# ALI – ABA

# LAND USE INSTITUTE

# August 22, 2002

## SELECTED RECENT CASES
## DECIDED IN FAVOR OF THE LANDOWNER

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## U.S. SUPREME COURT DECISIONS

**ADA:** **PLAINTIFFS UNDER THE AMERICANS WITH DISABILITIES ACT CANNOT RECOVER PUNITIVE DAMAGES**

***Barnes v. Gorman,*** 122 S.Ct. 2097 (2002).

The Supreme Court has made clear that plaintiffs suing under the ADA and the Rehabilitation Act are not entitled to punitive damages. Lawsuits arising under the ADA have become and will continue to be more prevalent in the context of land use disputes. This ruling in effect will limit the potential damages a plaintiff can recover under ADA claims.

**CLEAN WATER ACT PERMITS:** **COURT TO HEAR APPEAL ON WHETHER "DEEP RIPPING" REQUIRES DISCHARGE PERMIT UNDER THE CLEAN WATER ACT**

***Borden Ranch Partnership; Angleo K. Tsakopoulos v. United States Army Corps of Engineers; United States Environmental Protection Agency,*** *cert. granted* 122 S.Ct. 2355 (June 10, 2002). See report on this case, below at page 6.

**FAIR HOUSING ACT:** **SUPREME COURT DECIDES TO REVIEW NINTH CIRCUIT CASE HOLDING THAT OWNERS AND OFFICERS OF REALTY CORPORATIONS MAY BE HELD VICARIOUSLY LIABLE FOR AN EMPLOYEE'S VIOLATIONS OF THE FHA**

***Holley v. Crank***, 258 F.3d 1127 (9th Cir. 2001), *cert. granted*, *Meyer v. Holley*, 2002 U.S. LEXIS 3593 (U.S. May 20, 2002).

The builder told a mixed-race couple to present their offer to buy his house though a specific realty corporation. The corporation's sales agent never presented the offer to the builder, and when the builder inquired about the status of the offer, the sales agent stated he did not want to deal with the couple and used racial invectives when referring to the couple. The builder and the couple sued the sales agent, the corporation, and the individual who was the president, owner and sole shareholder of the corporation at the time. The U.S. Court of Appeals for the Ninth Circuit stated that the duty to obey the laws related to racial discrimination under the FHA is non-

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delegable. The court held that "a corporation and its officers may be held liable for their failure to ensure the corporation's compliance with the FHA, whether or not the officers directed or authorized the particular discriminatory acts that occurred." 258 F.3d at 1131. The U.S. Supreme Court granted certiorari.

**FAIR HOUSING ACT:** **SUPREME COURT TO REVIEW FAIR HOUSING ACT CLAIM OF RACIAL BIAS IN THE PASSING OF A MUNICIPAL REFERENDUM**

***Buckeye Community Hope Found., v. City of Cuyahoga Falls,*** *cert. granted* 2002 U.S. LEXIS 4691 (U.S. June 24, 2002).

The Supreme Court granted certiorari to review a Sixth Circuit decision regarding a claim against a municipality for demonstrating racial bias, thus violating the Fair Housing Act, for passing a referendum that essentially rescinded a low-income housing project approval. **See Sixth Circuit opinion summary below at page 7 under Federal Court Decisions**.

**REGULATORY TAKING/ WHAT IS PROPERTY?:** **HAVING CONCLUDED THAT INTEREST EARNED ON CLIENT'S PRINCIPAL HELD IN IOLTA ACCOUNTS IS PRIVATE PROPERTY, SUPREME COURT WILL NOW DETERMINE IF IOLTA PROGRAMS VIOLATE THE TAKINGS CLAUSE**

***Washington Legal Foundation v. Legal Foundation of WA***, 271 F.3d 835 (9th Cir. 2001), *cert. granted*, 2002 U.S. LEXIS 4225 (U.S. June 10, 2002).

All 50 states have instituted "Interest On Lawyers' Trust Accounts" ("IOLTA") programs that pool client deposits and use the interest on the combined deposits to provide legal services to poor persons. A few years ago the U.S. Supreme Court, in *Phillips v. Washington Legal Foundation*, 524 U.S. 156 (1998), held "that the interest income generated by funds held in IOLTA accounts is the 'private property' of the owner of the principal." 524 U.S. at 172. The Court left open the question of whether IOLTA programs created a taking without just compensation. Four individuals challenged the legality of Washington State's IOLTA program on Fifth and First Amendment grounds. The U.S. Court of Appeals for the Ninth Circuit, applying the ad hoc analysis used in *Penn Central Transportation Co. v. City of New York*, held that Washington State's IOLTA program did not take the individuals' property. The Ninth Circuit also found that even if their property was taken, there was no constitutional violation when they were not compensated because the compensation they would be due, from interest earned on funds deposited in the IOLTA program, "would be nil." The Supreme Court granted certiorari.

**REGULATORY TAKING:** **PENN CENTRAL BALANCING TEST IS THE APPROPRIATE METHOD TO DETERMINE WHETHER A TEMPORARY MORATORIUM ON DEVELOPMENT DEMANDS COMPENSATION UNDER THE TAKINGS CLAUSE**

***Tahoe-Sierra Preservation Council v. Tahoe Reg'l Planning Agency***, 122 S.Ct 1465 (2002).

The Supreme Court affirmed the Ninth Circuit holding that a taking had not occurred. The case involved a facial challenge to two "temporary" moratoria ordered by respondent Tahoe Regional

Planning Agency (TRPA) halting development on a substantial portion of the property subject to TRPA's jurisdiction for a period of 32 months while it studied the impact of development on Lake Tahoe and designed a strategy for environmentally sound growth. Plaintiffs (mostly residential lot owners) argued that this amounted to a *per* se taking of their properties arguing that the Court could effectively sever the 32-month segment from the remainder of each landowner's fee simple estate, and that this segment had been taken in its entirety by the moratoria under a *Lucas* analysis. The Supreme Court rejected this argument because "it ignores Penn Central's admonition that in regulatory takings cases we must focus on 'the parcel as a whole.'" The Court held that a temporary moratorium on development instituted by a local municipality requires an in depth "Penn Central balancing" analysis to determine whether the action constituted a taking requiring just compensation under the Takings Clause of the Constitution. **NOTE: See Other Papers in these course materials for a more detailed discussion of this case.**

**REGULATORY TAKING/ BREACH OF CONTRACT:**

**DOES CLAIM BEGIN TO ACCRUE WHEN FEDERAL LEGISLATION IS ENACTED ALLEGEDLY BREACHING A CONTRACTUAL RIGHT TO FREEDOM FROM REGULATORY COVENANTS?**

***Franconia Assoc.'s v. United States,*** 240 F.3d 1358 (Fed. Cir. 2001), *cert. granted* 122 S. Ct. 802 (U.S. January 4, 2002).

The Supreme Court granted certiorari in January of 2002 and has yet to hear plaintiff's appeal, which the Court limited to two questions. 1) Whether a breach of contract claim accrues for purposes of 28 U.S.C. § 2501 when Congress enacts a statute alleged to abridge a contractual right to freedom from regulatory covenants upon prepayment of government mortgage loans, and 2) Whether a Fifth Amendment Takings Claim accrues for purposes of 28 U.S.C. § 2501 when Congress enacts a statute alleged to abridge a contractual right to freedom from regulatory covenants upon prepayment of government mortgage loans.

Plaintiffs were owners of low-income rental housing units financed by mortgage loans from the Farmers Home Administration of the US Department of Agriculture. In exchange for low interest mortgage loans, plaintiffs agreed to restrictions on the use of their property subject to the mortgage and on the investment return. However, the agreements gave plaintiffs the option to prepay their loans at any time, thereby ending the restrictions. In 1988 and 1992, Congress enacted the Emergency Low Income Housing Preservation Act (ELIHPA) of 1987. Plaintiffs claimed that this action restricted the ability of plaintiffs to prepay their loans and that the statute constituted to a breach of their contracts with the Department of Agriculture, thus amounting to a taking of their property. Defendant moved to dismiss the claims because they had accrued more than six years prior to the date the suit was filed in May of 1997 and thus were barred by the six year statute of limitations established in 28 U.S.C. § 2501. The United States Court of Appeals for the Federal Circuit held that the claim began to accrue at the alleged moment the government breached the contract. Therefore, accrual began in 1988, more than six years after ELIHPA effected an appropriation of their contract right, thus barring plaintiffs from filing suit.

## FEDERAL COURT DECISIONS

**ADA:** **SIDEWALK MAINTENANCE AND ACCESSIBILITY FOR PEOPLE WITH DISABILITIES FALL WITHIN THE SCOPE OF THE ADA AND REHABILITAION ACT**

***Barden v. City of Sacramento,*** 2002 U.S. App. LEXIS 11276 (9th Cir. 2002).

Appellants were a group of disabled citizens alleging that the City violated the Americans with Disabilities Act and the Rehabilitation Act by failing to install curb ramps in new or altered sidewalks and by failing to maintain existing sidewalks in a manner ensuring accessibility for people with disabilities. The Ninth Circuit reversed the District Court's opinion and held that the ADA covered anything a public entity did including the maintenance of sidewalks. Title II of the ADA provided for the inclusion of qualified individuals with disabilities for participation, benefits, or activities of a public entity. The Rehabilitation Act protected the same group of individuals from discrimination of programs receiving federal financial assistance. Therefore, the court held that the maintenance of sidewalks was a normal function of a city and maintaining accessibility for individuals with disabilities was well within the scope of Title II.

**ADA:** **CITY'S BAN OF METHADONE CLINIC BASED ON FEAR AND STEREOTYPES VIOLATED THE AMERICANS WITH DISABILITIES ACT**

***MX Group, Inc. v. City of Covington***, 2002 U.S. App. LEXIS 11249 (6th Cir. 2002).

The owners of a methadone clinic received a zoning permit from the City. After the permit was issued, residents expressed opposition to the clinic. The City and the Board of Adjustment held public hearings and an assistant police chief testified that methadone clinics spawn criminal activity. The Board revoked the zoning permit and the clinic owners appealed. While that case was pending, the clinic owners found a new site. When the zoning administrator informed the city manager of the new permit request, the city solicitor sent a letter to him stating that methadone clinics were not a permitted use in the City. Subsequently, the City amended its zoning ordinance to completely foreclose the clinic owners' opportunity to locate in the City. The district court ruled in favor of the clinic owners and entered an order and injunction enjoining the City from withholding the zoning permits and stating that the City's zoning ordinance violated the ADA. The City appealed.

The court of appeals rejected the City's standing arguments and found that the clinic owners had standing because they presented evidence that they were denied a zoning permit because they care for individuals who have disabilities. After reviewing witness testimony from the hearings, the Court of Appeals then said that there was sufficient evidence to demonstrate that the reason the City denied the permit was the City's fear that the facility would attract more drug activity to the community. However, the clinic owners presented evidence that their other clinic had operated without incident and that methadone clinics present no more risk of drug trafficking than hospitals, pharmacies, or other facilities that deal with lawfully administered drugs. The court held that the permit denial and the subsequent zoning ordinance amendment were based on fear and stereotypes and violated the ADA.

**CIVIL RIGHTS ACT:** **EPA'S DISPARATE IMPACT DISCRIMINATION REGULATIONS DO NOT CREATE RIGHTS ENFORCEABLE UNDER SECTION 1983**

***South Camden Citizens in Action v. New Jersey Department of Environmental Protection***, 274 F.3d 771 (3rd Cir. 2001), *cert. denied*, 2002 U.S. LEXIS 4706 (U.S. June 24, 2002).

NJDEP allowed a cement company to start construction on a granulated blast furnace slag (GBFS) grinding facility pending final approval of its draft air permit. The facility is located in a minority, low-income neighborhood that hosts 20% of Camden's environmentally contaminated sites. In August of 2000, NJDEP held a public hearing on the draft air permit. Approximately 120 residents expressed their concerns with the project. NJDEP issued a report addressing the residents concerns and then, in October 2000, issued the cement company's final air permit. The residents sued NJDEP in federal court, claiming it violated Title VI of the Civil Rights Act of 1964 by intentionally discriminating against them in violation of § 601 by issuing the air permit and further claiming that the facility would have an adverse disparate impact on them in violation of § 602. The cement company intervened. The district court issued a preliminary injunction and remanded the case to NJDEP for a Title VI analysis. Soon thereafter, the U.S. Supreme Court, in *Alexander v. Sandoval*, 532 U.S. 275 (2001), held that Title VI does not create a freestanding private right of action to enforce regulations promulgated under § 602. The district court permitted the neighbors to amend their complaint to seek the injunction under § 1983, continued the preliminary injunction, and again, remanded the case to NJDEP. The cement company appealed and the Court of Appeals suspended the preliminary injunction pending appeal.

The court noted that the question before it was whether disparate impact regulations promulgated under § 602 create a right that might be enforced through a § 1983 action. The prohibition on disparate impact discrimination does not appear explicitly in Title VI, but is contained in U.S. EPA regulations, the court said. After a lengthy analysis of Supreme Court precedent and cases from other circuits, the court concluded that the Supreme Court in *Sandoval* found no evidence of congressional intent to create privately enforceable rights through § 602. 274 F.3d at 789. The court held that Congress, not the courts must create a private enforceable right under Title VI to be free from disparate impact discrimination. Therefore, it held "that a federal regulation alone may not create a right enforceable through Section 1983 not already found in the enforcing statute." *Id.* at 790. The district court's order granting the preliminary injunction against the cement company was reversed and remanded.

**CLEAN WATER ACT PERMITS:** **"DEEP RIPPING" REQUIRES DISCHARGE PERMIT UNDER THE CLEAN WATER ACT**

***Borden Ranch Partnership et al. v. United States Army Corps of Engineers***; United States Environmental Protection Agency, 261 F.3d 810 (9th Cir. 2001) *cert. granted*, 122 S.Ct. 2355 (June 10, 2002).

Appellant is a landowner who wanted to convert his property that had been used as cattle rangeland into vineyards and orchards which would require him to initiate "deep ripping," i.e. dragging metal prongs through the soil behind a tractor or bulldozer. The Army Corps of Engineers and the EPA notified appellant that such activity required a discharge permit under the

Clean Water Act (CWA), and appellant continued the deep ripping, ignoring the warnings as well as an administrative order agreed upon between the EPA, Army Corps, and himself. After violating the agreement and receiving another administrative order from the EPA, appellant filed a suit challenging the authority of the EPA and the Army Corps to regulate deep ripping under the CWA. The district court held that appellant was in violation of the CWA and found the EPA and Army Corps. were appropriate regulators under the act. On appeal, the 9th Circuit affirmed finding that deep ripping in this context constituted a discharge of a pollutant because the ripping of the protective layer of soil caused the soil to be lifted and redeposited elsewhere. Further, the court held that the CWA farming exception did not apply because changing the intended use of the ranch would bring the land into a use which it was not previously subject to. Also, the court reversed with respect to vernal pools, pools of rain water that gather during the rainy season, holding that the regulation of the vernal pools was not within the scope of the CWA. Appellants' contention that the damages were improperly assessed by the district court was without merit and the penalty was upheld.

**FAIR HOUSING ACT/ADA:** **REASONS FOR SPECIAL PERMIT DENIAL FOR FACILITIES FOR RECOVERING ALCOHOLICS WERE PRETEXT FOR CITY'S DISCRIMINATORY INTENT AND RETALIATORY MOTIVES**

***Regional Economic Community Action Program, Inc. v. City of Middletown***, 281 F.3d 333 (2nd Cir. 2002), *petition for cert. filed*, (May 3, 2002).

The non-profit developer sought to reuse two industrially zoned parcels for Head Start classes, a child-care center, medical and dental services, as well as two halfway houses for recovering alcoholics. The City required a special-use permit for multi-family housing. After debating the applications for four months, the Planning Board approved the special-use permit for the property where the developer intended to build a childcare facility, but rejected the special-use permit for the property where the developer intended to establish the halfway houses. The developer sued the City and its mayor under the Fair Housing Act, the Americans with Disabilities Act, and the Rehabilitation Act. At trial, the City argued that it denied the permit because it was concerned about industrial growth and it wanted to "protect the halfway house residents from the nuisance effect of the railroad." 281 F.3d at 349-50. The trial court granted summary judgment to the City on all of the developer's claims.

The Court of Appeals did not accept the City's proffered reasons, stating that "a reasonable juror might wonder why the Planning Board worried more about the impact of the railroad on recovering alcoholics than on children." *Id.* at 350. The court found the grant of a permit for the childcare facility on adjoining property, coupled with the Board members deposition testimony, and the map showing the area surrounding the properties was not largely industrial were evidence of pretext. The court ruled that the trial court should not have granted summary judgment in favor of the City because there was sufficient evidence for a reasonable juror to "find that the real reason [for the permit denial] was discrimination based on the identity of [the developer's] clients." *Id.* In addition, the court found that jury should have been allowed to evaluate the developer's retaliation claim that the City withdrew funding from a different project because the developer threatened the City with legal action after the denial of the special-use permit.

**FAIR HOUSING ACT:** **DENIAL OF LOW-INCOME HOUSING DEVELOPMENT VIOLATES FAIR HOUSING ACT IF DENIAL CREATES A DISPARATE IMPACT BASED ON RACE**

***Buckeye Community Hope Found., v. City of Cuyahoga Falls,*** 263 F.3d 627 (6th Cir. 2001), *cert. granted* 2002 U.S. LEXIS 4691 (U.S. June 24, 2002).

A non-profit organization ("Buckeye") sued the City of Cuyahoga Falls alleging violations of the Fair Housing Act (FHA) following a municipal referendum which rescinded its low-income housing approval by the City Planning Commission. Buckeye's initial challenge to the referendum in state court was not successful. When its building permit application was denied, Buckeye filed a federal claim in federal court for violations of the Fair Housing Act, Due Process Clause, and the Equal Protection Clause. The district court denied Buckeye's motion for summary judgment, concluding that there were still genuine issues of material fact. Meanwhile, the Ohio Supreme Court reheard Buckeye's case on a motion for reconsideration and found that since the action taken by City Council was administrative, the referendum violated Ohio's constitution.

Subsequently, the Court of Appeals for the Sixth Circuit reversed the district court, holding that Buckeye had sufficiently raised a genuine issue of material fact as to whether the opposition to the housing project reflected racial bias and whether defendants gave effect to that racial bias by allowing the referendum to stay the site-plan. Further, Buckeye raised a genuine issue of material fact as to whether defendants, by denying Buckeye the benefit of the project site plan, engaged in arbitrary, irrational, and therefore unconstitutional application of the law in violation of plaintiffs' right to due process. Finally, the court held that there were unresolved issues concerning defendant's liability with regards to the FHA claims. The Supreme Court, in June of 2002 granted a writ of certiorari to heart the City's appeal.

**FAIR HOUSING ACT:** **UNFAIR HOUSING PRACTICE FOR MUNICIPALITY TO DENY PERMIT THAT WOULD MAKE HOME HANDICAP ACCESSIBLE WITHOUT DEMONSTRATING THREAT OF HOMEOWNERS' REQUEST TO THE COMMUNITY**

***George and Astrid Dadian v. Village of Wilmette,*** 1999 U.S. Dist. LEXIS 6846 (N.D. Ill. 1999), *affirmed by* 269 F.3d 831 (7th Cir. October 18, 2001).

Plaintiffs, an elderly couple, sued the Village claiming that the Village violated the Federal Fair Housing Act by denying a permit request to construct a front driveway in order to accommodate plaintiffs' physical disabilities, which limited their ability to walk. To make their home handicap accessible, plaintiffs submitted a permit application to construct a front-yard driveway. They requested the Village to waive the requirement that front driveways only be allowed when 50% or more of the residences on the block have them. The municipality denied plaintiffs' request and the decision was upheld on appeal by an appeals board. The plaintiffs subsequently filed suit against the Village claiming that the denial of the permit caused them severe emotional pain, embarrassment, and humiliation, as well as physical pain from the inability to make their home

handicap accessible. Further, they alleged deprivation of equal opportunity to use and enjoy their dwelling resulting in substantial economic loss.

The Seventh Circuit affirmed the decision of the District Court, upholding six of plaintiffs' eight complaints. The lower court decision was based on the fact that the Village's arguments were not appropriate to decide a motion to dismiss because the issues of reasonability and necessity were questions of fact. Among the plaintiffs' successful complaints were the Federal Fair Housing Act (FHA) claim because the Village failed to counter the plaintiffs' proper FHA allegation that the denial of the permit was "unreasonable because it imposed undue financial and administrative burdens." The plaintiffs were able to prevail on their American Disabilities Act (ADA) claim as well. The court held that the ADA Title II claim, involving discrimination by a public entity, was applicable to zoning decisions and thus the plaintiffs had also stated a proper claim under this law.

**RELIGIOUS INSTITUTIONS:** **INVITATION TO HOMELESS TO SLEEP IN CHURCH'S OUTDOOR SPACE IS UPHELD AS PROTECTED UNDER THE FREE EXERCISE CLAUSE**

***Fifth Ave. Presbyterian Church v. City of New York,*** 2002 U.S. App. LEXIS 11390 (2nd Cir. 2002).

The United States Second Circuit Court of Appeals affirmed the district court's decision allowing homeless who preferred not to sleep in shelters to stay in the church's outdoor space at the church's invitation. The homeless were allowed to sleep in two designated areas including the landings at the top of the staircases leading into the church, and a space in between the church wall and the public sidewalk. The court did not consider the City's argument that the outdoor sanctuary was not a permissible "accessory" use under zoning regulations because the issue was not raised below. Further, the court affirmed the lower court because the church had demonstrated a likelihood of success in establishing that its provision of outdoor sleeping space for the homeless effectuated a sincerely held religious belief and therefore was protected under the Free Exercise Clause.

**RELIGIOUS INSTITUTIONS:** **LOCAL BOARD'S DENIAL OF PROPOSED HINDU TEMPLE WAS ARBITRARY AND UNSUPPORTED BY THE EVIDENCE**

***In Re: Four Three Oh, Inc.,*** **Debtor** ***Bd. of Adjustment of The Township of N. Bergen v. B.A.P.S. Northeast, Inc.; Michael Kaplan, Chapter 11 Trustee; Township of N. Bergen,*** 256 F.3d 107 (3rd Cir. 2001).

The Third Circuit affirmed a previous ruling that found the Township's denial of a use variance to construct a Hindu Temple was an arbitrary and unsupported decision. The temple purchased the property on the condition that the local Board of Adjustment approve the site for the Hindu Temple. The Board repeatedly delayed and refused to grant the variance. The bankruptcy court found the board had abused its discretion and granted the use variance. Subsequently, the court of appeals affirmed the grant of the variance in this proceeding. It held that under state law, a variance for a beneficial use should be granted if it satisfies the test by weighing the positive and

negative factors of the request. In this instance, the court found that a Hindu Temple was a beneficial use and that the Board's denial was unsubstantiated and a misuse of authority.

**SUBSTANTIVE DUE PROCESS:** **BOARD VIOLATED DEVELOPER'S RIGHTS BY DELAYING APPROVAL IN ORDER TO RECEIVE A VOLUNTARY IMPACT FEE FROM A COMPETING DEVELOPER**

***United Artists Theatre Circuit, Inc. v. Township of Warrington***, 2001 U.S. Dist. LEXIS 12189, (E.D. Pa. 2001).

The developer, UA, submitted a proposal to build a multi-plex movie theatre and entertainment complex. A year later, a competing developer submitted a proposal for a multi-plex theatre and retail center on an adjacent parcel. Despite state law allowing municipal impact fees, the Township had never enacted an enabling ordinance. Yet, the Board of Supervisors asked each developer to contribute an impact fee voluntarily to the Township. The competing developer offered to pay $100,000 annually, while UA resisted, citing company policy. The Board granted preliminary approval to the competing developer one month after receiving his application and granted final approval 3-½months later. UA did not receive preliminary approval until 14 months after submitting its initial application. The Board also tabled its vote on final approval 3 times, each time expressly asking if the developer would pay an impact fee. When UA did finally agree to pay the Township $25,000 annually, the Board voted to alter some of the conditions for approval, making it more difficult for the developer to build its theatre. The resolution granting preliminary approval required UA to acquire the rights-of-way needed for road improvements before it opened the theatre, however, the resolution granting final approval required UA to acquire the rights-of-way before it could start construction. The developer's approval occurred well after the competing proposal had received its approval.

The developer sued the Board and its individual members claiming they violated its substantive due process rights. The court rejected the Board members' argument for summary judgment based on qualified immunity. The court held that none of the Board members was entitled to qualified immunity because the developer presented evidence from which a reasonable fact finder could find that each Board member subjected the UA project to heightened scrutiny and delayed the project's approval in order to receive the impact fee from the competing developer. The court concluded that "[t]his motive, if proved, was improper and actions taken for this reason constitute a violation of the plaintiff's right to substantive due process." 2001 U.S. Dist. LEXIS 12189 at 29.

## STATE COURT DECISIONS

**AGRICULTURAL ZONING AND EXOTIC ANIMALS:**

**TIGERS 1, SNAKES 0 – COUNTY'S REFUSAL TO REZONE LAND ZONED AGRICULTURAL TO PERMIT KEEPING OF TIGERS WAS ARBITRARY AND CAPRICIOUS**

***Board of Commissioners of Roane County v. Joe Parker***, 2002 Tenn. App. LEXIS 122 (Tenn. Ct. App. 2002).

Tigers are faring better than snakes in the courts. Last year we reported that Maryland's intermediate appellate court found that the raising and marketing of exotic snakes qualified as commercial agriculture under a county's zoning regulations. Unfortunately for the snakes, the state's highest court has since ruled, in *Marzullo v. Kahl*, 783 A.2d 169 (Md. 2001), that the lower court failed to give the proper deference to the County Board of Appeals' decision that snake husbandry was not commercial agriculture and that the facility was not a "farm" because snakes are not dependant on the land as they can live in a constructed building.

In Roane County, Tennessee, on the other hand, the keeping of large exotic animals such as tigers is a permitted agricultural use. In this case, the tiger owners had purchased 9 acres of A-1 general agricultural land in 1991 to house a pet tiger, a permitted use. That prompted the County to create a new A-2 "special agricultural district." This district permitted animal shelters, preserves, and reservations for the keeping of wild and exotic animals in rural areas. Within three years, the tiger owners had acquired 50 or more exotic animals on the 9-acre tract. They purchased 3 additional tracts of land, for which they requested rezoning to the new A-2 district in order to expand the exotic animal sanctuary. The County refused even though it had granted rezoning to another person located in a residential subdivision who stated she planned to use the land for small exotic animals, a zoo quarantine and "perhaps big cats." The tiger owners sued and the trial court ruled the County's action was not arbitrary. The appeals court sided with the tigers, finding that the discrimination against the tiger owners was patent. The County conceded that the A-2 zoning classification "was provoked" by the Plaintiff's possession of the tiger. The court found that the tiger owners' rural property was more qualified for A-2 zoning than the subdivision property the County had zoned A-2 and held that that the refusal to rezone the tiger owner's property was discriminatory, arbitrary and capricious.

**BURDEN OF PERSUASION:**

**LANDOWNER MUST PERSUADE ZONING BOARD TO GRANT LAND USE EXTENSION SUBSEQUENT TO SATISFYING THE REQUIRED BURDEN OF PRODUCTION**

***Angelini v. Harford County,*** 2002 Md. App. Lexis 92 (Md. App. 2002).

Landowner brought suit against the County appealing the zoning board's denial of a 100-foot extension of the B-3 (General Business District) zone of her land. The Harford County Zoning Code § 267-10 states, "the zoning board may render interpretations by permitting the extension 1) if the boundary line of a district divided a land parcel held in single ownership on the effective date of a certain part of the zoning code, and 2) such extension did not exceed 100 feet beyond the boundary line." Plaintiff claimed that she met her burden of production in satisfying both of these requirements, thus mandating the board to grant her request. Even though the zoning board

agreed that she met her burden of production, it denied her request. The appeals court affirmed the board decision, interpreting the language in the zoning code to permit not mandate interpretation by permitting the extension. The court essentially held that as a first step plaintiff had to satisfy her burden of production to show that her request met the two criteria for use extensions. The second step required her to meet the burden of persuading the board that her request was necessary. Further, plaintiff had the burden of persuading the board that any alternatives were not appropriate. For example, the board, in denying her extension, stated that plaintiff provided no evidence why an extension of less than a 100 feet would not have sufficed.

**CONTRACT ZONING:** **DEVELOPER'S UNILATERAL PROMISE WAS NOT THE MEETING OF THE MINDS NEEDED TO TRIGGER ILLEGAL CONTRACT ZONING**

***Kerik v. Davidson County***, 551 S.E.2d 186 (N.C. Ct. App. 2001).

The County rezoned the landowner's 140.4 acres and required a 100-foot buffer along the western boundary of one of the parcels. In his application, the landowner had described various conditions to be placed upon the parcels, including buffers. Before the hearing on his application, the landowner sent a series of memos to the Planning Board members. The memos discussed his intent to offer parkland to the County and alternative development proposals. After approval of the application, several neighbors sought a judgment declaring the rezoning of the property by the County illegal and void. The trial court declared the rezoning void on the ground that it was illegal contract zoning and specifically found that "there was agreement on the part [of the landowner] to maintain certain buffers on his property in return for consideration for the rezoning by Davidson County." 551 S.E.2d at 189-90.

In reversing, the appellate court first reiterated that "rezoning is a legislative act," *id.* at 190, and that the "proper review of a local government's rezoning decision [including whether it engaged in contract zoning,] should be based on the 'whole record'." *Id.* at 191-92. Next, the appellate court found that the trial court improperly considered evidence outside of the record. Instead of remanding, the court considered the whole record and held that the County's Zoning Ordinance amendment did not constitute illegal contract zoning. The court found no evidence that a meeting of the minds took place or that reciprocal assurances were made. The only promises made about buffers were unilateral, by the landowner to the Board. The court also held that the provisions imposing 100-foot buffers on the property were void because other similarly situated rezoned properties were not required to have buffers.

**DEVELOPMENT AGREEMENTS:** **WATER AND SEWER CONNECTION CHARGES WERE CAPPED BY A LAND CONTRACT BETWEEN A LOCAL GOVERNMENT THAT CONTAINED COVENANTS THAT RUN WITH THE LAND, AND THUS WERE ENFORCEABLE BY ASSIGNEES**

***County Commissioners of Charles County v. St. Charles Associates Limited Partnership***, 784 A.2d 545 (Md. 2001).

As the developers proceeded with the build-out of a large planned unit development (PUD), the County and the developers executed a settlement agreement to resolve water and sewer capacity

entitlements and connection charges, as well as other issues related to municipal services. The Agreement expressly stated that the covenants would run with the land and that the right and obligations of the parties could be assigned. The Agreement also restricted the developer's rate of development and established a set price of $2,040 for water and sewer connection for each residential unit. Reasonable increases were permitted if the County obtained adequate rate studies. The Agreement was recorded. Over the next several years, the parties litigated over procedures used in the County's rate studies. The trial court concluded that the County's rate studies were flawed and issued an injunction capping the water and sewer connection fees at $2,040 for all residential properties in the PUD per the Agreement. During the litigation, the developer sold residential lots to two companies. Each deed provided that the conveyance was subject to the covenants, easements and restrictions of record. Several months later the developer made an assignment in accordance with the Agreement. After the assignment, the County notified the developer that it would not issue sewer and connection permits to the two companies at the capped hook-up rate, arguing that the Agreement did not bind future purchasers of the PUD lots. The developer sued for enforcement of the injunction and sanctions.

The state's highest court held that the Agreement, established by two sophisticated parties, did contain covenants that run with the land to bind the County and the developer. The court found that the language of the Agreement and the intention of the parties were clear, and also held that the deeds were by their express terms, assignments. The court affirmed that the County was barred from imposing any water and sewer connection fees in excess of the capped rate of $2,040 for any residential property in the PUD, unless the fees were properly modified after an adequate rate study.

**DEVELOPMENT AGREEMENTS:** **EXCULPATORY COVENANT DOES NOT RELEASE CITY FROM LIABILITY FOR LOSSES CAUSED BY ITS OWN NEGLIGENCE**

***1515-1519 Lakeview Boulevard Condominium Ass'n v. Apartment Sales Corp.***, 43 P.3d 1233 (Wash. 2002).

The homeowners were the owners of three condominiums that were rendered inhabitable when they sank about 4 feet and slid 2 feet laterally during winter storms. The homeowners sued the City, the developers, the contractor, the architect and the engineers (but not any lawyers). The homes had been constructed on steep slopes in a landslide-prone area. Before allowing the condominiums to be constructed, the City had imposed several conditions on the developer. These conditions included a covenant exculpating the City from liability for any damages caused by soil movement, except for damage caused solely by the City's negligence. The trial court had dismissed all claims against the City at summary judgment. The intermediate appellate court reversed in part and reinstated the claim arising from a negligently maintained storm drain.

The state's highest court affirmed, holding that the homeowners could pursue their claims against the City for negligent maintenance of a storm drain. The homeowners argued that the City's storm drain proximately caused the land to slide and they fell within the "special relationship" exception to the public duty doctrine. The court stated that to fall within the "special relationship exception" on their negligent maintenance claim, the homeowners must establish direct contact between a public official and the homeowner, express assurances and

justifiable reliance. They presented evidence that the City installed catch basins in front of one residence, that at least one of the owners had been compensated by the City for flood damage and that the owner received assurances from the City that it would maintain the storm drains. The court found this evidence sufficient to bring her within the "special relationship" exception. The court also held that local governments and property owners can enter into arms-length agreements "which may include waivers of liability for risks created by the proposed use of the property because of the shape, composition, location or other characteristic unique to the property sought to be developed." 43 P.3d at 1237. Here, the exculpatory covenant was tailored to specific risks unique to the particular development and appropriately limited to the danger of soil movement and "did not violate this State's abolition of sovereign immunity by functionally enacting blanket immunity." *Id.*

**EASEMENTS:** **COURT ADOPTS NEW TEST FOR UNILATERAL ALTERATIONS OF DITCH EASEMENTS**

***Roaring Fork Club, L.P., v. St. Jude's Co.,*** 36 P.3d 1229 (Colo. 2001), *cert. denied* 2001 Colo. LEXIS 1064 (Colo. December 17, 2001).

St. Jude's Company owns 240 acres of agricultural land that was upslope from Roaring Fork Club's property. Roaring Fork began construction around three irrigation ditches on its property, which St. Jude's and Roaring Fork both make use of, to better accommodate their golf and fishing development. St. Jude's had refused to sell portions of the easement or to formalize a ditch maintenance arrangement with the club prior to construction and therefore initiated a trespass action seeking a mandatory and permanent injunction requiring restoration of the ditches to original location and course. The trial court, appellate court, and Colorado Supreme Court all found Roaring Fork Club to have committed a trespass. First, the right to inspect, operate, and maintain a ditch easement could not be abrogated by alteration to the ditch. Second, the high court ruled that the alteration of a ditch by a "burdened estate" is not allowed without consent from the owner of the easement or from a declaratory order from a court that the changes will cause no damage to the benefited owner. However, the court stated that to satisfy this requirement the Restatement of Property test must be satisfied, namely, that the change does not significantly lessen the utility of the easement, increase the burdens on the owner of the easement, or frustrate the purpose for which the easement was created. Petition for rehearing was denied.

**EMINENT DOMAIN:** **AGENCY CANNOT USE INJUNCTION AS A SUBSTITUTE FOR "QUICK-TAKE" CONDEMNATION AUTHORITY**

***J.L. Matthews, Inc. v. Maryland National Park and Planning Commission***, 792 A.2d 288 (Md. 2002).

The Maryland-National Park and Planning Commission (MNCPPC) initiated a condemnation action to acquire a 29,000 square foot parcel of land that it wanted to convert into a park. Several months prior to the initiation of the action, the County had issued the landowner the requisite subdivision plan approvals to build 8 townhouse on the site. After approving the project, the County made two offers to purchase the property. The landowner rejected both offers and informed the County's land acquisition specialist that it had applied for building

permits. Two weeks later the County issued the building permits and the landowner began site work. MNCPPC then filed its complaint for condemnation, followed by motions for a temporary restraining order and a preliminary injunction. The trial court granted the agency's motions and enjoined the landowner from "carrying out any construction activity" until the trial concluded. 760 A.2d at 293-95. The landowner countered by filing a request for $200,000 in injunction damages in excess of any fair market value condemnation award. The agency then filed two motions *in limine* requesting that the landowner be prohibited from presenting evidence of "lost profits, costs and expenses" requested over and above the fair market value of the property and damages suffered as result of the injunction. The trial court granted the motions. At trial, the jury awarded the landowner $320,000 as just compensation. The intermediate appellate court affirmed, but the Maryland Court of Appeals (highest court) reversed.

The court concluded that MNCPPC had "regular," rather than "quick-take," condemnation authority under state law. Therefore, the fair market value of the property should have been "assessed by the jury as of the date of trial" because the taking does not occur until the condemnation authority "pays the judgment and costs assessed in the trial," and a landowner is free to use his property up to that time. *Id.* at 307, n28. Maryland law allows MNCPPC to obtain a temporary restraining order or preliminary injunction only "in exceptional or extraordinary circumstances to prevent the detrimental destruction, misuse or alienation of land." *Id.* at 307. However, the court found that MNCPPC's speculative evidence regarding its increased costs did not meet the high bar of exceptional or extraordinary circumstances to justify the injunction. Because the injunction blocked the landowner's efforts to continue to improve its property, the fair market value of the property was improperly determined as of the date of the injunction, rather than the date of trial. The court concluded that a "condemning authority is not entitled to utilize injunctive relief as a means of preserving its financial valuation of private property." *Id.*

**EMINENT DOMAIN:** **STATE CAN BRING CONDEMNATION ACTION AGAINST PRIVATE LAND PURCHASED BY AN INDIAN TRIBE**

***Cass County Joint Water Resource District v. 1.43 Acres of Land in Highland Township***, 643 N.W.2d 685 (N.D. 2002).

A landowner in North Dakota, when threatened with condemnation of 1.43 acres of his farm for a local dam project, sold his land to the Turtle Mountain Band of Chippewa for some blankets and beads in order to foil the project. The tribe has a reservation 200 miles from the farm and declared the land a formal burial site significant to its culture. A lower state court agreed that tribal sovereign immunity exempted the parcel from condemnation. The Supreme Court of North Dakota did not appreciate the landowner's creativity and reversed. The court concluded that the 1.43-acre tract was "simply private land which has been purchased by the Tribe." 643 N.W.2d at 698. Therefore, the court held that the State could exercise jurisdiction over the land, including an in rem condemnation action, because "the Tribe's sovereign immunity is not implicated" and the Federal Nonintercourse Act, which preempts the operation of any state law affecting the ownership of Indian trust land, did not preclude the condemnation action.

**EMINENT DOMAIN/REDEVELOPMENT:** **COURT RULES TAKING UNCONSTITUTIONAL BECAUSE IT WAS FOR** PRIVATE PROFIT NOT PUBLIC USE

***S.W. Ill. Dev. Auth. (SWIDA) v. Nat'l City Env'tl (NCE),*** 2002 Ill. LEXIS 299 (Ill. 2002).

In 1996, proceeds of taxable sports facility revenue bonds issued by SWIDA were lent to Gateway to finance a racetrack. In 1998, after neighboring NCE refused to sell an unused 148.5 acre tract of land to the racetrack owners, Gateway asked SWIDA to use its authority to take the land in order to allow the racetrack to expand its parking capabilities. SWIDA adopted a resolution to assist Gateway with the expansion and authorized an agreement with Gateway for acquisition of the property through quick take proceedings. NCE refused two offers of $1 million dollars to sell its tract of land and SWIDA subsequently filed a complaint seeking condemnation of, and acquisition of fee simple title to the property.

The trial court ruled in favor of SWIDA and found $900,000 to be just compensation for NCE's property. The appellate court reversed. The Supreme Court of Illinois affirmed the appellate court's reversal, holding that SWIDA exceeded its constitutional authority. The court found the racetrack to constitute a private venture designed to make profit, not to benefit a public use. The condemnation was viewed by the court as an attempt to assist Gateway in accomplishing its private goals, not to further some public interest in fostering economic development or to increase public safety by providing greater parking accommodations. The court refused to uphold such action because it was undertaken solely in response to the failure to negotiate an acceptable purchase price with NCE.

**EQUITABLE ESTOPPEL:** **MUNICIPALITY EQUITABLY ESTOPPED FROM REQUIRING A USE VARIANCE AFTER YEARS OF IGNORING A RESTAURANT'S STEADY EXPANSION**

***Bonaventure International, Inc. v. Borough of Spring Lake***, 795 A.2d 895 (N.J. Super. Ct. App. Div. 2002).

The owner of a restaurant located in a residential neighborhood was involved in a on-going dispute with neighboring homeowners. Over the years, the restaurant expanded from a private summer operation serving occupants of a 10-room hotel in 1975 to a public 96-seat year-round restaurant, available for large private functions, without the requisite approvals or variances from the municipality. The owner started providing large special events, as well as off-premises catering, after he purchased the property in 1991. The restaurant and the hotel had become nonconforming uses in 1975 when the area was zoned to allow only residential uses. In 1999 and 2000, the Planning Board held hearings on an appeal by the neighbors to compel the Zoning Officer to issue a cease and desist order. The neighbors detailed the history of the expansion of the restaurant and how the intensification of use impacted the neighborhood. The Board concluded that the restaurant was a nonconforming use that had been expanded without approval, but the municipality's inaction over the years barred the issuance of a cease and desist order at this late date. The trial court affirmed the Board's equitable estoppel finding in part, but ordered the restaurant owner to stop the on-premises private party functions and off-premises catering until it received a use variance.

On appeal from both parties, the appellate court found that the entire character and scope of the restaurant had changed substantially from the food service provided in 1975, but that the municipality had numerous opportunities to question this expansion and did not. It stated that a "court considers the quality, character and intensity of the expansion and its impact on a neighborhood" when evaluating the expansion of a nonconforming use. 795 A.2d at 903. The court affirmed that the municipality was equitably estopped from barring the operation of a 96-seat a la carte restaurant. However, the court also held that the owner could not invoke equitable estoppel for the off-premises catering and other uses added after it purchased the property in 1991. The court modified the trial court's list of prohibited activities requiring a use variance to add acceptance of reservations for a group of 20 or more persons.

**EQUITABLE ESTOPPEL:** **ZONING COMMISSION ESTOPPED FROM HIDING BEHIND FORMAL DEFECT IN A PLAT TO DENY CLUSTER HOUSING PROPOSAL**

***Equicor Development, Inc. v. Westfield-Washington Township***, 758 N.E.2d 34 (Ind. 2001).

The developer submitted a plat to the Town's Plan Commission for a 27.2-acre cluster housing development. After reviewing the plat, the technical advisory committee concluded no changes were necessary and the staff recommended approval. Some changes related to green space and streets were recommended by the Commission's Subdivision Committee and the developer addressed those. At the same time, the Town suspended its zoning provisions for cluster developments. The Commission voted to deny approval because the developer did not label the location and list the number of parking spaces on the plat, although the plat itself showed driveways and curbside spaces. The trial court affirmed, concluding the denial was supported by substantial evidence. The intermediate appellate court agreed that substantial evidence supported the denial, but reversed, holding that the Commission's decision was arbitrary and capricious because the true motive for the denial was concern over the density of the proposed development.

The state's highest court reversed, holding that the Commission's motivation was irrelevant. Throughout the subdivision review process, the Commission never raised any parking issue. The court stated that "[r]aising a formal defect such as failure to designate these visible, if undesignated, [parking] spaces at the last moment permits agencies to fumble endlessly with proposals that are entirely lawful." 758 N.E.2d at 39. Noting that the Commission had ample opportunity to point out any concerns related to the labeling of the parking on the plat, the court concluded that the developer had reasonably relied on the Commission's silence during the review process so the Commission was equitably estopped from using the parking issue to deny the plat.

**FINDINGS INADEQUATE:** **FINDINGS BASED UPON PERSONAL KNOWLEDGE OF BOARD MEMBER INADEQUATE TO ALLOW THE COURT TO REVIEW THE BOARD'S DENIAL OF SITE PLAN**

***Chapel Road Assoc.'s, L.L.C. v. Town of Wells,*** 2001 ME 178, 787 A.2d 137 (Me. 2001).

The Supreme Court of Maine remanded the case back to the planning board to correct its inadequate findings of fact in denying landowner's site plan application for the development of a sandwich shop. The planning board relied on its own member's personal knowledge and opinions contradicting plaintiff's evidence at the board hearing to deny the permit for failure to meet local traffic standards. The findings concluded that plaintiff failed to comply with the traffic ordinance. However, no findings were made concerning traffic, no findings were made indicating the portions of the ordinance that were violated, and no evidence was given upon which the board relied in determining plaintiff's noncompliance. Therefore, the court held that the Board's findings did not meet the requirements of the ordinance or statute and remanded to the Board in order to establish findings that permit meaningful judicial review.

**INITIATIVES:** **VOTER ENACTMENTS RESTRICTING COUNTY BOARD OF SUPERVISORS' ADMINISTRATIVE DISCRETION ARE NOT PERMITTED**

***Citizens for Jobs and the Economy v. County of Orange***, 115 Cal. Rptr. 2d 90 (Cal. Ct. App. 2002), *review denied*, 2002 Cal. LEXIS 2832 (Cal. April 17, 2002).

The voters of Orange County passed an initiative measure known as Measure F in March 2000 which put spending and procedural restrictions on the County Board of Supervisors regarding the planning and implementation of the conversion of the former Marine Corps air station at El Toro to civilian use. In 1994, the voters had approved Measure A, authorizing the County to amend its general plan to permit civilian aviation at El Toro and a year later, the Department of Defense designated the County as the sole local redevelopment authority for the air station. Measure F required that certain projects, civilian airports, new or expanded jails, or hazardous waste landfills, be approved by a two-thirds vote of the electorate. In addition, the measure restricted the County's ability to spend funds to plan such projects. Three days after approval, opponents of Measure F filed a petition for a writ of mandate and an injunction. The trial court issued the injunction to prevent its implementation, ruling that Measure F was "void and unenforceable." The appellate court agreed, stating "[t]his appears to be overreaching of local voter control." 119 Cal Rptr. at 107. Noting that initiative measures are not to be stricken down lightly, the court, however, found Measure F was clearly beyond the power of the electorate and defective in these three major respects: 1) it interfered with essential functions of fiscal planning and land use planning; 2) it interfered with administrative or executive acts; and 3) it was unconstitutionally vague. The court concluded that the County Board of Supervisors has sole authority to plan for the reuse of the air station, therefore Measure F's requirements of voter approval for any action impermissibly restricted the Board's administrative discretion.

**LARGE LOT (ENVIRONMENTAL PROTECTION) ZONING:**

**APPLICATION OF SIX-ACRE MINIMUM LOT SIZE, ALTHOUGH NOT A TAKING, IS ARBITRARY WHERE PROPERTY HAS NO ENVIRONMENTAL LIMITATIONS**

***Pheasant Bridge Corp. v. Township of Warren***, 777 A.2d 334 (N.J. 2001), *cert. denied*, 122 S.Ct. 1959 (U.S. 2002).

The developer purchaser 29 acres that were zoned for single-family homes on 1-½acre lots. Before the developer perfected its subdivision application, the Township adopted environmental protection zoning that required minimum lot sizes of 6 acres in areas with severe environmental constraints. The zoning change dropped the developer's potential yield from a range of 8 to 15 subdivided lots to 4 lots. The developer sued. The trial court held that the zoning ordinance was valid, however, it declined to reach the as applied challenge until the developer applied for a variance from the Board of Adjustment. The appeals court affirmed, but remanded to the trial court to evaluate the constitutionality of the ordinance as applied and whether that application constituted a taking. On remand, the trial court found the ordinance arbitrary as applied to the developer's property and held that a taking occurred. On appeal for the second time, the appeals court held that a taking did not occur because the developer could feasibly create 4 lots. The developer appealed.

The state supreme court stated that although municipalities possess a broad police power to zone, the application of environmental protection zoning to this property was unreasonable. The court noted that the only environmental constraint on the property was the high water table that was addressed by the property's access to sanitary sewers. In addition, the court pointed out that contiguous property with similar physical characteristics was zoned for 1-½acre lots. The court concluded that the Township had no authority to establish lot sizes - not tied to water and septic system requirements - simply to maintain the status quo of vacant land. However, the court also held that the developer could not sustain the temporary taking claim because it could not demonstrate that it was deprived of all or substantially all economically beneficial use of the property. The developer farmed the property during the litigation and could create 4 subdivision lots.

**NONCONFORMING USE:**

**DOCTRINE OF DIMINISHING ASSETS ALLOWS EXPANSION OF PHYSICAL CONFINES OF MINING USE AS LONG AS THE EXPANSION MEETS THE INTENT OF THE OWNER AT THE TIME THE USE BECAME NONCONFORMING**

***Town of West Greenwich v. A. Cardi Realty Associates***, 786 A.2d 354 (R.I. 2001).

The landowner conducted extensive excavation of earth and gravel on its property for the first two years of its ownership beginning in 1966. It then conducted much more limited, but continuous, excavation of "a few truckloads" of materials each year until 1988, when its excavation on the property increased significantly. Meanwhile, in 1969 the Town had enacted a zoning ordinance that required a special exception for earth removal operations in the landowner's district. In 1988, the Town issued cease-and-desist orders for the landowner to halt its excavation until it received a special exception and followed-up with a suit seeking a preliminary injunction. The landowner sued to enjoin the Town from interfering with its

operations. The trial court limited the landowner to removal of "a few truckloads" consistent with the use of the property when it became nonconforming in 1969. Both parties appealed.

The appeals court found that the mere fact the volume of material excavated was not substantial for a period of time did not defeat the existence of the landowner's nonconforming use. The court rejected the trial court's finding that the resumption of mass excavation in 1988 was an expansion of the nonconforming use. Applying the doctrine of diminishing assets, the court held that an owner of a nonconforming mining use "has the right to continue his or her operations into other areas of the parcel that can be shown, by objective evidence, to have been intended for excavation as of the date" the use became nonconforming. 785 A.2d at 363. The expansion should be measured by the intent of the owner, shown by objective criteria, at the time the use became nonconforming. The court determined that the landowner could lawfully continue to excavate and that it was not limited to "a few truckloads a year." However, the court remanded to determine the area in excavation that comprised the nonconforming use when the ordinance was enacted.

**NONCONFORMING USE:** **DOCTRINE OF DIMINISHING ASSETS APPLIES TO NONCONFORMING MINING OPERATIONS**

***City of Univ. Place v. Brian P. McGuire***, 102 Wn. App. 658, 9 P.3d 918 (Wash. App. 2000), *rev'd* 144 Wn.2d 640, 30 P.3d 453 (Wash. September 6, 2001).

City denied plaintiff, developer, a permit to remove fill from a portion of property he purchased from a land company that had mined small portions of the site for sand and gravel as a valid nonconforming use subject to an abandonment provision. Plaintiff wanted to use the fill from a 1.4-acre portion of property for a nearby development but the City refused permission. The appellate court affirmed the lower court's denial, holding that the nonconforming mining use of the land had been abandoned. The Supreme Court of Washington reversed, agreeing with plaintiff that the doctrine of diminishing assets applied to nonconforming mining operations. In its holding, the court found that the City failed to demonstrate that plaintiff had abandoned the nonconforming use because it provided no evidence showing that he discontinued the use for more than one year. In its ruling, the court emphasized that the nature of the excavation industry contemplates the use of land as a whole, not a use limited to a portion of land already excavated. Such a "diminishing-asset" enterprise is using all the land in a particular asset.

**PROCEDURAL DUE PROCESS:** **TIE VOTE TANTAMOUNT TO AN ARBITRARY DENIAL OF A VARIANCE**

***Tall Trees Construction Corp. v. Zoning Board of Appeals***, 761 N.E.2d 565 (N.Y. 2001).

The developer sought minor area variances to divide a 1.94-acre parcel into two lots, one of which would be a flagstaff lot, and to build a home on each. The property abutted the lot of the vice-chair of the Town of Huntington Zoning Board of Appeals. The Board rendered a tie vote and issued a "No Action" decision. The developer sued and the matter was remitted to the Board. The Board conducted another vote which was again split two-to-two, with two absent and two abstaining (including the neighboring vice-chair). The developer sued again. The lower court held that the vote constituted a denial, annulled the Board's second decision, and granted

the variances. The intermediate appellate court reversed, concluding that the tie vote was not a denial of the application. The State's highest court reversed and concluded that when "a quorum of the Board is present and participates in the proceedings on a variance application by actually casting votes, a tie vote failing to garner a majority to grant the application is not 'no action' but, in effect, a denial." 761 N.E.2d at 568. The court commented that the Board's history of "no action" tie votes blocked a landowner's right to judicial review and left applications in "zoning purgatory." *Id.* at 570. Noting that the Board made no factual findings and that prior minor variances had been granted in similar circumstances, the court held "the denial of the variances was arbitrary and capricious and an abuse of discretion." *Id.*

**PROCEDURAL ISSUES:** **ROLE OF ZONING BOARD OF APPEALS AND COURT ON ADMINISTRATIVE APPEAL FROM A DECISION OF THE PLANNING BOARD**

***Yates v. Gardner,*** 2001 ME 2, 763 A.2d 1168 (Me. 2001).

Plaintiff owns a marine electronics sales and repair business. The property owner directly adjacent to plaintiff's property applied for a permit to replace a piece of the dock and building on his property. The local Planning Board approved his application after finding that the project would not be a "substantial improvement" under the local Floodplain Management Ordinance. After construction was complete, the harbor enforcement officer discovered building code violations and the planning board re-examined the original application during a review for an "after-the-fact" permit application. The planning board found the project to be substantial, requiring compliance with particular building standards and denied the "after-the-fact" permit. The permit applicant appealed the planning board's decision to the Zoning Board of Appeals (ZBA), which treated the appeal as an administrative appeal rather than a request for a variance, and ordered the planning board to reissue the permits. The Supreme Court of Maine found that the ZBA was acting as an appellate body. Although it took evidence on the appeal, it closed the hearing before deciding to treat the appeal as an administrative appeal, and made no independent factual determination of the value of the property or costs of the improvements. Instead, the ZBA determined that the planning board had erred "by changing the rules" when it re-evaluated the project. Because the ZBA was acting as an appellate body, the court reviewed the decision of the planning board directly and found no error. It vacated the order of the ZBA and affirmed the judgment of the Planning board.

**REGULATORY TAKING/ PARCEL AS A WHOLE:** **EACH APPROVED LOT IN A RECORDED SUBDIVISION IS VALUED SEPARATELY IN CALCULATION OF JUST COMPENSATION**

***Town of Hillsborough v. Crabtree***, 547 S.E.2d 139 (N.C. Ct. App. 2001), *review denied*, 553 S.E.2d 213 (N.C. 2001).

In 1991, the landowners began to develop their 150-acre tract of land into a residential subdivision. They surveyed the property, obtained septic approval from the County Health Department for each lot, installed underground electrical service, constructed a new road, improved an existing road, recorded a subdivision plat depicting 14 lots greater than 10 acres, and obtained separate parcel identification numbers for each lot. In addition, they paid separate tax bills for each lot for 5 years. In 1992, they learned the Town considered their property a

potential site for the new reservoir so they ceased development activities. They did not receive official notice of the Town's intent to acquire the property until 4 years later and it was another year before the Town filed its condemnation suit. At trial, the Town argued that the property should be valued as a single tract because it was a "paper" subdivision, while the landowners argued that the property should be valued as 14 separate parcels. The trial court ruled in favor of the landowners and the Town appealed. The appeals court rejected the Town's arguments, concluding that the landowner's actions and the County's approvals demonstrated that the property was not a "paper" subdivision and that the Town's actions had prevented further development of the property. The court also concluded that the state's common law "unity rule," stating that all continuous tracts of land are considered an integrated unit for just compensation purposes, only applied to partial takings.

**NOTE:** In contrast to this case, the Supreme Court of Rhode Island, in ***Petrone v. Town of Foster***, 769 A.2d 591 (R.I. 2001), refused to recognize the landowner's property as 10 separate building lots for purpose of sale, even though the town clerk assessed the land as 10 separate lots. This was because, the landowners subdivided the property and recorded the deeds without the "required prior approval by the planning board". The trial court granted summary judgment in favor of the Town and the appellate court affirmed. The court held that the landowner could not rely on the ultra vires acts of the Town clerk and had failed to exhaust his administrative remedies in seeking subdivision approval.

**REGULATORY TAKING/ PARCEL AS A WHOLE:**

**COURT REMANDS TO REQUIRE *Palazzollo* TYPE ANALYSIS AND DEFINES PROPERTY INTEREST AS ENTIRE PARCEL OF LAND, NOT MERELY THE PORTION MOST AFFECTED BY REGULATION**

***Animas Valley Sand and Gravel v. Brd. of County Comm'rs of La Plata,*** 38 P.3d 59 (Colo. 2001), *cert. denied* 2002 Colo. LEXIS 3 (Colo. January 14, 2002).

Landowner brought an inverse condemnation proceeding against the County alleging that the County's land use plan, instituted on landowners property to regulate flood control and to increase tourism, constituted a taking. The land use plan permitted plaintiff to continue its sand and gravel operation but mining of sand, gravel, and heavy minerals was not permitted. The trial court held that the action did not constitute a taking and the appellate court agreed. However, the Supreme Court of Colorado reversed and remanded. The court applied a two-tiered analysis based on *Palazzolo* to determine first, if the landowner proved a *per se* taking, i.e. that the action left the land without any reasonable economic value; and second if the landowner failed to show a *per se* taking, did it prove a taking under a *Penn Central* fact specific inquiry analysis. The trial court originally ruled that the economic test was the only necessary analysis and therefore the high court remanded to allow the landowner to present evidence to support an ad hoc factual inquiry (the second prong of the test) at a new trial. On remand, the trial court must measure the diminution in the fair market value caused by the regulatory imposition. Under the *Penn Central* balancing inquiry, if diminution is proven, then plaintiff must show that its reasonable investment-backed expectations were adversely impacted by the plan. Other factors may be presented during the ad hoc factual takings inquiry for the trial court's consideration because the economic impact factors are essential but not dispositive.

The court also dealt with the issue of defining the property interest at stake since that is important in the comparative analysis of the diminution in the property value. It held that "in determining the economic ramifications of a regulatory act, a court must look at the contiguous parcels of land owned by the petitioner, not merely the portion most drastically affected by the regulation."

**REGULATORY TAKING/*AGINS* TEST:** **CITY ORDINANCE WAS A CONSTITUTIONALLY INVALID EXERCISE OF AUTHORITY AMOUNTING TO A COMPENSABLE TAKING OF PROPERTY**

***State Ex. Re. Shemo v. City of Mayfield Heights,*** 95 Ohio St. 3d 59, 765 N.E.2d 345 (Ohio 2002).

Realtors filed suit seeking declaratory judgment that the existing Single-Family House District zoning classification unconstitutionally restricted the use of the property and requested that the zoning be modified to allow for retail and warehouse development. Subsequent to Realtors claim and over Realtors' objections, the City rezoned the area to "Planned Unit Development" which restricted the use of the property to attached and detached single-family residential dwellings, an action that was also challenged in the pending suit. The Supreme Court of Ohio eventually upheld the decision of the lower court which found that there was no showing that the zoning modification promoted a legitimate governmental interest. The City subsequently approved an application for modification by Realtors consistent with the decision of the court. However, it refused to completely approve the road improvement plans and instead restricted use of the road, which provided access to the proposed retail development, to emergency use only. The present appeal arose from Realtors' suit in connection with this most recent restriction on realtors proposed development.

The Supreme Court of Ohio held that satisfaction of either prong of the *Agins* test is enough to establish a compensable taking of property. Plaintiff must show either that the ordinance was constitutionally invalid; i.e. that it did not substantially advance legitimate state interests, or that it denies the owner economically viable use of his land. The Court held that Realtors sufficiently satisfied the first prong; that the ordinance did not substantially advance any legitimate state interest. Further, the Court held that *res judicata* does not bar Realtors from bringing a takings claim just because they did not include it in the original action for declaratory judgment. Realtors were entitled to compensation in the amount of the diminution in the value of the use of their property during the period of the temporary taking.

**REGULATORY TAKING:** **DRAINAGE PROJECT ON PROPERTY CONSTITUTED A PHYSICAL INVASION EVEN THOUGH LANDOWNERS REQUESTED AND CONSENTED TO THE PROJECT**

***The State Ex Rel. Elsass v. Shelby County Brd. of Comm'rs,*** 2001 Ohio 1276, 751 N.E.2d 1032 (Ohio 2001).

Appellants, landowner as well as son and daughter-in-law, asked the County to improve drainage and flooding measures on their property allowing them to continue to lease the property to others for agricultural purposes. However, after measures were implemented, they filed a claim

alleging that the drainage project had resulted in a taking of their property and sought compensation. The appellate court held that there was no physical invasion because appellants' gave consent and further that an economically viable use remained. The Supreme Court of Ohio reversed and remanded. It held that the project did constitute a physical invasion on appellant's property allowing them to claim damages for the entry on their land, regardless of the fact that they consented to the project. Thus, the court of appeals erred in requiring appellants to prove that the project resulted in the loss of *all* economically viable use of the land. The case was remanded to determine if there was a loss of *any* economically viable use creating a compensable taking under the United States and Ohio Constitutions.

**REGULATORY TAKING:** **COMMONWEALTH EXCEEDED ITS AUTHORITY DERIVED BY AN AGRICULTURAL PRESERVATION RESTRICTION BY CREATING AN "OPTION TO PURCHASE CLAUSE" AS A PREREQUISITE TO APPROVAL**

***Twomey v. Comm'r of Food & Agric.***, 435 Mass. 497**,** 759 N.E.2d 691 (Mass. 2001).

The landowner purchased farmland that was subject to an agricultural preservation restriction (APR) executed by the previous owner. The APR restricts construction of a dwelling on the property unless approved by commissioner of the food and agriculture; approval only to be given if the proposed construction will not "defeat or derogate from the intent and purposes of the act" which grants authority to the Commonwealth to acquire APR's. The Commissioner subsequently created a policy to prevent any increase in value of the estate. The policy required the owner to grant the Commonwealth an option to acquire the land "at agricultural value" before the Commissioner approves construction for a dwelling on the property. The landowner claimed that his attempts to sell the land failed because the policy deterred people from purchasing it, and filed an action seeking injunction and a declaration that the Commissioner exceeded his authority. The court held that the Commissioner's "irrebuttable presumption" - that *any* dwelling would add value to the land such that appreciation would defeat or derogate from the intent of the Massachusetts law under which the APR was created - violated the APR because it failed to recognize that at the time the contract was formed, the original parties intended that some form of dwelling would be acceptable on the premises. However, consideration of an increase in property value may be a factor but not the dispositive factor in the commissioner's decision to allow or deny a dwelling on the property. The commissioner argued that his authority to deny a dwelling inherently includes the authority to approve something less such as an "option to purchase clause." However, the court held that such a policy was an attempt to gain a property right that the parties had expressly agreed would be given to the owner of the property.

**REGULATORY TAKING:** **THE *DOLAN* TEST APPLIES TO A "NONDEDICATORY DEVELOPMENT EXACTION" CREATED AS A RESULT OF THE TOWN'S FAILURE TO UNIFORMLY APPLY ITS DEVELOPMENT CODE**

***Town of Flower Mound v. Stafford Estates, L.L.P.,*** 71 S.W.3d 18 (Tex. Ct. App. 2002). (Petition for review filed 4/25/02.)

The Town of Flower Mound appealed the trial court's decision to award compensation to a partnership which had filed a takings claim against the Town for requiring it to improve a road abutting its property as a condition of plat approval for 247 lots on the property. The partnership was required to demolish the existing asphalt road and construct a two-lane concrete road with concrete shoulders. The appellate court affirmed the decision, holding that the *Dolan* test applied to the road improvement condition because the Town failed to apply its land development code in a uniform manner. Further, the court found that the Town's condition of approval had a legitimate safety interest but was not "sufficiently related to or roughly proportionate to proposed traffic increases." The court rejected the Town's argument that *Dolan* was applicable only to exactions requiring a dedication of real property, stating that the condition imposed was a "nondedicatory" development exaction. Also rejected was the Town's contention that *Dolan* is inapplicable because the required road improvement condition was legislatively created and contained standards. The court held that the exaction was largely the result of an adjudicative decision "that was required because the Town did not uniformly apply sections of its land development code." Thus, the court affirmed the award of damages for the taking of property exacted by the road improvement condition, but reversed the award of attorney's fees and expert witness fees.

**REGULATORY TAKING:** **DOWNZONING OF PROPERTY WAS AN UNREASONABLE INTERFERENCE WITH DEVELOPER'S INVESTMENT BACKED EXPECTATIONS AND ITS USE OF PROPERTY, AND THE CONTINUANCE OF A MORATORIUM DID NOT FURTHER A LEGITIMATE GOVERNMENTAL INTEREST**

***City of Glenn Heights v. Sheffield Dev. Co.***, 61 S.W.3d 634 (Tex. Ct. App. 2001).

In 1995, the City adopted a code that rezoned all property other than 14 previously approved planning development districts. In 1996, after conducting due diligence, respondent purchased 194 acres of undeveloped land zoned PD 10 (Planned Development District 10) which was one of the 14 districts not rezoned. Shortly after the property was purchased by respondent, the City enacted a moratorium on approvals of development applications to eliminate the potential for affected property owners to file a plat or development permit application reserving their development rights under the relevant Texas statute. The moratorium was to be for 30 days, but was extended until April of 1998, 15 months after it was put into effect. Respondent sued the city for violations of due process, equal protection, the takings clause of the Texas Constitution, and common law rights of promissory estoppel, latches and vested rights. The trial court granted the City's motion for directed verdict on the claimed violations of due process, equal protection, and violations of common law. Ultimately, however, the trial court found that the downzoning, not the moratorium, was a compensable taking and awarded $485,000 (difference between value before and after the downzoning) to respondent.

On appeal, the court analyzed the takings claims under the Texas Constitution and affirmed the trial court's decision. The appellate court held that the downzoning of the property passed constitutional muster because a legitimate governmental interest was involved, and some economic viable use still remained because the property still had a value of $600 to $700 per acre after the downzoning occurred. However, the court found that the 38% decrease in property value as a direct result of the downzoning constituted an unreasonable interference with the

investment backed expectations of respondent such that a compensable taking occurred. In addition, the court held that the continuance of the moratorium had nothing to do with the legitimate reason to enact it in the first place. Rather, once the city council had all the information necessary to decide on the issue motivating the moratorium initially, continuing the moratorium as a method of delay was not a legitimate governmental interest and thus it too amounted to a compensable taking.

**SPECIAL EXCEPTIONS:** **GRANT A SPECIAL EXCEPTION COMBINED WITH VARIANCES BECAUSE THE VARIANCES UPHELD WHERE THE SPECIAL EXCEPTION IS IN A SECTION OF THE ZONING ORDINANCE WHICH DOES NOT EXCLUDE VARIANCES**

***Alviani v. Dixon,*** 365 Md. 95, 775 A.2d 1234, (Md. 2001).

Respondents owned a parcel of land which they sought to have rezoned from "Residential Low Density" to "Community Retail" (C-1B) which would require a special exception in order for them to build an automotive service facility. After a number of administrative and adjudicatory proceedings, the county board of appeals granted the special exceptions and variances subject to satisfaction of the appropriate Maryland standards for granting variances. Petitioners subsequently appealed the grant of the special exceptions and variance, claiming that the county board erred in granting the special exception when the only way to approve it was by approving three variances. The Maryland high court, affirming the lower courts, held that "a special exception with variances may be granted by a zoning agency when the applicable code contains provisions excluding certain areas of the code from being subject to variance relief, but does not exclude the section covering the relevant special exception from being modified by variances." 775 A.2d 1234, 1242. Further, the court held that the variances only slightly modified the specific area standards for the special exception and did not enable a special exception use to be granted that would be outside of the scope of the general zoning provisions for the area, and the general character of the neighborhood would remain in tact. Lastly, the board's decision was supported by sufficient evidence to support their findings.

**SPECIAL EXCEPTIONS:** **BOARD IMPROPERLY DENIED SPECIAL EXCEPTION FOR HOTEL BASED UPON MERE SPECULATION OF HARM**

***In Re: Appeal of Brickstone Realty Corp.***, 789 A.2d 333 (Pa. Commw. Ct. 2001).

The landowner filed an application for a special exception for a 114-unit Marriott Residence Inn in the C-Commercial zoning district. The commercial zoning district permits hotels by special exception, "provided that satisfactory public sewage facilities are available." 789 A.2d at 335. The surrounding neighborhood consisted of a mix of residential, restaurant, office and other commercial uses. The planning commission recommended approval. At the public hearing before the zoning board, neighbors opposing the special exception testified that the proposed hotel would increase traffic congestion and cause cut-through traffic. The board determined that the landowner met its initial burden demonstrating compliance with the factors required for a special exception. However, the board determined the landowner failed "to demonstrate that the allowance of the special exception [would] not be contrary to the public interest," discrediting testimony about the number of employees and finding the traffic circulation around the hotel

inadequate for fire trucks. *Id.* at 337. The trial court reversed, concluding that the neighbors' testimony was merely speculation of harm and that the board abused its discretion by denying the application.

The appeals court affirmed, noting noted that a special exception is a use permitted conditionally if express standards and criteria are met. The court stated that once a landowner demonstrates compliance with the specific requirements of the ordinance, the use is presumed to be consistent with the promotion of health, safety and welfare. The burden then shifts to those in opposition to prove that the use, in fact, does not promote the heath, safety and welfare. The court noted that the neighbors did not present any expert testimony, and that they "did not present any concrete evidence of a high probability that the inn would generate traffic that would be abnormally higher than that generated by the same type of use and that this abnormally high traffic" would threaten the community. *Id.* at 342. Given that the hotel was permitted as a special exception and presumed to be appropriate, the court held that the neighbors "were required to produce more than lay expressions of concern for increased traffic in an already busy area." *Id.*

**STANDING:** **NEIGHBORHOOD ASSOCIATION'S MOTION TO INTERVENE IN APPLICANT'S COURT APPEAL DENIED**

***Brookridge Dist. Ass'n v. Planning and Zoning Comm'n of Greenwich,*** 259 Conn. 607, 793 A.2d 215 (Conn. 2001).

The applicant applied to the commission for a permit and approval to build a group home for psychiatric patients. Initially, the commission denied the application. The applicant then appealed to the trial court. The neighborhood Association unsuccessfully moved to intervene in the applicant's appeal. Thereafter, the commission voted to approve a settlement with the applicant and enter into a proposed stipulated judgment. The Association appealed to the trial court from the commission's decision to enter into the proposed stipulated judgment. The appeal was dismissed. The appellate court held that there was no absolute right of appeal to the courts from a decision of an administrative agency. A planning commission's decision to settle a pending appeal by entering into a stipulated judgment was not a decision within the meaning of the applicable state code and, therefore, an appeal to the trial court did not lie from that decision. However, the Association retained the right to request to be heard at the required lower court hearing on whether the settlement is in the public interest.

**STANDING:** **DECLATORY JUDGMENT SUIT BY CITY'S PLANNING ADVISORY COMMITTEE CHAIRMAN DISMISSED FOR LACK OF STANDING FOR FAILURE TO CLAIM A PERSONAL STAKE IN THE ADOPTION OF CITY ORDINANCES**

***Bremner v. City & County of Honolulu,*** 96 Haw. 134, 28 P.3d 350 (Haw. App. 2001), *cert. denied* 96 Haw. 346, 31 P.3d 203 (Haw. August 13, 2001).

The Supreme Court of Hawaii denied petition for certiorari filed by plaintiff, an employee of the City who helped draft the development and zoning regulations for Waikiki, who subsequently filed a declaratory judgment action challenging the validity of two ordinances passed by the City of Honolulu. One ordinance amended the development plan of Waikiki to strengthen the area's

economic viability and the other revised the zoning guidelines for Waikiki. Plaintiff alleged violations of his due process and equal protection rights, as well as his civil rights under Section 19830 of the Civil Rights Act. The circuit court dismissed all charges for lack of standing, holding that plaintiff could not factually support his claims and that he was nothing more than a concerned citizen. The appellate court affirmed the decision. It held that even though plaintiff had an intricate part in drafting the development and zoning regulations for Waikiki and was an experienced city planner, he failed to demonstrate "such a personal stake in the outcome of the controversy as to warrant his invocation of the court's jurisdiction and to justify the court's remedial powers on his behalf." The court outlined a number of instances that demonstrate Hawaii's liberal definition of standing but plaintiff failed to fit any of the possibilities that would give him a right to file the suit against the City. Further, the court also held that until there was an actual specific development project approved under the ordinance, none of the plaintiff's due process or equal protection challenges were ripe for adjudication.

**STANDING (AGGRIEVEMENT):** **PLAINTIFF LACKED STANDING FOR FAILURE TO DEMONSTRATE A CLAIM FOR A PRIVATE INJURY SUFFICIENT TO SHOW THAT HE WAS AGGRIEVED**

***Rinaldi v. Bd. of Appeal of Boston,*** 50 Mass. App. Ct. 657, 741 N.E. 2d 77 (Mass. App. 2001).

Plaintiff, owner and resident of property, filed a complaint against adjacent property owner (Maria Santos) to the Boston inspectional services department claiming building code violations. The resulting inspection ended in an agreement allowing Santos to apply for a building permit to renovate, which she filed immediately. The application was denied for violating certain building code provisions, but on Santos' appeal the Board of Appeals unanimously granted the variance. Plaintiff sought review of the Board's decision claiming that granting the variance to Santos would 1) violate the State building code, 2) result in greater demand for on-street parking, 3) increase traffic, and 4) interfere with his quiet enjoyment. The court denied plaintiff's motion for summary judgment claiming his injuries were "too remote." The appellate court affirmed, holding that plaintiff had to address violations of the building code with the State Building Code Board of Appeals before bringing appealing to state court. Plaintiff had failed to offer "evidence of a plausible claim of a definite violation of a private right, a private property interest, or a private legal interest, that is different from that suffered by the community generally" in order to prove that he was "aggrieved" such that his challenge of the zoning board's decision was warranted.

**VARIANCES:** **PURCHASER OF PROPERTY SUBSEQUENT TO ENACTMENT OF AN ORDINANCE RESTRICTING LAND USE HAS A RIGHT TO A VARIANCE FROM THE RESTRICTION ON THE PROPERTY**

***Richard Roeser Prof'l Builder, Inc. v. Anne Arundel County, Md.,*** 368 Md. 294, 793 A.2d 545 (Md. 2002).

Roeser was the contract purchaser of property, which required variances from the "Critical Area" and County zoning provisions in order to build the desired sized house on it. The Board of Appeals of the County denied the variance requests, stating that Roeser failed to exercise diligence in ascertaining the setback requirements prior to acquisition of the property and

therefore the hardship complained of was "self-created." The circuit court held that the Board's decision was arbitrary and capricious and an error of law because the common law had determined that topography and placement of property was not a self-created hardship and the Board had no evidence to show that Roeser created the hardship. The appellate court reversed, holding that where a person purchases property "with the intention to apply . . . for a variance from the restrictions imposed by the ordinance, he cannot contend that such restrictions caused him such a peculiar hardship that entitles him to the special privileges which he seeks." 793 A.2d at 548.

The Court of Appeals (highest court) in reversing the decision, cited evidence showing that the rule relied upon by the appellate court was no longer recognized, "because the purchaser of property acquires no greater right to a variance than his predecessor, he should not be held to acquire less." *Id.* at 551. The court's analysis includes a discussion of *Palazollo,* 533 U.S. 606, and states that if the court were to deny the right to obtain just compensation under the takings clause, when a landowner purchases property subsequent to the enactment of land use restrictions, the state could absolve itself of any obligation to defend an action restricting land use. *Id.* at 557. The court also distinguished all of the recognized hardships that are considered to be self-created and found that none of them arise from a purchase of property or the impact of a zoning ordinance. Rather, self-created hardship means hardship created by actions of the landowner.

**VESTED RIGHTS:** **RED FLAG FOR DEVELOPERS WHO PROCEED WITH CONSTRUCTION WHILE AN APPEAL IS PENDING**

***Pine Crest Lakes, Inc. v. Shidel***, 2002 Fla. LEXIS 1260 (Fla. May 31, 2002).

The Florida Supreme Court has declined to review an intermediate appellate court ruling, in *Pine Crest Lakes, Inc. v. Shidel*, 795 So. 2d 191 (Fla. Dist. Ct. App. 2001), that had affirmed the trial court's order requiring the demolition of 5 multi-family residential buildings because the buildings were inconsistent with the County's Comprehensive Plan. (The Plan called for the apartments on the property to be tiered so that the higher density would not be located adjacent to the nearby single family detached residential area. This was not done.) The intermediate appellate court upheld the trial court's funding that the project was inconsistent with the Plan's mandatory requirement for a density transition zone abutting the single family areas. The court noted that the neighboring homeowner had told the developer when it was beginning construction of the first building that she would seek demolition if the court found the project inconsistent. The court also flatly rejected the developer's "inequity" argument, stating that when the developer commenced construction in spite of the absence of a final decision "[i]t could not have had a reasonable expectation that its right to build what it proposed was finally settled." 795 So. 2d at 208. *See also, Lake Bluff Housing Partners v. City of South Milwaukee*, 632 N.W.2d 485 (Wis. Ct. App. 2001) (trial court's orders to raze two apartment buildings located on the shoreline of South Milwaukee affirmed). (rev. denied 643 N.W.2d 93 (Wis. 2002).

***Dreikausen v. Zoning Board of Appeals of the City of Long Beach***, 2002 N.Y. LEXIS 1554 (N.Y. 2002).

In contrast to the Florida court, the New York Court of Appeals (highest court) dismissed the neighboring owners' appeal as moot and did not require the developer to demolish 20 condominium units that were constructed or in various stages of completion. In this case, the developer had received a use variance from the Zoning Board of Appeals to build 20 condominiums and 20 boat slips on commercially zoned waterfront property. Four neighboring homeowners challenged the Board's grant of the variance as illegal, arbitrary and capricious, and also argued that the developer "failed to prove any of the statutory factors required for a use variance." 2002 N.Y. LEXIS 1554 at 4. They did not request preliminary injunctive relief and the trial court dismissed their petition. By this time, the developer had removed the marina, made site and bulkhead improvements, reconfigured utilities, received foundation permits and started pouring the foundations. The homeowners filed their appeal and, for the first time, sought injunctive relief because they learned the City was about to issue building permits for the condominiums.

The intermediate appellate court denied their request for injunctive relief and affirmed the trial court's dismissal of their petition, stating that the record contained sufficient evidence of the developer's unnecessary hardship to support the Board's decision to grant the variance. The homeowners appealed to the state's highest court and sought the demolition of the condominiums. At this point, the project was substantially completed. The New York Court of Appeals dismissed the homeowners' appeal as moot because they had not sought a temporary restraining order or preliminary injunctive relief at any time while the case was pending before the trial court. In addition, the court noted, the homeowners "did not contest the issuance of building permits, or a residential use, but protested that the proposed use was too intensive." *Id.* at 12.

**VESTED RIGHTS:** **DEVELOPER ENTITLED TO ISSUANCE OF APPROVAL LETTER FOR PLANS SUBMITTED BEFORE CITY DOWNZONED THE PROPERTY**

***1350 Lake Shore Associates v. Hill***, 761 N.E.2d 760 (Ill. App. Ct. 2001).

The developer obtained a rezoning to residential planned development (RPD) from the City of Chicago in 1978 to permit construction of a 40-story apartment building. After receiving the rezoning, the developer decided not to proceed with the project at that time and took no further action until 1996. When the developer took steps toward building the apartments in 1996, his plans were met with community opposition. The alderman for the ward where the property was located introduced an ordinance to downzone the property on December 10, 1997. The proposed apartment building would not be a permitted use. The next day, the project architect submitted plans, a Part II Submittal, to the City seeking a Part II Approval Letter. The Part II Approval Letter precedes the issuance of a zoning certificate, which precedes the issuance of a building permit. In April 29, 1998, the City approved the downzoning ordinance and refused to respond to the Part II Submittal. The developer filed suit claiming a vested right in the RPD zoning. The trial court ruled in favor of the City and the developer appealed seeking a writ of mandamus directing the City to issue the approval letter.

The appeals court reversed and remanded. The court rejected the City's arguments and concluded instead that that the City was not entitled to wait until the outcome of the downzoning ordinance before acting on the developer's request for the approval letter. Finding that the RPD zoning was in effect on the date the Part II Submittal was filed and that the proposed plans complied with the standards of the RPD zoning, the court concluded that the developer established a clear right to the issuance of the approval letter. In fact, the City had the authority and the duty to issue the letter because the submitted plans complied fully with the RPD ordinance. The court, however, expressed no opinion as to whether the developer was entitled to either a zoning certificate or a building permit.