Update on Planning, Land Use and Eminent Domain Decisions

Comprehensive Planning, Moratoria, Takings, and Vested Rights

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2:00 – 3:45 PM

Dwight Merriam, FAICP
Robinson & Cole LLP
Comprehensive Planning
Recent Developments in Comprehensive Planning

Edward J. Sullivan* and Jennifer M. Bragar**

I. Introduction

As it has for many years, this annual article catalogues the role of the comprehensive plan in land use regulation—in this case for the period from October 1, 2014 through September 30, 2015. One way of viewing that relationship is to consider the importance of the com-
Friends of Black Forest Preservation Plan, Inc. v. BOCC El Paso County
(Colo. App. 2016)

• 51,834 sq. ft. greenhouse
• Veteran owned and operated.
• Area governed by Black Forest Preservation Plan
• Approval upheld as consistent with “advisory” plan.
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.
Moratoria
Fort Collins v. Colo. Oil and Gas Assn. (Colo. 2016)

• 5 year moratorium on fracking and storage of fracking waste

• Like City of Longmont, a mixed matter of state and local concern
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.

*OurLongmont.org sign supporting the city’s ban on fracking*
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.
Takings
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.
Donna Murr felt like she "won the lottery" when the Supreme Court agreed to hear her family's appeal. Photo courtesy of the Pacific Legal Foundation.
This idyllic riverfront property in western Wisconsin is at the heart of a legal battle that's heading to the Supreme Court. Photo courtesy of the Pacific Legal Foundation.
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:
Several Names

• Numerator-denominator
  – Or just the denominator problem
• Takings fraction
• Relevant parcel
• Parcel as a whole
• Nonsegmentation
• Nonseverance
Surface and Subsurface Rights
Air Rights
Noncontiguous Holdings
Later-Acquired Properties
Transfer of Development Rights

Grand Central
The Temporal Dimension

Now

Later
A Hypothetical

An Iowa farmer decides to sell his farm and retire to Maui ...
Lessons Learned

- Consider separate ownerships to preserve rights.
- “Checkerboarding” may not always work if owner controls the other parcel.
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-2579
- Project R-2247

Schedule

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

Project U-2579
B - Right of Way: 2012
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, D, EA, EB, F - Right of Way and Construction: Post Year*

*Unfunded in 2013-2020 State Transportation Improvement Program
Vested Rights
Matter of Perlbinder Holdings, LLC v. Srinivasan (NY 2016)

- NYC large outdoor advertising sign
- Permit erroneously issued
- Later revoked
- No vested right
- The only way out?
  - Maybe a variance by the BSA?
Lessons Learned

• The burden is almost always on the applicant.
• An error by a public official seldom creates rights.
Bridge Aina Le'a, LLC v. State of Hawaii Land Use Commission
(D. Haw. 2016)

- 1,060 acres South Kohala
- Reclassified "agricultural use" to "urban use"
- Must be 60% affordable
- 16 built but too late
- Back to “agricultural use”
- Money damages for vested rights?
  - a'ole
Lessons Learned

• Timing is everything
• What makes a vest property right different than another kind of property right?