. City of Cheyenne,* 451 F.3d 643 (10th Cir. 2006) 39

3. **Nonconforming Use: Town Properly Granted Expansion to Religious Use under RLUIPA Without Requiring Special Permit as Use Was Nonconforming with Respect to Lot Coverage and Parking Requirements.** *Mintz v. Roman Catholic Bishop of Springfield,* 424 F. Supp. 2d 309 (D. Mass. 2006). 40

4. **Ripeness: RLUIPA Claim Was Unripe Where Homeowners Did Not Appeal Cease and Desist Order to Stop Weekly Prayer Meetings in Home.** *Murphy v. New Milford Zoning Commission,* 402 F.3d 342 (2d. Cir. 2005). 41

5. **Orthodox Jewish School States Claim That Village's Denial of Permit to Construct New School Building Violated RLUIPA.** *Westchester Day School v. Village of Mamaroneck,* 379 F. Supp. 2d 550 (S.D.N.Y. 2005) 41

6. **Claims Not Subject to RLUIPA:** 42

(a) **Ordinances Barring Use of Property Within Redevelopment Area as a Church Don't Violate RLUIPA and Are Constitutional.** *The Lighthouse Institute for Evangelism, Inc. v. City of Long Branch,* 406 F. Supp. 2d 507 (D. N.J. 2005). 42

(b) **Church Challenges Town's Condemnation of Parcel Next to That on Which It Proposes to Expand but Eminent Domain Proceedings Are Not Land Use Regulations Subject to RLUIPA.** *Faith Temple Church v. Town of Brighton,* 405 F. Supp. 2d 250 (W.D.N.Y. 2005). 42

(c) **Prohibition on Use of Initiative Process for Matters Relating to Religious Institutions Is Constitutional.** *Wirzburger v. Galvin,* 412 F.3d 271 (1st Cir. 2005). 43

B. STATE COURT DECISIONS

1. ***New York.*** **Requiring a Special Use Permit for Religious Group's**

Operation of Private College Does Not Violate RLUIPA. *Town of Mount Pleasant v. Legion of Christ, Inc.,* 21 A.D.3d 368 (N.Y. App. Div. 2005). 43

2. ***Oregon*. Denial of Conditional Use Permit for Meetinghouse Did Not Violate RLUIPA.** *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. City of West Linn,* 111 P.3d 1123 (Or. 2005). 44

3. ***Hawaii. (*First Impression): Ordinance Authorizing Exercise of Eminent Domain Is Neither a Zoning Nor a Landmarking Law and Does Not Violate RLUIPA.** *City and County of Honolulu v. Sherman,* 129 P.3d 542 (Haw. 2006). 44

XII. SIGNS AND BILLBOARDS

A. FEDERAL COURT DECISIONS

1. **Prior Restraint:** 46

(a) **Vagueness: Policy Clearly Prohibits Communication Directed Toward Traffic on Underpass and Thus It Is Not Unconstitutionally Vague.** *Faustin v. City and County of Denver,* 423 F.3d 1192 (10th Cir. 2005). 46

(b) **Overbreadth:** 46

(1) **Billboard Company Cannot Invoke Overbreadth Doctrine to Establish Constitutional Standing to Challenge Sign Code.** *Advantage Media, LLC v. City of Eden Prairie,* 405 F. Supp. 2d 1037 (D. Minn. 2005). 46

(2) **Broad Exemptions from Sign Restrictions for Governmental Signs Is Unconstitutional.** *Nichols Media Group, LLC v. Town of Babylon,* 365 F. Supp. 2d 295 (E.D.N.Y. 2005). 47

2. **Jurisdiction:** 47

(a) **Federal Question: State Cannot Regulate Billboards on Trust Land.** *Shivwits Band of Paiute Indians v. Utah,* 428 F.3d 966 (10th Cir. 2005). 47

(b) **Standing: Advertising Company is not Precluded From Challenging Refusal to Process Applications Although it Started Construction of Billboards Before Applying for Permits.** *Valley*

Outdoor, Inc. v. City of Riverside, 446 F.3d 948 (9th Cir. 2006). 48

(c) **Mootness:** 48

(1) **Revisions to Sign Code Addressing Sign Placement in Public Right-of-Way Mooted Protestors' Challenges to Prior Versions.** *Brazos Valley Coalition for Life, Inc. v. City of Bryan, Tex.,* 421 F.3d 314 (5th Cir. 2005). 48

(2) **City's Repeal of Sign Ordinance Provision That Allegedly Banned Off-Site Noncommercial Speech Rendered Company's Motion to Enjoin Its Enforcement Moot.** *Covenant Media of California, LLC v. City of Huntington Park, Cal.,* 377 F. Supp. 2d 828 (C.D. Cal. 2005). 49

(3) **Subsequently Enacted Amendments to City's Sign Code Moot Billboard Company's Appeal.** *National Advertising Co. v. City of Miami (I),* 402 F.3d 1329 (11th Cir. 2005). 50

(4) **Appeal of Dismissal of Challenge to Billboard Law Is Moot Where Law Has Been Amended and Claim for Damages Did Not Survive.** *Tanner Advertising Group, LLC v. Fayette County, Ga.,* 451 F.3d 777 (11th Cir. 2006). 50

(d) **Ripeness: Case Is Not Ripe for Review When Billboard Company Fails to Obtain Written Denial of Permit Application**. *National Advertising Co. v. City of Miami (II),* 2005 WL 638451 (11th Cir. 2005). 51

3. **Narrowly Tailored to Serve a Substantial Governmental Interest and Leaving Open Ample Alternative Avenues of Communication:** 51

(a) **Ban on Aerial Advertising Valid.** *Center for Bio-Ethical Reform, Inc. v. City & County of Honolulu,* No. 04-17496, 2006 WL 1843391 (9th Cir. 2006)... 52

(b) **Ordinance Prohibiting Pole Signs is Valid.** *G.K. Ltd. Travel v. City of Lake Oswego,* 436 F.3d 1064 (9th Cir. 2006). 52

(c) **City's Electronic Sign Ordinance Is Constitutional.** *La Tour v. City of Fayetteville, Ark.,* 442 F.3d 1094 (8th Cir. 2006). 53

4. **Content-Based Restrictions - Multiple Exemptions** 53

(a) **Sign Code with Multiple Exemptions from Permit Regulations Was Unconstitutional, Content-Based Restriction on Noncommercial Speech.** *Solantic v. City of Neptune Beach,* 410 F.3d 1250 (11th Cir. 2005). 53

(b) **California Outdoor Advertising Act Impermissibly Favors Commercial Speech and Must Be Interpreted as Allowing Noncommercial Messages Wherever Commercial Messages Are Allowed.** *Maldonado v. Kempton,* 422 F. Supp. 2d 1169 (N.D. Cal. 2006). 54

B. STATE COURT DECISIONS

1. **Prior Restraint: *Oregon.* Statutory Provisions for Variances Do Limit Officials' Discretion and Officials Must Act on Variance Requests Within Reasonable Time.** *Lombardo v. Warner,* 132 P.3d 22 (Or. 2006). 55

2. **Narrowly Tailored to Serve a Substantial Governmental Interest and Leaving Open Ample Alternative Avenues of Communication:** 55

(a) ***Georgia.* Ordinance Restricting Signs in Residential Areas Is Not Valid Unless It Is the Least Restrictive Means of Achieving Governmental Goals.** *Coffey v. Fayette County,* 610 S.E.2d 41 (Ga. 2005). 55

(b) ***Arizona.* Window Sign Clutter Upheld.** *Salib v. City of Mesa, 133 P.3d 756* (Ariz. Ct. App. 2006). 56

(c) **Content-Based Restrictions - Multiple Exemptions**

***Oregon.* State Billboard Regulations Unconstitutionally Restrict the Subject of Expression.** *Outdoor Media Dimensions, Inc. v. Dept. of Transportation,* 132 P.3d 5 (Or. 2005). 56

3. **Nonconforming Uses:** 57

(a) ***California.* In Determining Whether Nonconforming Advertising Sign Constituted a Nuisance, Court Properly Deferred to Department of Transportation Findings.** *Pallco Enterprises, Inc. v. Beam,*132 Cal. App. 4th 1482 (Cal. Ct. App. 2005). 57

(b) ***Pennsylvania.* Nonconforming Use of Sign Was Not Abandoned Where Signpost Was Maintained Without a Sign While Owner Sought New Tenant.** *Finn v. Zoning Hearing Board of Beaver*

Borough, 869 A.2d 1124 (Pa. Commw. Ct. 2005). 57

(c) ***Indiana.*** **Advertising Company May Relocate Signs, Thereby Terminating Nonconforming Use at Previous Location, Despite Landowner's Desire to Continue the Nonconforming Use.** *Hoosier Outdoor Advertising Corp. v. RBL Management, Inc.,* 844 N.E.2d 157 (Ind. Ct. App. 2006). 58

4. **Preemption:** ***California.*** **State Law Does Not Preempt Municipal Ordinances That Require Permit for Rebuilding Billboards Destroyed by Natural Forces.** *Viacom Outdoor, Inc. City of Arcata*, 140 Cal. App. 4th 230 (Cal. Ct. App. 2006). 59

5. **Taxation:** 59

(a) ***Pennsylvania.*** **Billboard Companies Have Not Shown They Are Likely to Succeed in Their Free Speech Challenge to City's Tax on Sign Receipts.** *Free Speech, LLC v. City of Philadelphia,* 884 A.2d 966 (Pa. Commw. Ct. 2005). 59

(b) ***Wisconsin.*** **Court Certifies to Supreme Court Questions as to Proper Method for Taxing Outdoor Advertising Signs.** *Adams Outdoor Advertising, Ltd. v. City of Madison,* No. 2005AP508, 2006 WL 1913059 (Wis. 2006). 59

6. **Enforcement:** ***New Mexico.*** **Injunction Ordering Removal of Sign Is Proper When Adult Bookstore Displays Additional Sign in Breach of Settlement Agreement.** *City of Sunland Park v. Harris News, Inc., 124 P.3d 566* (N.M. Ct. App. 2005). 59

7. **Vested Rights:** ***Indiana.*** **Court Adheres to Opinion That County's Location Permit Requirement Applies to Billboards, Construction of Which Wasn't to Commence Until Almost a Year after Permit Rule Was Enacted.** *Metropolitan Development Commission of Marion County v. Pinnacle Media, LLC*, 846 N.E.2d 654 (Ind. 2006). 60

XIII. STATUTORY INTERPRETATION

A. STATE COURT DECISIONS

1. ***Connecticut.*** **Administrative Appeal and Cease and Desist Order Do Not Qualify as an "Action to Enforce."** *Benson v. Zoning Board of Appeals of Town of Westport, Conn.*, 873 A.2d 1017 (Conn. App. Ct. 2005). 61

2. ***Connecticut.*** **Trailer Parked in Front of Retail Store to Display the**

Store's Products Constitutes a "Structure" Subject to Front Yard Setback Requirements. *Tylerville Home Center v. Haddam Zoning Board of Appeals,* No. CV040104469, 2005 WL 2650116 (Conn. 2005) 61

3. ***Connecticut.*** **Landscape Mulch Processing Is Permitted in Industrial Zones as Treatment of Articles Made of Previously Prepared Materials.** *Smith Bros. Woodland Management, LLC v. Planning & Zoning Commission of the Town of Monroe,* 868 A.2d 749 (Conn. App. Ct. 2005). 62

4. ***Georgia.*** **Judicial Review of Zoning Board Decision to Deny Building Permit Application to Expand Store Requires Court to Interpret Zoning Code as a Question of Law, Reflecting Legislative Intent.** *Northside Corp. v. City of Atlanta,* 619 S.E.2d 691 (Ga. Ct. App. 2005). 62

5. ***North Carolina.*** **To Determine Whether More Than 50 Percent of Building "Façade" Was Altered, at Least the Entire Front of the Building Must Be Considered.** *MMR Holdings, LLC v. City of Charlotte,* 621 S.E.2d 210 (N.C. Ct. App. 2005). 63

6. ***North Carolina.*** **City Lacked Authority to Regulate School District's Use of Land for Parking Lot.** *Nash-Rocky Mount Board of Education v. Rocky Mount Board of Adjustment,* 610 S.E.2d 255 (N.C. Ct. App. 2005). 63

7. ***Washington.*** **County's Prohibition Against "Covered Structure Whose Primary Occupancy Is Public Assembly" for 300-Plus Persons in Volcanic Hazard Areas Did Not Apply to Proposed Hotel with Adjoining 500-Person Conference Center.** *Tahoma Audubon Society v. Park Junction Partners,* 116 P.3d 1046 (Wash. Ct. App. 2005). 64

XIV. SUBDIVISIONS

A. ***California.*** **City Council's Adoption of Litigation Settlement Agreement in Closed Session That Increased Project Zoning Density and Blocked Future Zoning Changes Violated Zoning Administrative Proceedings and State Open Meetings Act.**. *Trancas Property Owners Association v. City of Malibu,* 41 Cal. Rptr. 3d 200 (Cal. Ct. App. 2005). 66

B. ***California.*** **Lots Created by Division in Violation of Subdivision Map Act in 1940-41 Are Not Legal Under Current Law.** *Fishback v. County of Ventura*, 35 Cal. Rptr. 3d 199 (Cal. Ct. App. 2005). 66

C. ***Connecticut.*** **Common Interest Development, with Tenants Leasing "Volumes**

of Space", Is Not a Subdivision. *Alvord Investment, LLC v. Zoning Board of Appeals of City of Stamford,* No. CV 04-0200940S, 2005 WL 2650134 (Conn. Super. Ct. 2005). 67

D. ***Georgia.*** **Denial of Subdivision Sketch Plan for Failure to Comply with "Paved Streets" Requirement Reversed Where Ordinance Was Ambiguously Worded.** *Screven County Planning Commission v. Southern States Plantation, LLP,* 614 S.E.2d 85 (Ga. 2005). 67

E. ***Michigan.*** **Having Obtained Acre Easement to Relocate Public Road, Village Could Not Grant Permission to Developer to Use Balance of Acres for Private Access Drives to Adjacent Complex.** *Blackhawk Development Corp. v. Village of Dexter,* 700 N.W.2d 364 (Mich. 2005). 68

F. ***New York.*** **Board Erred in Denying Subdivision Request Based on Previous Erroneous Determination That Lot Had Merged and in Denying Area Variance Without Considering Variance Criteria.** *Matherson v. Scheyer,* 20 A.D.3d 425 (N.Y. App. Div. 2005). 68

G. ***Pennsylvania.*** **Denial of Subdivision Approval Contained Adequate Reasons.** *Kassouf v. Township of Scott,* 883 A.2d 463 (Pa. 2005). 69

H. ***Pennsylvania.*** **"One Dwelling–One Lot" Requirement Applied to 12-Building, Multi-Unit Apartment Complex.** *Seipstown Village, LLC v. Zoning Hearing Board of Weisenberg Township,* 882 A.2d 32 (Pa. Commw. Ct. 2005). 70

I. ***Pennsylvania.*** **Tenant's Option to Purchase Land in 1982 Leasehold Did Not Create a Lawful Subdivision Compelling Township's Approval of 1998 Subdivision Application, Where Lots Would Not Comply with Current Minimum Zoning Ordinance Requirements.** *Guido v. Township of Sandy,* 880 A.2d 1220 (Pa. 2005). 71

J. ***Washington.*** **Purchaser, Aware That He Was Buying a Section of a Larger Parcel, Was Not an "Innocent Purchaser Without Actual Notice of Illegal Subdivision."** *Nagle v. Snohomish County,* 119 P.3d 914 (Wash. Ct. App. 2005). 72

XV. TAKINGS

A. PHYSICAL TAKINGS – INVERSE CONDEMNATION

1. FEDERAL COURT DECISIONS

(a) **Statute of Limitations Period: Takings Claims Based on Rails-to-**

Trails Conversions Begins to Run with Issuance of Notice of Interim Trail Use. *Illig v. United States,* 67 Fed. Cl. 47 (Fed. Cl. 2005). 73

(b) **Issuance of Permit That Led to Construction Damaging Neighboring Property Did Not Constitute Taking, Trespass, or Nuisance.** *Clark v. City of Anchorage,* No. Civ.A. 04-677-C, 2006 WL 288647 (W.D. Ky. 2006) 73

(c) **In Authorizing Connection to Water Supply, Town Did Not Authorize Trespass to Run a Line and Did Not Take Property.** *Cassaboon v. Town of Somers,* 359 F. Supp. 2d 320 (S.D.N.Y. 2005). 74

(d) **An Order to Enforce Building Codes or Abate a Public Nuisance Does Not Constitute a Taking; Demolishing a Dangerous Building was Not Irrational or Arbitrary**. *Davet v. City of Cleveland,* No. 05-3832, 2006 WL 2129349 (6th Cir. 2006). 74

2. STATE COURT DECISIONS

(a) ***California.*** **Impairment of Visibility of Billboards by Trees Planted by City Does Not, Alone, Establish Compensable Taking.** *Regency Outdoor Advertising, Inc. v. City of Los Angeles,* 111 P.3d 920 (Cal. 2005). 75

(b) ***Georgia.*** **Inverse Condemnation Rule Does Not Apply When Property Owner Agrees to Have Government Deposit Contaminated Substance on His Land.** *McElmurray v. Augusta-Richmond County,* 618 S.E.2d 59 (Ga. Ct. App. 2005). 75

(c) ***Florida.*** **Beach Restoration Project under which Sand is Added is an Unconstitutional Taking of Riparian Owner's Rights.** *Save Our Beaches, Inc. v. Florida Department of Environmental Protection,* ___S2d___ (FL 2006). 75

(d) ***Nevada.*** **Height Restrictions Designed to Promote Public Safety at McCarran International Airport Worked a *Per Se* Physical Taking.** *McCarran Int'l Airport v. Sisolak*, 2006 Nev. Lexis 80, 122 Nev. Adv. Op. No. 58 (Nev. July 13, 2006). 76

(e) ***Ohio*** **Interference With Groundwater Can Constitute a Taking.** *McNamara v. City of Rittman,* ___NE2d___ (OH 2006) ..... .76

(f) ***Pennsylvania.*** **Property Owner Had No Cause of Action for a De Facto Condemnation for Interference with Ingress and Egress from Service Station/Mini-mart Where State Reconfiguration Redirected Traffic.** *Sienkiewicz v. Department of Transportation,* 883 A.2d 494 (Pa. 2005). 77

(g) ***South Carolina.*** **Owner of Commercial Property Is Entitled to Compensation for Loss of Highway Access.** *Tallent v. South Carolina Dep't of Transportation,* 609 S.E.2d 544 (S.C. Ct. App. 2005). 77

(h) ***South Dakota.*** **State's Relocation of Highway Access Requires Consideration of Whether Owners Still Have Reasonable Access to Highway in an Inverse Condemnation Claim.** *Hall v. State ex rel. South Dakota Dep't of Transportation,* 712 N.W.2d 22 (S.D. 2006). 78

(i) ***South Dakota.*** **Resurfacing of Road with Gravel Did Not Constitute a Taking or Nuisance.** *Krier v. Dell Rapids Township,* 709 N.W.2d 841 (S.D. 2006). 78

(j). ***Texas.*** **To Recover Damages on Inverse Condemnation Theory, Owner must Prove that Defendant Government Entity Intentionally Took or Damaged Property.** *City of Keller v. Wilson,* 168 S.W.3d 802 (TX 2005) 79

B. REGULATORY TAKING

1. FEDERAL COURT DECISIONS

(a) **Claim Preclusion: Res Judicata Barred a Second Temporary Takings Claim in Federal Court when the State Court in the First Action Adjudicated the Claim Applying State Takings Law.** *Torromeo v. Town of Fremont,* 438 F.3d 113 (1st Cir. 2006) 79

(b) **Ripeness**: 80

(1) **Takings for Private Use Do Not Impose Ripeness Requirement.** *Schudmak v. Bossetta,* Civil Action No. 06-893, 2006 WL 1207958 (E.D. La. 2006). 80

(2) **Claims that Rent Control Ordinance Constituted a Taking Were Unripe.** *Manufactured Home Communities, Inc. v. City of San Jose,* 420 F.3d 1022 (9th Cir. 2005). .. 80

(3) **A Claim That Mobile Home Rent Control Ordinance Did Not Advance a Legitimate State Interest Was Properly Dismissed.** *Stardust Mobile Estates LLC v. City of San Buenaventura,* 142 F. App'x 300 (9th Cir. 2005). 81

(c) **Penn-Central Claims:** 81

(1) **Federal Cease and Desist Orders under Clean Water Act for Draining Wetlands and Lasting Nine and a Half Years May Constitute a Penn Central Temporary, Regulatory Taking Where Prior Court Found No Current Wetlands.** *Sartori v. U.S.,* 67 Fed. Cl. 263 (Fed. Cl. 2005). 81

(2) **Designation of Land as Unsuitable for Surface Mining Under Surface Mining Control and Reclamation Act Was Not a Taking Because Owner's Investment-Backed Expectation Was Unreasonable**. *Cane Tennessee, Inc. v. United States,* 63 Fed. Cl. 715 (Fed. Cl. 2005). 82

(d) **Property Interests:** 83

(1) **The Statutorily Created Peanut Quota, Under the Federal Agriculture Improvement and Reform Act, Is Not a Property Right That Is Compensable Under the Fifth Amendment.** *Members of the Peanut Quota Holders Association, Inc. United States,* 421 F.3d 1323 (Fed. Cir. 2005). 83

(2) **If the Party Asserting Taking has Contracted with Federal Government, the Contract Itself may be a Cognizable Property Interest.** *Consolidated Edison Co. of New York v. United States,* 67 Fed. Cl. 285 (Fed. Cl. 2005); **but see, Federal Government Abrogating its Contract with Local Irrigation Districts was not an Inverse Condemnation Action but one Sounding in Breach of Contract.** *Klarnath Irrigation Dist. v. United States,* 67 Fed. Cl. 504 (Fed. Cl. 2005) 83

(3) **Requirement that University House a Percentage of Students on Campus does not Constitute a Taking or Violate Constitutional Rights.** *George Washington University v. District of Columbia,* 391 F.Supp.2d 109 (U.S. District Ct, District of Columbia, 2005). 84

(4) **Army Corps of Engineers' Revocation of Wetlands Designation after Owner Bought Land in Reliance did not Constitute a Taking.** *Norman v. United States,* 429 F.3d 1081 (U.S. Ct. App. Fed Cir. 2005). 84

(5) **Federal Government's Cancellation of Grazing Permit was not a Taking Because Recipient of Permit had no Property Rights Under it.** *Colvin Cattle Co. v. United States,* 67 Fed. Cl. 588 (Fed. Cl. 2005) 85

(6) **Court of Federal Claims Certifies Two Questions to New Mexico Supreme Court Concerning State Property Law.** *Walker v. United States,* 69 Fed. Cl. 222 (Fed. Cl. 2005); *Walker v. United States,* 66 Fed. Cl. 57 (Fed. Cl. 2005). . 85

2. STATE COURT DECISIONS

(a) **Exhaustion of Remedies: *Indiana.* Court Lacked Jurisdiction to Consider Takings Claim Where Owners Had Not Sought Special Exception for Junkyard after Board Declared Their Business to Be a Junkyard.** *City of Marion v. Howard,* 832 N.E.2d 528 (Ind. Ct. App. 2005). 86

(b) **Ripeness: *California.* Regulatory Takings Claim Is Ripe, Despite Owner Not Applying for a Permit, When There Is No Uncertainty About the Use That Will Be Allowed.** *Dunn v. County of Santa Barbara,* 38 Cal. Rptr. 3d 316 (Cal. Ct. App. 2006). 87

(c) **Moratorium (Temporary Takings):** 87

(1) ***North Dakota.* Moratorium Lasting 21 Months While FEMA Identified Floodway Did Not Constitute a Taking.** *Wild Rice River Estate, Inc. v. City of Fargo,* 705 N.W.2d 850 (N.D. 2005). 87

(2) ***South Carolina.* A Taking May Occur When a Regulatory Delay Affects Less Than All Economically Viable Use of the Land.** *Byrd v. City of Hartsville,* 620 S.E.2d 76 (S.C. 2005). 88

(d) **Does Claimant Have a Property Interest:** 88

(1) ***Arizona.* Owner of Swingers Club Was Not Entitled to Compensation for Loss of Business Due to Ordinance Prohibiting Businesses Involving Live Sex Acts.** *Mutschler*

v. City of Phoenix, 129 P.3d 71 (Ariz. Ct. App. 2006). ... 89

(2) ***California.*** **Revocation of Permit for Alarm System Did Not Constitute a Taking.** *Ishal v. City of Los Angeles,* No. B178023, 2005 WL 3196412 (Cal. Ct. App. 2005). 89

(3) ***Michigan.*** **Denial of Wetlands Permit for Lowlands Portion of a Lot Did Not Constitute a Taking.** *K & K Construction, Inc. v. Department of Environmental Quality,* 705 N.W.2d 365 (Mich. Ct. App. 2005). 89

(e) **Penn-Central Claims:** 90

(1) ***California.*** **County's Open Range Ordinance is not a Taking.** *Herzberg v. County of Plumas,* ___ Cal.Rptr. ___, (CA 2005). 90

(2) ***Delaware.*** **Refusal to Grant Variances for Hotel Built Significantly Larger Than Approved Plan Did Not Constitute a Taking.** *Wilmington Hospitality LLC v. New Castle County,* No. Civ.A. 03C-07-213MMJ, 2005 WL 1654024 (Del. 2005). 91

(3) ***Iowa.*** **City Is Not Responsible for Damages Based on Rezoning, Which Allowed Construction of Ready-Mixed Concrete Plant, Resulting in Harm to Neighboring Owner.** *Harms v. City of Sibley,* 702 N.W.2d 91 (Iowa 2005). 91

(4) ***Idaho.*** **Enforcement of an Order Prohibiting Erection of a Fence along the Borders of a Lakefront Lot is not a Taking.** *City of Coeur D'Alene v. Simpson,* Docket No. 29299, 2005 Opinion No. 18 Ida. LEXIS 24). 92

(5) ***Massachusetts.*** **Zoning of Beach Property, Prohibiting Residential Development, Does Not Constitute a Taking.** *Gove v. Zoning Board of Appeals of Chatham,* 831 N.E.2d 865 (Mass. 2005). 92

(6) ***Michigan.*** **Rezoning of Former Elks Lodge Property to Residential Classification Was Not Arbitrary and Did Not Constitute a Taking.** *Dorman v. Township of Clinton,* 714 N.W.2d 350 (Mich. Ct. App. 2006). 93

(7) ***Minnesota.*** **City's Decision to Deny Amendment to**

Comprehensive Plan was Rational and Record does not Support an Unconstitutional Taking. *Wensmann Realty, Inc v. City of Eagan,* A05-1074 (Ct. App. MN). 93

(8) ***Mississippi.*** **City's Decision to Rezone Subject Property Cannot Possibly Amount to a Taking.** *Tippit v. City of Hernado,* 909 So.2d 1190 (MS 2005). 93

(9) ***New Jersey.*** **Enactment of New Jersey Highlands Act Did Not Constitute a Taking.** *OFP, LLC v. State,* No. MRS-L-000160-05, 2005 WL 3058157 (N.J. 2005). 94

(10) ***Utah.*** **Summary Judgment Is Inappropriate Where Additional Facts Are Necessary to Determine the Extent to Which Slope Ordinance Interfered with Reasonable Investment-Backed Expectations.** *Arnell v. Salt Lake County Board of Adjustment,* 112 P.3d 1214 (Utah Ct. App. 2005). 94

(11) ***West Virginia.*** **Requirement for Property Owners Outside City Limits to Discontinue Use of Septic System and to Hook Up to City's Sewer did not Constitute a Taking.** *Buda v. Town of Masontown,* 617 S.E.2d 831 (WV 2005)95

(f) **Total Parcel Rule:** 96

(1) ***Oregon.*** **State Rule Preventing Logging of 9 of Owner's 40 Acres to Protect Eagle Nest Does Not Result in a Taking.** *Coast Range Conifers, LLC v. State of Oregon,* 117 P.3d 990 (Or. 2005). 96

(2) ***California.*** **County's Conditioning Well Permit on Owner's Limiting Extraction to no more than 12,000 acre/feet a Year Wasn't a Compensable Regulatory Taking.** *Allegretti & Company v. County of Imperial,* ___Cal.Rptr.___ (CA 2006). 96

C. LAND USE EXACTIONS

1. FEDERAL COURT DECISION

School Impact Fees Do Not Constitute a Taking Even Though They Are Spent on Schools Throughout the District Rather Than on School Directly Impacted by Development. *Herron v. Mayor and City Council of Annapolis,* 388 F. Supp. 2d 565 (N.D. Md. 2005). 97

2. STATE COURT DECISIONS

(a) ***California.*** **City's Reduction in Building Inspection and Safety Fees Has Not Been Shown to Be Arbitrary.** *Jenkins v. City of Corona,* 44 Cal. Rptr. 3d 366, (Cal. Ct. App. 2006). 98

(b) ***Maine.*** **Subdividers May Not Challenge Imposition of Recreational Impact Fee After 30-Day Appeals Deadline or Through Action to Declare Impact Fee Ordinance Unconstitutional.** *Sold, Inc. v. Town of Gorham,* 868 A.2d 172 (Me. 2005). 98

(c) ***North Carolina.*** **Assessment of Owners of Barrier Island Property for Inlet Stabilization Project Was Valid**. *Parker v. New Hanover County,* 619 S.E.2d 868 (N.C. Ct. App. 2005). 99

(d) ***Oregon.*** **Absence of Findings Concerning "Rough Proportionality" in Requiring Dedication of Land.** *Hammer v. City of Eugene,* 121 P.3d 693 (Or. Ct. App. 2005). 99

(e) ***Utah.*** **As a Matter of First Impression, *Nollan/Dolan* "Rough Proportionality" Test Applies to Non-discretionary Application of Ordinance Requiring Dedication of Land for Future Road Widening.** *B.A.M. Development, LLC v. Salt Lake County,* 128 P.3d 1161 (Utah 2006). 100

(f) ***Virginia.*** **Connection Fees.** *Eagle Harbor, LLC v. Isle of Wight County,* 628 S.E.2d 298 (Va. 2006). 101

(g) ***Washington.*** **Property Owner Who Failed to Challenge Assessment Made by Local Improvement District in Statutory Time Period Is Barred from Making Collateral Attack Based on Takings and Substantive Due Process Claims.** *Tiffany Family Trust Corp. v. City of Kent,* 119 P.3d 325 (Wash. 2005). 101

XVI. TELECOMMUNICATIONS

A. FEDERAL COURT DECISIONS

1. **Prohibiting Service: County's Ordinance Imposing Restrictions on Wireless Telecommunications Towers Violates Telecommunications Act.** *Sprint Telephony PCS, LP v. County of San Diego,* 377 F. Supp. 2d 886 (S.D. Cal. 2005). 103

2. **Substantial Evidence:** 103

(a) **Denial of Permit for 120-Foot Tower in Area with 60-Foot Height Limit Did Not Violate Telecommunications Act.** *Michael Linet, Inc. v. Village of Wellington, Fla.,* 408 F.3d 757 (11th Cir. 2005). 103

(b) **Denial Unsupported by Substantial Evidence; Law Doesn't Allow Municipality to Deny Permit Application on Basis of Aesthetics Alone.** *Sprint PCS Assets, LLC v. City of La Canada Flintridge,* No. 05-55014, 2006 WL 1457785 (9th Cir. 2006). 104

(c) **Substantial Evidence Supported Denial of Application for Special Permit to Build 150-Foot Communications Tower on Golf Course.** *Omnipoint Communications, Inc. v. City of White Plains,* 430 F.3d 529 (2d. Cir. 2005). 104

B. STATE COURT DECISIONS

1. ***New Hampshire.*** **Not Sufficient Reason to Deny Property Owner a Variance So That It Can Lease Property for Construction of Telecommunications Tower That Town Itself to Lease Its Own Property for the Purpose.** *Chester Rod and Gun Club, Inc. v. Town of Chester,* 883 A.2d 1034 (N.H. 2005). 105

2. ***New Mexico.*** **General Purpose Language in Zoning Code Fails to Provide Adequate Guidance in Applying Standard of Reasonableness.** *Smith v. Bernalillo County,* 110 P.3d 496 (N.M. 2005). 105

3. ***New Mexico.*** **County Commission's Decision Granting Height Variance for a 198-Foot Telecommunications Tower, When Code Limits Height to 24 Feet, Was Supported by Substantial Evidence.** *Paule v. Santa Fe County Board of County Commissioners,* 117 P.3d 240 (N.M. 2005). . 106

4. ***Oregon.*** **Telecommunications Act Preempts In-Kind Compensation Provisions and Most-Favored-Rate Provisions in Franchise Agreements but Not City's Sales of Telecommunication Services to Public Schools or Other Governments.** *Time Warner Telecom of Oregon, LLC v. City of Portland,* Nos. CV 04-1393-PA, CV 05-1386-PA, 2006 WL 581135 (D. Or. 2006). 107

5. ***Washington.*** **Telecommunications Tower Must Meet General Requirement That Special Uses Be Appropriate for Location and Specific Standard for Wireless Facilities.** *Cingular Wireless, LLC v. Thurston County,* 129 P.3d 300 (Wash. Ct. App. 2006). 108

XVII. VARIANCES

A. ***Iowa.*** **City's Board of Adjustment Is Alone Responsible to Approve Exceptions and Variances to Ordinance.** *City of Johnston v. Christenson,* No. 04-0208, 2006 WL 827127 (Iowa 2006). 109

B. ***Maine.*** **Property Owner's Failure to Use Building Permit That Expired Before Effective Date of New Setback Regulations Does Not Constitute Self-Created Hardship Precluding Issuance of Variance.** *Phaiah v. Town of Fayette,* 866 A.2d 863 (Me. 2005). 109

C. ***New Hampshire.*** **A Permitted Use Is Presumed to Be Reasonable for Purposes of Determining Unnecessary Hardship for a Variance.** *Vigeant v. Town of Hudson,* 867 A.2d 459 (N.H. 2005). 110

D. ***New Jersey.*** **Statute Allowing Height Variances Requires Proof of Special Reasons Which Must Be Tailored to Height Restriction's Purposes.** *Grasso v. Borough of Spring Lake Heights,* 866 A.2d 988 (N.J. Super. Ct. App. Div. 2004). 110

E. ***New Jersey.*** **Variance Denial Was Arbitrary and Capricious Where Board Failed to Weigh Positive and Negative Effects of Granting Variances to Proposed Church and Confused Variance Issues with As-Yet-to-Be Submitted Site Plan Issues.** *House of Fire Christian Church v. Zoning Board of Adjustment of the City of Clifton,* 879 A.2d 1212 (N.J. Super. Ct. App. Div. 2005). 111

F. ***New Jersey.*** **Zoning Board Usurped Township's Zoning Authority by Granting Variance for Building That Grossly Exceeded Limitations of Residential District.** *Township of North Brunswick v. Zoning Board of Adjustment of Township of North Brunswick,* 876 A.2d 320 (N.J. Super. Ct. App. Div. 2005). 112

G. ***New York.*** **Denial of Area Variance, Based on Community Opposition, Violates Statute.** *W.K.J. Young Group v. Zoning Board of Appeals of Village of Lancaster, 16 A.D.3d 1021* (N.Y. App. Div. 2005). 113

H. ***New York.*** **Evidence That Conversion from Office to Residence Would Cost About Half of Property's Value Established Hardship Justifying Variance.** *Sullivan v. City of Albany Board of Zoning Appeals,* 20 A.D.3d 665 (N.Y. App. Div. 2005). 113

I. ***Pennsylvania.*** **Owners Entitled to Deemed Approval Where Board Failed to Render Written Decision Within Extension Period Agreed to by Owners.** *Conceptual Development, Inc. v. Zoning Hearing Board of Hampton,* 875 A.2d 1205 (Pa. Commw. Ct. 2005). 113

J. ***Pennsylvania.*** **Variance for Self-Storage Facility on Residentially Zoned Land**

Was Supported by Evidence That Residential Use Was Impractical. *Taliaferro v. Darby Township Zoning Hearing Board,* 873 A.2d 807 (Pa. Commw. Ct. 2005). 114

XVIII. VESTED RIGHTS

A. ***New Mexico.*** **Owner Had a Vested Right in a Helipad When the City Amended Its Zoning Code, Requiring City to Balance the Public Gain Against the Individual Loss When Calculating a Reasonable Amortization Period.** *KOB-TV, LLC v. City of Albuquerque,* 111 P.3d 708 (N.M. Ct. App. 2005). 115

B. ***Virginia.*** **Applicant Did Not Have Vested Right to Develop Under Previous Zoning Because It Had Not Obtained a Significant Government Act, Upon Which It Relied.** *Board of Supervisors of Culpeper County v. Greengael, LLC*, 626 S.E.2d 357 (Va. 2006). 116

C. ***Illinois.*** **Developer Who Submitted Conforming Plan One Day After Downzoning Ordinance Was Introduced Did Not Have Vested Right.** *1350 Lake Shore Associates. v. Casalino,* 842 N.E.2d 274 (Ill. App. Ct. 2006). 116

XIX. ZONING

A. FEDERAL COURT DECISIONS

1. **Annexation: City Lack Standing to Challenge Another City's Annexation of Unincorporated Areas, It Not Having Alleged It Actually Provides Utility Service to the Parcels.** *City of Oak Hill v. City of Edgewater, 917 So.2d 943* (D. Fla. 2006). 118

2. **Tribe Subject to Land Use Laws.** *Cayunga Indian Nation of New York v. Village of Union Springs,* 390 F. Supp. 2d 203 (N.D.N.Y. 2005). 118

3. **Those Challenging County's Ordinance Against Use of Certain Properties as Short-Term Vacation Rentals Claim County's Amendment of Ordinance Was Procedurally Defective.** *Neumont v. State of Florida,* 451 F.3d 1284 (11th Cir. 2006). 118

4. **Ordinance Limiting Display of Political Signs Discriminated Against Speech Based on Content and Was Not Narrowly Tailored.** *Beaulieu v. City of Alabaster,* No. 04-16230, 2006 WL 1791401 (11th Cir. 2006). 118

5. **Zoning Ordinance Invalid as Prior Restraint.** *Hollywood Community Synagogue, Inc. v. City of Hollywood, Fla.*, Nos. 04-61212CIV, 05-60687CIV, 2006 WL 1825004 (S.D. Fla. 2006). 119

B. STATE COURT DECISIONS

1. **Annexation**: 119

(a) ***Alabama.*** **For Competing Annexations, the First-in-Time Rule Does Not Apply.** *Town of Pike Road v. City of Montgomery,* 1050151, 2006 WL 1304941 (Ala. 2006). 119

(b) ***Florida.*** **County Challenges City's Annexation Ordinance for Lack of Contiguity of Area Taken In.** *County of Volusia v. City of Deltona,* 925 So. 2d 340 (Fla. Dist. Ct. App. 2006). 119

(c) ***Louisiana.*** **Municipality's Annexation of Tract to Which It Has No Plans to Extend Municipal Services Is Unreasonable.** *Parish of Acadia v. Town of Duson,* 909 So. 2d 642 (La. Ct. App. 2006). 119

(d) ***Maryland.*** **Municipality Gave Adequate Notice Before Conducting Hearing on a Resolution to Annex Unincorporated Area.** *Mayor & Town Council of Oakland v. Mayor & Town Council of Mountain Lake Park,* 896 A.2d 1036 (Md. 2006). 119

(e) ***Missouri.*** **City Did Not Acquire Prior Jurisdiction to Annex by Passing Resolution of Intent Before Village Proposed Annexation Ordinance.** *City of St. Joseph v. Village of Country Club,* 163 S.W.3d 905 (Mo. 2005). 119

(f) ***North Carolina.*** **Involuntary Annexation Statutes Require a "Meaningful Extension of Public Services" into an Area Proposed for Forced Annexation. Owners would Suffer "Material Injury" If Forced to Pay Additional Property Taxes, Yet Receive No Additional Services.** *Nolan v. Village of Marvin,* 624 S.E.2d 305 (N.C. 2006). 120

(g) ***Ohio.*** **Municipality That Has Historically Provided Water and Sewer Service for Extraterritorial Customers Is Permitted to Require Annexation of Extraterritorial Property as Condition of Continued Service.** *Bakies v. City of Perrysburg,* 843 N.E.2d 1182 (Ohio 2006). 120

(h) ***Ohio.*** **Health District Properly Rescinded Septic-System Permit for Homeowner Now That City Has Opted to Extend Sewer Line to Serve Him, Even Though Connection Requires Consent to Annexation.** *Clark v. Greene County Combined,* 844 N.E.2d 330 (Ohio 2006). 120

(i) ***West Virginia.*** **Map Accompanying Annexation Petition Need Not Have Been Free from Defect; It Sufficed That It Was Prepared Based on Prior Documents.** *CSX Hotels, Inc. v. City of White Sulphur Springs,* 617 S.E.2d 785 (W.V. 2005). 120

2. ***Iowa.*** **Rezoning from Heavy Industrial to Planned Urban Development Was Justified by City's Intent to Create Efficient Urban Development Patterns and Promote Health and Public Welfare by Discouraging Incompatible Development.** *Molo Oil Co. v. City of Dubuque,* 692 N.W.2d 686 (Iowa 2005). 120

3. ***Massachusetts.*** **Rezoning of Single Parcel to Flood-Prone Designation Following Hurricane Was Spot Zoning, but Did Not Constitute a Taking.** *Andrews v. Town of Amherst,* 2005 WL 2651395 (Mass. Land Ct. 2005). 121

4. ***Nebraska.*** **Developer of Confined Animal Feeding Facility Did Not Act in Good Faith in Beginning Construction After Enactment of New Law Restricting Such Operations, but Before Effective Date.** *Hanchera v. Board of Adjustment,* 694 N.W.2d 641 (Neb. 2005). 121

5. ***New Jersey.*** **Severe Downzoning of Undeveloped Land in Densely Populated Township Was Invalid.** *Bailes v. Township of East Brunswick,* 882 A.2d 395 (N.J. Super. Ct. App. Div. 2005). 122

6. ***New Jersey.*** **Exclusionary Zoning.** *Mount Laurel Township v. Stanley,* 885 A.2d 440 (N.J. 2005). 123

7. ***New Mexico.*** **Text Amendments Changing Development and Design Standards in Urban Center Were Valid Legislative Acts, Not Quasi-Judicial in Nature.** *Albuquerque Commons Partnership v. City of Albuquerque,* 62 P.3d 317 (N.M. Ct. App., October 3, 2002). 123

8. ***Wisconsin.*** **Municipality May Not Be Estopped from Seeking Enforcement of Zoning Laws Based on Mistakes by Officials, but Court Has Discretion in Deciding Whether to Grant Enforcement.** *Village of Hobart v. Brown County,* 698 N.W.2d 83 (Wis. 2005). 123

I. ACCESSORY USES

A. *Pennsylvania:* **Landing Strip Not Accessory Use.** *Risker v. Smith Township Zoning Hearing Board*, 886 A.2d 727 (Pa. Commw. Ct. 2005).

Facts: Landowners applied for permission to construct an airstrip for an antique airplane as a form of recreation. The property was zoned C-1 (conservation district), which did not permit airports or landing strips by right or as a conditional use. Nevertheless, landowners claimed an airstrip was an accessory use to a single-family dwelling. "Accessory use" was defined as "[a] subordinate use which is clearly incidental and related to that of a main structure or main use of land," but did not limit uses to the "customarily incidental." The strip would exceed the principal use in size, being 100 feet wide and 1,900 feet long. The Zoning Hearing Board denied request and determined that a grass landing strip was not an accessory use to a single-family dwelling. The trial court reversed and township appealed.

Holding: Appellate court reversed, ruling in favor of ZHB. The court held that "not even a broad reading of accessory use" constituted a landing strip as either a "subordinate" or an "incidental" use to a single-family dwelling. The size was greater than the principal use and thus, not "inferior" to the principal use. The impact upon the property and surrounding neighbors would not be of minor consequence, and the proposed use was not clearly incidental to the principal use.

B. *Connecticut:* **Planning and Zoning Commission Lacked Authority to Declaring Keeping Fewer Than Five Dogs an Accessory Use and Keeping of More Dogs Illegal.** *Graff v. Zoning Board of Appeals of Town of Killingworth,* 894 A.2d 285 (Conn. 2006).

Facts: Landowner kept 14 dogs at a house in a rural residential district, but did not sell dogs. The planning and zoning commission interpreted zoning regulations so four or fewer dogs was a permitted accessory use and keeping more than four dogs was a violation of zoning regulations. Zoning officer issued a cease-and-desist order.

Holding: The appellate court reversed. Characterizing the keeping of dogs as a "potential accessory use," the court stated that the regulations could have limited the number of dogs, but did not do so. The regulations defined "household pet" as including dogs and defined "accessory use" as "subordinate and customarily incidental to the principal use." Keeping more than four dogs on a large lot could reasonably be considered incidental in an area in which large numbers of animals, other than pets, are permitted, and that the use could be considered "customary," because there was evidence that at least five other owners have more than four dogs.

II. ADULT ENTERTAINMENT AND ADULT USES

A. FEDERAL COURT DECISIONS

1. **Substantial Governmental Interest:**

(a) **Adult-Oriented Business Must Cast Direct Doubt on the Rationale Supporting a City's Ordinance By Showing that the Evidence Relied Upon Does Note Support the Ordinance, or by Supplying Contradictory Evidence**. *Heideman v. South Salt Lake City*, No. 04-4199, 165 F. App'x 627 (10th Cir. 2006).

Facts: The city permitted nude entertainment at certain licensed establishments until May 2, 2001, when it enacted an ordinance that, among other things, prohibited all nude conduct in adult business establishments, either by employees or patrons. The ordinance did not prohibit erotic dancing, but required employees to dance wearing G-strings and pasties. Prior to enacting the ordinance, city council reviewed numerous court opinions and fifty-six reports and studies from other municipalities regarding the negative secondary effects associated with adult oriented businesses. The plaintiffs, dancers and an adult entertainment business, filed suit, claiming that the nudity ban violated their First Amendment rights. They sought a preliminary injunction, which the district court denied and the Tenth Circuit upheld. *Heideman v. S. Salt Lake City,* 348 F.3d 1182 (10th Cir. 2003)(*Heideman I).* The city failed to submit evidence to cast doubt on the evidence relied on by the city in enacting its ordinance, or on the reasonableness of the city's reliance on that evidence.

Holding: The district court granted the city's motion and the Tenth Circuit Affirmed. The city met its initial burden of presenting evidence "reasonably believed to be relevant," and it fell upon the plaintiffs to submit evidence casting doubt on the reasonableness or relevance of the city's evidence. The record failed to show any evidence to counter the city's concern over unsanitary conditions or the possibility of public health concerns associated with unregulated nude conduct in adult business establishments.

(b) **City's Enactment of Ordinance Prohibiting Nudity and Sexual Conduct in Alcohol-Serving Establishments was Based Upon Anecdotal Evidence and Unreliable Data Did Not Justify the Burdens on Erotic Expression.** *Daytona Grand, Inc. v. City of Daytona Beach, Fla.*, 410 F. Supp. 2d 1173 (M.D. Fla. 2006).

Facts: The city enacted an ordinance prohibiting nudity and sexual conduct in alcohol-serving establishments, together with adult business zoning regulations, to address what the city perceived to be the deleterious effects of adult businesses. The city's zoning regulations designated certain districts as the only locations in which "adult theaters" could open as a matter of right. An "adult theater" was defined as an establishment which exhibited, among other things, any live show or other presentation which depicted nudity. The nudity ordinance was later replaced with an ordinance that allowed nude dancers to wear G-strings and pasties so long as the adult theaters in

which they danced were not located within 500 feet or an establishment serving alcohol. The court previously granted summary judgment on the zoning ordinance and denied the city summary judgment on the constitutional claims. The case proceeded to trial on the issue of whether the city put forth sufficient evidence justifying the burdens that the ordinance placed on the erotic expression of nude dancing establishments.

Holding: The court held that it did not and ruled the ordinances were unconstitutional. The court held the city's pre-enactment evidence consisted of anecdotal evidence or opinions based on unreliable data. The city's data lacked comparison of crime in and around adult business establishments with crime rates in and around other similarly situated establishments.

(c) **Town, Which Did Not Consider Negative Secondary Impacts Until After Prohibiting Nude Dancing, Did Not Show a Substantial Governmental Interest Unrelated to Suppression of Expression.** *White River Amusement Pub, Inc. v. Town of Hartford,* 412 F. Supp. 2d 416 (D. Vt. 2005).

Facts: When the pub opened in 2001, the town had no ordinance prohibiting nude dancing. The town attorney examined ordinances in use in other towns, drafted an ordinance, and advised the selectmen to adopt a resolution stating that they had considered the secondary effects of adult uses. The selectmen failed to adopt such a statement, but held a hearing and passed an ordinance prohibiting nudity and specified sexual behavior in public places. At a subsequent meeting the town considered studies documenting negative secondary effects and stated reasons for the ordinance.

Holding: The court found the ordinance invalid. Although a fire caused the pub to close while the case was pending, the court held that it was not moot because the owner plans to re-open and continue to offer nude dancing. The ordinance does not target nude dancing, but bans all nudity in public places, and is facially neutral. It is within the town's police power and requiring pasties and G-strings is a minimal restriction.

The town did not establish that the law furthers a governmental interest unrelated to suppression of free expression. The court noted evidence that the pub has not had negative secondary effects and that the town's consideration of negative secondary effects, after enacting the law, did not relate those impacts to the town. The court dismissed claims of prior restraint, equal protection, and regulatory taking and held that the individual selectmen had legislative immunity.

(d) **Narrowly Tailored to Serve Substantial Government Interest:**

(1) **Local Regulation Pertaining to a Ban on Nudity in Public Places Where Liquor Is Sold Was Overbroad and Facially Unconstitutional.** *Odle v. Decatur County, Tenn.*, 421 F.3d 386 (6th Cir. 2005).

Facts: The Tennessee Adult-Oriented Establishment Registration Act requires "adult-oriented establishment" operators to obtain a license from a local adult-oriented establishment board

within a 120-day "grace" period of the Act's adoption, and provides for judicial review of license denials. In 2000, the Decatur County Commission passed an ordinance prohibiting nudity, the exposure of various body- parts, the use of instruments to simulate these body parts, and sexually suggestive conduct at "public places" where alcohol is sold, served, or consumed. The county board set the 120-day grace period on the day it first met, July 11, 2002. In a letter dated July 19, the county attorney informed the operator of a club that sells beer and offers nude and semi-nude dancing that a license must be obtained by November 8, 2002, but the operator never applied. The operator and four dancers sued the county, the commission, and the board seeking a declaratory judgment that the act's licensing scheme was an unconstitutional restraint on speech protected by the First Amendment, and that the local ordinance was facially unconstitutional for being overbroad. They also sought a temporary restraining order barring enforcement of both laws and a permanent injunction against their enforcement. The trial court granted the county and state's motion for summary judgment, being unpersuaded by the operator's constitutional challenges. The operator appealed.

Holding: The appellate court affirmed in part, reversed in part, and remanded. First, the Act's judicial review provision met the First Amendment's procedural safeguard that a prior restraint licensing scheme provide prompt judicial review and preservation of the status quo when a license is denied. The court ruled that the Act supercedes any common law judicial discretion on the matter. It further ruled the operator failed to offer any reason why the 120-day grace period was too short a time to preserve the status quo during application review and declaratory judgment action.

Second, the court reversed the lower court's ruling on the local ordinance, finding it oyerbroad. The prohibited behaviors must not reach a substantial amount of expression unattended by the harmful secondary effects the ordinance was enacted to prevent. such as criminal activity, disturbances to the peace, or moral degradation. The ordinance contained broad provisions without limitations for venues that might serve liquor and offer protected expression that were unlikely to spawn secondary harmful effects - such as the theater and ballet. The court remanded with directions to issue an injunction permanently enjoining enforcement of the ordinance.

(2) **Ordinance Banning Nude Dancing Was Overbroad and Unconstitutional.** *Jo-Bet, Inc. v. City of Southgate,* 415 F. Supp. 2d 725 (E.D. Mich. 2006).

Facts: A city ordinance banned nude dancing and specific sexual activities in all outdoor places owned by or open to the general public, and all buildings and enclosed places owned by or open to the general public. The plaintiff, the operator of a "totally nude juice and coffee bar," filed suit, arguing that the public nudity ordinance was overbroad because it banned constitutionally protected expression and that, as applied, the ordinance violated its equal protection rights, since the ordinance was not being enforced against bars with liquor licenses and dancing permits.

Holding: The court held the ordinance was overbroad in violation of the First Amendment. The "across the board" ban of all nude dancing reached protected expression of that dancing, in plays and motion pictures having high artistic purposes.

2. **Prior Restraint:**

(a) **Licensing:**

(1) **Adult Use Ordinance Providing for a Temporary License While Appeal of Denial Is Pending Provides for Prompt Judicial Review and Is Valid.** *Deja Vu of Cincinnati, LLC v. Union Township Board of Trustees,* 411 F.3d 777 (6th Cir. 2005).

Facts: A few months after the cabaret opened, the township enacted an ordinance to regulate licensing of adult entertainment businesses. The owner of the cabaret challenged the ordinance. After a stay, pending the Supreme Court's decision in *City of Erie v. Pap's A.M.,* 529 U.S. 277 (2000), the trial court entered a preliminary injunction prohibiting enforcement of sections pertaining to warrantless inspections and disclosure of personal information concerning owners and employees.

Holding: While the parties appealed, the township amended the ordinance to eliminate the provisions subject to the injunction, and the appellate court upheld the amended law. The court held that the ordinance requires the board to make a decision within 30 days of an application's submission and that Ohio Rev. CODE § 2506.01 provides for judicial review of final orders in quasi-judicial proceedings. The court rejected SOB's argument that judicial review might be prohibited by the statute as "preliminary to or a result of a criminal proceeding" because a license can be denied based on a prior conviction. The statute is not intended to prevent interlocutory appeals in criminal cases and the board's authority is civil, not criminal. The ordinance involves the application of reasonably objective criteria and provides for issuance of a temporary permit until the appeals process is complete. The court concluded that the safeguards were adequate, even for a prior restraint on expression.

The court characterized a requirement that adult businesses that do not serve liquor close at midnight as a "reasonable time, place, or manner restriction" that serves a significant governmental interest, was narrowly tailored to that interest, and leaves open ample alternative channels of communication. Adult cabarets that serve liquor are allowed to remain open until 2:30 a.m., but the court stated that the township had to take into account conflicting state liquor laws and relied on research indicating that adult uses that do not serve alcohol are often more unruly because patrons arrive already intoxicated. The city was entitled to rely on evidence from other jurisdictions in determining that its ordinance would curtail unwanted secondary effects of adult uses. The court further stated that a distinction between adult businesses with live entertainment and other adult businesses (which are subject to the 2:30 closing time) is not irrational and does not violate the Equal Protection Clause.

A requirement that license applicants disclose personal information, not including home address or social security number of employees, does not violate the First Amendment, but the court noted that the information is private and not subject to the Public Records Act. The owner lacked standing to

challenge civil disability provisions, which state that a license will be denied if the applicant or any person named in the application has been convicted of a sex offense within a specified period. The civil disability provisions remaining after the amendment of the ordinance were not found to be unconstitutional in the trial court and the provisions no longer apply to employees. Finally, the court rejected the owners' argument that the use of phrases such as "adequate supervision," "reasonable cause," and "uncover," as vague.

(2) **Judicial Review Process Satisfies First Amendment's Procedural Safeguard Requirement.** *Odle v. Decatur County, Tenn.*, 421 F.3d 386 (6th Cir. 2005). **[See (d)(1) above]**

(3) **140 Days for Decision and Appeal on Application Before Applicant Can Seek Judicial Review Is Unreasonable.** *Fantasyland Video, Inc. v. County of San Diego,* 373 F. Supp. 2d 1094 (E.D. Cal. 2005).

Facts: In 2002, San Diego amended ordinances governing adult entertainment businesses. The court rejected most of the challenges raised by owners of adult businesses. Characterizing the laws as "time, place, manner" restrictions, the court applied intermediate scrutiny. A limitation that prohibits operation of adult businesses between 2 and 6 a.m. does not completely ban protected expression and was intended to reduce negative secondary effects of noise, traffic, disorderly conduct, and crime during late night hours. The county relied on studies from, and experiences of, other jurisdictions, as well as testimony about local conditions in enacting the limitation. Evidence that such effects are independent of adult business was insufficient to cast direct doubt on the county's evidence and the court rejected a claim that the evidence was flawed.

A requirement that peep show booths be open and visible from a manager's station and not be operated unless a manager is on duty at that station was also upheld. The ordinance does not limit what movies can be shown or prevent use of booths and any economic impact the ordinance may have is irrelevant. The county was not required to choose the "best" or least restrictive means of achieving its goal, according to the court, and the law directly targets the part of adult uses that cause the problem.

The court upheld a prohibition on total nudity, stating that requiring pasties and a G-string is minimal, narrowly tailored to achieve stated goals, and does not deprive dance of "whatever erotic message it conveys." A requirement that entertainers be on an elevated stage at least six feet from patrons and prohibitions on direct tipping and touching are valid attempts to limit prostitution and narcotics transactions and do not unduly burden protected expression. The "pasties and CJ-string" rule is not relevant to the perceived need for buffering, the court stated, and a reference to tipping an employee who "regularly appears in a state of semi-nudity" is not impermissibly vague and does not impermissibly interfere with occupational liberty interests.

The ordinance restricts adult uses to industrial zones, subject to setback requirements, and requires businesses previously legally located in commercial zones to relocate within three years. The court

concluded that the business had not shown that the amendment was inconsistent with the general plan, noting testimony that the industrial district provides for uses with potential nuisance characteristics and that location of adult uses in industrial districts will reduce the impact of noise, traffic, and crime on the patrons of other commercial businesses. The county had provided detailed information about 76 locations in eight areas that could be used for adult businesses. The court disqualified four sites but held that the zoning leaves available sufficient alternatives, reiterating that economic impact need not be considered. Rejecting a claim of spot zoning, the court stated that there was no evidence to indicate that the county was discriminating against a particular business and that it would not otherwise speculate about motivation.

However, the ordinance does not contain adequate procedural safeguards. The ordinance allowed 30 days for determination of whether an application was complete, 40 days for hearings, 10 days to render a decision, and 60 days for an appeal before judicial review. The court held that because the decision must be based on nondiscretionary criteria, the period is not "reasonable," but that the provisions are severable. The court upheld licensing and registration requirements, including requirements for disclosure of "personal" information, not including home address or phone number. A requirement that every officer, director, general partner, and manager appear in person to apply, however, is an unduly burdensome prior restraint, redundant of a requirement that employees be licensed, and not related to the stated purposes of the ordinance, but is also severable.

(b) **Zoning: Requiring a Conditional Use Permit for an Adult Business is a Prior Restraint and Can Be Challenged Facially.** *Blue Moon Entertainment, LLC v. City of Bates City, Mo.,* 441 F.3d 561 (8th Cir. 2006).

Facts: Blue Moon Entertainment wanted to open an adult entertainment business with dancers wearing only "pasties" and "G-strings." After applying for an occupational license and waiting 15 days with no response, the applicant appealed to the board of aldermen. The city told the applicant that a conditional use permit ("CUP") would be required. Rather than applying for the CUP, the applicant filed suit alleging the city's CUP requirement was an unconstitutional prior restraint on his 1st and 14th Amendment rights. The district court denied the applicant's request for injunctive relief because his alleged harm could be remedied by a simple application.

Holding: The appellate court vacated the decision and remanded. Noting that a "licensing scheme must provide narrow, objective, and definite standards to guide the licensing authority," the court concluded that the city's CUP requirement is a prior restraint that the applicant may challenge facially. The district court erred in finding that the applicant's failure to apply for a CUP is per se fatal to its ability to demonstrate irreparable harm.

3. **Constitutionality of Ordinances: Enforcement of State Regulations Prohibiting "Any Lewdness Or Immoral Activity" Was Not Overbroad or Vague.** *181 S. Inc. v. Fischer*, No. 05-1882 (3d Cir. 2006).

Facts: The plaintiff company operated a liquor-licensed adult cabaret featuring sexually-explicit dance routines and topless dancers. After the company was cited and fined under a state

regulation prohibiting "any lewdness or immoral activity" on liquor-licensed premises, the company filed a complaint challenging the regulation. It argued the regulation proscribed protected forms of expression and was overbroad and vague.

Holding: The district court granted summary judgment upholding the regulation, and on appeal, the Third Circuit affirmed. Applying the four-part test in *United States v. O'Brien*, 391 U.S. 367 (1968), the court held the regulation did not prohibit individuals from participating in "lewd or immoral activity;" rather, it only prohibited such activity from occurring on liquor-licensed premises. The restriction on First Amendment freedoms was no greater than was essential to the furtherance of the regulation's stated purpose: the reduction of the "unacceptable social behavior" that arose in conjunction with the combination of erotic entertainment and alcohol. Because the plaintiff's violations fell within the conduct clearly proscribed, it could not complain of the vagueness of the law as applied to the conduct of others.

4. **Recreational Dancing Is Not Protected by First Amendment, and Ban on Lewd Dancing Is Not Arbitrary.** *Willis v. Town of Marshall, N.C.,* 426 F.3d 251 (4th Cir. 2005).

Facts: The town hosts regular concerts and gatherings at its community center. After rejecting suggestions that she "tone down" her sexually provocative dancing which involved simulating sexual acts and exposing her underwear and "privates," Willis was banned from the gatherings. Willis offered to apologize for inadvertent displays of underwear and to abide by any dress code to be adopted, but the town refused to lift the ban. Willis also claimed that she was singled out and that even her dance partner was not banished. The trial court denied her request for an injunction.

Holding: The appeals court affirmed, in part. Rejecting a First Amendment claim, the court reasoned that Willis was dancing for her own enjoyment and that recreational dancing is not protected expressive conduct. Because the constitutional right to associate requires an activity that is, itself, protected by the First Amendment, the ban did not implicate "expressive associational rights." Prohibiting lewd dancing was not different from prohibiting other activities, such as smoking or drinking. The court acknowledged the First Amendment "lurking in the background," and that Willis has a right to listen to performances at the center, but stated that the banishment did not directly implicate that right. A policy banning lewd dancing is not arbitrary, but rationally related to the town's interest in protecting children.

The court held her allegations were sufficient to support a "class of one" equal protection claim. The court rejected a substantive due process claim, based on claimed rights to travel and to be in a public forum. Although it is not clear that those are fundamental rights, according to the court, the claim "fully overlaps" the equal protection claim that the ban was arbitrary.

B. STATE COURT DECISIONS

1. **Substantial Governmental Interest:**

(a) **Narrowly Tailored to Serve Substantial Government Interest:**

(1) ***Texas.* "No Touch" Rule Held Unconstitutional - Not Narrowly Tailored to Prevent Secondary Adverse Effects.** *State v. Howard,* 172 S.W.3d 190 (Tex. App. 2005).

Facts: A provision of a city code regulating sexually oriented businesses imposed a "no touch" restriction. The defendant, a dancer at an adult cabaret, was charged by information with violating this provision by "recklessly" rubbing her breasts against a customer's head. Although the information alleged the culpable mental state of "recklessly," the code specifically made a violation of the "no touch" provision a strict liability offense, criminalizing conduct based on touching alone, regardless of any culpability. The dancer moved to quash or dismiss the information, arguing, inter alia, that because topless/exotic dancing was constitutionally protected expressive conduct, a culpable mental state was required to criminalize contact between the dancer and customer - accordingly, the dispensation of a culpable mental state in the "no touch" provision rendered the "no touch" provision void.

Holding: The Court of Appeals for the Fifth District of Texas agreed. The "no touch" provision was unconstitutional and void because it failed to restrict protected conduct narrowly to do only what was necessary to prevent the "secondary effects" of adult cabarets. "Criminalizing the touching of a customer without requiring any culpable mental state criminalizes accidental and inadvertent touching and thus is a greater restriction on free expression than is essential to further the City's interests."

(2) ***Oregon.* Ordinance Requiring Nude Dancers Be at Least Four Feet from Patrons Violates State Constitution Because Broad Exceptions for Acceptable Non-Obscene Entertainment.** *City of Nyssa v. Dufloth,* 121 P.3d 639 (Or. 2005).

Facts: After a police officer observed a nude dancer shaking her hair in a patron's face, the owners of the club were convicted of violating a local law that requires such entertainers to be at least four feet from the nearest patron. The ordinance includes an exception for plays, operas, classes, seminars, performances, and exhibitions that are "not obscene." The appeals court affirmed.

Holding: The highest court reversed and remanded, holding that the ordinance violated the state constitution's protections for expression. The state constitution protects expression that "the majority of citizens . . . would dislike." according to the court and the ordinance applies only to "disfavored" establishments. The court held that the ordinance is directed at expression and does not fall within a "well-established historical exception to the prohibition" for laws regulating public sexual conduct.

(3) ***Oregon.* State Law Against Live Sex Shows Violates State Constitution.** *State v. Ciancanelli,* 121 P.3d 613 (Or. 2005).

Facts: A state law against live sex shows makes it a crime to "direct, manage, finance or present a live public show in which the participants engage in … sexual conduct."

Holding: The court held that, because the statute as issue "prohibits and criminalized [certain sexual] acts only when they occur in an expressive context, i.e. in a 'vie public show'" it could not avoid concluding that "the statute is directed primarily, if not solely, toward the expressive aspect of the conduct that it describes. That is, the statute is one restraining free expression."

(4) ***New York.*** **Ordinance Imposing Percent of the Accessible Floor Area for Adult Use Known as the 60/40 Rule Remanded for Factual Finding Whether 60/40 Rule Is Narrowly Tailored.** *The People Theatres of N.Y., Inc. v. City of New York*, 843 N.E.2d 1121 (N.Y. 2005).

Facts: In 1995, New York City enacted an ordinance restricting adult businesses to certain areas of the city if a "substantial portion" of the establishment was devoted to adult use (the "1995 Ordinance"). The ordinance was interpreted by the New York City Department of Buildings to mean that "adult use" is any use where at least forty percent of the floor and cellar area accessible to customers are devoted to such use. The ordinance was termed the "60/40 Rule". "Adult use" can be defined as "sexually-oriented materials that many deem obscene." In 1998, in *Stringfellow's v. City of New York*, 91 N.Y.2d 383 (1998), the Court of Appeals found the 1995 Ordinance constitutional based on facts showing there was a nexus between adult uses and negative secondary effects in the community, such as increased crime rates, the reduction of which constitutes a legitimate government purpose, and not merely censorship. Many adult uses reconfigured their establishments so as to comply with the 60/40 Rule, placing the non-adult material in obscure places. The City, and even one court, perceived such action as a sham because the "essential nature of the use has not changed," making the 1995 Ordinance toothless. In 2001, New York City adopted an amendment to "clarify" the 1995 ordinance and to narrow the reconfiguration "loophole" by further restricting what constitutes a "substantial portion" (the "2001 Amendment"). Plaintiffs challenged the amendment, claiming a violation of free speech due to the City's failure to support the amendment with facts showing negative secondary effects of the 60/40 businesses.

Holding: In a 4-3 decision, the New York Court of Appeals, refusing to affirm the First Department reversal of a Supreme Court ruling that declared the 2001 amendment to New York City's Adult Use Zoning Ordinance invalid, remitted the case for a fact hearing to determine whether there are sufficient facts supporting the amendment further restricting adult businesses to find the ordinance constitutional, or whether the ordinance unconstitutionally restricts free speech by being insufficiently narrow.

2. **Content-Neutral Regulations:**

(a) ***Hawaii.*** **Ordinance Requiring Viewing Area of a Panoram Booth To Be Visible Within Business Was Not a Violation of Privacy and Reasonable Time, Place, and Manner Restrictions To Reduce Illegal Activity "Related" to Drug Dealing and Prostitution.** *Janra*

Enterprises, Inc. v. County of Honolulu, 113 P.3d 190 (Haw. 2005).

Facts: The City of Honolulu revised licensing requirements for a panoram business, which provides booths, for a fee, where persons may view pornographic videos they have purchased. The new ordinance provides that the viewing area of a panoram booth must be visible from a main aisle and that no curtain, door, wall, or other enclosure may obscure the entrance to each panoram booth.

The owner of an adult videotape and arcade business with 12 panoram booths sued the city when it denied him a panoram business license because a door blocked the main aisle, obstructing the viewing area of each booth, and because the booths had doors. The complaint sought a declaratory judgment that the ordinance was facially unconstitutionally violating rights to freedom of privacy and speech under Article 1 of the Hawaii Constitution. The parties stipulated to a temporary restraining order to enjoin the city from enforcing the ordinance for six months. The reviewing court concluded the ordinance was constitutionally valid and the owner appealed.

Holdings: The state high court affirmed. The court emphasized that the state constitution affords greater privacy rights than the U.S. Constitution. However, the court rejected the owner's argument that *State v. Kam*, 748 P.2d 372 (1988) (which held that Hawaii's right to privacy encompasses the correlative right to purchase pornographic material for home use) extends to the purchase and viewing of sexually explicit materials in any place of privacy, including an enclosed booth in a commercial establishment.

Nor did the ordinance violate the free speech clause in the state constitution. It was reasonable "time, place, and manner" restriction. It served a significant governmental interest because the city enacted the law to reduce "illegal activity" "related" to panoram booths-drug dealing and prostitution – in a way that made it easier to enforce laws, and it was content neutral because it did not single out or affect the films being shown. It also left open ample alternative channels of communication because the films could still be shown in the booths once the owner removed the doors and they were available for purchase to be viewed elsewhere.

(b) ***California.*** **Enforcement of No-Touch, Six-Foot Separation and Resulting Suspension of Establishment Permit for Violations Are Not Prior Restraints, but Valid Time, Place, and Manner Regulations.** *Krontz v. City of San Diego,* 136 Cal. App. 4th 1126 (Cal. Ct. App. 2006).

Facts: San Diego police conducted multiple undercover inspections of Deja Vu, a nude entertainment establishment operating under a police permit for nude entertainment, then sent the owner warning letters concerning at least 35 observed violations of the city's "no-touch, six-foot separation between patrons and dancers" operating requirements applicable to a nude entertainment permit. When later inspections resulted in additional violations, the city notified the owner that it would suspend his permit. After an administrative hearing on the proposed suspension, the hearing officer suspended his permit for seven days, having concluded the police proved three violations. A trial court denied the owner's petition for a writ of administrative mandamus. On appeal, the owner argued the suspension was an invalid prior restraint on constitutionally protected speech

(nude dancing) and an invalid time, space, or manner regulation.

Holding: The appeals court affirmed. First, the prior restraint argument failed because the challenge was not to the suppression of nude dancing, but to a punishment, the seven-day suspension imposed by a valid regulation (the "no touch, six-foot" rule). Moreover, the police do not have unbridled discretion to suspend a license, a predicate of an unlawful prior restraint. Secondly, the municipal code section on permit suspensions is a valid, time, place, or manner regulation. The suspension language is content neutral on its face, applying to any business required to have a permit, including those not afforded First Amendment protection; the "no touch-six foot" rules serves a substantial government interest unrelated to the suppression of free speech (reducing the secondary negative effects of adult businesses), and the rule is not greater that necessary to further the governmental interest (compliance with applicable laws and regulations).

3. **Prior Restraint: *North Carolina.* Zoning and Procedure: Applicant SOB Must Challenge Constitutionality of Ordinance While Seeking Variance; Board's Denial of Variance for Nonconforming Adult Bookstore Based on the Express Terms and Conditions of the Zoning Ordinance Was Not Arbitrary and Capricious.** *321 News & Video, Inc. v. Zoning Board of Adjustment,* 619 S.E.2d 885 (N.C. Ct. App. 2005).

Facts: The city's zoning ordinance in 1994 imposed a 500-foot separation requirement between adult businesses and certain specified uses; it also included an eight-year amortization period for nonconforming uses to comply or cease operation. In 2002, the owner of an adult bookstore since 1992 applied to the zoning board of adjustment for a variance, which the board could grant if certain buffers (freeways, interstate highways, traffic patterns, structures, etc.) were present to provide adequate protection from the secondary effects of an adult establishment. At the hearing, the board allowed the owner to present evidence about the lack of actual secondary effects, and then denied the variance based on findings that the store was located within 500 feet of a residential zone and park (enumerated protected uses in the ordinance) and the lack of any buffers. A trial court affirmed after reviewing the whole record, finding substantial evidence to support the decision. On appeal, the owner contended the trial court decision was arbitrary and capricious because he believed the board should have considered the lack of secondary effects associated with his store before denying the application.

Holding: The appeals court affirmed, holding that the trial court applied the proper standard of review when it upheld the board's decision. The owner's argument about the alleged failure of the board to consider the lack of secondary effects was in fact a separate, as-applied First Amendment challenge to the constitutionality of the ordinance. State law barred both the board and the trial court from addressing a constitutional issue in a variance proceeding (unless the board decision addressed the constitutionality of the ordinance) and so the board's failure to consider the constitutional challenge was not arbitrary and capricious.

4. **Attorney Fees: *California.* Cabaret Entitled Under Sec. 1983 to Recover Damages for Period It Was Shut Down, as Obtaining Injunctive Relief**

to Enforce Unconstitutional Ordinance Violated First Amendment. *Manta Management Corporation v. City of San Bernardino,* 44 Cal. Rptr. 3d 35 (Cal. Ct. App. 2006).

Facts: City obtained preliminary injunction against operations of cabaret, only to have the zoning ordinance on which it was based struck down.

Holding: Cabaret is entitled under sec. 1983 to recover $1.4 million in damages for the period it was shut down, as obtaining the injunctive relief to enforce an unconstitutional ordinance violated the First Amendment.

III. CIVIL RIGHTS

A. U.S. SUPREME COURT DECISION

Due Process Requires the Government to Provide Adequate Notice (Impending Tax Sale or Property Forfeiture). *Jones v. Flowers,* 126 S. Ct. 1708 (2006).

Facts: Jones and his wife bought a house in Little Rock in 1967. Jones moved to an apartment in 1993, but continued to pay the mortgage. The lender paid the taxes until 1997, when the mortgage was paid off, after which the taxes went unpaid. In 2000, the commissioner sent a certified letter to the house (ARK. CODE § 26-37-301) notifying Jones of the delinquency and his right to redeem. Nobody was home to accept the letter, which was not retrieved from the post office and was returned to the commissioner. Two years later the commissioner sent a second certified letter and published notice of a public sale. There were no bids and the state negotiated a private sale to Flowers for $21,042. The market value is $80,000. Flowers had an unlawful detainer notice delivered to the property. Jones's daughter received that notice and informed her father of the tax sale. Jones filed suit.

Holding: The trial court and highest state court held that the statutory notice provisions met due process requirements. The United States Supreme Court reversed. Due process does not require that the owner receive actual notice, but only that the notice be reasonably calculated, under all circumstances, to apprise interested parties of the pending action. The commissioner became aware in 2000 that Jones had not received notice sent by certified mail to the property and the knowledge that the statutory procedure was ineffective triggered an obligation to take additional steps. The Court noted that sending the notice as certified mail prevented other occupants from retrieving it at the post office and that there were several alternatives for attempting to contact Jones, including regular mail or posted notice. Although Jones may have had general knowledge of a tax delinquency, that knowledge is not the equivalent of notice that a tax sale is pending. Three dissenting Justices argued that the notice was adequate when balanced against the state's need to operate efficiently.

B. FEDERAL COURT DECISIONS

1. **Equal Protection Claims**

(a) **Class-Of-One Claims:**

(1) **Class-of-One Claim Fails From Lack of Evidence.** *Aida Food and Liquor, Inc. v. City of Chicago*, 439 F.3d 397 (7th Cir. 2006).

Facts: In 2000, the proprietor of the plaintiff company, Aida, received a letter from the city advising that it intended to take his property by eminent domain. Nothing further was done, but several public health inspections of the premises occurred in 2001 and 2002. In 2002, a number of building code violations were also discovered, with the plaintiff consenting to an interior inspection

of the electrical system after a citizen complaint was made. A second inspection (where consent was in issue) led to the power being shut off, with the store being closed to the public until repairs were made. The plaintiffs brought a Section 1983 suit alleging Fourth Amendment and Fifth Amendment procedural due process violations, and a "class of one" equal protection claim, based on an alleged scheme by the city to close Aida and its refusal to sell Aida a vacant adjacent lot.

Holding: The district court granted summary judgment for the defendants, and the Seventh Circuit affirmed. The plaintiff's consent to the first inspection eliminated any Fourth Amendment claim, and the failure to raise objections in the complaint related to the second waived the argument. The "class of one" claim failed in the absence of evidence that the plaintiff was treated differently than any other establishment.

(2) **Equal Protection Claim Under the Class-of-One Fails under Theory of Taxation and Assessment.** *Jicarilla Apache Nation v. Rio Arriba County,* 440 F.3d 1202 (10th Cir. 2006).

Facts: The Jicarilla Apache Nation (JAN) purchased an upscale hunting resort in New Mexico. After learning that the JAN purchased the ranch and that ranch income was largely derived from elk hunting and related activities, the assessor reclassified the property from agricultural to miscellaneous no-agricultural and ceased to classify the elk as livestock. The effect was to increase the property tax bill by over $110,000 per year. No other property was reclassified in a similar fashion, even though others derived substantial income from similar elk hunting activities. JAN responded by bringing a "class of one" equal protection claim.

Holding: The district court granted summary judgment for the defendants and the Tenth circuit affirmed. The JAN failed to show that the reassessment did not demonstrate the minimal competence necessary to avoid being irrational and wholly arbitrary.

(3) **Development Plan Denied Despite Meeting All Technical Requirements; Court Grants Permit But Denies Class of One Claim From Lack of Evidence.** *Maulding Development, LLC v. City of Springfield*, No. 05-1626 (7th Cir. 2006).

Facts: Maulding, a developer, submitted warehouse development plans to the City. Before giving final approval, the City agreed to the preliminary variance requests and the proposed economic development agreement. At some point during the planning stage, certain African-American City officials asked that the project be relocated to an area with a significant African-American population, and Maulding agreed. The new plan met all of the technical requirements and no variances were necessary. Neighbors opposed the development (at the meeting, Maulding was "verbally attacked with racial slurs") and the city denied the application, citing public safety concerns. Maulding sued. The district court granted mandamus ordering the approval of the plan, as approval of a development plan that met all technical requirements was a ministerial act, not a discretionary one. The district court, however, granted summary judgment for the City on

Maulding's "class of one" equal protection claim (alleging that the City's failure to give approval was on account of Maulding's race).

Holding: On Maulding's appeal, the Seventh Circuit affirmed. "Maulding's claim is doomed because of the total lack of evidence of someone who is similarly situated but intentionally treated differently than it." The fact that an alderman stated that this was the first time approval was denied for a plan that met all of the technical requirements was insufficient.

(b) **Equal Protection Claim Fails With Special Assessment Where All Similarly Situated Are the Same**. *Creason v. City of Washington*, 435 F.3d 820 (8th Cir. 2006).

.

Facts: The city imposed a "special assessment" against the landowner adjacent to a road, but gave all of them the option of exchanging an easement for the special assessment cost (to offset the value of the donated land against the special assessment). The plaintiffs declined the city's offset offer, and the city initiated condemnation proceedings. As a result of the condemnation proceedings, the city paid the plaintiffs a $6,870 condemnation award. The city thereafter imposed a special assessment on their property of $5,238.66 (77 % of the condemnation award). When the plaintiffs brought a Section 1983 action against the city and city officials alleging the special assessment violated their rights to due process, just compensations and equal protection, the district court granted the city's motion to dismiss.

Holding: On appeal, the Eighth Circuit affirmed. The plaintiffs failed to state a claim for which relief can be granted – the equal protection claim failed as the city treated the plaintiffs and other similarly situated landowners the same, and even if the special assessment could be said to constitute a taking, the plaintiffs did not argue they did not receive just compensation.

(c) **Plaintiff Fails to Prove Racial Discrimination But Official Immunity is Denied Where No Effort to Correct and Maintain "Incompetently Constructed Ditch."** *Wilson v. Northcutt,* 441 F.3d 586 (8th Cir. 2006).

Facts: Responding to complaints of flooding from residents, the city began construction of a drainage ditch along a street. When construction reached the plaintiff's vacant lots, the crew stopped work, with the result that drainage water started pooling on the lots. Corrective work was done, but the plaintiff alleged this failed to remedy the pooling. She claimed the ditch was constructed to flood her lots because she was African-American, and that the ditch was neglected and not cleared of debris in retaliation for her earlier complaints. She also claimed the city retaliated by towing a mobile home being used as a restaurant owned by her sister. She brought a Section 1983 action against the city and city officials alleging violations of the district court's denial of their motions for summary judgment of grounds of qualified immunity.

Holding: The Eighth Circuit held the individual defendants were entitled to qualified immunity on the construction claim and the towing claim, as the plaintiff failed to adduce any evidence of purposeful race discrimination or retaliatory intent. However, in the absence of any explanation of

why no effort was made to correct and maintain the "incompetently constructed ditch," the officials were not entitled to immunity.

(d) **Village Acted in Good Faith By Following Village Attorney's Advice and Did Not Violate Equal Protection in Denying Permit** *Bernard v. Village of Hinsdale,* 411 F. Supp. 2d 965 (N.D. Ill. 2006).

Holding: The village's denial of an application to permit plaintiff property owner to build two residences on a single property lot did not violate plaintiff's equal protection rights, even when the village previously issued two permits to build on a similarly situated property, because the decision denying the second permit was made in reliance on the zoning board's affirmation of village attorney's staff interpretation finding that the property was a single zoning lot, and there was no evidence that the village did not make the prior decision in good faith or had intentionally ignored the village's zoning code.

(e) **Gun Ordinance Restricting Locations for Firearms Dealerships Did Not Violate Dealer's Equal Protection As There Was No Obligation To Ensure Availability of Reasonable Alternatives.** *Koscielski v. City of Minneapolis,* 435 F.3d 898 (8th Cir. 2006).

Facts: In 1995, the owner leased a site and opened a firearm dealership. Two months later the city enacted a moratorium, prohibiting firearms dealers from locating or expanding and tried, unsuccessfully, to apply it retroactively to the business. The city then amended its ordinances so that firearms dealerships must obtain conditional use permits and locate only in certain districts at specified distances from day care centers and churches. In 2002, the owner's lease was terminated as part of a redevelopment project. He relocated at a greater distance from churches and day care centers, but in a district that prohibits firearms dealers. The city issued a cease-and-desist order. The owner challenged the ordinance; the trial court dismissed.

Holding: The appeals court affirmed. Rejecting an equal protection claim, the court noted that there are no other firearms dealers in the city and that public safety implications justify different treatment from other retail businesses. The purpose of the ordinance, protection of public safety, is legitimate. In a non-constitutional case, there is no obligation to ensure the availability of reasonable alternatives, so the fact that sites zoned for the use may not be available is irrelevant. Finally, the court held that there was no evidence to support a claim of personal or political animus and the takings claims were not ripe.

2. **Due Process Claims:**

(a) **County Commissioner's Denial of Rezoning Application Was an Executive, Not Legislative, Decision and Not Subject to Due Process Protections.** *Lewis v. Brown,* 409 F.3d 1271 (11th Cir. 2005).

Facts: When the owners bought their 272-acre parcel in unincorporated Bartow County it was zoned for agricultural use. They applied for rezoning to the residential classification, for development of single-family dwellings, consistent with the county's land use plan. Brown, the sole member of the county commission, denied the application.

Holding: The trial court dismissed and the appeals court affirmed. Brown's decision, which affected a limited number of people, was an executive, rather than legislative, action and the Due Process Clause does not provide protection against arbitrary decision-making. Although Georgia state courts characterize county zoning decisions as legislative acts, that characterization is not dispositive for purposes of federal rights.

(b) **City Showed No Rational Basis for Refusing to Reconnect Utilities to Houses Seaward of the Public Beach Line Because of a Tropical Storm.** *Mikeska v. City of Galveston*, 451 F.3d 376 (5th Cir., June 06, 2006).

Facts: After Tropical Storm Frances and the subsequent erosion of the vegetation line on the shore, the plaintiffs' homes fell entirely on the city's public beach and were considered an encroachment on the public's use of the beach. As a result, the city condemned the plaintiffs' homes and disabled a number of public utilities, including electricity, sewer, and water services. After the plaintiffs' requests for the restoration of these services were denied, they filed suit. The district court granted the city's motion for summary judgment, finding that the city's actions were rationally related to the state interest of protecting the public's access to the beach, as well as protecting the beaches from interference. The plaintiffs appealed.

Holding: On the substantive due process claim, the Fifth Circuit found that the city did have an important role in the protection of the beach; however, it failed to provide any rational reasons for its refusal to reconnect utilities to the existing homes. In addition, the city failed to offer any reason for its differential treatment of homeowners (some were reconnected to services while others – including the plaintiffs – were not). Accordingly, the Fifth Circuit ruled the grant of summary judgment for the city was improper, and remanded the matter for further proceedings.

(c) **When Taken As a Whole, Defendant City's Conduct Was Harsh But Not So Extreme As To "Shock the Conscience."** *Development Group, LLC v. Franklin Township Bd. of Supervisors,* No. 05-1055, 162 F. App'x 158 (3d. Cir. 2006).

Facts: Developers sought unsuccessfully to obtain approval from the township for their project. They appealed, and as the appeal was pending in the courts, the developers filed a Section 1983 action against the Board of Supervisors, the planning commission, various individual members, and the township solicitor, alleging violations of their rights to procedural due process, substantive due process, and equal protection. Specifically, they claimed "conscience-shocking" behavior in that the township never intended to allow them to develop the property, offered the plaintiffs other developments projects if they would abandon the proposal, that the solicitor proposed that the parties enter into settlement negotiations once the plans were rejected and suggested they

wait to negotiate until after the proposal was formally rejected in order to avoid the application of the open meetings law. There was no evidence that the defendants did anything illegal. The district court granted summary judgment for the defendants and the developers appealed.

Holding: The Third Circuit, in a short ruling, agreed with the district court that "even when taken as a whole, Defendants' conduct, though harsh, was not so extreme as to shock the conscience," and thus did not violate the developer's substantive due process rights. "Our decision in *United Artists Theatre Circuit, Inc. v. Township of Warrington* makes clear that federal courts are not to be cast in the role of a 'zoning board of appeals."

(d) **Health Code Violator Not Denied Due Process When Restaurant Temporarily Shutdown and Inspector Entitled to Qualified Immunity Because His Conduct Did Not Violate Any Clearly Established Statutory or Constitutional Right.** *Camuglia v. City of Albuquerque*, 448 F.3d 1214 (10th Cir. 2006).

Facts: The plaintiff's restaurant received notice of several health code violations (cockroaches and others) and the next morning, the restaurant was chemically sprayed to kill the insects. The city's health inspector nonetheless decided to temporarily suspend the plaintiff's permit for one day out of concern that the chemicals were improperly applied. After all food surfaces had been cleaned and exposed food discarded the following day, the restaurant was allowed to reopen. The plaintiff sued the city and its health inspector, arguing that he was denied procedural and substantive due process because the health inspector acted intentionally and willfully, without allowing a pre-deprivation hearing. The district court granted summary judgment in favor of the defendants.

Holding: The Tenth Circuit affirmed, finding that the health inspector was entitled to qualified immunity because his conduct did not violate a clearly established statutory or constitutional right. While the plaintiff did not dispute the validity of the ordinance, he claimed the inspector's actions were not in accordance with the ordinance because there was no "substantial hazard" as required by the ordinance. However, the court ruled that the city, acting pursuant to its health inspector's findings, could close a restaurant without providing a pre-deprivation hearing in order to protect the public health of its citizens. The court also found that plaintiff's substantive due process rights were not violated because the inspector's action did not shock the conscience and amount to an arbitrary deprivation.

(e) **Lead-Based Paint Poisoning Prevention Act Did Not Confer Personal Federal Rights "Rights-Creating" Approach Set Forth in *Gonzaga Univ. v. Doe*, 536 U.S. 273 (2002).** *Johnson v. City of Detroit,* 446 F.3d 614 (6th Cir. 2006).

Facts: Johnson, a tenant of Section 8 housing, filed a Section 1983 action against the City of Detroit and the City of Detroit Housing Commission (DHC), seeking damages for lead-based paint poisoning allegedly suffered by her minor son while he was a tenant at a public housing project owned and operated by the defendants. Specifically, she alleged a deprivation of federal rights

purportedly conferred by provisions of the Lead-Based Paint Poisoning Prevention Act, 42 U.S.C. §§ 4821-46 ("LBPPPA"), the United States Housing Act of 1937, as amended, 42 U.S.C. §§ 1437-1437bbb ("USHA"), and administrative regulations promulgated pursuant to those statutes. Using the "rights-creating" approach set forth in *Gonzaga Univ. v. Doe*, 536 U.S. 273 (2002), the district court dismissed on the basis that the legislation did not confer personal federal rights that could be enforced pursuant to Section 1983.

Holding: The Sixth Circuit affirmed. In the absence of specific "rights-creating" language, statutory text that merely benefitted putative plaintiffs was insufficient to confer a new federal right under Section 1983.

(f) **Sand and Gravel Operator Stated Claim for Substantive Due Process Where He Facially Attacked the Downzoning Zoning Ordinance at Issue Based Upon Arbitrary and Irrational Conduct.** *County Concrete Corporation v. Township of Roxbury*, 442 F.3d 159 (3d. Cir. 2006).

Facts: County Concrete Corp. and Roxbury Township engaged in a 12-year dispute over the company's 1994 application for subdivision and site plan approval to extend the sand and gravel operations to three adjoining acres. A 2001 comprehensive zoning ordinance effectively prevented the expansion when the parcel at issue was rezoned for single-family dwellings. In 2003, the company sued the township in federal court alleging violations of substantive due process (SDP), equal protection (EP), and takings. The trial court dismissed the claims for either lack of ripeness or failure to state a claim.

Holding: The appeals court reversed and remanded. The takings claim was ripe for federal adjudication because it was based on a facial challenge to the 2001 ordinance, the company having alleged the ordinance's mere enactment denied them all economically viable use of their property. The trial court erred by treating and dismissing this claim as an unripe, as-applied challenge under the Williamson ripeness/finality test, which requires a final decision regarding the application of the regulation to the property at issue before an alleged taking is ripe for judicial review. A facial takings claim, however, is not subject to the Williamson test where, as here, it alleges that any application of the regulation at issue is unconstitutional. The facial SDP challenges to the ordinance and the SDP challenge to the legislators' and public officials' obstructive course of conduct prior to the ordinance's enactment were also ripe for review. The complaint stated a facial SDP claim upon which relief can be granted as to the ordinance (it lacked any legitimate reason, was arbitrary and capricious, and not rationally related to any legitimate government reason) and an SDP claim as to the township's prelegislative and obstructive course of conduct (facts indicating irrationality and arbitrariness, i.e., impeding operations, imposing illegal conditions and restrictions in violation of a 1993 agreement). Dismissal of the EP claim, however, was affirmed, as the allegations that "similarly situated property" was not similarly rezoned were conclusory at best.

(g) **Federal Court Properly Abstains Under Younger Doctrine While State Court Action Pending.** *Ebiza, Inc. v. City of Davenport,* No. 3:06-CV-00039-JEG, 2006 WL 1516019 (S.D. Iowa 2006).

Facts: The plaintiff business and its president filed an application for a special use permit to operate a facility as a bar. When the permit was denied on the basis of parking, traffic, noise, and litter concerns, the plaintiff filed suit in state court seeking a declaratory judgment that the defendant's action was arbitrary and capricious. While that case was pending, plaintiff applied for a business license to use the facility as a dance hall rather than as a bar. This license was also denied under a special provision allowing the mayor to order a denial of an otherwise automatic granting of such licenses. Plaintiff exhausted administrative appeals and brought a second action in state court challenging the arbitrariness and capriciousness of the denial as violative of due process.

Meanwhile, the plaintiff once again changed his business plan and filed for a liquor license to be used in the facility, which would now operate as a restaurant and bar, not a dance hall. At that time, the city passed a 120-day moratorium on the issuance of any new business licenses. While the state court actions were pending, the plaintiff decided to file a complaint in federal court seeking an injunction, claiming the city violated procedural due process by passing the moratorium, tabling his license applications, and denying his other business and special use licenses. He also alleged equal protection claims, an unlawful taking by the ordinance, and a violation of civil rights based on plaintiff owner's Hispanic origin. The city sought a dismissal of claims due to the state court actions already pending, which were nearly identical in nature. Plaintiff argued that they were not identical, as the state court claims did not challenge the moratorium or the treatment of his liquor licenses.

Holding: The district court analyzed the case under the *Younger* line of cases (federal court should abstain from exercising jurisdiction if an ongoing state judicial proceeding implicates important state interests and that proceeding affords an adequate opportunity to raise federal questions presented). It ruled that *Younger* applied due to the ongoing judicial actions involving the state's police powers and interests, and that the plaintiff could seek the resolution of federal claims in that proceeding. Further, the plaintiff did not offer persuasive evidence of bad faith under a *Younger* exception. Because the plaintiff was seeking damages in addition to injunctive relief, the federal court action was to be stayed until the state actions were complete and a resolution of the licenses was decided upon the termination of the moratorium. If plaintiff was wronged and no remedy was available in state court, the case could continue at the federal level.

3. **Fourth Amendment: Administrative Warrants For Public Health Inspections Did Not Violate Fourth Amendment.** *Dawson v. City of Seattle*, 435 F.3d 1054 (9th Cir. 2006).

Facts: An exterminator advised an assistant city attorney that two boardinghouses "were the worst examples of rodent and insect infestation and rodent harborage I had ever seen in a residential setting," two Department of Public Health (DPH) investigators conducted an exterior search which neither verified nor disconfirmed the allegations. They obtained a search warrant that included interior searches of individual units. DPH asked the police to assist in executing the warrant to provide security. The plaintiff residents alleged that officers conducted some searches of tenants' rooms incidental to providing security, and detained the residents in a separate room. None of the residents was injured or transported to a police station. The residents brought a Section 1983 action alleging that the search was unconstitutional because the investigators lacked probable cause when they applied for the inspection warrants and because the warrants were too broad; they also alleged

the city failed to train its employees regarding the proper standards for obtaining a search warrant.

Holding: The district court granted summary judgment in favor of the defendants, and the Ninth Circuit affirmed. There was probable cause that a search of the houses would reveal evidence of a crime, one that posed health hazards of potentially epidemic proportions, and the judge properly and permissibly issued the search warrants. The warrants were not constitutionally overbroad, andthey satisfied the Fourth Amendment's requirement to specify particularly the places that officers could search and the items that they could seize. The police detention aided a lawful search conducted pursuant to valid warrants supported by ample probable cause.

C. STATE COURT DECISIONS

1. **Equal Protection Claims: *California.* Ordinance Allowing Large Department Stores to Sell Furniture but Prohibiting Furniture Sales in Smaller Stores Was Unconstitutional.** *Hernandez v. City of Hanford,* 40 Cal. Rptr. 3d 905 (Cal. Ct. App. 2006); ***Petition for Review Granted***, 2006 Cal. LEXIS 8364; 2006 Daily Journal DAR 9241.

Facts: The sale of "home furnishings" was permitted in the planned commercial (PC) district, but furniture stores were not permitted. Department stores in the district, such as Wal-Mart, sold furniture. The company, which already had a furniture store in downtown Hanford, opened a mattress store in the PC: district and also sold bedroom furniture. After citing the company for a zoning violation, the city amended its code to clarify that, in the PC: zone, a department store with at least 50,000 square feet of interior area could sell furniture on no more than 2,500 square feet of area, but that smaller stores could not sell furniture. The purpose was to preserve the downtown district, while not discouraging department stores from locating in the PC zone.

Holding: The trial court upheld the ordinance, but the appeals court found that it violated the equal protection clause. Applying the rational basis standard, the court stated that distinction between large department stores selling furniture and smaller stores selling furniture is arbitrary given the 2,500 square-foot limit.

IV. COMPREHENSIVE PLAN

A. *Florida.* Comprehensive Plan in Existence on Date of Issuance of Building Permit Controls in Challenges to Proposed Development's Consistency with Plan. *Lake Rosa v. Board of County Commissioners,* 911 So. 2d 206 (Fla. Dist. Ct. App. 2006).

Facts: A community coalition challenged the Putnam County board of commissioners' decision to issue Lake Swan Camp a building permit for a dormitory facility to house 80 youth campers, and the first phase of a camp expansion plan to construct a gym, tennis courts, a new administration building, health club, and swimming pool. The camp property included approximately 15 percent of the small lake's shoreline. Seeking injunctive and other relief, the coalition alleged the permit was invalid under state planning law because the use was inconsistent with the comprehensive plan. When the camp applied for the building permit on November 19, 2001, the comprehensive plan designated the camp and other property "Agricultural II," which permitted camps. On December 11, the board amended the plan via the land use map by reclassifying the camp and surrounding lands as "Rural Residential," which did not permit camps.

Holding: The trial court ruled the permit was proper because the date of the permit application controls a plan consistency determination. The appeals court reversed, holding the permit was invalid because the date for determining a permit application's land use consistency with a comprehensive plan is the date of its order, which in this proceeding was April 12, 2002. Moreover, the comprehensive plan mandated that nonconforming land uses be brought into conformance with future land use map designations. Here, the new land use designation made the camp a nonconforming use, which the county improperly allowed to expand in clear violation of the comprehensive plan's "rural residential" land use designation. In its remand for further proceedings, the court noted that the trial court would have to decide the proper remedy because the structure was already built and the coalition was not seeking its demolition.

B. *Nebraska.* Ordinance Allowing Rezoning and Resolution Amending the Comprehensive Development Plan Were Lawful. *Smith v. City of Papillion,* 705 N.W.2d 584 (Neb. 2005).

Holding: City council properly amended city's comprehensive development plan and rezoned tract to accommodate a Wal-Mart Supercenter project. Though a development plan does indeed provide a long-term strategy for city development, such a characteristic does not make it legislation that must be passed by ordinance as opposed to by resolution.

C. *Montana.* Rezonings Must Substantially Comply with Growth Plan. *Citizen Advocates for a Livable Missoula, Inc. v. City Council of Missoula,* 130 P.3d 1259 (Mont. 2006).

Facts: The hospital bought land adjoining its building from the city of Missoula. The land had been used primarily for equipment storage and maintenance. The hospital proposed to expand onto land used by a nearby Safeway grocery store. The plan called for construction of a new

Safeway "megastore" on the land acquired from the city, which required rezoning. The office of planning recommended denial and residents opposed the application. The planning board recommended approval and, after asking the office of planning to recommend conditions, the city council approved the rezoning.

Holding: The trial and highest courts upheld the approval. A growth policy is not a regulatory document (MC § 76-1-605) and the action substantially complied with the city's growth plan. While certain aspects of the rezoning are not in harmony with the plan's goals of encouraging existing neighborhood businesses, supporting a residential and small business environment, and preserving the neighborhood's history, the hospital and Safeway are important neighborhood institutions and play a critical economic role. Not every zoning proposal can be consistent with every aspect of the plan. The Safeway does not benefit only its owner and the hospital and will not be so significantly different from prior uses and zoning as to constitute spot zoning.

V. CONDEMNATION

A. FEDERAL COURT DECISIONS

Condemnation Notice Fell Short of Due Process. *Brody v. Village of Port Chester,* 434 F.3d 121 (2d. Cir. 2005).

Facts: In 1996, the owner bought commercial property in an area planned for redevelopment. The village finally decided to pursue the Modified Marina Redevelopment Project and the owner participated extensively in the environmental review process. The village initiated condemnation proceedings and held a public hearing on June 7, 1999, to determine public use and necessity, as required by Eminent Domain Procedures Law (EDPL). The village published notice and mailed notice to the owner, who attended and protested inclusion of his property in the project. Because of a defect in the notice, the village published notice again and held a second hearing on July 6. The owner did not attend, but his comments from the previous hearing were included in the record. On July 18-19, the village published a synopsis of the hearing, which triggered the 30-day period for seeking judicial review of the determinations made at the hearing. The owner did not appeal the determination. In April 2000, the village began the process to take title.

Holding: The court held that the owner could not challenge the public use determination. The owner and others filed suit in federal court, alleging due process violations. The trial court ruled in favor of the village; the appeals court vacated and remanded. The notice of the 30-day period for appealing the public use determination was insufficient, according to the court, which noted that the village had the addresses of all potential condemnees and that mailed notice would not have been a hardship. The EDPL now requires mailed notice. Notice must be reasonably calculated to convey the required information; while the village was not obligated to give instructions for pursuing an appeal, the notice should have made conspicuous mention of the 30-day review period. Citizens are generally charged with constructive knowledge of the laws affecting their property, but the court concluded that "reasonable notice" required some mention of the appeal period, given the constitutional significance of the public use determination, the brief period for seeking review of that determination, and the unlikelihood of an average citizen being aware of the significance of the publication of a synopsis of the hearing. The court rejected an argument that the EDPL's provision of a summary hearing to review the determination of public use is insufficient, noting the government's interest in completing projects in a timely manner, the need for deference to legislative determinations, and that the role of the court in eminent domain proceedings is one of "patrolling the borders."

B. STATE COURT DECISIONS

1. *Maryland.* Municipalities May Condemn an Individual Blighted or Deteriorated Dwelling That Is Not in a Slum or Blighted Area. *City of Frederick v. Pickett,* 897 A.2d 228 (Md. 2006).

Facts: An absentee owner failed to make a long-vacant residential dwelling structurally sound, secure, and clear of litter, despite the Frederick office of code enforcement's repeated orders

to do so. On March 21, 2002, the board of aldermen passed an enabling ordinance authorizing the city to acquire a blighted dwelling unit by eminent domain upon finding that the unit was likely to continue to deteriorate or that its continued deterioration would contribute to the blighting or deterioration of the immediate area. Immediately thereafter the board discussed and approved a second ordinance condemning the vacant property based on the findings in the enabling ordinance. On March 25, the mayor signed the enabling ordinance and then the specific taking ordinance.

Holding: The city initiated condemnation proceedings in trial court, which dismissed the action after an evidentiary hearing. Reading the statute empowering municipalities to condemn blighted properties (Article 23A, Section 2(b)(37)) together with the constitutional provision giving municipalities urban renewal authority to condemn structures in blighted or slum areas, the court held that municipalities may condemn an individual property only if it is located in a designated slum or blight area. It also ruled that the specific taking ordinance was ultra vires because the board acted beyond its authority when it passed the condemnation ordinance before the mayor had signed the enabling ordinance. On the city's notice of appeal to the intermediate court, the high court took jurisdiction and reversed, holding a single building can be condemned regardless of its location. Section 2(b)(37) is simply remedial legislation allowing municipalities to stop the spread of blight through acquisition of a blighted single or multi-family dwelling. Further, the board's passage of the ordinance condemning the specific property was not ultra vires because Section 2(b)(37) does not require municipalities to enact an enabling ordinance before exercising the authority to condemn individual properties.

2. ***Pennsylvania.*** **Home Rule City Could Condemn Property for a Public Golf Course Under Third Class City Code in the Absence of Any Superceding and Uniform, Statewide Statute Precluding the Taking.** *In Re Condemnation by the City of Coatesville, 898 A.2d 1186* (Pa. Commw. Ct. 2006).

Facts: The City of Coatesville filed a declaration to take property by condemnation for a public golf course, referencing sections of the Third Class City code. The estate filed a preliminary objection claiming the city lacked the power to condemn the property under the code because it was now a home rule municipality and subject to Home Rule taking law, and, further, that the city lacked the authority to condemn property for a recreational facility because it was a proprietary business, not a public purpose.

Holding: The trial and appeals courts upheld the legality of the declaration. Home rule law gives home rule municipalities broad powers to exercise any powers or function not superceded by a preclusive statute made uniformly applicable to the entire commonwealth. There being no uniform taking statute to supercede the city's home rule municipal authority, the city could condemn the property under either its broad home rule powers or the Third Class City code, which undisputedly authorized the taking. In addition, case law establishes that the taking of property for a city-constructed public golf course is a public, not proprietary use, the defining issue being "public occupancy." While some members of the public are necessarily excluded from the course while others use it, the duration of occupancy is limited, and there is no requirement that an entire community or even a significant portion of it should directly participate in an activity to make it a

public use.

3. ***Virginia.*** **Property Owner Entitled to Notice Affording It Chance to Bring Property into Compliance with Authority's Standards.** *Norfolk Redevelopment and Housing Authority v. C and C Real Estate, Inc.*, *630 S.E.2d 505* (Va. 2006).

Holding: Pursuant to conservation plan, city's authority seeks to condemn property used as automobile salvage yard. It doesn't violate due process that the taking comes fifteen years after the area was declared blighted, as owner hasn't demonstrated that in the period since the blight finding the property's condition has been remedied. Nor is it unlawful that the property may be reconveyed for industrial use. However, condemnee was entitled to notice affording it a chance within a year to bring its property into compliance with authority's standards.

4. ***Wisconsin.*** **Proposed Condemnee Entitled to Litigation Expenses When State Failed to Negotiate in Good Faith Before Making Jurisdictional Offer.** *The Warehouse II, LLC v. State of Wisconsin Dep't of Transportation, 715 N.W.2d 213* (Wis. 2006).

Holding: In failing to negotiate in good faith with proposed condemnee before making its jurisdictional offer, state violated a "fundamental, statutory requirement necessary to validly commence condemnation and confer jurisdiction on the condemnation commission and the courts." Accordingly, the would-be condemnee is entitled to its litigation expenses.

5. ***Texas.*** **In Failing to Specify What the Alleged Public Use of Tract, City Hasn't Shown That There Are Any.** *Whittington v. City of Austin, 174 S.W.3d 889* (Tex. App. 2005).

VI. EMINENT DOMAIN

A. FEDERAL COURT DECISIONS

1. **Railroad May Go Forward with Federal Preemption Challenge to Eminent Domain Statutes.** *Dakota, Minnesota & Eastern Railroad Corp. v. Rounds,* 422 F. Supp. 2d 1073 (S.D.S.D. 2006).

Holding: Railroad may go forward with its federal preemption challenge to eminent domain statutes, though the matter will be mooted if state passes amendment requiring rural water systems, electric utilities and others to pay the railroad fair value for their crossing easements.

B. STATE COURT DECISIONS

1. ***Georgia.*** **County Ordinance Is Unconstitutional Infringement on Power Company's Powers of Eminent Domain.** *Forsyth County v. Georgia Transmission Company,* Nos. S06A0421 and S06A0422, 2006 WL 1724357 (Ga. 2006).

Holding: County's requirement that power companies obtain its consent before constructing high voltage power transmission lines unconstitutionally infringes on power companies' powers of eminent domain.

2. ***Ohio.*** **Economic Benefit to Community Alone Does Not Justify Government Taking of Private Property; Use of Term "Deteriorating Area" as Standard for Invoking Eminent Domain Is Overly Vague and Therefore Void.** *City of Norwood v. Horney,* --- N.E.2d ----, 2006 WL 2096001, 2006-Ohio-3799 (Ohio Jul 26, 2006) (NO. 2005-0227, 2005-1210, 2005-1211, 2005-0228).

Facts: Owners contest city's right to condemn their home to make way for developer's office, retail, and apartment redevelopment project expected to generate millions in annual revenue for the city.

Holding: Judge properly found that the area isn't blighted; and "(w)e hold that although economic factors may be considered in determining whether private property may be appropriated, the fact that the appropriation would provide an economic benefit to the government and community, standing alone, does not satisfy the public-use requirement" of the state constitution. City's use of "deteriorating area" as a standard for takings is void for vagueness and unconstitutionally incorporates speculation as to the future condition of the property to be appropriated. And statutory provision precluding court from enjoining a taking once compensation has been deposited violates the separation-of-powers doctrine.

3. ***Oklahoma.*** **County's Use of Eminent Domain Power Was Statutorily Unauthorized.** *Board of County Commissioners of Muskogee County v.*

Lowery, 136 P.3d 639 (Okla. 2006).

Facts: The county initiated condemnation of temporary and permanent rights-of-way for installation of three water pipelines. Two pipelines would serve only Energetix, a privately owned electric generation plant proposed for construction, and would run from the Arkansas River to supply up to eight million gallons per day to cooling towers at the natural gas-fired plant. A third line and six fire hydrants were to be built by Energetix for a rural water district if Energetix obtained all necessary rights-of-way.

Holding: The trial court held that the county properly exercised its power of eminent domain for a public purpose under 27 O.S. §5. The appeals court reversed. The highest court held that the condemnations were unlawful takings for a private benefit to a private party and that economic development alone, not connected with blight, is not a public purpose under the statute. While acknowledging the Supreme Court's decision in Kelo v. City of New London, 125 S. Ct. 2655 (2005), the court stated that Oklahoma strictly construes the power of eminent domain in favor of landowners. The state constitution (Art. 2 §23) provides that private property may not be "taken or damaged for private use, with or without compensation." The court granted the owners attorney's fees for the appeal.

4. ***Pennsylvania.*** **Redevelopment Authority's Condemnation of Private Property in Blighted Area for Transfer to Religious Organization to Construct School Violates Establishment Clause.** ***In Re Redevelopment Authority of City of Philadelphia*****,** *891 A.2d 820* (Pa. Commw. Ct. 2005).

5. ***Indiana.*** **Owners Waived Objections to Taking by not Filing Within Statutory Period.** *Hass v. State,* 843 N.E.2d 994 (Ind. Ct. App. 2006).

Facts: The state Department of Transportation ("DOT") notified the owners of land on U.S. Route 6 in Porter County that it needed the land for a highway improvement project. The owners declined an offer of $9,580. The DOT filed a complaint. The court awarded $28,480 in compensation, plus fees. The owners did not file exceptions within the statutory deadline and the court entered judgment.

Holding: The appeals court affirmed. Rejecting the owners' claim that the land was not needed for the project, the court found that the owners waived appeal of the decision overruling objections to the complaint by not filing within the statutory deadline. The court nonetheless found that the trial court was correct: The issue of necessity for a taking is within the discretion of the legislature and is not proper for judicial review. There was nothing in the record to support a claim that the taking was a subterfuge for private use. The court similarly rejected the appeal of the appraisal as untimely and held that the fact that the trial judge lives near the property did not mandate recusal.

VII. FAIR HOUSING ACT

A. **Substance Abuse Facility Would Have Been Protected by Fair Housing Act.** *Lakeside Resort Enterprises, LP v. Board of Supervisors of Palmyra Township,* No. 05-1163 (3d Cir. 2006)

Facts: Lakeside proposed to located a drug- and alcohol-treatment facility in an area zoned Community Commercial. The township enacted an ordinance that prohibited such facilities in Community Commercial districts and denied Lakeside's application for a conditional use of the property. Lakeside challenged the validity of the ordinance under the Fair Housing Amendments Act (FHAA) of 1988,2 42 U.S.C. §§ 3601 et seq.

Holding: The district court entered judgment as a matter of law for the township, finding that the average resident stay (14.8 days) in Lakeside facilities was not a significant period of time, and that the residents would attend only for treatment and not view the facility as a permanent residence. On appeal, the Third Circuit reversed, finding the proposed facility qualified as a dwelling under the Fair Housing Act. The "short, funding-limited, average stay [was] not dispositive" as Congress considered a "dwelling" to be a facility which was occupied as, or designed or intended for occupancy as, a residence by one or more families. Here, the average stay was longer than a typical stay at a hotel or motel; the facility was intended for longer stays and many residents stayed longer than two weeks; and while at the facility, the residents treated the premises like a home.

VIII. GROWTH MANAGEMENT

A. *Minnesota.* Removal of a Property from Metropolitan Urban Service Area Was Not Arbitrary and Did Not Constitute a Taking. *Concept Properties, LLP v. City of Minnetrista,* 694 N.W.2d 804 (Minn. Ct. App. 2005).

Facts: In 1975, the previous owner of a 48.7-acre parcel paid a $28,020 assessment for sewer trunk improvements. Although the property was not to connect to the line, it was part of the Metropolitan Urban Services Area (MUSA), anticipated to have services for urban development within 20 years. The city's 1981 comprehensive plan also designated the land as part of the MUSA, but in the mid-1980s the size of the MUSA was reduced. The 1992 comprehensive plan designated the property as residential-agricultural with a three-acre minimum lot size. When the city began updating its plan in 1997, pursuant to MINN. STAT. § 473.864, the owner asked that the land be included in the MUSA. The planning commission voted to delay urban development and designated the property "MUSA 2010-2015." The metropolitan council rejected the plan because it called for a MUSA more than double what was required by forecasts. The metropolitan council required the city to reduce the MUSA's rate of expansion. The city ultimately designated the land, and 75 other properties, as "beyond 2020 MUSA" and zoned it "staged development" with a 10-acre minimum lot size. The city denied the new owner's request for rezoning.

Holding: The trial court ruled in favor of the city. The appeals court affirmed. The change in the property's MUSA status was not arbitrary, but was a legislative act, adopted after extensive hearings and rationally related to concerns about lack of resources, urban sprawl, and the need to comply with the metropolitan council's regional policies. The city was not required to find that the previous designation was a mistake in order to change that designation or to make specific findings about each parcel. The denial of rezoning was not arbitrary, but was based on the same concerns as well as a desire to conform to the new comprehensive plan. The owner did not present sufficient reasons for rezoning. The 1975 payment did not create a vested right to MUSA inclusion or cause the city to be estopped from denying inclusion in the MUSA because the city did not commit to connect the property to the sewer. Rejecting a "takings" claim, the court noted that the property still benefits from the proximity of the trunk sewer line and that the owner has begun construction of a nursery and a residence on the property and can construct three additional houses by using septic systems.

B. *Oregon.* Measure 37, Requiring Government to Compensate for Reductions in Market Value or Waive Land Use Regulations, Is Valid. *MacPherson v. Department of Administrative Services, 130 P.3d 308* (Or. 2006).

Facts: Measure 37 (ORS 197.352) was approved by the voters in 2004 and requires public bodies to either compensate owners for reductions in market value attributable to land use regulations or modify, remove, or not apply those regulations. The Measure exempts regulations concerning historically recognized public nuisances, pornography, nude dancing, or public health and safety (fire codes and pollution laws); regulations required by federal law; and laws enacted prior to acquisition of property by the owner or a family member. Regulations subject to Measure 37 include rules and goals of the Land Conservation and Development Commission; local

comprehensive plans and zoning, subdivision, and transportation ordinances; statutes and rules regulating farming and forest practices; and metropolitan service district regional plans and goals.

Holding: A trial court found the measure unconstitutional. The Oregon Supreme Court reversed. Measure 37 does not suspend, delay, or interrupt operation of any land use law in violation of the state constitution; nothing in the Measure prohibits future enactment, amendment, or repeal of land use laws or of Measure 37 itself. It does not violate the guarantee of equal privileges and immunities; the distinction between owners who acquired before regulation and those who acquired after regulation does not create a "true class." The Measure does not violate separation of powers by allowing legislative bodies, rather than the executive, to decide whether and when to enforce land use laws. The court noted the combined functions of local governing bodies and that there is no requirement that every delegation of legislative power be accompanied by standards to safeguard against arbitrary exercise of that power. Measure 37 does not impermissibly waive sovereign immunity; nothing in the state constitution prohibits the state from deciding that it will compensate owners for economic consequences of land use regulations. The court also rejected claims under the U.S. Constitution. While the Measure does not include pre-deprivation procedures to protect those whose interests may be harmed by governmental action under its provisions, it does not preclude implementation of such procedures. The court noted that the state has procedures for claims against state entities and concluded that the Measure does not, on its face, violate procedural due process rights. Rejecting a substantive due process claim, the court stated that the Measure does not implicate any fundamental right and that the policies behind the Measure are not irrational.

IX. NONCONFORMING USES

A. ***Colorado.*** **As Statute Precludes Zoning Measures That Terminate Through Amortization Without Compensation Nonconforming Property Uses That Were Lawful at Their Inception, City Could Not Zone Nude Dancing Facility Out of Its Existing Location.** *JAM Restaurant, Inc. v. City of Longmont,* No. 04CA1705, 2006 WL 408315 (Colo. Ct. App. 2006).

B. ***Vermont.*** **Building's Parking Lot Is Not a Nonconforming Structure Whose New Use Is Grandfathered from Current Zoning Regulations.** *In re Korbet,* 868 A.2d 720 (Vt. 2005).

Facts: The owners of a general store purchased property formerly housing a general store, post office, and apartment, with the intent to move their store there. The town planning commission approved their site plan review application, which showed nine parking spaces in the rear of the store and additional spaces on each side, subject to certain conditions. The zoning board of adjustment granted the owners' application for a conditional use permit (CUP), requiring them to run the store in conformity with the site plan and stated hours of operation.

Holding: Neighbors appealed the board's decision to the environmental (trial) court, which denied the CUP application because the proposal violated current zoning regulations. The court initially found that the proposed store was a "small enterprise" under the zoning regulations and thus needed a CUP to locate within the town's "Village" district. It next reasoned that the proposed "small enterprise" was a preexisting nonconforming use because it required a CUP that had never been obtained. Consequently, the board erred in granting the CUP because the preexisting nonconforming use had been discontinued for over a year, making the proposed use subject to, and in violation of, current zoning law—which requires commercial parking lots to be set back 50 feet from existing adjacent homes. It further held that even if the existing building was entitled to nonconforming structure protection, such protection does not encompass the parking lot, which must comply with current regulations. The owners appealed, arguing that the parking lot and the building constitute a nonconforming structure and thus are grandfathered from current zoning law. The state's highest court affirmed, holding that parking is not a structure under the zoning regulations, which define structure as "[a]n assembly of materials for occupancy or use." It further ruled that even if parking were part of a nonconforming structure, the proposal still did not meet zoning requirements, which allows enlargement of a nonconforming structure only if the "degree of noncompliance" is not increased. Noting that only the previous owners had used the rear area of the building for parking, the court concluded that the trial court had properly ruled that the proposed parking arrangement for customers increased the degree of noncompliance.

C. ***Virginia.*** **(First Impression) Residential Nonconforming Use in One Part of Commercially Zoned Building Does Not Extend Nonconforming Use Throughout the Entire Building.** *Patton v. City of Galax,* 609 S.E.2d 41 (Va. 2005).

Facts: In 1997, the owners of a building on Main Street in Galax began renovations to

replace the building's first floor commercial uses (drugstore, woodworking shop, beauty shop) with residential apartments. The second floor already contained residential apartments, previously made nonconforming by enactment of a zoning ordinance that zoned the property general business and allowed apartments only as a conditional use. The city notified the owners that it would not issue building permits without a conditional use permit (CUP), and then obtained a temporary injunction. Meanwhile, the owners applied for a CUP, but the planning commission denied the application because the proposed apartments would front on Main Street, a "designated street" within the meaning of the city's code. The owners appealed to the zoning board of appeals, which denied their appeal. They then filed suit, claiming that using the entire building for residential purposes was a permitted nonconforming use because the second floor has been continually used for residential apartments since before the city's zoning code was adopted.

Holding: The trial court affirmed the city's decision. The state's highest court affirmed, holding as a matter of first impression that a residential unit established in one part, but not all, of the building prior to enactment of the zoning code did not constitute a grandfathered right to extend the nonconforming use throughout the building.

D. ***Oregon.*** **Proof of Nonconforming Use Requires Both Proof of Uninterrupted Use and Proof That the Use Was Lawful at Its Inception.** *Aguilar v. Washington County,* 120 P.3d 514 (Or. Ct. App. 2005).

Facts: A 34-acre parcel, first zoned in 1974 and currently zoned agriculture-forestry, contains a building built between 1974 and 1980 and another built between 1980 and 1984. After 1984 a roof was built over the open area between the buildings, and the property was used for storage in connection with an excavation business. In 2000, the current owners bought the property. They subsequently built walls to enclose the open ends, without obtaining permits, and began using the building to store groceries and vending supplies. The use is not permitted in the district. After being cited for violations, the owners sought verification that the use was nonconforming. The county denied the application. The Land Use Board of Appeals and court of appeals affirmed, based on ORS 215.130, which defines nonconforming uses.

Holding: The court held that the applicant is required to prove both that the use was lawful at its inception and that it has continued for up to 20 years without interruption. The local government has the option of requiring proof of continuity without interruption for a 10-year period. In this case the owner was able to prove uninterrupted use, but not that the use was lawful when it began.

X. PREEMPTION

A. STATE COURT DECISIONS

1. *Georgia.* Statute Requiring County Consent Before Solid Waste Collected in City May Be Taken into It for Disposal Violates the Commerce Clause. *Fulton County v. City of Atlanta, 629 S.E.2d 196* (Ga. 2006).

Facts: Atlanta entered into contracts with companies for collection of municipal solid waste and disposal in landfills in Forsyth and Butts counties. Fulton County demanded that the city comply with OCGA § 36-1-16 (a), which prohibited the transportation of waste across county or state lines for purposes of disposal in a landfill without the consent of both the originating and receiving counties. The city refused.

Holding: The trial and highest courts found the statute unconstitutional because it impairs the free flow of interstate commerce. The court cited Fort Gratiot Sanitary Landfill v. Michigan, 504 U.S. 353 (1992), stating that the state cannot authorize its political subdivisions to do what it cannot do.

2. *New Hampshire.* Wood Cogeneration Facility's Use of Construction and Debris Woodchips Did Not Require a New Variance, Where Initial Variance Imposed No Conditions on Type of Chips Used and State Air Emissions Standards Preempted Local Government Control. *Bio Energy LLC v. Town of Hopkinton,* 891 A.2d 509 (N.H. 2005).

Facts: In 1983, the Hopkinton planning board approved Bio Energy's site plan application to operate an industrially zoned, wood cogeneration facility. The facility burns woodchips to generate steam and electricity, which it sells to public and private utilities. The zoning board of appeals (ZBA) subsequently approved a variance to allow the facility's construction with no conditions on burning, even though Bio Energy had stated its interests in burning alternative fuels. In 2001, the selectmen issued Bio Energy a building permit to mechanize the delivery of C & D woodchips (materials from construction and demolition projects) from a storage area to the power plant, only to issue Bio Energy a cease and desist order in 2003 to stop burning the C & D on the ground that the 1983 variance did not permit it.

Bio Energy sought a declaratory judgment that state air emissions statutes preempted local control over the burning of C & D woodchips, that it could proceed with construction under the 2001 building permit and the 1983 variance because there was no change in use, and that it was entitled to attorneys fees under state law for the costs related to the cease and desist order. The trial court vacated the cease and desist order, holding the doctrine of preemption precluded local control over air emissions standards. It further concluded there was no change in use to compel a new variance permit and dismissed the claim for attorney's fees.

Holding: The appeals court affirmed in part and reversed in part. It affirmed the preemption

ruling because the air emissions statutes are a comprehensive scheme that broadly regulates air contaminants under Title V of the Clean Air Act by establishing ambient state air quality standards and a statewide permitting system. Moreover, since neither the planning board nor the ZBA variance imposed any conditions on the source or nature of woodchips to be used, the trial court properly refused to impose any limitations on woodchips use.

Reversing on the issue of attorneys fees, however, the court remanded. Attorneys fees are recoverable when a court dismisses a cease and desist order if that order was not well-grounded in fact. The record showed that Bio Energy used the woodchips with the town's knowledge, that the town had actively sought to reach an agreement with the facility to burn the town's C & D debris, and that the state and federal governments had issued a modified Title V permit to burn the debris.

3. ***New Jersey.*** **Rail Carrier Is Exempt from Solid Waste Management Act.** *Town of Kearny v. New Jersey Rail Carriers, LLC,* 2005 WL 2363101 (N.J. 2005).

Facts: The company sought recognition by the Federal Surface Transportation Board as a rail carrier so that it would be exempt from state regulation pursuant to the Interstate Commerce Commission Termination Act. 49 U.S.C. § 701 (ICCTA). The New Jersey Department of Environmental Protection intervened, concerned that the company would operate a solid waste transfer station that would otherwise be regulated under N.J.A.C. 7:26-1.4. The department withdrew its objections when the company agreed to comply with regulations applicable to intermodal container facilities handling completely sealed containers of waste and to waive the exemption and seek a permit in the event that it should operate as a solid waste facility. The board accepted the settlement and recognized the company as a rail carrier. After the facility began operations, officials claimed to observe open trucks carrying debris. The town filed a complaint. The department issued a notice of violation, which it later rescinded.

Holding: The trial court dismissed on preemption grounds; the appeals court affirmed. The town acknowledged that the ICCTA preempts local regulation, so the issue was whether the company had violated its agreement with the department. That agreement was not enforceable by the town, according to the court.

4. ***New Mexico.*** **Under Home Rule Powers, City Had Authority to Prohibit Drilling of Well and This Authority Was Not Preempted by Existing State Law.** *Smith v. City of Santa Fe, 133 P.3d 866* (N.M. Ct. App. 2006).

5. ***Pennsylvania.*** **Municipal Grading Permit Requirement Is Not Preempted by State Oil and Gas Act.** *Commonwealth v. Whiteford, 884 A.2d 364* (Pa. Commw. Ct. 2005).

Facts: The owner obtained conditional approval from the Department Of Environmental Protection and site plan approval from the planning commission to dig a gas well, but did not obtain a grading permit from the municipality, Penn Hills. The municipality issued a notice of violation, requiring the owner to apply for a permit and repair damage to the road. When the owner failed to

comply, the municipality filed complaints. The owner was convicted and fined $400 for each of two violations.

Holding: The appeals court affirmed. Violation of the municipal ordinance which does not provide for imprisonment is a civil offense, but the municipality provided the owner with greater protection than required by proceeding as in a criminal action. Rejecting an argument that local law was preempted by the Oil and Gas Act, 58 P.S. 601.602, the court reasoned that the municipality was not attempting to regulate activities directly related to the operation of a well.

XI. RELIGIOUS LAND USE AND INSTITUTIONALIZED PERSONS ACT (RLUIPA)

A. FEDERAL COURT DECISIONS

1. What is a Substantial Burden? - Finding Against the Local Government:

(a) **Church Need Not Show the Absence of Alternative Parcels on Which It Could Build to Show Substantial Burden.** *Sts. Constantine & Helen Greek Orthodox Church, Inc. v. City of New Berlin.* 396 F.3d 895 (7th Cir. 2005).

Facts: A church whose congregation was outgrowing its existing building acquired a 40-acre tract of residentially zoned land in New Berlin and applied to rezone 14 acres of the land to institutional so it could build a new church—as soon as it raised the estimated $12 million needed for construction. In response to the planning director's concern that the zoning would allow other institutional uses if the church sold the property after failing to raise construction funds, the church proposed accompanying its proposed institutional zoning with a PUD overlay ordinance that limits future uses to church-related uses. This satisfied the planning director, who recommended approval, but the planning commission rejected the application because the planning commission members thought that a new owner would not be bound by the PUD's restrictions. The mayor suggested that the church apply for a conditional use permit instead, but the church declined because it might not have enough time to both raise funds and begin construction by the one-year deadline applicable to conditional use permits. The mayor also suggested that the church apply for a PUD that overlay the existing residential zoning rather than the proposed institutional zoning. The church refused that suggestion and sued the city, alleging a violation of the Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C.A. § 2000cc(a)(1). The trial court granted summary judgment in favor of the city, relying on *Civil Liberties for Urban Believers v. City of Chicago (CLUB)*, 342 F.3d 752 (7th Cir. 2003), to rule that the church would have to show that there was no other parcel of land on which it could build its church. The church appealed.

Holding: The appeals court reversed and remanded, holding that although the church had to first show that denial of its application imposed a "substantial burden" on it, it did not have to show that there was no other parcel of land on which it could build. It stated that the trial court misinterpreted the CLUB decision, noting that it involved a challenge to the zoning ordinance, not to the denial of a rezoning request. Having to seek a permit to build outside a residential zoning district may not place a substantial burden on churches, but in this case, the church would have either to sell its land and find a suitable alternative parcel or be subjected to unreasonable delay by having to restart the permit process to satisfy the planning commission about a contingency for which the church has already provided complete satisfaction. The city was not entitled to summary judgment, but since the facts were undisputed, the court remanded the case to the trial court to rule in favor of the church, but to stay its order for 90 days to give the city and church a chance to negotiate.

(b) **Church's Proposed Construction of Religious School Is Exercise of Religion and Protected by RLUIPA from Township's Denial of Special Use Permit.** *Living Water Church of God v. Charter*

Township of Meridian, 384 F. Supp. 2d 1123 (W.D. Mich. 2005).

Holding: Church's proposed construction of religious school is the "exercise of religion" and protected by RLUIPA from township's denial of special use permit.

2. **What is a Substantial Burden? - Finding For the Local Government:**

(a) **Substantial Burden on Religious Exercise, Justifying RLUIPA Claim, Did Not Exist Where Village Did Not Completely Deny Church's Application for Expansion.** *Cathedral Church of the Intercessor v. Incorporated Village of Malverne,* 353 F. Supp. 2d 375 (E.D.N.Y. 2005).

Facts: In 1998, a church in Malverne submitted plans to the village for a 5,700 square-foot expansion of its sanctuary and administrative offices. Following considerable opposition from the community, the church withdrew its plans and resubmitted new plans the next year for a 2,275-square-foot expansion. The building department denied the application as a "business use." The church claimed the denial was frivolous and made in bad faith since the earlier application had not been considered a "business use." After the village failed to respond to six inquiries by the church, the village attorney finally informed the church by letter that the board of trustees considered the expansion a "business use" and the church would have to seek a variance from the zoning board of appeals. Following more public hearings and further revisions, the expansion plans were approved and the village issued a building permit to the church. Almost two years later, the church filed a complaint in federal district court against the village, alleging that the village violated the Constitution, the Religious Land Use and Institutionalized Persons Act (RLUIPA), and state and local codes.

Holding: The federal trial court dismissed the constitutional claims and the RLUIPA claims. It found that the church failed to state a "class of one" equal protection claim pursuant to Olech, that it was not denied substantive or procedural due process, and that the board's actions lacked religious animus. The church failed to state a claim under RLUIPA because the village did not completely deny the church's application; thus its actions cannot constitute a "substantial burden" on religious exercise.

(b) **Denial of Permit to Allow Church to Operate 100-Child Public Day Care Center in Residential Area Did Not Violate Constitutional Rights or RLUIPA.** *Grace United Methodist Church v. City of Cheyenne,* 451 F.3d 643 (10th Cir. 2006).

Facts: A church, Grace United, sought to operate a "commercial" 100-child daycare with a "religious education program" on church property in a residential zone. The zoning ordinance prohibited any entity from operating a daycare with more than twelve children, and the license was denied. The city also subsequently denied a variance sought by the church. It found the proposed daycare center was not a church, primary or secondary school, or any other similar use permitted within the zone, and the use was incompatible with the neighborhood. The church sued, alleging that

the City violated the Religious Land Use and Institutionalized Persons Act (RLUIPA) by imposing a substantial burden on the church's exercise of religion, the First Amendment, and the Fourteenth Amendment's due process and equal protection clauses. A homeowners' association intervened in the action as a matter of right and sought a declaration that the daycare center would violate neighborhood restrictive covenants. The district court granted summary judgment to the defendants on the church's constitutional claims and a jury found against the church under RLUIPA and the restrictive covenants.

Holding: On appeal, the Tenth Circuit initially affirmed the rulings below and held it unnecessary to address whether the homeowners' association lacked standing to intervene and whether the district court had jurisdiction over the restrictive covenant claims. However, the court granted the church's petition for an en banc rehearing, vacated its previous opinion, and issued this revised opinion. It held, among other things, that (1) the ordinance was a neutral policy of general applicability which did not offend First Amendment free exercise principles or the church's speech and associational rights; (2) RLUIPA did not require the religious activity that was substantially burdened by the land use regulation at issue to be "fundamental," and the error in the jury instruction regarding the substantial burden test was harmless. (3) The homeowners' association had standing to intervene; and (4) the court properly exercised supplemental jurisdiction on the restrictive covenant claim.

3. **Nonconforming Use: Town Properly Granted Expansion to Religious Use under RLUIPA Without Requiring Special Permit as Use Was Nonconforming with Respect to Lot Coverage and Parking Requirements.** *Mintz v. Roman Catholic Bishop of Springfield,* 424 F. Supp. 2d 309 (D. Mass. 2006).

Facts: St. Ann's Parish, near the center of Lenox, in a residential district with a 15,000-square-foot minimum lot size, had a rectory and 600-seat church on its property, with 44 parking spaces. Neighbors complained of illegal parking and blocked traffic. The parish obtained a building permit for a 150 person social hall with a kitchen and office space, with a condition that the church and social center not operate at the same time. Neighbors appealed.

The ordinance permits religious uses, but with four percent maximum lot coverage. The total lot coverage with the social center would be 13 percent. The ordinance also requires one parking spot for every three seats and prohibits expansion of a nonconforming use without a special permit. The zoning board of appeals upheld the permit, with an additional requirement that 50 parking spaces be added to the site, and the trial court affirmed.

Holding: After noting the unique alignment of the parties with respect to the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U.S.C.§ 2000cc, the court held that activities that will be conducted in the center encompass "religious exercise" and that application of the code would impose a "substantial burden" in violation of RLUIPA. The court rejected arguments that the inability to construct a building that is an accessory use cannot, as a matter of law, be a substantial burden, and that RLUIPA was intended to protect unfamiliar religions rather than mainstream congregations. The court took a "broad view," stating that RLUIPA did not

contemplate that a congregation's religious exercise could be frozen in time.

While the town claimed no compelling interest in the code, neighbors argued that the use would cause greater impact at the site. The court noted that the lot coverage restrictions applicable to religious institutions are much more stringent than those that apply to other uses, that the church was legally nonconforming with respect to parking, and that conditions were imposed to address the neighbors' concerns. The state's "Dover Amendment," ch. 40A §3, provides that no zoning law shall "prohibit, regulate, or restrict the use of land or structures for religious purposes . . . such land or structures may be subject to reasonable regulations concerning the bulk and height . . . parking and building coverage."

The court rejected an argument that state law should have been applied, stating that it is doubtful that a different result would have been reached. The court also rejected an argument that the matter should be remanded to the zoning board and that the parish should be required to obtain a special permit or variance.

4. **Ripeness: RLUIPA Claim Was Unripe Where Homeowners Did Not Appeal Cease and Desist Order to Stop Weekly Prayer Meetings in Home.** *Murphy v. New Milford Zoning Commission,* 402 F.3d 342 (2d. Cir. 2005).

Facts: In 1994, homeowners in New Milford started holding weekly prayer meetings in their home. They live on a cul-de-sac with six other single-family homes. The number of participants at these prayer meetings ranges from 10 to as many as 60 people. After receiving complaints from the neighbors about traffic, parking, and noise problems associated with the meetings, the town's zoning enforcement officer visited the home on three Sundays and found between 13 and 20 cars lined up in the property's driveway and rear yard, and the cul-de-sac. The zoning commission decided this was not a customary accessory use in a single-family residential neighborhood and sent the owners a letter advising them they were in violation of the zoning regulations. The owners sued the town, alleging constitutional and statutory claims. The zoning enforcement officer then issued a cease and desist order. Rather than appeal that order, the owners amended their complaint, claiming the order violated the First Amendment and the Religious Land Use and Institutionalized Persons Act (RLUIPA), as well as the Connecticut Act Concerning Religious Freedom. The federal trial court found that the RLUIPA claim was ripe for review and issued a permanent injunction against the town.

Holding: The appeals court vacated the decision and remanded with instructions to dismiss without prejudice. It held that the RLUIPA claim was not ripe for judicial review because the owners had failed to appeal the cease and desist order. The court relied on the two-prong test established in Williamson County, which requires a plaintiff to obtain a final, definitive position on how it could use the property from the town charged with implementing the zoning regulations. "By-passing the zoning board of appeals and its hearing processes, which were statutorily designed for exploration and development of the issues, leaves the [owners'] alleged injuries ill-defined."

5. **Orthodox Jewish School States Claim That Village's Denial of Permit to**

Construct New School Building Violated RLUIPA. *Westchester Day School v. Village of Mamaroneck,* 379 F. Supp. 2d 550 (S.D.N.Y. 2005).

Holding: Orthodox Jewish school states claim that village's denial or permit to construct new school building violated RLUIPA.

6. **Claims Not Subject to RLUIPA:**

(a) **Ordinances Barring Use of Property Within Redevelopment Area as a Church Don't Violate RLUIPA and Are Constitutional.** *The Lighthouse Institute for Evangelism, Inc. v. City of Long Branch,* 406 F. Supp. 2d 507 (D. N.J. 2005).

(b) **Church Challenges Town's Condemnation of Parcel Next to That on Which It Proposes to Expand but Eminent Domain Proceedings Are Not Land Use Regulations Subject to RLUIPA.** *Faith Temple Church v. Town of Brighton,* 405 F. Supp. 2d 250 (W.D.N.Y. 2005).

Facts: The City of Long Branch adopted a commercial corridor redevelopment ordinance and plan listing bowling alleys, assembly halls, motion picture theaters, and restaurants, but not churches, as permitted uses. Located in the plan area was an evangelical mission whose property was declared in the redevelopment plan to be in need of rehabilitation. When the mission submitted a rehabilitation proposal to the planning board, seeking a waiver from the prohibition of churches, the board and city council rejected it. The mission sued the city in federal court, alleging the prohibition against churches violated the substantial burden and nondiscrimination provisions of the Religious Land Use and Institutionalized Persons Act (RLUIPA), the free exercise clause, New Jersey's religion clause, and the organization's free speech and assembly rights.

Holding: The court granted summary judgment in favor of the city on all claims. The ordinances imposed no substantial burden on the mission members' religious exercise because it did not prevent them from expressing their religious beliefs. The substantial burden test applies to the expression of a religious belief, not to the religious use of land or property. Further, the mission's relocation would not impose a substantial burden because there were suitable venues in 90 percent of the rest of the city. It also found that the city had a compelling interest in limiting churches in an area intended to create an artistic and dynamic commercial center (noting that state and local laws prohibiting the sale of alcohol within 1,000 feet of a religious organization would further restrict development). Concluding that RLUIPA's legislative history and other circuit decisions required a challenge to be reviewed under traditional equal protection principles requiring a "similarly situated" analysis comparing land uses, the court found no discrimination because there were no combination of uses either currently existing or imagined in the redevelopment plan similarly situated to the mission. The court declined to adopt the 11th Circuit's reasoning in *Midrash Sephardi, Inc. v. Town of Surfside* and *Konikov v. Orange County* (holding that a statute which fails to impose a substantial burden on religious practice might still violate the nondiscrimination provision based on a "natural perimeter" standard). The replacement of the equal protection test for

an independent natural perimeter standard would essentially cause the mission to be treated more favorably than nonsecular assemblies.

The church, which had a contract to purchase the property, challenged the town's decision to condemn the property. The court dismissed. Although the church had standing to challenge the decision, it did not establish that the decision was in bad faith or irrational. The record supported the town's claim that the parcel was the only remaining parcel of its size suitable for development as a park in accordance with its comprehensive and open space plans. The condemnation did not violate the Free Exercise Clause or its state equivalent. The court stated that it did not have authority under the state Eminent Domain Procedure Law § 207 to consider claims under the federal Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc; those claims had also been raised in federal court.

(c) **Prohibition on Use of Initiative Process for Matters Relating to Religious Institutions Is Constitutional.** *Wirzburger v. Galvin,* 412 F.3d 271 (1st Cir. 2005).

Facts: The parents of children enrolled in religiously affiliated schools wanted to amend Article 18 of the state constitution, which prohibits public support of private elementary and secondary schools, to allow the state to provide loans, grants, or tax benefits to students in private schools. The Attorney General denied certification of the proposed initiative because Article 48 specifically prohibits use of the initiative process for amendment of Article 18 or matters relating to religious institutions. The trial court entered summary judgment, upholding the Article 48 exclusions, and the appeals court affirmed.

Holding: Because of the communicative aspects of the initiative process, the court applied intermediate scrutiny, but concluded that the exclusions are not intended to suppress expression and are narrowly tailored to serve a significant state interest in the law-making process. The court noted that the initiative process includes both speech and non-speech elements and that there is no precedent indicating that a state may not regulate the matters subject to initiative. The exclusions do not violate the free exercise clause because they do not make distinctions based on religious status, infringe on freedom of belief, or prohibit any religious act. Rejecting an equal protection argument, the court reasoned that the exclusions do not implicate a suspect classification, do not have a discriminatory purpose, and apply equally to initiatives that would favor religion and to those that would disfavor religion.

B. STATE COURT DECISIONS

1. ***New York.*** **Requiring a Special Use Permit for Religious Group's Operation of Private College Does Not Violate RLUIPA.** *Town of Mount Pleasant v. Legion of Christ, Inc.,* 21 A.D.3d 368 (N.Y. App. Div. 2005).

Facts: The town filed suit, seeking a declaration that the Legion of Christ's use of its property as a private college violated the ordinance. The trial court ruled in favor of the owner and awarded fees.

Holding: The appeals court reversed, holding that the use is a private college and that such a use requires a special permit. Requiring a permit does not violate the Religious band Use and Institutionalized persons Act of 2000, 42 U.S.C. § 2000cc. Requiring a religious organization to go through the same application process as a secular organization cannot be considered a substantial burden on the exercise of religious freedom.

2. ***Oregon.*** **Denial of Conditional Use Permit for Meetinghouse Did Not Violate RLUIPA.** *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. City of West Linn,* 111 P.3d 1123 (Or. 2005).

Facts: The church sought a conditional use permit to build a meeting house on a single-family residential lot in West Linn because its meetinghouse in another town was becoming crowded. The lot was 5.64 acres and surrounded by three streets and undeveloped land, but the church proposed to subdivide the tract to create one lot to contain an existing residence, one to extend a street, and the remaining 3.85-acre lot to contain a 16,558-square-foot, single-story meeting house with parking lots covering 2.02 acres. The planning commission denied the application on the ground that the size and dimensions were unsuitable for a residential neighborhood and the city council agreed. The church had not submitted a noise study and there were concerns about whether the plan included sufficient land for buffering. The state land use board of appeals reversed.

Holding: The appeals court reversed, in favor of the city. The highest court affirmed. After examining the history behind the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. §2000cc, the court concluded that the denial did not impose a substantial burden on religious exercise because it did not "force" or "pressure" a choice between following religious precepts and forfeiting certain benefits or abandoning one or more of those precepts to obtain those benefits. While the denial had adverse consequences to the church, it was clear that the church could acquire additional land for buffering and there was no evidence that the city was motivated by religious animus or would reject a revised application. There was no evidence that the denial caused the church to turn anyone away, modify its worship, or reduce its activities. The court noted that the siting of a large building often involves multiple applications.

3. ***Hawaii. (*****First Impression): Ordinance Authorizing Exercise of Eminent Domain Is Neither a Zoning Nor a Landmarking Law and Does Not Violate RLUIPA.** *City and County of Honolulu v. Sherman,* 129 P.3d 542 (Haw. 2006).

Facts: An ordinance established the authority of the city to acquire, either by voluntary purchase or through exercise of the power of eminent domain, the fee simple interest in land situated underneath condo developments from the fee owners of the land in order to convey fee simple title to the owner-occupants of the units who, prior to the city's acquisition, leased the fee interests from the fee owners. Pursuant to its eminent domain power, the city designated units within a condo complex for conversion from leasehold to fee simple. The owner of the fee, a church, opposed condemnation and counterclaimed for violations of, among other things, the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), relying on *Cottonwood Christian Ctr. v. Cypress*

Redevelopment Agency, 218 F. Supp. 2d 1203 (C.D. Cal. 2001). The city argued the church's reliance on *Cottonwood* was "irrelevant" because the property interests that were to be condemned pursuant were not religious; accordingly, RLUIPA did not apply.

Holding: The court below held that RLUIPA was inapplicable as a defense to conversion, and on appeal, the Supreme Court of Hawaii, in a case of first impression, affirmed. "A plain reading of RLUIPA compels the conclusion that the application of [the ordinance] to qualified units of the [condo complex] does not violate RLUIPA. Because [the ordinance] is neither a zoning nor a landmarking law, it does not constitute a 'land use regulation' pursuant to the RLUIPA definition of that term."

XII. SIGNS AND BILLBOARDS

A. FEDERAL COURT DECISIONS

1. **Prior Restraint:**

(a) **Vagueness: Policy Clearly Prohibits Communication Directed Toward Traffic on Underpass and Thus It Is Not Unconstitutionally Vague.** *Faustin v. City and County of Denver,* 423 F.3d 1192 (10th Cir. 2005).

Facts: An unwritten City of Denver policy banned signs and banners on overpasses. Faustin was repeatedly asked by police to stop displaying a banner ("Abortion Kills Children") on a highway overpass. She brought a Section 1983 action challenging the policy, arguing facial vagueness and overbreadth. The district court granted her summary judgment.

Holding: The Tenth Circuit reversed and remanded, concluding that the city was entitled to judgment as a matter of law. While the scope of the policy was in dispute, the police evidence was that their consistent policy and practice was to prohibit all banners or signs on highway overpasses, whether or not such signs or banners were attached to protective fencing. The court assumed the broadest policy supportable by the record and still concluded that Faustin failed to establish that such a policy was either unconstitutionally broad or vague. The city could constitutionally restrict signs or banners on highway overpasses, and such speech was legitimately subject to regulation; Faustin made no showing that the policy had ever been applied to prohibit any expression on overpasses other than signs or banners facing motorists below; and the policy was not vague, either facially or as applied.

(b) **Overbreadth:**

(1) **Billboard Company Cannot Invoke Overbreadth Doctrine to Establish Constitutional Standing to Challenge Sign Code.** *Advantage Media, LLC v. City of Eden Prairie,* 405 F. Supp. 2d 1037 (D. Minn. 2005).

Facts: Advantage Media submitted applications for 14 billboards to the City of Eden Prairie, Minn. The city has a sign code that regulates off-premise signs, including limitations on the size, height, location, and design of such signs. The code also prohibits motion and nonaccessory signs. Thirteen of the proposed billboards had rotating columns to display three different images on each billboard face, in violation of the prohibition against motion and non-accessory signs. Some or all of the proposed signs exceeded the limits for height, size, sign base, number of signs per street front and space between sign faces, as established in the city's sign code. Advantage Media filed a complaint in federal district court, asserting both that the sign code was facially unconstitutional and unconstitutional as applied to it. The company argued that the city's sign code deprived it and others of the right to free speech, due process and equal protection.

Holding: The trial court granted summary judgment in favor of the city. The court noted that the majority of the company's specific challenges to the sign code were not fairly traceable to its injury because they did not serve as the basis for denying the applications. Further, the company did not meet the adversarial zeal requirement to involve the overbreadth doctrine. The Metromedia holding, the court said, rests on the prudential requirement that a plaintiff's interests in challenging a statute must be consistent with the First Amendment interests of the third parties it seeks to represent.

(2) **Broad Exemptions from Sign Restrictions for Governmental Signs Is Unconstitutional.** *Nichols Media Group, LLC v. Town of Babylon,* 365 F. Supp. 2d 295 (E.D.N.Y. 2005).

Facts: After trying unsuccessfully to obtain permits for billboards to be placed along the Sunrise Highway, advertising companies challenged sign ordinances enacted by the towns of Babylon and Islip. Both ordinances had been amended in response to earlier lawsuits. Sunrise Highway is a limited-access road that runs through both towns, with three lanes in each direction at its widest point. Much of the area around the highway is single-family residential. Evidence at trial indicated that the proposed billboards would have a "jarring effect on the landscape."

Holding: The federal trial court found certain provisions unconstitutional, but severable. The ordinances do not have an unconstitutional impact on commercial speech. The commercial speech at issue is neither unlawful nor misleading and is entitled to First Amendment protection, according to the court, but the stated goals, aesthetics and traffic safety, are substantial government objectives that are directly advanced by the ordinances and there is a "reasonable fit" between the objectives and the restrictions. Islip's limitation on the number of ground signs to one per parcel does not impermissibly burden non-commercial speech. The fact that officials must read the content of proposed signs before issuing a permit, to determine whether the sign will be off-premises advertising, does not vest those officials with unconstitutional discretion over content. Rejecting a Commerce Clause argument, the court reasoned that Islip's total ban, and Babylon's ban in one district, of off-premises signs do not impermissibly discriminate against out-of-state businesses. The overall effect of the restriction on both interstate and local activity is minimal as compared to the benefits to the towns. Use of the terms "obscene," "pornographic, "commercial," and "non-commercial" does not render the ordinances unconstitutionally vague. There are judicial standards by which all of those terms can be judged. The Islip ordinance also uses the terms "immoral," "institutional," "public interest," and "historic," which are unconstitutionally vague, but can be severed.

2. **Jurisdiction:**

(a) **Federal Question: State Cannot Regulate Billboards on Trust Land.** *Shivwits Band of Paiute Indians v. Utah,* 428 F.3d 966 (10th Cir. 2005).

Holding: Grant of summary judgment for plaintiffs affirmed where defendant-State lacked

authority to regulate billboard advertising displays erected by plaintiffs on land held in trust by the federal government for the plaintiffs.

(b) **Standing: Advertising Company is not Precluded From Challenging Refusal to Process Applications Although it Started Construction of Billboards Before Applying for Permits.** *Valley Outdoor, Inc. v. City of Riverside,* 446 F.3d 948 (9th Cir. 2006).

Facts: The company began to pour foundations for five billboards within 100 feet of a freeway without applying for permits. The code prohibited billboards within 750 feet of a freeway. After the company filed a challenge to the ordinance, the law was partially invalidated in an unrelated case. In the meantime, the company completed the billboards, although the city had refused to process its permit applications. The city enacted a new ordinance, including the 750-foot buffer, and issued a stop-work order. The trial court enjoined the city from enforcing the invalidated code provisions and held that the new ordinance could not be applied to the billboards which were erected before its effective date, but held that the company lacked standing to challenge the city's handling of its applications because it began construction without permits. The city obtained an order prohibiting commercial advertising on the signs.

Holding: The appeals court reversed in part and remanded, holding that the trial court erred in disallowing evidence that the company had standing. Because the substantive provisions of the new ordinance and the invalidated provisions of the former ordinance could not be enforced against the company, it lacked standing to challenge those provisions, but it was improper for the court to reject evidence of selective enforcement of the law. The city claimed it had unbridled discretion to decide which late-filing applicants get to erect billboards and which do not, according to the court, which created a tenable First Amendment claim. Differential treatment of late-filed applications may have been irrational and arbitrary, in violation of equal protection principles. Evidence of how the city handled applications is relevant to challenging that treatment.

(c) **Mootness:**

(1) **Revisions to Sign Code Addressing Sign Placement in Public Right-of-Way Mooted Protestors' Challenges to Prior Versions.** *Brazos Valley Coalition for Life, Inc. v. City of Bryan, Tex.,* 421 F.3d 314 (5th Cir. 2005).

Facts: In 2002, police officers in Bryan, Texas, told member of a religious right-to-life group protesting in front of Planned Parenthood that a city ordinance prohibited them from placing their signs in the right-of-way, even their handheld signs resting on the ground against their legs. The group sued the city for money damages, contending the exceptions to the sign prohibition constituted impermissible viewpoint discrimination in violation of the federal and state constitutions. In 2003, the city enacted Ordinance 1428, which amended the sign code to eliminate the exceptions (other than handheld signs). A second ordinance, 1431, created an exception for flags. defined as pieces of fabric that conveyed a noncommercial message, which were permitted in unimproved public rights-of-way with the consent of the abutting property owner. Ordinance 1431 was a

response to community support for a traditional Labor Day fund-raiser by boy scouts who temporarily placed one of their American flags in the public right-of-way fronting a donor's property. The group amended their complaint to challenge both ordinances, claiming they lacked content neutrality because they allowed private property owners the right to make viewpoint-specific distinctions the city itself could not make.

Shortly after the group motioned for summary judgment, the city enacted Ordinance 1443, which comprehensively revised the sign code. It described the public right-of-way in detail, reserved the general prohibition, and created an exception for government signs, safety signs, and flags, the latter still conditioned on the abutting property owner's consent. It also provided for an administrative process for determining whether a flag, was commercial or noncommercial, apparently in response to the group's amended complaint. The trial court subsequently granted the city's motion for summary judgment and awarded the city $5,600 in costs.

Holding: The appeals court affirmed. It first rejected the groups facial challenges, holding Ordinance 1443 mooted the claims based on the prior versions of the sign code. Moreover, there was no evidence to support the group's argument that the city intended to repeal Ordinance 1443 once the case was over. Additionally, the revised code eliminated the allegedly offending sections of the permitting process and the group had no prudential standing to challenge several other sections in the ordinance, which were unrelated to their activities.

The court also held that the provision giving abutting property owners the right to permit or disallow a flag in the unimproved right-of-way was a content-neutral time, place, and manner requirement. It reasonably recognized that a flag in front of a person's private property sends an expressive message attributable to the property owner, not to the flag's owner. Finally, the court concluded the group was not entitled to damages, absent any evidence of being cited, arrested, or subjected to actual or threatened physical force or having their signs confiscated under ordinance.

(2) **City's Repeal of Sign Ordinance Provision That Allegedly Banned Off-Site Noncommercial Speech Rendered Company's Motion to Enjoin Its Enforcement Moot.** *Covenant Media of California, LLC v. City of Huntington Park, Cal.,* 377 F. Supp. 2d 828 (C.D. Cal. 2005).

Facts: The City of Huntington Park, California, denied a billboard advertising company's sign permit application and refused to process 13 additional applications because the sign ordinance prohibited billboards and off-site signs, defined as an advertisement for "merchandise, service or entertainment, which is not sold, produced, manufactured or furnished at the property oil which the sign is located." The sign company sued the city in federal court, seeking to enjoin tile enforcement of the sign ordinance because it made an impermissible content-based distinction between on-site and off-site signs, effectively banning all noncommercial speech at such sites.

Shortly after the sign company motioned the court for a preliminary injunction to ban enforcement of the sign ordinance, the city repealed it and enacted a new sign ordinance as emergency legislation, which by state law would expire within 45 days. The new ordinance provided that a noncommercial

message of any type may be substituted for any "duly permitted or allowed commercial message or any duly permitted or allowed noncommercial message" if the sign structure or mounting device is legal. It also expressly stated that this provision is intended to prevent any inadvertent favoring of commercial speech or messages over noncommercial speech or messages.

Holding: The court denied the preliminary injunction, holding it was rendered moot by the new ordinance, there being no active case or controversy regarding enforcement of the old ordinance. Although there are some circumstances where the repeal of an ordinance might not moot an action to enjoin its enforcement, the sign company presented no evidence that the absence of an injunctive order would cause irreparable harm to the company. There was no reasonable expectation or evidence that the city intended to reenact the prior ordinance, since the city had shown its intent to extend the emergency ordinance for period of 10 months and 15 days. Furthermore, the city adopted a resolution disavowing any intention to reenact the repealed ordinance or any similar ordinance. The court also denied the city's motion to dismiss the entire action because the sign company might be able to prove it was entitled to an injunction against the new ordinance. The company's claim for attorneys' fees and costs under state law also precluded a dismissal of the action, as does the claim for nominal damages based on the city's past enforcement of the old ordinance.

(3) **Subsequently Enacted Amendments to City's Sign Code Moot Billboard Company's Appeal.** *National Advertising Co. v. City of Miami (I),* 402 F.3d 1329 (11th Cir. 2005).

Facts: In 1990, the City of Miami adopted a comprehensive zoning ordinance that included regulations of billboards and signs. The regulations provided a five-year grace period for advertisers to remove nonconforming billboards. In April 2001, after nearly a decade of nonenforcement, the city began notifying owners of property containing nonconforming billboards. Three months later, the city took steps to begin removing such billboards without notice. An outdoor advertising company that maintains more than 40 billboards throughout the city filed a lawsuit in federal district court, claiming the city's sign regulations violated the First and Fourteenth Amendments because they discriminated against noncommercial speech and lacked procedural safeguards. After the lawsuit was filed, the city amended its zoning ordinance to change entirely the provisions complained about. The trial court ruled that the company lacked standing to enforce the rights of noncommercial speakers and that the regulations did not violate the First Amendment.

Holding: On appeal, the city argued that the zoning ordinance amendments rendered the case moot. The company argued that the case was not moot because the city might simply reenact the challenged ordinance later. The appeals court found no evidence that the city intended to return to its prior legislative scheme, and so reversed and remanded with instructions to dismiss.

(4) **Appeal of Dismissal of Challenge to Billboard Law Is Moot Where Law Has Been Amended and Claim for Damages Did Not Survive.** *Tanner Advertising Group, LLC v. Fayette County, Ga.,* 451 F.3d 777 (11th Cir. 2006).

Facts: In 2003, the company applied for eight permits for off-premise, freestanding signs.

Each would be 50 feet high, with two faces, each 14 feet by 48 feet. The county's 1998 ordinance allowed permanent off-premise commercial or noncommercial signs no more than three feet high and with display space no larger than two feet by two feet; such signs were required to be brown with white lettering (§ 1-43). The ordinance prohibited use of "attention-getting devices" such as balloons, streamers, and certain types of lighting as well as display of obscene material (§ 1-5). A permit was required for each off-premise sign and violation of the ordinance was punishable by fines and up to 12 months imprisonment. The ordinance provided no time limit for the zoning administrator's review. After the applications were denied, the company sought an injunction to prohibit enforcement of the ordinance. The county amended the ordinance to impose a 30-day limit on the zoning administrator's review of permit applications and reduce the penalties for violations. The federal trial court denied an injunction, finding § 1-43 constitutional as applied to the company and holding that the company lacked standing for other challenges.

Holding: The appeals court reversed, holding that the company had standing to bring a facial challenge to all sections of the ordinance. After two other courts concluded that sections of the law were unconstitutional, the appeals court granted rehearing. Meanwhile, the county repealed the sign ordinance and enacted a new law. The only surviving provision from the 1998 law is the prohibition on attention-getting devices. The court dismissed the appeal as moot. Although the company had originally sought damages based on its loss of revenue, it did not appeal the decision that § 1-43, on which the denial of its applications was based, was valid; the claim for damages was, therefore, not before the appeals court and a claim of facial invalidity cannot be the basis of an award of damages. Because the denial was based on a valid restriction, the company had no vested right in the issuance of permits under the 1998 ordinance. The 2005 amendment rendered moot the challenges to the former law, except for the surviving prohibition on attention-getting devices, and the company lacked standing to challenge that prohibition because there was no evidence that the company ever intended to use such devices.

(d) **Ripeness: Case Is Not Ripe for Review When Billboard Company Fails to Obtain Written Denial of Permit Application**. *National Advertising Co. v. City of Miami (II),* 2005 WL 638451 (11th Cir. 2005).

Facts: The outdoor advertising company sought permits from the City of Miami to build seven new billboards. The city's zoning clerk did not issue the permits because the proposed billboards exceeded the height limitations. Furthermore, the clerk orally informed the company's agents that the billboards were not permitted in the zone where proposed. The company filed suit, alleging that the city's denial violated the First Amendment.

Holding: The federal trial court granted summary judgment in favor of the city, finding that the claims were not ripe for review because the company had failed to obtain a written denial of its permit application. The appeals court affirmed on ripeness grounds.

3. **Narrowly Tailored to Serve a Substantial Governmental Interest and Leaving Open Ample Alternative Avenues of Communication:**

(a) **Ban on Aerial Advertising Valid.** *Center for Bio-Ethical Reform, Inc. v. City & County of Honolulu,* No. 04-17496, 2006 WL 1843391 (9th Cir. 2006).

Holding: The U.S. Court of Appeals for the Ninth Circuit upheld a Honolulu ordinance that prohibited the use of aircraft or other self-propelled or buoyant airborne object to display, in any manner or for any purpose whatsoever, any sign or advertising device. The ordinance was part of a "longstanding scheme aimed at regulating outdoor advertising in order to protect the critical visual landscape that has made the area famous," and limiting the amount of commercial or promotional "interruption." (Hawaii has no billboards or other large outdoor advertising.) The Center for Bio-Ethical Reform, an anti-abortion group, challenged the ban. The Center already used trucks in Honolulu that were "plastered with giant photos of bloodied fetuses," and sought to tow 100-foot-long airplane banners with "graphic photographs of aborted fetuses" overbeaches and other areas. Its position was that the ban was a violation of free speech rights, the municipality did not have jurisdiction to enact a ban over coastal waters; that the Federal Aviation Administration (FAA) had granted it a permit to tow the banners (albeit one that was subject to local laws), and others. The court found all these arguments were unpersuasive. A review of the history, purpose, and physical characteristics of the airspace indicated that it was a nonpublic forum, and not just an extension of the fora below. So long as the ban was reasonable in light of the purpose served by the forum and viewpoint neutral, the prohibition was valid. As "preservation of the visual beauty of Honolulu's coastal and scenic areas [was] of paramount importance," the ban survived.

(b) **Ordinance Prohibiting Pole Signs is Valid.** *G.K. Ltd. Travel v. City of Lake Oswego,* 436 F.3d 1064 (9th Cir. 2006).

Facts: A travel company advertised on a 42.5-square-foot pole sign erected in Lake Oswego in 1980. When the company was sold in 2001, the change in text on the sign triggered review under the 1994 sign code. Among other provisions, the code requires permits, provides for review of readability, clarity, and compatibility, and generally prohibits pole signs. Existing signs were required to be brought into conformity when the copy changed or no later than May 2004. The city denied a permit for the text change, issued a citation, and denied an application for a variance.

Holding: The federal trial and appeals courts ruled in favor of the city. The prohibition on pole signs is justifiable without reference to content and, because the law required that all pole signs be brought into conformity by 2004, the court declined to consider whether the grandfather clause was content-based. The city has significant interests in aesthetics and traffic safety and, after much deliberation, determined that the law would serve those interests. The prohibition is narrowly tailored and leaves available ample alternative channels of communication. The court also considered a facial challenge to the rest of the ordinance and held that it is content-neutral, despite "speaker-based" exemptions from the permit requirement for public agencies, hospitals, and railroads, and "event-based" exemptions for temporary signs in residential zones. Review for readability and clarity is not content-based and the law makes no distinction between commercial and non-commercial messages. Because the code is content-neutral, the procedural requirements of the "prior restraint" doctrine do not apply. The law contains sufficient criteria concerning size, type, and compatibility and does not vest unbridled discretion in making permit decisions. The court also

rejected a claim of vagueness.

(c) **City's Electronic Sign Ordinance Is Constitutional.** *La Tour v. City of Fayetteville, Ark.,* 442 F.3d 1094 (8th Cir. 2006).

Facts: The Fayetteville sign code prohibits any flashing, blinking or animated signs. A trial court found an accountant, who installed a motion sign in an office window displaying political messages, guilty of violating the ordinance. Following a settlement with the city, the accountant filed a 1983 civil rights suit, claiming the ordinance was unconstitutional under the equal protection clause because it was content-based as applied to him. The city did not prohibit motion signs that display time and temperature.

Holding: The federal trial and appeals court upheld the facial constitutionality of the ordinance in an intermediate scrutiny analysis, holding the prohibition of message signs served a substantial and content-neutral interest and traffic safety purpose and left open ample alternative channels of communication. It rejected the accountant's argument that the ordinance was content-based as applied to him because the city did not prohibit signs that flash time and temperature, reasoning such signs posed significantly less concern about driver distraction than a message sign. One justice concurred, concluding the stronger content-neutral justification for an implied exemption for time-temperature signs is preventing the proliferation of message signs, which would interfere with the city's substantial interest in traffic safety.

4. **Content-Based Restrictions - Multiple Exemptions**

(a) **Sign Code with Multiple Exemptions from Permit Regulations Was Unconstitutional, Content-Based Restriction on Noncommercial Speech.** *Solantic v. City of Neptune Beach,* 410 F.3d 1250 (11th Cir. 2005).

Facts: The City of Neptune Beach sign code requires a permit before a sign may be erected and prohibits visible movement or the illusion of movement, no lights or illuminations that cause movement, or rotation, flashing, or blinking. The sign code exempted 17 categories of signs and contained multiple findings of fact relating to safety and aesthetic concerns. In 2003, the city brought an enforcement action against a walk-in emergency medical care business (Solantic) that had installed an electronic variable message center (EVMC) sign in front of its Neptune Beach facility. The lit sign flashed, blinked, and scrolled alternate messages promoting social and health causes. The enforcement notice listed three sign code violations, including failure to obtain a sign permit, and informed Solantic that sign code violations are punishable by fines of up to $250 a day, or $500 a day for repeat violations. After a hearing, the city code enforcement board determined Solantic's sign violated the code and directed Solantic to cure the three violations by obtaining a sign permit and modifying the sign so that the copy would not move. Solantic subsequently applied for a sign permit without modifying the sign as ordered. The city issued a second notice of violation, and the board assessed fines totaling $75 a day from the date of the observed violations until all were cured. When the city denied Solantic's appeal, the business brought both facial and as-applied First Amendment challenges, contending that the ordinance was an unconstitutional content-based

restriction on noncommercial speech. Solantic also alleged the sign code was an unconstitutional prior restraint on speech because there was no time limit for sign permit decisions. The district court denied Solantic's motion for preliminary injunction, reasoning that the permit requirement was not a prior restraint on speech and that the code was a content-neutral time, place, and manner restriction. Solantic took an interlocutory appeal.

Holding: The federal appeals court reversed and held that the trial court abused its discretion by not applying a balancing test. The court decided the case on the merits and held that the sign code was an unconstitutional content-based restriction on noncommercial speech. It remanded on the fines and permanent injunctive relief issues only. The court concluded the 17 exemptions were an impermissible content-based discrimination among types of noncommercial speech. Discussing these exemptions, the court noted that one permitted religious symbols, government flags, and insignias, although an individual wanting to display a flag would have to apply for a permit. Another exemption allowed government signs to feature moving parts or flashing lights, but not signs maintained by individuals. One exempted temporary electioneering signs while subjecting individuals expressing a political viewpoint, such as "Reform Medicare," "Save Social Security," "Abolish the Death Penalty" and "Overturn Roe v. Wade," to numerous restrictions. Another exemption allowed a homeowner to display year-round "religious displays" such as a nativity scene, but her neighbors could not display a statue of the President or any secular figure or put an image of a soldier bearing the sign "Support Our Troops" or "Bring Our Troops Home."

The court reviewed the sign code under strict scrutiny analysis, querying whether the city's justification for the content-based scheme of regulations was narrowly tailored to serve a "compelling interest." Following *Dimmitt v. City of Clearwater*, 985 F.2d 1565 (11th Cir.1993), the court concluded that the city's stated aesthetic and safety interests were not "compelling," being too general and abstract to justify the regulations. The city failed its constitutional charge to explain how aesthetic and safety interests were served by the sign code or why these interests did not apply to the multiple exemptions. Finally, the court agreed with Solantic that the city's failure to impose time limits for permitting decisions made the code an unconstitutional, prior restraint on speech. This failure effectively vested building officials with "unbridled discretion" to pick and choose which signs would be displayed by enabling them to "pocket veto" disfavored permit applications. The court remanded with direction to consider Solantic's request for permanent injunctive relief and a declaration that Solantic is not liable for accrued fines.

(b) **California Outdoor Advertising Act Impermissibly Favors Commercial Speech and Must Be Interpreted as Allowing Noncommercial Messages Wherever Commercial Messages Are Allowed.** *Maldonado v. Kempton,* 422 F. Supp. 2d 1169 (N.D. Cal. 2006).

Facts: The owner of a commercial building adjacent to Highway 101 in Redwood City has a double-sided sign that was attached to the roof in the 1950s. The California Outdoor Advertising Act, Cal. Bus. & Prof. Code § 5271, prohibits billboard advertising along a landscaped freeway unless it advertises goods or services available on the premises. The California Department of Transportation ("DOT") cited the owner for violations in 1993 and 1996. The owner claimed that

the signs were lawful because they advertised businesses that leased space on the premises. The DOT obtained an injunction to prohibit advertising on the signs.

When the owner displayed the message "Available for On Site Lease," a court entered a finding of contempt. The owner then displayed messages such as "Help Stop Terrorism" and "Pray for World Peace," listing numbers for the FBI and the Red Cross. The court again imposed a fine, concluding that a Habitat for Humanity sign violated the injunction. While a challenge to the Act was pending, the DOT denied permission to display political signs. The trial court upheld the distinction between on-premise and off-premise signs. An amended complaint was filed and there was a remand. The court then entered summary judgment, holding the Act impermissibly favors commercial messages. A billboard law must allow noncommercial messages if it allows on-premise commercial messages. The Act prohibits noncommercial messages, but includes an exception for on-premise "advertising displays," defined in a way that does not include noncommercial messages, and exemptions for temporary political signs, directional signs, and official signs, which would be unnecessary if the Act did not apply to noncommercial signs. A claim that the state has treated the Act as not applying to noncommercial speech was contradicted by the DOT's actions, according to the court, but the Act should not be entirely invalidated.

Holding: The court enjoined the state from enforcing the Act to prohibit noncommercial speech in any location where commercial speech is permitted and advised the state to propose methods to deal with the possibility that the law is chilling the exercise of free speech with respect to noncommercial messages.

B. STATE COURT DECISIONS

1. **Prior Restraint: *Oregon.* Statutory Provisions for Variances Do Limit Officials' Discretion and Officials Must Act on Variance Requests Within Reasonable Time.** *Lombardo v. Warner,* 132 P.3d 22 (Or. 2006).

2. **Narrowly Tailored to Serve a Substantial Governmental Interest and Leaving Open Ample Alternative Avenues of Communication:**

(a) ***Georgia.* Ordinance Restricting Signs in Residential Areas Is Not Valid Unless It Is the Least Restrictive Means of Achieving Governmental Goals.** *Coffey v. Fayette County,* 610 S.E.2d 41 (Ga. 2005).

Facts: The county enacted an ordinance restricting non-commercial signs in residential areas to one sign per lot, with a size of no more than six square feet. Residents sought an injunction to prevent enforcement. The trial court upheld the ordinance, finding that the ordinance was rationally related to the county's interests in traffic safety and aesthetics.

Holding: The highest court reversed and remanded. Noting that the Georgia Constitution provides broader protection than the First Amendment, the court stated that the trial court should have determined whether the county adopted the least restrictive means of achieving its goals.

(b) ***Arizona.*** **Window Sign Clutter Upheld.** *Salib v. City of Mesa,* 133 P.3d 756 (Ariz. Ct. App. 2006).

Facts: Salib owned a donut shop and displayed signs affixed to his store windows that advertised his products. In 2002, after giving Salib several warnings, a city code enforcement officer ordered Salib to remove his window signs because their display violated Mesa's Sign Code. The code prohibited businesses from covering more than 30% of their windows with signs. Salib was not cited, but challenged the provision on the basis that it violated his free speech rights under the Arizona and United States Constitutions. Mesa asserted both aesthetics and safety as reasons for the restriction. Salib argued that no studies were conducted to determine what aesthetic or safety problems existed and how the Sign Code could solve such problems, so the Sign Code had not been proven to advance governmental interests. The city asserted the city council researched the effects of the Sign Code on aesthetics, although copies of the research were not kept, and the Code contained a statement of purpose. Both parties agreed that the signs at issue involved only commercial speech.

Holding: The trial court granted summary judgment in favor of Mesa, and on appeal, the Arizona Court of Appeals affirmed. The First Amendment did not require a formal study before a regulation could be enacted, and the 30% restriction was a reasonable fit to further the goal of improving aesthetics. The provision met the *Central Hudson* test for regulation of commercial speech and was constitutional under the First Amendment.

(c) **Content-Based Restrictions - Multiple Exemptions**
Oregon. **State Billboard Regulations Unconstitutionally Restrict the Subject of Expression.** *Outdoor Media Dimensions, Inc. v. Dept. of Transportation,* 132 P.3d 5 (Or. 2005).

Facts: In 1971, Oregon enacted the Oregon Motorist Information Act [ors 377.700 to 377.840 and 377.992 (1999)]("OMIA") to comply with the federal Highway Beautification Act of 1965 [23 U.S.C. § 1311("HBA"). The OMIA distinguishes between on-premises and off-premises signs. A person must obtain a permit and pay a fee before erecting an outdoor advertising sign, which is defined as a sign that advertises goods, products, and services are not sold on the premises (``off-premises signs"). No permit or fee is required for on-premises signs. Several billboard companies were cited for not obtaining permits. They challenged the OMIA on several constitutional grounds. The Court of Appeals upheld the OMIA.

Holding: The state's highest court reversed and held that the OMIA'S distinction between off-premises and on-premises signs unconstitutionally restricts the "subject" of expression in violation of Article I, section 8 of the Oregon Constitution. The court noted that a gas station located near a highway could erect a sign with the message "Gas for Sale" without a permit, but the sign could not carry the message "Eat at Joe's: 10 Miles Ahead" without paying a fee and obtaining a permit. The court did not accept the state's assertion that this distinction between on-premises vs. off-premises signs is a content-neutral time, place, and manner regulation. Both types of signs "can pose the same risk to safety and have the same adverse effect on scenic beauty;" the court said.

However, the court found that the state's permit and fee requirements do not constitute an impermissible prior restraint on expression and represent a reasonable time, place, and manner restriction unrelated to the substance of the message. Considering the appropriate remedy, the court concluded that invalidation of the entire OMIA was unnecessary. Instead, the court struck the permit and fee requirements for outdoor advertising signs. [ORS 377.725(1)].

3. **Nonconforming Uses:**

(a) ***California.*** **In Determining Whether Nonconforming Advertising Sign Constituted a Nuisance, Court Properly Deferred to Department of Transportation Findings.** *Pallco Enterprises, Inc. v. Beam,*132 Cal. App. 4th 1482 (Cal. Ct. App. 2005).

Facts: In 1958, the owner of land along State Highway 50 in Rancho Cordova obtained a permit and erected an advertising sign facing east. In 1962, a permit issued for a west-facing display on the same structure. The permits did not authorize illumination. Pursuant to the 1965 Highway Beautification Act 23,U.S.C. §131 and the 1967 Outdoor Advertising Act. Bus. & Prof. Code § 5216, the structure became a nonconforming use. When Beam bought the property in 1998, the signs were illuminated. An advertising company that wanted to build its own sign in the area was prevented from doing so because the Beam sign was within 500 feet of the proposed location. The company made several attempts to buy the Beam sign and apparently even blocked the sign with trees and a trailer. In a lawsuit between the parties, the company claimed that the sign was a nuisance.

Meanwhile, the California Department of Transportation, which regulates signs, issued a citation and then met with Beam. The department concluded that the display could continue in its existing configuration after the illumination was removed. The trial court, relying on the department's determination, ruled in favor of Beam and included an award of costs.

Holding: The appeals court affirmed, holding that the trial court properly deferred to the department's finding that the elimination of lighting brought the display into conformance with the law. Although the Act did not eliminate nuisance claims with respect to signs, the company's claim of nuisance was based on violation of the Act. Rejecting a claim that the nonconforming use of the sign had been abandoned by the installation of lights, the court again deferred to the department's interpretation of the Act as allowing the owner to correct violations. The fact that the company had claimed violation of the Act before the department issued a citation did not put Ream on "notice" of violation and trigger the 30-day period for correction. The installation of the lighting did not amount to "placing" a new display and abandonment of the lawful nonconforming use in existence before the lighting was installed.

(b) ***Pennsylvania.*** **Nonconforming Use of Sign Was Not Abandoned Where Signpost Was Maintained Without a Sign While Owner Sought New Tenant.** *Finn v. Zoning Hearing Board of Beaver Borough,* 869 A.2d 1124 (Pa. Commw. Ct. 2005).

Facts: In 1985, the owner bought a two-story building in a commercial district and began to use the first floor as his law office. He has leased the second floor to tenants and has maintained two four-by-four signposts in the yard, one containing a 12-square-foot sign for the law office, and the other containing a 12-square-foot sign for the tenant. The tenants' signpost was in continuous use until 2000. In September 2002, a new tenant installed a sign without obtaining a permit. The following year, the zoning officer directed removal of the sign because the ordinance permits only one freestanding sign per site and requires a permit. The board concluded that the nonconforming use had been abandoned.

Holding: The trial court affirmed, but the appeals court reversed. Abandonment of a nonconforming use requires proof of both actual abandonment and intent to abandon. The fact that no sign was displayed for two years created a presumption of intent to abandon, but the owner rebutted that presumption with testimony that he maintained the signpost as available while he procured a new tenant and that the sign was only removed to comply with the ordinance, not to abandon the use.

(c) ***Indiana.*** **Advertising Company May Relocate Signs, Thereby Terminating Nonconforming Use at Previous Location, Despite Landowner's Desire to Continue the Nonconforming Use.** *Hoosier Outdoor Advertising Corp. v. RBL Management, Inc.,* 844 N.E.2d 157 (Ind. Ct. App. 2006).

Facts: Property on Route 37 north of Bloomington has contained billboards since the 1930s, In 1989, the then-owners leased property to Hoosier, including provisions that Hoosier owned the structures and would remove them upon termination of the lease. In 1996, Monroe County enacted an ordinance that prohibits off-premise signs. The law allows continuation of nonconforming signs at existing locations or relocation of signs to new locations in specified districts with a "commitment" to remove existing signs.

In 2004, Hoosier removed its signs at the request of a new owner of the land; its lease had expired. The landowner sought permits to install new signs at the locations that had been used by the Hoosier signs. Hoosier sought permits to relocate its signs to the specified districts. Only one application could be granted because the ordinance prohibited an increase in the total number of signs. The planning commission granted the owner's application and denied Hoosier's application; the board of zoning appeals (BZA) reversed. The trial court reinstated the commission's decision.

Holding: The appeals court reversed after holding that the BZA's failure to participate did not affect its review. Rejecting an argument that Hoosier had no "signs" that could be relocated, the court noted that the definition of a sign refers to a "structure," a "piece of work ... for ... ornamentation" and that the BZA's reasonable interpretation of its own ordinance should be accepted. The ordinance requirement of "commitment" to relocation was satisfied by removal of the Hoosier signs; there was no requirement that the owner agree to restrict future use. The ordinance provision that applications for relocation include a "stipulation" that the nonconforming use at the previous location shall be deemed abandoned immediately upon relocation, did not require the landowner's approval of or agreement to abandonment. The nonconforming use on the land ceased

to exist when the billboard structures were removed, regardless of whether they actually displayed advertising at that time and regardless of the landowner's intent.

4. **Preemption: *California.* State Law Does Not Preempt Municipal Ordinances That Require Permit for Rebuilding Billboards Destroyed by Natural Forces.** *Viacom Outdoor, Inc. City of Arcata*, 140 Cal. App. 4th 230 (Cal. Ct. App. 2006).

Facts: Viacom owned four billboards located within the City of Arcata and adjacent to a state highway. For each of the billboards, Viacom had a current "outdoor advertising permit" issued by the California Department of Transportation (CalTrans). When the billboards were destroyed by windstorms in 2001, Viacom began rebuilding them, but a city official posted "stop work" orders and directed Viacom to cease rebuilding until it applied for permits as required by the city's Building Code and its Sign Code. Viacom did not apply for permits but sued the city in a Section 1983 action that alleged a violation of its rights. It claimed that the city had no regulatory authority to require permits for reconstructing billboards as the sole applicable law was a state law, the Outdoor Advertising Act, Bus. & Prof. Code, section 5200, *et seq*. Specifically, a section in the State Act withdrew municipal power over "customary maintenance" of any billboard for which CalTrans had issued a permit. At trial, the court held the ordinances were preempted, that the city violated Viacom's federal civil rights, and awarded damages and attorney's fees.

Holding: On appeal, the California Court of Appeal reversed. "Local power has never been viewed as a zero-sum contest with the state's authority to regulate outdoor advertising," and a review of the legislative history, the section relied on, and the rest of the State Act indicated that none used "the type of language accepted as expressly preempting all local power over a given topic." Further, a review of the provisions indicated that re-erection of a billboard went beyond "customary maintenance," and that the section was limited to the power of CalTrans, and not whether any other jurisdiction's permit might be needed. Since Viacom never applied for the city permits, any claim it might have for damages was premature.

5. **Taxation:**

   (a) ***Pennsylvania.* Billboard Companies Have Not Shown They Are Likely to Succeed in Their Free Speech Challenge to City's Tax on Sign Receipts.** *Free Speech, LLC v. City of Philadelphia,* 884 A.2d 966 (Pa. Commw. Ct. 2005).

   (b) ***Wisconsin.* Court Certifies to Supreme Court Questions as to Proper Method for Taxing Outdoor Advertising Signs.** *Adams Outdoor Advertising, Ltd. v. City of Madison,* No. 2005AP508, 2006 WL 1913059 (Wis. 2006).

6. **Enforcement: *New Mexico.* Injunction Ordering Removal of Sign Is Proper When Adult Bookstore Displays Additional Sign in Breach of Settlement Agreement.** *City of Sunland Park v. Harris News, Inc., 124 P.3d*

566 (N.M. Ct. App. 2005).

Facts: In 1998, the adult bookstore filed suit in federal district court to prevent the city from enforcing its zoning ordinance, asserting a First Amendment right to operate less than 1,000 feet from a residentially zoned district and less than 500 feet from a liquor store. The parties entered into a settlement in which the city agreed not to enforce its zoning ordinance against the bookstore and the business agreed to drop the litigation. Subsequently, the bookstore displayed a truck in its parking lot with the words "Adult Video" illuminated on its side. In 2000, the city filed suit in state court alleging breach of contract. The bookstore filed suit in federal district court seeking declaratory and injunctive relief. The city amended its complaint to add nuisance claims and requested damages totaling $398,500 for the 797 days of the bookstore's violation of the sign ordinance. The state court concluded that the bookstore's truck sign breached the settlement agreement and ordered the bookstore to pay $1,250 as a statutory penalty, another $1,250 as consequential and punitive damages for breach of contract, and another $1,250 for consequential damages as a nuisance to the public and private residents in the area. The court also ordered the sign to be removed.

Holding: The court of appeals reversed in part and affirmed in part, concluding that there was insufficient evidence that the settlement agreement contained the bookstore's promise to obey the city's ordinances. The district court erred in concluding that the city's ordinances were enforceable via the breach of contract action. The court of appeals affirmed the district court's conclusion that the bookstore breached the agreement by displaying an additional sign, and affirmed the injunction ordering removal of the sign. The court reversed the monetary damages as well as the nuisance rulings.

7. **Vested Rights: *Indiana.* Court Adheres to Opinion That County's Location Permit Requirement Applies to Billboards, Construction of Which Wasn't to Commence Until Almost a Year after Permit Rule Was Enacted.** *Metropolitan Development Commission of Marion County v. Pinnacle Media, LLC*, 846 N.E.2d 654 (Ind. 2006).

Facts: The company applied to the state highway department for permits to erect billboards in the rights-of-way of interstate highways in Marion County, which did not require location permits for such billboards. Before the state issued permits the county enacted an ordinance requiring location permits. The trial court held that the law did not apply to the company.

Holding: The highest court reversed and affirmed itself on reconsideration. Changes in zoning ordinances are subject to vested rights, but filing for state permits did not establish vested rights. The court noted that vested rights could accrue prior to the filing of certain applications, but refused to speculate on hypothetical situations

---

XIII. STATUTORY INTERPRETATION

A. STATE COURT DECISIONS

1. *Connecticut.* **Administrative Appeal and Cease and Desist Order Do Not Qualify as an "Action to Enforce" to Defeat Claim of Nonconforming Use.** *Benson v. Zoning Board of Appeals of Town of Westport, Conn.*, 873 A.2d 1017 (Conn. App. Ct. 2005).

Facts: In 1995, Benson was granted a variance to build a three-story addition to her house, which did not comply with the side yard setback. The abutting neighbors appealed to the trial court when the board granted the variance without stating any reasons. In August 1997, the court reversed the board's decision and the zoning officer revoked her zoning permit. The next month, Benson filed a second variance request for the house addition. The board granted the request and provided several reasons for its determination of undue hardship. The abutting neighbors appealed to the trial court again. During the appeal, Benson completed the construction and was issued a certificate of zoning compliance in December 1997. The trial court sustained the neighbors' appeal and the court of appeals affirmed in 2001 on the grounds of res judicata and collateral estoppel. In June 2001, the zoning enforcement officer avoided the permits issued previously and ordered Benson to remove the addition to her house. Benson appealed the enforcement action to the board, which upheld the action. Benson appealed to the trial court, which affirmed the order to remove the addition.

Holding: The court of appeals reversed. Section 8-13(a) of the General Statutes provides that when a nonconforming structure has existed for three years without "the institution of an action to enforce" it is deemed a nonconforming building. Benson argued that a civil action for injunction was required. The neighbors argued that their appeals of the variances constituted an action to enforce. The board argued that the issuance of a cease and desist permit was an action to enforce. The court of appeals decided that the phrase "institution of an action to enforce" was ambiguous and that the phrase has never been held to mean anything other than the filing of a civil action in court. The various actions taken by the neighbors and the board merely established that the variance was granted improperly and that the addition violated the regulation. They did not initiate an action to enforce the regulation within the three-year limitations period.

2. *Connecticut.* **Trailer Parked in Front of Retail Store to Display the Store's Products Constitutes a "Structure" Subject to Front Yard Setback Requirements.** *Tylerville Home Center v. Haddam Zoning Board of Appeals, No. CV040104469*, 2005 WL 2650116 (Conn. 2005).

Facts: The zoning enforcement officer issued a cease and desist order to Tylerville Home Center because it had a trailer parked in front of its business, advertising the store's products, which encroached in the front-yard setback. The business was ordered to remove the display from its property. The business appealed to the zoning board of appeals, claiming the trailer was not a "structure" as defined in the town's zoning ordinance, but rather a commercial motor vehicle. The board affirmed the officer's decision but ordered the business to move the trailer to the side or rear of the building.

Holding: On appeal, the superior court noted that the board was required to determine the reasonableness of the decision of the zoning enforcement officer. In applying the regulations, the board was acting administratively in a quasi-judicial capacity. Examining the definition of "structure" in the town's zoning ordinance, the superior court concluded that the trailer is a structure and violated the site plan. It was eight feet wide, 20 feet long and located eight feet from the building, and situated over several parking spaces.

3. ***Connecticut.*** **Landscape Mulch Processing Is Permitted in Industrial Zones as Treatment of Articles Made of Previously Prepared Materials.** *Smith Bros. Woodland Management, LLC v. Planning & Zoning Commission of the Town of Monroe,* 868 A.2d 749 (Conn. App. Ct. 2005).

Facts: In 1999, the owner of 1.54-acre property in Monroe zoned design industrial began operating a wholesale landscape mulch processing operation without approval. It continued operations despite a cease and desist order from the town. In 2002, the owner applied to the town for a special exception to build a 288-square-foot office building, large concrete storage bins, and a four-space paved parking lot. Although 14 people spoke in favor of the application and only one person spoke in opposition, the commission denied the exception, stating that the use would generate noxious fumes, would provide a home for vermin, and would not be in the best interest of the community.

Holding: The trial court reversed, in favor of the owner. The appeals court affirmed, holding that a special exception was not required because the use is permitted. The ordinance permits the "manufacture, compounding, assembling and treatment…of articles made principally of previously prepared materials." After examining the dictionary definition of "prepared," the court reasoned that wood, bark, and stumps are "prepared" by sorting and cutting before being taken to the subject property for processing into mulch. The court found no substantial evidence to support findings that the use would result in odors or vermin, noting that the use had been in operation for three years without such problems.

4. ***Georgia.*** **Judicial Review of Zoning Board Decision to Deny Building Permit Application to Expand Store Requires Court to Interpret Zoning Code as a Question of Law, Reflecting Legislative Intent.** *Northside Corp. v. City of Atlanta, 619 S.E.2d 691* (Ga. Ct. App. 2005).

Facts: After the Atlanta Bureau of Buildings had denied the corporate owner of a liquor package store since 1976 a building permit to add rear floor space, the board of zoning adjustment (BZA) affirmed the denial. The 13ZA based the denial on its interpretation of the zoning code which grandfathers package liquor stores licensed before 1997 from complying with the 600-foot distance requirement from certain uses "provided such location is not expanded or enlarged." Reading the term "location" as meaning the building itself, the ZBA concluded the zoning code prohibited the store's expansion. On appeal, the trial court upheld the ZBA's interpretation of the zoning code, concluding it was required to defer to its interpretation because that interpretation was not arbitrary or capricious.

Holding: The appeals court reversed, holding that the lower court erred by applying the wrong standard of review and that the package store owner was entitled to the building permit. It initially determined that the lower court improperly relied on a decision concerning the application of the arbitrary and capricious standard of review to a zoning board's decision involving the violation of a conditional variance. Applying the correct standard, that the judicial interpretation of a zoning ordinance is a question of law, the court stated that the package store's right to a permit depended on the interpretation of the term "location" in the grandfathering provision. Reading the section of the code setting forth the 600-foot limitation, the court reasoned that, as used there, the term referred to the entire site occupied by the store, not to the building. It concluded that the legislative intent in the grandfathering provision was to prohibit a package store location from expanding its property site, but not the expansion of the building thereon.

The court rejected the city's argument that the store's appeal was moot because it had repealed the grandfathering provision, stating that the owner had a vested right to have the expansion permit application considered under the law then in existence.

5. ***North Carolina.*** **To Determine Whether More Than 50 Percent of Building "Façade" Was Altered, at Least the Entire Front of the Building Must Be Considered.** *MMR Holdings, LLC v. City of Charlotte,* 621 S.E.2d 210 (N.C. Ct. App. 2005).

Facts: The auto dealership has a sign displaying the name of the business that stretches across the top of a 40-foot by eight-foot canopy on the front of the building. The canopy has been in place since the 1970s. A 2003 remodeling project involved replacement of Plexiglas surrounding the canopy with paneling. The building inspector ordered the sign removed because the work constituted alteration of more than 50 percent of the facade so that the roof sign was no longer a lawful nonconforming use. The zoning board and trial court affirmed.

Holding: The appeals court reversed and remanded. Because the ordinance does not define "facade," the Court looked to the dictionary definition and held that the canopy, by itself, was not the facade. The definition, which refers to the "face" of a building, indicates that a facade is at least an entire side of the building and not just a strip across the front. The court further noted that the use of the term "canopy" in the ordinance indicates that it is not synonymous with "facade" and remanded for determination of whether 50 percent of the facade was altered, using a definition that includes at least the entire front of the building.

6. ***North Carolina.*** **City Lacked Authority to Regulate School District's Use of Land for Parking Lot.** *Nash-Rocky Mount Board of Education v. Rocky Mount Board of Adjustment,* 610 S.E.2d 255 (N.C. Ct. App. 2005).

Facts: The zoning board told the school board that it would need a fence permit and a driveway permit for a proposed bus parking lot at the high school, which adjoins residential neighborhoods. The district obtained the permits, installed crushed gravel and a fence, and began to use the lot. Neighbors complained about noise, dust, congestion, and trash. The city told the school board that it would have to obtain a special use permit. The Board of Adjustment denied a

permit. The trial court reversed, holding that the board lacked jurisdiction.

Holding: The appeals court affirmed. The city has authority to regulate "the location and use of buildings, structures, and land," N.C. GEN. STAT. § 160A-381(a), but may exercise its power over other governmental entities only under circumstances set forth in N.C. GEN. STAT. § 160A-392, which refers to "erection, construction, and use of buildings." Although the local ordinance defines "building" as including "parking area," the court stated that a local body cannot define the scope of the authority granted by statute. The plain meaning of "building" does not encompass a parking lot. The city does not have authority to regulate government-owned land simply because it is used in connection with a building.

7. ***Washington.*** **County's Prohibition Against "Covered Structure Whose Primary Occupancy Is Public Assembly" for 300-Plus Persons in Volcanic Hazard Areas Did Not Apply to Proposed Hotel with Adjoining 500-Person Conference Center.** *Tahoma Audubon Society v. Park Junction Partners,* 116 P.3d 1046 (Wash. Ct. App. 2005).

Facts: Developers sought approval from Pierce County's planning and land use department for a large resort to be located in a designated volcanic hazard area. The resort would include a 270-room lodge, golf course, vacation homes, restaurants, a train station, and an 18,000-square-foot, 500-person conference center adjoining the lodge. The department's draft environmental impact statement concluded the conference center was a permissible "critical facility," which the county code defined as a "covered structure whose primary occupancy is public assembly to accommodate 300 persons. The final EIS, however, determined the conference center was not a critical facility because the hotel was the primary, private use. Critical facilities that can accommodate more than 300 persons are prohibited in volcanic hazard areas.

Holding: On appeal by a wildlife organization challenging the resort and the conference center, a hearing officer determined the center was not a critical facility because the entire resort was privately owned and the lodge was the primary occupancy. Deferring to the county's assessment of the resort, the hearing officer issued a conditional rise permit. On appeal, the trial court reversed, concluding the resort could not be built in a volcanic hazard area because it was a prohibited critical facility. Reading the phrase "covered structure whose primary occupancy is public assembly to mean a structure where persons gather in one place for lawful purposes, the court determined it applied to the center and that the record showed it was possible to conclude that the conference center was the primary occupancy.

The Washington Supreme Court affirmed in part and reversed in part, reinstating the hearing officer's issuance of the permits on other grounds and holding that the conference center does not meet the definition of a "critical facility" because the hotel is the primary occupancy and it is not used for public assembly. First, the lodge/hotel, as the relevant "covered structure" is the "primary occupancy" within the meaning of the uniform building code, which is incorporated by reference into the county code. While the lodge contains many amenities, including the conference center, its principal function is overnight guest accommodation.

Second, the hotel will be used for public accommodation, not "public assembly." Defining the latter as a place that is shared or accessible to all members of a community to gather together for some common purpose, the court reasoned that despite the hotel's capacity to accommodate more than 300 guests, these guests were not "assembled" within the meaning of the ordinance when housed in separate rooms.

XIV. SUBDIVISIONS

A. *California.* City Council's Adoption of Litigation Settlement Agreement in Closed Session That Increased Project Zoning Density and Blocked Future Zoning Changes Violated Zoning Administrative Proceedings and State Open Meetings Act. *Trancas Property Owners Association v. City of Malibu, 41 Cal. Rptr. 3d 200* (Cal. Ct. App. 2005).

Facts: In two closed sessions, the Malibu city council adopted a settlement agreement (SA) in which the city and a developer agreed to settle litigation over disapproved final subdivision maps for a proposed project upland of the Pacific Coast Highway. The project included 15 single-family lots on a 27-acre tract and 52 condominiums on the remaining nine-acre tract. The SA provided that the city would rescind the disapproval (which stemmed from a finding that the 1985 preliminary maps had expired and were subject to various unmet conditions), and the city would permit the developer to build up to 32 units on the smaller tract (with four affordable housing units), subject to the preliminary plan conditions, in exchange for dedicating the larger one to the city. The city also agreed not to enact any zoning or other ordinances blocking the agreed-upon development. When an adjacent homeowners association sued the city, seeking a writ of mandate requiring the city to set aside its approval of the SA for violation of the Brown Act, an open meetings statute, the trial court denied the relief, holding the closed session meetings fell within the act's litigation settlement exception.

Holding: Reversing, the appeals court struck down the city's agreement not to block future zoning. A promise to abjure future legislative zoning action is an impermissible departure from standard zoning administrative proceedings, including findings and public hearings. Describing the SA as an attempt to circumvent these proceedings by contract, the court pointed out the city and developer had a lawful procedural means to fix the zoning governing a development project—a development agreement—that works without an unconstitutional surrender of the police power. The city council's agreement to grant what essentially amounted to a zoning variance for the 32-unit project also violated the Brown Act. While that act provides an exception to permit cities to settle litigation in closed session, it does not empower a city council to circumvent or violate substantive laws requiring due process, public-hearing-based decision making.

B. *California.* Lots Created by Division in Violation of Subdivision Map Act in 1940-41 Are Not Legal Under Current Law. *Fishback v. County of Ventura*, 35 Cal. Rptr. 3d 199 (Cal. Ct. App. 2005).

Facts: In September 1940, the owner of a 140-acre parcel recorded a survey purporting to subdivide the southern part of the parcel into 15 lots. By August 1941, the owner had conveyed 10 of the lots. The Meltzers eventually acquired several of those lots, parcels created from the subdivision of those lots, and additional lots created from land retained by the owner in 1941. They sought certification that their 12 lots were legal. The county mistakenly certified two lots, but concluded that the others were not legal. The trial and appeals courts upheld the denials. The Subdivision Map Act (SMA) in effect in 1940-1943 defined "subdivision" as "any land or portion

thereof shown on the last preceding tax roll as a unit or as contiguous units which is divided for the purpose of sale, whether immediate or future, by any subdivider into five or more parcels within any one year period."

Holding: The court rejected an argument that the first four lots conveyed in 1940 were legal under the Act and also rejected an argument that the land retained by the original owner did not constitute a parcel because the owner did not intend to sell that parcel. Because the original subdivision of 10 lots was not legal, the subsequent division of some of those lots cannot be legal. A statute clarifying that parcels legally created without a parcel map under prior 1aw are legal despite the addition of the parcel map requirement to the SMA, does not legalize illegally created parcels.

C. ***Connecticut.*** **Common Interest Development, with Tenants Leasing "Volumes of Space," Is Not a Subdivision.** *Alvord Investment, LLC v. Zoning Board of Appeals of City of Stamford,* No. CV 04-0200940S, 2005 WL 2650134 (Conn. Super. Ct. 2005).

Facts: The 35-acre property in a light industrial zone is subject to an 85-year ground lease, recorded in 2004, along with a declaration under the Common Interest Ownership Act, Gen. Stars. § 47-202, a notice of a "space lease," and a sublease. The declaration creates three "units," defined as "volumes of space" above the ground, within the development. The property contains several buildings and a chemical research lab is already in operation. Stop & Shop, a supermarket, had a 25-year space lease for a unit. The zone permits, but does not define, the use of a supermarket.

The zoning officer, while noting the concerns of neighbors, concluded that the proposed use complied with the use and lot coverage restrictions of the ordinance and issued a permit in 2003. The city appealed and the zoning board of appeals reversed. The trial court reversed in favor of Stop & Shop. The city argued that the tenants lacked standing because the declaration was not recorded in compliance With the statute.

Holding: The court rejected the argument, reasoning that the statute does not require that all contemplated construction be complete or even started prior to recording. The court noted that the units, created by the recording, are not t1cfined by buildings, but are volumes of space. Employing the same logic, the court concluded that subdivision approval was not required because no lots were created. The statutory (Gen. Stars. § 818) and ordinance definitions of subdivision and lot refer to parcels of land and the development does not involve a division of land. A common interest community is characterized by group decision making and sharing charges attributable to common elements, such as taxes and insurance, not by division of land.

D. ***Georgia.*** **Denial of Subdivision Sketch Plan for Failure to Comply with "Paved Streets" Requirement Reversed Where Ordinance Was Ambiguously Worded.** *Screven County Planning Commission v. Southern States Plantation, LLP, 614 S.E.2d 85* (Ga. 2005).

Facts: The Screven County planning commission and board of commissioners denied a

subdivision sketch plan showing a 32-lot development with access provided through two existing, unpaved county roads, because a land development regulation (§ 6.1) required their paving as a condition of approval. When the subdivision developers sued the county for mandamus relief, the trial court ruled that the regulation at issue was ambiguous and construed it in their favor, concluding that the county could not require the roads to be paved. The court also addressed § 6.8, which authorizes the commission to deny a proposed subdivision where existing roads are inadequate to serve the additional traffic generated by the proposed development. Finding evidence that the proposed subdivision would not have a significant impact on area traffic, the court granted mandamus relief, concluding the developers had a vested right to sketch plan approval.

Holding: The state high court affirmed in part and reversed in part. It affirmed the trial court's interpretation of the road-paving regulation in the developers' favor based on the doctrine of statutory interpretation that a court must construe an ambiguous zoning ordinance in a property owner's favor. Section 6.1 requires "paved streets," but not where the lots "are located on the right-of-way of an existing county road," wording which was at least ambiguous because it was unclear as to whether the word "streets" refers only to interior subdivision streets or also to existing, abutting public roads. It reversed the trial court's ruling on vested rights. Although the planning commission discussed the proposed subdivision's effect on area traffic, it did not rely on § 6.8 as grounds for denying the plan. Section 6.8 gives the commission discretionary authority to determine the adequacy of existing roads to serve additional traffic and the commission did not exercise that discretion.

E. ***Michigan.*** **Having Obtained Acre Easement to Relocate Public Road, Village Could Not Grant Permission to Developer to Use Balance of Acres for Private Access Drives to Adjacent Complex.** *Blackhawk Development Corp. v. Village of Dexter,* 700 N.W.2d 364 (Mich. 2005).

Holding: Having obtained an acre easement to relocate public road, village couldn't grant permission to developer to use the balance of the acre for private access drives and other improvements for adjacent commercial complex.

F. ***New York.*** **Board Erred in Denying Subdivision Request Based on Previous Erroneous Determination That Lot Had Merged and in Denying Area Variance Without Considering Variance Criteria.** *Matherson v. Scheyer,* 20 A.D.3d 425 (N.Y. App. Div. 2005).

Facts: In preparation for a proposed sale to the current owner, the 1997 owner of two back-to-back lots, which shared a common rear boundary and had frontage on parallel streets, applied to the Town of Islip board of zoning appeals (ZBA) for an area variance to legalize the dwelling on the second, nonconforming lot. The ZIIA ruled that the two lots had merged; and then concluded that the variance application was in fact a subdivision application, which it denied on the ground that the application was improperly brought and misleading.

In 2002, the new owner applied to the ZBA to subdivide the lots in order to construct a conforming residence on the vacant 80 x 100 ft. lot. He also sought an area variance to legalize the existing

dwelling on the second 40 x 100 ft. substandard lot. The ZBA denied the application, finding it essentially identical to the 1997 application, and incorporated the reasons stated in the 1997 determination into its determination. The trial court granted the owner's petition to annual the 2002 determination and directed the ZBA to approve the application. The town appealed.

Holding: The appeals court affirmed, holding the ZBA acted arbitrarily, capriciously, and without a rational basis. The court initially stated it could consider the 1997 determination by virtue of its incorporation into the 2002 denial and found there was no rational basis or substantial evidence to support the ZBA's 1997 merger determination. The prior owner had averred, without contradiction, that a fence separated the two lots, that she never used the vacant lot, and that the neighborhood used it as a dumping ground. Concluding that the ZBA could not subsequently deny the 2002 subdivision on the same grounds, the court ruled the 2002 subdivision petition was properly brought.

The court also concluded that when reviewing the 1997 application for an area variance for an existing dwelling, the ZBA failed to explain how granting it would have an undesirable effect on the community. Nor did the ZBA consider the other factors when reviewing an area variance, including whether the requested area variance was substantial, whether the benefit could feasibly be achieved through another method, and whether the difficulty was self-created.

G. ***Pennsylvania.*** **Denial of Subdivision Approval Contained Adequate Reasons.** *Kassouf v. Township of Scott,* 883 A.2d 463 (Pa. 2005).

Facts: In 1998, the owner filed an application under the steep slopes ordinance, preliminary to establishing a residential subdivision. A court overturned the township's denial. The township subsequently tried to revoke the permit and make the owner apply under a new ordinance. The court held that the township could not require application under the new law. In June 2000, the owner sought subdivision approval and, after the application was found incomplete, filed a revised application in July. The town engineer issued a report indicating that the application failed to comply with several ordinances. The planning commission considered the report and the objections of residents who believed that flooding and other problems stemmed from an earlier development by the owner.

The owner obtained a 60-day extension and submitted a revised application on October 9. The engineer's report identified 30 problems and cited ordinances with which the plan did not comply. On October 18, the commission voted to make an unfavorable recommendation. The owner submitted another revised plan on October 23 and, at its October 24 meeting, the township commissioners agreed to continue the matter until the November 28 meeting, requiring that the owner submit another plan on November 14. The owner submitted a plan on November 14. In the meantime, the engineer issued a review of the October 23 plan. finding violation of four ordinances. He concluded that the final plan was still not in compliance.

On November 28, the commissioners voted to deny the application and specified 16 reasons. The owner challenged the denial, claiming the application was deemed approved. The trial, appeals, and

highest courts affirmed. While the commissioners' decision letter, referring to the engineer's "comments," "requests." and "requirements," without physical attachment or details did not incorporate the engineer's report by reference, it did contain adequate, independent reasons for denial, sufficient to avoid deemed approval status. Seven reasons cited an ordinance by Section number, the requirements of that ordinance, and the plan's deficiency with respect to the requirements.

Holding: The court rejected a claim that citation without the name of the ordinance was insufficient. It was not clear whether the commissioners considered the owner's November 22 letter, but the court held that the owner was given ample opportunity to correct defects and that the commissioners did not act in bad faith.

H. ***Pennsylvania.*** **"One Dwelling–One Lot" Requirement Applied to 12-Building, Multi-Unit Apartment Complex.** *Seipstown Village, LLC v. Zoning Hearing Board of Weisenberg Township,* 882 A.2d 32 (Pa. Commw. Ct. 2005).

Facts: A developer filed a preliminary plot development plan with Weisenberg Township for an apartment complex consisting of12 buildings and 14 to 18 units per building, with the entire 28-acre parcel maintained as a single lot in common ownership. The zoning officer issued an opinion letter stating the plan failed to comply with a zoning ordinance requirement that a plot plan show a separate lot for each dwelling. The developer appealed to the zoning hearing board for a determination that the ordinance was ambiguous and inapplicable to the plan or, alternatively; a variance from the requirement.

At the noticed public hearing, the developer's engineer testified that he had drafted a 12-lot subdivision plan, which the developer chose not to submit because the lots were oddly shaped and had unnatural boundaries. Following an executive session the board orally voted that the separate lot requirement was ambiguous and inapplicable and the developer left the hearing, room. The board then realized it had not given the many objectors an opportunity to testify and heard some that evening and at a continued hearing, when it rescinded its oral vote, determined the requirement was unambiguous and applicable to the plan, and denied the variance.

The trial court rejected the developer's appeal and affirmed the board, stating that the developer was trying to avoid complying with minimum lot area and setback requirements. The developer appealed, contending the board had engaged in improper ex parte hearings after the oral vote, which he alleged was a final order that they could not reconsider. He also argued that the hoard erred in finding the requirement unambiguous and that he was entitled to at variance because the requirement itself created an unnecessary hardship.

Holding: The appeals court affirmed. The municipal planning code provides that a zoning hearing board is not a final order until reduced to writing and, thus, the board could reconsider its oral vote. There was no ex parte communication because the code also affords all parties the

opportunity to respond and present evidence and argument. Nor was the one dwelling--one lot requirement ambiguous since the zoning ordinance definition of "dwelling" includes the subcategory "multiple dwelling." Finally, the developer failed to meet his burden of demonstrating that the application of the one dwelling-one lot requirement would result in unnecessary hardship.

I. ***Pennsylvania.*** **Tenant's Option to Purchase Land in 1982 Leasehold Did Not Create a Lawful Subdivision Compelling Township's Approval of 1998 Subdivision Application, Where Lots Would Not Comply with Current Minimum Zoning Ordinance Requirements.** *Guido v. Township of Sandy,* 880 A.2d 1220 (Pa. 2005).

Facts: A 1982 lease informally divided a 3.4-acre lot located in Sandy Township into two parcels. Parcel A was leased with a restaurant. The owner of the entire lot built and ran a convenience store on Parcel B, a 0.77 acre parcel (33,259 sq. feet). The lease also contained a provision allowing the tenant on Parcel A to purchase the parcel before the lease expired in 1999. In 1990, the township repealed its 1964 zoning ordinance and adopted a new ordinance which set the minimum lot size where the lot was located at 45,000 square feet. In 1997, it adopted a new subdivision ordinance requiring all subdivisions to comply with the minimum requirements of the 1996 zoning ordinance.

When the tenant on Parcel A attempted to exercise the option in 1998, the lot owner would not convey the parcel, fearing the action would make Parcel B a commercially useless, nonconforming residual lot. The tenant sought the planning commission's formal subdivision approval, but was denied based on the lot owner's objection. Seeking specific performance of the option, the tenant sued the lot owner in trial court. The litigation was stayed while the tenant was directed to reapply to the planning commission, which subsequently approved the subdivision. On the lot owner's appeal, the trial court affirmed, holding tile lease/purchase option created a lawful subdivision when executed.

The appeals court reversed. There was no subdivision until the Parcel A tenant formally submitted the subdivision application in 1998, when the 1996 zoning ordinance applied. Since Parcel B was not grandfathered in 1996 as a nonconforming lot, the planning commission erred in approving the subdivision because it did not comply with the minimum lot size requirement.

Holding: The Pennsylvania Supreme Court affirmed, distinguishing between subdivision of property in fact (the creation of a substantial, equitable interest in land) and subdivision through the townships formal subdivision procedure. Pursuant to the Pennsylvania Municipalities Planning Code (MPC) the township enacted subdivision and land use ordinances which create a formal, governmental subdivision approval process for subdivisions that comply with the applicable zoning ordinance. As the court explained, the legislature made formal subdivision mandatory (legally "trumping subdivision by decd or a purchase option) to protect and promote public health, safety, welfare, and natural resources, and to require conformance with comprehensive plans.

Consequently, the 1996 zoning ordinance applied to the subdivision application, which did not conform to its requirements. The lot owner could seek relief through the MPC and the 1997 subdivision ordinance, which allow parties to seek written modifications from that ordinance's requirements.

J. ***Washington.*** **Purchaser, Aware That He Was Buying a Section of a Larger Parcel, Was Not an "Innocent Purchaser Without Actual Notice of Illegal Subdivision."** *Nagle v. Snohomish County,* 119 P.3d 914 (Wash. Ct. App. 2005).

Facts: An "innocent purchaser for value without actual notice of an illegal subdivision" may obtain a building permit. RCW 58.17.210 . Nagle's parents bought a parcel in 1961. Nagle purchased the north half in 1974. In 1982, Nagle bought Parcel B, part of the remaining south half of the original parcel. Parcel B did not have a separate tax number and was not shown as a separate parcel on any zoning map. The decd did not reference any subdivision plat, but was stated in fractional units on a government survey. A transfer declaration filed at the time, unsigned, did not answer questions about whether the conveyance divided land and whether the conveyance complied with subdivision laws. In 1999, Nagle sought "innocent purchaser" status. The county denied the request. The trial court reversed.

Holding: The appeals court reversed, reinstating the denial. There is no question that Nagle was aware of the attempt to subdivide and whether he knew that the division was illegal at the time was irrelevant.

XV. TAKINGS

A. PHYSICAL TAKINGS – INVERSE CONDEMNATION

1. FEDERAL COURT DECISIONS

(a) **Statute of Limitations Period: Takings Claims Based on Rails-to-Trails Conversions Begins to Run with Issuance of Notice of Interim Trail Use.** *Illig v. United States,* 67 Fed. Cl. 47 (Fed. Cl. 2005).

Facts: The railroad filed a notice of exempt abandonment with the Interstate Commerce Commission (ICC), seeking authorization to abandon service over a 6.2-mile segment in south St. Louis County, Missouri. The ICC issued a notice of interim trail use (NITU), pursuant to the National Trails System Act, 16 U.S.C. § 1247; 28 U.S.C. § 2501, on March 25, 1992. In December, the railroad entered into an agreement under which Trailnet assumed responsibility for the maintenance of the segment as a recreational trail, subject to reactivation. A deed was recorded in January 1993.

In 1997, the railroad requested that the proceeding be reopened and that the NITU be partially vacated to allow reactivation of part of the line to serve a shipper. The ICC vacated the original decision with respect to that part of the line in April 1997. On December 28, 1998, owners of property along the vacated segment sued, claiming that conversion to a recreational trail constituted a taking of their interests.

Holding: Although the court ruled in favor of the owners on the issue of liability and gave notice of a proposed settlement in excess of $5.1 million, it subsequently granted a motion to dismiss based on the six-year statute of limitations. Citing *Caldwell v. United States,* 391 F.3d 1226 (Fed. Cir. 2004), the court held that the limitations period begins to run with issuance of a NITU. The court rejected arguments that *Caldwell* was based on some unique feature of Georgia law and that the amendment of the NITU in 1997 should be considered the "last governmental act," triggering the limitations period. The government's stipulation that it was liable to the owners did not operate as a waiver of the statute of limitations.

(b) **Issuance of Permit That Led to Construction Damaging Neighboring Property Did Not Constitute Taking, Trespass, or Nuisance.** *Clark v. City of Anchorage,* No. Civ.A. 04-677-C, 2006 WL 288647 (W.D. Ky. 2006).

Facts: The property consists of 58 lots around a small lake and park dedicated for public

use. In the 1960s the city filled the lake and used the area as a municipal waste dump. In 1996, the city began construction on the site, which allegedly changed the natural flow and caused water to accumulate on the neighbors' property. The Louisville & Jefferson Metropolitan Sewer District (MSD) issued a stop-work order, but then approved the project without notifying the neighbors.

Holding: The court dismissed the neighbors' claims of taking, nuisance, and trespass. Issuance of a permit to use property, even in a way that has a negative impact on other property, does not constitute a taking. An allegation that issuance of the permit led to construction that led to accumulation of water did not state a claim for trespass. MSD cannot be liable for a nuisance because any unreasonable use of the property was by the city, not MSD.

(c) **In Authorizing Connection to Water Supply, Town Did Not Authorize Trespass to Run a Line and Did Not Take Property.** *Cassaboon v. Town of Somers,* 359 F. Supp. 2d 320 (S.D.N.Y. 2005).

Facts: The Danko family well ran dry and they obtained a permit from the town to connect to the water district. Danko then excavated and built the line across a 50-foot unimproved, adjoining right-of-way dedicated in 1929. There was no other way to connect to the water line. The owner of property on either side of the right-of-way was not notified of Danko's permit application and did not become aware of the construction for several months. Danko's predecessor had signed a release of any rights in the strip. The two lots are undersized and can be developed only in combination with the right-of-way strip. The owner filed suit against the town.

Holding: The court entered summary judgment in favor of the town. The town did not take any land or violate the due process rights of the owner. The town simply gave Danko permission to connect to a water supply and did not authorize Danko to trespass. While it would have been "neighborly" to give the owner notice, notice was not constitutionally required. Because Danko acted as a private person and not in concert with the town, there was no "state action" and federal claims against Danko were also dismissed.

(d) **An Order to Enforce Building Codes or Abate a Public Nuisance Does Not Constitute a Taking; Demolishing a Dangerous Building was Not Irrational or Arbitrary**. *Davet v. City of Cleveland,* No. 05-3832, 2006 WL 2129349 (6th Cir. 2006).

Holding: City opts to condemn and demolish building with multiple code violations. Administrative finding that the building posed a danger to the community is preclusive in owner's sec. l983 action.

2. STATE COURT DECISIONS

(a) ***California.*** **Impairment of Visibility of Billboards by Trees Planted by City Does Not, Alone, Establish Compensable Taking.** *Regency Outdoor Advertising, Inc. v. City of Los Angeles,* 111 P.3d 920 (Cal. 2005).

Facts: The City of Los Angeles planted palm trees along the boulevard approaching the airport. The owner of billboards along the boulevard filed a takings claims against the city, arguing that the trees impaired the visibility of the signs. The trial court found no compensable taking.

Holding: The appeals court affirmed, holding that the impairment of visibility is not, by itself, a "substantial" impairment requiring compensation. The court cited as analogous a case where no taking was found in a situation where the value of a business was reduced because traffic was rerouted.

(b) ***Georgia.*** **Inverse Condemnation Rule Does Not Apply When Property Owner Agrees to Have Government Deposit Contaminated Substance on His Land.** *McElmurray v. Augusta-Richmond County,* 618 S.E.2d 59 (Ga. Ct. App. 2005).

Holding: The Court of Appeals of Georgia held that property owners who had agreed with a city to allow it to use their farm as a sewage sludge disposal site, but the sludge turned out to have an undisclosed high concentration of metals and hazardous metals, thus raising a danger of contamination of cattle raised on feed grown on the subject land, did not have a cause of action in inverse condemnation, but could proceed with their lawsuit against the county as successor to the city, on a breach of contract theory. While inverse condemnation suits may be brought against cities or counties for contaminating land, that rule does not apply where the owner agrees to have the government deposit the contaminated substance on his land. Then the controversy is governed by contract principles.

(c) ***Florida.*** **Beach Restoration Project under which Sand is Added is an Unconstitutional Taking of Riparian Owner's Rights.** *Save Our Beaches, Inc. v. Florida Department of Environmental Protection,* ___S2d___ (FL 2006).

Holding: Beach restoration project under which sand is added is an unconstitutional taking of riparian owner's rights, as, under it, the erosion control line becomes the new property boundary, denying the upland landowners any property gained by accretion.

(d) ***Nevada.*** **Height Restrictions Designed to Promote Public Safety at McCarran International Airport Worked a *Per Se* Physical Taking.** *McCarran Int'l Airport v. Sisolak*, 2006 Nev. Lexis 80, 122 Nev. Adv. Op. No. 58 (Nev. July 13, 2006).

Facts: 1980s, Steve Sisolak purchased three parcels near the Las Vegas Strip, about a mile from McCarran. At the time of the purchase, airport zoning restricted the height of structures on the land to 80-90 feet, subject to variance. In 1990, McCarran expanded a runway in conformity with the 1979 county master plan, which necessitated additional height restrictions, again subject to variance. In 2000, the county planning commission and the FAA approved a proposal to build a four-story resort hotel and casino on the site, up to a height of 66 feet. The approval lapsed, however, because the developer failed to commence construction. Shortly thereafter, Sisolak filed a complaint alleging that the height restriction ordinances constitute a *per se* taking. He submitted evidence showing that aircraft flew over the land at altitudes less than 500 feet. The trial court ruled that this evidence established a *per se* taking under *Loretto,* which holds that every government-compelled permanent physical occupation of land is a taking.

Holding: On appeal, the Nevada Supreme Court agreed, rejecting the county's arguments that the ordinances are mere height restrictions and thus subject to takings analysis under *Penn Central.* The court stressed that, in its view, the challenged ordinances "allow aircraft to exclusively use the airspace as a critical departure area within an airport approach zone," and "facilitate flights through private property." Although the county never denied Sisolak a variance, the court concluded the matter is ripe because one need not seek a variance to ripen a *per se* physical claim. The high court also rejected the county's contention that the overflights should be evaluated under *Causby*, which holds that overflights are a taking only if they are so low and frequent as to be a direct interference with the use of the land. The majority ruled that the ordinances worked a taking under both the Nevada and federal constitutions, but emphasized that the Nevada Constitution gives landowners greater protection. The *Sisolak* ruling stands in contrast to a 2004 ruling by the same court in *County of Clark v. Tien Fu Hsu*, No. 38853, in which the court overturned a $22 million takings challenge to airport height restrictions as applied to land within a "transition zone." Unlike the "approach zone" at issue in *Sisolak*, a transition zone is a mere buffer zone that provides an extra margin of safety in case a plane deviates from the normal flight path. The *Tien Fu Hsu* court stated that "a rule supporting the notion that airport height-restriction ordinances, of necessity, effect *per se* takings, is overboard in its reach," and it ruled against the landowners on ripeness grounds because they had not pursued variance procedures. The *Sisolak* opinion nowhere mentions *Tien Fu Hsu.*

(e) ***Ohio*** **Interference With Groundwater Can Constitute a Taking.** *McNamara v. City of Rittman,* ___NE2d___ (OH 2006) .

Facts: In separate cases, landowners claimed that drilling by governmental entities on neighboring land lowered their aquifers and constituted "takings" of groundwater. Federal trial courts ruled in favor of the governmental bodies.

Holding: The appeals court certified the issue to the state appeals court, which ruled in favor of the owners. Ohio recognizes a property interest in groundwater underlying an owner's land, subject to the "reasonable use" doctrine, under which an owner can be liable for unreasonable withdrawal of groundwater that interferes with another owner's rights. A seizure of water rights need not involve a physical invasion of land.

(f) ***Pennsylvania.*** **Property Owner Had No Cause of Action for a De Facto Condemnation for Interference with Ingress and Egress from Service Station/Mini-mart Where State Reconfiguration Redirected Traffic.** *Sienkiewicz v. Department of Transportation,* 883 A.2d 494 (Pa. 2005).

Facts: The Pennsylvania Department of Transportation (PennDOT) began planning to reconfigure an interchange and associated roadways to accommodate its heavy use and deteriorating traffic conditions. The reconfiguration also called for the installation of curbing along a road where a commercial property owner operated a service station/mini-mart because of its proximity to the interchange. The new curbing would narrow direct access to the service station by commercial traffic and the redirected traffic flow would cause drivers to travel about 1,000 additional feet to reach the station. Just before the actual reconfiguration work began, the property owner filed a petition in trial court under the state eminent domain statute asking that a board of viewers be appointed to hear his claim for a de facto condemnation and consequential damages from the planned curbing and reconfigured traffic pattern. PennDOT completed the reconfiguration during the litigation, but had not yet installed the planned curbing. During construction, the landowner closed the business because of falling profits. The trial court eventually ruled that PennDOT had effected a de facto condemnation and directed the board of viewers to assess just compensation. It reasoned that there was no actionable claim on the redirected traffic argument.

With no factual finding that PennDOT had actually narrowed access to the property by installing the new curb, the court also held that the narrowed widening, interfered with direct means of ingress and egress from the property. The appeals court affirmed, concluding that the closure of the business (due to construction) should not shield PennDOT from compensating the property owner for its interference with access once the curbing was installed.

Holding: The state high court reversed, holding the interference-with-direct-access claim was defeated by the absence of any evidence that PennDOT had installed the curbing, which also precluded the cause of action for a de facto condemnation. It rejected the property owner's argument that the redirected traffic pattern was relevant to the direct access claim, noting that the state's interest in traffic safety prevailed over the owner's property interests.

(g) ***South Carolina.*** **Owner of Commercial Property Is Entitled to Compensation for Loss of Highway Access.** *Tallent v. South*

Carolina Dep't of Transportation, 609 S.E.2d 544 (S.C. Ct. App. 2005).

Facts: Property used for a beauty shop, tanning salon, and consignment shop had immediate access to Highway 123 via Old Easley Bridge Road until the department of transportation blocked the road for construction. The business then had access to the highway only by a series of secondary roads.

Holding: The trial and appeals courts held that the property owner was entitled to compensation. Actual physical taking of property is not required; a compensable taking can occur when an owner is deprived of "ordinary beneficial use and enjoyment." The issue is not whether the property immediately abuts the part of the road that was closed, but whether the property owner was "specially injured." The owner presented evidence that she lost walk-in business and that the value of the business was adversely affected, which was sufficient to establish special injury.

(h) ***South Dakota.*** **State's Relocation of Highway Access Requires Consideration of Whether Owners Still Have Reasonable Access to Highway in an Inverse Condemnation Claim.** *Hall v. State ex rel. South Dakota Dep't of Transportation,* 712 N.W.2d 22 (S.D. 2006).

Facts: After the state decided to close the Exit 66 interchange on 1-90 and relocate the highway access one mile east, the owners of a convenience store and filling station near Exit 66 saw their sales drop drastically. They closed their business and brought an inverse condemnation suit against the state. The trial court concluded the property owners did not have a property interest in the continued flow of traffic past their business and granted summary judgment in favor of the state.

Holding: The state's highest court reversed. The state's constitution provides that "private property shall not be taken for public use, or damaged, without just compensation" and the damage clause provides an additional remedy than does the federal constitution. The court said that the right of access is a private property right, and refused to consider the state's arguments to the contrary which were raised for the first time on appeal. Since the trial court did not consider the "right of access" issue, the state supreme court reversed and remanded with directions to the trial court to consider whether the owners still had reasonable access to the highway, whether the owners' injury was peculiar to their land and not the kind suffered by the general public, and whether the state's action was arbitrary or unreasonable.

(i) ***South Dakota.*** **Resurfacing of Road with Gravel Did Not Constitute a Taking or Nuisance.** *Krier v. Dell Rapids Township,* 709 N.W.2d 841 (S.D. 2006).

Facts: A section of Highway 115, known as Garfield Avenue, fell into disrepair and the township blocked a portion with a gate. In 1997 the owner built a house adjacent to a paved portion of Garfield Avenue, near the blocked section. In 2001 the township decided to resurface the road with gavel. The owner claimed that the gravel made ruts and potholes worse and caused dust. The trial court ruled in favor of the township.

Holding: The highest court affirmed. Nuisance is defined by SDCL 21-10-1 as "unlawfully doing an act, or omitting to perform a duty" that interferes with a highway and SDCL 31-13-1 provides that the township "shall" maintain roads, but courts cannot impose specific standards for repair of roads. The state constitution allows an inverse condemnation claim based on "damage" to property, but the owner had not claimed injury unique from that suffered by other owners.

(j) ***Texas.*** **To Recover Damages on Inverse Condemnation Theory, Owner must Prove that Defendant Government Entity Intentionally Took or Damaged Property.** *City of Keller v. Wilson,* 168 S.W.3d 802 (TX 2005).

Holding: The Texas Supreme Court held among other things in a lengthy opinion that to recover damages on an inverse condemnation theory, the owner must prove that the defendant government entity intentionally took or damaged his property, or it was substantially certain that this would be the result of the government's activity.

B. REGULATORY TAKING

1. FEDERAL COURT DECISIONS

(a) **Claim Preclusion: Res Judicata Barred a Second Temporary Takings Claim in Federal Court when the State Court in the First Action Adjudicated the Claim Applying State Takings Law.** *Torromeo v. Town of Fremont,* 438 F.3d 113 (1st Cir. 2006)

Facts: In the late 1990s, the Fremont planning board approved two developers' planned residential subdivisions. When the town later enacted a growth control ordinance empowering the board to limit the number of building permits issued, the board denied the necessary permits. In the first lawsuit, a trial court concluded the developers were entitled to $71,600 and $23,800, respectively, in compensation for a temporary taking under the Fifth Amendment through the wrongly denied permits. The state high court reversed, holding the growth control ordinance was not unconstitutional but merely invalid because the town failed to follow statutory enactment

procedures. The developers sued a second time in federal trial court, contending the town failed to compensate them justly for a Fifth Amendment taking. They also alleged substantive due process and equal protection claims.

Holding: The Federal court dismissed the claim and the appeals court affirmed, holding res judicata barred the takings claim because it had been adjudicated in the state court and the other claims could have been adjudicated in that same proceeding. Pursuant to New Hampshire res judicata doctrine, the parties in both actions were the same and the federal takings claim had actually been litigated to a final judgment in the state court action. The state high court properly cited only state cases interpreting the state constitution's taking provision as evidence that there was no federal takings claim, the Fifth Amendment's takings clause being no more protective than state law.

Additionally, the remaining claims failed as a matter of law. The substantive due process doctrine applies only when a governmental action shocks the judicial conscience. Wrongly denied permit do not shock the conscience when the cause was a failure to follow statutory enactment procedures. Finally, the equal protection claim failed because the developers failed to demonstrate that the denied permits caused them to be treated differently than other "similarly situated property owners."

(b) **Ripeness:**

(1) **Takings for Private Use Do Not Impose Ripeness Requirement.** *Schudmak v. Bossetta,* Civil Action No. 06-893, 2006 WL 1207958 (E.D. La. 2006).

Holding: Seeking compensation in state court first is not a prerequisite to suit in federal court. This seems obvious, but, oddly, the 7th Circuit requires suit in state court. *See Daniels v. Area Plan Com'n of Allen County*, 306 F.3d 445 (7th Cir.2002). Schudmak follows the 5th Circuit, which like the Sixth and Ninth, do not impose this ripeness requirement.

(2) **Claims that Rent Control Ordinance Constituted a Taking Were Unripe.** *Manufactured Home Communities, Inc. v. City of San Jose,* 420 F.3d 1022 (9th Cir. 2005).

Facts: The rent control ordinance enacted in 1986 ties annual rent increases to the consumer price index to allow owners to maintain the same level of income as earned in the base year of 1985.The owner bought a mobile home park in 1997 and petitioned for review of the annual rent increase, claiming that an increase in rent on the underlying property had increased expenses. Because the previous owner had destroyed records from 1985, the owner was unable to provide base year data. The hearing officer denied the requested increase. A court held that the ordinance was unconstitutional in failing to provide for a fair return when an innocent owner could not provide base year data. The city amended the ordinance to allow estimates of base year data and to provide that

it does not prohibit a hearing officer from granting an increase "demonstrated as necessary." When the owner again petitioned for an increase, the hearing officer rejected a claim that it was impossible to estimate 1985 data and denied relief. The state trial and appeals courts affirmed; the highest court declined review. The city then rejected a claim that certain tenants were exempt from rent control. The owner filed in federal court. The trial court dismissed.

Holding: The appeals court affirmed, first holding that certain claims were barred because they had been raised in state court and that claims against individual tenants, not raised in the administrative process, were not ripe. An "as applied" takings claim with respect to the ordinance was also unripe. The owner did not, by claiming that the hearing examiner was biased, establish that seeking compensation through state procedures was futile. The owner had not pursued claims relating to tenant exemptions through the administrative process and those claims were also unripe. Finally, the court rejected a claim that the ordinance did not substantially advance a legitimate state interest, citing the Supreme Court's decision in *Lingle v. Chevron,* 125 S. Ct. 2074 (2005).

(3) **A Claim That Mobile Home Rent Control Ordinance Did Not Advance a Legitimate State Interest Was Properly Dismissed.** *Stardust Mobile Estates LLC v. City of San Buenaventura, 142 F. App'x 300* (9th Cir. 2005).

Facts: After its application for a rent increase was denied, the company claimed that the city's Mobile Home Park Rent Control Stabilization Ordinance was invalid because it failed to substantially advance a legitimate state interest and constituted a "taking."

Holding: The trial court dismissed and the appeals court affirmed. Under the Supreme Court's recent decision in *Lingle v. Chevron U.S.A., Inc., 125* S. Ct. *2074 (2005),* the "substantially advances" formula is not a valid takings test. Any claim that the denial of a rent increase constituted a taking is unripe because the company has not pursued state remedies.

(c) **Penn-Central Claims:**

(1) **Federal Cease and Desist Orders under Clean Water Act for Draining Wetlands and Lasting Nine and a Half Years May Constitute a Penn Central Temporary, Regulatory Taking Where Prior Court Found No Current Wetlands.** *Sartori v. U.S.,* 67 Fed. Cl. 263 (Fed. Cl. 2005).

Facts: In 1989, Willowbrook Farms purchased 8,300 acres of land, including three parcels deeded separately and separated from each other and the primary land area by canals and drainage ditches. The owners began clearing vegetation from the three parcels in 1992 to make it suitable for agricultural production. In 1993, the Army Corps of Engineers issued a cease and desist order

pursuant to the Clean Water Act (CWA) for grading and clearing almost 1,500 acres of jurisdictional wetlands. In 1994, the Environmental Protection Agency (EPA) issued a cease and desist order for failing to obtain a CWA §301 permit to discharge pollutants into U.S. waters.

In 2001, a federal appellate court found that two of the three parcels were a former wetland drained in a 1960s watershed project. The owners subsequently sued the United States in the Court of Federal Claims, alleging a temporary, categorical taking under *Lucas* or a temporary regulatory taking under *Penn Central*. The United States motioned for Summary judgment, arguing the owners failed to allege facts sufficient for either claim.

Holding: The court granted the government's motion to dismiss the temporary categorical takings claim under *Lucas*. It concluded the owners failed to demonstrate how their failure to devclop either the entire 8,500 acres or only the three parcels for the nine and a half years in which the cease and desist order was in effect deprived them of all economic use of their property, as *Lucas* requires. Pointing out that a cease and desist order is not an actual physical appropriation of property, the predicate of a categorical *Lucas* taking, the court noted in dictum that the existence of a *temporary* categorical taking is a rare possibility.

The court precluded summary judgment on the temporary regulatory takings claim. It concluded there were sufficient issues of material fact concerning the determination of the "parcel as a whole" (either the entire 8,500 acres or the three parcels) for a trial under the three factors in *Penn Central*. The court reasoned that the claim might succeed if the relevant parcel definition supports the owners' claim that the government's action-the cease and desist orders-mimicked a physical restriction on the use of property that did not contain wetlands, that this restriction had a sufficient economic impact, and that it interfered with their distinct investment-backed expectations (more than a small diminution in value or profitability).

(2) **Designation of Land as Unsuitable for Surface Mining Under Surface Mining Control and Reclamation Act Was Not a Taking Because Owner's Investment-Backed Expectation Was Unreasonable.** *Cane Tennessee, Inc. v. United States,* 63 Fed. Cl. 715 (Fed. Cl. 2005).

Facts: The Secretary of the Interior designated land in Bledsoe County as unsuitable for surface mining pursuant to a process established in 1977 by the Surface Mining Control and Reclamation Act (SMCRA). The owner of designated property filed a regulatory takings action in the federal court of claims.

Holding: The trial court held that the unsuitability designation under SMCRA did not effect a compensable partial regulatory taking of the property because the owner's investment-backed expectations, based on the regulatory regime in place at the time it acquired the property, were unreasonable.

(d) **Property Interests:**

(1) **The Statutorily Created Peanut Quota, Under the Federal Agriculture Improvement and Reform Act, Is Not a Property Right That Is Compensable Under the Fifth Amendment.** *Members of the Peanut Quota Holders Association, Inc. United States,* 421 F.3d 1323 (Fed. Cir. 2005)

Holding: The U.S. Court of Appeal for the Federal Circuit held that rights to lease peanut quotas established by statute but later terminated by another statute, were private property of the peanut farmers, but they were not the kind of compensable property that the government could not rescind by subsequent legislation. Said the court: "The government is free to create programs that convey benefits in the form of property, but, unless the statute itself or surrounding circumstances indicate that such conveyances are intended to be irrevocable, the government does not forfeit its right to withdraw those benefits or qualify them as it chooses."

(2) **If the Party Asserting Taking has Contracted with Federal Government, the Contract Itself may be a Cognizable Property Interest.** *Consolidated Edison Co. of New York v. United States,* 67 Fed. Cl. 285 (Fed. Cl. 2005) **but see, Federal Government Abrogating its Contract with Local Irrigation Districts was not an Inverse Condemnation Action but one Sounding in Breach of Contract.** *Klarnath Irrigation Dist. v. United States,* 67 Fed. Cl. 504 (Fed. Cl. 2005)

Edison Holdings: The U.S. Court of Federal Claims ruled that when the government failed to live up to the terms of its contract with a utility, whereby the government was obligated to remove spent nuclear fuel but failed to do so, that gave rise to a right of action on both breach of contract and inverse condemnation theories. The court said that a trial would be required because "If the party asserting the taking has contracted with the federal government, the contract itself may be a cognizable property interest that, if abrogated by legislative or regulatory action, may form the basis of a takings claim."

Klarnath Holdings: Farmers in Southern Oregon and Northern California file claims to just compensation due to a taking of their water rights when, acting to protect endangered species, the federal government abrogated its contract with local irrigation districts, which accordingly temporarily reduced water supplies to those farmers, the U.S. Court of Federal Claims ruled that even though contracts are property, on the facts presented here, the remedy of the farmers who were deemed third-party beneficiaries under those contracts, was not an inverse condemnation action, but one sounding in breach of contract.

(3) **Requirement that University House a Percentage of Students on Campus does not Constitute a Taking or Violate Constitutional Rights.** *George Washington University v. District of Columbia,* (391 F.Supp.2d 109 (U.S. District Ct, District of Columbia, 2005)

Facts: In approving the university's plan for the years 2000-2010, the Board of Zoning Adjustment (BZA) imposed conditions that placed a cap on enrollment and included a sanction, prohibiting construction of nonresidential campus buildings if the school failed to house 70 percent of its students on campus. After an injunction issued, the (BZA) revised the order, changing the enrollment cap, requiring the school to house 70 percent of its 8,000 undergraduates on campus, and requiring that each undergraduate above the 8,000 threshold be housed on campus or outside the Foggy Bottom neighborhood. The order included a six-month grace period.

Holding: The trial court found the order unconstitutional. The appeals court reversed in part. The trial court then dismissed the University's civil rights claims. Rejecting takings claims, the court reasoned that the order does not result in physical occupation of property, but, at worst, requires the school to use its property in a particular way, which does not deprive it of all economic benefit or interfere with investment-backed expectations. The school can still use its off-campus housing and, since 1985, has been aware of the BZA's concern about the impact of its growth on the neighborhood. The BZA's actions were rationally related to a legitimate governmental interest in protecting the neighborhood and did not violate the equal protection or due process rights of the school or its students.

(4) **Army Corps of Engineers' Revocation of Wetlands Designation after Owner Bought Land in Reliance did not Constitute a Taking.** *Norman v. United States,* 429 F.3d 1081 (U.S. Ct. App. Fed Cir. 2005)

Facts: In 1987, the owner of 2425 acres in Reno obtained conditional approval for development. The following year, the U.S. Army Corps of Engineers prepared a wetlands delineation pursuant to its 1987 manual, designating 28 acres of jurisdictional wetlands, including 17 acres on the 470-acre parcel subsequently purchased by the Normans. Because of controversy after the delineation was made public, the Corps revoked its 1988 delineation, conducted a new study pursuant to an updated manual, and identified 230 acres of wetlands with 87 acres on the Norman parcel. After the development plan was amended based on the new delineation, the Normans bought additional parcels, so that they owned about 2,280 acres.

In 1995, the Normans obtained a "404 permit" under the Clean Water Act, 33 U.S.C. § 1344, for 15 acres of wetlands. In 1999, after negotiations with the Corps, they obtained another 404 permit to fill about 60 acres in exchange for creating or restoring 195 acres of wetlands as mitigation. The Normans had been selling parcels to developers and, by 1999, owned only 716 acres. The Normans

first filed suit in 1995.

Holding: The trial court rejected taking claims and illegal exactions; the appeals court affirmed. The Normans argued that the case was unique because of the revocation of the 1988 delineation on which they relied in making their purchase, and that they were not simply challenging the conditions of the 1999 permit. The court noted the events that followed and stated that the relationship between that revocation and the claimed loss was "too attenuated" to support the weight the Normans placed on it. The Normans' transfer of title to the mitigation wetlands to a nonprofit association was voluntary and did not amount to a physical taking. Even if cases dealing with physical exactions applied to this case, there was an appropriate nexus between the wetlands set aside and the public interest served. There was no categorical taking, because there was no deprivation of all economically viable use of the 2,280-acre parcel. Rejecting a regulatory taking claim, the court reasoned that economic impact and investment-backed expectations could not be measured from 1988, when the Normans did not yet own most of the property. Finally, the court rejected an illegal exaction claim, reasoning that even if the concept applied to alleged takings of real estate, rather than money, the relationship between the Corps' alleged "misapplication of federal law" and the claimed loss was too tenuous.

(5) **Federal Government's Cancellation of Grazing Permit was not a Taking Because Recipient of Permit had no Property Rights Under it.** *Colvin Cattle Co. v. United States,* 67 Fed. Cl. 588 (Fed. Cl. 2005)

Holding: The U.S. Court of Federal Claims ruled that the federal government's cancellation of a Taylor Act grazing permit was not a taking because the recipient of such a permit has no property rights under it, so none could he taken when the permit was cancelled. That result was not changed because the owner may have had water rights in the subject area by virtue of state law.

(6) **Court of Federal Claims Certifies Two Questions to New Mexico Supreme Court Concerning State Property Law.** *Walker v. United States,* 69 Fed. Cl. 222 (Fed. Cl. 2005); *Walker v. United States,* 66 Fed. Cl. 57 (Fed. Cl. 2005).

Facts: On a motion for reconsideration, the U.S. Court of Federal Claims acknowledged its mistake when it earlier held that ranchers in New Mexico were collaterally estopped from asserting their taking claims in the U.S. Court of Federal Claims because the U.S. District Court had ruled that the ranchers did not have legal title.

Holding: The court concluded that collateral estoppel does not bar the ranchers from alleging ownership of compensable water, access and forage rights. "As a matter of federal law, the law of the Territory of New Mexico and the law of the state of New Mexico, local customs, laws, and the decisions of courts, governs the determination, validity, scope, and nature of the ranchers' alleged

water, access, and forage rights in the allotments in the Gila National Forest, including the appropriations of non-reserved water on land reserved from the public domain." The court certified two questions to the New Mexico Supreme Court: (1) Does the law of the state of New Mexico recognize a limited forage right implicit in a vested water right? (2) Does the law of the state of New Mexico recognize a limited forage right implicit in a right-of-way for the maintenance and enjoyment of a vested water right?

2. STATE COURT DECISIONS

(a) **Exhaustion of Remedies: *Indiana.* Court Lacked Jurisdiction to Consider Takings Claim Where Owners Had Not Sought Special Exception for Junkyard after Board Declared Their Business to Be a Junkyard.** *City of Marion v. Howard,* 832 N.E.2d 528 (Ind. Ct. App. 2005).

Facts: The owners operated a business in Grant County, Indiana, from 1991 to 1999, storing damaged vehicles for insurance companies and auctioning those vehicles after settlement. They bought a parcel in Marion, zoned Industrial-2 like the existing location, and obtained approval from the area plan commission to store disabled vehicles, a permitted use. After the business relocated, neighboring owners complained that it was actually a junkyard. The board of zoning appeals found that the use was a junkyard, which would require a zoning change or a special exception.

The owners did not apply for a special exception, but filed suit and also sought a change of use to an "auction sales yard," which was denied. Because the business continued to operate, the city brought a nuisance complaint, obtained a temporary restraining order, and padlocked the gates. "the order was dissolved four days later and the lock was removed. The trial court upheld the board's decision, but ruled against the city on the nuisance claim. The owners filed suit, alleging violation of federal constitutional rights and claiming that the mayor exercised improper influence over board members. A jury awarded $170,200.

Holding: The appeals court reversed. The court examined the "final decision" requirement set forth in *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City,* 473 US 172 (1985) and, on its own motion, held that the trial court lacked jurisdiction over the "taking" claim because the board made no final ruling concerning the extent to which the property could be used. The court noted that the owners did not seek a special exception for a junkyard and that there was no evidence that such an application would be futile. The court also noted that the owners had not sought compensation under Indiana's inverse condemnation law. The city had not challenged an award of $7,665 for the unlawful padlocking of the business, resulting in a "taking" for four days.

(b) **Ripeness: *California.* Regulatory Takings Claim Is Ripe, Despite Owner Not Applying for a Permit, When There Is No Uncertainly About the Use That Will Be Allowed.** *Dunn v. County*

of Santa Barbara, 38 Cal. Rptr. 3d 316 (Cal. Ct. App. 2006).

Facts: The owner of a six-acre parcel in Summerland, zoned for single-family residential use with a three-acre lot minimum lot size, applied to subdivide to create two lots. The land is on a sea cliff and is subject to the California Coastal Act, PUB. RES. CODE § 30121. An environmental impact report was prepared. The county concluded that only one house could be built on the land because of wetlands and setbacks and denied the application. The owner's suit was rejected.

Holding: The appeals court reversed, in part, holding that the regulatory taking claim was ripe, although the owner has not applied for a permit, because there is no uncertainty as to the use that will be permitted for the property. The court upheld the wetlands designation as environmentally sensitive habitat area under the local coastal plan. The court noted evidence that the area met the definition of wetlands and rejected an argument that only higher quality wetlands are entitled to protection. There was evidence that the wetlands play a valuable role in the ecosystem. The Coastal Act does not permit residential development in wetlands under any circumstances, so the county did not err in failing to consider mitigation alternatives.

(c) **Moratorium (Temporary Takings):**

(1) ***North Dakota.*** **Moratorium Lasting 21 Months While FEMA Identified Floodway Did Not Constitute a Taking.** *Wild Rice River Estate, Inc. v. City of Fargo,* 705 N.W.2d 850 (N.D. 2005).

Facts: The owner acquired property south of Fargo in 1947 and platted 38 lots in 1993, 10 of which are located on an oxbow of the river. The owner spent about $500,000 for sewer connections, promotion, and other development costs. One lot was sold in 1994 for $24,000. The river has a long history of significant flooding and, during a 1997 flood, all undeveloped lots in the subdivision were under water. After the flood, the city began working with the Federal Emergency Management Agency (FEMA) and brought the subdivision under its extraterritorial jurisdiction. While FEMA was mapping a floodway, the city imposed a moratorium on building permits. The moratorium was in effect for 21 months and affected some, but not all, lots in the subdivision.

During the moratorium, the owner's daughter was denied a permit to build, one buyer signed a contract to buy two lots, and another signed a lot-hold agreement, but no lots were actually sold. After the moratorium ended, five lots sold at prices from $32,900 to $55,900. Other sales are pending.

Holding: The trial court dismissed an inverse condemnation claim and the highest court affirmed. Based on the Supreme Court's decision in *Lingle v. Chevron* 125 S. Ct. 2074 (2005), the court rejected a claim that the moratorium did not substantially advance a legitimate state interest.

A moratorium lasting more than a year does not constitute a "per se" taking, according to the court, which employed the *Penn Central* factors (438 U.S. 104 (1978)) and looked at the "parcel as a whole" to determine the economic impact of the moratorium. The land had viable economic use during the moratorium, which did not single out the owner's property, but applied to several developments. The development's history of sales indicates that the owner suffered only a delay in one or two sales. The city acted diligently and in good faith to protect prospective buyers.

(2) ***South Carolina.*** **A Taking May Occur When a Regulatory Delay Affects Less Than All Economically Viable Use of the Land.** *Byrd v. City of Hartsville,* 620 S.E.2d 76 (S.C. 2005).

Facts: A landowner's property lay partly in the City of Hartsville and partly in Darlington County. The agriculturally zoned property also lay within the boundary of Coker Farms, a National Historic Landmark (NHL), which retained its NHL designation even as the land was divided into multiple parcels with no common ownership. When the landowner petitioned the city to rezone a small parcel under contract to a commercial developer, the city deferred action, fearing commercial development would cause the NHL designation to be revoked for all of Coker Farms. Eleven months later the city approved the rezoning, now assured that the change would not affect the farm's landmark status. Within two months of application, the city subsequently approved the landowner's second petition to rezone the entire city tract for commercial use and the landowner contracted to sell the land. However, Darlington County (which maintained both city and county tax and land records) would not approve the deeds because the county tax records for the entire city tract flagged it as deed-restricted based on the NHL designation. The landowner sued the city for a regulatory inverse condemnation based on the rezoning delays and alleged the city had engaged in a civil conspiracy with the county. When the trial court granted summary judgment to the city on both claims, the landowner appealed the takings claim.

Holding: The state high court affirmed, finding no taking. The court overruled its decisions in *Glover v. County of Charleston* 606 S.E.2d 773, 777 (2004) and *Greenville County v. Kenwood Enterprise;, Inc.,* 587 S.E.2d 428, 438 (2003), concluding that a taking may occur when regulatory delay affects less than all economically viable use of the land. Applying *Penn Central,* the court held that the city's concern about protecting the farm's NHL status was a legitimate governmental interest. Delaying both zoning decisions was a reasonable means of furthering that interest. Any interference with the landowner's investment-backed expectations was too slight to render either delay unreasonable. Moreover, the land was zoned for agricultural use and the landowner's ability to farm the land during the decision-making process was never disturbed.

(d) **Does Claimant Have a Property Interest:**

(1) ***Arizona.*** **Owner of "Swingers" Club Was Not Entitled to Compensation for Loss of Business Due to Ordinance**

Prohibiting Businesses Involving Live Sex Acts. *Mutschler v. City of Phoenix,* 129 P.3d 71 (Ariz. Ct. App. 2006).

Facts: In 1998, Phoenix enacted an ordinance prohibiting businesses providing the opportunity to view or participate in a live sex act and declaring such businesses a public nuisance. After raids in 2002, "swingers" clubs experienced a downturn. The owner of a club was convicted of violating the ordinance, which was upheld as constitutional. The owner closed the business. The building remained vacant for several months.

Holding: The trial and appeals courts held that the owner was not entitled to compensation. Government may not immunize itself from takings claims by simply labeling a particular use as a nuisance, but regulation does not constitute a taking if it only bans conduct that constitutes a public nuisance pursuant to "background principles of nuisance and property law." The theory that the government cannot "take" a nonexistent property right precludes all claims, including claims of partial taking. The prohibition does not interfere with "reasonable" investment-backed expectations; the live sex act business was not a protected property right. The court noted health hazards and held that the conduct prohibited by the ordinance could have been prohibited as a common law public nuisance.

(2) ***California.*** **Revocation of Permit for Alarm System Did Not Constitute a Taking.** *Ishal v. City of Los Angeles,* No. B178023, 2005 WL 3196412 (Cal. Ct. App. 2005).

Facts: Los Angeles requires a permit for use of an alarm system. The code provided that a permit could be suspended or revoked for more than 10 false alarms in a 12-month period or for failure to pay the service fee for false alarms. The owner of a small store had 10 false alarms within a year and paid service fees of $760. An additional bill of $190 was unpaid and the city revoked the permit.

Holding: The trial and appeals courts rejected the owner's takings claims, holding that he had no property right in the permit. The court noted that the owner can operate his business without the permit and that the owner was given an opportunity to show that the false alarms were beyond his reasonable control.

(3) ***Michigan.*** **Denial of Wetlands Permit for Lowlands Portion of a Lot Did Not Constitute a Taking.** *K & K Construction, Inc. v. Department of Environmental Quality,* 705 N.W.2d 365 (Mich. Ct. App. 2005).

Facts: In 1988, the owner of four contiguous parcels in Oakland County, totaling about 82 acres, began to build a restaurant and sports complex to occupy 42 acres on parcel 1. The

Department of Environmental Quality (DEQ) issued a cease-and-desist order because the property included wetlands. The owner applied for a permit to fill the wetlands and requested that the DEQ remove the designation. Waterford Township denied the permit application, pending the outcome of the request. The DEQ issued a denial, noting that the owner had options. The owner filed suit.

In 1990, the DEQ rejected a second application. In the meantime, an office building and restaurant were built on the uplands portion of parcel 1. The trial court considered only parcel 1 and concluded that a taking had occurred. Pursuant to MCL 324.30323, the court gave the DEQ the option to compensate the owner for lost value, or to buy the land, or to modify its action to minimize impact on the property. The DEQ chose to issue a permit, based on the second application. The court also awarded $450,000, plus interest, for the "temporary taking" and $3.25 million, plus interest, for the taking of the wetlands. The appeals court affirmed.

Holding: The highest court reversed, stating that the trial court erred when it considered only parcel 1 and not the value of the upland buildings. On remand, the trial court again concluded that parcel 1 had no value after the first denial and entered a total judgment exceeding $16 million. The owner had not used the permit to build on the lower portion of parcel 1, claiming that the continuing litigation meant that the permit was subject to revocation. The permit expired before the remand, but had been reissued with a letter stating that the DEQ did not intend to revoke the permit regardless of the outcome of the litigation. The trial court did not consider the existence of the permit in making its award.

The appeals court reversed in favor of the DEQ. The trial court disregarded the specific instructions of the highest court to consider the value of the other parcels and, even limiting consideration to parcel 1, no categorical taking occurred, as evidenced by the presence of two buildings on the property. The trial court also improperly applied the *Penn Central* factors for evaluating a regulatory taking claim. The appeals court reasoned that the permit denial did diminish the value of the property, but that the economic impact was mitigated by the remaining value. The owner was aware of the wetlands regulations when he acquired the property and so he did not have a "reasonable investment-backed expectation" of being able to develop the entire parcel as proposed by the first application. The government's regulatory action to protect wetlands, without a physical taking, benefits and burdens all owners in the state.

(e) **Penn-Central Claims:**

(1) ***California.*** **County's Open Range Ordinance is not a Taking.** *Herzberg v. County of Plumas,* ___ Cal.Rptr. ___, (CA 2005) (Neighbor's cattle invade owners' yard. County's open range ordinance isn't a taking).

(2) ***Delaware.*** **Refusal to Grant Variances for Hotel Built Significantly Larger Than Approved Plan Did Not**

Constitute a Taking. *Wilmington Hospitality LLC v. New Castle County,* No. Civ.A. 03C-07-213MMJ, 2005 WL 1654024 (Del. 2005).

Facts: The owner sought to build a 118,805 square-foot hotel. The county approved a final record plan in 1990. In 1998, the county issued a building permit for a 155,480-square-foot hotel and the owner proceeded to invest about $25 million in construction. In 2000, during an inspection for a certificate of occupancy, the county discovered that the hotel exceeded the approved plan by 38,000 square feet. The owner applied for variances to increase the maximum floor area ratio, to allow encroachment on the floodplain, and to reduce the number of required parking spaces. The board of adjustment denied the applications and the county rejected a request to open part of the hotel. The owner filed for bankruptcy and tire hotel was sold. The owner then filed suit against the county.

Holding: His due process and inverse condemnation claims were dismissed; the equal protection and breach of contract claims were not dismissed. The owner's motion to amend his takings claim was denied. Rejecting a claim that denial of a certificate of occupancy took away all economic value, the court noted that the owner was able to sell the hotel. There was no physical taking and, applying the *Penn Central* factors, the court reasoned that the owner had no reasonable investment-backed expectation of being able to use the additional square footage in the hotel and that the county did not act to harm property interests, but simply declined to grant variances for the noncompliant building.

(3) ***Iowa.*** **City Is Not Responsible for Damages Based on Rezoning, Which Allowed Construction of Ready-Mixed Concrete Plant, Resulting in Harm to Neighboring Owner.** *Harms v. City of Sibley,* 702 N.W.2d 91 (Iowa 2005).

Facts: In 2000, after being denied a building permit, the tenant applied for rezoning of land on the south side of County Road A22 from the light industrial to the heavy industrial classification, to permit construction of a ready mixed concrete plant. The planning and zoning commission recommended approval. The Harms live on the other side of A-22 and filed a protest. Because "supermajority" requirements applied, the city council's vote of three to two in favor of approval amounted to denial. The tenant filed a new application, identifying the property to he rezoned as 201 feet from the center of A-22 so that the Harms were not able to trigger the supermajority requirement. The city council approved the application. The Harms filed suit, alleging that the rezoning constituted a taking and established a nuisance. The owner obtained building permits for the plant and concrete storage silo. The trial court denied a temporary restraining order. At trial there was extensive testimony about noise, dust, traffic, and bright lights affecting the property on which the Harms have lived for 37 years.

Holding: The trial court upheld the rezoning, but found that the plant did constitute a nuisance

and did amount to a taking. The court awarded $43,750 for loss of value against the city and $30,000 in special damages against the owner and the tenant. The court dismissed a claim by the owner and tenant for indemnification by the city. The appeals court affirmed. but held that there was no taking. The highest court affirmed. Rejecting the inverse condemnation claim, the court applied the "consequential damages title." The rezoning ordinance was valid and it was the actions of the owner and the tenant that determined the impact on the harms property, not the direct actions of the city. The court noted that the Harms are not without a remedy and that both the owner and the tenant are liable for nuisance.

(4) ***Idaho.*** **Enforcement of an Order Prohibiting Erection of a Fence along the Borders of a Lakefront Lot is not a Taking.** *City of Coeur D'Alene v. Simpson,* Docket No. 29299, 2005 Opinion No. 18 (2005 Ida. LEXIS 24)

Fed up with people entering and mistreating their waterfront lot, couple erect fence, only to be informed by city of ordinances forbidding fences within forty feet of shoreline. The court dismisses all claims for an unconstitutional regulatory taking and for equal protection based on a "class-of-one" theory.

(5) ***Massachusetts.*** **Zoning of Beach Property, Prohibiting Residential Development, Does Not Constitute a Taking.** *Gove v. Zoning Board of Appeals of Chatham,* 831 N.E.2d 865 (Mass. 2005).

Facts: The family acquired land in the Little Beach area in 1926. The land is part of a narrow, low-lying peninsula at the southeast corner of Cape Cod. The family eventually developed a motel, marina, rental cottages, and single-family homes. Several lots were sold for development. Gove inherited two cottages, several lots, and a fractional interest in other lots in 1975. Because of a breach that has recently occurred in a barrier island, the Little Beach area is now open to the ocean and vulnerable to storms. There has been significant erosion and virtually no development since 1980. In 1985, the town created a conservancy district, including all the land in the 100-year floodplain, to reduce risks to people and property and to protect the water supply. The ordinance bars construction of new residential buildings, but allows specified nonresidential uses, such as fishing, harvesting, outdoor recreation, and boat launches. Lot 93 is within the conservancy district. Having previously attempted to sell Lot 93, in 1998 Gove contracted to sell it for $192,000, contingent on the buyers' ability to obtain permits for a house and septic system. After permits were denied, Gove and the buyers filed suit against the town. The trial and appeals courts ruled in favor of the town.

Holding: The highest court affirmed, first rejecting an argument that the zoning was invalid because it failed to substantially advance a legitimate state interest. The court relied on the Supreme Court's recent decision in *Lingle v. Chevron U.S.A.,* Inc., 125 S.Ct. 2074 (2005), and stated that a

zoning ordinance is valid unless its application "bears no reasonable relation" to a legitimate governmental purpose. Rejecting an inverse condemnation claim, the court noted that there was no physical invasion and no "total" taking because the zoning allows for income-producing uses. The court applied the *Penn Central* factors to the regulatory taking claim and held that the zoning did not have a substantial economic impact on the "highly marginal" property, which has remained undeveloped for decades "for good reason." Gove had no reasonable investment-backed expectation of selling or using the property for residential development. The character of the governmental action, which was intended to protect people and property, was reasonable.

(6) ***Michigan.*** **Rezoning of Former Elks Lodge Property to Residential Classification Was Not Arbitrary and Did Not Constitute a Taking.** *Dorman v. Township of Clinton, 714 N.W.2d 350* (Mich. Ct. App. 2006).

Facts: Dorman, a licensed mortgage lender and broker, bought property in 2001 for $273,000 after seeing it once. The only access is by residential roads; the closest thoroughfare is half a mile away. There is a single-family subdivision on one side, a single home on another; two sides contain multifamily housing. The property had been zoned for multifamily residential, but was rezoned to the light industrial designation in 1993, with a special exception for construction of a 7,000-square-foot Elks Club. Dorman planned a public storage facility and began renovating the interior of the lodge. The planning commission recommended rezoning and the township returned the property to the multifamily residential designation.

Holding: The trial and appeals courts rejected Dorman's takings claim. A municipality is not required to zone for the most profitable use and Dorman was not deprived of all economically viable use. The court noted evidence that the property could be divided into eight lots, which could be sold at $45,000 each and Dorman's "minimal research" before buying the property, and concluded that the rezoning did not interfere with reasonable investment-backed expectations. The rezoning was not arbitrary, but was related to the legitimate interest in protecting the residential nature of the area.

(7) ***Minnesota.*** **City's Decision to Deny Amendment to Comprehensive Plan was Rational and Record does not Support an Unconstitutional Taking.** *Wensmann Realty, Inc v. City of Eagan,* A05-1074 (Ct. App. MN)

(8) ***Mississippi.*** **City's Decision to Rezone Subject Property Cannot Possibly Amount to a Taking.** *Tippit v. City of Hernado,* 909 So.2d 1190 (MS 2005)

Holding: Where, after the rezoning of the subject property from residential to office uses, the neighbors sued the city, claiming that the rezoning took their property, the court ruled: "The record is devoid of evidence demonstrating that the [Plaintiffs] have been deprived of the use and

enjoyment of their property or denied any economic benefits derived from their land. As a consequence, in the absence of such evidence, the City's decision to rezone the subject property cannot possibly amount to a taking."

(9) ***New Jersey.*** **Enactment of New Jersey Highlands Act Did Not Constitute a Taking.** *OFP, LLC v. State,* No. MRS-L-000160-05, 2005 WL 3058157 (N.J. 2005).

Facts: The Highlands Act, N.J.S. 13:20-1, enacted in August 2004, is intended to provide uniform protection against sprawl for an 800,000-acre area in northern New Jersey that provides drinking water for half of the state's population. The Act establishes an area for development and a preservation area. The owner of 93 acres in Morris County obtained subdivision approval in 1999 to create 26 lots and spent the next few years litigating conditions and obtaining other required approvals. The owner applied for a potable water supply permit in November 2003, but the application was returned be the Department of Environmental Protection (DEP) on March 22, 2004 for failure to include the signature of the municipal authority. The application was resubmitted within days, but the permit was not approved until May 2004.The Act contains an exemption for developments that had obtained certain approvals by March 29, 2004. Failing to qualify for the exemption, the project was subject to the Act. The owner sued, claiming that the adoption of the Act constituted a taking.

Holding: The court rejected the argument, finding that the strong public interest in the law outweighed the burden on individual property rights. The Act allows for exemptions, hardship waivers, transfer of development rights, and voluntary acquisitions to mitigate the severity of its restrictions. The retroactive application of the Act meets "rational basis" standards and did not violate equal protection or due process requirements. The owner argued that even without a constitutional violation, the retroactive application would result in "manifest injustice," but the court again noted the important public interests as weighed against the owner's reliance on municipal approvals. The court further reasoned that it has no way of knowing the impact of the Act because the owner has not applied for any of the options, such as transfer of development rights, and that the DEP has not ruled on a hardship waiver.

(10) ***Utah.*** **Summary Judgment Is Inappropriate Where Additional Facts Are Necessary to Determine the Extent to Which Slope Ordinance Interfered with Reasonable Investment-Backed Expectations.** *Arnell v. Salt Lake County Board of Adjustment, 112 P.3d 1214* (Utah Ct. App. 2005).

Facts: In 1999, Arnell purchased Lot 13 in the Forest Hills Subdivision from Madsen for $95,000 by a warranty deed. His intention was to build a single-family house on the property. When he sought a building permit, he learned about the county's Slope Ordinance, which precludes

development on grades that exceed 30 percent. Lot 13 contains an average slope grade that exceeds 40 percent. Neither Arnell nor Madsen knew about the county's Slope Ordinance at the time of purchase. Arnell applied for and was denied a variance. Then he filed a takings relief petition with the county commission pursuant to the county code. The matter was referred to a hearing officer who, despite making findings in favor of Arnell, ruled he lacked standing since he acquired Lot 13 after the Slope Ordinance was enacted. The county commission delayed action on the recommendation to give Arnell time to provide site-specific data proving the feasibility of building a residence on Lot 13. Arnell never provided the additional information requested by the county because he said it was too costly and it would not assure that the county would allow him to build. After the hearing officer concluded that Arnell lacked standing, the U.S. Supreme Court decided *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001), which held, in part, that a takings claim "is not barred by the mere fact that title was acquired after the effective date of the state-imposed restriction." The hearing officer informed the county commission that his earlier ruling was overruled. Nevertheless, the county commission voted 5-3 to deny Arnell a building permit and his request for compensation. Arnell filed an inverse condemnation claim under the U.S. and Utah Constitutions. He also sought rescission of the purchase contract with Madsen.

Holding: The trial court granted the county's and Madsen's motions for summary judgment against Arnell, and he appealed. The court of appeals reversed in part, and held that Arnell's takings claim was ripe and that the trial court erred in granting summary judgment on that issue because additional facts were needed to determine the extent to which the slope ordinance has interfered with Arnell's reasonable investment-backed expectations. The court affirmed the summary judgment granted in favor of Madsen and held that Arnell was not entitled to rescission of the purchase contract because there wasn't a mutual mistake of fact between the parties since Arnell's failure to obtain a building permit was a future event. Arnell also argued that he was entitled to rescission of the contract because the slope ordinance is an encumbrance which violates the covenant against encumbrances in the warranty deed. The court disagreed because purchasers are charged with taking notice of public statutes restricting the use of the property.

(11) ***West Virginia.*** **Requirement for Property Owners Outside City Limits to Discontinue Use of Septic System and to Hook Up to City's Sewer did not Constitute a Taking.** *Buda v. Town of Masontown,* 617 S.E.2d 831 (WV 2005)

Holding: The West Virginia Court of Appeals held that where owners of property located outside city limits were required to discontinue use of their septic system and to hook up to the city's sewer, that did not constitute a taking of their property. It was only an exercise of the police power. Also, the owners were not entitled to notice an opportunity to be heard before the town approved construction of its new sewer system.

(f) **Total Parcel Rule:**

(1) ***Oregon.*** **State Rule Preventing Logging of 9 of Owner's 40 Acres to Protect Eagle Nest Does Not Result in a Taking.** *Coast Range Conifers, LLC v. State of Oregon,* 117 P.3d 990 (Or. 2005).

Facts: In 1996, the logging company acquired 40 acres in the Coast Range by exchange with the U.S. Forest Service. Two years later, government employees saw bald eagles and their nest on the land. Eagles are listed as a threatened species by the Endangered Species Act, 16 U.S.C. § 1533, so state regulations required the company to file a plan with the state forester before logging.

The state forester approved a plan with a buffer of 400 feet (about nine acres) around the nest. By September 1998, the company had logged 31 acres. After the nesting season, the state forester denied a plan to log the remaining nine acres because the eagles might return to the site. The board of forestry affirmed. The company sued. The trial court entered summary judgment in favor of the state. The appeals court reversed, holding that the state denied the company all economic use of the final nine acres.

Holding: The state's highest court reversed and held the "whole parcel" rule applied. The court rejected an argument that the state constitution prohibition on takings (Arr. 1, § 18) applied only to physical takings, but also rejected an argument that physical and regulatory takings should be treated alike. In cases involving regulator raking, a court should consider ability to use the whole parcel to determine whether the property retains any economically viable use. In this case, the owner retained the ability to log three-quarters of the property. The court analogized to a setback requirement.

Rejecting claims under the U.S. Constitution, the court noted that, under the U.S. Supreme Court's recent decision in *Lingle v. Chevron* (125 S.Ct. 2074), whether a regulation substantially advances a legitimate governmental interest is not a valid means of determining whether a regulatory taking occurred. The court also rejected a claim under Lucas v. South *Carolina Coastal Council,* 505 LJ.S. 1003 (1992), that the regulation deprived the property of all economic value. The regulation did not result in physical occupation of the land. Rules that prevent alteration of a natural condition differ from rules that authorize entry on property. Finally, the court held that whether the regulation is a taking under the balancing test set out in *Penn Central Transportation v. New York City,* 438 U.S. 104 (1978), is a question of law, which need not be submitted to a jury. The trial court properly weighed the company's investment-backed expectations against the state's interests.

(2) ***California.*** **County's Conditioning Well Permit on Owner's Limiting Extraction to no more than 12,000 acre/feet a Year Wasn't a Compensable Regulatory Taking.** *Allegretti & Company v. County of Imperial,* ___Cal.Rptr.___ (CA 2006)

Facts: Imperial County issued a conditional use permit allowing Allegretti to re-drill an inactive well on a 2,400-acre parcel subject to the condition that total groundwater extraction on the property be limited to 12,000 acre-feet per year. Allegretti claimed the condition constituted both a physical and regulatory taking of his property.

Holding: The Fourth District Court of Appeal ruled that the county's actions did not effect a physical taking because the actions lacked the hallmarks of an actual physical occupation or invasion of the land, in that the county did not appropriate, impound or divert any water.

The court also found no regulatory taking because the permit condition did not deny Allegretti all economically viable use of his property, nor did it meet the *Penn Central* takings analysis: the condition did not unreasonably impair the value or use of the property or invade or appropriate any of Allegretti's property; and there was no interference with reasonable investment-backed expectations, as Allegretti's water right was already restricted by the California Constitution to the amounts needed for the landowner's reasonable beneficial use. The court did not address other takings theories, such as whether the permit condition lacked the appropriate nexus with the use permit itself. Also, the court's decision was based in part on the trial court's finding that Allegretti did not show any economic impact from the 12,000 acrefoot restriction. Accordingly, the long-term import of the case remains uncertain.

C. LAND USE EXACTIONS

1. FEDERAL COURT DECISION

School Impact Fees Do Not Constitute a Taking Even Though They Are Spent on Schools Throughout the District Rather Than on School Directly Impacted by Development. *Herron v. Mayor and City Council of Annapolis,* 388 F. Supp. 2d 565 (N.D. Md. 2005).

Facts: In 1987, the county passed an ordinance requiring new development to pay impact fees for schools. If the funds are not expended within six years, the current owner may be entitled to a refund. In 1999, the city passed an ordinance to collect school impact fees. The following year, the county and city entered into an agreement under which the city was to collect school impact fees for the county. Herron owns property for which an impact fee was paid by a developer in 2003. Herron filed suit claiming an unconstitutional "taking."

Holding: The court dismissed the claim. Herron lacked standing because she never paid the fee, although she may be able to seek a refund if the fees paid by the developer are not used by 2009. She did not establish that the fee was added to the price she paid for her property. Even if she had paid the fee, there would be no taking. Herron argued that fees paid city residents were used to fund

improvements throughout the district and so there was no "rational nexus" between the fee and the development. The court held that the system of collecting and spending impact fees meets the "rough proportionality" test.

2. STATE COURT DECISIONS

(a). ***California.*** **City's Reduction in Building Inspection and Safety Fees Has Not Been Shown to Be Arbitrary.** *Jenkins v. City of Corona, 44 Cal. Rptr. 3d 366,* (Cal. Ct. App. 2006).

(b) ***Maine.*** **Subdividers May Not Challenge Imposition of Recreational Impact Fee After 30-Day Appeals Deadline or Through Action to Declare Impact Fee Ordinance Unconstitutional.** *Sold, Inc. v. Town of Gorham,* 868 A.2d 172 (Me. 2005).

Facts: In 1999, the Town of Gorham adopted an impact fee ordinance requiring subdivision developers to reserve a percentage of the subdivision site for active recreation use or pay the town a $500 impact fee for the construction of new or expanded recreation areas. Contrary to the state impact fee statute, the local ordinance lacked a schedule for expenditure of collected fees and a procedure by which unexpended fees would be refunded. In 2002, developers who had received subdivision approvals subject to the impact fee payment condition sued the town, alleging the fees paid should be returned because the ordinance violated the state impact fee statute. They also sought a declaratory judgment that the ordinance was unconstitutional.

Holding: On the developers' motion for summary judgment, the trial court allowed the statutory and constitutional issues to proceed, rejecting the town's argument that the action was time-barred because state civil procedure law requires challenges to municipal administrative actions—here the fee payment approval condition—to be brought within 30 days of the action. It also held that the fee ordinance was unconstitutional because it violated the state impact fee statute. While the litigation proceeded, the town repealed the impact fee provision and enacted a recreation open space impact fee ordinance that met statutory requirements. The state's highest court vacated and remanded the decision, holding that the developers were required to file challenges to the impact fee approval condition within 30 days of its imposition. Having failed to do so, the requirements became final and could not be challenged. It also held that the developers could not sidestep this procedural appeals requirement through a declaratory judgment action seeking a ruling that the town lacked the lawful statutory or constitutional authority to impose the impact fee approval condition. The court explained that the declaratory judgment law permits anticipatory challenges to resolve a planned action before the action proceeds and is applied to the detriment of the plaintiff. In this case, the developers attempted to bring an after-the-fact challenge to the town's application of the impact fee ordinance, after the time to appeal the administrative decision had expired.

(c) ***North Carolina.*** **Assessment of Owners of Barrier Island Property**

for Inlet Stabilization Project Was Valid. *Parker v. New Hanover County,* 619 S.E.2d 868 (N.C. Ct. App. 2005).

Facts: Mason Inlet, which connects the Atlantic Ocean to the Intracoastal Waterway on the south side of Figure Eight Island, was migrating, resulting in decreased navigability, erosion of Wrightsville Beach Island, loss of a public beach and parking, and blockage of Mason Creek with a sandbar. An association representing 1,060 homeowners on the islands met with county commissioners to discuss its plan to stabilize the inlet by excavating a new channel, indicating that the project would be privately financed. After listening to an environmental coastal engineer and making findings about the damage, the commissioners adopted a resolution supporting a plan to stabilize the inlet. The association later requested public financing by means of a special assessment and reported that it had surveyed owners and determined that the majority favored a special assessment. The association proposed assessing the estimated cost of $4,221,387 by using a formula based on property values and distance from the inlet. After holding a hearing to consider assessment allocations, the commissioners adopted an assessment resolution. After the project was completed, the commissioners held another hearing to confirm the final assessment roll, which assessed plaintiff's property $4,414. The plaintiff challenged the assessment.

Holding: The trial court entered summary judgment for the county. The appeals court affirmed. The assessment did not violate the state constitution's requirement that the power of taxation be used for public purposes only. Counties play a key role in preserving beaches, protecting property and water quality, and ensuring navigability. The project had direct benefits for the public. Rejecting an argument that the county did not comply with N.C. GEN. STATS. §§153A-185, -186, the court stated that the statute authorizes a special assessment for beach erosion control or flood and hurricane protection, and for watershed improvement. The statute anticipates using different methods for assessing different geographic areas involved in a project and the use of a combination of methods. The commissioners did not improperly delegate responsibility for determination of the assessment method to the association, but held hearings and met with others before finalizing the plan.

(d) ***Oregon.*** **Absence of Findings Concerning "Rough Proportionality" in Requiring Dedication of Land.** *Hammer v. City of Eugene,* 121 P.3d 693 (Or. Ct. App. 2005).

Facts: In 1996**,** the owner's application to partition land was approved, subject to conditions, including those that required conveyance of title or casements to portions of the property. The owner complied, without objection, and final approval was granted in 1998. Two years later the owner sued, as part of a class action, seeking compensation for the property conveyed.

Holding: The trial court entered summary judgment, holding that the city was liable because it had not made *"Dolan* findings" demonstrating "rough proportionality" between the impact of the proposed development and the exaction. The appeals court reversed, holding that the absence of

findings does not require a determination of liability. The court noted that the takings clause, under which *Dolan* was decided, does not include procedural requirements. Procedural requirements are imposed by the due process clause. The administrative body involved in *Dolan* happened to have made findings concerning rough proportionality and the court addressed those findings. The presence or absence of findings does not, in itself, determine whether justice requires compensation.

(e) ***Utah.* As a Matter of First Impression, *Nollan/Dolan* "Rough Proportionality" Test Applies to Non-discretionary Application of Ordinance Requiring Dedication of Land for Future Road Widening.** *B.A.M. Development, LLC v. Salt Lake County,* P.3d 1161 (Utah 2006).

Facts: B.A.M. Development received preliminary approval from the Salt Lake County Planning and Zoning Commission to develop a residential subdivision on 15 acres. As a condition of approval, B.A.M. agreed to set aside a 40-foot-wide strip for future road widening. A year later, after consultation with the state transportation department, the county concluded that the eventual road widening would be 53 feet. The county revised the conditions of approval to require B.A.M. to dedicate an additional 13 feet of the property to the county. B.A.M. objected, claiming the additional 13 feet did not satisfy the "rough proportionality" test and appealed to the Salt Lake County Board of Commissioners. The board affirmed the decision but conducted no hearing, took no evidence, and issued no legal or factual findings.

Holding: B.A.M. appealed to the district court, which heard evidence and affirmed the board's decision. The court of appeals concluded that the district court erred when it took evidence and remanded with instructions that the appropriate county agency grant B.A.M. an administrative hearing on its taking claim and apply the "rough proportionality" test. Meanwhile, the Utah Legislature passed UTAH CODE SECTION 10-9A-801 (SUPP. 2005) which allows the district court to call witnesses and take evidence if there is no record made below in a land use case. Although this statute took effect after B.A.M. obtained review by the state supreme court, it was appropriate to apply SECTION 10-9A-801 retroactively to the facts of this case because it did not affect any substantive rights. The state supreme court concluded that the district court did not exceed its discretion by taking evidence on B.A.M.'s appeal. In 2005, the Utah Legislature also passed UTAH CODE ANN. SECTION 17-27A-507, effective in May 2005, adopting the "rough proportionality" test when a county imposes a development exaction on a land use application. Since SECTION 17-27A-507 implicates substantive rights, it could not have retroactive effect but the court concluded it was "pivotal" in its analysis. Following a discussion of the evolution of regulatory takings jurisprudence, and noting the "unruly judicial chorus" on the issue of whether the "rough proportionality" test applies to legislative, as opposed to adjudicative, decisions, the court concluded that the "rough proportionality" test governs the county's exaction of B.A.M.'s property. Although the legislature's recent enactment cannot be applied retroactively, since this was an issue of first impression upon which the court had not issued an opinion, it was proper "to align the law applicable to this case to that later embraced by the legislature." The state supreme court remanded to the district court with instructions to conduct a "rough proportionality" review.

(f) ***Virginia.*** **Connection Fees.** *Eagle Harbor, LLC v. Isle of Wight County, 628 S.E.2d 298* (Va. 2006).

Facts: County that has three service districts issued general obligation bonds for water and sewer projects and from the bond proceeds allocated all the sewer work to two of the districts. Finding that it needs additional revenue to service the bonds, county significantly increases connection fees and ends the credit that developers get for constructing their own utility improvements for gifting to the county. Developers in the district that didn't receive sewer improvements from the bond proceeds claim that the resulting connection fees are not "fair and reasonable," at least for that portion attributable to the sewer system.

Holding: Though the developers incurred considerable expense in providing sewer lines only to have to pay the county $7,400,000 in sewer connection fees, their pleadings, by incorporating county's report that mentions the need not to use general fund moneys to supplement the public utilities budget, indicate that the fees were fair.

(g) ***Washington.*** **Property Owner Who Failed to Challenge Assessment Made by Local Improvement District in Statutory Time Period Is Barred from Making Collateral Attack Based on Takings and Substantive Due Process Claims.** *Tiffany Family Trust Corp. v. City of Kent,* 119 P.3d 325 (Wash. 2005).

Facts: In 1986, the city of Kent issued a conditional use permit with a mitigation agreement in which the owner agreed to pay a proportional amount of nearby road improvements. Payment for the actual improvement became due when the city formed a local improvement district (LID). The agreed-upon special benefit for the increased value of the property was estimated to be not less than $23,800. In 1998, the LID was formed and the city assessed the property owner $364,939 based on the fair market value of the property before and after the improvements. After several mailings, which the owner claimed he never received, the city notified the owner of the 1999 assessment by certified mail, which was returned unclaimed. Upon allegedly learning of the LID assessment in a 1999 title search, the property owner sued the city in 2000, challenging the assessment amount, which he claimed exceeded any special benefit. He asked the trial court to void the assessment and sought damages and compensation for an unconstitutional taking, for substantive and procedural due process violations, and for § 1983 civil rights violations. The trial court dismissed the suit on the city's motion for summary judgment because the statutory period for attacking the assessments had passed.

Holding: The Washington Supreme Court affirmed. The court initially explained that the constitutionality of the amount assessed to the property owner depended on whether it was a true, LID assessment or, as the owner alleged, a mitigation fee (which could have made the fee subject to the constitutional standards under the state environmental policy act). While acknowledging the original 1986 mitigation agreement, the court concluded the ultimate result, 12 ycars later, was an

LID assessment because the city followed the statutory formula for forming the LID and making the assessments. Consequently, the property owner's argument should have been made through the statutory procedures and within the statutory time period for challenging the LID assessment, which the property owner failed to do. Ruling that the assessment was therefore conclusively correct because the statutory time period had passed, the court concluded the owner could not sidestep the statutory bar by collaterally attacking the assessment in the guise of constitutional takings and due process claims. It also dismissed the § 1983 claim, finding that the property owner made no such argument before the trial court in any summary judgment motions.

XVI. TELECOMMUNICATIONS

A. FEDERAL COURT DECISIONS

1. **Prohibiting Service**: **County's Ordinance Imposing Restrictions on Wireless Telecommunications Towers Violates Telecommunications Act.** *Sprint Telephony PCS, LP v. County of San Diego,* 377 F. Supp. 2d 886 (S.D. Cal. 2005).

Holding: With all the recent attention focused on the possible rewrite of the Nation's telecommunications law, a recent federal court decision invalidating a cellular tower zoning ordinance may have gone unnoticed. In *Sprint Telephony PCS,* the court held that the county's zoning ordinance relating to wireless telecommunications facilities violated the federal Telecommunications Act of 1996. Sprint challenged the ordinance pursuant to 47 U.S.C. § 253(a), which bars all state and local regulations that "prohibit or have the effect of prohibiting" the ability of an entity to provide interstate or intrastate telecommunications service. The court found that the ordinance's permit regulations, taken together, had the effect of prohibiting the provision of telecommunications services. The court was especially concerned with two aspects of the ordinance. One provision would have permitted other carriers to co-locate on Sprint's facilities, even thought the ordinance was unclear as to what the terms and conditions of the co-location would be. The other provision provided that the county's Director of the Department of Planning and Land Use could require the applicant to provide "any additional information" on the project. The court found this provision to be overbroad, with no limit on what and how much additional information the Director could require from the applicant. One bright spot in the opinion, however, is that the court found that section 253 (a) did not provide a private right enforceable through 42 U.S.C. § 1983. The court's holding echoed that of the recent case of City *of Rancho Palos Verdes v. Abrams,* 125 S. Ct. 1453 (2005), where the U.S. Supreme Court held that a plaintiff could not enforce limitations on local zoning authority set forth in section 332(c)(7) through section 1983.

2. **Substantial Evidence**

(a) **Denial of Permit for 120-Foot Tower in Area with 60-Foot Height Limit Did Not Violate Telecommunications Act.** *Michael Linet, Inc. v. Village of Wellington, Fla.,* 408 F.3d 757 (11th Cir. 2005).

Facts: The company identified the Village's golf and country club as an ideal site for an antenna to provide cell phone service. Because the proposed 120-foot tower would exceed the 60-foot height limit, the company proposed concealment within a flagpole. Residents objected, stating concerns about property values, proximity to a school, and non-commercial air traffic. The company presented evidence that a similar pole in another community had not adversely affected values and that a 150-foot pole had been allowed at another site in the Village. The application was denied. The company sued under the Telecommunications Act of 1996, 47 U.S.C. § 332 and 42 U.S.C. § 1983.

Holding: The federal trial and appeals courts upheld the denial. The court first noted that the Supreme Court had held, while the case was pending, that violation of the Telecommunications Act does not give rise to a § 1983 claim (*City of Rancho Palos Verde v. Abrams*, 125 S. Ct. 1453). The denial was based on substantial evidence and did not violate the Telecommunications Act; the applicant did not demonstrate that an alternate location was not feasible. The Act prohibits discrimination between providers of functionally equivalent providers only if the discrimination is unreasonable and the company did not show that allowing another company to build a 150-foot tower and then denying its application was unreasonable.

(b) **Denial Unsupported by Substantial Evidence; Law Doesn't Allow Municipality to Deny Permit Application on Basis of Aesthetics Alone.** *Sprint PCS Assets, LLC v. City of La Canada Flintridge,* No. 05-55014, 2006 WL 1457785 (9th Cir. 2006).

Facts: The Ninth Circuit amended its previous order in this matter, reported at 435 F.3d 933 (9th Cir. 2006), in its entirety. In this case, Sprint, a wireless telecommunications company, sought to install two wireless telecommunications facilities. After the city denied two of Sprint's five applications, Sprint brought two actions against the City—one for each permit application denied—alleging violations of the Telecommunications Act of 1996 (TCA).

Holding: The district court concluded that a city ordinance provided "substantial evidence" supporting the permit denial. In a separate, concurrently-filed ruling, the Ninth Circuit addressed, and agreed with, Sprint's argument that state law preempted provisions of the city ordinance. *See Sprint v. City of La Cañada Flintridge*, No. 05-55014 (9th Cir. May 23, 2006). The only issue in this opinion was whether portions of an ordinance preempted by state law could constitute substantial evidence supporting a permit denial under federal law. The Ninth Circuit held that because the city had overstepped its regulatory authority under state law, its wireless ordinance was not viable; accordingly, it could not constitute evidence in support of the city's permit denials. The district court's conclusion that substantial evidence supported the permit denials was, as a result, reversed.

(c) **Substantial Evidence Supported Denial of Application for Special Permit to Build 150-Foot Communications Tower on Golf Course.** *Omnipoint Communications, Inc. v. City of White Plains, 430 F.3d 529* (2d. Cir. 2005).

Facts: The city denied a permit for a 150-foot cellular communications tower to be disguised as a tree on a golf course. The golf course then entered into an agreement that it would not allow construction of cellular towers in exchange for neighbors' acquiescence in construction of a maintenance facility. Holding that the denial was not supported by substantial evidence and violated the Federal Telecommunications Act, 47 U.S.C. § 332, the trial court awarded $1,327,665 in damages plus attorneys fees.

Holding: The appeals court reversed. Aesthetics is a permissible basis for permit denial and the tower would be half again as tall as any tree in the area, so the board could reasonably conclude that the tower would be widely visible. The court noted defects in the company's study, showing that the tower would not be visible, and that the board was not bound to accept the company's expert testimony. The long-standing dispute between the golf course and area residents did not render the objections of residents unsubstantiated. In addition, the company failed to demonstrate "public necessity" for the tower under New York law, which required proof of a gap in service and that the proposed site was more feasible than other options. The court noted that other companies serve the area with towers at other locations.

B. STATE COURT DECISIONS

1. ***New Hampshire.*** **Not Sufficient Reason to Deny Property Owner a Variance So That It Can Lease Property for Construction of Telecommunications Tower That Town Itself to Lease Its Own Property for the Purpose.** *Chester Rod and Gun Club, Inc. v. Town of Chester,* 883 A.2d 1034 (N.H. 2005).

2. ***New Mexico.*** **General Purpose Language in Zoning Code Fails to Provide Adequate Guidance in Applying Standard of Reasonableness.** *Smith v. Bernalillo County,* 110 P.3d 496 (N.M. 2005).

Facts: Gerald Smith is a federally licensed amateur radio operator who moved to New Mexico in 1998 to find property on which to build an amateur radio antenna. After speaking with zoning officials in Bernalillo County, Smith was assured that amateur radio towers were permitted on the five-acre parcel in the east mountain area zoned A-2, and that a regulation specifically exempted such towers from height restrictions. Smith also reviewed amendments to the zoning ordinance which went into effect in June 1999 and found that amateur radio antennas were exempt from height regulations. He obtained a building permit to construct two 130-foot towers with 10-foot masts, which would support multiple antennas and be secured by guy wires. After neighbors complained about the towers, the county zoning officials changed their interpretation and concluded that the towers did not comply with the zoning ordinance. Prior to Smith's tower, the county had treated amateur radio towers as customarily incidental to residential activities in the A-2 zone. Now the county argued that it could bar an otherwise permissive use that had been expressly exempted from height regulation on the ground that the height was "unreasonable" as a customarily incidental use in a rural residential zone.

Holding: The district court entered judgment in favor of the county and the appeals court affirmed. The state supreme court granted certiorari and reversed. The general purpose language of the A-2 zoning does not provide county officials with adequate guidance in applying the standard of reasonableness to determine whether a proposed use should be considered customarily incidental. The court said, "Ad hoc, standard-less regulation that depends on no more than a zoning official's

discretion would seriously erode basic freedoms that inure to every property owner."

3. ***New Mexico.*** **County Commission's Decision Granting Height Variance for a 198-Foot Telecommunications Tower, When Code Limits Height to 24 Feet, Was Supported by Substantial Evidence.** *Paule v. Santa Fe County Board of County Commissioners,* 117 P.3d 240 (N.M. 2005).

Facts: SkyHigh Communications, LLC wanted to build a 198-foot telecommunications facility in Santa Fe County, New Mexico, and submitted an application for a height variance. Although a telecommunications tower is a permitted use anywhere in the county, the county development code limits structures to a height of 24 feet. The public hearing was held on December 12, 2000. One commissioner recused himself because he is related to the applicant. Following testimony and presentation of the evidence, two commissioners voted in favor, one commissioner voted in opposition, and the chairperson did not vote. On December 28, the commission issued a written order approving the variance, subject to conditions. The order included several factual findings.

Neighbors appealed the commission's decision to district court on January 26, 2001. The district court reversed, concluding that the commission had acted arbitrarily and capriciously, and the vote was not taken in accordance with the commission's procedural rules. The county and applicant filed a petition for a writ of certiorari with the court of appeals. The court granted the petition, but following briefing, quashed the petition without explanation.

Holding: The state supreme court granted the county's petition for writ of certiorari and reversed. The court concluded that the case implicates the "deferential standard of review normally afforded to decisions of New Mexico administrative bodies" which is an "issue of substantial public interest that should be determined by the supreme court."

First, the county argued that the neighbors' appeal was untimely because it was filed more than 30 days following the date of the hearing at which the vote was taken on December 12, 2000. The court found this argument unpersuasive because Section 39-3-1.1 NMSA 1978 requires the "notice of appeal within thirty days of the date of filing of the final decision." In this case, the written order was issued on December 28 and the notice of appeal was filed less than 30 days later. The supreme court declined to review the court of appeals' decision to quash the writ of certiorari because that decision is within the discretion of the lower court.

The supreme court held that the commission properly followed its procedural rules. Although new rules, which would have required the chairperson to vote, were considered and voted upon at the same meeting as the variance application, the commission did not consider the new rules to be effective immediately and the court deferred to the commission's determination regarding the rules. The commission's authority for granting a variance was limited by the terms of the development code which states that a variance may be granted "where it can be shown that strict compliance with

the requirements of the code would result in extraordinary hardship to the applicant because of unusual topography or other such non-self-inflicted conditions or that these conditions would result in inhibiting the achievement of the purposes of the code." The county code also requires that any variation or modifications be no more than a minimum casing of the code requirements.

Examining the entire record, the supreme court concluded that the district court and the neighbors were mistaken in their belief that the telecommunications tower was prohibited by the code, when the code allows such towers anywhere in the county. The applicant was not seeking a use variance but an area or dimensional variance. Among other findings, the commission had concluded that "it would be more appropriate to erect a single, larger tower than multiple, small towers" and had also concluded that denial would "constitute a

prohibition of provision of personal wireless services" under the Telecommunications Act. The state supreme court held there was substantial evidence to support the commission's decision.

4. ***Oregon.*** **Telecommunications Act Preempts In-Kind Compensation Provisions and Most-Favored-Rate Provisions in Franchise Agreements but Not City's Sales of Telecommunication Services to Public Schools or Other Governments.** *Time Warner Telecom of Oregon, LLC v. City of Portland,* Nos. CV 04-1393-PA, CV 05-1386-PA, 2006 WL 581135 (D. Or. 2006).

Facts: Time Warner and Qwest sold telecommunications services in Oregon, and both had franchise agreements with the city that permitted them to install and operate telecommunications systems in city streets. A provision in such agreements was that the franchisee provide the city with "in kind" underground duct upon request. The city used such "in kind" contributions to operate a Integrated Regional Network Enterprise (IRNE), which provided the city with voice and Ethernet high-speed data transmission services. IRNE also sold Ethernet high-speed data transmission services to other governments and public schools. Time Warner and Qwest sued, alleging that their franchise agreements violated the Telecommunications Act of 1996 (TCA) and that the city illegally competed with them by providing telecommunications services to other entities.

Holding: On motions for summary judgment, the court held that the TCA, § 253, preempted the in-kind compensation provisions in the franchise agreement and the most-favored-rate provisions in both franchise agreements, but not the other provisions of the franchise agreements, or the city's sales of telecommunications services to public schools and other governments.

5. ***Washington.*** **Telecommunications Tower Must Meet General Requirement That Special Uses Be Appropriate for Location and Specific Standard for Wireless Facilities.** *Cingular Wireless, LLC v.*

Thurston County, 129 P.3d 300 (Wash. Ct. App. 2006).

Facts: Because of a coverage gap in its wireless communications service, the company sought a special use permit to build a 150-foot monopole on a site in a rural residential district in the Boston Harbor area. The area has scenic vistas of farmland and Mt. Rainier. The site is near a wildlife refuge and is part of a 3.25-acre parcel containing a fire station and picnic and play areas used by the community as a park. The planning department recommended approval subject to conditions. Residents appealed under the state environmental policy act *(*RCW ch. 43.21C), raising concerns about aesthetics, radio frequency emissions, and environmental impact. The hearing examiner found that the proposal met specific code standards for wireless communications facilities relating to height, setbacks, co-location with other providers, separation, siting, screening, access, camouflaging, security, noise, parking, signals and storage, but did not meet comprehensive plan general standards for special uses because it was not appropriate for the proposed location. The hearing examiner disregarded concerns about health impacts of emissions, as required by the Telecommunications Act (TCA), 47 U.S.C. § 332 and noted that the proposal met guidelines issued by the U.S. Fish and Wildlife Service and that the state Department of Fish and Wildlife found that it would have no impact. The county' board affirmed, stating that the proposed use would be a "looming presence" that would detract from the aesthetic environment.

Holding: The trial and appeals courts affirmed, holding that a permit may be denied based on general special use standards even if the proposal complies with requirements for the specific use. Denial did not improperly elevate the comprehensive plan above specific zoning ordinances; comprehensive plan standards were adequately specific and not inconsistent with the code, and the proposal had to comply with both. The court noted that the code also includes a general standard requiring that a special use be appropriate for the location and rejected an argument that the specific standards determine whether the use is appropriate in the location. The general standards arc not unconstitutionally vague; they supplement the specific standards and allow the county to take the particular location into account. The county properly considered the availability of service through other providers only after finding that the proposed tower would have an undue adverse effect on the character of the neighborhood, to determine whether the use would have an "overriding public benefit," and whether the denial would violate the TCA because it would amount to an effective prohibition on cellular service. The hearing examiner made findings that indicated consideration of all the evidence and supported denial; the company did not establish that the site was the least intrusive means of closing a significant coverage gap, so denial did not violate the TCA.

XVII. VARIANCES

A. ***Iowa.*** **City's Board of Adjustment Is Alone Responsible to Approve Exceptions**

and Variances to Ordinance. *City of Johnston v. Christenson,* No. 04-0208, 2006 WL 827127 (Iowa 2006).

Facts: When a storm badly damaged several outbuildings on a farm used in part to pasture four horses, the owner of the preexisting nonconforming use applied to the Johnston board of adjustment for a special exception and area variance to replace the buildings with a single 80 x 200-foot, 24-foot high structure to be used to store feed, supplies, and horses. The board approved the requests conditioned on site plan approval by the planning and zoning commission and the city council. At the city council's request, the board reconsidered and reaffirmed the approval without a written decision after considering the city's vigorous argument that the intended structure violated two ordinances; a limitation on the size of a replacement structure for a damaged accessory building for a permitted use and the elimination of the nonconforming status when a nonconforming use structure is destroyed. The city subsequently filed a writ of certiorari to challenge the legality of the decision in trial court, and then refused to take action on the submitted site plan. It then filed a petition for a declaratory judgment in trial court.

Holding: After staying the writ of certiorari, the court considered the declaratory judgment petition and granted summary judgment to the city, holding the proposed structure violated the ordinances at issue as a matter of law and that the board had failed to consider them in either its initial approval or reconsideration The state high court reversed and remanded, concluding the trial court erred in holding that the board failed to consider the ordinances. When the board decided the need for the structure to provide "an exercise area for horses" justified the special exception and variance, albeit without a written decision, it necessarily decided the use was permitted as a continuation of a nonconforming use. The court agreed with the landowner that the doctrine of issue preclusion barred the city from relitigating the board's decision by means of a declaratory judgment action because that decision had preclusive effect on the court.

B. ***Maine.*** **Property Owner's Failure to Use Building Permit That Expired Before Effective Date of New Setback Regulations Does Not Constitute Self-Created Hardship Precluding Issuance of Variance.** *Phaiah v. Town of Fayette,* 866 A.2d 863 (Me. 2005).

Facts: In 1991, the owners of a property in Fayette obtained a building permit for a residence, but the permit expired unused after 18 months. A new owner acquired the property in 1991, but made no attempt to develop the property until 2002. An engineering firm determined that road and shore setbacks established by a 2000 revision of the zoning ordinance precluded any place on the lot to build a house. In 2003, the planning board denied a permit for a house with an 1,800-square-foot footprint, and the board of appeals denied a variance.

Holding: The trial court vacated, in favor of the owner. The state's highest court affirmed in part and remanded for further proceedings. It held that the board erred in concluding that the owner's failure to take advantage of the 1991 building permit constituted a self-created hardship.

It also found ambiguous the board's conclusion that the proposed development would yield more than a reasonable return.

C. ***New Hampshire.*** **A Permitted Use Is Presumed to Be Reasonable for Purposes of Determining Unnecessary Hardship for a Variance.** *Vigeant v. Town of Hudson,* 867 A.2d 459 (N.H. 2005).

Facts: The owner of a narrow 1.6-acre, 770-foot-long lot bounded by two roads applied to Hudson's zoning board of adjustment for a variance from a 50-foot setback requirement to build within 30 feet of one of the roads. The owner also applied for a special exception for 10-foot temporary encroachment into a wetlands buffer zone during construction. The owner planned to build a five-unit dwelling, a use permitted under the lot's zoning. The board denied the applications, but the trial court reversed.

Holding: The state's highest court affirmed, holding that the owner satisfied the "unnecessary hardship" standard of N.H. REV. STAT. ANN. § 674:33. The proposed use, permitted by the ordinance, is presumed to be reasonable and a variance is necessary to enable that use because of the property's unique characteristics. The owner is not required to show that the land would be valueless without the variance, and the fact that other uses would be possible is immaterial. The court noted that without the variance, only an area about 200 feet long and 20 to 25 feet wide could be developed.

D. ***New Jersey.*** **Statute Allowing Height Variances Requires Proof of "Special Reasons" Which Must Be Tailored to Height Restriction's Purposes.** *Grasso v. Borough of Spring Lake Heights,* 866 A.2d 988 (N.J. Super. Ct. App. Div. 2004).

Facts: The owners of property in a generally flat area in the Borough of Spring Lake Heights applied to for a permit to build a two-story house. They represented that the house would comply with the 30-foot height limit, but had measured the building's height from grade at its foundation, rather than from the curb, as required by the ordinance. After the house was roofed and sided, neighbors complained and it was determined that because of the lot's steep upward slope from the street, the house rose 38 feet above the curb. The board of adjustment denied the owners' request for a variance. The trial court voided the permits.

Holding: The appeals court affirmed in part and remanded. It first held that the borough is not estopped from requiring removal of the house because the owner, having failed to provide accurate information required by the ordinance, cannot establish good faith. The court noted that estoppel is rarely invoked against a municipality and that a permit issued in violation of the ordinance cannot create any rights. The court then articulated, for the first time, the standard for a height variance under N.J. STAT. ANN. § 40:55D-70(d)(6), to permit the height of a structure to exceed the height limit by more than 10 feet or 10 percent. An applicant must prove "special reasons," that the variance can be granted without substantial detriment to the public good, and that it will not

substantially "impair the intent" of the zoning. The "special reasons" hardship requirement depends on the type of variance at issue. For some types of variance, "special reasons" requires proof that the restriction effectively prohibits use of the property. The court stated that the interpretation of "special reasons" should be tailored to the purpose of the restriction. In this case, the owner would have to convince the board that a 38-foot high house would not be out of place in the neighborhood, would not block views, or would have benefits outweighing the detriments.

E. ***New Jersey.*** **Variance Denial Was Arbitrary and Capricious Where Board Failed to Weigh Positive and Negative Effects of Granting Variances to Proposed Church and Confused Variance Issues with As-Yet-to-Be Submitted Site Plan Issues.** *House of Fire Christian Church v. Zoning Board of Adjustment of the City of Clifton,* 879 A.2d 1212 (N.J. Super. Ct. App. Div. 2005).

Facts: The House of Fire Christian Church purchased property in a single-family residential zone which permits houses of worship as conditional uses upon meeting certain requirements. It then submitted a conditional use variance application to the Clifton board of adjustment for relief from the 20,000-sq.-ft. minimum lot size requirement (it was 17,325 square feet) and from the 100-foot minimum lot width requirement (it was 70 feet). The church intended to seek site plan approval once the board granted the variances. After the second hearing, the city amended the rear yard setback conditional use requirement for houses of worship in single-family residential zones to 35 feet. During the last three meetings, the board focused on the church's failure to comply with the minimum requirements, then denied the variance application, finding it deficient in lot area, lot width, parking spaces and rear yard setback and concluding it substantially impaired the intent and purpose of the zoning plan and ordinance.

On the church's appeal, the trial court remanded the variance application to the board for a consolidated hearing to include site plan details because the use variance and site plan issues were so interrelated that both applications should be considered in a single administrative proceeding. It invalidated the ordinance amendment changing the rear yard setback. The trial court agreed with the church that the city's action to amend the zoning ordinance violated the Religious Land Use and Institutionalized Persons Act (RLUIPA) and ordered the city to pay the church's costs and counsel fees for violating RLUIPA. The city filed an interlocutory appeal.

Holding: Without addressing the merits of the case, the appeals court affirmed in part and reversed in part. It agreed with the trial court that the church was entitled to a new, "unbifurcated" hearing so that all the related issues could be resolved. The record showed the board's denial was arbitrary and capricious because it sometimes took testimony about site plan issues and that this caused considerable confusion during the proceedings (as when the board asked a witness about traffic problems, a site plan issue which the board concluded had a detrimental effect. The record also indicated the church met its low burden of showing the church was an inherently beneficial use (a positive effect) and that the board failed to weigh the positive and negative effects of granting the variances and to determine, in balance, whether granting them would cause a substantial detriment to the public good. It also failed to consider the imposition of reasonable conditions to alleviate any

detrimental effects.

The court reversed the lower court's invalidation of the ordinance amending the rear setback. It initially stated that a municipality may change its zoning ordinance during the pendency of a site plan application or even in direct response to a particular application if the amendment is consistent with the municipal land use stature. The record showed the city's reason for changing the setback was uniformity, since the setback for single-family residences and other conditional uses permitted in the zone was already 35 feet.

The appeals court reversed on the RLUIPA issue, concluding the claim was not ripe for determination because the record lacked sufficient justification to support the trial court's ruling that the city had violated RLUIPA. Without taking discovery or holding an evidentiary hearing, tire trial court concluded the amendment was a "substantial burden" under RLUIPA simply because the city took steps during the application, without legal justification, to make it more difficult for the church to build. The court below also misread RLUIPA by effectively shifting the burden of persuasion to the city. RLUIPA initially requires the church to demonstrate that the amendment actually imposed a substantial burden on religious exercise, and only then does the burden shift to the city to demonstrate that it furthered a compelling governmental interest and was the least restrictive means of furthering that interest. It also noted that "substantial burden" means more than an inconvenience on religious exercise and is akin to a significant pressure than coerces a religious adherent to conform his or her behavior accordingly. Finally, the court ruled the church's RLUIPA claim would not be reconsidered until the board makes a final decision.

F. ***New Jersey.*** **Zoning Board Usurped Township's Zoning Authority by Granting Variance for Building That Grossly Exceeded Limitations of Residential District.** *Township of North Brunswick v. Zoning Board of Adjustment of Township of North Brunswick,* 876 A.2d 320 (N.J. Super. Ct. App. Div. 2005).

Facts: The zoning board of adjustment (ZBA) granted use and bulk variances for a four-story, 85-unit luxury senior citizen apartment building on a 3.66-acre lot in a single-family residential zone with a 30-foot height limit and a density restriction of 2.9 dwellings per acre. The lot had been zoned for mixed uses until 1999, when the master plan was updated and a total of 24 acres were downzoned to avoid construction of apartments on narrow, deep lots.

Holding: The trial and appeals court found the variances invalid. The township had standing to sue to protect the integrity of its authority to zone. The grant of variances for a use that would grossly exceed the limitations imposed by the rezoning only about a year earlier would significantly alter the township's zoning plan.

G. ***New York.*** **Denial of Area Variance, Based on Community Opposition, Violates Statute.** *W.K.J. Young Group v. Zoning Board of Appeals of Village of Lancaster,* 16 A.D.3d 1021 (N.Y. App. Div. 2005).

Facts: The zoning board denied an application for a variance from the 46,000-square-foot lot area requirement that would have allowed the applicant to build 22 units on a 37,000-square-foot parcel.

Holding: The appeals court reversed and remanded, stating that the board failed to weigh the benefit to the applicant against the detriment to the health, safety, and welfare of the community, as required by Village Law 7-712-b(3)(b). The court stated that the record indicated that the denial was based on community opposition.

H. ***New York.*** **Evidence That Conversion from Office to Residence Would Cost About Half of Property's Value Established Hardship Justifying Variance.** *Sullivan v. City of Albany Board of Zoning Appeals,* 20 A.D.3d 665 (N.Y. App. Div. 2005).

Facts: The property was used as a dentist's residence and office for several years before the owners bought it in 1980. The owners continued the use, but an ordinance enacted in 1983 classified the property as residential and did not permit home occupations or dental offices. The owners moved their residence in 1985. They later sought a variance to use the building as a dental office, presenting evidence that the cost of converting the property to single-family residential use would be about half its full-value assessment as a residence. The board granted the application and the trial court dismissed an appeal.

Holding: The appeals court affirmed, holding there was sufficient evidence that the owners would not realize a reasonable return on their investment if required to convert the property. The hardship was not self-created, according to the court, which noted that the owners bought the property before the use was prohibited.

I. ***Pennsylvania.*** **Owners Entitled to Deemed Approval Where Board Failed to Render Written Decision Within Extension Period Agreed to by Owners.** *Conceptual Development, Inc. v. Zoning Hearing Board of Hampton,* 875 A.2d 1205 (Pa. Commw. Ct. 2005).

Facts: The owners of 5.7 acres in a highway commercial district applied for site plan approval to replace an existing parking area with a 9,000-square-foot retail/office building. The township solicitor indicated that an existing building would have to be brought into compliance with current landscaping and parking standards and told the owners to either appeal to the zoning hearing board or request a variance. The owners appealed to the board and sent a letter asking the board to consider nonconforming use, vested rights, and variance. The board held a hearing on May 28, 2002. The owners agreed to extend the 45-day decision period under 53 P.S. § 10908(9) until July 25. On July 22 the board announced that it would deny relief because it lacked jurisdiction; a written denial was sent by facsimile on August 1. The trial court remanded. The board considered issues

of vested rights, variance by estoppel, and nonconforming use and again denied the appeal. The owners returned to the trial court, which rejected a claim of deemed approval.

Holding: The appeals court reversed. The statute requires the board to "render a written decision" within 45 days "unless the applicant has agreed . . . to an extension of time." Rejecting the board's claim that it initially lacked jurisdiction, the court noted that it has jurisdiction to grant a variance and that the owners had requested a variance.

J. ***Pennsylvania.*** **Variance for Self-Storage Facility on Residentially Zoned Land Was Supported by Evidence That Residential Use Was Impractical.** *Taliaferro v. Darby Township Zoning Hearing Board,* 873 A.2d 807 (Pa. Commw. Ct. 2005).

Facts: The 9.68-acre property, zoned for residential use, adjoins a major highway and commercial uses. Residential structures were removed from the property in 1960. 1991 and 1998 plans to develop residential uses were never implemented. The property has unusual grades and there are issues about the adequacy of utilities. The applicant proposed a 16-structure, 132,975-square-foot self-storage business, fenced and buffered, with customer access only between 7 a.m. and 7 p.m. After two hearings the board approved a variance.

Holding: On remand, the board held seven more hearings and made findings that residential use of the property had ceased and was not practical and that its unique physical characteristics prevented development. The board again granted a variance and the court affirmed. The applicant demonstrated unnecessary hardship and the board was within its discretion in rejecting the testimony of an expert presented by objectors. The use will not have an adverse impact on the community; will have a minimal impact on traffic and utilities; and no impact on schools. Because residential development is impractical, the court reasoned, the variance is the minimum that will afford relief.

XVIII. VESTED RIGHTS

A. *New Mexico.* Owner Had a Vested Right in a Helipad When the City Amended Its Zoning Code, Requiring City to Balance the Public Gain Against the Individual Loss When Calculating a Reasonable Amortization Period. *KOB-TV, LLC v. City of Albuquerque,* 111 P.3d 708 (N.M. Ct. App. 2005).

Facts: KOB-TV, a television station, sought permission from the City of Albuquerque to remodel a facility that it has operated for nearly 50 years near a residential neighborhood. KOB-TV received approval from the F.A.A. to build a permanent helipad at the site and the city subsequently granted a building permit for construction of the helipad. Relying on the building permit, KOB-TV purchased a $1 million helicopter and began remodeling its facility. Following noise complaints from the neighborhood, the city council amended the zoning code making helipads allowable uses only within a SU-1 special use zone. KOB-TV's property is zoned SU-2. The amendment requires a minimum distance of 350 feet from residential areas; limits non-emergency operations to three daily; and prohibits helicopter landing and take-off operations. The ordinance excludes medical and law enforcement helicopters from its restrictions. Meanwhile, neighborhood residents sought revocation of KOB-TV's building permit, which the city council granted. KOB-TV appealed both the zoning amendment and the permit revocation to district court, arguing due process, equal protection, and civil rights violations. KOB-TV maintained it had a vested right to the helipad and the zoning amendment constituted a downzoning of its property.

Holding: The district court affirmed the city council's approval of the zoning amendment, considering it a quasi-judicial action. The court of appeals affirmed in part and reversed in part. The court held that the zoning amendment was a valid exercise of the city's zoning authority, but it was a legislative action rather than a quasi-judicial action because it has general application and reflects public policy regarding matters of a general nature. The zoning amendment did not constitute a downzoning because there was no change in the zoning of KOB-TV's property. The zoning amendment was a citywide restriction that did not target a specific property. The court distinguished between nonconforming uses and vested rights, noting that KOB-TV had obtained a vested right because it acquired a permit from the city and substantially relied on the permit by making improvements to its facility and purchasing the helicopter. KOB-TV also had a nonconforming use because it had a prior lawful use when the zoning amendment went into effect. KOB-TV challenged the reasonableness of the one-year amortization period, and the court agreed, remanding that issue to the city council for consideration of evidence regarding a reasonable amortization period. The court cited factors to be considered in balancing the public gain against the individual loss, including (1) the nature of the structure located on the property; (2) the nature of the use; (3) the location of the property in relation to surrounding uses; (4) the character of and uses in the surrounding neighborhood; (5) the cost of the property and improvements; (6) the benefit to the public by requiring the termination of the nonconforming use; 7) the burden on the property owner by requiring termination of the nonconforming use; and (8) the length of time that use has been in existence and the length of time the use has been nonconforming.

B. ***Virginia.*** **Applicant Did Not Have Vested Right to Develop Under Previous Zoning Because It Had Not Obtained a Significant Government Act, Upon Which It Relied.** *Board of Supervisors of Culpeper County v. Greengael, LLC*, 626 S.E.2d 357 (Va. 2006).

Facts: In 2000, the county amended its comprehensive plan designating the 96-acre property, zoned for high-density residential use, as "future industrial." The property was not rezoned. In 2002, a contract purchaser, planning a mixed use development, approached the county about water and sewer service. The county indicated that it was not in a position to serve the property and noted that the proposal conflicted with the plan. The purchaser approached the town, which rejected an application for service as incomplete and, despite a review committee recommendation of conditional approval, denied a second application. The county rejected a subdivision application for failure to include various required submissions, including a required letter promising water and sewer service. On the same day, the county entered into an agreement with the town, requiring the town to sell the county excess water and sewer capacity. The county subsequently rezoned the land to the light industrial classification.

Holding: The trial court held that the applicant had vested rights to develop under the previous zoning and that the county had "manipulated" the situation, and ordered the county to work with the applicant to secure water and sewer service. The highest court reversed in part, holding that there was no evidence that the county manipulated the process. Rejection of the subdivision application was not arbitrary. The county did not have authority to waive the ordinance requirement of a letter concerning provision of utilities and did not have any way to provide those services when it was asked to do so. The town was not obligated to provide services and there was no evidence that the county influenced the town's decision not to provide services. The applicant had no vested right to develop under the previous zoning classification because it had not obtained a significant governmental act on which it relied. Rejecting a claim of piecemeal downzoning, the court stated that the rezoning was not downzoning, but allows more intensive use of the land, and was not piecemeal, but was intended to comply with the comprehensive plan. The court also rejected a taking claim, stating that the applicant did not lose all economic use of the property and that the property was always subject to the utility letter requirement.

C. ***Illinois.*** **Developer Who Submitted Conforming Plan One Day After Downzoning Ordinance Was Introduced Did Not Have Vested Right.** *1350 Lake Shore Associates. v. Casalino,* 842 N.E.2d 274 (Ill. App. Ct. 2006).

Facts: In 1978, Chicago rezoned the property for a planned residential development of 196 units in a 40-story building. The developer did not begin investigating development until 1996 and met with members of the community the following year. There was opposition and, after warning the developer to negotiate, the alderman for the area introduced a downzoning ordinance. The next day, the developer submitted plans and sought an approval letter certifying compliance with the planned development ordinance, a prerequisite to obtaining a zoning certificate and a building permit. Although the plans did comply, the department of planning did not act. The city downzoned

the property and imposed a 125-foot height limitation.

Holding: The trial court upheld the rezoning, but the appeals court remanded. In 2002, the trial court ordered issuance of an approval letter, but held that the owner did not have a vested right to a zoning certificate. The appeals court again remanded. In 2004, the trial court entered judgment in favor of the city; the appeals court affirmed. There is generally no vested right to continuation of a zoning ordinance unless an innocent party has, in good faith, made substantial expenditures or a substantial change in position. In this case the trial court determined that the developer had knowledge, on some date after the initial meeting, that a downzoning ordinance could be introduced; after it had that knowledge, the developer could no longer rely on obtaining a zoning certificate. The court upheld the trial court's computations and consideration of the cost of the land and the expenditures in proportion to the anticipated cost of the project in determining that the developer did not make a substantial change in position before gaining that knowledge.

XIX. ZONING

A. FEDERAL COURT DECISIONS

1. **Annexation**: **City Lacks Standing to Challenge Another City's Annexation of Unincorporated Areas, It Not Having Alleged It Actually Provides Utility Service to the Parcels.** *City of Oak Hill v. City of Edgewater,* 917 So.2d 943 (D. Fla. 2006).

2. **Tribe Subject to Land Use Laws.** *Cayunga Indian Nation of New York v. Village of Union Springs,* 390 F. Supp. 2d 203 (N.D.N.Y. 2005).

Facts: An Indian tribe sought to establish a gaming facility, which became the subject of several stop work orders on the basis that the proposed use violated land use laws. The tribe claimed it was exempt from the laws because the property fell within the statutory definition of Indian country, and brought suit against the local governments seeking declaratory and injunctive relief. The defendant municipalities filed a counterclaim against the tribe.

Holding: The district court enjoined the defendants from applying or enforcing their land use laws; however, the Second Circuit directed a reconsideration of the injunction order in light of the Supreme Court's decision in *City of Sherrill, New York v. Oneida Indian Nation of New York*, 125 S. Ct. 1478 (2005). The defendants moved to vacate the injunction and for summary judgment, which was granted The district court held that the tribe was not entitled to immunity from state and local land use laws, given the Supreme Court's ruling in *City of Sherrill*, where the Court focused on the disruptive nature of exemption from taxation by local government. "If avoidance of taxation is disruptive, avoidance of complying with local zoning and land use laws is no less disruptive. In fact, it is even more disruptive. The Supreme Court clearly expressed its concern about the disruptive effects of immunity from state and local zoning laws, even to the point of citing to this case as an example."

3. **Those Challenging County's Ordinance Against Use of Certain Properties as Short-Term Vacation Rentals Claim County's Amendment of Ordinance Was Procedurally Defective.** *Neumont v. State of Florida,* 451 F.3d 1284 (11th Cir. 2006).

4. **Ordinance Limiting Display of Political Signs Discriminated Against Speech Based on Content and Was Not Narrowly Tailored.** *Beaulieu v. City of Alabaster,* No. 04-16230, 2006 WL 1791401 (11th Cir. 2006).

5. **Zoning Ordinance Invalid as Prior Restraint.** *Hollywood Community Synagogue, Inc. v. City of Hollywood, Fla.* Nos. 04-61212CIV, 05-60687CIV, 2006 WL 1825004 (S.D. Fla. 2006).

B. STATE COURT DECISIONS

1. **Annexation:**

(a) ***Alabama.*** **For Competing Annexations, the First-in-Time Rule Does Not Apply.** *Town of Pike Road v. City of Montgomery,* 1050151, 2006 WL 1304941 (Ala. 2006).

(b) ***Florida.*** **County Challenges City's Annexation Ordinance for Lack of Contiguity of Area Taken In.** *County of Volusia v. City of Deltona,* 925 So. 2d 340 (Fla. Dist. Ct. App. 2006).

(c) ***Louisiana.*** **Municipality's Annexation of Tract to Which It Has No Plans to Extend Municipal Services Is Unreasonable.** *Parish of Acadia v. Town of Duson,* 909 So. 2d 642 (La. Ct. App. 2006).

(d) ***Maryland.*** **Municipality Gave Adequate Notice Before Conducting Hearing on a Resolution to Annex Unincorporated Area.** *Mayor & Town Council of Oakland v. Mayor & Town Council of Mountain Lake Park,* 896 A.2d 1036 (Md. 2006).

(e) ***Missouri.*** **City Did Not Acquire Prior Jurisdiction to Annex by Passing Resolution of Intent Before Village Proposed Annexation Ordinance.** *City of St. Joseph v. Village of Country Club,* 163 S.W.3d 905 (Mo. 2005).

Facts: The city passed a resolution of intent to annex territory; a week later, the village proposed an annexation ordinance. The city sought a declaratory judgment under the doctrine of prior jurisdiction, which provides that the municipality that takes the first valid step toward annexation has the right to proceed.

Holding: The trial court ruled in favor of the village and the highest court affirmed. The court examined M.S. § 71.015, which contains a "vague" reference to a resolution of intent, but sets forth a "detailed and elaborate structure" for accomplishing involuntary annexation, beginning with the proposal for annexation. The requirements of the statute ensure that the municipality is serious about annexation. To allow a municipality to acquire prior jurisdiction with only a resolution of

intent would frustrate the process.

(f) ***North Carolina.*** **Involuntary Annexation Statutes Require a "Meaningful Extension of Public Services" into an Area Proposed for Forced Annexation. Owners would Suffer "Material Injury" If Forced to Pay Additional Property Taxes, Yet Receive No Additional Services.** *Nolan v. Village of Marvin,* 624 S.E.2d 305 (N.C. 2006).

(g) ***Ohio.*** **Municipality That Has Historically Provided Water and Sewer Service for Extraterritorial Customers Is Permitted to Require Annexation of Extraterritorial Property as Condition of Continued Service.** *Bakies v. City of Perrysburg,* 843 N.E.2d 1182 (Ohio 2006).

(h) ***Ohio.*** **Health District Properly Rescinded Septic-System Permit for Homeowner Now That City Has Opted to Extend Sewer Line to Serve Him, Even Though Connection Requires Consent to Annexation.** *Clark v. Greene County Combined,* 844 N.E.2d 330 (Ohio 2006).

(i) ***West Virginia.*** **Map Accompanying Annexation Petition Need Not Have Been Free from Defect; It Sufficed That It Was Prepared Based on Prior Documents.** *CSX Hotels, Inc. v. City of White Sulphur Springs,* 617 S.E.2d 785 (W.V. 2005).

2. ***Iowa.*** **Rezoning from Heavy Industrial to Planned Urban Development Was Justified by City's Intent to Create Efficient Urban Development Patterns and Promote Health and Public Welfare by Discouraging Incompatible Development.** *Molo Oil Co. v. City of Dubuque,* 692 N.W.2d 686 (Iowa 2005).

Facts: The City of Dubuque amended its zoning ordinance as part of its master plan to transform a harbor area along the Mississippi River from an industrial area into a pedestrian-oriented area. The amendment rezoned industrially used property from heavy industry to planned urban development, which made the existing industrial uses nonconforming and prohibited their expansion. Owners of the industrial property sued the city, claiming the amended ordinance was an unreasonable exercise of the city's police power and resulted in an unconstitutional taking of their property.

Holding: The trial court upheld the ordinance and rejected the takings claim as unripe because the landowners had not exhausted their administrative remedies. The state's highest court affirmed,

holding that the rezoning was a proper exercise of the city's police power. It applied the "fairly debatable" standard of review, under which a court will not substitute its judgment as to the debated reasonableness of a legislative zoning action where there is evidence to support its application to a particular property. The court found evidence that the rezoning encouraged efficient urban development patterns, promoted health and general welfare by prohibiting development (including expansion of existing industrial uses) incompatible with the commercial, recreational, and residential uses in the area, and encouraged the most appropriate use of the land. The court rejected the owners' argument that the validity of a zoning statute depends on a balancing of the public good against the private harm to property owners, overruling *F.H. Uelner Precision Tools & Dies, Inc. v. City of Dubuque* (1971). It also affirmed the trial court's holding on the takings issue, pointing out that the owners had failed to seek administrative relief, including a variance from the board of adjustment and the judicial review of the board's decision.

3. ***Massachusetts.*** **Rezoning of Single Parcel to Flood-Prone Designation Following Hurricane Was Spot Zoning, but Did Not Constitute a Taking.** *Andrews v. Town of Amherst,* 2005 WL 2651395 (Mass. Land Ct. 2005).

Facts: The vacant, 20-acre parcel is crossed by two waterways and is prone to flooding. Some of the land is designated as 100year floodplain by the Federal Emergency Management Agency. The size of that designation was reduced in 1994. The land was zoned for light industrial use, but used for agriculture until the current owners bought it as an investment in 1985. The owners have investigated various uses of the property and unsuccessfully tried to sell it. There have been unsuccessful petitions to authorize the town to buy an interest in the land for conservation. Surrounding uses include a commercial building, formerly used as an auction barn, and various agricultural uses; much of the area is subject to an agricultural preservation restriction. After Hurricane Floyd flooded most of the tract and surrounding properties in 1999, neighbors gathered evidence and proposed to rezone the land to a flood-prone conservancy district. The proposal passed; there had previously been no parcels in the flood-prone district, only strips adjoining bodies of water.

Holding: The court invalidated the action as illegal spot zoning, noting that the parcel was treated differently than neighboring land, which had also flooded during the hurricane; that evidence in support of the change was inadequate to justify singling out the small parcel; and that the land did not meet the bylaw definition for the designation. The court rejected a due process claim, stating that flood control is a legitimate public interest. The court also rejected a regulatory takings claim, reasoning that temporary imposition of the flood-prone designation allowed some economically viable use of the land.

4. ***Nebraska.*** **Developer of Confined Animal Feeding Facility Did Not Act in Good Faith in Beginning Construction After Enactment of New Law Restricting Such Operations, but Before Effective Date.** *Hanchera v. Board of Adjustment,* 694 N.W.2d 641 (Neb. 2005).

Facts: In 2001, the county developed a comprehensive plan and regulations to restrict construction of confined animal feeding operations. On September 25, it enacted zoning regulations, which were published on October 9 and became effective October 16. The company wanted to build confined animal feeding facilities on two properties that it contracted to buy on October 4. On one property, the company spent $600 on easements and a Department of Environmental Quality application in early August; $10,844 on concrete on October 13; and $23 on October 15 for electrical inspection. On the second property, the company also spent $600 in August, as well as $4,000 toward the purchase price of the land on October 5; $115 for an electrical inspection; and $653 for concrete. The company also made a down payment of $93,553 on September 30, but did not become the record owner of the properties until December. A neighbor challenged the construction.

Holding: The zoning administrator, board of adjustment, and trial court held that the facilities were not subject to the new regulations. The highest court reversed, holding that the owner did not substantially change its position "in good faith reliance on existing zoning," so that it acquired a nonconforming use. The owner was aware of the pending change and his actions taken after September 25 were an attempt to circumvent the new regulations.

5. ***New Jersey.*** **Severe Downzoning of Undeveloped Land in Densely Populated Township Was Invalid.** *Bailes v. Township of East Brunswick,* 882 A.2d 395 (N.J. Super. Ct. App. Div. 2005).

Facts: Most of East Brunswick Township is densely populated and close to build out. The property in question, zoned "rural preservation," is less densely populated and bisected by the turnpike. The permitted density for the area has changed several times. A density of seven units per acre was permitted as part of a consent order in exclusionary zoning litigation. In 1990, the township changed the zoning resulting in litigation and an injunction prohibiting enforcement of the new ordinances. In 2001, two new ordinances retained the six-acre minimum lot size previously imposed, but increased the densities permitted under cluster options so that a maximum of one dwelling per three acres would be permitted under specified circumstances. Owners challenged the rezoning. Some of the land at issue is not currently put to any productive use, some borders dense residential development, and some adjoins a busy road. The trial court upheld the ordinances. The appeals court reversed and remanded, finding the ordinances invalid as applied to the property.

Holding: The court determined that zoning must be "drawn with reasonable consideration to the character of each district and its peculiar suitability for particular uses" (N.J.S. 40:551D-l). The "severe" downzoning of the property is not required to protect against damage to floodplains and wetlands that are protected by other laws. Most of the property would be suitable for septic systems and, in any case, low-density residential development poses less risk of aquifer pollution than existing agricultural uses. The township presented no evidence that the rezoning will support its stated goal of preserving agricultural land and a municipality may not compel preservation of open space by restrictive zoning without some other legitimate purpose. The court noted the state planning commission's "equity policy" (N.J.S 52:18A), requiring that the objectives of the planning

act not disproportionately affect particular owners. and stated that these few, primarily elderly, owners of undeveloped property should not bear an unfair burden.

6. ***New Jersey.*** **Exclusionary Zoning.** *Mount Laurel Township v. Stanley,* 885 A.2d 440 (N.J. 2005).

7. ***New Mexico.*** **Text Amendments Changing Development and Design Standards in Urban Center Were Valid Legislative Acts, Not Quasi-Judicial in Nature.** *Albuquerque Commons Partnership v. City of Albuquerque,* 62 P.3d 317 (N.M. Ct. App., October 3, 2002)

Facts: The city's comprehensive plan describes an urban center as an area containing high densities and tall structures to reduce sprawl and auto travel. The uptown Sector Plan was adopted in 1981 and established the zoning regulations for a 460-acre area. The plan envisioned the uptown area as a future urban center and required site plan approval for development, but it did not include mandatory densities or parking requirements. In 1994, a developer proposed a low-density, big box shopping center for a 28-acre undeveloped parcel within the uptown area. A zoning map amendment was required, but there was strong opposition and the developer withdrew the application. The city then initiated review of the 1981 Uptown Sector Plan. Two weeks later the developer applied for approval of a smaller big box retail project that would not require a zoning map amendment. While the city held a workshop on the revisions to the plan and prepared information on traffic, air quality, and other matters, the application was referred to the Environmental Planning Commission (EPC), which deferred the matter pending a moratorium on development in the area. The 1995 revisions to the Uptown Sector Plan proposed floor area ratio requirements, limits on outdoor parking, required employers to implement strategies to limit single-occupant car trips, and included recommendations for making the area pedestrian-friendly. The developer objected, but the neighborhoods in the area favored the revisions. The EPC voted against the plan amendments, but the city council enacted the amendments. Then the EPC considered the developer's application and decided that the proposed big box retail development did not comply with the 1995 amendments.

Holding: The trial court ordered that the original 1981 sector plan requirements be applied to the application. Following another hearing in 1999, the EPC again denied the application; the city council affirmed. The court then ordered the city approve the application. The developer argued that the city's amendments to the sector plan constituted a quasi-judicial action and that he should have been entitled to due process. In 2003, a jury awarded the developer more than $8.3 million for civil rights violations. The appeals court reversed both the jury award and the approval of the application. Enactment of the 1995 amendments was a legislative act, not rezoning requiring compliance with quasi-judicial procedures, the court reasoned, because the changes apply to all parcels within the sector plan area, not just the developer's three undeveloped tracts.

8. ***Wisconsin.*** **Municipality May Not Be Estopped from Seeking Enforcement of Zoning Laws Based on Mistakes by Officials, but Court**

Has Discretion in Deciding Whether to Grant Enforcement. *Village of Hobart v. Brown County,* 698 N.W.2d 83 (Wis. 2005).
