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SELECTED RECENT CASES OF INTEREST TO LANDOWNERS

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SELECTED RECENT CASES

By: John J. Delaney*

U.S. SUPREME COURT DECISION

INITIATIVES/REFERENDUM: Administrative As Well As Legislative Actions of Local Governments are Subject to Referendum

City of Cuyahoga Falls v. Buckeye Community Hope Foundation, 123 S.Ct. 1389 (2003).

Site plan application for affordable housing project approved by City Council through "City Ordinance No. 48-1996." Citizen group filed a petition for referendum pursuant to City Charter. Applicant, Buckeye, filed suit in state court arguing that the Ohio Constitution does not authorize popular referendums on administrative matters. Two years later the Ohio Supreme Court ruled that the Ohio Constitution "authorizes referendums only in relation to legislative acts, not administrative acts, such as the site plan ordinance (123 S. Ct. at 1393). Buckeye was then issued permits and commenced construction. Subsequently, however, the referendum repealing the ordinance was passed and Buckeye had also initiated suit in federal court against the City, raising equal protection and due process claims as well as claims of Fair Housing Act violations. The Court of Appeals for the Sixth Circuit held that Buckeye had produced sufficient evidence to go to trial on certain issues relating to the City's alleged racial bias in delaying issuance of permits, and had also stated a valid claim under the FHA.

The Supreme Court (Justice O'Connor) reversed, holding that the City's action in putting the site-plan ordinance to referendum did not violate equal protection or give effect to any racial bias that may have motivated the citizens who sought the referendum. Regarding the referendum issue, the Court, citing its earlier, often criticized decision in *Eastlake v. Forest City Enterprises, Inc.*, 426 U.S. 668, 672, 675 (1976), held that subjecting the "site plan ordinance" to the City's referendum process *"regardless of whether that ordinance reflected an administrative or legislative decision"* did not constitute *per se* arbitrary government conduct under the due process clause (123 S. Ct. at 1396, emphasis added). No credence was given to the Ohio

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Supreme Court's decision that the state constitution's referendum provision did not apply to administrative acts such as site plan approvals. Rather, the Court stated that by allowing the referendum process to proceed under its charter, the City "was advancing significant First Amendment interests." (*Id*. at 1395.)

FEDERAL COURT DECISION

CIVIL RIGHTS ACT: No Absolute Legislative Immunity for Individual Members of County Council In Denying a Conditional Use Permit

Kaahumanu v. County of Maui, 315 F.3d 1215 (9th Cir. 2003).

Section 1983 suit against the County and individual members of the County Council by operator of commercial wedding business and pastor of church, arising from denial by the Council of a conditional use permit (CUP) to conduct a commercial wedding business on beach-front residential property. The District Court granted the Council members' motion to dismiss the claims against them in their official capacities, but denied their motion to dismiss the claims against them in their individual capacities based on legislative immunity. The Court of Appeals for the 9th Circuit in affirming, held that the Council's decision whether to grant or deny a CUP was an administrative act, rather than a "legislative act" and thus Council members were not entitled to absolute legislative immunity under Section 1983.

A court determines whether an action is "legislative" for purposes of legislative immunity under Section 1983 by considering each of four non-mutually exclusive factors: (1) whether the act involves ad hoc decision-making, or the formulation of policy, (2) whether the act applies to a few individuals, or to the public at large, (3) whether the act is formally legislative in character, and (4) whether it bears all the hallmarks of traditional legislation. Approval of the CUP was an "ad hoc" act because it was based upon circumstances of a particular case and did not effectuate policy or create a binding rule of conduct for the community. The mere fact that the County Council retained authority to approve or deny a CUP does not imply that this is a policy making activity, notwithstanding the formally legislative character of the decision. The decision in question did not have all of the hallmarks of traditional legislation, since it did not change the County's comprehensive zoning ordinances or policies underlying them, or affect the County's budgetary priorities. Thus, the decision to deny the CUP was an administrative act rather than a "legislative" act, and Council members were not entitled to absolute legislative immunity for having taken this action.

NOTE: Compare this decision regarding the nature of conditional use permits to those of the Minnesota Supreme Court in *Schwardt* at page 3, and the South Dakota Supreme Court in *Kirschenman* at page 7.

STATE COURT DECISIONS

ADEQUATE PUBLIC FACILITIES: Meaning of "Programmed for Construction"

Annapolis Market Place, LLC v. Parker, 802 A.2d 1029 (Md. 2002).

Property owner applied for rezoning of 32 acre parcel from residential to a commercial zone that permitted housing as a conditional use. The City Board of Appeals approved the rezoning application, finding that roads were adequate to accommodate the proposed use. (It failed to make findings regarding schools and fire suppression facilities.) The ordinance required that for specified public facilities to be deemed adequate to serve the use allowed by the new zoning classification, they must either be in existence or "programmed for construction." On appeal initiated by adjacent residents, the Court of Appeals (highest court) affirmed the lower court's reversal of the Board, holding that under the applicable statute, public infrastructure, such as roads, not programmed and budgeted for construction in the state or county capital improvement program, cannot be considered as "available" for purposes of determining the adequacy of public facilities.

NOTE: The court acknowledges in a footnote that in the absence of an ordinance such as in the case at bar, the issue of adequacy could be decided in the post-zoning process, such as at subdivision review, or by way of a development agreement.

AGRICULTURAL ZONING: Pigs Win. Approval of a Conditional Use Permit is Quasi-Judicial

Schwardt v. County of Watonwan, 656 N.W. 2d 383 (Minn. 2003).

Nearby opposing landowners sought review of approval by the County Board of Commissioners of a Conditional Use Permit (CUP) for confinement facilities for 3,120 hogs on neighboring property. *Schwardt* lived on a farm approximately ½ mile from the proposed site and opposed the CUP based on concerns regarding health, odors, water pollution, property values and dust from increased traffic. Reviewing what it regarded as a quasi-judicial process, the Minnesota Supreme Court stated that counties have a wide latitude in making decisions about special use permits, i.e., the test upon court review is whether there was a reasonable basis for the decision or whether the County acted unreasonably, arbitrarily or capriciously. The Court found that the applicant met the standards for approval of the CUP; thus the opponents had the burden of demonstrating either the failure of the proposal to meet county standards, or that there was an abuse of discretion. Because of the deference given by courts to decisions of local government bodies and the presence of evidence supporting the decision of the board, the decision was upheld.

NOTE: Contrast this case to *Kirshenman v. Hutchinson County*, *infra*, page 7, where the Wisconsin Supreme Court held that a CUP process for approval of a piggery was deemed to be discretionary in character and not administrative. Therefore, the approval of the CUP was subject to referendum.

COMPREHENSIVE PLAN: Rezoning Based Upon Uncodified Design Concepts in Comprehensive Plan Is Invalid

Pinecrest Homeowners Association v. Cloninger, 62 P.3d 938 (Wash. 2003).

Property owner sought rezoning of an 8.47 acre parcel from "residential office" to "mixed use", including retail, office and residential uses. (One of these, a restaurant, has been built.) The City Council approved the rezoning with the requirement that the development be in accordance with certain design concepts set forth in approved 1998 amendments to its comprehensive plan. However, none of these concepts had as yet been codified in the zoning ordinance. Adjacent residents appealed. The trial court upheld the City's approval of the rezoning. The Washington Supreme Court reversed, holding that the standards for the rezoning were too vague and did not provide the "necessary specific criteria for land use decisions." The court reiterated that planning and zoning were distinct processes, and zoning could not be accomplished through the planning process. It further held that when the City desires to implement zoning recommendations in a comprehensive plan, it must follow through by enacting specific zoning regulations.

A comprehensive plan is a "generalized coordinated land use policy statement." It embodies "policy determinations and guiding principles", whereas zoning ordinances "provide the detailed means of giving effect to those principles." The "concepts" set out in the plan are not intended to be the "specific regulations necessary to give effective or meaningful guidance" to applicants, design professionals or public officials responsible for enforcing the code. Thus, the land use regulations in question permit the City to make decisions which are "discretionary, arbitrary, vague, unarticulated and unpublished" and therefore, are unenforceable.

CONDITIONAL/CONTRACT ZONING: Rezoning Based Upon Annexation Agreement Was Improper

City of Rockville v. Rylyns Enterprises, Inc., 814 A.2d 469 (Md. 2002).

The City and property owner agreed to the annexation of property into the City and placement of property into the City's I-1 Zone, a "service industry use" zone that permitted a multitude of commercial uses by right and by special exception; including gas stations. They then entered into an annexation agreement providing that the property could not be used for any retail purpose other than a gasoline service station. The City thereupon approved the rezoning of the property to I-1, subject to the conditions of the annexation agreement, including the restriction on use of

the property to a gasoline service station. A nearby competing gas station operator appealed the rezoning on grounds that it was illegal conditional zoning. (No review of the validity of the annexation agreement was sought in the appeal.) The Court of Appeals (highest court) agreed with appellants and overturned the rezoning on the ground that the City did not have authority, under state law, to condition zoning approval of a euclidean zone upon a limitation of uses permitted therein. The court also found, *inter alia*, that even though the state enabling act allows some forms of conditional zoning (e.g., regarding design, construction, landscaping, etc.) the rezoning approval was illegal conditional zoning because it was based on the conditions on use imposed in the annexation agreement. Limiting the use of the property was improper, even though the gas station use was one of the uses allowed by special exception in the I-1 Zone. (In a footnote, the court specifically noted that its decision was not intended to invalidate the use of annexation agreements.)

Two judges filed a lengthy dissent arguing that the majority erred in finding that the state's enabling legislation did not permit local authorities to limit uses when approving a zoning application.

EASEMENTS: Lot Purchasers in Planned Community Had Implied Easement to Use Common Areas

Kobrine LLC v. Metzger, 824 A.2d 1031 (Md. App. 2003).

In 1991 Appellant Kobrine purchased a lot in Harbor Light Beach ("HLB"), a planned community adjacent to the Patuxent River, which included common areas, including a beach area adjacent to Kobrine's lot for recreation, boating and access to the river. HLB was originally subdivided in 1956. In 1998, Kobrine purchased part of an adjacent parcel which in the original subdivision is described as "Area Reserved for the Use of Lot Owners" and which had been used by Appellees Metzger and others for recreational purposes and access to the river for at least two decades ("the Parcel"). After Kobrine sought to bar access to the Parcel, Metzger and other residents sought an injunction to establish their rights of use and access.

The appellate court held, *inter alia*, that Metzger and the other residents had established an implied easement for recreational purposes, based on over twenty years of such use, and the general plan of development of the subdivision which set aside the Parcel as common area. Any conceivable uncertainty regarding the original developer's intent is removed by examining the history of the subdivision's sale and marketing. The court's jurisdiction in equity to enforce the rights of other lot owners is not limited to "technicalities", including whether the covenant runs with the land, but rather on whether a party shall be allowed to use the land "in a manner inconsistent with the contract entered into by his vendor" of which he had notice when he purchased the Parcel. Kobrine was ordered to convey title to the Parcel to the residents in the subdivision, as contemplated in the original subdivision documents.

EXCLUSIONARY ZONING: Principles of "Mt. Laurel" Reaffirmed

Toll Brothers, Inc. v. Township of West Windsor, 803 A.2d 53 (N.J. 2002).

Toll Brothers, owner of a 293 acre tract, sued the Township in 1993, alleging that it had engaged in an unconstitutional pattern of exclusionary zoning in violation of the original Mt. Laurel decision ("Mt. Laurel I" - municipalities must provide a realistic opportunity for development of affordable housing); as well as "Mt. Laurel II" (permitting a builder under certain conditions to seek court approval of construction that will include affordable housing, (i.e., a builder's remedy), and the Fair Housing Act (FHA) of New Jersey. The trial court concluded that the Township had provided 241 units of its 929 unit fair share housing obligation, and then evaluated nine other sites that were the sole remaining sites upon which the Township's remaining obligation for affordable housing could be satisfied. The evaluation was for the purpose of determining whether the Township was in fact providing a realistic opportunity for the development of affordable housing. The trial court considered (1) unnecessary cost-generating site development standards unrelated to health/safety; (2) restrictions on the type and mix of housing permitted; (3) infrastructure requirements; (4) environmental constraints; and (5) access to water and sewer services at a reasonable cost. Based on its assessment of the number of affordable housing units that each site could reasonably support, the trial court determined that the Township was not in compliance with its present affordable housing obligation and awarded Toll Brothers a builders remedy. The court further found that the Township's almost exclusive reliance on multi-family housing, despite the very low demand for it, provided little incentive for the owners of inclusionary sites to commence development. Further, the trial court concluded that the Township's sewer construction requirements created a disincentive to development. The Appellate Division affirmed.

The New Jersey Supreme Court limited its inquiry to whether the Township's ordinances, regulations and site factors prevented a realistic opportunity for development of affordable housing; whether market demand for particular housing type was properly considered; and whether Toll Brothers was entitled to a builder's remedy. It affirmed, finding that the Township had violated the New Jersey Constitution and the State Fair Housing Act by preventing a "realistic opportunity for development of affordable housing" through its ordinances and regulations. Further, Toll Brothers was entitled to a builder's remedy. The New Jersey Constitution "bars municipalities from using land use regulations to hinder construction of affordable housing, thereby excluding low and moderate income persons from their towns." The Mt. Laurel doctrine requires a municipality to promulgate appropriate land use ordinances under which a developer could be expected to construct the municipality's fair share of affordable housing. The builder's remedy is a judicial remedy for enforcement of the Mt. Laurel doctrine and serves as an incentive to private developers to challenge a municipality's zoning ordinance. Merely zoning for affordable housing that cannot be built by private developers who are motivated by profit does not satisfy a municipality's Mt. Laurel obligation. The lower court

properly considered market demand, including substantial evidence to support its holding that market demand for multi-family housing would not provide a realistic opportunity for development of affordable housing.

Further, the Township's sewer construction and financing requirements were unduly cost-generative and therefore presented a significant impediment to the potential development of affordable housing. The builder's remedy is a means to accomplish what the municipality might otherwise have been unable or unwilling to do itself. Here, the Township did not establish that Toll Brothers had acted in bad faith by not applying to the Planning Board for variances, because the site in question was not a good candidate for variances.

INITIATIVES/REFERENDA: A Decision In An Administrative Matter Is Not Subject to Initiative

Citizens for a Public Train Trench Vote v. City of Reno, 53 P.3d 387 (Nev. 2002).

Citizens challenged a proposal by the City to lower train tracks below street level, and filed an initiative petition for public vote on the project. City sought an injunction to prevent the public vote. The trial court found that the petition was unconstitutional under the Nevada Constitution because it allowed the initiative process to dictate the outcome of administrative decisions. The Supreme Court of Nevada, affirming the trial court, held that the subject of the initiative proposal was administrative in nature because it dealt with a particular project, not legislative policy. Therefore, it could not be decided by a public referendum. Under the Nevada Constitution, an initiative must relate to legislation of general applicability and of a permanent nature, intended to guide the City's citizens regarding the choice of public work projects, not to such matters as a train trench which implement general rules and policies.

INITIATIVES/REFERENDA: Pigs Lose. Approval of a Conditional Use Permit is Subject to Referendum

Kirschenman v. Hutchison County Board of Commissioners, , 656 N.W.2d 330 (S.D. 2003).

Opposing citizens filed suit for *writ of mandamus* to compel the County Board of Commissioners to submit to referendum its grant of a Conditional Use Permit (CUP) for the construction and operation of a confinement facility for 3,200 hogs. The County had rejected the petition for referendum, stating that the Board's decision to grant the CUP was administrative, not legislative, under state law and therefore was not referable. The trial court, finding for the pig farmer, agreed that the decision was administrative and therefore not subject to referendum. In reversing, the South Dakota Supreme Court held that the decision on the CUP was legislative not administrative and therefore was referable. While acknowledging that an "administrative decision merely puts into execution a plan already adopted by the legislator…", the court

nevertheless concluded that when the local government has discretion as to what it may do and acts under that discretion, "a legislative act" occurs which is subject to referendum. The opinion refers to the authority of the "Board of Adjustment" (not the Board of County Commissioners) to approve CUPs, and notes that the Board, not specifying which one, or whether the Board of County Commissioners is acting as a "Board of Adjustment") retains "complete discretion" to determine whether to grant or deny a CUP.

The Board argued that because the zoning ordinance allows the Board of County Commissioners to grant CUPs and that "animal feeding operation . . . and holding facilities," is one of the uses specifically allowed, the time for the citizens of the County to have taken action, was when the ordinance authorizing approval of CUPs for such facilities was enacted. The court responded that an enabling ordinance allowing the possibility of approval of such a CUP did nothing to put the voters on notice that such use would ultimately be allowed. Moreover, the ordinance provided no "objective criteria" upon which the Board could rely, and there were no "standards or conditions" for determining where and when such a facility would be allowed. In the absence of objective criteria, the Board's grant of a CUP was not administrative and thus, if the Board's reasoning prevailed, County citizens would never have an opportunity to call for a referendum on a CUP because the time for seeking a referendum on the enabling ordinance provision had passed.

NOTE: Compare this decision regarding the nature of the conditional use process to that of the Minnesota Supreme Court in *Schwardt* at page 3 and that of the 9th Circuit in *Kaahumanu*, at page 2.

VARIANCES: No Self-Created Hardship Where Purchaser Acquires Land with Knowledge of Need for an Area Variance

Stansbury v. Jones, 812 A.2d 312 (Md. 2002).

Landowner combined two substandard lots (created prior to enactment of subdivision ordinance) into larger lots in accordance with provisions of County's "antiquated lots" law. Landowner then sought a variance from setback requirements in order to develop the larger lot. The Board of Appeals denied the variance on the ground that the property owner's hardship, namely that the larger lot did not have adequate setbacks, was self-created when the property owner merged the smaller lots under County law. On appeal, the trial court remanded the matter to the Board to consider the variance under all of the applicable standards under County variance law. The appellate court reversed the trial court and held that the property owner's hardship was self-created and therefore the variance was properly denied.

The Court of Appeals (highest court) reversed, holding that the landowner's subdivision of non-conforming lots into conforming lots in furtherance of a County law regarding antiquated lots was not a self-created hardship and could not be the basis of the Board's denial of a variance

application. "[W]hen a property owner does that which is permitted, or required under a zoning code, that property owner is not necessarily creating an automatic hardship for purposes of the self-created hardship standards of variance provisions." Situations where a purchaser contracts to buy property, subject to an "area variance", have never been regarded as a "self created hardship." Further, "because a purchaser … acquires no greater right to a variance than his predecessor, he should not be held to acquire less." Self-created hardship does not arise from the purchase, but rather from "the actions" of the landowner.

VESTED RIGHTS: **Continuing Construction In Good Faith, Even After A 10-Year Lapse, Created Vested Rights**

AWL Power, Inc. v. City of Rochester, 813 A.2d 517 (N.H. 2002).

In 1987, Developer received planning board approval for an 18 unit residential subdivision, conditioned, *inter alia,* upon its making specified public improvements and paying a $50,000 impact fee for off-site improvements. Developer thereafter commenced construction of the project. Under applicable law, a developer who commences construction within one year of approval gains a four-year exemption from subsequently enacted zoning ordinances, dating from the recording of the approval. After Developer completed six units and expended a substantial amount towards required public improvements, the city amended its zoning ordinance, rendering much of the remainder of the development a non-conforming use, although by law Developer had the right to continue development of the project based on the four year exemption from subsequently enacted zoning ordinances. However, in 1990, due to an economic downturn in the market, Developer ceased work on the project. When Developer attempted to resume construction of the project 10 years later, the city planning board found that although about 43% of required public improvements and 10% of all total public and private improvements had been completed, its right to complete the project had not vested, and that the changes in the zoning ordinance were no longer stayed by the four year exemption, thus barring the Developer from completing the project. The board revoked the project approval, and the Developer appealed.

Following an affirmance of the board action by a lower court, the New Hampshire Supreme Court reversed, ruling that Developer's completion of six units and expenditure of over $200,000 for public improvements, plus payment of the impact fee, were more than adequate actions to vest Developer's right to complete the project. The lower court wrongly applied a substantial construction standard (based on a contract theory) that measured the $200,000 of public improvements against $6.4 million, the projected cost of the entire development. The New Hampshire common law standard allows vesting when there is good faith, substantial construction, or substantial liability incurred, or both. The lower court standard would lead to anomalous results, as it "unfairly burdens developers with large or complex plans." The correct standard for "substantial construction" vesting considers not only construction measured against the entire plan, but also "whether the amount of completed construction is *per se* substantial in amount, value or worth." This analysis depends upon the facts and circumstances of each case.

See also: ***Moreau v. Town of Litchfield***, 813 A.2d 527 (N.H. 2002) (Developer obtained sufficient vested rights to be exempt from application of subsequently imposed impact fees.); ***Eason v. Board of County Comm'rs of Boulder County***, 70 P.3d 600 (Colo. App. 2003) (Jury verdict against County for $150,000 in Section 1983 suit upheld on vesting grounds where, five years after County issued a permit to *Eason* to operate a self-storage business, using semi-trailers, the County revoked the permit, claiming that the use of semi-trailers for permanent storage was no longer permitted.)

VESTED RIGHTS/AGRICULTURAL ZONING: **Delaware Modifies Its "Permit Plus" Test**

In re: 244.5 Acres of Land v. Delaware Agricultural Lands Foundation, 808 A.2d 753 (Del. 2002).

Developer is the owner of a planned residential development ("PRD"). Prior to application for building permits and commencement of construction of the PRD, an adjacent parcel was approved by a state agency as an agricultural preservation district, which provides that adjacent development must set back 50 feet from the district. Developer filed suit seeking a declaratory ruling that the setback was inapplicable to the PRD or, in the alternative, compensation for a taking. The trial court found the developer had no vested right exempting the PRD from the 50-foot setback and denied the relief requested.

In reversing, the Delaware Supreme Court modified the state's long held "permit plus" rule in favor of a balancing test to determine the applicability of the "substantial compliance" doctrine. The nature and extent of the public interest to be served is weighed against the nature and extent of the developer's reliance on prior approvals and most of all, the developer's good faith. Applying these tests, the court found that Developer had acquired a vested right to develop the PRD without having to comply with the subsequently imposed 50-foot setback. The court further stated that Developer's "extensive efforts to secure all necessary approvals from local government authorities not only establishes good faith reliance but also precludes its project from being classified as a new subdivision."