Land Use Law Developments of the Past Year

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Myrick v. Peck Electric Company et al.
Vermont Supreme Court (2017)

- Solar Panels Next Door Look Ugly.
- Private Nuisance Based on Aesthetics? NO!
- Need Unreasonable & Substantial Interference with Use & Enjoyment of Property.
- Need noise, light, odor, vibration, contamination, etc.
- Diminution of Property Values Not Enough
Lessons Learned

To Sue For Private Nuisance, It Had Better Be
More Than Just Unattractive!
Bostick v. Desoto County
Mississippi Appeals Court (5/9/2017)

• Houses Rented for Short-Term Rentals
• County alleged violated “single family dwelling” zoning.
• Vacation rentals to short-term transients not “single family dwelling”
• Dissent argued decision not justified under literal reading of Ordinance
Lessons Learned

• Be proactive and design an ordinance to regulate short-term transient rentals
• Do not rely on “after the fact” interpretations and arguments to existing ordinances not designed to accommodate or address those uses
• Consider policy implications, as impact on affordable rental housing
Panhandling Regulations
After Reed v. Gilbert, Arizona

- *Reed* expanded free-speech protections - applied strict scrutiny to regulating temporary signs re: location of church services.
- Federal courts declare local restrictions on time and place of begging a violation of First Amendment rights.
- Across the US, cities are abandoning efforts to regulate panhandling
Panhandling Regulations

- Federal courts have blocked regulations:
  - Historic districts – Springfield, IL; Lowell, MA
  - After dark, near ATMs – Grand Jct., CO
  - Roads, traffic islands, transit stops – Worcester, MA
  - Most ordinances found too broad
Panhandling - Balancing Needs

- Cities and towns have “a legitimate interest in promoting the safety and convenience of its citizens” (US District Judge Timothy Hillman)
- Needy people have a right to ask for help
• Plaintiffs were several panhandlers represented by the ACLU
• Claimed violation of 1st Amendment
• Prohibitive provisions found unconstitutional:
  – After dark
  – Repetitive requests
  – Obstruction of pedestrian path
  – On the bus, in parking garage
Lessons Learned

• Assume ordinances directed only at panhandlers are content based and subject to strict scrutiny
• Focus on control of adverse effects, not the speaker.
• Regulations controlling location, aggressiveness, interference with pedestrians/vehicles should be clear and tied to governmental purpose, evidence and action.

You can’t always get what you want!
Cave Corp. v. Conservation Commission of Attleboro (MA Appeals Court 2017)

Home Rule wetland case

- Developer filed project application (NOI) and got local ConCom permit (OOC) for phase 1 development.
- Developer filed NOI for phase 2, ConCom did not respond.
- Developer SOC from state DEP.

- Did earlier OOC limit phase 2 work despite ConCom inaction?
Lessons Learned

Superseding Order of Conditions issued by DEP on later project does not divest ConCom of authority to regulate activity on subject land, if same land is also subject of separate and earlier NOI on which the ConCom acted timely in issuing its OOC.
Chester v. Laroe Estates
(137 S.Ct. 1654)

Intervention standing case

- Land developer-contractor sued town seeking monetary compensation.
- Real estate developer-purchaser sought to intervene as of right.
- Unclear if relief sought by real estate developer differed from relief sought by land developer.

- USDC for SDNY denied intervention for lack of Article III standing, real estate developer appealed.
- SCOTUS held that an intervenor of right must have Article II standing in order to pursue relief that is different from that which is sought by a party with standing.
Lessons Learned

• For any and all relief sought, there must be a litigant with standing.

• A plaintiff must demonstrate standing for each claim she seeks to press and for each form of relief that is sought.
Lynch v. California Coastal Commission (CA 2017)

- Did conditions in seawall permit create an unconstitutional taking?
- Permit limited to 20 years, must reapply to remove, modify or extend sea wall
- Restriction against any new development that needed sea wall for protection

- While case made its way, owners recorded deed restriction with conditions in permit and built sea wall
- Claim barred – “one who accepts the benefit of a permit also accepts its burdens”
Lessons Learned

- No “emergency exception” to acceptance of benefits ruling
- Time limit to allow Commission opportunity to consider “managed retreat” must wait for a more patient and less threatened landowner
Specht v. Big Water Township
(Utah 2017)

• Was Board’s grant of variance “arbitrary and capricious” because it didn’t make separate findings for each of the conditions for a variance?

• While the minutes were sketchy, the tapes proved to the Court that the Board had considered and discussed all the evidence.
Lessons Learned

• Don’t just vote “yes or no” – make sure the minutes reflect the Board’s discussions and the evidence used to support the decision
Sullivan v. Board of Zoning Appeals

2016 NY Slip Op 07911 [144 AD3d 1480]
Appellate Division, Third Division
Nov. 23, 2016 as corrected through Jan. 4, 2017

- R1B Zoning District
- Single-family residences and Houses of Worship
- Partnership with non-profit
- To provide “home-base” for 14 homeless individuals
Sullivan v. Board of Zoning Appeals

• Dept. of Building and Codes said “use variance” required
• Church sought interpretation from ZBA who found the use “permitted”
• Challenged: NY Supreme Court reverses ZBA
• NY Appellate Division reverses reinstating ZBA finding
Lessons Learned

Services to the homeless have been judicially recognized as religious conduct
Riverside Church v. City of St. Michael

2017 WL 2226553 (D. Minn. 2017)
Amended 2017 WL 3521719

- Church seeks to purchase movie theater for religious worship – multi-year effort
- 2800-seat Theater located in B-1 zoning district where “collective religious worship” not permitted
Riverside Church v. City of St. Michael

- City’s effort to regulate secondary effects of religious assembly use failed to narrowly tailor time, place and manner restrictions.
- Court awards church damages of $1,345,595 plus prejudgment and post-judgment interest.

Riverside Wins $1.35 Million Settlement in Case against City of St. Michael

MAY 24, 2017 BY MIKE SCHÖMER

Nearly two years after the City of St. Michael and Big Lake Township’s Riverside Church tussled, both publicly and privately, over the current St. Michael Cinema building, a judgement has awarded more than $1.3 million to the church to cover its legal and court costs due to the past proceedings.
Lessons Learned

Even legitimate public interests may not insulate a city or town from liability
Vermont Wind Farm Referendum
November 2016

• Two small towns voting on huge wind turbine project

• Developer offered every registered voter hundreds of dollars per year for 25 years if project built

• Opponents claimed bribery and undue influence

• Attorney General said no violation of “Purity of Elections” statute

• Referendum non-binding
Results of Vote:

- In Grafton, 235 Disapproval to 158 Approval.

- In Windham, 181 Disapproval to 101 Approval.
Lessons Learned

Maybe you can’t even buy an election anymore!
Kilmartin v. Barbuto
Rhode Island Supreme Court (5/2/17)

- State, as “trustee of the public beach”, sued lot owners

- State claimed subdivision plat dedicated 24 acres of beach to public

- Lot owners claimed ownership of beach

- Court found Plat “unambiguous” and no public dedication intended

- If ambiguous, extrinsic evidence showed no dedication intended
Lessons Learned

Careful review of land evidence records is necessary to support “manifest intent” to dedicate private land to the public for public use.
Wolfram v. Town of North Haven

2017 ME 114 (6/6/17)

- Grandfathering case
- Nebo Lodge wanted to raze the “bungalow” – one of 2 buildings on lot and rebuild as Annex to existing Inn & Restaurant
- Abutter challenges interpretation of bylaw & due process (emails between PB members and applicant)
Take Aways/Lessons Learned

• Inapplicable bylaw sections can’t be used to prohibit activity permitted elsewhere in bylaw
• Undefined terms take customary meaning (Webster’s Dictionary)
• *Ex parte* communications are not fatal unless they in fact affect that decision
• SMALL TOWN GOSSIP LIVES
• Redevelopment of a 16.77 acre parcel on the Willamette River previously used as a religious camp & conference center.
• Request for reduced lot size zoning in conjunction with a 72-lot flexible subdivision failed.
• Submission of a revised plan under current 10,000sf zoning with 62 lots.
• Petitioner challenges filing of “similar plan” within 2 years & excessive tree cutting.
Reinert v. Clackamas County

- Repetitive Petitions
  - Land Use Board of Appeals did not err in hearing a proposal for 62 rather than 72 lots
  - Must look at differences to determine whether “substantially similar”

- Tree Preservation
  - Bylaw required “wooded areas” and “significant .. groves of trees ... be incorporated in the development plan wherever feasible” requires balancing of those features “with the needs of the development”
  - Did not require consideration of alternate plans with fewer lots.
Lessons Learned

Regulation supported by Comprehensive Plan concerning tree preservation cannot be used to limit development potential where bylaw balances the “needs of the development plan”

Be careful with your bylaw drafting
McKee v. City of Fitchburg
(WI 2017)

Vesting of rights case

• Before developer applied for a building permit, zoning changed.

• Zoning change precluded planned development.

• Developer claimed vested rights accrue when made substantial expenditures in reliance on government action.

• Wisconsin follows a different rule: rights do not vest until a developer has submitted a building permit application.
Lessons Learned

- Understand the timing and submission requirements for vesting, different in each state.
- *See* Dunbar Homes *v.* Zoning Board of Adjustment of the Township of Franklin, NJ 2017.
Signs and free speech case

- Billboard owner brought action against Tennessee DOT because DOT removed noncommercial billboards and signs pursuant to TN billboard law.
- TN billboard law was content-based, making “on-premises” signs ok, subject to law.
- State had to look to billboard content to determine if advertised activity was “on premises”
- TN billboard was unconstitutional.
Lessons Learned

• State statute that requires the state to assess a sign’s content to determine if it’s “exempt” is content-based.
**Smith v. Westfield**
(MA 2017)

**Playground**

- Very recent decision of national interest: it concerns the public trust doctrine—which is common law in most states—and it comes to us from our own backyard.
- Playground received Federal Land and Water Conservation Fund grant on condition of permanent protection for recreation.
- Does playground, while not originally taken or acquired for natural resources purposes, become protected under Article 97 of the Amendments to the MA Constitution due to receipt of LWCF grant?
- Yes.

![Cross St. Playground](image_url)
Lessons Learned

• Article 97 protection of parklands and other natural resources in MA does not require a recording in the registry of deeds, as permanent dedication can be exhibited otherwise.

• Determination can be based on the totality of the circumstances over time.
Brenmor Properties v. Planning and Zoning Commission of Town of Lisbon (CT 2017)

- Town denied application for affordable housing subdivision on grounds that project failed to comply with road ordinance

- In affordable housing projects – burden of proof is on town to show that public health and safety concerns outweigh need for affordable housing
Lessons Learned

• Town planner and engineer said road didn’t comply but never provided evidence of any specific harm that made the road unsafe
• Never identified the public interest being protected
Preston v. Zoning Board of Hopkinton (RI 2017)

- Neighbor complained about alpacas being kept in Residential District - Livestock or pets?
- ZBA allowed animals but permission limited to current owners
- Decision – zoning is the regulation of land use, not the person who occupies it
- Dissent – majority misses fact that ZBA failed to decide pets vs. livestock
Lessons Learned

- A decision that rests on the characterization of a particular animal and not the species in general is not a proper zoning opinion.
Murr v. Wisconsin
137 S. Ct. 1933, 582 U.S. ___ (2017)

Merger, “Denominator” problem
The Challenge

- Four siblings own 2 lake-front properties purchased separately by parents in 1960’s
- 1976 regs vested substandard lots but required merger of adjacent lots under common ownership
- 1994 transfer to siblings brought into common o’ship
Lessons Learned

One and One do not always add up to Two...

1 + 1 ≠ 2

Limit of only one house on both parcels was not a taking
Pennsylvania Environmental Defense Foundation v. Wolf

2017 WL 2687761 (Court of Appeals, Md. 2017)

- PEDF challenges use of oil and gas lease proceeds for anything other than environmental protection

- Decision supplants 40-year, 3-part legal test
Lessons Learned

Victory for public trust doctrine that will play a significant role in general environmental protection and specific response to climate change
For materials, go to:

https://tinyurl.com/2017-SNEAPA-Law