2016 Cases of the Year
Our “A Team” To Start Off The Year!

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Auspro Enterprises v. Texas DOT
(Texas App., 2016)

• Exemptions for on premise, election and other signs held to violate content neutrality.
Lessons Learned

• Review your sign ordinance!
• The courts are serious about content neutrality
Murr v. Wisconsin
(US 2016)

- Two lots purchased at different times.
- Merged by action of zoning.
  - Substandard
  - Same owners
- Parcel as a whole case.
- What is the relevant parcel?
Land dispute

The Murr family claims that St. Croix County took its property without compensation. The U.S. Supreme Court has agreed to hear its case.

Members of the Murr family pose for a photo last summer at their cabin on the St. Croix River. Each year, the family chooses a state theme for its big gathering and last year it was Kentucky. The U.S. Supreme Court has agreed to take the family’s case in which it argues St. Croix County and the state are wrongly preventing it from selling a vacant lot adjacent to the summer home.
Whether, in a regulatory taking case, the “parcel as a whole” concept as described in *Penn Central Transportation Company v. City of New York*, establishes a rule that two legally distinct but commonly owned contiguous parcels must be combined for takings analysis purposes.

“A man is like a fraction whose numerator is what he is and whose denominator is what he thinks of himself. The larger the denominator, the smaller the fraction.”

—Leo Tolstoy

Source/Notes:
Surface and Subsurface Rights
Air Rights
Consolidated Operations
Later-Acquired Properties
Lessons Learned

• Consider separate ownerships to preserve rights.

• “Checkerboarding” may not always work if owner controls the other parcel.
City of Longmont v. Colorado Oil and Gas Association (Colo. 2016)

- Home-Rule community ordinance banned fracking.
- State statute regulated oil and gas production.
- Court invalidated ordinance based on operational preemption.
- Ordinance frustrated state regulation of a mixed state/local issue.
Lessons Learned

• If an ordinance under consideration locally could conflict with state law, particularly where there is already tension between state and local interest, take special care to narrowly tailor the local law.
U.S. Army Corp of Engineers
v. Hawkes
(US 2016)
Whether the United States Army Corps of Engineers' determination that the property at issue contains “waters of the United States” protected by the Clean Water Act, constitutes “final agency action for which there is no other adequate remedy in a court," and is therefore subject to judicial review under the Administrative Procedure Act.
• The three-factor test:
  – “Those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.”

• Unanimously held that a Jurisdictional Determination (JD) by ACOE may be judicially challenged.
Lessons Learned

• JD meets the two requirements set forth in *Bennet v. Spear* that the action is “the consummation of the agency’s decisionmaking process” and also “one by which rights or obligations have been determined, or from which legal consequences will flow” and is therefore a final agency action subject to judicial review.
Ophca LLC v. City of Berkeley
(D.C.N.D. Calif. 2016)

• Facial attack on affordable housing ordinance fails; held not to violate Nollan/Dolan tests.
Lessons Learned

• “No set of circumstances” test difficult when defense is available
Residential & Agric. Advisory Comm., LLC v. Dyersville City Council
(N.D. Iowa 2016)

• Annexation and Rezoning of 193+ acre site of Field of Dreams farm from A-Agriculture to C-2 Commercial

• Plan of new owners to create All Star Ballpark Heaven baseball and softball complex and tourist attraction
• MOU 6/18/2012 – city to put forth best efforts to annex; create tax increment finance district; connect property to city water and sewer ($2.48M), enter into development agreement making payments for water and sewer connection from TIF revenues
• Neighboring farm owner objections:
  – City council not impartial
  – Rezoning is arbitrary and capricious
  – Inconsistent with the comprehensive plan
  – Spot zoning
  – Equal protection; due process violations under state constitution
Lessons Learned

• Comprehensive plan is important basis for rezoning, even if no strict consistency requirement

• Process including public hearings critically important even if difficult

• Separation of powers remains key
Friends of Black Forest Pres. Plan v. Bd. of Cty Commissioners of El Paso Cty.,
(Colo. App. 2016)

• Special permit for three greenhouses
• Black Forest Preservation Plan, a “small area plan” (SAP)
• Does it comply?
• Held: Plans are advisory; “competent evidence” to support
Lessons Learned

• Preparation of detailed land use regulatory plans does not make them mandatory regulations.

• But, by ordinance...

• Insufficient language:
  – “area should remain primarily residential”
  – “commercial development should be strictly limited”
616 Croft Ave., LLC v. City of West Hollywood

(Calif. Ct. app. 2016)

• First case to apply *San Jose* decision.

• Approval of an in-fill project.
  – 11 condominiums to replace 2 SF homes.
  – Subdivision map approval conditioned on payment of fees.
    • $540,000, $36,000, and $4,000.

• Not an exaction and not a taking.

• No apparent need to demonstrate reasonableness.
Exceptional 11-unit new construction Architectural in prime West Hollywood location steps from WeHo Arts District, PDC, restaurants and so much more. The dramatic building, by award winning Architect, Michael Lehrer, features two towers connected by floating industrial steel bridges and staircases with a tranquil garden courtyard between. The seven distinctive single-level condos and four commanding open-concept lofts offer modern living at its finest with a seamless integration between style and function. All units feature high ceilings, oversized windows and doors, designer finishes, hardwood floors, Thermador appliances, side-by-side parking, extra storage and private use exterior space (patios, rooftop decks, and/or yards depending on unit.) Many units offer panoramic views. Controlled access entry gate is a stunning work of art by Los Angeles based artist, Alice K-nitz. Penthouse 10 is a loft unit. Photos are representative and are from model unit 4. Only three units remain!
616 North Croft Avenue 6 | West Hollywood, CA 90048

Sale Price: $1,275,000 | Beds: 2 | Baths: 2.00 | Sq. Feet: 1,600 | MLS#: 16114298 | Status: Sold
Lessons Learned

- Demonstrates need for SCOTUS to address whether reasonableness standards of Nollan/Dolan should apply to legislative decisions.
Kirby v. North Carolina Department of Transportation (NC 2016)

- Recording of a Highway Corridor Map land bank prevented plaintiffs from improving, developing, and subdividing their property for an unlimited period of time.
- Held: taking of property rights by eminent domain, not police power; remanded for trial on damages.
Winston-Salem Northern Beltway
Project R-2247, Project U-2579, and Project U-2579A

Legend
- Freeway/Expressway
- Major Thoroughfare
- Minor Thoroughfare
- Railroad
- County Line

Preferred Alternatives
- Project U-2579A
- Project U-2579
- Project U-2579A
- Project R-2247

Schedule
Project U-2579A
AA, AB - Right of Way and Construction: Post Year*

Project U-2579
B - Right of Way: 2012
Construction: Fiscal Year 2014
C, D, E, F - Right of Way and Construction: Post Year*
G (Replacement of Hastings Hill Road Bridge over US 421) - Right of Way: In progress
Construction: 2015

Project R-2247
B, CA, CB, DA, EA, EB, F - Right of Way and Construction: Post Year*

*Unfunded in 2013-2020 State Transportation Improvement Program
Lessons Learned

• Saving highway development costs is laudable, but may trigger inverse condemnation claim.

• Cases are divided on this issue; other courts have upheld laws with similar protective remedies

• See APA Legislative Guidebook Section 7-501

- 123 unit studio apartments on two adjacent parcels, with no onsite parking
- Board of Adjustment granted area variance and special exception

proposed micro-units
• Area variance requires finding of “practical difficulty”
  – Proposed use of the property cannot be a basis --property itself must be unique.
  – Record does not show legal conclusions flowing rationally from the findings of fact.
  – Remand --Additional hearings and findings of fact
• Special exception for reduced parking for historic resource (garage)
• Only the amount of relief needed to alleviate the proven difficulty
• The BOA must fully explain the reasons shaping its ultimate conclusion
Lessons Learned

• Prepare a record at the BOA

• For in-town studio apartments consider changing the zoning code requirements
Plaintiffs sued nonprofit zoo under the Endangered Species Act.

Claimed a taking of tigers and lemurs by inadequate treatment.

Court found plaintiffs had injury in fact by harm to their aesthetic interest.

Court found harm and harassment constituting a taking.

Inadequate sanitation, environmental enrichment, housing and veterinary care.

Animals ordered moved to other facilities.
Cricket Hollow Zoo owners face another lawsuit over mistreatment of animals

Suit claims two lions living in "deplorable" conditions

Njarra, an African Lion, relaxes in her cage at Cricket Hollow Zoo, a private zoo near Manchester in 2004. (Gazette file photo)
Lessons Learned

• Municipalities operating zoos and other animal attractions must ensure proper treatment of animals, particularly if dealing with listed endangered species.

IT’S A JUNGLE OUT THERE!
Inclusive Communities Project v. Texas Department Of Housing and Community Affairs

(USDC ND Tex.. 2016)

• On remand.
• “[A]pplying a materially different (and more onerous) prima facie case burden of proof than the one applied originally...”
• ICP did not prove prima facie case.
Lessons Learned

• Applied burden-shifting approach:
  – Plaintiff must show practice causes discriminatory effect.
  – If yes, then defendant must prove practice necessary to achieve “substantial, legitimate, nondiscriminatory interests”
  – Burden then shifts to plaintiff to show available, less discriminatory practice.
Questions and, we hope, some answers...