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Fast paced,
national perspective,
lessons learned...
Devaney v. Kilmartin
(D.R.I. 2015)

• Challenge to a Noise Ordinance exempting bells

• Town and Churches were sued, *inter alia*, on First Amendment Grounds

• Federal Constitutional Complaints Dismissed

• Court Found Ordinance was secular, not sectarian
Lessons Learned

• Careful drafting of Ordinances can avoid costly trials
Brost v. City of Santa Barbara
(Cal. Ct. App. 2d Dist. 2015)

- California regulatory takings case
- Homes destroyed by wildfire
- Ordinances prohibited rebuilding in landslide area
- Prohibition not justified by preventing public nuisance
- Court found regulatory taking and damages payable
Lessons Learned

• Trying to protect property owners from themselves by preventing use of their own property for a legal use is a slippery slope
Drummey v. Town of Falmouth  

- Massachusetts case concerning a town’s exemption (or not) from its zoning laws
- Town built a wind turbine on town property
- Abutters bothered by noise lived 1,300 – 3,200 feet away appealed to Building Inspector to enforce zoning (need for special permit)
- ZBA voted 3:1 to reverse the Building Inspector, but the vote didn’t carry and therefore the BI interpretation was upheld – and appealed
Lessons Learned

• A municipality is not per se exempt from zoning
• Although a town might utilize a structure for its own purposes, it does not make an otherwise regulated use exempt as a “municipal use”
• Just one member can get a board in trouble
Skawski v. Greenfield Investors Property Development LLC

• Greenfield Planning Board granted special permit for 135,000 sf retail facility
• Abutters appealed pursuant to MGL c. 40A s. 17 in Housing Court
• Developer sought transfer to Permit Session of the Land Court – abutters opposed, motion denied
• Analysis of court jurisdiction – Statute creating permit session for big projects removed jurisdiction of Housing Court, in favor of Land Ct
Lessons Learned

• In creating a permit session for large permit-based projects, the Legislature conferred original jurisdiction of those matters to the Superior Court and the permit session of the Land Court and implicitly denied such jurisdiction to Housing Court.

• Court is unsympathetic to convenience of the parties, despite the stage of litigation.
Reed v. Town of Gilbert
(US 2015)

Municipal sign code imposing more stringent restrictions on signs directing the public to the meeting of a non-profit group (a church) than on signs conveying other messages (such as political) is content-based regulation of speech that cannot survive the test of strict scrutiny.
Decided 9-0. Opinion by Justice Thomas expands meaning of “content-based” to reach thousands more signs subject to local regulation, formerly thought to be content neutral, now presumptively unconstitutional. On remand, Court of Appeals struck down the ordinance.

Regarded as vastly expanding free speech rights. Reaches all kinds of rules distinguishing between types of speech. Other federal courts since Reed have invalidated laws barring panhandling, automated phone calls, and “ballot selfies.”
Lessons Learned

Simple facts yielded a ruling making lots of laws subject to the most searching form of 1st Amendment review which puts the burden on the government to prove the challenged law is “narrowly tailored to serve compelling state interests.”

“You can stare at those words as long as you like, but here is what you need to know: Strict scrutiny, like a Civil War stomach wound, is generally fatal.” (NYT 8.18.15 p.A18)
EPA interpreted 42 U.S.C. §7412(n)(1)(A) of the Clean Air Act, which requires the agency to regulate power plants when “appropriate and necessary,” unreasonably when it refused to consider cost when making that initial decision to regulate.
EPA approach to mercury and other toxics (MATS) was challenged by two dozen states and trade groups representing the electric generating industry and coal mining.

Decided 5-4. Opinion by Justice Scalia ruled that when Congress orders an agency to begin regulating an industry, but says it should do so only if “appropriate and necessary,” the agency must take costs into account before it issues any orders.
Lessons Learned

EPA wrong in refusing to make the cost-benefit analysis upfront, before starting any regulatory program, preferring to review cost-benefit when imposing plant-specific controls.

Temporarily blocked EPA regulating power plants for mercury (potentially applicable to many other pollutants). Important to recognize that ruling does not affect EPA’s legal authority to regulate in this area of air pollution. And Scalia says EPA did not have to follow any particular method of gauging costs, but it had to fashion some way to calculate that prior to doing any regulating.
Are Zoning Board members with “substantial leadership” positions in an Organization that is deemed to have an interest in a Zoning application for Property within 200 feet of its property disqualified?
Lessons Learned

Thou shalt not underestimate where “indirect” disqualifying interests may be found that render zoning decisions vulnerable to appeal.
Church of Our Savior v. City of Jacksonville
(M.D. Fla 2014)

RLUIPA – “Equal Terms” provision
Lessons Learned

A successful “comparator” shares similarity in size, intensity of use, location, fit within the surrounding community, and public support.
Glick v. Harvey
(NY App. Div. 2015)

Did use of city-owned land for park-like purposes actually create public parkland absent a formal dedication?
Lessons Learned

If you want to prove that land has been dedicated to public use, you have to show that the municipality manifested a "present, fixed and unequivocal intent" to create a public park.
NYU Project – Case Two: Payment for use of parkland was proper “quid pro quo”; the Environmental Impact Statement didn’t have to consider plaintiffs’ alternative development when such development was inconsistent with the project goals.
Lessons Learned

When deciding to grant zoning relief, the decision should provide a “reasonable elaboration” of the basis for the approval of the project.
Schaecher v. Bouffault

(VA. June 4, 2015)

• Virginia Supreme Court decision
• Special Use Permit applicant alleges defamation by county Planning Commissioner
• Commissioner was neighbor who opposed Special Use Permit for kennel
• Defendant indicated applicant lied and would violate covenants and easements
Lessons Learned

In Virginia, to find defamation, barking is not enough – you need a real bite!
Hartwell v. Town of Ogunquit
(Me. 2015)

• Classic Land Use case
• Board refuses to follow required procedures – twice
• Board ignores decision on substantive issue
• Court remand – three times
• Can anyone say “Outcome Determinative”?
Lessons Learned

In the State of Maine, if you are betting, bet on the side of lobsters.
Palitz v. Zoning Board of Tisbury  
(Mass. 2015)

• Massachusetts Subdivision Control exception allowing division of a lot containing multiple dwelling structures

• Such "ANR" division, however, does not confer zoning compliance or non-conforming property protections

• Despite variance, future owner can be denied relief to tear down and rebuild a larger home
Lessons Learned

• Caution Required when taking advantage of statutory permissions

• While a variance runs with the land and can legitimize an otherwise nonconforming lot, conditions associated with the variance can control when it comes to changes to the lot or structures thereon

• Owner Beware!
Mitchell v. Commissioner of Internal Revenue
(Colo. 2015)

- Case involves IRS disallowance of a tax deduction for donation of a Conservation Easement
- Land encumbered by an unsubordinated mortgage (at the time of the grant) does not meet the "protected in perpetuity" test
Lessons Learned

Don’t Mess with the IRS. No good deed goes unpunished.
The federal Fair Housing Act prevents discrimination in sale and rental of housing. Disparate-impact claims are cognizable under the FHA.

Decided 5-4. Opinion by Justice Kennedy held FHA focuses on the consequences of the actions rather than actor’s intent, similar to Title VII of the Civil Rights Act of 1964 and Age Discrimination in Employment Act, enacted about the same time with disparate-impact liability.
Disparate-impact liability is consistent with FHA’s purpose to prevent discriminatory housing practices as it allows plaintiffs to counteract unconscious prejudices and disguised discrimination that may be harder to uncover than disparate treatment.

ICP claimed TDHCA granted tax credits disproportionately to developments within minority and Caucasian neighborhoods, leading to concentration of low-income housing in minority neighborhoods, perpetuating segregation violating FHA.
Lessons Learned

At trial, ICP showed discrimination by disparate impact using statistical allocation of tax credits, which District Court ruled proved a prima facie case. Unable to show no less discriminatory alternatives existed, TDHCA lost. Court of Appeals upheld result as consistent with HUD regulations, the agency tasked with implementing the FHA.

Supreme Court agreed. A prima facie case for disparate-impact liability, however, must meet a robust causality requirement, as evidence of racial disparity on its own is not sufficient.
June 23, 2005, the Supreme Court decided *Kelo v. City of New London*, 5-4, holding that “economic development” satisfied the public-use requirement of the 5th Amendment. The majority suggested states remain free to restrict the use of eminent domain.

In response, 44 states changed their laws (11 changed their constitutions, 40 enacted new statutes). Most relate to the meaning of “public use” or “public purpose.” Of these, 30 states tightened these terms, 25 changed their definitions of “blight,” 11 gave prior owners repurchase rights for property not used for the taken purpose or later sold, 9 changed the burden of proof in eminent domain cases, and 2 states prohibited or limited transferring taken property to private parties for any reason.
In 3 of the 6 remaining states without constitutional or legislative changes, their supreme courts increased protections against takings for private use (in 7 states with new statutory protections, their supreme courts added some more).

In summary, over 10 years, 47 states increased protections against takings for private use. In 3 states (Arkansas, Massachusetts, and New York), the District of Columbia, and the U.S. territories, Kelo applies and state constitutions or statutes were not changed.
Lessons Learned

“No building was ever constructed on the site of the condemned homes, or even in the project area more generally...now a field of weeds, a home for feral cats, and, occasionally, a dumping ground for storm debris...The original developer disappeared long ago, as have a string of subsequent developers, none of which have been able to finance the project... no development at all on any property acquired by eminent domain or under threat of eminent domain...Before condemnation, the area was a working-class neighborhood, where people knew their neighbors and where, in many cases, families had lived for generations...Now, it lies empty, as it has for the past nine years.”

Source: http://www.yalelawjournal.org/forum/looking-back-ten-years-after-kelo
Exactly how compelling is a recommendation from the Planning Board in the Beach and Dune Zoning District to convert pre-existing non-conforming residential uses into conditional uses to facilitate their repair from storm damage?
Lessons Learned

Comprehensive Plan consistency may remain the over-arching rubric, but the decision of whether and when to incorporate amendments into the Zoning Regulations remains squarely with the Zoning Commission.

New York Appellate Court finds basis for ZBA to reverse its original denial of area variances and upholds their subsequent approval.
Lessons Learned

From a planning perspective, there are meaningful alternatives to a “hardship” standard for the legitimate issuance of variances and this fact may inspire planners to seek legislative changes to provide for such alternatives.
Burton v. Glynn County
(Ga. 2015)

Property owners violated zoning ordinance by operating an “event venue” in a residential subdivision.
Lessons Learned

Zoning ordinance limited use to single family residences and other uses “customarily incidental” to such residences. Making house available for weddings and other events over 25 times in a 3 year period, with 100s of guests, was “sufficiently voluminous” to exceed any definition of “customarily incidental”.

What about listing your house on AirBnB?
City Council’s failure to enact legislation to pave paper street is not a de facto taking of a developer’s property.
Lessons Learned

To show a de facto taking, the property owner must show that the City’s actions (or non-action in this case) substantially deprived the owner of any beneficial use of the property.

“No duty exists to compel a municipality to enact legislation.”