Update on the Latest, Greatest Land Use Cases and Statutes

John C. Cappello, Esq.
Jacobowitz and Gubits, LLP

Steven M. Silverberg, Esq.
Silverberg Zalantis LLP

Daniel A. Spitzer, Esq.
Hodgson Russ LLP

Moderator:
Dwight H. Merriam, Esq.
Robinson & Cole LLP

SILVERBERG ZALANTIS LLP

LAND USE APPLICATIONS FOR RELIGIOUS USES

BY STEVEN M. SILVERBERG[1]

The New York Rule

Cornell University v. Bagnardi, 68 N.Y.2d 583,510 N.Y.S.2d 861, 866 1986).

"The controlling consideration in reviewing the request of a school or church for permission to expand into a residential area must always be the over-all impact on the public's welfare. Although the special treatment afforded schools and churches stems from their presumed beneficial effect on the community, there are many instances in which a particular educational or religious use may actually detract from the public's health, safety, welfare or morals. In those instances, the institution may be properly denied. There is simply no conclusive presumption that any religious or educational use automatically outweighs its ill effects (*Jewish Reconstructionist Synagogue v. Incorporated Vil. of Roslyn Harbor*, 38 N.Y.2d 283, 292, 379 N.Y.S.2d 747, 342 N.E.2d 534 [Breitel, Ch.J., concurring], *cert. denied* 426 U.S. 950, 96 S.Ct. 3171, 49 L.Ed.2d 1187). The presumed beneficial effect may be rebutted with evidence of a significant impact on traffic congestion, property values, municipal services and the like."

Pine Knolls Alliance Church v. Zoning Bd. of Appeals of Moreau, 5 N.Y.3d 407, 804 N.Y.S.2d 708, 710 (2005)

"After engaging in the appropriate balancing process, zoning officials may conclude that "a particular educational or religious use may actually detract from the public's health, safety, welfare or morals" (*id. at 595*) and may deny a special use permit on that basis. When the negative impacts are not so extreme as to warrant outright denial, mitigating conditions may be imposed to ameliorate the harm "provided they do not, by their cost, magnitude or volume, operate indirectly to exclude such uses altogether" (*id. at 596* [citation omitted]). In assessing a special permit application, zoning officials are to review the effect of the proposed expansion on the public's health, safety, welfare or morals, concerns grounded in the exercise of police power, "with primary consideration given to the over-all impact on the public welfare" (*Trustees of Union Coll., 91 N.Y.2d at 166*)."

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[1] Steven M. Silverberg is a partner in Silverberg Zalantis LLP OF Tarrytown, N. Y. where he concentrates his practice in municipal and land use law and related litigation. He Blogs on related topics at http://blog.szlawfirm.net/

Religious Land Use and Institutionalized Persons Act (RLUIPA)

The Statute

RLUIPA covers three categories of government action: (1) if a "substantial burden is imposed in a program or activity that receives Federal financial assistance, even if the burden results from a rule of general applicability"; (2) the substantial burden affects commerce; or (3) the substantial burden is imposed by "a land use regulation or system of land use regulations. . ." when the government has in place "formal or informal procedures or practices that permit the government to make, individualized assessments of the proposed uses for the property involved."[i]

As has been noted,[ii] the three categories implicate, respectively, the Spending Clause (U.S. Const. art. I, sec. 8, cl.1), the Commerce Clause (U.S. Const. art. I, sec. 8, cl.3) and the Enforcement Clause (U.S. Const. amend. XIV sec. 5).

RLUIPA further provides that implementation of a land use regulation in a manner which discriminates, excludes, limits or otherwise treats a religious institution or assembly on "less than equal terms with a nonreligious assembly or institution" would be an action that substantially burdens religious exercise.[iii] The burden shifts to the government to defend the regulation once a religious institution carries its burden of establishing that a regulation substantially burdens the exercise of religion. Further, under the statute, religious exercise is a vague enough concept to offer broad opportunities for claims of infringement as the statute provides that religious exercise "includes any exercise of religion, whether or not compelled by, or central to, a system of religious belief."[iv]

Fortress Bible Church v. Feiner, 694 F.3d 208 (2d Cir. 2012)

The Second Circuit Court of Appeals affirmed the decision of the U.S. District Court for the Southern District of New York finding that the Town of Greenburgh had violated the Religious Land Use and Institutionalized Persons Act (RLUIPA) in its handling of an application for land use approvals by a church. The Circuit Court affirmed the District Court which had " ordered broad relief: (1) it annulled the positive declaration and findings statement; (2) it ordered that the Church's 2000 site plan be deemed approved for SEQRA purposes and enjoined any further SEQRA review; (3) it ordered the Board to grant the Church a waiver from the landscaped parking island requirement; (4) it ordered the Zoning Board to grant a variance permitting a side building location; (5) it ordered the Town to issue a building permit for the 2000 site plan; (6) it enjoined the Town from taking any action that unreasonably interferes with the Church's project; and (7) it imposed $10,000 in sanctions for spoliation of evidence."

In its appeal, the Town raised several arguments: "(1) RLUIPA is by its terms inapplicable to the environmental quality review process employed by the Town to reject the proposal, (2) there was insufficient evidence that the defendants had imposed a substantial burden on plaintiffs' religious exercise under RLUIPA, (3) plaintiffs' class-of-one Equal Protection claim is not viable because

they have not alleged a single comparator similarly situated in all respects, (4) plaintiffs' Free Exercise rights were not violated, (5) the Town did not violate Article 78, and (6) the district court lacked the authority to order the Town Zoning Board, a non-party, to take any action with regard to the Church."

The Court, in affirming, concluded all of these contentions are "without merit."

Perhaps the most interesting argument was that SEQRA is not a "land use regulation" and therefore does not implicate RLUIPA. However, the Court found that although: "we agree that SEQRA itself is not a zoning or landmarking law for purposes of RLUIPA, we hold that when a government uses a statutory environmental review process as the primary vehicle for making zoning decisions, those decisions constitute the application of a zoning law and are within the purview of RLUIPA."

Noting that no circuit has yet addressed this issue, the Court went on to say:

"We have little difficulty concluding that SEQRA itself is not a zoning law within the meaning of RLUIPA. SEQRA is not concerned with the division of land into zones based on use. It is focused on minimizing the adverse environmental impact of a wide range of discretionary government actions, many of which are totally unrelated to zoning or land use.6 See N.Y. Envtl. Conserv. Law § 8-0105(4). Thus, the Town's use of the SEQRA process did not automatically implicate RLUIPA. By its terms, however, RLUIPA also applies to "the application of" a zoning law. 42 U.S.C. § 2000cc-5(5). Although SEQRA by itself is not a zoning law, in this case the Town used the SEQRA review process as its vehicle for determining the zoning issues related to the Church's land use proposal....to hold that RLUIPA is inapplicable to what amounts to zoning actions taken in the context of a statutorily mandated environmental quality review would allow towns to insulate zoning decisions from RLUIPA review. A town could negotiate all of a project's zoning details during a SEQRA review and completely preempt its normal zoning process. These decisions would then be immune to RLUIPA challenge. We decline to endorse a process that would allow a town to evade RLUIPA by what essentially amounts to a re-characterization of its zoning decisions."

In demonstrating how a bad fact pattern can be fatal to any argument, the Court went on to note:

"The Town's own Planning Commissioner (subsequently replaced by the Town) believed that the alleged environmental impacts did not warrant a positive declaration, but the Town initiated the SEQRA review process anyway after the Church refused to accede to the Town's demand that it donate a fire truck or provide some other payment in lieu of taxes. The Town then manipulated its SEQRA findings statement to "kill" the project on the basis of zoning concerns despite the fact that there were no serious environmental impacts. We decline to insulate the Town from liability with regard to its decisions on zoning issues simply because it decided them under the rubric of an environmental quality review process."

In addressing the Town's argument that the SEQRA determination was not a substantial burden on the congregation as a different building could be built on the site, citing its own conclusions in another Westchester RLUIPA case, the Court held:

"The record easily supports the district court's finding that the Town's actions amounted to a complete denial of the Church's ability to construct an adequate facility rather than a rejection of a specific building proposal. See Westchester Day Sch., 504 F.3d at 349. Finally, we conclude, as the district court found based upon ample evidence, that the burden on the Church was more than minimal and that there was a close nexus between the Town's denial of the project and the Church's inability to construct an adequate facility. Fortress Bible Church, 734 F. Supp. 2d at 501-08. Because, as the district court found, the Town's stated compelling interests were disingenuous, its actions violated RLUIPA. Id. at 502-05, 508. Our conclusion that the Church was substantially burdened is bolstered by the arbitrary, capricious, and discriminatory nature of the Town's actions, taken in bad faith. Westchester Day Sch., 504 F.3d at 350-51. The Town attempted to extort from the Church a payment in lieu of taxes, it ignored and then replaced its Planning Commissioner when he advocated on the Church's behalf, and Town staff intentionally destroyed relevant evidence."

In arguing that the District Court erred in finding that the Town had violated the Church's First Amendment Right to Free Exercise, the Town argued that the court should have applied a rational basis test rather than a strict scrutiny test. The Court declined to set a bright line rule on the applicable test in zoning cases stating instead: " we conclude that on the record before us there was no rational basis for the Town's actions. The district court's holding was premised on its finding that the Town had acted in bad faith and disingenuously misused the SEQRA process to block the Church's project....Accordingly, we conclude that the Town lacked a rational basis for delaying and denying the Church's project and therefore violated the Church's Free Exercise rights."

On the Church's Equal Protection argument, the Court noted the need for a "high degree of similarity" when, as here, there is an argument that the Church is a class of one. The Court noted:

"The Church's use of multiple comparators is unusual, and presents us with a matter of first impression. We conclude, however, that the Church's evidence of several other projects treated differently with regard to discrete issues is sufficient in this case to support a class-of-one claim. The purpose of requiring sufficient similarity is to make sure that no legitimate factor could explain the disparate treatment....Where, as here, the issues compared are discrete and not cumulative or affected by the character of the project as a whole, multiple comparators are sufficient so long as the issues being compared are so similar that differential treatment with regard to them cannot be explained by anything other than discrimination. We conclude that there is sufficient evidence in the record to support the Church's class-of-one claim."

The Court went on to analyze the other applications, raised as comparison by the Church, noting in each instance that the Town had allowed development to move forward without addressing one or more of the same issues raised by the Town in its SEQRA review of the Church's project. The Court therefore concluded: "where, as here, a decision is based on several discrete concerns, and a claimant presents evidence that comparators were treated differently with regard to those specific concerns without any plausible explanation for the disparity, such a claim can succeed."

Finally, the Court conclude that the Article 78 relief was properly granted due to the arbitrary nature of the Town's actions and that the injunctive relief was "specifically tailored to the injury

the Church had suffered" and was therefore reasonable. The Court declined to address the issue of relief against the non-party Zoning Board of Appeals, because that issue had not been raised below.

[ii] *Grace United Methodist Church v. City of Cheyenne,* 235 F.Supp.2d 1186, 1192 (D. Wyo.2002)
[iii] 42 U.S.C. 2000cc (b) (1), (2) and (3)
[iv] 42 U.S.C 2000cc (5) (7) (A)

68 N.Y.2d 583, 503 N.E.2d 509, 510 N.Y.S.2d 861, 37 Ed. Law Rep. 292

Cornell University, Appellant-Respondent,
v.
Elizabeth S. Bagnardi et al., Respondents-Appellants, and Charles Hindman et al., Intervenors-Respondents.
In the Matter of Sarah Lawrence College, Appellant,
v.
Zoning Board of Appeals of the City of Yonkers, Respondent, and Lawrence Park West and Neighborhood Homeowners Association, Inc., Intervenor-Respondent.

Court of Appeals of New York
Argued November 13, 1986;
decided December 19, 1986

CITE TITLE AS: Cornell Univ. v Bagnardi

SUMMARY

Cross appeals, in the first above-entitled action, by permission of the Court of Appeals, from an order of the Appellate Division of the Supreme Court in the Third Judicial Department, entered April 22, 1985, which modified, on the law, and, as modified, affirmed a judgment of the Supreme Court entered in Tompkins County upon a decision of the court at a Trial Term (Frederick B. Bryant, J.), declaring (1) that the use of plaintiff's premises at 316 Fall Creek Drive for the Modern Indonesia Project is an educational use within the corporate powers of the plaintiff and that such use does not endanger the public health, safety or welfare, (2) that the provisions of the City of Ithaca Zoning Ordinance as applied to prevent the plaintiff from using that property are void and ineffective, and (3) that defendants be restrained from interfering with the proposed use of the property. The modification consisted of declaring invalid the City of Ithaca Zoning Ordinance insofar as it requires the issuance of a variance for plaintiff's proposed expansion of an educational use into the Cornell Heights area of the City of Ithaca and conditions the issuance of such variance upon a showing of hardship; converting the remainder of the action to a proceeding pursuant to CPLR article 78, and annulling the determination of respondent Zoning Board of Appeals.

Appeal, in the second above-entitled proceeding, by permission of the Court of Appeals, from an order of the Appellate Division of the Supreme Court in the Second Judicial Department, entered April 21, 1986, which (1) reversed, on the law, so much of an order of the Supreme Court at Special Term (Albert M. Rosenblatt, J.), entered in Westchester County in a proceeding pursuant to CPLR article 78, as, upon reargument, adhered to the original judgment, annulling a determination of respondent Zoning Board of Appeals of the City of Yonkers denying petitioner a special exception use permit and ordering the Zoning Board of Appeals to issue the permit, (2) vacated the judgment, and (3) dismissed the proceeding on the merits.

Cornell Univ. v Bagnardi, 107 AD2d 398, modified.

Matter of Sarah Lawrence Coll. v Zoning Bd. of Appeals, 119 AD2d 753, reversed.

HEADNOTES

Municipal Corporations--Zoning--Educational Institutions Desiring to Expand Into Purely Residential Neighborhoods

([1]) The presumption that religious or educational uses of property are always in furtherance of the public health, safety and morals may be rebutted by a showing that the proposed use would actually have a net negative impact, by evidence of a significant impact on traffic congestion, property values or municipal services, and a reasonably drawn special permit requirement may be used to balance the competing interests in this area. In all instances, the governing standard should be the protection of the public's health, safety, welfare and morals. Accordingly, where a university which sought to relocate an interdisciplinary academic program involving approximately 15 people to a large house it owned in an area abutting the university's campus, and where a college which sought to house 13 students and 1 staff member in a private house across the street from its main

campus, were prevented from implementing their expansion plans for reasons not related to these considerations, in that the zoning boards involved demanded that the schools make a showing of affirmative need for the proposed expansion, denial of their applications was improper. Both schools should be given the opportunity to apply for special permits without having to show a special need, and the municipalities in which they are located should be given the opportunity to determine whether reasonable conditions should be imposed that would mitigate any deleterious effects on the surrounding community.

Appeal--Academic and Moot Questions

([2]) In an action for a declaratory judgment brought after denial of plaintiff university's application for a variance in order to relocate a small academic program to a house it owned in an area abutting the university's campus, Supreme Court adjudged that the proposed educational use would not endanger the public's health, safety or welfare and that the zoning ordinance as applied to prevent plaintiff from using its property were void and ineffective, and the Appellate Division modified and declared the subject ordinance invalid to the extent that it required a variance for the proposed use and conditioned the granting of a variance on a showing of hardship and held that the ordinance impermissibly distinguished between levels of educational uses, following which the ordinance was amended to eliminate the need for a variance for such uses as that proposed by plaintiff and to remove any distinctions between levels of educational use and to permit all educational uses subject to obtaining a special permit. Since the amended ordinance will govern plaintiff's new application for a special permit, that portion of plaintiff's declaratory judgment action which seeks a declaration that the former zoning ordinance was unconstitutional or unconstitutionally ***585** applied is moot; however, because the university's attempt to enjoin defendants entirely from interfering with plaintiff's proposed project remains in controversy, the appeal should not be dismissed and the merits may be addressed by the Court of Appeals.

TOTAL CLIENT SERVICE LIBRARY REFERENCES

Am Jur 2d, Zoning and Planning, §§157-157.7, 260, 284, 288.

NY Jur, Zoning and Planning Laws, §§178-187.

ANNOTATION REFERENCES

Children's day-care use as violation of restrictive covenant. 29 ALR4th 730.

Validity, construction, and effect of agreement to rezone, or amendment to zoning ordinance, creating special restrictions or conditions not applicable to other property similarly zoned. 70 ALR3d 125.

What constitutes "school", "educational use", or the like within zoning ordinance. 64 ALR3d 1087.

POINTS OF COUNSEL

Thomas Mead Santoro and *Walter J. Relihan, Jr.,* for appellant-respondent in the first above-entitled action.
I. This case presents the opportunity to reaffirm the public policy of this State favoring educational uses of property for the benefit of all. *(Matter of Summit School v Neugent,* 82 AD2d 463.) II. The trial court properly construed and applied New York State law on educational use exemptions to the case at bar. *(Matter of New York Inst. of Technology v Le Boutillier,* 33 NY2d 125; *Matter of Westchester Reform Temple v Brown,* 22 NY2d 488; *Matter of Diocese of Rochester v Planning Bd.,* 1 NY2d 508; *Matter of Wiltwyck School for Boys v Hill,* 11 NY2d 182; *Matter of Concordia Coll. Inst. v Miller,* 301 NY 189; *Jewish Reconstructionist Synagogue v Incorporated Vil. of Roslyn Harbor,* 38 NY2d 283; *Matter of Islamic Socy. v Foley,* 96 AD2d 536; *Diocese of Buffalo v Buczkowski,* 112 Misc 2d 336, 90 AD2d 994; *Matter of Imbergamo v Barclay,* 77 Misc 2d 188; *Meadows v Binkowski,* 50 Misc 2d 19, 27 AD2d 706.) III. The trial court properly found that the zoning ordinance as applied to plaintiff's proposed educational use was void and ineffective. *(Matter of Diocese of Rochester v Planning Bd.,* 1 NY2d 508; ***586** *Matter of Community Synagogue v Bates,* 1 NY2d 445; *Jewish Reconstructionist Synagogue v Incorporated Vil. of Roslyn Harbor,* 38 NY2d 283; *Matter of Hofstra Coll. v Wilmerding,* 24 Misc 2d 248; *Matter of Concordia Coll. Inst. v Miller,* 301 NY 189.) IV. The instant action was properly brought. *(Matter of Nassau Children's Home v Board of*

Zoning Appeals, 77 AD2d 898.) V. The motion to intervene at the appellate level should not have been granted by the court below. *(White v Globe Indem. Co.,* 14 AD2d 743; *Matter of Unitarian Universalist Church v Shorten,* 64 Misc 2d 851, 1027; *Matter of Clearview Gardens First Corp. v Foley,* 11 AD2d 1047, 9 NY2d 645; *Matter of Wood v Fahey,* 62 AD2d 86; *Auerbach v Bennett,* 64 AD2d 98; *Horn Constr. Co. v Town of Hempstead,* 33 Misc 2d 381.)

Ralph W. Nash, City Attorney, for respondents-appellants in the first above-entitled action.

I. The instant appeal may be dismissed because the amendment of the zoning ordinance has rendered the particular controversies moot. *(Matter of Mascony Transp. & Ferry Serv. v Richmond,* 71 AD2d 896, 49 NY2d 969; *Matter of Alscot Investing Corp. v Incorporated Vil. of Rockville Centre,* 99 AD2d 754, 64 NY2d 921; *Matter of Stato v Squicciarini,* 59 AD2d 718, 44 NY2d 816; *Matter of Asman v Ambach,* 64 NY2d 989; *Matter of Storar,* 52 NY2d 363.) II. This court should abrogate the favored status rule for educational and religious uses under municipal zoning ordinances. *(Matter of Diocese of Rochester v Planning Bd.,* 1 NY2d 508; *Matter of New York Inst. of Technology v Le Boutillier,* 33 NY2d 125; *Jewish Reconstructionist Synagogue v Incorporated Vil. of Roslyn Harbor,* 38 NY2d 283; *Matter of Holy Spirit Assn. v Rosenfeld,* 91 AD2d 190; *Village of Belle Terre v Boraas,* 416 US 1; *Lakewood, Ohio, Congregation of Jehovah's Witnesses v City of Lakewood,* 699 F2d 303, 464 US 815; *Young v American Mini Theatres,* 427 US 50; *Schad v Mount Ephraim,* 452 US 61; *Larkin v Grendel's Den,* 459 US 116; *Euclid v Ambler Co.,* 272 US 365.) III. The present Ithaca zoning laws are valid as regards plaintiff's proposed use under current decisional law of New York. *(Matter of New York Inst. of Technology v Le Boutillier,* 33 NY2d 125.)

Nathaniel F. Knappen and *Richard B. Thaler* for intervenors-respondents in the first above-entitled action.

I. Local zoning regulations which are designed to: provide for the public health, safety, and welfare; ensure the most desirable use of land; conserve the value of buildings; and enhance the value and appearance of land throughout the area, apply to ***587** educational institutions. *(Euclid v Ambler Co.,* 272 US 365; *Matter of New York Inst. of Technology v Le Boutillier,* 33 NY2d 125.) II. Law in New York State requires a balancing test pitting the college's desire to expand against the legitimate interest of community residents to protect and preserve their neighborhood. *(Matter of New York Inst. of Technology v Le Boutillier,* 33 NY2d 125; *Matter of Clark v Board of Zoning Appeals,* 301 NY 86; *Matter of Solla v Simonds,* 86 AD2d 612; *Matter of Kenyon v Quinones,* 43 AD2d 125; *Ames v Palma,* 52 AD2d 1077.) III. The question of whether the Board of Zoning Appeals must approve Cornell's application for a special permit is not ripe for judicial review because the ruling of the court below did not finally determine the issue, and a new hearing has not been held under the revised ordinance. *(Matter of Organization to Assure Servs. v Ambach,* 56 NY2d 518; *Pfeiffer v Byrne,* 53 NY2d 1021; *Spears v Berle,* 48 NY2d 254.) IV. The intervention by the Cornell Heights residents was an intervention as of right, and the decision of the court below to grant the intervention was not an abuse of discretion. *(Bay State Heating & Air Conditioning Co. v American Ins. Co.,* 78 AD2d 147; *Matter of Carriage Hill v Lane,* 20 AD2d 914; *Myertin 30 Realty Dev. Corp. v Oehler,* 82 AD2d 913; *Matter of Unitarian Universalist Church v Shorten,* 64 Misc 2d 851, 1027; *Vantage Petroleum v Board of Assessment Review,* 91 AD2d 1037, 61 NY2d 695; *Patron v Patron,* 40 NY2d 582.)

Carl Stahl for appellant in the second above-entitled proceeding.

I. Petitioner-appellant complied with the requirements of the zoning ordinance for the granting of a special exception use permit. *(Matter of Aloe v Dassler,* 278 App Div 975; *Matter of Pleasant Val. Home Constr. v Van Wagner,* 41 NY2d 1028; *Matter of Family Consultation Serv. v Howard,* 14 Misc 2d 194; *Matter of Mason v Zoning Bd. of Appeals,* 72 AD2d 889.) II. The determination of the Zoning Board was arbitrary, capricious and unsupported by substantial evidence as measured by the standards applicable to educational institutions. *(Matter of Diocese of Rochester v Planning Bd.,* 1 NY2d 508; *Matter of Pleasant Val. Home Constr. v Van Wagner,* 41 NY2d 1028; *Matter of Ouderkirk v Board of Appeals,* 58 AD2d 667; *Brandeis School v Village of Lawrence,* 18 Misc 2d 550; *Matter of Concordia Coll. Inst. v Miller,* 301 NY 189; *Matter of Westchester Reform Temple v Brown,* 22 NY2d 488; *Matter of Board of Coop. Educ. Servs. v Gaynor,* 60 Misc 2d 316, 33 AD2d 701; ***588** *Matter of Imbergamo v Barclay,* 77 Misc 2d 188.) III. Petitioner-appellant has met the "need" requirement imposed by this court if any such requirement exists under the circumstances of this case. *(Matter of North Shore Hebrew Academy v Wegman,* 105 AD2d 702.)

Jay B. Hashmall, Corporation Counsel (Dennis M. McMahon of counsel), for respondent in the second above-entitled proceeding.

I. The applicant has not demonstrated any need for the requested relief and therefore is not entitled to a special

exception use permit. *(Matter of New York Inst. of Technology v Le Boutillier,* 33 NY2d 125; *Matter of Westchester Reform Temple v Brown,* 22 NY2d 488; *Matter of Community Synagogue v Bates,* 1 NY2d 445.) II. Petitioner did not comply with the statutory requirements for a special exception use permit. *(Matter of Tandem Holding Corp. v Board of Zoning Appeals,* 43 NY2d 801; *Matter of North Shore Steak House v Board of Appeals,* 30 NY2d 238; *Matter of Mobil Oil Corp. v Oaks,* 55 AD2d 809; *Matter of Fiore v Zoning Bd. of Appeals,* 21 NY2d 393; *Matter of Point Lookout Civic Assn. v Zoning Bd. of Appeals,* 94 AD2d 744; *Matter of Berg v Michaelis,* 21 AD2d 322, 16 NY2d 822.)

Michael R. Edelman for intervenor-respondent in the second above-entitled proceeding.

I. Special Term's decision annulling the local Board's denial of petitioner's application to convert a single-family home in a residential area into a college dormitory was properly reversed by the court below. *(Matter of Everheart v Johnston,* 30 AD2d 608; *McGowan v Cohalan,* 41 NY2d 434; *Matter of Cowan v Kern,* 41 NY2d 591.) II. Petitioner failed to show that a demonstrable need existed for the proposed expansion. Notwithstanding the "special status" accorded to educational use applicants, a local zoning board may properly deny an application for a special exception use permit to expand the use where need is lacking. *(Matter of New York Inst. of Technology v Le Boutillier,* 33 NY2d 125; *Matter of Diocese of Rochester v Planning Bd.,* 1 NY2d 508; *Matter of Westchester Reform Temple v Brown,* 22 NY2d 488; *Matter of Concordia Coll. Inst. v Miller,* 301 NY 189; *Matter of Property Owners Assn. v Board of Zoning Appeals,* 2 Misc 2d 309.) III. There was substantial evidence in the record upon which the local Zoning Board of Appeals could reasonably deny petitioner's application. *(Matter of Diocese of Rochester v Planning Bd.,* 1 NY2d 508; *Matter of Lemir Realty Corp. v Larkin,* 11 NY2d 20; *Matter of Tandem Holding Corp. v Board of Zoning Appeals,* 53 AD2d 697; *Matter of* ***589** *Mobil Oil Corp. v Oaks,* 55 AD2d 809; *Matter of Klein v Siegel,* 47 AD2d 924; *Corter v Zoning Bd. of Appeals,* 46 AD2d 184; *Matter of Fiore v Zoning Bd. of Appeals,* 21 NY2d 393; *People ex rel. Hudson-Harlem Val. Tit. & Mtge. Co. v Walker,* 282 NY 400; *Matter of Von Kohorn v Morrell,* 9 NY2d 27.)

OPINION OF THE COURT

Titone, J.

([1]) In these cases involving local zoning regulations, we are called upon to determine the proper method of balancing the needs and rights of educational institutions that desire to expand or construct into purely residential neighborhoods against the concerns of the surrounding residents about the potential inconveniences. We hold that the presumption that educational uses are always in furtherance of the public health, safety and morals may be rebutted by a showing that the proposed use would actually have a net negative impact, and that a reasonably drawn special permit requirement may be used to balance the competing interests in this area. In all instances, the governing standard should be the protection of the public's health, safety, welfare and morals. Since in these cases the schools involved were prevented from implementing their expansion plans for reasons not related to these considerations, the denial of their applications was improper.

I.

Plaintiff Cornell University sought to relocate its Modern Indonesia Project, an interdisciplinary academic program involving approximately 15 people on a full-time basis, to a large house it owned in the Cornell Heights area abutting the Cornell campus. Uses permitted in that area, zoned R-2a, included one- and two-family dwellings, churches, public parks or playgrounds, libraries, public or parochial schools and fire stations. Private schools were allowed by special permit of the Board. A "school" was defined as a "public, private or church-affiliated establishment academically below the college level, for the education of children and for adults in subjects or skills" (City of Ithaca Zoning Ordinance § 30.3 [78]).

Having assumed that its proposed use did not accord with uses allowed as of right or by special permit in the area, plaintiff applied for a variance, which the local Board of Zoning Appeals is empowered to issue where zoning restrictions impose "practical difficulties or unnecessary hardship" ***590** (City of Ithaca Zoning Ordinance § 30.58 [B] [3]). After a hearing, plaintiff's variance application was denied. The Board found that Cornell would suffer no hardship if the variance were denied and concluded that there would be potential unspecified damage to the character of the neighborhood. The Board further stressed that Cornell had shown no need to move its program to the particular site it had chosen.

Plaintiff then commenced a declaratory judgment action

seeking a declaration that the ordinance was "unconstitutional, illegal and invalid and/or unconstitutionally, illegally, and invalidly applied to plaintiff". Supreme Court, after trial, adjudged that the proposed use was an educational use that would not endanger the public's health, safety or welfare, that the provisions of the zoning ordinance as applied to prevent plaintiff from using its property for the Modern Indonesia Project were void and ineffective and that defendants should be restrained from interfering with the proposed use of plaintiff's property.

The Appellate Division modified the judgment. That court first substituted for the trial court's declaration concerning the invalidity of the ordinance a narrower declaration of its own that the ordinance was invalid to the extent that it required a variance for the proposed use and conditioned the granting of a variance on a showing of hardship. Such requirements, the court held, do not bear a substantial relation to public health, safety, morals or general welfare and are therefore improper. The court also held that the City of Ithaca Zoning Ordinance impermissibly distinguished between educational uses at the college level and those below. Having thus partially invalidated the ordinance, the court concluded that the proposed use fell within the category of uses available with a special permit. As a consequence, the court converted the remainder of the action into a proceeding under CPLR article 78 and remitted the matter to the Board to consider whether a special permit should be granted and whether any restrictions or conditions should be imposed.

After this decision and this court's subsequent decision to grant both sides leave to appeal under CPLR 5602 (a) (2) *(see, Matter of Lakeland Water Dist. v Onondaga County Water Auth.,* 24 NY2d 400), the zoning ordinance was amended to eliminate the need for a variance for uses such as that proposed by Cornell and to remove any distinctions between levels of educational use. Under the amended ordinance, all ***591** educational uses are permitted subject to obtaining a special permit. The section governing the issuance of special permits was also amended to add a requirement that the property owner show the need to use the particular site chosen for the educational use.

II.

Sarah Lawrence College sought to house 13 students and 1 staff member in a private house across the street from its main campus. The building is located in an S-200 residential district where a college use is allowed, but only by special permit. The ordinance delineating the factors to be considered in determining whether a special permit should be issued states, in part:

"C. Such permit may be granted subject to such additional conditions and safeguards as may be deemed by the Board to be advisable and appropriate.

"D. Such use shall be found by the Board to be in harmony with the general purposes and intent of this Chapter.

"E. Such use shall not affect adversely the character of the district, nor the conservation of property values, nor the health and safety of residents or workers on adjacent properties and in the general neighborhood.

"F. Such use shall be of such appropriate size, and so located and laid-out in relation to its access streets, that vehicular and pedestrian traffic to and from such use will not create undue congestion or hazards prejudicial to the character of the general neighborhood.

"G. Such use shall not conflict with the direction of building development in accordance with any Master Plan or portion thereof which has been adopted by the Planning Board."

The Planning Board issued an unfavorable report finding, upon the college's application, that the proposed use might depreciate property values, would increase traffic, would damage the character of the neighborhood and would lead to other similar applications along the same street. Furthermore, the Board found that the house was not contiguous to other college-related facilities and that sufficient evidence of need for an additional dormitory facility had not been adduced. Sarah Lawrence then submitted its application to the Zoning Board of Appeals for a special permit on the ground that the percentage of its students seeking on-campus housing had ***592** increased immeasurably and that the facilities available on the actual campus could no longer house all of them.

Following a hearing, the Zoning Board of Appeals denied the application, basing its decision on the college's lack of need to expand and its conclusion that any hardship or practical difficulties borne by the college were self-included. The Board further deemed the college's traffic survey unrepresentative of local conditions and

stated that the college's experts did not prove to its satisfaction that surrounding property values would not be adversely affected by the proposed student housing arrangements.

Sarah Lawrence thereafter commenced an article 78 proceeding, which resulted in the annulment of the Board's determination and a direction that it issue the permit. The court concluded that the evidence at the hearing could not support a determination that the proposed use would pose a health or safety hazard or have an adverse impact on the neighborhood. The Appellate Division, however, reversed, finding that the Board's determination was not arbitrary and capricious and that it was supported by substantial evidence.

III.

([2]) Initially, the unusual circumstances in the *Cornell Univ. v Bagnardi* case present the question whether plaintiff's appeal should be dismissed on mootness grounds because of the recent amendments to the City of Ithaca's zoning ordinance. Notably, the zoning ordinance, whose constitutionality plaintiff attacked, has been repealed, and it is the amended ordinance which will unquestionably govern plaintiff's new application for a special permit. Therefore, that portion of plaintiff's declaratory judgment action which seeks a declaration that the former City of Ithaca zoning ordinance was unconstitutional, or unconstitutional as applied, is clearly moot *(see, Matter of Sibarco Stas. v Town Bd.,* 24 NY2d 900). Remaining in controversy, however, is the university's attempt to enjoin defendants entirely from interfering with plaintiff's proposed project, relief which was granted after trial and reversed by the Appellate Division. Because that aspect of the controversy remains live, the appeal should not be dismissed and the merits may be addressed.

IV.

The rules governing the relationship between the right of ***593** educational institutions to expand and the right of municipalities to regulate land use cannot be fully understood without reference to their background. Historically, schools and churches have enjoyed special treatment with respect to residential zoning ordinances and have been permitted to expand into neighborhoods where nonconforming uses would otherwise not have been allowed. Such favored status once seemed unobjectionable, since elementary schools and small churches serving the surrounding area were welcomed as benefits to the neighborhood. However, the advent of the automobile, as well as the growth and diversification of religious and educational institutions, brought a host of new problems. Sprawling universities brought increased traffic and other unexpected inconveniences to their neighbors, while the benefits these universities conferred were becoming less relevant to the residents of the immediately surrounding areas. Thus, neighbors who may have formerly welcomed the construction of a new school began to view its arrival with distrust and concern that it would unnecessarily bring people from other communities into the neighborhood to disrupt its peace and quiet.

With this change in attitude, courts were thrust into the role of protecting educational institutions from community hostility. Zoning ordinances that imposed limitations on the construction of public schools were held to conflict with the general law of the State *(Union Free School Dist. v Village of Hewlett Bay Park,* 198 Misc 932, *affd* 278 App Div 706; 2 Anderson, American Law of Zoning § 12.09, at 419-420 [2d ed]). The construction of parochial schools would not bear interference because of both their educational nature and the First Amendment protections afforded those schools *(see, Matter of Diocese of Rochester v Planning Bd.,* 1 NY2d 508; 2 Rathkopf, Zoning and Planning § 20.02 [3], at 20-18). And, an ordinance which permitted public schools but excluded religious or private schools would not withstand challenge in New York *(Matter of Diocese of Rochester v Planning Bd., supra,* at p 526).

On a broader level, the courts held that schools, public, parochial and private, by their very nature, singularly serve the public's welfare and morals *(Matter of New York Inst. of Technology v Le Boutillier,* 33 NY2d 125, 130; *Matter of Concordia Coll. Inst. v Miller,* 301 NY 189, 195; *Matter of Summit School v Neugent,* 82 AD2d 463). Colleges and universities were also recognized as serving the public's welfare in ***594** the same important ways *(see, e.g., Matter of Concordia Coll. Inst. v Miller, supra; Long Is. Univ. v Tappan,* 202 Misc 956, *affd* 281 App Div 771, *affd* 305 NY 893; *compare, Yanow v Seven Oaks Park,* 11 NJ 341, 94 A2d 482). Because of the inherently beneficial nature of churches and schools to the public, we held that the total exclusion of such institutions from a residential district serves no end that is reasonably related to the morals, health, welfare and safety of the community *(Matter of Diocese of Rochester v Planning*

Bd., supra, at p 522; 2 Anderson, American Law of Zoning § 12.10, at 422 [2d ed]; 2 Rathkopf, Zoning and Planning § 20.01 [4], at 20-9). Since a municipality's power to regulate land use is derived solely from its right to use its police powers to promote these goals, such total exclusion is beyond the scope of the localities' zoning authority *(Matter of Westchester Reform Temple v Brown,* 22 NY2d 488, 493; *see also, Euclid v Ambler Co.,* 272 US 365, 395; 2 Rathkopf, Zoning and Planning § 20.01 [2] [a]; 1 Rohan, Zoning and Land Use Controls § 3.05 [2], at 3-219).

These general rules, however, were interpreted by some courts to demand a full exemption from zoning rules for all educational and church uses *(see, e.g., Matter of Property Owners Assn. v Board of Zoning Appeals,* 2 Misc 2d 309 [requiring a special permit be issued for an athletic stadium seating 4,000 spectators]; *Zoning Regulations as Applied to Schools, Colleges, Universities and the Like,* Ann., 36 ALR2d 653, 664; 2 Rathkopf, Zoning and Planning § 20.01 [2] [a]). The result has been to render municipalities powerless in the face of a religious or educational institution's proposed expansion, no matter how offensive, overpowering or unsafe to a residential neighborhood the use might be. Such an interpretation, however, is mandated neither by the case law of our State nor common sense.

Although in *Matter of Diocese of Rochester v Planning Bd.* (1 NY2d 508, *supra),* we found an exclusion of a religious use to be arbitrary and unreasonable, we rejected any conclusive presumption of an entitlement to an exemption from zoning ordinances. In that regard, we explicitly rejected any argument that "appropriate restrictions may never be imposed with respect to a church and school and accessory uses" or that "under no circumstances may [such uses] ever be excluded from designated areas" *(id.,* at p 526). Furthermore, while we stated in *Matter of New York Inst. of Technology v Le Boutillier* (33 NY2d 125, *supra)* that *ordinarily* the factors bearing on public health, safety and welfare such as traffic ***595** hazards, impairment of the use, enjoyment or value of properties in surrounding areas and deterioration of appearance of an area would not be weighty enough to foreclose an educational use in a residential area *(id.,* at p 131), we did not intend to establish a rigid rule that educational or religious uses may never properly be found to conflict with these factors to such an extent as to endanger the public's health, safety, welfare or morals.

([1]) The controlling consideration in reviewing the request of a school or church for permission to expand into a residential area must always be the over-all impact on the public's welfare. Although the special treatment afforded schools and churches stems from their presumed beneficial effect on the community, there are many instances in which a particular educational or religious use may actually detract from the public's health, safety, welfare or morals. In those instances, the institution may be properly denied. There is simply no conclusive presumption that any religious or educational use automatically outweighs its ill effects *(Jewish Reconstructionist Synagogue v Incorporated Vil. of Roslyn Harbor,* 38 NY2d 283, 292 [Breitel, Ch. J., concurring], *cert denied* 426 US 950). The presumed beneficial effect may be rebutted with evidence of a significant impact on traffic congestion, property values, municipal services and the like.

Thus, educational and religious uses which would unarguably be contrary to the public's health, safety or welfare need not be permitted at all. A community that resides in close proximity to a college should not be obliged to stand helpless in the face of proposed uses that are dangerous to the surrounding area. Such uses, which are clearly not what the court had in mind when it stated that traffic and similar problems are outweighed by the benefits a church or school brings *(Matter of Westchester Reform Temple v Brown,* 22 NY2d 488, 496-497, *supra),* are unquestionably within the municipality's police power to exclude altogether. "[E]ven religious [and educational] institutions [must] accommodate to factors directly relevant to public health, safety or welfare, inclusive of fire and similar emergency risks, and traffic conditions insofar as they involve public safety [citations omitted]" *(Jewish Reconstructionist Synagogue v Incorporated Vil. of Roslyn Harbor, supra,* at pp 291-292 [Breitel, Ch. J., concurring]).

Less extreme forms of expansion that are nonetheless obnoxious ***596** to the community's residents, of course, require a more balanced approach than total exclusion. "[I]n *Matter of Westchester Reform Temple v Brown* (22 NY2d 488, 496) * * * the court recognized that 'considerations which may wholly justify the exclusion of commercial structures from residential areas * * * [may] * * * be considered for the purpose of minimizing, insofar as practicable, the impairment of surrounding areas or the danger of traffic hazards' " *(Jewish Reconstructionist Synagogue v Incorporated Vil. of Roslyn Harbor, supra,* at p 292 [Breitel, Ch. J., concurring]). A special permit

may be required and reasonable conditions directly related to the public's health, safety and welfare may be imposed to the same extent that they may be imposed on noneducational applicants *(Jewish Reconstructionist Synagogue v Incorporated Vil. of Roslyn Harbor, supra,* at pp 291-292 [Breitel, Ch. J., concurring]; *Matter of Summit School v Neugent,* 82 AD2d 463, 466, *supra; see, Matter of Diocese of Rochester v Planning Bd.,* 1 NY2d 508, 526, *supra).* Thus, a zoning ordinance may properly provide that the granting of a special permit to churches or schools may be conditioned on the effect the use would have on traffic congestion, property values, municipal services, the general plan for development of the community, etc. *(see generally,* 2 Anderson, New York Zoning Law and Practice ch 24 [3d ed]). The requirement of a special permit application, which entails disclosure of site plans, parking facilities, and other features of the institution's proposed use, is beneficial in that it affords zoning boards an opportunity to weigh the proposed use in relation to neighboring land uses and to cushion any adverse effects by the imposition of conditions designed to mitigate them (2 Rathkopf, Zoning and Planning § 20.01 [4], at 20-11). These conditions, if reasonably designed to counteract the deleterious effects on the public's welfare of a proposed religious or educational use should be upheld by the courts, provided they do not, by their cost, magnitude or volume, operate indirectly to exclude such uses altogether *(see,* 2 Anderson, American Law of Zoning § 12.11, at 426 [2d ed]).

V.

In each of the cases before us these standards were not properly applied. The zoning boards involved in each case were, in fact, using an impermissible criterion in that they demanded that the schools make a showing of affirmative ***597** need for the proposed expansion. The boards' use of this criterion may have been based, in part, on our decision in *Matter of New York Inst. of Technology v Le Boutillier* (33 NY2d 125, *supra),* in which we upheld a zoning appeal board's denial of a school's special permit based upon the lack of even a "colorable need" to expand *(id.,* at p 131). A requirement of a showing of need to expand *(Sarah Lawrence Coll. v Zoning Bd. of Appeals),* or even more stringently, a need to expand to the particular location chosen *(Cornell Univ. v Bagnardi; see, Matter of Community Synagogue v Bates,* 1 NY2d 445), however, has no bearing whatsoever upon the public's health, safety, welfare or morals. The imposition of such a requirement, or any other requirement unrelated to the public's health, safety or welfare, is, therefore, beyond the scope of the municipality's police power, and, thus, impermissible. To the extent that *New York Inst. of Technology v Le Boutillier (supra)* may be construed otherwise, it should not be followed. In addition, the board's requirement in *Sarah Lawrence Coll. v Zoning Bd. of Appeals,* that the college show that *no* ill effects will result from the proposed use in order to receive a special permit, is improper because it fails to recognize that educational and religious uses ordinarily have inherent beneficial effects that must be weighed against their potential for harming the community.

In light of our holding that the institutions' need to expand may not be considered and that the possible ill effects their proposed uses may have on the surrounding area may be taken into account, the applications of both Cornell and Sarah Lawrence must be reconsidered by the local zoning boards of appeal. Both schools should be given the opportunity to apply for special permits without having to show a special need, and the municipalities in which they are located should be given the opportunity to determine whether reasonable conditions should be imposed that would mitigate any deleterious effects on the surrounding community. Although the recently amended ordinance of the City of Ithaca is not technically before us, we note that, in accordance with this opinion, its requirement of a showing of need may not validly be applied to plaintiff Cornell's application.

Accordingly, in *Cornell Univ. v Bagnardi,* the order of the Appellate Division should be modified, with costs to plaintiff, by striking, as moot, so much of that order as declared the City of Ithaca's zoning ordinance partially invalid and remitting the matter to the Board of Zoning Appeals for consideration ***598** of Cornell's special use permit application in accordance with this opinion. In *Matter of Sarah Lawrence Coll. v Zoning Bd. of Appeals,* the order of the Appellate Division should be reversed, with costs, and the matter remitted to the Zoning Board of Appeals for consideration of Sarah Lawrence's special use permit application, in accordance with this opinion.

Chief Judge Wachtler and Judges Meyer, Simons, Kaye and Alexander concur; Judge Hancock, Jr., taking no part.

In *Cornell Univ. v Barnardi:* Order modified, with costs to plaintiff, and matter remitted to Supreme Court, Tompkins County, with directions to remand to the Board of Zoning Appeals of the City of Ithaca for consideration of the special use permit application in accordance with

503 N.E.2d 509, 510 N.Y.S.2d 861, 37 Ed. Law Rep. 292

the opinion herein and, as so modified, affirmed.

In *Matter of Sarah Lawrence Coll. v Zoning Bd. of Appeals:* Order reversed, with costs, and matter remitted to Supreme Court, Westchester County, with directions to remand to the Zoning Board of Appeals of the City of Yonkers for consideration of the special use permit application in accordance with the opinion herein. ***601**

5 N.Y.3d 407, 838 N.E.2d 624, 804 N.Y.S.2d 708, 2005 N.Y. Slip Op. 07732

In the Matter of Pine Knolls Alliance Church, Respondent
v
Zoning Board of Appeals of the Town of Moreau, Appellant

Court of Appeals of New York
Argued September 15, 2005
Decided October 20, 2005

CITE TITLE AS: Matter of Pine Knolls Alliance Church v Zoning Bd. of Appeals of the Town of Moreau

SUMMARY

Appeal, by permission of the Court of Appeals, from an order of the Appellate Division of the Supreme Court in the Third Judicial Department, entered January 13, 2005. The Appellate Division (1) reversed, on the law, a judgment of the Supreme Court, Saratoga County (Thomas D. Nolan, Jr., J.), which had dismissed the petition, in a proceeding pursuant to CPLR article 78, to review a determination of respondent partially denying petitioner's request for a special use permit, and (2) granted the petition.

Matter of Pine Knolls Alliance Church v Zoning Bd. of Appeals of Town of Moreau, 14 AD3d 863, reversed.

HEADNOTE

Municipal Corporations
Zoning
Special Use Permit

So much of the determination of respondent Zoning Board of Appeals (ZBA) as denied petitioner Church permission to construct a secondary driveway in connection with the Church's application for a special use permit to implement its proposed expansion plan was neither arbitrary nor capricious. The ZBA did not impermissibly require the Church to make an affirmative showing of a need to expand as a condition precedent to the issuance of a special use permit. The requirement that petitioner widen its existing driveway (in lieu of constructing a new one) was an appropriate mitigating condition that was neither so costly or extreme that it undermined the efficacy of the expansion plan. Nor did it prohibit the Church's religious use of its newly acquired parcel. The ZBA's determination that the Church could address the congregation's traffic concerns without the construction of a secondary roadway that would have significant negative impacts on the surrounding residential community was supported by substantial evidence.

TOTAL CLIENT-SERVICE LIBRARY REFERENCES

Am Jur 2d, Zoning and Planning §§ 357, 857, 884, 885, 889, 893, 894, 913, 958.

Carmody-Wait 2d, Proceeding Against a Body or Officer § 145:1450.

NY Jur 2d, Buildings, Zoning, and Land Controls §§ 321, 380, 382, 384, 386, 424, 429.

***408** New York Real Property Service §§ 48:67, 48:85.

ANNOTATION REFERENCE

See ALR Index under Zoning.

FIND SIMILAR CASES ON WESTLAW

Database: NY-ORCS

Query: zoning /2 board /3 appeal & special /3 permit /p driveway & arbitrary

POINTS OF COUNSEL

Bartlett, Pontiff, Stewart & Rhodes, P.C., Glens Falls (*Martin D. Auffredou* and *Elisabeth B. Mahoney* of counsel), for appellant.

I. The Appellate Division improperly applied this Court's holding in *Cornell Univ. v Bagnardi* (68 NY2d 583 [1986]) to the present case. (*Trustees of Union Coll. in Town of Schenectady in State of N.Y. v Members of Schenectady City Council,* 91 NY2d 161; *McGann v Incorporated Vil. of Old Westbury,* 293 AD2d 581; *Matter of Apostolic Holiness Church v Zoning Bd. of Appeals of Town of Babylon,* 220 AD2d 740; *Matter of Diocese of Rochester v Planning Bd. of Town of Brighton,* 1 NY2d 508; *Matter of Assembly of God Church of Bay Shore, N.Y. v Islip Town Bd.,* 228 AD2d 585; *Matter of Holy Trinity Greek Orthodox Church of Hicksville v Casey,* 150 AD2d 448.) II. The Appellate Division improperly directed respondent to issue a permit to petitioner and, instead, should have remitted the application to respondent for reconsideration. (*Cornell Univ. v Bagnardi,* 68 NY2d 583; *McGann v Incorporated Vil. of Old Westbury,* 293 AD2d 581; *Neddermeyer v Town of Ontario Planning Bd.,* 155 AD2d 908.) III. Respondent's determination was supported by substantial evidence. (*Matter of Fuhst v Foley,* 45 NY2d 441; *Matter of Cowan v Kern,* 41 NY2d 591; *Conley v Town of Brookhaven Zoning Bd. of Appeals,* 40 NY2d 309; *Matter of Diocese of Rochester v Planning Bd. of Town of Brighton,* 1 NY2d 508; *Matter of PDH Props. v Planning Bd. of Town of Milton,* 298 AD2d 684; *Matter of Albany-Greene Sanitation v Town of New Baltimore Zoning Bd. of Appeals,* 263 AD2d 644; *Matter of Squire v Conway,* 256 AD2d 771; *Matter of Eddy v Niefer,* 297 AD2d 410.)

FitzGerald Morris Baker Firth P.C., Glens Falls (*William A. Scott* of counsel), for respondent.

I. The question of whether substantial evidence was presented to support the Zoning Board of Appeals of the Town of Moreau's decision is not at issue on ***409** this appeal. (*Matter of Harrison Orthodox Minyan v Town Bd. of Harrison,* 159 AD2d 572; *Neddermeyer v Town of Ontario Planning Bd.,* 155 AD2d 908.) II. The Appellate Division's ruling is consistent with the prior rulings of this Court. (*Cornell Univ. v Bagnardi,* 68 NY2d 583; *Trustees of Union Coll. in Town of Schenectady in State of N.Y. v Members of Schenectady City Council,* 91 NY2d 161; *Matter of Cornell Univ. v Beer,* 16 AD3d 890; *Matter of Holy Trinity Greek Orthodox Church of Hicksville v Casey,* 150 AD2d 448; *Matter of Assembly of God Church of Bay Shore, N.Y. v Islip Town Bd.,* 228 AD2d 585.) III. The relief afforded by the Appellate Division was appropriate. (*Matter of Sarah Lawrence Coll. v Zoning Bd. of Appeals in City of Yonkers,* 119 AD2d 753; *Cornell Univ. v Bagnardi,* 107 AD2d 398, 68 NY2d 583; *Neddermeyer v Town of Ontario Planning Bd.,* 155 AD2d 908.)

OPINION OF THE COURT

Graffeo, J.

In *Cornell Univ. v Bagnardi* (68 NY2d 583, 589 [1986]), our task was to determine how best to balance the needs and rights of educational and religious institutions seeking to expand their facilities in residential neighborhoods against the concerns of local ****2** residents who might be harmed or inconvenienced by the proposed construction projects. We approved the special permit application process as an effective means of addressing expansion requests but we annulled the two zoning determinations under review because the zoning officials in both cases had impermissibly required the colleges that sought special permits to prove their need to expand. In this case, we are asked to apply our decision in *Cornell University* to a controversy between a church and a zoning board of appeals.

I.

Since 1974, petitioner Pine Knolls Alliance Church has operated a place of worship on a 5.78 acre parcel of property in a residential district on Route 32 in the Town of Moreau, Saratoga County, pursuant to a special use permit issued by the Town. After purchasing an adjoining 14.3 acres, the Church applied to respondent Zoning Board of Appeals (ZBA) in November 2002 for a modification of its existing special use permit to implement an expansion plan. The Church proposed the construction of a 9,970 square foot addition to its 10,075 square foot main church, a 2,120 square foot addition to its 6,040 square foot youth building, a new 3,780 square foot building for ***410** use as a counseling center, relocation and expansion of the playground, relocation of an existing storage shed and trailer, and expansion of the parking lot.

As a final aspect of the plan, although a driveway already connected the parking lot to Route 32, the Church sought to build a second access road about 500 feet to the north of the existing driveway that would assist the flow of traffic between the parking lot and Route 32. The new

roadway would be aligned opposite a residential cross street, creating a four-way intersection on Route 32.

The ZBA referred the entire expansion application to the Town Planning Board for a report and recommendation. At the request of the Planning Board, the Church hired Creighton Manning Engineering, LLP to conduct a traffic study. The engineering report concluded that the proposed expansion, including the addition of a new access road, would have no significant impact on traffic in the surrounding neighborhood and that no mitigation was necessary at the affected intersection. Based on the report, the Planning Board issued a "positive recommendation" concerning the project, but suggested that plantings be placed to shield neighboring properties from the effects of the expansion.

In the meantime, neighborhood residents retained professional engineer Lawrence M. Levine to conduct a traffic analysis. Levine determined that the proposed secondary access road would create traffic problems both for churchgoers and for nearby residents. Levine cited the potential for increased cut-through traffic that would disrupt the residential neighborhood across from the church property, turning conflicts that could result in accidents at the new four-way intersection and sight-line problems for vehicles exiting the Church. He further opined that ****3** construction of the additional driveway would lead to noise and light pollution and create runoff problems for adjoining residential properties. Although he recognized that the entire expansion plan would result in increased church-related traffic, Levine nonetheless concluded that it was not necessary for the Church to construct a second access road. Instead, Levine commented that parking lot congestion could be alleviated by widening the existing driveway to create two lanes (with one dedicated as a left-turning exit lane after services) and applying "[s]imple traffic management techniques" to control overlapping arrivals and departures.

***411** In March 2003, the ZBA referred the Church's development proposal to the Saratoga County Planning Board. Like its town counterpart, the County Planning Board generally recommended that the expansion plan be approved, but it expressed reservations about the secondary driveway. It urged the ZBA to examine alternatives that would lessen the impact of the new roadway on neighboring properties, including withholding approval of the access road until all other reasonable traffic control measures were instituted by the applicant. In particular, the County Planning Board suggested that the ZBA consider requiring the Church to widen its existing driveway, eliminate parking adjacent to the existing intersection, employ a traffic control officer during peak usage hours or take other actions to ease traffic congestion.

After conducting a public hearing, the ZBA issued a determination in August 2003 approving every aspect of the development plan except the Church's request to construct the second driveway. Apart from the additional roadway, the ZBA concluded that the project would not result in significant adverse impacts to the public welfare. Crediting the findings in the Levine engineering report, however, the ZBA found that the secondary roadway would "present undue and inconvenient impacts to the public welfare including noise and traffic upon the neighboring properties" and would affect "green space" to the extent that these negative impacts "outweigh any perceived benefit to the Church at this time." The ZBA noted that the new driveway was unnecessary because the Church's traffic needs could be met through minor upgrades to the existing entrance road, such as the removal of a planter, widening the existing driveway to establish two exit lanes and eliminating parking along the exit lanes. The denial of the additional driveway was made without prejudice to the Church renewing its application or submitting a new application at a later time should the recommended measures prove ineffective.

The Church then commenced this CPLR article 78 proceeding challenging that portion of the ZBA determination that denied permission to construct the secondary roadway. The Church argued that the ZBA had impermissibly imposed a requirement that the Church establish a "need" for the access road contrary to this Court's decision in *Cornell University* and the determination was therefore arbitrary and capricious. Supreme Court dismissed the petition, finding that the denial of the secondary driveway was supported by the negative impact evidence ****4** in the ***412** record and the ZBA had not impermissibly interfered with the Church's religious activities when it disapproved construction of the new driveway. To the contrary, Supreme Court viewed the denial as a permissible condition to the ZBA's grant of a modified special use permit.

On appeal, the Appellate Division reversed, granting the petition and directing the issuance of a special use permit authorizing the second driveway. Opining that the "underlying reason" for the ZBA's denial was the

Church's failure to establish that it needed an additional access road and interpreting our decision in *Cornell University* as precluding any consideration of the Church's needs, the Court concluded that the determination was fatally flawed (14 AD3d 863, 864 [2005]). We granted the ZBA permission to appeal to this Court and we now reverse and reinstate the order of Supreme Court confirming the ZBA determination.

II.

"Historically, schools and churches have enjoyed special treatment with respect to residential zoning ordinances and have been permitted to expand into neighborhoods where nonconforming uses would otherwise not have been allowed" (*Cornell Univ. v Bagnardi*, 68 NY2d at 593). Recognizing that educational and religious institutions are presumed to have a beneficial effect on the community, we clarified in *Cornell University* that this presumption can be rebutted "with evidence of a significant impact on traffic congestion, property values, municipal services and the like" (*id.* at 595). We have invalidated ordinances that impose blanket bans on religious or educational uses in particular communities in favor of a case-by-case review, endorsing the special use permit application process as the proper procedure for addressing expansion requests (*see Trustees of Union Coll. in Town of Schenectady in State of N.Y. v Members of Schenectady City Council*, 91 NY2d 161 [1997]). This procedure "affords zoning boards an opportunity to weigh the proposed use in relation to neighboring land uses and to cushion any adverse effects by the imposition of conditions designed to mitigate them" (*Cornell Univ.*, 68 NY2d at 596 [citation omitted]).

After engaging in the appropriate balancing process, zoning officials may conclude that "a particular educational or religious use may actually detract from the public's health, safety, welfare or morals" (*id.* at 595) and may deny a special use permit on ***413** that basis. When the negative impacts are not so extreme as to warrant outright denial, mitigating conditions may be imposed to ameliorate the harm "provided they do not, by their cost, magnitude or volume, operate indirectly to exclude such uses altogether" (*id.* at 596 [citation omitted]). In assessing a special permit application, zoning officials are to review the effect of the proposed expansion on the public's health, safety, welfare or morals, concerns grounded in the exercise of police power, "with primary consideration given to the over-all impact on the public welfare" (*Trustees of Union Coll.*, 91 NY2d at 166). Applications may not be denied based on ****5** considerations irrelevant to these concerns.

Thus, in *Cornell University*, we struck down two zoning decisions involving colleges because zoning officials in both cases had required that the educational institutions seeking special permits prove their need to expand as a condition precedent to granting the application--an improper criterion. We reasoned that "[a] requirement of a showing of need to expand . . . , or even more stringently, a need to expand to the particular location chosen . . . , has no bearing whatsoever upon the public's health, safety, welfare or morals" and, as such, was impermissible (*Cornell Univ.*, 68 NY2d at 597 [citations omitted]). We made clear in *Cornell University* that it is not the role of zoning officials to second-guess the expansion needs of religious and educational institutions. That being said, however, once those institutions have identified their own needs and presented those interests in a special permit application, zoning officials have the flexibility to consider other means of accommodating those needs if the negative impacts of the proposed use outweigh its beneficial effects.

Unlike in *Cornell University*, the ZBA in this case did not require the Church to make an affirmative showing of a need to expand as a condition precedent to the issuance of a special use permit. Indeed, there was no discussion in the ZBA determination concerning whether the Church needed its comprehensive expansion plan, which included significant additions to existing structures, the erection of a new building, and the relocation and expansion of other facilities. Rather, the inquiry was whether the proposed expansion could be accomplished in a manner that mitigated the negative impacts on the surrounding community. Based on record evidence, the ZBA found that it could and granted all aspects of the application except for the secondary roadway.

***414** Although the Church was denied permission to construct a new access road, this was not a denial of permission to expand. The ZBA acknowledged that the expansion project could result in internal traffic concerns, but found that the Church could address those concerns in ways other than as proposed. Instead of constructing a new roadway off Route 32, the Church was allowed to increase the capacity of its existing driveway. This was the functional equivalent of imposing mitigating conditions on the grant of an application--a practice expressly approved in *Cornell University* as long as such

conditions do not "by their cost, magnitude or volume, operate indirectly to exclude" the religious or educational use of the parcel. The requirement that petitioner widen its existing driveway (in lieu of constructing a new one) is neither so costly or extreme that it undermines the efficacy of the expansion plan, nor does it prohibit the Church's religious use of the newly acquired parcel. It therefore meets the test articulated in *Cornell University*.

The Church argues that the ZBA's reference to the need for the secondary ****6** driveway is indistinguishable from the "need to expand" analysis disapproved in *Cornell University*. We disagree. The ZBA never required the Church to prove a need to expand, either in general terms or in relation to the adjoining property the Church had purchased for that purpose. Instead, it determined that there was a means for the Church to address the congregation's traffic concerns (which the Church itself had recognized) without construction of a secondary roadway that would have significant negative impacts on the surrounding residential community. It was only in this sense that the ZBA noted that the Church did not "need" the additional access road. Read in context, the discussion of need did not involve an impermissible interference with the internal affairs of the Church but arose out of an appropriate balancing of interests well within the scope of the powers of a ZBA.

In sum, in this case the ZBA found that the expansion could be accomplished in a manner that was less intrusive to neighboring properties. This determination is supported by substantial evidence in the record, particularly the findings in the Levine traffic study and the Saratoga County Planning Board recommendation. Because there was nothing improper, irrational, arbitrary or capricious about the ZBA's analysis or the conclusion ***415** it reached, the determination should not have been disturbed.[*]

Accordingly, the order of the Appellate Division should be reversed, with costs, and the petition dismissed.

Chief Judge Kaye and Judges G.B. Smith, Ciparick, Rosenblatt, Read and R.S. Smith concur.

Order reversed, etc.

FOOTNOTES

Footnotes

[*] As a result of our decision upholding the ZBA determination, we have no occasion to address the ZBA's additional contention that, even if the determination had been erroneous, the Appellate Division erred in granting the petition instead of remitting the matter to the ZBA for further proceedings.

PL 106–274, September 22, 2000, 114 Stat 803

UNITED STATES PUBLIC LAWS
106th Congress - Second Session
Convening January 24, 2000

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PL 106–274 (S 2869)
September 22, 2000

RELIGIOUS LAND USE AND INSTITUTIONALIZED PERSONS ACT OF 2000

An Act To protect religious liberty, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

<< 42 USCA § 2000cc NOTE >>

SECTION 1. SHORT TITLE.

This Act may be cited as the "Religious Land Use and Institutionalized Persons Act of 2000".

<< 42 USCA § 2000cc >>

SEC. 2. PROTECTION OF LAND USE AS RELIGIOUS EXERCISE.

(a) SUBSTANTIAL BURDENS.—
(1) GENERAL RULE.—No government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the government demonstrates that imposition of the burden on that person, assembly, or institution—
(A) is in furtherance of a compelling governmental interest; and
(B) is the least restrictive means of furthering that compelling governmental interest.
(2) SCOPE OF APPLICATION.—This subsection applies in any case in which—
(A) the substantial burden is imposed in a program or activity that receives Federal financial assistance, even if the burden results from a rule of general applicability;
(B) the substantial burden affects, or removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes, even if the burden results from a rule of general applicability; or
(C) the substantial burden is imposed in the implementation of a land use regulation or system of land use regulations, under which a government makes, or has in place formal or informal procedures or practices that permit the government to make, individualized assessments of the proposed uses for the property involved.
(b) DISCRIMINATION AND EXCLUSION.—
(1) EQUAL TERMS.—No government shall impose or implement a land use regulation in a manner that treats a religious assembly or institution on less than equal terms with a nonreligious assembly or institution.
(2) NONDISCRIMINATION.—No government shall impose or implement a land use regulation that discriminates against

any assembly or institution on the basis of religion or religious denomination.
(3) EXCLUSIONS AND LIMITS.—No government shall impose or implement a land use regulation that—
(A) totally excludes religious assemblies from a jurisdiction; or
(B) unreasonably limits religious assemblies, institutions, or structures within a jurisdiction.

<< 42 USCA § 2000cc–1 >>

SEC. 3. PROTECTION OF RELIGIOUS EXERCISE OF INSTITUTIONALIZED PERSONS.

(a) GENERAL RULE.—No government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution, as defined in section 2 of the Civil Rights of Institutionalized Persons Act (42 U.S.C. 1997), even if the burden results from a rule of general applicability, unless the government demonstrates that imposition of the burden on that person—]
(1) is in furtherance of a compelling governmental interest; and
(2) is the least restrictive means of furthering that compelling governmental interest.
(b) SCOPE OF APPLICATION.—This section applies in any case in which—
(1) the substantial burden is imposed in a program or activity that receives Federal financial assistance; or
(2) the substantial burden affects, or removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes.

SEC. 4. JUDICIAL RELIEF.

<< 42 USCA § 2000cc–2 >>

(a) CAUSE OF ACTION.—A person may assert a violation of this Act as a claim or defense in a judicial proceeding and obtain appropriate relief against a government. Standing to assert a claim or defense under this section shall be governed by the general rules of standing under article III of the Constitution.

<< 42 USCA § 2000cc–2 >>

(b) BURDEN OF PERSUASION.—If a plaintiff produces prima facie evidence to support a claim alleging a violation of the Free Exercise Clause or a violation of section 2, the government shall bear the burden of persuasion on any element of the claim, except that the plaintiff shall bear the burden of persuasion on whether the law (including a regulation) or government practice that is challenged by the claim substantially burdens the plaintiff's exercise of religion.

<< 42 USCA § 2000cc–2 >>

(c) FULL FAITH AND CREDIT.—Adjudication of a claim of a violation of section 2 in a non-Federal forum shall not be entitled to full faith and credit in a Federal court unless the claimant had a full and fair adjudication of that claim in the non-Federal forum.

<< 42 USCA § 2000cc–2 >>

<< 42 USCA § 1988 >>

(d) ATTORNEYS' FEES.—Section 722(b) of the Revised Statutes (42 U.S.C. 1988(b)) is amended—
(1) by inserting "the Religious Land Use and Institutionalized Persons Act of 2000," after "Religious Freedom Restoration Act of 1993,"; and
(2) by striking the comma that follows a comma.

<< 42 USCA § 2000cc–2 >>

(e) PRISONERS.—Nothing in this Act shall be construed to amend or repeal the Prison Litigation Reform Act of 1995 (including provisions of law amended by that Act).

<< 42 USCA § 2000cc–2 >>

(f) AUTHORITY OF UNITED STATES TO ENFORCE THIS ACT.—The United States may bring an action for injunctive or declaratory relief to enforce compliance with this Act. Nothing in this subsection shall be construed to deny, impair, or otherwise affect any right or authority of the Attorney General, the United States, or any agency, officer, or employee of the United States, acting under any law other than this subsection, to institute or intervene in any proceeding.

<< 42 USCA § 2000cc–2 >>

(g) LIMITATION.—If the only jurisdictional basis for applying a provision of this Act is a claim that a substantial burden by a government on religious exercise affects, or that removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes, the provision shall not apply if the government demonstrates that all substantial burdens on, or the removal of all substantial burdens from, similar religious exercise throughout the Nation would not lead in the aggregate to a substantial effect on commerce with foreign nations, among the several States, or with Indian tribes.

<< 42 USCA § 2000cc–3 >>

SEC. 5. RULES OF CONSTRUCTION.

(a) RELIGIOUS BELIEF UNAFFECTED.—Nothing in this Act shall be construed to authorize any government to burden any religious belief.
(b) RELIGIOUS EXERCISE NOT REGULATED.—Nothing in this Act shall create any basis for restricting or burdening religious exercise or for claims against a religious organization including any religiously affiliated school or university, not acting under color of law.
(c) CLAIMS TO FUNDING UNAFFECTED.—Nothing in this Act shall create or preclude a right of any religious organization to receive funding or other assistance from a government, or of any person to receive government funding for a religious activity, but this Act may require a government to incur expenses in its own operations to avoid imposing a substantial burden on religious exercise.
(d) OTHER AUTHORITY TO IMPOSE CONDITIONS ON FUNDING UNAFFECTED.—Nothing in this Act shall—
(1) authorize a government to regulate or affect, directly or indirectly, the activities or policies of a person other than a government as a condition of receiving funding or other assistance; or
(2) restrict any authority that may exist under other law to so regulate or affect, except as provided in this Act.
(e) GOVERNMENTAL DISCRETION IN ALLEVIATING BURDENS ON RELIGIOUS EXERCISE.—A government may avoid the preemptive force of any provision of this Act by changing the policy or practice that results in a substantial burden on religious exercise, by retaining the policy or practice and exempting the substantially burdened religious exercise, by providing exemptions from the policy or practice for applications that substantially burden religious exercise, or by any other means that eliminates the substantial burden.
(f) EFFECT ON OTHER LAW.—With respect to a claim brought under this Act, proof that a substantial burden on a person's religious exercise affects, or removal of that burden would affect, commerce with foreign nations, among the several States, or with Indian tribes, shall not establish any inference or presumption that Congress intends that any religious exercise is, or is not, subject to any law other than this Act.
(g) BROAD CONSTRUCTION.—This Act shall be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this Act and the Constitution.
(h) NO PREEMPTION OR REPEAL.—Nothing in this Act shall be construed to preempt State law, or repeal Federal law, that is equally as protective of religious exercise as, or more protective of religious exercise than, this Act.

(i) SEVERABILITY.—If any provision of this Act or of an amendment made by this Act, or any application of such provision to any person or circumstance, is held to be unconstitutional, the remainder of this Act, the amendments made by this Act, and the application of the provision to any other person or circumstance shall not be affected.

<< 42 USCA § 2000cc–4 >>

SEC. 6. ESTABLISHMENT CLAUSE UNAFFECTED.

Nothing in this Act shall be construed to affect, interpret, or in any way address that portion of the first amendment to the Constitution prohibiting laws respecting an establishment of religion (referred to in this section as the "Establishment Clause"). Granting government funding, benefits, or exemptions, to the extent permissible under the Establishment Clause, shall not constitute a violation of this Act. In this section, the term "granting", used with respect to government funding, benefits, or exemptions, does not include the denial of government funding, benefits, or exemptions.

SEC. 7. AMENDMENTS TO RELIGIOUS FREEDOM RESTORATION ACT.

<< 42 USCA § 2000bb–2 >>

(a) DEFINITIONS.—Section 5 of the Religious Freedom Restoration Act of 1993 (42 U.S.C. 2000bb–2) is amended—
(1) in paragraph (1), by striking "a State, or a subdivision of a State" and inserting "or of a covered entity";
(2) in paragraph (2), by striking "term" and all that follows through "includes" and inserting "term "covered entity" means"; and
(3) in paragraph (4), by striking all after "means" and inserting "religious exercise, as defined in section 8 of the Religious Land Use and Institutionalized Persons Act of 2000.".

<< 42 USCA § 2000bb–3 >>

(b) CONFORMING AMENDMENT.—Section 6(a) of the Religious Freedom Restoration Act of 1993 (42 U.S.C. 2000bb–3(a)) is amended by striking "and State".

<< 42 USCA § 2000cc–5 >>

SEC. 8. DEFINITIONS.

In this Act:
(1) CLAIMANT.—The term "claimant" means a person raising a claim or defense under this Act.
(2) DEMONSTRATES.—The term "demonstrates" means meets the burdens of going forward with the evidence and of persuasion.
(3) FREE EXERCISE CLAUSE.—The term "Free Exercise Clause" means that portion of the first amendment to the Constitutionthat proscribes laws prohibiting the free exercise of religion.
(4) GOVERNMENT.—The term "government"—
(A) means—
(i) a State, county, municipality, or other governmental entity created under the authority of a State;
(ii) any branch, department, agency, instrumentality, or official of an entity listed in clause (i); and
(iii) any other person acting under color of State law; and
(B) for the purposes of sections 4(b) and 5, includes the United States, a branch, department, agency, instrumentality, or official of the United States, and any other person acting under color of Federal law.
(5) LAND USE REGULATION.—The term "land use regulation" means a zoning or landmarking law, or the application of such a law, that limits or restricts a claimant's use or development of land (including a structure affixed to land), if the claimant has an ownership, leasehold, easement, servitude, or other property interest in the regulated land or a contract or

option to acquire such an interest.
(6) PROGRAM OR ACTIVITY.—The term "program or activity" means all of the operations of any entity as described in paragraph (1) or (2) of section 606 of the Civil Rights Act of 1964 (42 U.S.C. 2000d–4a).
(7) RELIGIOUS EXERCISE.—
(A) IN GENERAL.—The term "religious exercise" includes any exercise of religion, whether or not compelled by, or central to, a system of religious belief.
(B) RULE.—The use, building, or conversion of real property for the purpose of religious exercise shall be considered to be religious exercise of the person or entity that uses or intends to use the property for that purpose.

Approved September 22, 2000.

PL 106–274, 2000 S 2869

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

August Term 2011

(Argued: September 23, 2011 Decided: September 24, 2012)

Docket No. 10-3634-cv

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FORTRESS BIBLE CHURCH, REVEREND DENNIS G. KARAMAN,

Plaintiffs-Appellees,

-- v. --

PAUL J. FEINER, individually & in his official capacity as the Supervisor of the Town of Greenburgh, SONJA BROWN, in her official capacity as Councilwoman for the Town of Greenburgh, KEVIN MORGAN, in his official capacity as Councilman for the Town of Greenburgh, DIANA JUETTNER, in her official capacity as Councilwoman for the Town of Greenburgh, FRANCIS SHEEHAN, in his official capacity as Councilman for the Town of Greenburgh, TOWN BOARD OF GREENBURGH, THE TOWN BOARD OF THE TOWN OF GREENBURGH, TOWN OF GREENBURGH, THE TOWN OF GREENBURGH,

Defendants-Appellants.

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B e f o r e : WALKER, CHIN and LOHIER, Circuit Judges.

Defendants-appellants Paul J. Feiner, Sonja Brown, Kevin Morgan, Diana Juettner, Francis Sheehan, Town Board of Greenburgh, the Town Board of the Town of Greenburgh, and the Town of Greenburgh, appeal from a judgment of the United States District Court for the Southern District of New York (Stephen C.

Robinson, Judge), holding that they had violated plaintiffs-appellees' rights under the Religious Land Use and Institutionalized Persons Act as well as the First Amendment, the Equal Protection Clause, and New York constitutional and statutory law. We conclude that the district court correctly applied the law and discern no clear error in its factual findings. AFFIRMED.

ROBERT A. SPOLZINO (Joanna Topping, Cathleen Giannetta, on the brief), Wilson, Elser, Moskowitz, Edelman & Dicker LLP, White Plains, New York, for Defendants-Appellants.

DONNA E. FROSCO, Keane & Beane, P.C., White Plains, New York, for Plaintiffs-Appellees.

JOHN M. WALKER, JR., Circuit Judge:

This appeal concerns a longstanding land-use dispute between plaintiff-appellee Fortress Bible Church ("the Church") and defendant-appellant Town of Greenburgh, New York ("the Town") over the Church's plan to build a worship facility and school on land that it owned within the Town. After a series of contentious administrative proceedings effectively preventing the Church's project from going forward, the Church, along with its pastor, plaintiff-appellee Reverend Dennis G. Karaman ("Karaman"), sued the Town, its Town Board ("the Board"), and several Board members (collectively "the Town defendants") in the

United States District Court for the Southern District of New York (Stephen C. Robinson, Judge). The Church alleged violations of the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA"), 42 U.S.C. § 2000cc et seq., as well as of its constitutional Free Exercise and Equal Protection rights, and Article 78 of New York's Civil Procedure Law. After a 26-day bench trial, the district court entered judgment for the plaintiffs on all counts. On appeal, the Town makes six contentions: (1) RLUIPA is by its terms inapplicable to the environmental quality review process employed by the Town to reject the proposal, (2) there was insufficient evidence that the defendants had imposed a substantial burden on plaintiffs' religious exercise under RLUIPA, (3) plaintiffs' class-of-one Equal Protection claim is not viable because they have not alleged a single comparator similarly situated in all respects, (4) plaintiffs' Free Exercise rights were not violated, (5) the Town did not violate Article 78, and (6) the district court lacked the authority to order the Town Zoning Board, a non-party, to take any action with regard to the Church. We find all of these contentions to be without merit and therefore AFFIRM the decision of the district court.

BACKGROUND

Facts

In reviewing a judgment after a bench trial, we accept the district court's factual findings unless they are clearly erroneous. See Arch Ins. Co. v. Precision Stone, Inc., 584 F.3d 33, 38-39 (2d Cir. 2009). Because we do not identify error in any of the district court's findings that are pertinent to this appeal, we set forth the relevant facts as found by the district court.[1]

I. The Church's Proposal

Plaintiff Fortress Bible Church is a Pentecostal church established in the 1940s. It is a tax-exempt religious organization with approximately 175 members. In addition to its worship activities, the Church runs Fortress Christian Academy ("the School"), a private Christian school. Plaintiff Dennis G. Karaman is the Church's pastor.

The Church is currently located in Mount Vernon, New York. Its Mount Vernon facilities, however, are not adequate to accommodate its religious practice. In 1998, the Church purchased a parcel of land on Pomander Drive in the Town of Greenburgh, New York, with the intention of building a larger facility. This parcel ("the Pomander Drive property") was vacant

[1] A more comprehensive accounting of the facts can be found in the district court's thorough opinion. Fortress Bible Church v. Feiner, 734 F. Supp. 2d 409 (S.D.N.Y. 2010).

except for a small residence on one edge. The surrounding neighborhood includes residences, business offices, churches, and major roads. Prior to purchasing the property, Karaman advised the Town of his intent to build a church and school on the grounds, and stated that if the property was not suitable for this purpose, he would not purchase it.

The Church sought to build a single structure on the Pomander Drive property that would house a worship facility and a school. The proposed church would accommodate 500 people and the school would accommodate 150 students. The structure would have 125 parking spaces and occupy 1.45 acres of the 6.53 acre plot. To construct its proposed building, the Church required three discretionary land use approvals from the Town: (1) site plan approval from the Board, (2) a waiver of the landscaped parking island requirement, and (3) a variance from the Town's Zoning Board of Appeals ("the Zoning Board") to allow the building to be located closer to one side of the property. Because the Church's proposal required discretionary government approval, it triggered New York's State Environmental Quality Review Act ("SEQRA"), N.Y. Comp. Codes R. & Regs. Tit. 6, §§ 617.2(b), 617.3(a) (requiring environmental review process whenever government takes certain discretionary action).

II. The SEQRA Review Process

The SEQRA review process entails several stages. First, the "lead agency" (in this case, the Board) must make an initial determination of environmental significance. 6 N.Y.C.R.R. § 617.6. If the environmental impact of the proposal is small, the lead agency can issue a negative declaration, meaning there is no potential for significant adverse environmental impact, or a conditioned negative declaration, meaning that the potential for adverse environmental impact can be mitigated by the agency. § 617.7. Alternately, if the lead agency determines that the proposal has the potential for at least one significant adverse environmental impact, the lead agency must issue a "positive declaration" and require the applicant to submit an Environmental Impact Statement ("EIS") evaluating the environmental impact of the project. § 617.7. Preparation of an EIS involves several steps. The applicant prepares a scoping document (outlining the scope of the environmental impact), a draft EIS ("DEIS"), and a final EIS ("FEIS"), and must seek feedback at each stage from the public and approval from the lead agency. §§ 617.8, 617.9.

The Church submitted its initial proposal on or about November 24, 1998. On January 27, 1999, the Church and its consultants appeared at a Board work session to discuss the application. The Board requested that the Church examine the project's impact on local traffic and access to the property. In

response, the Church hired consultants to perform a traffic study of the area. It also sought feedback from the New York State Department of Transportation ("NYSDOT") and nearby residents. On or about January 17, 2000, the Church submitted a revised proposal which included a comprehensive traffic study and additional information about potential environmental impacts. After reviewing the proposal, Anthony Russo ("Russo"), the Town Planning Commissioner, believed that the Church had adequately mitigated the Town's traffic concerns and advised the Board that it could issue a Conditioned Negative Declaration.

On July 11, 2000, Karaman and other Church representatives attended a work session with the Board. At the meeting, defendant Town Supervisor Paul Feiner ("Feiner") stated that he was concerned with the Church's tax-exempt status and asked it to donate a fire truck or make some other payment in lieu of taxes. Other Board members commented to the effect that they did not want the property to be used as a church. The Church declined to donate a fire truck or make any other payment in lieu of taxes. On July 19, 2000, the Board issued a positive declaration, triggering the full SEQRA review process.

Over the next several years, the Church provided all of the information required by the SEQRA process. It produced a scoping document followed by a DEIS, which the Town accepted as complete on October 24, 2001. The Town held hearings on the proposal on

December 12, 2001, and January 9, 2002. During this comment period, NYSDOT submitted comments indicating its approval of the Church's traffic study. Despite the Church's efforts, however, the Town continued to resist the project. On May 3, 2001, Karaman met with Feiner to discuss the review process. Karaman asked what he could do to move the process along, and Feiner responded that the Church could agree to make yearly financial contributions to the fire department. Another Board member suggested to Russo on multiple occasions that he should "stop" or "kill" the project. In early 2002, the Town replaced Russo with a new Planning Commissioner and retained consultants to analyze the Church's proposal.

On April 5, 2002, after further consultation with Town officials, the Church submitted a proposed FEIS. The Town refused to discuss the project with the Church and refused to move forward with the review process. Despite having accepted the DEIS and scoping document as complete, which would normally finalize the universe of issues relevant to SEQRA review, the Town began to request new information and raise new issues for the Church to address. The Church provided the requested information and attempted to meet the Town's demands. During the summer of 2002, the Town stopped the review process altogether due to the Church's refusal to reimburse it for certain disputed fees the Town had incurred during the process. On January 17,

2003, the Church sent a letter to the Town summarizing its view that the Town had inappropriately delayed its building application despite its consistent efforts to meet the Town's requests.

On February 25, 2003, the Town took the unusual step of taking over preparation of the FEIS. It did not notify the Church that it had done so until March 17, 2003. The Town edited the FEIS to include a number of additional problems with the proposal, and did not consider the Church's input addressing those problems.

On June 11, 2003, the Church instituted this action. It alleged violations of RLUIPA and its rights under the First and Fourteenth Amendments, as well as New York law, and sought an order compelling the Town to complete SEQRA review and approve the project.

On April 14, 2004, the Town denied the Church's application.[2] In its findings statement the town stated its primary reasons for rejecting the application as: (1) violation of a recently enacted "steep slope" zoning ordinance; (2) stress on the police and fire departments; (3) retaining walls that constituted an attractive nuisance; and (4) traffic and parking problems.

[2] The Town initially tried to adopt this findings statement on January 6, 2004, but the district court declared that statement void because it violated New York's Open Meetings Law.

III. The District Court Decision

The district court conducted a bench trial over 26 non-consecutive days between October 2006 and March 2007. On August 11, 2010, in a lengthy opinion containing 622 factual findings, the district court found that the Town had violated the Church's rights under RLUIPA, the Free Exercise Clauses of the First Amendment and New York Constitution, the Equal Protection Clauses of the Fourteenth Amendment and New York Constitution, and Article 78 of New York's Civil Procedure Law. Fortress Bible Church v. Feiner, 734 F. Supp. 2d 409, 522-23 (S.D.N.Y. 2010). It found that the Town had acted in bad faith and had used the SEQRA review process illegitimately as a way to block the Church's proposal. It therefore concluded that the Town had substantially burdened the Church by preventing it from moving to an adequate facility, resulting in a violation of RLUIPA and the Free Exercise Clause. Id. at 496-508, 511-12. The district court also found an Equal Protection violation based on a class-of-one theory. Id. at 513-17. While acknowledging that the Church had not presented a single comparator similarly situated in all respects, it found the Church's comparators to be sufficient with regard to each of the discrete issues cited by the Town. Additionally, the district court found that Town staff, including at least one Board member, had intentionally

destroyed discoverable evidence despite specific instructions not to do so.

The district court ordered broad relief: (1) it annulled the positive declaration and findings statement; (2) it ordered that the Church's 2000 site plan be deemed approved for SEQRA purposes and enjoined any further SEQRA review; (3) it ordered the Board to grant the Church a waiver from the landscaped parking island requirement; (4) it ordered the Zoning Board to grant a variance permitting a side building location; (5) it ordered the Town to issue a building permit for the 2000 site plan; (6) it enjoined the Town from taking any action that unreasonably interferes with the Church's project; and (7) it imposed $10,000 in sanctions for spoliation of evidence. Id. at 520-22. The district court directed the parties to submit additional information with regard to compensatory damages. Id. at 520-21. Judgment was entered on August 12, 2010. The Town appeals.

DISCUSSION

On appeal, the Town challenges the district court's holding that it violated the Church's rights under RLUIPA, the First and Fourteenth Amendments, the New York Constitution, and Article 78. It also contends that the district court lacked any authority over the Zoning Board, a non-party to this litigation.

We review a district court's conclusions of law after a bench trial de novo and its findings of fact for clear error. Reynolds v. Giuliani, 506 F.3d 183, 189 (2d Cir. 2007). We may affirm on any ground appearing in the record. Freedom Holdings, Inc., v. Cuomo, 624 F.3d 38, 49 (2d Cir. 2010). The district court's grant of injunctive relief is reviewed for abuse of discretion. Third Church of Christ, Scientist, of N.Y.C. v. City of New York, 626 F.3d 667, 669 (2d Cir. 2010).

RLUIPA

A. Applicability

RLUIPA bars states from imposing or implementing a "land use regulation" in a manner that imposes a substantial burden on a person or institution's religious exercise unless it is the least restrictive means of furthering a compelling state interest. 42 U.S.C. § 2000cc(a)(1). A "land use regulation" is defined as "a zoning or landmarking law, or the application of such a law, that limits or restricts a claimant's use or development of land." § 2000cc-5(5). Appellants contend that RLUIPA is entirely inapplicable because SEQRA is not a land use regulation within the meaning of the statute.[3] Though we agree that SEQRA itself

[3] The Church contends that the Town has waived this argument by not raising it during trial. The issue was raised before the district court in a post-trial brief, and was considered by the district court. It is therefore proper to consider this argument on appeal. See Quest Med., Inc. v. Apprill, 90 F.3d 1080, 1087 (5th Cir. 1996).

is not a zoning or landmarking law for purposes of RLUIPA, we hold that when a government uses a statutory environmental review process as the primary vehicle for making zoning decisions, those decisions constitute the application of a zoning law and are within the purview of RLUIPA.[4]

Environmental quality laws are designed to inject environmental considerations into government decisionmaking and minimize the adverse environmental impact of regulated actions. See City Council of Watervliet v. Town Bd. of Colonie, 3 N.Y.3d 508, 515, 520 n.10 (2004). This approach was first adopted by the federal government with the National Environmental Policy Act of 1969 ("NEPA"), Pub. L. 91-190, 83 Stat. 852 (1970) (codified as amended at 42 U.S.C. § 4321 et seq.). See, Caleb W. Christopher, Success by a Thousand Cuts: The Use of Environmental Impact Assessment in Addressing Climate Change, 9 Vt. J. Envtl. L. 549, 552-53 (2008). A number of states, including New York, have enacted state government review laws patterned after NEPA. See, e.g., California Environmental Quality Act, Cal. Pub. Res. Code § 21002.1 et seq.

No court of appeals has yet addressed whether an environmental quality statute may constitute a zoning law under

[4] The parties agree that no landmarking law was involved in this dispute. We therefore need only decide whether the SEQRA review process, as employed here, constituted the application of a zoning law.

RLUIPA.[5] Although the purview of "zoning" is hard to delineate precisely, at its core it involves the division of a community into zones based on like land use. See City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 54-55 (1986); Daniel R. Mandelker, Land Use Law, §§ 4.02-4.15 (5th ed. 2003); Patricia E. Salkin, American Law of Zoning § 9.2 (5th ed. 2008). We have little difficulty concluding that SEQRA itself is not a zoning law within the meaning of RLUIPA. SEQRA is not concerned with the division of land into zones based on use. It is focused on minimizing the adverse environmental impact of a wide range of discretionary government actions, many of which are totally unrelated to zoning or land use.[6] See N.Y. Envtl. Conserv. Law § 8-0105(4). Thus, the Town's use of the SEQRA process did not automatically implicate RLUIPA.

By its terms, however, RLUIPA also applies to "the application of" a zoning law. 42 U.S.C. § 2000cc-5(5). Although

[5] The Ninth Circuit noted the question but declined to reach it in San Jose Christian Coll. v. City of Morgan Hill, 360 F.3d 1024, 1036 (9th Cir. 2004).

[6] "Actions" that trigger SEQRA include "(i) projects or activities directly undertaken by any agency; or projects or activities supported in whole or part through contracts, grants, subsidies, loans, or other forms of funding assistance from one or more agencies; or projects or activities involving the issuance to a person of a lease, permit, license, certificate or other entitlement for use or permission to act by one or more agencies; [and] (ii) policy, regulations, and procedure-making." N.Y. Envtl. Conserv. Law § 8-0105(4).

SEQRA by itself is not a zoning law, in this case the Town used the SEQRA review process as its vehicle for determining the zoning issues related to the Church's land use proposal. The fact that these issues were addressed during the SEQRA review process rather than the Town's normal zoning process does not transform them into environmental quality issues. We therefore conclude that, in these circumstances, the Town's actions during the review process and its denial of the Church's proposal constituted an application of its zoning laws sufficient to implicate RLUIPA for a number of reasons.

First, the SEQRA review process was triggered because the Church required three discretionary land use approvals from the Town: (1) site plan approval, (2) a waiver of the landscaped parking island requirement, and (3) a variance to allow the building to be located closer to one side of the property. These approvals all relate to zoning and land use rather than traditional environmental concerns. See Midrash Sephardi, Inc. v. Town of Surfside, 366 F.3d 1214, 1235 n.17 (11th Cir. 2004) (citing regulations about building size and parking as "run of the mill" zoning laws); cf. 6 N.Y.C.R.R. § 617.7(c)(1) (providing examples of adverse environmental impacts under SEQRA). If the Town had issued a Negative Declaration and foregone SEQRA review, these three issues would have been treated by the Town as zoning

questions and their outcome would have been subject to challenge under RLUIPA.

Second, in its Town Code, the Town has intertwined the SEQRA process with its zoning regulations.[7] The regulations relating to SEQRA are contained in Part II of the Town Code, titled "Land Use." Section 200-6 of the Town Code states that "[n]o action . . . shall be carried out, approved or funded by [a Town agency] unless it has complied with [SEQRA]." Under § 285-55, site plan approval is required for a building permit. Since site plan approval is a discretionary approval that triggers SEQRA, any construction project will involve some level of SEQRA review. If a positive declaration is issued, the applicant will have to proceed through the SEQRA process before addressing any zoning issues, or resolve those issues during the SEQRA process. 6 N.Y.C.R.R. § 617.3(a); Town Code §§ 200-8 – 200-11 (describing SEQRA review process that must be completed).

Third, once the review process was underway, the Town focused on zoning issues rather than traditional environmental issues. The Town's primary stated concern was increased traffic. Although increased car traffic potentially raises environmental concerns due to increased emissions, the district court's factual findings make clear that the Town was concerned with the common

[7] The Town Code is available at http://www.ecode360.com/GR0237.

everyday annoyances associated with traffic, not with its environmental impact. The Town's FEIS emphasized concerns about line of sight for cars turning into the proposed property and the adequacy of the Church's parking. The Town also based denial of the project on the height of proposed retaining walls and the alleged failure to comply with a steep slope ordinance. These are standard land use issues.

Finally, to hold that RLUIPA is inapplicable to what amounts to zoning actions taken in the context of a statutorily mandated environmental quality review would allow towns to insulate zoning decisions from RLUIPA review. A town could negotiate all of a project's zoning details during a SEQRA review and completely preempt its normal zoning process. These decisions would then be immune to RLUIPA challenge. We decline to endorse a process that would allow a town to evade RLUIPA by what essentially amounts to a re-characterization of its zoning decisions.

Indeed, the Town's actions were to that effect notwithstanding that RLUIPA was enacted while the SEQRA review process was underway. The district court's comprehensive findings demonstrate that the Town disingenuously used SEQRA to obstruct and ultimately deny the Church's project. The Town's own Planning Commissioner (subsequently replaced by the Town) believed that the alleged environmental impacts did not warrant a

positive declaration, but the Town initiated the SEQRA review process anyway after the Church refused to accede to the Town's demand that it donate a fire truck or provide some other payment in lieu of taxes. The Town then manipulated its SEQRA findings statement to "kill" the project on the basis of zoning concerns despite the fact that there were no serious environmental impacts. We decline to insulate the Town from liability with regard to its decisions on zoning issues simply because it decided them under the rubric of an environmental quality review process.

To recap, in no sense do we believe that ordinary environmental review considerations are subject to RLUIPA. However, when a statutorily mandated environmental quality review process serves as a vehicle to resolve zoning and land use issues, the decision issued constitutes the imposition of a land use regulation as that term is defined in RLUIPA. See 42 U.S.C. § 2000cc(a)(1); 2000cc-5(5).

B. Substantial Burden

The Town also argues that, if RLUIPA does apply, the Church was not substantially burdened within the meaning of the statute because the Church had alternative means of building a new facility. The Town contends that the only harm the Church suffered was an inability to build the exact structure it

desired, which does not rise to the level of a substantial burden. We find sufficient evidence in the record to support the district court's finding that the Church's current facilities were inadequate to accommodate its religious practice and that the Town was acting in bad faith and in hostility to the project such that it would not have allowed the Church to build any worship facility and school on the Pomander Drive Property. Accordingly, we affirm the district court's holding that the Town's actions during the SEQRA process substantially burdened the Church's religious practice.

RLUIPA prohibits a government from imposing a land use regulation in a way that creates a substantial burden on the religious exercise of an institution.[8] 42 U.S.C. § 2000cc(a)(1). A substantial burden is one that "directly coerces the religious institution to change its behavior." Westchester Day Sch. v. Vill. of Mamaroneck, 504 F.3d 338, 349 (2d Cir. 2007) (emphasis omitted). The burden must have more than a minimal impact on religious exercise, and there must be a close nexus between the two. Id.

[8] 42 U.S.C. § 2000cc(b) also bars discrimination against a religious entity or treatment on unequal terms with nonreligious entities. The district court found a substantial burden and therefore did not reach the plaintiffs' equal terms or discrimination RLUIPA claims. Fortress Bible Church, 734 F. Supp. 2d 409, 508-09. Since we affirm on the substantial burden claim, we too need not reach the claims for discrimination or unequal terms.

A denial of a religious institution's building application is likely not a substantial burden if it leaves open the possibility of modification and resubmission. Id. However, if the town's stated willingness to consider another proposal is disingenuous, a conditional denial may rise to the level of a substantial burden. Id. Moreover, when the town's actions are arbitrary, capricious, unlawful, or taken in bad faith, a substantial burden may be imposed because it appears that the applicant may have been discriminated against on the basis of its status as a religious institution. Id. at 350-51; see also Saints Constantine & Helen Greek Orthodox Church, Inc. v. City of New Berlin, 396 F.3d 895, 900 (7th Cir. 2005).

The district court credited Karaman's testimony that the Church's Mount Vernon facility was not adequate to accommodate its religious practice. Fortress Bible Church, 734 F. Supp. 2d at 488-90. Specifically, Karaman stated that the Church was unable to expand its membership, which it believes is a God-given mission, host missionaries, perform full-immersion baptisms, or perform "altar calls," in which members of the congregation pray at the altar. Id. at 488-89. Karaman also testified that the Church was unable to adequately run a Christian school because the School's present facilities did not have enough space to accommodate handicapped students or higher-level subjects. Id.

at 490-91. We identify no error in the district court's finding that the Church was substantially burdened by its inability to construct an adequate facility.

Similarly, we find no error in the district court's finding that the "Defendants' purported willingness to consider a modified plan [was] wholly disingenuous." Id. at 502. The district court identified ample evidence that the Town wanted to derail the Church's project after it refused to accede to its demand for a payment in lieu of taxes, and that it had manipulated the SEQRA process to that end. Additionally, the Town continually rejected the Church's attempts to accommodate its stated concerns. The record easily supports the district court's finding that the Town's actions amounted to a complete denial of the Church's ability to construct an adequate facility rather than a rejection of a specific building proposal. See Westchester Day Sch., 504 F.3d at 349.

Finally, we conclude, as the district court found based upon ample evidence, that the burden on the Church was more than minimal and that there was a close nexus between the Town's denial of the project and the Church's inability to construct an adequate facility. Fortress Bible Church, 734 F. Supp. 2d at 501-08. Because, as the district court found, the Town's stated compelling interests were disingenuous, its actions violated

RLUIPA. Id. at 502-05, 508. Our conclusion that the Church was substantially burdened is bolstered by the arbitrary, capricious, and discriminatory nature of the Town's actions, taken in bad faith. Westchester Day Sch., 504 F.3d at 350-51. The Town attempted to extort from the Church a payment in lieu of taxes, it ignored and then replaced its Planning Commissioner when he advocated on the Church's behalf, and Town staff intentionally destroyed relevant evidence. Further, the district court's finding regarding the Town's open hostility to the Church qua church was not clear error; the record reflects comments from members of the Board indicating that they were opposed to the project because it was "another church." The Town's desire to prevent the Church from building on its property relegated it to facilities that were wholly inadequate to accommodate its religious practice. We affirm the district court's finding that the Town violated the Church's rights under RLUIPA.

Free Exercise

The Town also challenges the district court's holding that it violated the Church's First Amendment right to the Free Exercise of Religion. The First Amendment generally prohibits government actions that "substantially burden the exercise of sincerely held religious beliefs" unless those actions are

narrowly tailored to advance a compelling government interest. Fifth Ave. Presbyterian Church v. City of New York, 293 F.3d 570, 574 (2d Cir. 2002). In other words, such actions are subject to strict scrutiny by reviewing courts. However, "[w]here the government seeks to enforce a law that is neutral and of general applicability, . . . it need only demonstrate a rational basis for its enforcement." Id.; see also Employment Div. v. Smith, 494 U.S. 872, 879 (1990).

In this case, the district court applied strict scrutiny and, referencing its RLUIPA analysis, concluded that the Town had substantially burdened the Church's religious exercise and lacked a compelling interest. On appeal, the Town contends that rational basis review, rather than strict scrutiny, is the correct standard in this context because SEQRA is a neutral law of general applicability. The Church maintains that strict scrutiny is appropriate because SEQRA review involves an individualized assessment, thus placing it outside the purview of Smith. See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 537 (1993).

The Second Circuit has not specifically addressed whether zoning decisions trigger rational basis review or strict scrutiny. Although some scattered district court decisions have held that zoning laws by their nature involve individualized

assessments and trigger strict scrutiny, see Cottonwood Christian Ctr. v. Cypress Redevelopment Agency, 218 F. Supp. 2d 1203, 1222-23 (C.D. Cal. 2002); Freedom Baptist Church of Del. Cnty. v. Twp. of Middletown, 204 F. Supp. 2d 857, 868 (E.D. Pa. 2002), the majority of circuits that have addressed this question have concluded that zoning laws with the opportunity for individualized variances are neutral laws of general applicability. See Civil Liberties for Urban Believers v. City of Chicago, 342 F.3d 752, 764 (7th Cir. 2003); Cornerstone Bible Church v. City of Hastings, 948 F.2d 464, 472 (8th Cir. 1991); Grace United Methodist Church v. City of Cheyenne, 451 F.3d 643, 651-55 (10th Cir. 2006); First Assembly of God of Naples, Fla., Inc. v. Collier Cnty., 20 F.3d 419, 423-24 (11th Cir. 1994). Similarly, this circuit has found a landmarking law to be facially neutral despite the fact that it gave the government the ability to designate "historical districts," and therefore entailed some measure of individual assessment. Rector, Wardens, & Members of Vestry of St. Bartholomew's Church v. City of New York, 914 F.2d 348, 354-56 (2d Cir. 1990).

We need not resolve here whether zoning variance decisions challenged under the Free Exercise Clause are subject to strict scrutiny or rational basis review because we conclude that on the record before us there was no rational basis for the Town's

actions. The district court's holding was premised on its finding that the Town had acted in bad faith and disingenuously misused the SEQRA process to block the Church's project. The district court found as a factual matter that the reasons offered by the Town for delaying and denying the project were pretextual and concluded that the Town's witnesses were not credible. See Fortress Bible Church, 734 F. Supp. 2d at 491-94 (providing a "mere sampling" of examples of non-credible testimony by Town witnesses), 505-08 (explaining how each of the Town's stated reasons was pretextual). The record supports this conclusion. There is no basis to distrust the district court's finding that the Town's proffered rational bases were not sincere and that it was instead motivated solely by hostility toward the Church qua church. Accordingly, we conclude that the Town lacked a rational basis for delaying and denying the Church's project and therefore violated the Church's Free Exercise rights.[9]

The Town also presses the argument that the Free Exercise Clause is inapplicable to land use regulations. It points to decisions from several circuits holding that religious

[9] Appellants also challenge the district court's conclusion that they violated the parallel Free Exercise Clause in the New York Constitution. Under that clause, courts employ a balancing test to determine if the interference with religious exercise was unreasonable. Catholic Charities of Diocese of Albany v. Serio, 7 N.Y.3d 510, 525 (2006). For the reasons stated above, we conclude that the Town's interference with the Church's project was not reasonable and violated the New York Constitution.

institutions do not have a constitutional right to build wherever they like. See, e.g., Lighthouse Inst. for Evangelism, Inc. v. City of Long Branch, 510 F.3d 253, 273-74 (3d Cir. 2007); Lakewood, Ohio Congregation of Jehovah's Witnesses, Inc. v. City of Lakewood, 699 F.2d 303, 306-07 (6th Cir. 1983). The cases cited by the Town are inapposite. In those cases, the proposed building was directly barred by town ordinance and the religious institution sought individual relief from the general rule. The burden in this case resulted from the Town's disingenuous bad faith efforts to stall and frustrate this particular Church's construction plan, which was not itself barred by the Town's zoning code. The lengthy SEQRA review process was costly to the Church, and the Church was forced to remain in an inadequate facility for its duration.

For these reasons, we affirm the district court's holding that the Town violated the Church's First Amendment right to the free exercise of religion.

Equal Protection

The Town argues on appeal that the district court erred in finding a violation of the Fourteenth Amendment's Equal Protection Clause because the Church's class-of-one theory is barred by Engquist v. Ore. Dep't of Agric., 553 U.S. 591 (2008),

and because the Church has not provided a single comparator situated similarly to it in all respects.

The Equal Protection Clause has traditionally been applied to governmental classifications that treat certain groups of citizens differently than others. Id. at 601. In Village of Willowbrook v. Olech, 528 U.S. 562, 564 (2000), however, the Supreme Court affirmed the existence of a class-of-one theory for equal protection claims, under which a single individual can claim a violation of her Equal Protection rights based on arbitrary disparate treatment. In Olech, a property owner sought to connect her property to the municipal water supply. The village had required a 15-foot easement from other property owners who had sought to connect to the water supply, but demanded a 33-foot easement from Olech. The Supreme Court recognized an Equal Protection claim "where the plaintiff alleges that she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment." Id. at 564.

Eight years later, in Engquist, the Court clarified that a class-of-one claim is not available in the public employment context. It based its holding primarily on the government's status in that context as a proprietor rather than a sovereign, and the corresponding decrease in constitutional protections for

its employees. 553 U.S. at 598-99, 605-09. The Court also noted that certain governmental functions that involve discretionary decisionmaking are not suitable for class-of-one claims. Id. at 603-04.

We have since held that Engquist does not bar all class-of-one claims involving discretionary state action. In Analytical Diagnostic Labs, Inc. v. Kusel, 626 F.3d 135 (2d Cir. 2010), we recognized a class-of-one claim in the context of a state system for issuing clinical testing laboratory permits. We noted that the state was acting as a sovereign rather than a proprieter, and further observed that the licensing panel did not have complete discretion because it operated within a regulatory framework, held a mandatory hearing, and its decision could be challenged under New York Civil Procedure Law Article 78.

Like Analytical Diagnostic Labs, this case presents a clear standard against which departures can be easily assessed. See Engquist, 553 U.S. at 602-03. The SEQRA review process is guided by regulation and the result can be challenged under Article 78. Additionally, the Town was acting in its regulatory capacity as a sovereign rather than as a proprieter; it was making decisions about the ways in which property owners could use their land. The evidence provided by the Church illustrates a disparity in

treatment that cannot fairly be attributed to discretion. A class-of-one claim is thus cognizable in this context.

The Town argues that, even if a class-of-one claim is viable, the Church's evidence was not sufficient to establish such a claim because it did not provide a single comparator similarly situated in all respects, but instead presented evidence of multiple projects that were each treated differently with regard to a discrete issue. We have held that a class-of-one claim requires a plaintiff to show an extremely high degree of similarity between itself and its comparators. Ruston v. Town Bd. for Skaneateles, 610 F.3d 55, 59-60 (2d Cir. 2010). The Church must establish that "(i) no rational person could regard the circumstances of the plaintiff to differ from those of a comparator to a degree that would justify the differential treatment on the basis of a legitimate government policy; and (ii) the similarity in circumstances and difference in treatment are sufficient to exclude the possibility that the defendants acted on the basis of a mistake." Id. at 60 (quotation marks omitted).

The Church's use of multiple comparators is unusual, and presents us with a matter of first impression. We conclude, however, that the Church's evidence of several other projects treated differently with regard to discrete issues is sufficient

in this case to support a class-of-one claim. The purpose of requiring sufficient similarity is to make sure that no legitimate factor could explain the disparate treatment. See Neilson v. D'Angelis, 409 F.3d 100, 105 (2d Cir. 2005) (noting that purpose of comparator requirement is to "provide an inference that the plaintiff was intentionally singled out for reasons that so lack any reasonable nexus with a legitimate governmental policy that an improper purpose . . . is all but certain"), overruled on other grounds, Appel v. Spiridon, 531 F.3d 138, 139-40 (2d Cir. 2008). Where, as here, the issues compared are discrete and not cumulative or affected by the character of the project as a whole, multiple comparators are sufficient so long as the issues being compared are so similar that differential treatment with regard to them cannot be explained by anything other than discrimination. We conclude that there is sufficient evidence in the record to support the Church's class-of-one claim.

The principal reasons for denying the Church's application cited in the Town's FEIS were violation of a recently enacted "steep slope" zoning ordinance, stress on the police and fire departments, retaining walls that constituted an attractive nuisance, and traffic and parking problems. A proposal by the Hackley School, located in a mixed-use neighborhood, to double

its size, involved the same steep slope concerns as the Church's proposal. The Hackley School proposal was submitted in 2001, almost three years after the Church's proposal, and at that time, the Town had yet to enact its steep slope ordinance. While considering the ordinance, the Town ordered a moratorium on steep slope construction. It issued the Hackley School a waiver from this moratorium, however, and then expedited review of the proposal so that it was approved prior to adoption of the steep slope ordinance. Despite the fact that the Church's proposal was submitted years earlier than the Hackley School's, the Town cited the Church's failure to comply with the steep slope ordinance as a basis for denying its proposal and never provided it with a waiver or the option of expedited consideration.

The Hackley School proposal also involved retaining walls comparable to those proposed by the Church. Although the Town did not raise retaining walls as a concern with the Hackley School's application, it relied on the Church's proposed retaining walls as a basis for denying the Church's application, and did so even after the Church had offered to construct a fence on top of its walls to eliminate any danger.

Proposals by Union Baptist Church and the Solomon Schechter School both failed to provide the amount of parking required by Town ordinance. In both instances, however, the Town

accommodated the proposals by allowing the use of on-street parking and approved the projects without requiring the mandated number of spaces. The Church's proposal contained the required number of spaces, but the Town still cited parking concerns as a reason for denying it and failed to offer any accommodation.

Finally, the Town's primary stated reason for issuing a positive declaration was increased traffic. However, a proposal by LDC Properties, Inc., to build a commercial office building near the same major intersection as the Church's proposal ("the LOSCO proposal") received a conditioned negative declaration even though, according to the Town's own traffic consultant, it raised the same traffic concerns as the Church's proposal.[10] The Town did not require the LOSCO proposers to take any steps to mitigate these traffic concerns. Similarly, the Solomon Schechter School proposal was located close to the Pomander Drive property and created similar vehicle and pedestrian traffic concerns. The

[10] In fact, the Town appears to have been acutely aware of the overlapping traffic issues. The Deputy Town Attorney advised the Town Planning Commissioner that because of "the comparisons that may be drawn" between the Church and LOSCO, "please be careful and conscious of potential issues in drafting . . . the determination of significance. . . . Remember that they have the same traffic consultant and be wary." Fortress Bible Church, 734 F. Supp. 2d at 476.

Town approved this application without requiring any steps from the applicant to mitigate traffic.[11]

In short, the Church has presented overwhelming evidence that its application was singled out by the Town for disparate treatment. Though each of the comparator projects involved features unique to that proposal, the Town has not explained how those other features could have influenced discrete issues like the adequacy of parking, the safety of retaining walls, or increased traffic. We recognize that, where multiple reasons are cited in support of a state actor's decision, it will usually be difficult to establish a class-of-one claim. However, where, as here, a decision is based on several discrete concerns, and a claimant presents evidence that comparators were treated differently with regard to those specific concerns without any plausible explanation for the disparity, such a claim can succeed. Further, such a claim is bolstered where, as here, the evidence demonstrates that the government's stated concerns were pretextual. We affirm the district court's conclusion that the Church has adequately established a class-of-one Equal Protection claim.

[11] Additionally, for both LOSCO and the Solomon Schechter School, the Town analyzed the impact on traffic under the assumption that the Church's proposal had already been completed and was generating traffic. Yet it still approved the proposals without requiring any traffic mitigation.

Article 78

Under Article 78 of New York's Civil Procedure Law, a town's SEQRA determination may be set aside when it is "arbitrary, capricious or unsupported by the evidence." Riverkeeper, Inc. v. Planning Bd. of Southeast, 9 N.Y.3d 219, 232 (2007). The district court held that the Town's determination was not supported by substantial evidence because the Town's stated concerns were either "unsupported" or "wholly fabricated." Fortress Bible Church, 734 F. Supp. 2d at 519. The Town contends that its findings were rationally based on the findings of its traffic consultant, and that the district court's decision was therefore in error.

As we have previously discussed, the record contains ample evidence to support the district court's conclusion that the Town's actions were wholly disingenuous. Accordingly, we identify no error with the district court's decision to set aside the Town's SEQRA determination.

The District Court's Injunction

Finally, the Town argues that the district court abused its discretion in crafting its injunction because it was not permitted to enjoin "governmental determinations that have not yet been made," Appellant's Br. at 37, and because it had no

authority to bind the Zoning Board, which was not a party to the litigation.

We review a district court's grant of injunctive relief for abuse of discretion. See Etuk v. Slattery, 936 F.2d 1433, 1443 (2d Cir. 1991). A district court has substantial freedom in framing an injunction. Id. The district court's injunction: (1) ordered that the Church's 2000 site plan be deemed approved for SEQRA purposes and enjoined any further SEQRA review; (2) ordered the Board to grant the Church a waiver from the landscaped parking island requirement; (3) ordered the Zoning Board to grant a variance permitting a side building location; (4) ordered the Town to issue a building permit for the 2000 site plan; and (5) enjoined the Town from taking any action that unreasonably interferes with the Church's project.

With regard to its first argument, the Town relies on Monsanto Co. v. Geertson Seed Farms, 130 S. Ct. 2743 (2010). Geertson involved a suit against the Animal and Plant Health Inspection Service ("APHIS"). APHIS had decided to completely deregulate a certain species of genetically modified alfalfa. The district court enjoined APHIS from fully deregulating the alfalfa, and further issued an injunction preemptively barring APHIS from implementing any partial deregulation plan. The Supreme Court held that the latter portion of the injunction was

an abuse of the district court's discretion because the plaintiffs could file a new suit if APHIS actually attempted partial deregulation and there was no evidence that partial deregulation would cause the same irreparable harm as full deregulation. Id. at 2760-61. Geertson has no bearing on the present case. The district court's injunction was specifically tailored to the injury the Church had suffered and did not exceed the district court's discretion.

The Town also argues that the portion of the injunction compelling the Zoning Board to grant a variance permitting a side building location exceeded the district court's authority because, under New York law, the Zoning Board is a separate entity from the Town over which the district court had no jurisdiction. See Commco, Inc. v. Amelkin, 62 N.Y.2d 260, 265-68 (1984) (town board has no authority to bind the town's zoning board to a consent decree to which the zoning board was not a party). We need not reach this question, however, because the Town did not raise this objection before the district court and has therefore waived it on appeal. See In re Nortel Networks Corp. Sec. Litig., 539 F.3d 129, 132 (2d Cir. 2008).

CONCLUSION

For the reasons described above, the Town's arguments on appeal are without merit and we conclude that the relief ordered by the district court was within its discretion. The judgment of the district court is AFFIRMED.

35 Misc.3d 450, 940 N.Y.S.2d 458, 2012 N.Y. Slip Op. 22037
(Cite as: 35 Misc.3d 450, 940 N.Y.S.2d 458)

C

Supreme Court, Tompkins County, New York.
ANSCHUTZ EXPLORATION CORPORATION, Petitioner, Plaintiff,
For a Judgment Pursuant to Articles 78 and 3001 of the Civil Practice Law and Rules,
v.
TOWN OF DRYDEN and Town of Dryden Town Board, Respondents, Defendants.

Feb. 21, 2012.

Background: Lessee that owned natural gas leases covering over one-third of total area of town commenced hybrid Article 78 proceeding and declaratory judgment action against town, claiming that Oil, Gas and Solution Mining Law (OGSML) preempted zoning amendment banning all activities related to exploration for and production of oil and gas that lessee proposed to obtain by high-volume hydraulic fracturing, otherwise known as hydrofracking. Town moved for dismissal of Article 78 petition and for summary judgment.

Holding: The Supreme Court, Tompkins County, Phillip R. Rumsey, J., held that, in matter of first impression, zoning amendment was not preempted by OGSML.

Motion granted.

West Headnotes

[1] Amicus Curiae 27 1

27 Amicus Curiae
27k1 k. Right to appear and act in general. Most Cited Cases

Amicus Curiae 27 3

27 Amicus Curiae
27k3 k. Powers, functions, and proceedings. Most Cited Cases

The court considers the following criteria in deciding whether to permit the filing of amicus curiae briefs: (1) whether the applications were timely, (2) whether each application states the movant's interest in the matter and includes the proposed brief, (3) whether the parties are capable of a full and adequate presentation of the relevant issues and, if not, whether the proposed amici could remedy this deficiency, (4) whether the proposed briefs identify law or arguments that might otherwise escape the court's consideration or would otherwise be of assistance to the court, (5) whether consideration of the proposed amicus briefs would substantially prejudice the parties, and (6) whether the case involves questions of important public interest. 22 NYCRR § 500.23(a)(4).

[2] Parties 287 41

287 Parties
287IV New Parties and Change of Parties
287k37 Intervention
287k41 k. Grounds. Most Cited Cases

A party is entitled to intervene as of right only upon a showing that the representation of its interests by the parties is inadequate and that it may be bound by the judgment; both elements must be present. McKinney's CPLR 1012(a)(2).

[3] Zoning and Planning 414 1603

414 Zoning and Planning
414X Judicial Review or Relief
414X(B) Proceedings
414k1600 Parties
414k1603 k. Intervention and new parties. Most Cited Cases

Unincorporated association's members, as town residents or landowners, were not authorized to intervene either as of right or permissively in oil and gas lessee's lawsuit against town, seeking to invalidate zoning amendment that banned exploration for or production of oil and gas, since members had no substantial interest in outcome of lawsuit that was unique from any other resident or landowner in town, and members' submissions did not materially add to town's

defense. McKinney's CPLR 1012(a)(2), 1013.

[4] Parties 287 38

287 Parties
287IV New Parties and Change of Parties
287k37 Intervention
287k38 k. In general. Most Cited Cases

While the only requirement for obtaining an order permitting intervention is the existence of a common question of law or fact, the resolution of such a motion is nevertheless a matter of discretion. McKinney's CPLR 1013.

[5] Municipal Corporations 268 121

268 Municipal Corporations
268IV Proceedings of Council or Other Governing Body
268IV(B) Ordinances and By-Laws in General
268k121 k. Proceedings to determine validity of ordinances. Most Cited Cases

Unlike challenges directed to the procedures followed in the enactment of an ordinance, challenges to the substantive validity of a legislative act may not be maintained in an Article 78 proceeding. McKinney's CPLR 7801 et seq.

[6] Zoning and Planning 414 1576

414 Zoning and Planning
414X Judicial Review or Relief
414X(A) In General
414k1572 Nature and Form of Remedy
414k1576 k. Statutory proceeding. Most Cited Cases

Any challenge by oil and gas lessee to substantive validity of town's zoning amendment, banning exploration for or production of oil and gas, was not cognizable in Article 78 proceeding, since only challenges to procedures followed in enacting legislative act could be heard in Article 78 proceeding, but not challenges to substantive validity of legislative act. McKinney's CPLR 7801 et seq.

[7] Zoning and Planning 414 1027

414 Zoning and Planning
414I In General
414k1019 Concurrent or Conflicting Regulations; Preemption
414k1027 k. Mining and minerals; sand and gravel. Most Cited Cases

Town's zoning amendment, banning exploration for or production of oil and gas, including by hydrofracking, anywhere within town, was not preempted by Oil, Gas and Solution Mining Law's (OGSML) supersedure clause, superseding all local laws or ordinances relating to regulation of oil, gas, and solution mining industries, since clause did not preempt local zoning power to regulate land use in connection with oil and gas production, but rather preempted only local laws regulating operations of oil and gas production. McKinney's ECL § 23–0303(2).

[8] Zoning and Planning 414 1004

414 Zoning and Planning
414I In General
414k1004 k. Zoning power in general. Most Cited Cases

Towns are empowered to enact zoning regulations through two different procedures: (1) by ordinance, pursuant to Town Laws, and (2) by local law, pursuant to the Statute of Local Governments and the Municipal Home Rule Law. McKinney's Town Law §§ 261, 264, 265.

[9] Zoning and Planning 414 1004

414 Zoning and Planning
414I In General
414k1004 k. Zoning power in general. Most Cited Cases

Whether a substantive zoning provision is a law or an ordinance is determined solely by the procedure utilized in its enactment; the distinction between laws and ordinances in the area of land use regulations is not significant, and indeed, the terms are often used interchangeably. McKinney's Town Law §§ 261, 264, 265.

[10] Zoning and Planning 414 1027

414 Zoning and Planning
414I In General
414k1019 Concurrent or Conflicting Regulations; Preemption
414k1027 k. Mining and minerals; sand and gravel. Most Cited Cases

Town's zoning amendment, banning exploration for or production of oil and gas, including by hydrofracking, anywhere within town, did not directly conflict with Oil, Gas and Solution Mining Law's (OGSML) substantive provisions regulating well location, thereby precluding preemption of amendment by OGSML; provisions addressed technical operational concerns, were intended to further statutory purposes of avoiding waste, providing for greater ultimate recovery of oil and gas, and protecting correlative rights, and regulated exploration and production only in locations in which those activities could be conducted in compliance with zoning ordinances governing traditional land use that OGSML did not address with respect to traffic, noise, or industry suitability for particular community or neighborhood. McKinney's ECL 23–0303(2), 23–0305(8)(c), 23–0501(1)(b), (2)(a), 23–0503(2), (3)(a), (4), 23–0701, 23–0901.

[11] Municipal Corporations 268 111(2)

268 Municipal Corporations
268IV Proceedings of Council or Other Governing Body
268IV(B) Ordinances and By-Laws in General
268k111 Validity in General
268k111(2) k. Conformity to constitutional and statutory provisions in general. Most Cited Cases

Where there is an express supersedure clause, there is no need to consider implied preemption; resolution of such cases turns on proper construction of the supersedure clause at issue.

[12] Municipal Corporations 268 111(2)

268 Municipal Corporations
268IV Proceedings of Council or Other Governing Body
268IV(B) Ordinances and By-Laws in General
268k111 Validity in General
268k111(2) k. Conformity to constitutional and statutory provisions in general. Most Cited Cases

Whether there is conflict between the local ordinance and the allegedly preemptive state statute is considered as part of the process of statutory interpretation, specifically by measuring the effect of the local ordinance against the purpose of the state statute.

[13] Zoning and Planning 414 1027

414 Zoning and Planning
414I In General
414k1019 Concurrent or Conflicting Regulations; Preemption
414k1027 k. Mining and minerals; sand and gravel. Most Cited Cases

Zoning amendment's provision invalidating permits issued by local, state, or federal agency, commission, or board for use that would violate ban on exploration for or production of oil and gas, including by hydrofracking, anywhere within town, was preempted by Oil, Gas and Solution Mining Law (OGSML), warranting severance and striking of provision, since town lacked authority to invalidate permit lawfully issued by another governmental entity, provision directly related to regulation of oil and gas industries, and provision and could be severed without impairing underlying purpose of amendment. McKinney's ECL 23–0301 et seq.

***460** The West Firm, PLLC, by Thomas S. West, Esq., Yvonne E. Hennessey, Esq., Albany, Attorneys for Petitioner–Plaintiff, **Anschutz Exploration** Corp.

Mahlon R. Perkins, P.C. by Mahlon R. Perkins, Esq., Dryden, Attorney for Respondents–Defendants,***461** Town of Dryden and Town of Dryden Town Board.

Knauf Shaw, LLP, by Alan J. Knauf, Esq., Rochester, Attorneys for Proposed Intervenor, Dryden Resources Awareness Coalition.

Kendall Law, by Amy K. Kendall, Esq., Rochester, Attorneys for Proposed Intervenor, Dryden Resources Awareness Coalition.

George A. Mathewson, Esq., Lake George, amicus curiae, pro se.

Jordan A. Lesser, Esq., Albany, Attorney for Barbara Lifton, Assemblywoman, State of New York Assembly, amicus curiae.

PHILLIP R. RUMSEY, J.

In this case of first impression, the court is asked to determine whether a local municipality may use its power to regulate land use to prohibit exploration for, and production of, oil and natural gas. The controversy arises from the proposed use of high-volume hydraulic fracturing (hydrofracking) to obtain natural gas from the Marcellus black shale formation which underlies the southern portion of New York State. The Town of Dryden is located in the Marcellus shale region.[FN1] In effect to prohibit hydrofracking, the Dryden Zoning Ordinance was amended on August 2, 2011 to ban all activities related to the exploration for, and production or storage of, natural gas and petroleum (the Zoning Amendment). Petitioner-plaintiff (Anschutz) owns gas leases covering approximately 22,200 acres in the Town—representing over one-third of its total area—that were obtained prior to enactment of the Zoning Amendment and has invested approximately $5.1 million in activities within the Town.[FN2] It commenced this hybrid CPLR article 78 proceeding/declaratory judgment action against the Town of Dryden and the Town of Dryden Town Board (collectively the Town) on September 16, 2011 seeking invalidation of the Zoning Amendment on the basis that it is preempted by the Oil, Gas and Solution Mining Law (OGSML). The Town timely answered and moved for dismissal of the article 78 proceeding and for summary judgment declaring the Zoning Amendment valid.

FN1. While the focus is currently on the Marcellus shale formation, hydrofracking may also be used to recover natural gas from the Utica shale formation, which underlies much of southern and western New York—including the Town of Dryden—at depths below the Marcellus shale.

FN2. The facts regarding Anschutz's activity within the Town were taken from the document entitled, "Affidavit of Pamela S. Kalstrom," dated September 15, 2011, which was not executed in the manner required of an affidavit because it contains an acknowledgment rather than the required jurat. However, it has been considered, inasmuch as the error in execution does not affect a substantial right of a party (*see* CPLR 2001; *Matter of Smith v. Board of Stds. & Appeals of City of N.Y.*, 2 A.D.2d 67, 153 N.Y.S.2d 131 [1956]; *Federal Natl. Mtge. Assoc. v. Graham*, 67 Misc.2d 735, 324 N.Y.S.2d 827 [1971]; *see also Krug v. Offerman, Fallon, Mahoney & Cassano*, 245 A.D.2d 603, 664 N.Y.S.2d 882 [1997]).

In light of the high degree of public interest in hydrofracking, the court received several inquiries about the procedure for filing amicus curiae briefs. All who contacted chambers were referred to *Kruger v. Bloomberg*, 1 Misc.3d 192, 768 N.Y.S.2d 76 (2003) and were advised that, absent consent from the parties, a motion would be necessary. Motions seeking leave to file an amicus curiae brief were timely filed by George A. Mathewson, Esq. and Assemblywoman Barbara Lifton.[FN3] In ***462** addition, a motion for leave to intervene was timely filed by Dryden Resources Awareness Coalition (DRAC). Prior to the return date, the court notified the parties and the non-party movants that the motions for leave to file amicus briefs and to intervene would be considered on submission. Inasmuch as the proposed intervenor would be entitled to participate in all aspects of the case as a party if the motion to intervene were ultimately to be granted, counsel for DRAC was permitted to participate in oral argument on the merits of the petition and the Town's motions.

FN3. Two additional untimely attempts were made—only days prior to the scheduled return date of November 4, 2011—to file motions for leave to submit amicus briefs. By two separate letter decisions dated November 2, 2011, the court declined to sign the proposed orders to show cause submitted (1) on November 1, 2011 by Earthjustice, on behalf of Natural Resources Defense Council, Inc., Beverly Ommegang, Theodore Gordon Flyfishers, Inc., Riverkeeper, Inc. and Catskill Mountainkeeper, and (2) on November 2, 2011 by the Town of Ulysses (*see generally Hurrell–Harring v. State of New York*, 14 N.Y.3d 833, 900 N.Y.S.2d 724, 926 N.E.2d 1230 [2010], *citing* Rules of Ct. of Appeals

> [22 NYCRR] § 500.23[a][1][iii] [illustrating that the Court of Appeals denies untimely filed motions for leave to file amicus briefs]). The Town thereafter attempted to place the brief by the Town of Ulysses before the court, notwithstanding the court's rejection of the Town of Ulysses's untimely motion, by filing a Supplemental Memorandum of Law that is substantially identical to the amicus curiae brief proposed by the Town of Ulysses. It has not been considered by the court.

MOTIONS FOR LEAVE TO FILE AMICUS CURIAE BRIEFS

[1] The court has considered the following criteria in deciding whether to permit the filing of amicus curiae briefs: (1) whether the applications were timely; (2) whether each application states the movant's interest in the matter and includes the proposed brief; (3) whether the parties are capable of a full and adequate presentation of the relevant issues and, if not, whether the proposed amici could remedy this deficiency; (4) whether the proposed briefs identify law or arguments that might otherwise escape the court's consideration or would otherwise be of assistance to the court; (5) whether consideration of the proposed amicus briefs would substantially prejudice the parties; and (6) whether the case involves questions of important public interest (*see* *Kruger,* 1 Misc.3d at 198, 768 N.Y.S.2d 76; *see also* Rules of Ct. of Appeals [22 NYCRR] § 500.23[a][4]). No one factor is dispositive. Mathewson and Lifton both filed timely motions which indicated their interest in this proceeding/action and included their respective proposed briefs. Although the parties have very capably advanced their respective positions, there is no prejudice to them in permitting the proposed amici to be heard on this case of first impression involving a matter of important public interest (*see* *Kruger,* 1 Misc.3d at 196, 768 N.Y.S.2d 76, *citing* *Colmes v. Fisher,* 151 Misc. 222, 223, 271 N.Y.S. 379 [1934]; *Matter of Alfred Condominium v. City of New York,* 2010 WL 7762750 [2010]). Accordingly, the motions should be granted to the extent that the movants present arguments related to the issues in controversy. On that basis, Lifton's motion for leave to file an amicus curiae brief is granted. With respect to the arguments advanced by Mathewson, both parties correctly note that Points II–IV in his proposed brief are wholly unrelated to the matters at issue in this proceeding/action; [FN4] therefore, his motion for leave to file an amicus curiae brief is ***463** granted only to the extent that the court will consider the argument raised in Point I of his brief.

> FN4. Points II and III allege that various practices associated with hydofracking that might be allowed by the OGSML render it unconstitutional, while Point IV argues that the draft Supplemental Generic Environmental Impact Statement related to hydrofracking currently under consideration by the DEC violates the equal protection clauses of the New York and United States Constitutions.

THE MOTION TO INTERVENE

DRAC identifies itself as an unincorporated association which has approximately 71 individual members who are residents or landowners in the Town of Dryden. It timely moved to intervene and submitted a proposed answer, affidavits from its president and five additional members, and a memorandum of law. Its motion is opposed by the parties. Inasmuch, as noted below, the court has granted the Town's motion to dismiss the article 78 proceeding, DRAC must show that it is entitled to intervene in the action under the more demanding standards applicable to actions set forth in CPLR article 10.

[2][3] A party is entitled to intervene as of right only upon a showing that the representation of its interests by the parties is inadequate and that it may be bound by the judgment; both elements must be present (*see* CPLR 1012[a][2]; *St. Joseph's Hosp. Health Ctr. v. Department of Health of State of NY,* 224 A.D.2d 1008, 637 N.Y.S.2d 821 [1996]; Alexander, Practice Commentaries, McKinney's Cons. Laws of N.Y., Book 7B, CPLR C1012:3, pp. 156–157). Here, DRAC members have shown no substantial interest in the outcome of the action unique from those of any other resident or landowner in the Town of Dryden. As noted by the Town, it is the proper party to defend the Zoning Amendments which it enacted (*see* *St. Joseph's Hosp. Health Ctr.*). The Town has met that duty by capably advancing its position (*see* *Matter of Spangenberg,* 41 Misc.2d 584, 588, 245 N.Y.S.2d 501 [1963]). Moreover, DRAC's submissions do not materially add to the defense advanced by the Town (*see* *Matter of Mayer,* 110 Misc.2d 346, 441 N.Y.S.2d 908 [1981]). Accordingly, DRAC is not entitled to intervene as of right.

[4] With respect to permissive intervention pursuant to CPLR 1013, "[w]hile the only requirement for obtaining an order permitting intervention under this section is the existence of a common question of law or fact, the resolution of such a motion is nevertheless a matter of discretion" (*Matter of Pier v. Board of Assessment Review of the Town of Niskayuna,* 209 A.D.2d 788, 789, 617 N.Y.S.2d 1004 [1994]). The factors noted above also weigh in favor of exercising the court's discretion to deny permissive intervention. Accordingly, DRAC's motion to intervene is denied.[FN5] The court will, however, grant DRAC amicus curiae status for the purpose of considering the arguments presented in its brief (*see Matter of Pace–O–Matic, Inc. v. New York State Liq. Auth.,* 72 A.D.3d 1144, 898 N.Y.S.2d 295 [2010]; *Kruger,* 1 Misc.3d at 196, 768 N.Y.S.2d 76).

FN5. In light of the determination that DRAC should not be permitted to intervene, the court need not consider the parties' arguments that it lacks standing.

THE ARTICLE 78 PROCEEDING

[5][6] Enactment of the Zoning Amendment was a legislative act (*see Long Island Pine Barrens Soc., Inc. v. Suffolk County Legislature,* 31 Misc.3d 1208[A], 2011 N.Y. Slip Op. 50534[U], 2011 WL 1348384 [2011]; *see also Matter of Durante v. Town of New Paltz Zoning Bd. of Appeals,* 90 A.D.2d 866, 456 N.Y.S.2d 485 [1982]). Unlike challenges directed to the procedures followed in the enactment of an ordinance, challenges to the substantive validity of a legislative act may not be maintained in an article 78 proceeding (*see Matter of Save the Pine Bush v. City of Albany,* 70 N.Y.2d 193, 202, 518 N.Y.S.2d 943, 512 N.E.2d 526 [1987]; ***464***Matter of Frontier Ins. Co. v. Town Bd. of Town of Thompson,* 252 A.D.2d 928, 676 N.Y.S.2d 298 [1998]; *Long Island Pine Barrens Soc., Inc.*). Inasmuch as Anschutz challenges only the substantive validity of the Zoning Amendment—and not the procedures utilized in its enactment—the Town's motion seeking judgment dismissing that part of the petition and complaint which seeks relief under CPLR article 78 must be, and hereby is, granted.

THE TOWN'S MOTION FOR SUMMARY JUDGMENT (PREEMPTION ANALYSIS)

The Marcellus shale formation extends northeast from Ohio and West Virginia, through Pennsylvania, into southern and central New York.[FN6] Geologists have long known that the entire formation contains vast quantities of natural gas—as much as 489 trillion cubic feet, or over 400 years supply for New York at its current level of use—however, the depth of the formation and the tightness of the shale made extraction difficult and expensive. Recent enhancements to the techniques of horizontal drilling and hydrofracking have made recovery of natural gas from the Marcellus shale formation economically viable. As a result, interest in gas production through the use of hydrofracking has, in recent years, increased dramatically throughout the Marcellus region.

FN6. The following information regarding hydrofracking in the Marcellus Shale formation was summarized from the "Marcellus Shale" webpage obtained from the New York State Department of Environmental Conservation (DEC) website at http:// www. dec. ny. gov/ energy/ 46288. html (site last accessed February 21, 2012), from the U.S. Energy Information Administration website at http:// www. eia. gov/ energy_ in_ brief/ about_ shale_ gas. cfm (last accessed February 21, 2012), and from the United States Environmental Protection Agency website at http:// www. epa. gov/ hydraulic fracturing/ process. html (last accessed February 21, 2012), of which the court takes judicial notice (*see generally Matter of Albano v. Kirby,* 36 N.Y.2d 526, 532–533, 369 N.Y.S.2d 655, 330 N.E.2d 615 [1975]; *Kingsbrook Jewish Med. Ctr. v. Allstate Ins. Co.,* 61 A.D.3d 13, 16, 19–20, 871 N.Y.S.2d 680 [2009]; *Grunberger v. S & Z Serv. Sta. Inc.,* 28 Misc.3d 1206[A], 2010 N.Y. Slip Op. 51163[U], at * 3, 2010 WL 2679887 [2010]). *See also Coastal Oil & Gas Corp. v. Garza Energy Trust,* 268 S.W.3d 1, 6–7 [2008] [hydrofracking in non-porous gas-bearing formations explained]).

To access natural gas using these techniques, a vertical well bore is drilled to a depth just above the target gas-bearing formation. The well bore is then extended horizontally within the gas-bearing rock for up to several thousand feet. Multiple horizontal wells may be drilled laterally from the same vertical bore. After drilling, the horizontal wells are subjected to hydrofracking by pumping fluid into the rock for-

mation at high pressure to create fractures in the rock, thereby increasing the quantity of gas that will flow into the well. The hydrofracking fluid consists of water to which various compounds are added to make the process more effective, such as a propping material, or "proppant,"—like sand—which consists of particles that will remain after the hydrofracking process is complete to hold the fractures open; a gel to carry the proppant into the fractures; a biocide to prevent the growth of bacteria that could damage well piping or plug the fractures; and various other agents intended to ensure that the proppant remains in place or to prevent corrosion of the pipes in the well. Many of the compounds used are toxic. Hydrofracking requires large volumes of water—as much as one million or more gallons for each well—most of which is recovered as waste that must be handled, transported and disposed of properly. Tanker trucks transport water to the well sites and thereafter remove waste ***465** fluid. As many as 200 truck loads may be required to supply the water necessary to hydrofrack a single well.

Because hydrofracking may involve the risk of contaminating ground and surface water supplies, it has become extremely controversial. Beginning in 2009, many Town residents requested that the Town Board take action to ban hydrofracking within its jurisdiction and a petition containing 1,594 signatures was presented to the Town Board on April 20, 2011 requesting such a ban (*see* Affidavit of Mary Ann Sumner, sworn to October 13, 2011, ¶ 2).[FN7] The Zoning Amendment was enacted in response to those requests (*see id.,* ¶¶ 2, 3, 15; Affidavit of Mahlon R. Perkins, sworn to October, 2011, ¶ 13) to, in relevant part, add the following new section to Article XXI of the Town's Zoning Ordinance:

> FN7. According to the 2010 Census, the population of the Town of Dryden was 14,435 on April 1, 2010 (*see* http:// 2010. census. gov/ 2010 census/ popmap/ index. php (site last accessed February 21, 2012).

"Section 2104. Prohibited Uses.

(1)Prohibition against the Exploration for or Extraction of Natural Gas and/or Petroleum.

No land in the Town shall be used: to conduct any exploration for natural gas and/or petroleum; to drill any well for natural gas and/or petroleum; to transfer, store, process or treat natural gas and/or petroleum; or to dispose of natural gas and/or petroleum exploration or production wastes; or to erect any derrick, building or other structure; or to place any machinery or equipment for any such purposes.

(2)Prohibition against the Storage, Treatment and Disposal of Natural Gas and/or Petroleum Exploration and Production Materials. No land in the Town shall be used for: the storage, transfer, treatment and/or disposal of natural gas and/or petroleum exploration and production materials.

(3)Prohibition against the Storage, Treatment and Disposal of Natural Gas and/or Petroleum Exploration and Production Wastes. No land in the Town shall be used for: the storage, transfer, treatment and/or disposal of natural gas and/or petroleum exploration and production wastes.

(4)Prohibition against Natural Gas and/or Petroleum Support Activities. No land in the Town shall be used for natural gas and/or petroleum support activities.

(5)Invalidity of Permits. No permit issued by any local, state or federal agency, commission or board for a use which would violate the prohibitions of this section or of this Ordinance shall be deemed valid within the Town."

(*See* Minutes of Special Town Board Meeting August 2, 2010, p. 14; *see also* petition and complaint, ¶ 17; answer, ¶ 17).[FN8]

> FN8. The Zoning Amendment also amended Appendix A (Definitions) of the Zoning Ordinance by adding definitions for Natural Gas, Natural Gas and/or Petroleum Exploration, Natural Gas and/or Petroleum Exploration and Production Materials, Natural Gas and/or Petroleum Production Wastes, Natural Gas and/or Petroleum Extraction, and Natural Gas and/or Petroleum Support Activities (*see* Minutes of Special Town Board Meeting August 2, 2010, pp. 13–14).

Anschutz asserts two separate causes of action seeking declaratory judgment that the Zoning

Amendment is invalid—first, that it is expressly preempted by the supersedure clause of the OGSML set forth in ECL 23–0303 and, second, that it is preempted because it impermissibly conflicts with the substantive provisions of the OGSML that directly regulate gas production.

***466** The OGSML contains the following express supersedure clause:

> "The provisions of this article shall supersede all local laws or ordinances *relating to the regulation of the oil, gas and solution mining industries;* but shall not supersede local government jurisdiction over local roads or the rights of local governments under the real property tax law."

(ECL 23–0303[2] [emphasis supplied]). This provision was last amended more than thirty years ago, long before the potential use of hydrofracking to recover natural gas from the Marcellus shale in New York could have been anticipated. Determining whether it preempts enactment of zoning ordinances that regulate where—or whether—operations related to gas production may occur is a matter of first impression, requiring statutory interpretation without consideration of the disparate public opinions about hydrofracking. The Court of Appeals has held that a similar supersession clause contained in the Mined Land Reclamation Law (Environmental Conservation Law article 23, title 27; herein MLRL) did not preempt local zoning ordinances (*see Matter of Frew Run Gravel Prods. v. Town of Carroll,* 71 N.Y.2d 126, 524 N.Y.S.2d 25, 518 N.E.2d 920 [1987]). In light of the similarities between the OGSML and the MLRL as it existed at the time of *Matter of Frew Run,* the court is constrained to follow that precedent in this case.

In *Matter of Frew Run,* the Court of Appeals considered the following supersedure provision of the MLRL:

> "For the purposes stated herein, this title shall supersede all other state and local laws *relating to the extractive mining industry;* provided, however, that nothing in this title shall be construed to prevent any local government from enacting local zoning ordinances or other local laws which impose stricter mined land reclamation standards or requirements than those found herein."

(ECL 23–2703[2], as enacted by the Laws of New York, 1976, Chapter 477 [emphasis supplied]). It began its analysis by noting that where, as here, a statute contains an express supersession clause, resolution of the issue turns on proper construction of the clause by interpreting the plain meaning of the text in light of the relevant legislative history and the underlying purposes of the statute. It held that the zoning ordinance did not relate to the extractive mining industry but to an entirely different subject, i.e., land use. The Court itself later concisely summarized its holding in *Matter of Frew Run* as follows:

"In *Frew Run,* we distinguished between zoning ordinances and local ordinances that directly regulate mining activities. Zoning ordinances, we noted, have the purpose of regulating land use generally. Notwithstanding the incidental effect of local land use laws upon the extractive mining industry, zoning ordinances are not the *type* of regulatory provision the Legislature foresaw as preempted by Mined Land Reclamation Law; the distinction is between ordinances that regulate property uses and ordinances that regulate mining activities. In *Frew Run,* we concluded that nothing in the plain language, statutory scheme, or legislative purpose of the Mined Land Reclamation Law suggested that its reach was intended to be broader than necessary to preempt *conflicting regulations dealing with mining operations and reclamation of mined lands* ' (*id.,* at 133, 524 N.Y.S.2d 25, 518 N.E.2d 920 [emphasis added]), and that in the absence of a clear expression of legislative intent to preempt local control over land use, the statute could not ***467** be read as preempting local zoning authority."

(*Matter of Gernatt Asphalt Prods. v. Town of Sardinia,* 87 N.Y.2d 668, 681–682, 642 N.Y.S.2d 164, 664 N.E.2d 1226 [1996] [citations omitted; emphasis in original]; *see also Matter of Hunt Bros. v. Glennon,* 81 N.Y.2d 906, 908–909, 597 N.Y.S.2d 643, 613 N.E.2d 549 [1993]; *Preble Aggregate v. Town of Preble,* 263 A.D.2d 849, 850, 694 N.Y.S.2d 788 [1999], *lv. denied* 94 N.Y.2d 760, 706 N.Y.S.2d 81, 727 N.E.2d 578 [2000]; *Matter of Sour Mtn. Realty v. New York State Dept. of Envtl. Conservation,* 260 A.D.2d 920, 923–924, 688 N.Y.S.2d 842 [1999], *lv. denied* 93 N.Y.2d 815, 697 N.Y.S.2d 562, 719 N.E.2d 923 [1999]).[FN9]

FN9. *Cf. Matter of Envirogas v. Town of Kiantone,* 112 Misc.2d 432, 447 N.Y.S.2d 221 (1982), *affd.* 89 A.D.2d 1056, 454 N.Y.S.2d 694 (1982), *lv. denied* 58 N.Y.2d 602, 458 N.Y.S.2d 1026, 444 N.E.2d 1013 (1982) (zoning ordinance providing that no oil or gas well could be constructed without prior payment of a $2,500 compliance bond and $25 permit fee did not relate to land us and was preempted by the OGSML because it directly conflicted with the permit procedure administered by the DEC).

[7] The primary language of the two supersedure clauses is nearly identical. The MLRL provides that "[f]or the purposes stated herein, this title shall supersede all other state and local laws *relating to the extractive mining industry* " (emphasis supplied), while the OGSML provides that "[t]he provisions of this article shall supersede all local laws or ordinances *relating to the regulation of the oil, gas and solution mining industries* (emphasis supplied). Inasmuch as both statutes preempt only local regulations "relating" to the applicable industry, they must be afforded the same plain meaning—that they do not expressly preempt local regulation of land use, but only regulations dealing with operations (*see Matter of Frew Run,* 71 N.Y.2d at 131, 133, 524 N.Y.S.2d 25, 518 N.E.2d 920). Neither supersedure clause contains a clear expression of legislative intent to preempt local control over land use and zoning. Notably, the MLRL law was amended in 1991 to codify the holding of *Matter of Frew Run* and, in 1996, the amended supersession clause was construed by the Court of Appeals in *Matter of Gernatt* to permit a complete ban on mining activities within a municipality. Yet, even in light of this legislative and judicial activity regarding the preemptive scope of the MLRL, there remains an absence from the OGSML—as enacted in 1976 and amended in 1981 to add the supersedure clause—of a clear expression of legislative intent to preempt local zoning control over land use concerning oil and gas production.

[8][9] Anschutz's attempts to distinguish the language of the two supersession clauses are unavailing. It argues that the two clauses are different because the MLRL only preempts "local laws," while the OGSML provides for preemption of "local laws and ordinances," and that by use of the additional term "ordinances," the OGSML necessarily preempts zoning ordinances, such as the Zoning Amendment, where the MLRL does not. Its argument exalts form over substance. Towns are empowered to enact zoning regulations through two different procedures-by ordinance, pursuant to Town Law §§ 261, 264 and 265, and by local law, pursuant to the Statute of Local Governments § 10(6) and the Municipal Home Rule Law (*see Matter of Pete Drown, Inc. v. Town Bd. of Town of Ellenburg,* 229 A.D.2d 877, 646 N.Y.S.2d 205 [1996], *lv. denied* 89 N.Y.2d 802, 653 N.Y.S.2d 279, 675 N.E.2d 1232 [1996]; *Yoga Socy. of N.Y. v. Incorporated Town of Monroe,* 56 A.D.2d 842, 392 N.Y.S.2d 81 [1977], *appeal* ****468*** *dismissed* 42 N.Y.2d 910 [1977]; Rice, 2012 Supp Practice Commentaries, McKinney's Cons. Laws of NY, Book 61, Town Law § 264, 2012 Supp. Pamph, at pp. 63–64). Whether a substantive zoning provision is a law or an ordinance is determined solely by the procedure utilized in its enactment. The distinction between laws and ordinances in the area of land use regulations is not significant; indeed, the terms are often used interchangeably (*see e.g. Matter of Gernatt,* 87 N.Y.2d at 681–682, 642 N.Y.S.2d 164, 664 N.E.2d 1226 [refers to zoning *ordinances* as land use *laws* having an incidental effect on the extractive mining industry]). Thus, it would be illogical to conclude that the matter of preemption turns on whether a zoning regulation is enacted as a local law or as an ordinance.

Anschutz also argues that the OGSML is not susceptible to the distinction made by the Court of Appeals when it determined that the MLRL preempts only local laws relating to operations, i.e. laws governing "how" are preempted, but not those governing "where." In that regard, it notes that the supersedure provisions of the MLRL and the OGSML contain different specific exceptions. The OGSML excepts only local government jurisdiction over local roads and rights regarding real property taxation. Anschutz contends that if the supersedure clause preempted only regulation of operations—the "how"—then the exception for local government jurisdiction over local roads would be unnecessary because regulation of roads does not affect operations.[FN10] Its argument overlooks the fact that hydrofracking depends upon transport of equipment, supplies and large volumes of hydrofracking fluid and waste by truck. Regulation of local roads to restrict or regulate heavy truck traffic, or to require repair of damage caused by such traffic, would plainly relate to operation of gas wells by directly affecting access to well sites or other areas of operation and by imposing additional burdens or costs.

Accordingly, because regulation of local roads affects operations, the fact that the supersedure clause contains the exception for jurisdiction over local roads does not support the conclusion that the Legislature intended to preempt local zoning power not directly concerned with regulation of operations.[FN11]

> FN10. Taxation of oil and gas economic units is governed exclusively by Real Property Tax Law article 5, title 5 (RPTL 590 *et seq.*), enacted concurrently with the 1981 amendment of the OGSML (*see* RPTL 594).

> FN11. The Court of Appeals explained that the MLRL was intended to achieve two different legislative aims—providing statewide standards regulating mining operations and separately permitting stricter local regulation of reclamation to address legitimate local concerns—and that the exception contained in the MLRL for local zoning ordinances imposing stricter standards for reclamation was related only to the second purpose (*see Matter of Frew Run,* 71 N.Y.2d at 132–134, 524 N.Y.S.2d 25, 518 N.E.2d 920). It did not consider the exception when it decided that the plain meaning of the main clause of the supersedure provision of the MLRL did not preempt local regulation of land use, but only after it turned to consideration of the purpose and history of the statute (*see id.* at 131–132, 524 N.Y.S.2d 25, 518 N.E.2d 920). Accordingly, that the two supersedure provisions contain different exceptions to preemption is not a basis for ascribing different meanings to the nearly identical language of their respective primary clauses.

Nor is the court able to discern any meaningful difference in the purposes of the two laws—both provide for statewide regulation of operations with the primary goal of encouraging efficient use of a natural resource, and the supersedure provisions of both were enacted to eliminate inconsistent local regulation which had impeded that goal. The legislative history ***469** and purpose of the MLRL were summarized by the Court of Appeals as follows:

> "The purposes of the statute are to foster a healthy, growing mining industry' and aid in assuring that land damaged by mining operations is restored to a reasonably useful and attractive condition' (Mem. of Governor Wilson, June 15, 1974, filed with Assembly Bill 10463–A, Governor's Bill Jacket, L. 1974, ch. 1043). The policy of the State, the Legislature has declared, is to foster and encourage the development of an economically sound and stable mining and minerals industry' (ECL 23–2703[1]). To further this policy, the Mined Land Reclamation Law was enacted to establish the badly needed guidelines which would allow for the utilization of the state's vast mineral resource based in a manner compatible with wise resource management' and to eliminate [r]egulation on a town by town basis [which] creates confusion for industry and results in additional and unfair costs to the consumer' (Mem. of Department of Environmental Conservation in support of Assembly Bill 10463–A, May 31, 1974, Governor's Bill Jacket, L. 1974, ch. 1043). Thus, one of the statute's aims is to encourage the mining industry by the adoption of standard and uniform restrictions and regulations to replace the existing patchwork system of [local] ordinances' (*id.*)."

(*Matter of Frew Run,* 71 N.Y.2d at 132, 524 N.Y.S.2d 25, 518 N.E.2d 920).

The legislative history of the 1981 amendments to the OGSML—when the supersedure clause was enacted—similarly states that the purpose is to "promote the development of ... NYS's resources of oil and natural gas" (Mem. dated July 9, 1981, filed with Senate Bill 6455–B) and "to provide for the efficient, equitable and environmentally safe development of the State's oil and gas resources" (Mem. of Governor Carey dated July 27, 1981, filed with Senate Bill 6455–B).[FN12] Nowhere in the legislative history provided to the court is there any suggestion that the Legislature intended—as argued by Anschutz—to encourage the maximum ultimate recovery of oil and gas regardless of other considerations, or to preempt local zoning authority.

> FN12. Anschutz submitted an affidavit by Gregory Sovas, who was employed by DEC and its predecessor agency from 1968 until January 2001, in which he provides his opinion regarding the legislative history and purposes of the OGSML and the 1981 amendments thereto and to DEC's interpretation, implementation and enforcement thereof. It may not be considered, because it

> is not part of the recognized legislative history (*see* *Matter of Lorie C.*, 49 N.Y.2d 161, 169, 424 N.Y.S.2d 395, 400 N.E.2d 336 [1980]; *McKechnie v. Ortiz*, 132 A.D.2d 472, 475, 518 N.Y.S.2d 134 [1987], *affd.* 72 N.Y.2d 969, 534 N.Y.S.2d 358, 530 N.E.2d 1278 [1988]; *Matter of Morabito v. Hagerman Fire Dist.*, 128 Misc.2d 340, 341, 489 N.Y.S.2d 989 [1985], *citing* *Matter of Lorie C.*). In addition, even if it is assumed that his affidavit accurately represents DEC's interpretation of the supersedure clause, it is not relevant because the issue in the present case involves one of pure statutory interpretation that does not require reliance upon DEC's knowledge or understanding of underlying operational practices (*see* *Kurcsics v. Merchants Mut. Ins. Co.*, 49 N.Y.2d 451, 459, 426 N.Y.S.2d 454, 403 N.E.2d 159 [1980]; *cf.* *Cortland Regional Med. Ctr., Inc. v. Novello*, 33 Misc.3d 777, 782–783, 930 N.Y.S.2d 848 [2011, Rumsey, J.], *quoting* *Kurcsics*).

The OGSML contains the following express statement of its purpose:

> "It is hereby declared to be in the public interest to regulate the development, production and utilization of natural resources of oil and gas in this state in such a manner as will prevent waste; to authorize and to provide for the operation and development of oil and gas properties in such a manner that a ***470** greater ultimate recovery of oil and gas may be had, and that the correlative rights of all owners and the rights of all persons including landowners and the general public may be fully protected, and to provide in similar fashion for the underground storage of gas, the solution mining of salt and geothermal, stratigraphic and brine disposal wells."

ECL 23–0301. The foregoing provision does not state that it is in the public interest to require—or maximize—development of the oil and gas resources of New York State. Rather, it states that the purpose of the OGSML is to regulate any development or production of such resources which may occur in a manner that prevents waste, permits greater ultimate recovery of oil and gas, and protects the correlative rights of all persons. By interpreting the foregoing provision as pertaining to regulation of development and production only in locations where such activities may be conducted in compliance with applicable zoning ordinances governing land use, the OGSML may be construed in a fashion which avoids any "abridgement of a town's powers to regulate land use through zoning powers expressly delegated in the Statute of Local Governments § 10(6) and Town Law § 261" (*Matter of Frew Run*, 71 N.Y.2d at 134, 524 N.Y.S.2d 25, 518 N.E.2d 920).

[10][11][12] Nor is any significant difference in the purpose of the two statutes apparent from their respective regulatory schemes. While the OGSML—unlike the MLRL—contains provisions which directly affect where operations may be conducted, such as those governing delineation of pools, well spacing, and integration of units (*see* ECL 23–0305[8][c]; ECL 23–0501; ECL 23–0503, ECL 23–0701, 23–0901), they address technical operational concerns and are intended to further the stated statutory purposes of avoiding waste, providing for greater ultimate recovery of oil and gas and protecting correlative rights. For example, wells must be spaced to comport with the geological features of the underlying pool or formation—taking into consideration the type and depth of the formation and whether there are any field-bounding faults—to allow efficient recovery of the entire field (*see* ECL 23–0501[1][b], [2][a]; ECL 23–0503[2], [3][a], [4]). None of the provisions of the OGSML address traditional land use concerns, such as traffic, noise or industry suitability for a particular community or neighborhood (*see* Town Law § 261; *Louhal Props. v. Strada*, 191 Misc.2d 746, 751, 743 N.Y.S.2d 810 [2002], *affd. on the opinion below* 307 A.D.2d 1029, 763 N.Y.S.2d 773 [2003]). Thus, zoning regulations do not directly conflict with the provisions of the OGSML that relate to well location.[FN13]

> FN13. As the Court of Appeals noted, where, as here, there is an express supersedure clause, there is no need to consider implied preemption; resolution of such cases turns on proper construction of the supersedure clause at issue (*Matter of Frew Run*, 71 N.Y.2d at 130–131, 524 N.Y.S.2d 25, 518 N.E.2d 920). Whether there is conflict between the local ordinance and the state statute is considered as part of the process of statutory interpretation, specifically by measuring the effect of

the local ordinance against the purpose of the state statute (*id.* at 133–134, 524 N.Y.S.2d 25, 518 N.E.2d 920). Here, no impermissible conflict has been found.

That the OGSML does not contain a clear expression of legislative intent to preempt local zoning authority (*see Matter of Gernatt*, 87 N.Y.2d at 682, 642 N.Y.S.2d 164, 664 N.E.2d 1226) is further apparent when it is compared to state statutes that indisputably preempt the local zoning power (*see e.g.* ECL, article 27, title 11 [siting industrial hazardous waste facilities]; ***471** Mental Hygiene Law § 41.34 [siting community residential facilities]). The OGSML differs from such statutes in two significant respects. First, unlike the OGSML, the intent to preempt local zoning ordinances is clearly expressed in the text of the other statutes. ECL 27–1107 states that local municipalities may not require "conformity with *local zoning or land use laws and ordinances* " (emphasis supplied).[FN14] Mental Hygiene Law § 41.34(e) provides that "a community residence established pursuant to this section and family care homes shall be deemed a family unit, *for the purposes of local laws and ordinances* " (emphasis supplied), to preclude local governments from excluding group homes from areas zoned for single-family residences (*see also Incorporated Vil. of Nyack v. Daytop Vil.*, 78 N.Y.2d 500, 506–507, 577 N.Y.S.2d 215, 583 N.E.2d 928 [1991] [Mental Hygiene Law § 41.34 expressly withdraws the zoning authority of local governments]; Salkin, 1 N.Y. Zoning Law & Prac. § 7:25 [Mental Hygiene Law § 41.34 was designed to preempt local control over planning and zoning decision making]).

FN14. It bears noting that although ECL 27–1105(2)(f) originally required denial of an application to construct or operate a hazardous waste facility if it "would be contrary to local zoning or land use regulations in force on the date of the application" (*Matter of Washington County Cease v. Persico*, 99 A.D.2d 321, 324–325, 473 N.Y.S.2d 610 [1984], *affd. on opinion below* 64 N.Y.2d 923, 488 N.Y.S.2d 630, 477 N.E.2d 1084 [1985] [emphasis in original]), ECL article 27, title 11 was thereafter amended to expressly preempt local zoning authority (*see* ECL 27–1105[3] [f]; ECL 27–1107; Weinberg, Practice Commentaries, McKinney's Cons. Laws of N.Y., Book 17 1/2, ECL 27–1105).

Second, these other statutes contain provisions by which the traditional concerns of zoning are required to be considered by the agency charged with deciding whether to issue a permit under state law (*see* ECL 27–1103[2][b], [c], [g], [h]; Mental Hygiene Law § 41.34[c][5]). As previously noted, the OGSML does not require consideration of such factors prior to issuance of well permits. To ensure that local concerns are considered, these other statutes require advance notice to, and allow participation by, a municipality in which a proposed facility is to be located (*see* ECL 27–1105[3][c]; ECL 27–1113; Mental Hygiene Law § 41.34[c]). By contrast, the OGSML only requires that notice be provided to a municipality before drilling commences—after a well permit has been granted (*see* ECL 23–0305[13]). A clear legislative intent to preempt local zoning authority is not apparent from the fact that the OGSML does not specifically provide a mechanism for consideration of local concerns. Rather, by construing the OGSML in accordance with its plain meaning—i.e., as superseding only local regulation of operations—it may be harmonized with those statutes that grant the zoning power to local municipalities (*see Matter of Frew Run*, 71 N.Y.2d at 134, 524 N.Y.S.2d 25, 518 N.E.2d 920). Under this construction, local governments may exercise their powers to regulate land use to determine where within their borders gas drilling may or may not take place, while DEC regulates all technical operational matters on a consistent statewide basis in locations where operations are permitted by local law.

The fact that the Zoning Amendment bans all operations related to oil and gas exploration and production anywhere within the Town of Dryden does not compel a different result. In *Matter of Gernatt*, the Court of Appeals rejected the argument that if the land within a municipality contains extractable minerals, then the municipality is required to permit them to be mined somewhere. It held that, inasmuch ***472** as the MLRL does not restrict the power to zone, a municipality may exercise its zoning authority to completely ban mining within its jurisdiction. In proceeding to determine that the doctrine of exclusionary zoning does not prohibit use of the zoning power to exclude industrial uses—a point not raised in this case—the Court specifically noted that the zoning power may properly be used to limit the use of natural resources, stating that:

"A municipality is not obliged to permit the exploitation of any and all natural resources within the town as a permitted use if limiting that use is a reasonable exercise of its police powers to prevent damage to the rights of others and to promote the interests of the community as a whole."

(*Matter of Gernatt,* 87 N.Y.2d at 684, 642 N.Y.S.2d 164, 664 N.E.2d 1226 [citations omitted]). In light of the determination that the OGSML—like the MLRL—does not preempt local zoning power to regulate uses of land, there is no rational basis for distinguishing *Matter of Gernatt;* accordingly, the OGSML does not preempt a municipality's authority—through the exercise of its zoning power—to completely ban operations related to oil and gas production within its borders.[FN15]

FN15. Although the court recognizes that natural gas extraction—unlike gravel mining—does not necessarily affect the surface of the ground directly over the area from where the natural resource is removed, the fact that the boundaries of formations containing gas may not conform to municipal boundaries is not a logical basis for distinguishing *Matter of Gernatt.* The same considerations about well location and spacing exist wherever there is a boundary between areas where drilling is permitted and where it is not; therefore, it would be illogical to conclude that a municipality may lawfully exclude gas drilling from certain areas of the municipality, but not the entire municipality (*cf. Voss v. Lundvall Brothers,* 830 P.2d 1061 [1992]). Moreover, because the location of any boundaries between areas where drilling is a permitted use and where it is prohibited by a local zoning ordinance-whether between different districts within a municipality or between different municipalities-will be known when a well permit application is under consideration, DEC may account for such boundaries to efficiently site wells in any areas where drilling is allowed.

Finally, while this is a case of first impression in New York State, the issue of the use of the local zoning power to regulate location of natural gas drilling operations has been considered in several decisions by the highest courts of Pennsylvania and Colorado. While they are not binding precedents in this case, it is instructive that both courts reached the same conclusion as this court did by applying New York precedent—that their respective state's statute governing oil and gas production does not preempt the power of a local government to exercise its zoning power to regulate the districts where gas wells are a permitted use.

Pennsylvania's Oil and Gas Act specifically empowers local governments to enact zoning regulations, provided that they do not impose "conditions, requirements or limitations on the same features of oil and gas well operations regulated by this act or that accomplish the same purposes as set forth in this act" (*Huntley & Huntley, Inc. v. Borough Council of the Borough of Oakmont,* 600 Pa. 207, 212, 964 A.2d 855, 858 [2009] [emphasis and quotation omitted]). This language is similar to the supersedure provisions of the OGSML and the MLRL, which both preempt only those local laws which regulate operations. In an analysis remarkably similar to that conducted by the Court of Appeals in *Matter of Frew Run,* the Pennsylvania Supreme Court concluded that the zoning laws serve a different purpose than statutes aimed at efficient production and utilization of a natural***473** resource, i.e., regulation of land use and development (*see Huntley,* 600 Pa. at 225, 964 A.2d at 865). It then adopted the same how-versus-where distinction in concluding that a zoning ordinance prohibiting gas wells in a residential district was not preempted by the Oil and Gas Act. In a case decided the same day, it held that a local ordinance that regulated well operations by the imposition of permitting and bonding requirements and by regulation of operations-similar to the one at issue in *Matter of Envirogas,* 112 Misc.2d 432, 447 N.Y.S.2d 221—was preempted by the Oil and Gas Act (*see Range Resources v. Salem Township,* 600 Pa. 231, 964 A.2d 869 [2009]). Citing *Huntley* and *Range Resources,* Pennsylvania's intermediate appellate court held that zoning regulations prohibiting gas drilling within the flight path of an airport runway and imposing setback and screening requirements were not preempted by the Oil and Gas Act because they "reflect traditional zoning regulations that identify which uses are permitted in different areas of the locality" (*Penneco Oil Co., Inc. v. County of Fayette,* 4 A3d 722, 733 [2010]).

In a pair of cases that it also decided the same day,

the Colorado Supreme Court held that Colorado's Oil and Gas Conservation Act—which does not contain an express supersedure clause, but contains a purposes clause similar to the OGSML—does not preclude local municipalities from regulating the districts within which gas drilling may occur (*see* *Board of County Commissioners of La Plata County v. Bowen/Edwards Assoc., Inc.*, 830 P.2d 1045 [1992]; *Voss*, 830 P.2d 1061 [1992]). It further held that, inasmuch as gas pools do not conform to municipal boundaries, a zoning ordinance that totally banned all drilling within a local government's borders would be preempted because it would conflict with the state's interest in fostering efficient development and production of oil and gas reserves. In New York, however, as previously noted, the Court of Appeals has held otherwise—that a total ban on the extraction of natural resources is permissible where the Legislature has not restricted municipal authority to regulate permissible uses of land (*see* *Matter of Gernatt*, 87 N.Y.2d at 682–683, 642 N.Y.S.2d 164, 664 N.E.2d 1226).[FN16]

FN16. The court does not find *Newbury Twp. Bd. of Trustees v. Lomak Petroleum (Ohio), Inc.*, 62 Ohio St.3d 387, 583 N.E.2d 302 (1992) instructive in this case. There, the statute at issue was notably different than the OGSML because it permitted a local municipality to prohibit oil or gas well drilling in areas traditionally considered appropriate for such activity based only on health and safety considerations. While acknowledging that municipalities could properly enact zoning regulations based on health and safety concerns, the Court invalidated a local zoning ordinance prohibiting gas wells in all residential districts by substituting its own judgment for that of the town in finding that drilling was appropriate in areas used for agricultural production and zoned residential.

THE ZONING AMENDMENT'S PROVISION INVALIDATING PERMITS

[13] The Zoning Amendment provides that "[n]o permit issued by any local, state or federal agency, commission or board for a use which would violate the prohibitions of this section or of this Ordinance shall be deemed valid within the Town" (Dryden Zoning Ordinance, Section 2104[5]). While the Town may regulate the use of land within its borders—even to the extent of banning operations related to production of oil or gas—it has no authority to invalidate a permit lawfully issued by another governmental entity. Rather, enforcement of the provisions of its Zoning Ordinance relating to the use of land is restricted to those remedies authorized by Town Law § 268 and Municipal Home Rule Law § 10(4)(a), (b). Moreover, by ***474** purporting to invalidate permits that may be issued by any state agency—including DEC—this provision relates directly to regulation of the oil and gas industries and, accordingly, is expressly preempted by the OGSML. Thus, it is invalid.

However, the presence of the invalid provision does not require that the entire Zoning Amendment be invalidated because it may be severed without impairing the underlying purpose of the Zoning Amendment (*see* *CWM Chem. Servs., L.L.C. v. Roth*, 6 N.Y.3d 410, 422–425, 813 N.Y.S.2d 18, 846 N.E.2d 448 [2006]; *Wiggins v. Town of Somers*, 4 N.Y.2d 215, 222, 173 N.Y.S.2d 579, 149 N.E.2d 869 [1958], *rearg. denied* 4 N.Y.2d 1045, 1046, 177 N.Y.S.2d 704, 1025, 152 N.E.2d 663, 420 [1958]; *St. Joseph Hosp. of Cheektowaga v. Novello*, 43 A.D.3d 139, 146, 840 N.Y.S.2d 263 [2007], *appeal dismissed* 9 N.Y.3d 988, 848 N.Y.S.2d 22, 878 N.E.2d 606 [2007], *lv. denied* 10 N.Y.3d 702, 853 N.Y.S.2d 544, 883 N.E.2d 371 [2008]; *see also* Dryden Zoning Ordinance § 2101 ["The invalidity of any section or provision of this Ordinance shall not invalidate any other section or provision thereof"]). Accordingly, Section 2104(5) is hereby severed and stricken from the Zoning Amendment and the Dryden Zoning Ordinance.

CONCLUSION

Inasmuch as the court is unable to discern any meaningful difference between the language of the supersedure clauses of the MLRL—as it existed when *Matter of Frew Run* was decided—and the OGSML, or in the respective legislative histories, purposes or regulatory schemes of the two statutes, it is constrained to apply *Matter of Frew Run* and *Matter of Gernatt* in determining that the Zoning Amendment is not preempted by the OGSML. Accordingly, the Town's motion for summary judgment is granted, and it is adjudged and declared that the Zoning Amendment—as herein modified by severing and striking Section 2104(5)—is not preempted by the OGSML.

This decision constitutes the order and judgment

of the court. The transmittal of copies of this decision, order and judgment by the court shall not constitute notice of entry.

N.Y.Sup.,2012.
Anschutz Exploration Corp. v. Town of Dryden
35 Misc.3d 450, 940 N.Y.S.2d 458, 2012 N.Y. Slip Op. 22037

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*37 Misc. 3d 1204A, *; 2012 N.Y. Misc. LEXIS 4684, **;*
*2012 NY Slip Op 51881U, ***; 42 ELR 20208*

[*1]** Elvin Jeffrey, VESTAL GAS COALITION, ARENA HOTEL CORPORATION, NELSON HOLDINGS LTD., and BINGHAMTON-CONKLIN GAS COALITION STEERING COMMITTEE, Petitioners, against Matthew T. Ryan, in his official Capacity as Mayor, City of Binghamton, and The CITY COUNCIL, CITY OF BINGHAMTON, Respondents.

CA2012-001254

SUPREME COURT OF NEW YORK, BROOME COUNTY

37 Misc. 3d 1204A; 2012 N.Y. Misc. LEXIS 4684; 2012 NY Slip Op 51881U; 42 ELR 20208

October 2, 2012, Decided

NOTICE: THIS OPINION IS UNCORRECTED AND WILL NOT BE PUBLISHED IN THE PRINTED OFFICIAL REPORTS.

CORE TERMS: local law, moratorium, extraction, gas exploration, police powers, exploration, storage, drilling, summary judgment, statute of limitations, municipality, zoning, declaratory judgment, industrial, land use, alleviate, banning, heavy, zoning law, quotations, planning, invalid, crisis, enact, property owner, permitted use, special permit, session, zoned, local government

HEADNOTES

[*1204A] Gas and Oil--Local Regulation--Moratorium. Parties--Standing.

COUNSEL: [1]** FOR PETITIONERS: ROBERT H. WEDLAKE, ESQ. AND KENNETH S. KAMLET, ESQ., OF COUNSEL, HINMAN, HOWARD & KATTELL, LLP, BINGHAMTON, NY.

FOR RESPONDENTS: DAVID F. SLOTTJE, ESQ. AND HELEN H. SLOTTJE, ESQ., OF COUNSEL, COMMUNITY ENVIRONMENTAL DEFENSE COUNCIL, INC., SYRACUSE, NY.

JUDGES: Hon. Ferris D. Lebous, J.S.C.

OPINION BY: Ferris D. Lebous

OPINION

Procedural Background

Petitioners filed this combined Article 78 and Declaratory Judgment (CPLR §3001) action seeking to invalidate Chapter 250 of the City of Binghamton Code of Ordinances, entitled "Prohibition of Gas and Petroleum Exploration and Extraction Activities, Underground Storage of Natural Gas, and Disposal of Natural Gas or Petroleum Extraction, Exploration, and Production Wastes," which was adopted as Local Law 11-006 on December 21, 2011 by the Binghamton City Council and signed by Mayor Ryan on December 22, 2011. On June 19, 2012, Petitioners moved for summary judgment. Petitioners argue that this local law is a zoning law that was required to be referred to the Broome County Planning Board prior to enactment, that it is superseded by Environmental Conservation Law §23-0303, or alternatively, that it is a moratorium and that the requirements for a moratorium have **[**2]** not been met and thus the law is invalid.

Respondents have opposed Petitioners' motion for summary judgment, and have cross-moved to dismiss the petition. Respondents claim that the law was enacted pursuant to their police powers, and not as a zoning law. Respondents maintain that because it was enacted pursuant to the City's police powers, GML §239-m is not applicable, and the City was not required to refer the local law to the Planning Board prior to enactment; that Local Law 11-006 is not a moratorium; and that it is not superseded by ECL §23-0303. Respondents also make procedural arguments that the summary judgment motion was premature as they have not had an opportunity to file an answer to the petition. Respondents have also cross-moved to dismiss the petition on the grounds that the Petitioners do not have standing, and that the statute of limitations has expired.

Discussion

The basic facts of this case are not contested, rather it is the legal conclusions to be drawn from the facts that are contested.

According to the Petition, Petitioner Elvin Jeffrey, a property owner in the City of Binghamton, "wished to preserve the opportunity to lease some or all of his land for natural gas **[**3]** exploration and extraction" and opposed Local Law 11-006. (See, Petition, paragraph 1).

Petitioner Vestal Gas Coalition is an unincorporated group of landowners from Vestal, a town adjoining the City of Binghamton. Their goal is to foster natural gas exploration. They claim that Local Law 11-006 adversely affects their ability to obtain a natural gas lease for their members. (See, Petitioner, paragraph 2).

Petitioner Arena Hotel Corporation owns the Holiday Inn Binghamton. This Petitioner claims that the passage of Local Law 11-006 will have a detrimental effect on their business as **[***2]** they have had a significant amount of business as a result of the natural gas exploration and extraction activities that are occurring in neighboring Pennsylvania. (See, Petition, paragraph 3).

Petitioner Nelson Holdings Ltd. owns an 11 acre parcel in the City of Binghamton which is zoned I-3 Heavy Industrial pursuant to the City of Binghamton zoning regulations. (See, Petition, paragraph 4). The Nelson Petitioners have argued that due to this property being zoned heavy industrial, gas extraction, exploration, and storage would be a permitted use by special permit assuming DEC's issuance of regulations permitting **[**4]** gas exploration and extraction in New York State. While the zoning law provisions for "heavy industrial" do not by definition permit property owners to automatically engage in gas exploration, drilling or storage, Petitioner Nelson would be able to apply to the zoning board of appeals for a special permit authorizing such use on this property.

All of the Petitioners opposed this local law.

To determine the exact nature of this local law it is necessary to review its enactment by the City Council. At a Work Session of the Binghamton City Council held on November 21, 2011, David F. Slottje, Esq., counsel for Respondents, made a presentation to the City Council requesting that they pass a law, drafted by Attorney Slottje, banning activities associated with the drilling for natural gas, and gas exploration. (See, "Transcript of City Council Work Session November 21, 2011 Part 3" which is part of Exhibit "O" to the Memorandum of Law in Support of Petitioner's Verified Article 78 Petition, dated May 30, 2012). In this transcript Mr. Slottje explains to the City Council why he believes a law banning gas drilling and exploration would survive a legal challenge. On page 5 of that transcript Mr. **[**5]** Slottje stated,

It's [the local law being proposed] a moratorium in the sense of having a finite period. It's like a sunset clause. 24 months. It is not literally a moratorium because this is not literally a zoning ordinance. This is a police power ordinance. But it quacks like a duck and walks like a duck. So, you can absolutely think of it in terms of being a moratorium.

On **[**6]** December 5, 2011 the City Council held another work session where the proposed law banning gas drilling and exploration was discussed. Mr. Slottje addressed the council, as did Mr. Kenneth Frank, Esq., Corporation Counsel for the City of Binghamton. Mr. Frank stated his concerns with regard to the local law, and advised the City Council that the time limit in the proposed local law made it a moratorium. In Mr. Frank's opinion the Council was not seeking to stop gas drilling and exploration so that the Council could investigate the impacts of it on the community, or so that DEC could issue regulations and the City review them to determine the impact on the community, and therefore it would not be appropriate for the Council to enact a moratorium. Mr. Frank was adamant that the Council should pass a law not a moratorium.

Despite Respondents' protestations to this Court to the contrary, it is quite clear that even they thought this would be a moratorium. At the December 5, 2011 Working Session of the Binghamton City Council Mr. Slottje stated,

This is for a two-year period, if you decide to pass this, there will be a de facto moratorium within the City on essentially gas drilling, both **[**7]** extraction activities, disposal of waste activities, and so on . . . It's a temporary two-year law . . .(See, Memorandum of Law in Support of Petitioner's Verified Article 78 Petition, dated May 30, 2012, Exhibit "P," "Transcript of **[***3]** December 5, 2011 City Council Worksession" page 1).

At this same meeting Helen H. Slottje, Esq. stated about the proposed law, " . . . the idea here is to give the City some time to figure out exactly what it wants to do about this industry. But in the meantime, put a halt on it . . ." *Id.*

Mr. Slottje also stated that the two year limitation in the law was so it would be, politically, more acceptable and easier for the members of the Council to pass. *Id.* at page 6. In fact this transcript shows that there may not have been support on the Council for a ban on gas drilling and exploration without a time limit placed on the duration of the ban. *Id.*

The law passed with the provision that it expires within 24 months after enactment (on December 31, 2013) unless sooner repealed.

Analysis

Procedural Issue

Respondents argue that Petitioners' motion for summary judgment is premature, as they have not had an opportunity to file an answer to the petition, and that pursuant **[**8]** to CPLR §3212(a) a motion for summary judgment can only be made after issue has been joined.

However, under certain circumstances it is appropriate for the court to grant a motion for summary judgment prior to Respondents formally answering the petition (*Matter of Thomas Giorgio v. Bucci*, 246 AD2d 711, 713, 667 N.Y.S.2d 484 (3rd Dept., 1998), *lv to appeal denied*

91 NY2d 814, 698 N.E.2d 956, 676 N.Y.S.2d 127 (1998) held that in an Article 78 proceeding where the parties had apprised the court of all relevant arguments there was no requirement that the court grant leave to serve an answer). In *Matter of Davila v. New York City Housing Authority*, 190 AD2d 511, 512, 593 N.Y.S.2d 12 (1st Dept. 1993), *lv. to appeal denied* 87 NY2d 801, 661 N.E.2d 160, 637 N.Y.S.2d 688 (1995) the court stated the following:

As for respondents' contention that the trial court improperly ruled on the merits of the petition without allowing respondents to serve an answer, respondents clearly informed the trial court of their relevant arguments to dismiss the petition. Thus, it was not necessary under CPLR 7804(f) to grant respondents leave to serve an answer to the petition following denial of the motion to dismiss. (citations and quotations omitted).

Here, Petitioners moved for summary judgment, and Respondents **[**9]** have moved to dismiss the petition. Both Petitioners and Respondents have fully briefed and argued their positions on the issues in this case. The facts of this case are straightforward, and not at issue. The questions presented are all legal in nature. Since the parties have had a full opportunity to present their arguments there is no need to delay this case to permit Respondents to file an answer.

Standing

To have standing to sue, a party must show that it will or has suffered actual harm as a result of the enactment of the law in question. The harm must be real, it cannot be remote or speculative, and in land use cases, the petitioner's harm must be different than the harm to the general public. (See, **[***4]** *Matter of Brunswick Smart Growth, Inc., et al. v. Town of Brunswick*, 73 AD3d 1267, 1268, 901 N.Y.S.2d 387, (3rd Dept., 2010); see also, *Association for a Better Long Island, Inc, et al. v. New York State Department of Environmental Conservation, et al.*, 97 AD3d 1085, 949 N.Y.S.2d 291 (3rd Dept., 2012)).

Moreover, there is not ". . . any requirement that the harm necessary to confer standing be actual and in the present rather than potential and in the future as long as it is reasonably certain that the harm will occur **[**10]** if the challenged action is permitted to continue." (*Police Benevolent Assn. of NY State Troopers, Inc. v. Division of NY State Police*, 29 AD3d 68, 70, 811 N.Y.S.2d 176, (3rd Dept., 2006) [citations and quotations omitted]).

"[Standing] is a threshold issue. If standing is denied, the pathway to the courthouse is blocked . . . The rules governing standing help courts separate the tangible from the abstract or speculative injury, and the genuinely aggrieved from the judicial dilettante or amorphous claimant. . . Were we to deny standing to all plaintiffs in this action, an important constitutional issue would be effectively insulated from judicial review."(*Saratoga County Chamber of Commerce v. Pataki*, 100 NY2d 801, 812, 814, 798 N.E.2d 1047, 766 N.Y.S.2d 654, (2003) [citations omitted]).

Prior to the enactment of Local Law 11-006, owners of real property zoned for industrial use in the City of Binghamton could have applied for a special use permit to engage in gas drilling, exploration or storage. Local Law 11-006 has eliminated the opportunity for these property owners to even apply for a special permit for such use; therefore, these property owners are unquestionably adversely affected by the enactment of Local Law 11-006.

Here, Petitioner **[**11]** Nelson Holdings Ltd. owns real property in the City of Binghamton that is zoned heavy industrial. Given the nature of the activities that are permitted in a heavy industrial zone, assuming DEC approval of gas exploration and extraction, Petitioner clearly would be eligible to apply to the zoning board of appeals for a special use permit to use its property for gas storage, exploration or extraction activities since these activities are similar to the already permitted uses under the zoning code. (See, Affidavit of Kenneth S. Kamlet, Esq., sworn to on July 26, 2012, and Petitioners' Opposition to Respondents' Memorandum of Law In Support of Motion to Dismiss, pages 13-15, which contains a chart showing the permitted uses that exist under the City of Binghamton's zoning regulations which are similar to the activities

prohibited by Local Law 11-006). Petitioner Nelson Holdings Ltd. has stated that it had intended to pursue this activity on its property, but due to the enactment of Local Law 11-006, it can no longer do so. Thus, on the facts as presented here, this Petitioner is being prevented from using its property for an activity that, in all likelihood, would have been a permitted **[**12]** use by special permit prior to the enactment of Local Law 11-006. This is real harm to this landowner. Thus, the Court finds that, at the very least, Nelson Holdings Ltd. has standing in this case.

Given that the Court has determined that Nelson Holdings Ltd. has standing, it is not necessary for the Court to reach the issue of whether any of the remaining Petitioners have standing.

Statute of Limitations

Challenges to the actions of agencies and officers of state and local government are **[***5]** brought through an Article 78 proceeding. (*Matter of Luczaj v. Bortnik*, 91 AD3d 872, 873, 937 N.Y.S.2d 277 (2nd Dept., 2012). An Article 78 must be commenced within 4 months of the action being challenged (CPLR 217(1)). When commenced in relation to the enactment of a law, it must be commenced within 4 months of when the law was enacted. *Id.*

Local Law 11-006 became effective when signed by the Mayor on December 22, 2011. Contrary to Petitioners' claims, their demand that the City Council and the Mayor refer the local law to the Broome County Planning Commission in accordance with GML §239-m does not extend the statute of limitations beyond April 22, 2012 (four months after the statute became effective). (*Matter of Stankavich v. Town of Duanesburg Planning Bd.*, 246 AD2d 891, 667 N.Y.S.2d 997 (3rd Dept., 1998), **[**13]** where petitioner did not contest the constitutionality or validity of the statute, the action had to be commenced as an Article 78 and, in that particular case, the statute of limitations was 30 days.). Since Petitioners did not file the Article 78 action within the four month time frame, it is barred by the statute of limitations.

That being said, however, the same limitation of time does not apply to the declaratory judgment part of the petition. As stated in *Bunis v. Conway*, 17 AD2d 207, 208, 234 N.Y.S.2d 435 (4th Dept., 1962), *app. denied*, 17 AD2d 1036, 235 N.Y.S.2d 831 (1962), *app. dismissed*, 12 NY2d 882, 188 N.E.2d 260, 237 N.Y.S.2d 993 (1963), and *app. dismissed*, 12 NY2d 645 (1963), "[i]t is the settled law that an action for a declaratory judgment will lie where a constitutional question is involved or the legality or meaning of a statute is in question and no question of fact is involved" (citations and quotations omitted). Generally, unless a different statute of limitations is specified, the statute of limitations for a declaratory judgment action is six years, (*Saratoga County Chamber of Commerce v. Pataki* at 815 *supra*). Thus, while it is true that a party cannot get the benefit of the longer statute of limitations by couching an Article 78 **[**14]** in terms of a declaratory judgment action (see, *People v. Thomas*, 47 AD3d 850, 850 N.Y.S.2d 530 (2nd Dept., 2008), *lv. to appeal denied* 10 NY3d 871, 890 N.E.2d 260, 860 N.Y.S.2d 497 (2008)), that is not what happened here.

Petitioners' request for a declaration that the statute is invalid because it is a moratorium that does not meet the legal requirements for a moratorium, is a proper question for a declaratory judgment action. Consequently, the declaratory judgment portion of Petitioners' petition falls within the statute of limitations.

Pre-Emption

Recently two cases have been decided regarding the pre-emption of local laws pertaining to gas explorations, storage and extraction. In those cases, the Honorable Phillip R. Rumsey in *Anschutz Exploration Corp. v. Town of Dryden*, 35 Misc 3d 450, 940 N.Y.S.2d 458, and the Honorable Donald F. Cerio, Jr. in ***Cooperstown Holstein Corp. v. Town of Middlefield, 35 Misc 3d 767, 943 N.Y.S.2d 722***, in well reasoned, well founded decisions, determined that ECL 23-0303(2) does not supersede local government's rights to regulate the use of the lands within their jurisdictions. This court adopts the reasoning of those cases and holds that Local Law 11-006 is not superseded by ECL 23-0303(2).

Moratorium

Whether or not **[**15]** Local Law 11-006 is a moratorium is the crux of this case. It is clear that **[***6]** a municipality can enact laws pursuant to its police powers to protect the health, safety and welfare of its citizens, and it does not have to do so through a zoning law. (*Matter of Pete Drown, Inc. v. Town of Ellenburg*, 188 AD2d 850, 591 N.Y.S.2d 584 (3rd Dept., 1992), where town enacted a local law prohibiting the operation of a commercial incinerator in the town, the court held that this local law was not a zoning law, rather, it had been enacted pursuant to the town's police powers. Further the town had no obligation to refer the local law to the planning board pursuant to GML 239-m; see also, *Gernatt Asphalt Prods. v. Town of Sardinia*, 87 NY2d 668, 684, 664 N.E.2d 1226, 642 N.Y.S.2d 164 (1996), "[a] municipality is not obliged to permit the exploitation of any and all natural resources within the town as a permitted use if limiting that use is a reasonable exercise of its police powers to prevent damage to the rights of others and to promote the interests of the community as a whole" [citations and quotations omitted]).

A municipality is allowed to enact a temporary "stop-gap" measure to ban a particular land use while the municipality is reviewing a comprehensive **[**16]** zoning law (*Matter of Lakeview Apts. Of Hunns Lake v. Town of Stanford*, 108 AD2d 914, 485 N.Y.S.2d 801 [2nd Dept., 1985], *appeal discontinued* 65 NY2d 925; *Matter of Mitchell v. Kemp*, 176 A.D.2d 859, 575 N.Y.S.2d 337 [2nd Dept., 1991]), or where there are new circumstances that need to be addressed by the municipality (*Land Use Moratoria*, James A Coon Local Government Technical Series, New York State Department of State, at pg. 1). Temporarily banning development or certain land uses is the hallmark of a moratorium. For the enactment of the moratorium to be upheld, the municipality must show that it's actions were:

1. in response to a dire necessity;

2. reasonably calculated to alleviate or prevent a crisis condition; and

3. that the municipality is presently taking steps to rectify the problem.

(See, *Matter of Belle Harbor Realty Corp. v. Kerr*, 35 NY2d 507, 512, 323 N.E.2d 697, 364 N.Y.S.2d 160, (1974) ". . . a municipality may not invoke its police powers solely as a pretext to assuage strident community opposition [it must meet the three requirements set forth above] . . . When the general police power is invoked under such circumstances it must be considered an emergency measure and is circumscribed by the exigencies of that emergency," see also, *Charles v. Diamond*, 41 NY2d 318, 360 N.E.2d 1295, 392 N.Y.S.2d 594 (1977); **[**17]** and *Land Use Moratoria*, pg. 3).

In the matter before this Court, Respondents have failed to provide any evidentiary proof that would provide a justification, based upon the health and safety of the community, for the banning of gas exploration, storage and extraction. Instead of proof, Respondents have produced only conclusions. Respondents have not explained how, if the activities that are banned by the law are such a grave threat, that threat will suddenly no longer exist on December 31, 2013 when the law expires. Respondents clearly are not relying on the anticipated regulations from the New York Stated Department of Environmental Conservation to alleviate any health and safety threats that may be posed by this activity, as this local law clearly states in its findings that regulations that relate to gas exploration and extraction are incapable of protecting the health and safety of the residents. The two year "sunset" renders Respondents' claims that the law is solely an exercise of their police powers illusory. This activity cannot be so detrimental that it must be banned, but only for two years, particularly when it is clear that the City is not engaging in any investigation, **[**18]** studies or other activities in the interim in order to determine if there is a way to alleviate any harm to the people of the city from this future activity. **[***7]**

Local Law 11-006's inclusion of a "sunset" provision leads to no other rational conclusion except

that this law is a moratorium. The City Council's bare conclusion in its Findings of Fact that this law was enacted pursuant to the police power cannot change the true character of this law. The comments made at the Binghamton City Council worksessions clearly show that even the drafters of the law believed it was a moratorium, as well as Corporation Council and some of the members of the council.

The Court recognizes that the issue of gas exploration, extraction and storage is a controversial issue currently being debated throughout the state, and that there may be fierce opposition to gas exploration, extraction and storage by some members of the community. However, the City cannot just invoke its police power solely as a means to satisfy certain segments of the community. Rather, the city must satisfy the well established legal requirements that show a dire emergency; that the moratorium is reasonably calculated to alleviate a crisis; **[**19]** and that they are taking steps to solve the problem. (*Matter of Belle Harbor Realty Corp. v. Kerr*, 35 NY2d *supra*).

In this case, there is no other conclusion that the Court can reach, however, than that Local Law 11-006, fails to meet the criteria for a properly enacted moratorium. First, there has been no showing of a dire need. There can be no showing of dire need since the New York State Department of Environmental Conservation has not yet published the new regulations that are required before any natural gas exploration or drilling can occur in this state. Since there are no regulations, no permits are being granted. Second, since the DEC is not yet issuing permits, there is also no crisis nor a crisis condition that could possibly be shown by the City at this time. Finally, the City clearly did not enact this law so that it could take steps to study or alleviate any problems that may be caused by gas drilling, exploration or storage. Consequently, the Court is constrained to hold that Local Law 11-006 is invalid.

Now, therefore, it is hereby

ORDERED AND ADJUDGED, that Respondents' motion to dismiss is granted to the extent that Petitioners' Article 78 cause of action is dismissed, **[**20]** and the motion is otherwise denied, and it is further

ORDERED AND ADJUDGED, that the petition and motion for summary judgment are granted to the extent that the court declares Local Law 11-006 invalid for the reasons stated herein.

This constitutes the order and judgment of the Court.

Dated: October 2, 2012

At Binghamton, New York

/s/ Ferrs D. Lebous

Hon. Ferris D. Lebous, J.S.C.

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637 F.3d 1366
United States Court of Appeals,
Federal Circuit.

ARKANSAS GAME & FISH COMMISSION,
Plaintiff–Cross Appellant,
v.
UNITED STATES, Defendant–Appellant.

Nos. 2009–5121, 2010–5029. | March 30, 2011.

Synopsis
Background: Arkansas Game and Fish Commission filed a physical takings claim against the United States in the Court of Federal Claims, alleging that the United States had taken its property without just compensation. The United States Court of Federal Claims, Charles F. Lettow, J., 87 Fed.Cl. 594, concluded that the United States had taken a temporary flowage easement over the Commission's property and awarded a total of $5,778,757.90 in damages, and government appealed.

[Holding:] The Court of Appeals, Dyk, Circuit Judge, held that deviations by the Army Corps of Engineers from an operating plan for dam, which caused increased flooding in state wildlife management area, were explicitly of a temporary nature, and therefore, could not be "inevitably recurring" or constitute the taking of a flowage easement.

Reversed.

Newman, Circuit Judge, filed dissenting opinion.

West Headnotes (3)

[1] **Eminent Domain**
Temporary Use

In general, if particular government action would constitute a taking when permanently continued, temporary action of the same nature may lead to a temporary takings claim. U.S.C.A. Const.Amend. 5.

3 Cases that cite this headnote

[2] **Eminent Domain**
What Constitutes a Taking; Police and Other Powers Distinguished

An injury that is only in its nature indirect and consequential, i.e. a tort, cannot be a taking. U.S.C.A. Const.Amend. 5.

3 Cases that cite this headnote

[3] **Eminent Domain**
Flooding

Deviations by the Army Corps of Engineers from an operating plan for dam, which caused increased flooding in state wildlife management area, were explicitly of a temporary nature, and therefore, could not be "inevitably recurring" or constitute the taking of a flowage easement. U.S.C.A. Const.Amend. 5.

2 Cases that cite this headnote

Attorneys and Law Firms

***1366** Julie D. Greathouse, Perkins & Trotter, PLLC, of Little Rock, Arkansas, argued for plaintiff-cross appellant. With her on the brief were James F. Goodhart and John P. Marks, Arkansas Game & Fish Commission, of Little Rock, Arkansas.

***1367** Robert J. Lundman, Attorney, Environment & Natural Resources Division, United States Department of Justice, of Washington, DC, argued for defendant-appellant. With him on the brief was Ignacia S.

Moreno, Assistant Attorney General.

Before NEWMAN and DYK, Circuit Judges, and WHYTE,* District Judge.

Opinion

Opinion of the court filed by Circuit Judge DYK. Dissenting opinion filed by Circuit Judge NEWMAN.

DYK, Circuit Judge.

The Arkansas Game and Fish Commission ("the Commission") filed a physical takings claim against the United States in the Court of Federal Claims ("Claims Court"), alleging that the United States had taken its property without just compensation. The Commission claimed that temporary deviations by the Army Corps of Engineers ("the Corps") from an operating plan for Clear-water Dam during the years 1993 to 2000 caused increased flooding in the Commission's Dave Donaldson Black River Wildlife Management Area ("Management Area"). This flooding, in turn, caused excessive timber mortality in the Management Area. The Claims Court concluded that the United States had taken a temporary flowage easement over the Commission's property and awarded a total of $5,778,757.90 in damages. *Ark. Game & Fish Comm'n v. United States,* 87 Fed.Cl. 594, 617, 647 (2009). Because we conclude that the Corps' deviations did not constitute a taking, we reverse.

BACKGROUND

The Commission owns the Management Area, which is located in northeast Arkansas and consists of 23,000 acres on both banks of the Black River. The Commission operates the Management Area as a wildlife and hunting preserve and harvests timber, thereafter reforesting the harvested areas. The Corps completed construction of the Clearwater Dam in 1948. The dam is located in southeast Missouri approximately 115 miles upstream of the Commission's Management Area. The reservoir created by the dam is called Clearwater Lake. The primary purpose of the dam was to provide flood protection.

A

Whenever the Corps constructs a dam, it adopts a water control plan reflected in a Water Control Manual. These water control plans detail release rates, safety features, and other operating instructions. They are required by Corps regulation. U.S. Army Corps of Engineers, Eng'r Reg. No. 1110–2–240, at 2 (Oct. 8, 1982) [hereinafter EM 1110–2–240]. The plans are developed by regional district commanders "in concert with all basin interests which are or could be impacted by or have an influence on project regulation" and then submitted to the Corps for approval. *Id.* at 3, 4.

This case concerns release rates from the dam established by the plan for Clearwater Dam and deviations from the planned rates. The purpose of regulating release rates is to control the flow of the Black River in order to reduce the adverse effects of flooding in downstream areas. The dam cannot be operated in a manner that completely eliminates flooding because water must be released from the ***1368** dam, and the released water will, to some extent, cause flooding. If the release rates are lower, the height of the flooding is decreased but the period of flooding is increased. If the release rates are higher, the height of the flooding is increased but the period of flooding is decreased. Apparently, agricultural interests favored a lower release rate even though this would lead to longer periods of flooding, while the Commission and those located near Clearwater Lake preferred a higher release rate to return the lake to its normal level more quickly. As will be seen, the claim here is that the Commission's property was damaged by the temporary adoption of a lower release rate during the growing season, prolonging the release period and damaging trees.

In order to understand the parties' respective positions, it is necessary to describe the background of the 1953 plan and the deviations from that plan that are challenged here. The plan for Clearwater Dam was developed over a period of several years and was finally adopted as part of the Clearwater Lake Water Control Manual in 1953. After the Corps completed construction of Clearwater Dam in 1948, it experimented with release levels for five years. Releases were measured by the maximum height of the water at the Poplar Bluff Gauge in the Black River, which is downstream of the dam but upstream of the

Management Area. The first maximum levels at Poplar Bluff during this early period were 12 feet during agricultural season and 14 feet during non-growing season. The Corps concluded that "operating experience" showed these high releases negatively affected too many downstream areas. J.A. 9865. Therefore, in 1950, the Corps reduced the maximum release levels to 10.5 feet during growing season and 11.5 feet during non-growing season. After three years during which "no consistent problems [were] encountered," the Corps approved the first Clearwater Lake Water Control Manual in 1953.[1] J.A. 9865. Under the Manual's "normal regulation," releases were regulated so that the water height at Poplar Bluff did not exceed 10.5 feet during growing season and 11.5 feet during non-growing season. The maximum release levels at Poplar Bluff allowed for the quick release of water during the growing season, so flooding occurred in short-term waves rather than over extended periods. The Manual's normal regulation somewhat mimicked the natural flooding patterns in the region. During the 1993–2000 period, the Manual's "normal regulation" releases were the same as under the original 1953 plan.

The Clearwater Lake Manual allowed for deviations from the "normal regulation" releases for (1) emergencies, (2) "unplanned minor deviations," such as for construction or maintenance, and (3) "planned deviations" requested for agricultural, recreational, and other purposes. J.A. 9907–08. The deviations in question here fell into the latter category. According to the Manual, the Corps was "occasionally requested to deviate from normal regulation." *Id.* at 9907. Planned deviations had to be approved by the Corps' Southwestern Division, which was required to consider "flood potential, lake and watershed conditions, possible alternative measures, benefits to be expected, and probable ***1369** effects on other authorized and useful purposes." *Id.* As described in the Manual, these requests were for specific activities that required deviations only for limited periods of time, such as the harvesting of crops, canoe races, and fish spawning. Therefore, the approved deviations were by their nature temporary.

The temporary deviations here began in 1993, forty years after the adoption of the Water Control Manual.[2] In 1993, the Corps approved a "planned deviation" from the Water Control Manual's approved releases for a three month period from September 29 to December 15, 1993, lowering the maximum release level to six feet at the request of agricultural interests that desired slower releases to "allow[ ] farmers more time to harvest their crops." J.A. 8237–38. No permanent change was made to the Water Control Manual at that time. But in the same year, the Corps fostered creation of the White River Ad Hoc Work Group ("White River Group") to "recommend minor changes to the approved regulating plan[s]" for dams across the White River Basin, which included Clearwater Dam. *Id.* at 8242. In other words, the White River Group was to propose permanent changes to approved plans, including the Clearwater Lake Water Control Manual.

The Corps' regulations provided that water control plans "will be revised as necessary to conform with changing requirements resulting from [new] developments." ER 1110–2–240 at 2. The regulations also required that "plans will be subject to continuing and progressive study by personnel in field offices of the Corps." *Id.* Substantive revisions "require[d] public involvement and public meetings," and the Corps was required to provide a report to the public at least 30 days before the meeting "explain[ing] the recommended ... change ... explaining the basis for the recommendation ... [and providing] a description of its impacts." *Id.* at 4a. Moreover, in making revisions, the Corps was also required to "comply with existing Federal regulations," such as the National Environmental Policy Act ("NEPA"). *Id.* at 2, A–1.

The White River Group included private recreational, agricultural, navigational, and hydropower interests, as well as state and federal agencies such as the Commission. The Commission objected to deviations from the approved water releases in the 1953 plan that would lower the release rates because such deviations would prolong the release period. The lower maximum release rates meant that water would evacuate from Clearwater Dam more slowly, causing consistent downstream flooding in the Management Area during the tree growing season. (The tree growing season lasts, on average, from April 4 to October 11 each year, and the "critical months" are June, July, and August.) Higher maximum release rates, on the other hand, would result in short-term waves of flooding that would quickly recede. The Commission specifically complained that the lake was 530 feet deep on April 15, 1994, and that, at the lower maximum rates, it took sixty days of constant releases for the lake to reach its targeted summertime level, flooding the Management Area for most of that two-month period.

In 1994, the White River Group, unable to recommend permanent revisions to the release plan, proposed a year

"interim operating plan" that called for temporary ***1370** deviations during an eight month period. J.A. 8244. The Corps approved "the proposed interim operating plan" as a deviation from April 1994 through April 1995, allowing deviations from the normal release rates from April through November. *Id.* at 8241. The plan set the maximum target level at 11.5, instead of 10.5 feet, for the first two weeks in April and then set the maximum level at 8 feet for the next month and 6 feet from mid-May through November. In February 1995, when the White River Group again proved unable to propose a final plan, the Corps approved an extension of the "interim operating plan ... to continue as a deviation" for another 12 months through April 1996, allowing deviations from April to November. *Id.* at 8251. The Corps noted that it would "monitor the effectiveness of the interim operating plan" during that period. *Id.*

In February 1996, the White River Group formed a subcommittee of solely Black River interests ("the Black River Group"), including the Commission, to recommend a plan for Clearwater Dam. The Black River Group also could not reach consensus on a proposed permanent deviation plan for Clearwater Dam. Instead, the Corps approved a new "Interim Operating Plan" proposed by the Black River Group for Clearwater Dam for another 12 months through April 15, 1997, with deviations occurring April through November. The Corps said it would "continue to monitor the effectiveness" of both the White River and Black River "interim operating plans." *Id.* at 8254. The new Black River Group interim plan differed from the prior interim plan recommended by the White River Group. It set the release rate at 6 feet in June and at 5 feet from July through November. This interim plan lapsed in April 1997, and no new interim plan was immediately adopted, leaving the 1953 Manual release rates in place. The Corps did, however, approve a temporary planned deviation in accordance with the Manual from June 3, 1997, to July 5, 1997, to prevent possible flooding and another temporary planned deviation from June 11, 1998, to November 30, 1998, in response to a request from agricultural interests.

The White River Group disbanded in 1997 when it recommended a final plan for the rest of the White River Basin, but the Black River Group continued to work on a plan for Clearwater Dam. The Black River Group finally recommended a proposed plan on September 15, 1998, and that plan was approved as a temporary deviation for 13 months from December 1, 1998, to December 31, 1999, with deviations occurring during the entire 13 month period. This proposed plan also differed from the interim plans approved in prior years, setting the maximum level at 4 feet from mid-May through November but increasing the maximum level if the lake behind Clearwater Dam filled to a certain volume.

In 1999, the Corps began the process of adopting a revised permanent release plan for Clearwater Dam. In keeping with federal regulations, the Corps prepared an Environmental Assessment ("EA"). An EA is a brief report, without detailed descriptions or data, indicating possible environmental consequences that can help determine whether a more extensive Environmental Impact Statement ("EIS") is necessary pursuant to NEPA. An EIS is necessary where there is a possibility of significant environmental impacts. In comments made on the draft EA, the Commission objected to the proposed changes to the Water Control Manual. The Corps agreed that the proposed revision would require an EIS under NEPA.

Meanwhile, the Corps approved the continuation of the 1999 deviations for 11 ***1371** months through December 1, 2000, as "a temporary Water Control Plan." J.A. 8294. In May 2000 and March 2001, the Corps and Commission together conducted tests to determine the environmental impact on the Management Area when certain levels of water were released from Clearwater Dam. In doing so, the Corps confirmed that tree roots would be flooded under the proposed plan, which could potentially damage or destroy the trees. Therefore, the Corps declined to further pursue a permanent revision to the 1953 Water Control Manual and returned to the releases set out in the original Manual.

In sum, after approving a planned deviation in 1993, the Corps approved three different interim deviation plans with different release rates during the period from 1994–2000. During some portions of that period no interim plan was in place. When temporary plans were in place, for all but two years (1999 and 2000), the release rates deviated from the 1953 plan during only part of the year, usually April through November. During this entire 1994–2000 period, efforts were made to propose a permanent amendment to the 1953 plan, but no permanent revision to the plan was ever adopted. The effort was finally abandoned in 2001, and the un-amended 1953 plan continued to govern. The chart below summarizes the details of these temporary deviation plans.[3]

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In 2005, the Commission brought suit against the United States under the Tucker Act, 28 U.S.C. § 1491, claiming that the temporary release rate deviations during the 1993–2000 period constituted a taking of a flowage easement entitling the Commission to compensation. The Commission alleged that the deviations caused repeated increased flooding and damaged and destroyed timber in the Management Area. The United States denied that a taking had occurred. The United States argued that any increased flooding was only temporary and constituted, if anything, a tort rather than a taking. The United States also argued that the damage was not substantial enough to constitute a taking and that the effects in any event were not predictable, again defeating a takings claim.

A hearing was held before the Claims Court from December 1, 2008, to December 12, 2008, in which eighteen witnesses testified. In addition to addressing the nature of the deviations from the 1953 plan (described above), the hearing addressed two other issues: the substantiality of the flooding and the predictability of the alleged damage.

With respect to the substantiality of the flooding, the Commission's testimony showed that the Management Area flooded regularly during the 1993–2000 period, including during the tree growing season. The presence of standing water or saturated soil during tree growing season can weaken the roots of the multiple species of oak trees located in the Management Area, which can also render the oaks more susceptible to drought conditions.

The flooding was not consistent from year to year. The parties' experts disagreed as to the amount of increased flooding. Two experts for the Commission, Drs. Heitmeyer and Overton, testified about the extent of the increased flooding. Both used the height of the Corning water gauge along the Black River (downstream of the Poplar Bluff gauge) as a proxy for when flooding occurred, observing that flooding occurred when the Corning gauge reading was over 5 feet. Dr. Heitmeyer reported that the gauge exceeded 5 feet (the level at which flooding occurred) during the tree growing season about 29 more days per year from 1993–1999 than from 1949–1992. Dr. Overton compared the gauge readings from 1981–1992 to the readings from 1993–1999. He explained that the Corning gauge reached a level where substantial flooding occurred (between 8 and 10.5 feet) an average of 24 more days per year during the tree growing season from 1993–1999 than from ***1373** 1981–1992. Dr. Overton's data also indicated that flooding occurred in the Management Area an average of 8.5 more days per year from 1993–1999 during the "critical" tree growing period of June to August.

During 1999 and 2000, the region suffered a moderate drought. Therefore, according to both the United States and the Commission, the deviations during 1999 and 2000 did not have much practical effect because the water flow was low and did not cause flooding. However, the Commission witnesses testified that drought conditions increased tree mortality in the Management Area. Trees weakened by six years of additional flooding during the tree growing season could not survive the drought.

The final question addressed at the hearing was the predictability of the results following the government's actions. The Claims Court found that the Corps was unaware in 1993 that deviations would cause additional flooding in the Management Area. Indeed, one Corps official testified that the Corps believed the downstream effect of the deviations would diminish before the water reached Arkansas. However, the Commission sent repeated letters to the Corps claiming that the ongoing deviations were causing additional flooding in the Management Area and also raised its concerns in the White River Group and Black River Group meetings. Still, in its 1999 draft EA, the Corps would have found "no significant impact" based on the proposed revisions to the plan. The Corps only changed its mind about the effects of the deviations after conducting the May 2000 and March 2001 test releases with the Commission which confirmed the possible adverse impacts on the Management Area and led the Corps to return to the release rates in the original 1953 plan.

The parties also disputed the issue of causation and the amount of damage caused by the flooding. The Commission's expert testified that half of the damaged trees would die within five years and the living damaged trees were worth half of their original value. The United States argued that this testimony was inadmissible because so-called cruise maps on which the testimony was based had been destroyed and that the expert evidence in any event used unreliable guesses and was inadmissible under the Federal Rules of Evidence and *Daubert v. Merrell Dow Pharmaceuticals., Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993). The Commission also sought regeneration costs to restore areas suffering from invasions of new wetland vegetation

to their pre-deviation condition. The United States contended that the Commission failed to prove the United States' actions resulted in the devaluation from invasive growth and, even if it did, the damages were only consequential.

C

The Claims Court concluded that the deviations from the 1953 Water Control Manual were "interim deviations" that were "approved at various times from 1993 to 2000." 87 Fed.Cl. at 603. The court also found that:

> "Certainly no *permanent* flowage easement in the Management Area was taken by the flooding attributable to the Corps' deviations from the operating Plan for Clearwater Dam.... [A] *temporary* flowage easement is a necessary foundation for the Commission's takings claim, as has always been evident from the Commission's pleadings and proofs."

***1374** *Id.* at 617 (emphasis in original); *see also id.* at 619–20 (finding appropriation was "temporary rather than permanent"). The court concluded that a takings claim could be based on such a temporary activity. *Id.* at 618.

The Claims Court relied on the observations by Drs. Heitmeyer and Overton and determined that the deviations caused a substantial enough increase in flooding to constitute the taking of a flowage easement. It also held that the flooding was the predictable result of government action because with any "reasonable investigation of the effects of the deviations ... it would have been able to predict" that the deviations would cause flooding and damage timber in the Management Area. 87 Fed.Cl. at 623. The Claims Court also concluded that the increased tree growing season flooding caused increased timber mortality in the Management Area, and therefore awarded damages based on the loss of timber and regeneration costs for some areas that had been inundated by new wetland vegetation. The Claims Court awarded $5.5 million in damages for dead or declining timber, relying on the Commission expert's testimony about the value of the trees.[5] It also awarded $176,428.34 in damages for regeneration costs, but it granted damages only for areas classified as having suffered "severe" rather than "heavy" or "moderate" effects.

The United States appealed, contending that no taking had occurred, and that if it had, the damages were overstated. The Commission cross-appealed, contending that the Claims Court should have awarded additional damages for regeneration. We have jurisdiction pursuant to 28 U.S.C. § 1295(a)(3).

DISCUSSION

Determining whether a taking has occurred is a "question of law based on factual underpinnings," and as such, we review the Claims Court's legal analysis and conclusion de novo and its factual findings for clear error. *See Ridge Line, Inc. v. United States,* 346 F.3d 1346, 1352 (Fed.Cir.2003).

I

[1] [2] In general, if particular government action would constitute a taking when permanently continued, temporary action of the same nature may lead to a temporary takings claim. *See First English Evangelical Lutheran Church of Glendale v. Cnty. of Los Angeles,* 482 U.S. 304, 328, 107 S.Ct. 2378, 96 L.Ed.2d 250 (1987). However, cases involving flooding and flow-age easements are different. Both Supreme Court precedent and our own precedent dictate that we must distinguish between a tort and a taking. An injury that is only "in its nature indirect and consequential," i.e. a tort, cannot be a taking. *Sanguinetti v. United States,* 264 U.S. 146, 150, 44 S.Ct. 264, 68 L.Ed. 608 (1924). The Supreme Court has long recognized that to be considered a taking overflows must "*constitute an actual, permanent invasion of the land,* amounting to an appropriation of *and not merely an injury to the property.*" *Id.* at 149, 44 S.Ct. 264 (emphases added). The Court has stated that an invasion is permanent when there is a "permanent condition of continual overflow" or "a permanent liability to intermittent but inevitably recurring overflows." ***1375** *United States v. Cress,* 243 U.S. 316, 328, 37 S.Ct. 380, 61 L.Ed. 746 (1917); *see also United States v. Kansas City Life Ins. Co.,* 339 U.S. 799, 810 n. 8, 70 S.Ct. 885, 94

L.Ed. 1277 (1950) (quoting *Cress* and finding a taking where the plaintiff's land was "permanently invaded by the percolation of ... waters").

In *Cress,* the Court found a taking where the erection of a lock and dam on the Cumberland River "subject[ed] [the plaintiffs land] to frequent overflows of water." *Cress,* 243 U.S. at 318, 37 S.Ct. 380. The Court explained that these intermittent overflows showed "that this [was] not a case of temporary flooding or consequential injury," where takings liability would be denied, "but [instead] a *permanent condition,* resulting from the erection of the lock and dam." *Id.* at 327, 37 S.Ct. 380 (emphasis added). It further stated that there was "no difference of kind ... between a permanent condition of continual overflow [which had previously been found to constitute a taking] ... and a *permanent liability* to intermittent but inevitably recurring overflows." *Id.* at 328, 37 S.Ct. 380 (emphasis added).

In *United States v. Dickinson,* 331 U.S. 745, 746–47, 67 S.Ct. 1382, 91 L.Ed. 1789 (1947), the Court also found a taking based on a permanent condition. In *Dickinson,* the United States constructed a dam, and the "water above the dam was ... impounded to create a deeper channel," thereby permanently raising the river level, "permanently flood[ing]" some of the adjacent land, and subjecting more of it to intermittent overflows. *Id.* at 746–47, 67 S.Ct. 1382. Even though Dickinson later "reclaimed most of his land which the Government originally took by flooding," the Court found that the reclamation did not "change[ ] the fact that the land was taken [in the first place] ... and an obligation to pay for it then arose." *Id.* at 751, 67 S.Ct. 1382. The nature of the government's action remained permanent, even though the reclamation had mitigated some of the effects. Again, the Court distinguished between invasions that were permanent or temporary in character. Summarizing these cases, in *Loretto v. Teleprompter Manhattan CATV Corp.,* 458 U.S. 419, 428, 102 S.Ct. 3164, 73 L.Ed.2d 868 (1982), the Supreme Court noted that it has "consistently distinguished between flooding cases involving a permanent physical occupation, on the one hand, and cases involving a more temporary invasion ... that causes consequential damages within, on the other."

Numerous cases from our predecessor court have similarly held that inherently temporary conditions cannot result in the taking of a flowage easement. *See Barnes v. United States,* 538 F.2d 865, 870 (Ct.Cl.1976); *Nat'l By–Products, Inc. v. United States,* 405 F.2d 1256, 1273 (Ct.Cl.1969); *Fromme v. United States,* 412 F.2d 1192, 1197 (Ct.Cl.1969). "The plaintiff must establish that flooding will 'inevitably recur,' in the phrasing of the *Cress* case." *National By–Products,* 405 F.2d at 1273. "[G]overnment-induced flooding not proved to be inevitably recurring occupies the category of mere consequential injury, or tort." *Barnes,* 538 F.2d at 870.

The Commission argues that under our decision in *Ridge Line* a permanent invasion is not required and that appropriation of a "temporary flowage easement" is sufficient. Commission's Br. 39. This argument is without support. A panel decision of this court cannot, of course, overturn Supreme Court precedent or our precedent. In any event, we did not purport to do so in *Ridge Line.* The case involved a permanent condition—runoff caused by ***1376** the construction of a postal facility.[6] As such, we had no reason to address whether an inherently temporary condition could be considered a taking. The holding in *Ridge Line* is fully consistent with the *Cress* case's emphasis on the "inevitably recurring" nature of intermittent flooding.

In *Ridge Line* we noted that the Claims Court had erred in "confin[ing] its analysis of liability to whether the government's actions constituted a permanent and exclusive occupation." 346 F.3d at 1352, 1354 (internal quotation omitted). We concluded that "permanent destruction or exclusive occupation by government runoff is not always required for a successful taking [ ]." *Id.* at 1354. In other words, we explained, the "occupation" need not be exclusive and the destruction need not be "permanent." *Id.* at 1352. "[I]ntermittent flooding of private land can constitute a taking of an easement." *Id.* at 1354. Thus, we confirmed that intermittent but inevitably recurring flooding could constitute a taking and that continuous inundation was not required. *Id.* at 1357. But, citing *Barnes,* we noted that "government-induced flooding not proved to be inevitably recurring occupies the category of mere consequential injury, or tort." *Id.* at 1355 (quoting *Barnes,* 538 F.2d at 870). The condition leading to the "intermittent, but inevitably recurring" flooding, *id.* at 1357, must be permanent. Otherwise, it could not be "inevitably recurring."

Ridge Line also clarified that, in distinguishing between a tort and a taking, courts must additionally consider 1) whether "the government's actions were sufficiently substantial to justify a takings remedy" and 2) whether the harm suffered by the plaintiff was "the predictable result of the government's action." 346 F.3d at 1355, 1356. The

Ridge Line court relied on *Sanguinetti,* where the Supreme Court found no taking in that case because it was unclear whether any substantial additional flooding actually occurred and whether the overflow was "the direct result of the [canal]" and thus would be reasonably anticipated by the government. 264 U.S. at 149, 44 S.Ct. 264. Similarly, in *John Horstmann Co. v. United States,* 257 U.S. 138, 146, 42 S.Ct. 58, 66 L.Ed. 171 (1921), the Supreme Court found no taking where flooding was caused by the movement of underground percolating waters "which no human knowledge could even predict."

[3] The parties in this case vigorously dispute whether the extent and frequency of flooding satisfied the substantiality requirement and whether it was predictable. However, we need not decide whether the flooding on the Management Area was "sufficiently substantial to justify a takings remedy" or "the predictable result of the government's action," *Ridge Line,* 346 F.3d at 1355, 1356, because the deviations were by their very nature temporary and, therefore, cannot be "inevitably recurring" or constitute the taking of a flowage easement. For this reason, we also need not address the parties' dispute as to the calculation of damages.

II

Most government-induced flooding cases involve overflows caused by permanent structures or improvements, such as dams, canals, or levees. *See, e.g., Dickinson,* 331 U.S. at 746–47, 67 S.Ct. 1382 (involving the ***1377** construction of a dam and the resulting rise in the river level); *Sanguinetti,* 264 U.S. at 147, 44 S.Ct. 264 (involving a canal insufficient to carry away flood waters); *Cress,* 243 U.S. at 327, 37 S.Ct. 380 (involving erection of a lock and dam); *Ridge Line,* 346 F.3d at 1351 (involving runoff caused by construction of Post Office facility); *Nat'l By–Products,* 405 F.2d at 1259–61 (involving a levee built on one side of a creek without a corresponding levee on the other side). Permanent conditions often, but not always, yield inevitably recurring flooding. *Compare Cress,* 243 U.S. at 327, 37 S.Ct. 380 (finding inevitably recurring flooding), *with National By–Products,* 405 F.2d at 1274–75 (finding no taking because plaintiffs did not prove floods caused by levees would inevitably recur).

As with structural cases, in determining whether a governmental decision to release water from a dam can result in a taking, we must distinguish between action which is by its nature temporary and that which is permanent. But in distinguishing between temporary and permanent action, we do not focus on a structure and its consequence. Rather we must focus on whether the government flood control policy was a permanent or temporary policy. Releases that are ad hoc or temporary cannot, by their very nature, be inevitably recurring.

The Commission's entire theory is contrary to governing law. The Commission does not contend that the deviations from the 1953 plan and the resulting flooding were inevitably recurring. Rather, the Commission contends that temporary deviations are sufficient. In its brief, it contended "that [the fact that] the Corps eventually stopped [the] deviations only render[ed] the taking temporary," Commission's Br. 41, and therefore claims "the [United States] appropriated a *temporary* flowage easement for which it must pay," *id.* at 39 (emphasis added). At oral argument, the Commission similarly argued that it "do[es] not think the law requires [the deviations] to be permanent or that the government intended ... to make [them] permanent." Oral arg. at 18:17–18:25, *available at* http://www.cafc.uscourts.gov/. It argued again that "the fact that ... the United States abandoned its easement only makes [the taking] temporary." *Id.* at 20:33–20:41.

The Commission's concession that the government action was temporary in nature is fully consistent with the established facts. The undisputed facts are clear that the governmental action was designed to be temporary and that the Corps never approved a permanent change in the pre-existing flow rates. As discussed above, all of the deviations from 1993 to 2000 were approved only as temporary or interim deviations. The multiple interim plans differed. Even where deviations were the same in consecutive years, such as in 1994 and 1995, the Corps had to approve an extension of the interim deviation plan for the second year.

The Commission itself similarly referred to the deviations as temporary or interim. During oral argument, the Commission noted that when deviations first began they were temporary and made in response to particular requests by specific interests and that the permanent revisions to the plan were never approved. Moreover, in an internal memorandum summarizing the first meeting of the Black River Group in 1996, a Commission official described the 1994–1995 deviations as "a temporary

interim plan." J.A. 9145. In a later memorandum, a second Commission official acknowledged that "[d]uring the ***1378** years [ ] 95, 96, and 97[,] the so-called interim plan was tried." *Id.* at 2434. Martin Blaney, the Commission's Statewide Habitat Coordinator, testified at trial that an "interim plan" had been used from 1998–2000. *Id.* at 1811. Similarly, Robert Zachary, the Wildlife Supervisor for the Commission, testified that the Corps' "interim plan of operation" caused tree growing season flooding in 1996. *Id.* at 1687.

Therefore, the numerous deviation plans were inherently temporary, and the Corps, despite considering permanent revisions in 1999, never approved any of the deviations as a permanent policy. In order to make any *permanent* change to the release rates, Corps regulations required compliance with federal regulations. The Corps did not even begin the EA or EIS necessary to comply with NEPA until 1999, and it never completed the necessary steps to implement a permanent revision of the Water Control Plan. As such, the plaintiffs have not met their burden to prove that the increased flooding would be "inevitably recurring" because the deviations were explicitly temporary.

Binding decisions of the Court of Claims, our predecessor court, in *Barnes* and *Fromme* found no taking under similar circumstances. In *Barnes,* the Fort Randall Dam was constructed in 1952, and the government began to release water "to evacuate the excess water accumulation caused by rains and melting snows" in 1969. 538 F.2d at 868. The releases caused intermittent flooding from 1969–1973 and again beginning in 1975. *Id.* at 868–69, 872. Noting that "the flooding [was] of a type which will be inevitably recurring," *id.* at 872, the court determined that a taking had occurred but held that it did not occur until "the permanent character of intermittent flooding could fairly be perceived" in 1973, *id.* at 873. Consequently, it did not allow the plaintiffs to recover for crop damage sustained from 1969–1973 because it was not obvious that the releases and the flooding would be permanent until 1973. *Id.*

In *Fromme,* the Corps constructed a channel and levee near the plaintiff's property. 412 F.2d at 1194. During construction of this project, from 1965–1967, the defendant maintained a "temporary spoil bank," which caused the plaintiff's land to flood "for a substantially longer time than would have been the case if the spoil bank and partially completed levee had not been in existence." *Id.* at 1195. The court held that no taking occurred during the 1965–1967 period because the spoil bank only "represented a temporary situation," and the channel would not lead to the "inevitably recurring floodings which the Supreme Court [had] stressed ... in *Cress.*" *Id.* at 1196–97. Hence, both *Barnes* and *Fromme* indicate that flooding must be a permanent or inevitably recurring condition, rather than an inherently temporary situation, to constitute the taking of a flowage easement.[7]

Because the deviations from the 1953 plan were only temporary, they cannot ***1379** constitute a taking. The actions at most created tort liability. We recognize that in other contexts the distinction between a temporary and permanent release plan may be difficult to define. The government cannot, of course, avoid takings liability by characterizing inevitably recurring events as merely a series of temporary decisions. Here, however, the Corps' regulatory scheme has itself clearly distinguished between permanent and temporary release rates. The deviations in question were plainly temporary and the Corps eventually reverted to the permanent plan. Under such circumstances, the releases cannot be characterized as inevitably recurring.

III

For the foregoing reasons, we reverse the Claims Court's decision that the United States had taken a flowage easement on the Commission's land without just compensation.

REVERSED.

COSTS

No costs.

NEWMAN, Circuit Judge, dissenting.

The Court of Federal Claims found that the six years of improper government induced flooding caused substantial damage to the Donaldson Black River Wildlife Management Area. The flooding resulted from deviations from the agreed water release schedule of the Clearwater

Dam Water Control Manual, which schedule had been in place since 1953 and had operated, without injury to the preserve, until the Army Corps of Engineers decided to depart from the Manual and to provide increased flooding from 1993 through 2000. The Arkansas Commission raised strong objections, but the increased flooding was not abated. The Court of Federal Claims found, and my colleagues on this panel do not dispute, that the destruction of valuable hardwood and other injurious changes in the Arkansas preserve were due to these extensive improper flooding activities.

After the continuing protests by the Commission, the Corps of Engineers finally came to investigate in March 2001 and immediately ceased the increased flooding, stating that there was "clear potential for damage to bottomland hardwoods." Transcript of Colonel Holden's Remarks to the Black River Operations Public Meetings, April 25 and 26, 2001. J.A. 9802. However, the damage had already been done.

The Court of Federal Claims, after a two-week trial including eighteen witnesses, documentary evidence, and an actual site visit, held that a taking of property had occurred in terms of the Fifth ***1380** Amendment, and awarded damages for the losses incurred.[1] My colleagues on this panel now conclude that no taking occurred and no liability ensued, giving the reason that the Corps eventually abated its destructive flooding. In so ruling, the court departs from constitutional right and well-established precedent. I respectfully dissent.

DISCUSSION

This Wildlife Management Area spans approximately 23,000 acres along the banks of the Black River in north-eastern Arkansas. The Management Area serves as a hardwood timber resource with systematic harvests of mature oak, and also provides habitat for migrating water-fowl and serves as a hunting preserve. The Water Control Plan for Clearwater Dam had been in place for forty years; the water-release plan had been devised after five years of experimental study and interaction of all the interests served by these waters, and served these interests well, until 1993, when the Corps of Engineers began to deviate from the authorized Plan. The Commission repeatedly complained to the Corps that the deviations were causing extensive flooding that was damaging the bottomland hardwoods and other aspects of the Wildlife Management Area. The Corps did not investigate until 2001, when it confirmed the Commission's concerns and returned to the authorized Water Control Plan.

The floodings drove the hardwood ecosystem to a state of collapse, killing most of the red oaks and many white oaks. Although bottomland ecosystems exist with naturally-occurring seasonal flooding and other climate variations, the nuttall oak and overcup oak, in particular, could not tolerate this artificial flood regime that covered the trees' root systems for extended unnatural periods during the growing season, for six consecutive years. The record states that the increased releases in 1999 and 2000 were less injurious because there was a drought, but the damage had already been done.

The Court of Federal Claims found that the government was responsible for the flooding and the injury caused thereby, that "the damage done to the Commission's property interest in its timber was permanent rather than temporary," and that "the government's superinduced flows so profoundly disrupted certain regions of the Management Area that the Commission could no longer use those regions for their intended purposes, *i.e.,* providing habitat for wildlife and timber for harvest." 87 Fed.Cl. at 620. The court found that "the Corps of Engineers had been repeatedly warned by members of the Commission," and that "the effect of deviations in the Management Area was predictable, using readily available resources and hydrologic skills." *Id.* at 622–23. My colleagues do not dispute these findings. Instead, my colleagues rule that no property interest was taken in Fifth Amendment terms, on the theory that "[b]ecause the deviations from the 1953 plan were only temporary, they cannot constitute a taking." Maj. op. at 1378. This conclusion, and the reasoning on which it is based, diverge from constitutional precedent, and contravene the large body of decisions arising from government operations involving water management.

Government-induced flooding is a recognized physical intrusion. The Court has "long considered a physical intrusion by ***1381** government to be a property restriction of an unusually serious character for purposes of the Takings Clause." *Loretto v. Teleprompter Manhattan CATV Corp.,* 458 U.S. 419, 426, 102 S.Ct. 3164, 73 L.Ed.2d 868 (1982). In *Loretto* the Court cited flooding cases to illustrate the constitutional treatment of temporary intrusions, observing that they are subject to a "complex balancing process," *id.* at 436 n. 12, 102 S.Ct.

3164. Applying this balancing process to floodings, the courts have recognized that "isolated invasions, such as one or two floodings ..., do not make a taking ..., but repeated invasions of the same type have often been held to result in an involuntary servitude." *Ridge Line, Inc. v. United States,* 346 F.3d 1346, 1357 (Fed.Cir.2003) (quoting *Eyherabide v. United States,* 345 F.2d 565, 569 (Ct.Cl.1965)). When the invasion "preempt[s] the owner's right to enjoy his property for an extended period of time," the principles of constitutional deprivation of property apply. *Id.* at 1356.

Precedent well establishes that when property "is actually invaded by superinduced additions of water ... so as to effectively destroy or impair its usefulness, it is a taking within the meaning of the Constitution." *Pumpelly v. Green Bay Co.,* 80 U.S. 166, 181, 13 Wall. 166, 20 L.Ed. 557 (1872). Precedent does not require constant or permanent flooding, and eventual abatement of the flooding does not defeat entitlement to just compensation; the specific facts must be considered, as for any invasion of property. *See, e.g., United States v. Dickinson,* 331 U.S. 745, 751, 67 S.Ct. 1382, 91 L.Ed. 1789 (1947) (finding a taking although the plaintiff reclaimed most of the land that the government had flooded); *United States v. Cress,* 243 U.S. 316, 328, 37 S.Ct. 380, 61 L.Ed. 746 (1917) (a taking occurred where the erection of a lock and dam subjected the plaintiff's land to frequent overflows of water that were intermittent but recurring); *Ridge Line,* 346 F.3d at 1354–1355 (finding that there may be a taking although the property owner had constructed water detention facilities that abated the flooding); *Cooper v. United States,* 827 F.2d 762 (Fed.Cir.1987) (finding a taking where flooding was remedied by the Corps after five years); *Barnes v. United States,* 538 F.2d 865, 869, 872 (Ct.Cl.1976) (finding a taking where a government dam caused parts of the plaintiffs land to be subject to additional intermittent flooding, reducing crop yields); *Eyherabide,* 345 F.2d at 570 ("The measure of plaintiffs' recovery is for the temporary taking (from 1954 through 1959)," when the plaintiff's land was subject to intermittent physical invasions during that period.).

In turn, short duration floods have been held not to constitute a taking. *See, e.g., Hartwig v. United States,* 485 F.2d 615, 620 (Ct.Cl.1973) ("The principle may be reduced to the simple expression: One flooding does not constitute a taking."). As another example, the flooding in *National By-Products, Inc. v. United States,* 405 F.2d 1256, 1257 (Ct.Cl.1969), lasted for only two months, and the court held that the event did not rise to the level of a taking. Also, on facts where the flooding did not produce extensive or permanent damage, a taking did not occur, as in *Sanguinetti v. United States,* 264 U.S. 146, 149–50, 44 S.Ct. 264, 68 L.Ed. 608 (1924) ("Prior to the construction of the canal the land had been subject to the same periodical overflow.... If there was any permanent impairment of value, the extent of it does not appear. It was not shown that the overflow was the direct or necessary result of the structure; nor that it was within the contemplation of or reasonably to be anticipated by the Government.").

***1382** When the plaintiff actually benefitted from the government operation, no taking was found, as in *Fromme v. United States,* 412 F.2d 1192 (Ct.Cl.1969), where construction of a channel caused two years of flooding that left part of the plaintiff's land in a boggy and weedy condition, a condition that was expected to disappear within two to three years. Citing evidence that the land had previously been subject to occasional flooding, and that the new channel was "very beneficial to the plaintiff in connection with the development of an extensive and valuable deposit of sand and gravel in her land," the court concluded that "the evidence in the record fails to show a taking." *Id.* at 1194–97.

Precedent recognizes that the flood-induced destruction of timber is permanent injury, and is compensable within the meaning of the Fifth Amendment. On facts close to those herein, in *Cooper v. United States,* 827 F.2d 762 (Fed.Cir.1987), during the five-year period in which the Corps of Engineers was conducting construction along a waterway, river blockage subjected Cooper's timbered land to standing flood water for prolonged periods during the spring and summer growing seasons, killing the timber. The court held that the United States had effected a taking, although the flooding was abated by the Corps after five years. *Id.* at 763–64 (citing *Armstrong v. United States,* 364 U.S. 40, 48, 80 S.Ct. 1563, 4 L.Ed.2d 1554 (1960); *Murray v. United States,* 817 F.2d 1580, 1583 (Fed.Cir.1987) (destruction of a property interest is a compensable taking within the meaning of the Fifth Amendment)). The court in *Cooper* awarded compensation based on the value of the destroyed timber. *Id.* at 764.

Binding precedent directly contravenes the court's decision today. The floods in *Cooper* and the government activity that caused them were no less "inherently temporary," the words by which the majority characterizes the flooding, *see* maj. op. at 1378, than the

recurring flood releases here. In *Cooper* the flooding recurred each year, for as long as the river was clogged by the construction conducted by the Corps, just as the flooding here recurred each year, for as long as the Corps continued the improper release deviations.

Contrary to the court's holding today, no court has held that flooding damage is never compensable if the flooding is eventually stopped, whatever the injury. The decision in *Fromme* is misapplied by my colleagues, for *Fromme* illustrates the traditional balance that characterizes takings decisions, not a *per se* rule against taking if the flooding is eventually stopped. The Court of Federal Claims correctly held that: "The Supreme Court permits recovery based on temporary takings.... In effect, the temporary taking of a flowage easement resulted in a permanent taking of timber." 87 Fed.Cl. at 624. The trees that were killed did not revive. No error has been shown in the trial court's view of the facts and law.

My colleagues err in their analysis, incorrectly holding that the issue is solely whether the injurious flooding was eventually ended. My colleagues err in ruling that: "we do not focus on a structure and its consequence. Rather we must focus on whether the government flood control policy was a permanent or temporary policy." Maj. op. at 1377. That view of the Fifth Amendment is incorrect. *See, e.g., Owen v. United States,* 851 F.2d 1404, 1412 (Fed.Cir.1988) (en banc) ("[I]t is not the location of the *cause* of the damage that is relevant, but the location and permanence of the *effect* of the government action causing ***1383** the damage that is the proper focus of the taking analysis."). The question is not solely whether the Corps' departure from the flood control policy of the Water Control Manual was permanent or was abated after six years, but whether the increased flooding caused significant injury before the flooding was abated, such that, on balance, the Fifth Amendment requires just compensation.

The panel majority appears to acknowledge that "if particular government action would constitute a taking when permanently continued, temporary action of the same nature may lead to a temporary takings claim," maj. op. at 1374, but then discards this possibility as a matter of law in concluding that "the deviations were by their very nature temporary and, therefore, cannot be 'inevitably recurring' or constitute the taking of a flowage easement." Maj. op. at 1376. Thus the panel majority holds, contrary to law, that because the improper Arkansas flooding was not of permanent duration, there cannot be a taking despite the permanent flood damage. *See, e.g., Navajo Nation v. United States,* 631 F.3d 1268, 1278 (Fed.Cir.2011) ("Indeed, our precedent requires that temporary reversible takings must be analyzed in the same constitutional framework applied to permanent irreversible takings.") (quoting *Yuba Natural Res., Inc. v. United States,* 821 F.2d 638, 641 (Fed.Cir.1987)); *Skip Kirchdorfer, Inc. v. United States,* 6 F.3d 1573, 1583 (Fed.Cir.1993) (explaining that the "limited duration of [a] taking is relevant to the issue of what compensation is just, and not to the issue of whether a taking has occurred").

The findings of the Court of Federal Claims are not disputed by my colleagues as to the nature, cause, and amount of the damage to the Arkansas property. The determination that a compensable taking occurred is fully in conformity with precedent. My colleagues' ruling contradicts the entire body of precedent relating to the application of the Fifth Amendment to government-induced flooding. I respectfully dissent.

Footnotes

[*] Honorable Ronald M. Whyte, District Judge, United States District Court for the Northern District of California, sitting by designation.

[1] The Water Control Manual was amended in 1972 and 1995, but not in respects involving the release rates of water from the dam.

[2] It appears that there were deviations in years before 1993, but none of those is challenged here. Nor, apparently, were they challenged in the past.

[3] In the chart, the deviations are described by the targeted water height levels at Poplar Bluff Gauge. Most of the deviation plans also included alternative target levels if Clearwater Lake, located behind the dam, reached certain elevations. For example, under the 1994 interim plan, the target level at Poplar Bluff Gauge from May 15 to November 30 was six feet unless Clearwater Lake became 70 percent full, in which case more water would be released to a target level of 8 feet at Poplar Bluff. For purposes of

simplification, these alternative target levels have not been included in the chart.

Plan	Date of Plan	Deviations (and Date)	Normal Regulation
1993 Deviation Request Under Original Plan	9/29/93–12/15/93	6 ft (9/29/93–12/15/93)	10.5 ft or 11.5 ft4
1994 White River Group Interim Plan	4/1/94–4/15/95	11.5 ft (4/1/94–4/14/94)	10.5 ft
		8 ft (4/15/94–5/14/94)	10.5 ft
		6 ft (5/15/94–11/30/94)	10.5ft or 11.5 ft
		11.5 ft (4/1/95–4/15/95)	10.5 ft
White River Group Interim Plan Extension	4/15/95–4/15/96	8 ft (4/15/95–5/14/95	10.5 ft
		6 ft (5/15/95–11/30/95)	10.5 ft or 11.5 ft
		11.5 ft (4/1/96–4/15/96)	10.5 ft
1996 Black River Group Interim Plan	4/15/96–4/15/97	11.5 ft (4/15/96–5/20/96)	10.5 ft
		6 ft (6/1/96–6/30/96)	10.5 ft
		5 ft (7/1/96–11/30/96)	10.5 ft
1998 Deviation Request Under Original Plan	6/11/98–11/30/98	5 ft (6/11/98–11/30/98)	10.5 ft or 11.5 ft
1998 Black River Group Proposed Plan	12/1/98–12/31/99	11.5 ft (12/1/98–5/14/99)	10.5 ft or 11.5 ft
		4 ft (5/15/99–11/30/99)	10.5 ft or 11.5 ft
Black River Group Proposed Plan Extension	1/1/00–12/1/00	11.5 ft (1/1/00–5/14/00)	10.5 ft or 11.5 ft
		4 ft (5/15/00–11/30/00)	10.5 ft or 11.5 ft

4 The normal regulation is 10.5 feet during agricultural season and 11.5 feet during non-growing season.

5 The court rejected the claim that the testimony of the Commission's experts should be excluded.

6 Although the plaintiff later refilled the land eroded by government runoff, *Dickinson,* as discussed above, shows that later reclamation by the plaintiff does not defeat the otherwise permanent nature of an invasion.

7 The Commission argues that *Cooper v. United States,* 827 F.2d 762 (Fed.Cir.1987) is analogous and supports finding a taking in this case. In *Cooper,* during the period that the Corps was conducting construction along a waterway (1979–1984), part of a river was blocked, subjecting the plaintiff's timbered land "to standing flood water for long periods of time during the [growing season]" of that period. *Id.* at 762. The court found that the temporary flooding constituted a taking of plaintiffs timber. *Id.* at 763. However, the court did not discuss the tort versus taking distinction. Moreover, it explicitly noted that its decision was "not controlled by [ ] cases ... dealing with flowage easements" because the plaintiff had not requested compensation for a flowage easement. *Id.* We have consistently held that panel authority that does not address an issue is not binding as to the unaddressed issue. *See, e.g., Sacco v. United States,* 452 F.3d 1305, 1308 (Fed.Cir.2006) (finding that a prior case "is not binding precedent on [a] point because the court did not address the issue" in that prior case); *Boeing N. Am., Inc. v. Roche,* 298 F.3d 1274, 1282 (Fed.Cir.2002) ("[W]e are not bound by [a prior opinion] on the issue ... since [that] issue was neither argued nor discussed in our opinion."); *see also Brecht v. Abrahamson,* 507 U.S. 619, 631, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993) (stating that if a decision does not "squarely address[ ] [an] issue," a court remains "free to address the issue on the merits" in a subsequent case). Therefore, *Cooper* does not govern. We must follow cases such as *Cress*, *Barnes*, and *Fromme* as to the test for the taking of a flowage easement.

1 *Arkansas Game & Fish Comm'n v. United States,* 87 Fed.Cl. 594 (2009).

No. _____

In the Supreme Court of the United States

ARKANSAS GAME & FISH COMMISSION,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

PETITION FOR A WRIT OF CERTIORARI

JAMES F. GOODHART
JOHN P. MARKS
ARKANSAS GAME & FISH COMMISSION
#2 Natural Resources Drive
Little Rock, AR 72205
(501) 223-6327

JULIE DEWOODY GREATHOUSE
Counsel of Record
MATTHEW N. MILLER
KIMBERLY D. LOGUE
PERKINS & TROTTER, PLLC
101 Morgan Keegan Dr., Ste. A
Little Rock, AR 72202
(501) 603-9000
jgreathouse@perkinstrotter.com

Counsel for Petitioner

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Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTION PRESENTED

Petitioner Arkansas Game & Fish Commission, a constitutional entity of the State of Arkansas, sought just compensation from the United States under the Takings Clause of the Fifth Amendment for physically taking its bottomland hardwood timber through six consecutive years of protested flooding during the sensitive growing season. The Court of Federal Claims awarded $5.7 million, finding that the Army Corps of Engineers' actions foreseeably destroyed and degraded more than 18 million board feet of timber, left habitat unable to regenerate, and preempted Petitioner's use and enjoyment. The Federal Circuit, with its unique jurisdiction over takings claims, reversed the trial judgment on a single point of law. Contrary to this Court's precedent, a sharply divided 2-1 panel ruled that the United States did not inflict a taking because its actions were not permanent and the flooding eventually stopped. The Federal Circuit denied rehearing *en banc* in a fractured 7-4 vote. The question presented is:

> Whether government actions that impose recurring flood invasions must continue permanently to take property within the meaning of the Takings Clause.

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This case presents a compelling opportunity for this Court to clarify takings law by holding that any physical invasion that falls short of a *per se* taking must be weighed upon all the circumstances. Certainly, not every government invasion of property constitutes a taking. But the core Fifth Amendment standards do not suffer the government a free license to temporarily invade private property. The Federal Circuit in this case recognized that rule but concluded that flood waters are different, even when the government increases flooding on one person to benefit others and foreseeably inflicts massive damage. Because a fractured Federal Circuit in this case reversed the Court of Federal Claims' award of just compensation for timber and habitat on the sole ground that the United States' six-year flooding regime was "inherently temporary," the Arkansas Game & Fish Commission respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit in this case. If the Court grants review and reverses, the Commission asks the Court to remand with directions to consider all the facts and circumstances.

OPINIONS BELOW

The precedential opinion of the Court of Federal Claims is reported at 87 Fed. Cl. 594 and reproduced at App. 38a. The precedential opinion of the Federal Circuit is reported at 637 F.3d 1366 and reproduced at App. 1a. The Federal Circuit's precedential order denying panel rehearing and rehearing *en banc* is electronically reported at 2011 WL 3511076 and reproduced at App. 162a.

JURISDICTION

The Federal Circuit rendered its decision on March 30, 2011. The Arkansas Game & Fish Commission petitioned for rehearing *en banc* on May 13, 2011. The Federal Circuit subsequently denied panel rehearing and rehearing *en banc* on August 11, 2011. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

The Fifth Amendment to the United States Constitution provides in relevant part: "[N]or shall private property be taken for public use, without just compensation."

The relevant provisions of the Tucker Act, as codified at 28 U.S.C. § 1491(a)(1), (c), are reproduced at App. 181a. Statutory sections 28 U.S.C. §§ 1295(a)(3) and 1346(a)(2), which further establish the jurisdiction of the Court of Federal Claims and the Federal Circuit, are reproduced at App. 180a. A relevant portion of the Flood Control Act of 1928, as codified at 33 U.S.C. § 702c, is also reproduced at App. 182a.

STATEMENT OF THE CASE

This case raises the question of whether the United States can be held liable under the Fifth Amendment's Takings Clause for physically taking property through temporary flood invasions. From 1993 to 2000, over the Arkansas Game & Fish Commission's ("Commission") warnings and objections, the United

States Army Corps of Engineers ("Corps of Engineers" or "Corps") imposed a temporary flood regime to benefit specific upstream interests by deviating from the approved 1953 Water Control Plan at Clearwater Dam sitting upstream from the Commission's Dave Donaldson Black River Wildlife Management Area ("Management Area"). For the first six years (the last two years being drought years), the Corps of Engineers' actions flooded the Commission's bottomland hardwood forest at a time and to an extent that it could not tolerate, killing and degrading thousands of trees—nearly 18 million board feet—across portions of the roughly 23,000 acre Management Area. In 2001, the Corps of Engineers stopped deviating and abandoned plans to permanently change the Water Control Plan after a test release from Clearwater Dam convinced it of the "clear potential for danger." App. 125a.

After a two-week trial that included eighteen witnesses, a site visit, pre- and post-trial briefing, and post-trial argument, the Court of Federal Claims (Judge Charles F. Lettow) held that the United States owed just compensation of approximately $5.6 million for timber taken, plus an additional $176,428.34 for a regeneration program to address degraded forest habitat that will not recover on its own. On appeal to the Federal Circuit by the government and a cross-appeal by the Commission (as to the regeneration award amount), a split panel (2-1) reversed the entire judgment on a point of law. It conceived a *per se* rule that temporary government action that causes flooding and substantial damage to property can never be a taking if the government does not intend to create a permanent flooding condition. A fractured Federal Circuit subsequently denied rehearing and rehearing

en banc (7-4) in a precedential order with three written opinions. Four of the seven-judge majority that denied rehearing were silent as to their reasons.

A. The Black River Wildlife Management Area

The Management Area is located along both banks of the Black River in northeastern Arkansas. The forests in and adjacent to the Management Area are among the largest contiguous areas of bottomland hardwood forest in the Upper Mississippi Alluvial Valley. They contain diverse hardwood timber species—including nuttall, overcup, and willow oaks—that support a variety of wildlife. In particular, the bottomland hardwood forests of the Management Area provide shelter and food for migratory waterfowl that pass through the areas in the late fall and early winter on the Mississippi River flyway.

In an effort to preserve this unique habitat, the Commission purchased much of the land that constitutes the Management Area in the 1950s and 1960s. The Commission operates the Management Area as a wildlife and hunting preserve with a special emphasis on waterfowl management. Each winter, portions of the Management Area are artificially flooded to benefit wintering waterfowl and to provide recreational opportunities for waterfowl hunting. The Management Area also serves as a valuable timber resource. The Commission systematically harvests mature oak and removes unhealthy or unproductive trees to stimulate the growth of new timber and sustain a diverse habitat. With these management practices in place, the Management Area has become a premier duck hunting area. It is also a popular

location for other forms of hunting, fishing, and bird watching.

B. The Corps of Engineers' Deviations

Clearwater Lake and Dam is located upstream from the Management Area and approximately 32 miles northwest of Poplar Bluff, Missouri. Since 1948, the Corps has controlled releases of water from Clearwater Dam to regulate the flow of the Black River and reduce the flooding of lands along the river. In order to regulate the amount of water released, the Corps approved a Water Control Plan that since 1953 has specified the timing and extent of water releases. These predetermined releases mimicked the Black River's natural flow with pulses of water that typically spill over onto riparian lands and then quickly recede. However, from 1993 to 2000, the Corps implemented a series of consecutive, annually-approved deviations from its established Water Control Plan. These deviations prolonged the dam releases to benefit upstream farmers who wanted to reduce flooding on their properties that had been occurring under the approved Water Control Plan. The slower releases still flooded the Commission's Management Area and then sustained the flooding for unnatural, extended periods during six consecutive growing seasons with the effect that trees growing at lower elevations (e.g., bottomland hardwoods) were inundated at critical times when their roots needed to breathe. Moderate drought years in 1999 and 2000 prevented flooding but wiped out the trees that had lost their root systems from the prior six years' flooding.

The Commission repeatedly objected to the ongoing deviations and warned the Corps that it was causing

significant damage. The Corps nonetheless had begun working to permanently adopt similar revisions to the Water Control Plan. In a draft version of an environmental assessment, it concluded that these releases from Clearwater Dam would have no significant impact because their effects diminish at approximately the Missouri/Arkansas state line. Only after engaging in water-stage testing in 2000 and 2001 at the Commission's urging did the Corps acknowledge the harmful effects of its deviations and decide to abandon its intent to permanently change the Plan. In a March 2001 email, Colonel Thomas Holden (United States Army Corps of Engineers, Little Rock District) reported that the Corps had "confirmed that [the Commission's] contentions are correct" and described the deviations as having "significant impacts to the bottomland hardwoods in the Donaldson/Black River Wildlife Management area." App. 185a-186a; *see also* App. 125a. He further advised his colleagues that "anyone could challenge us in that [the] deviations are not in compliance with NEPA and enjoin us. Blissful ignorance of the preceding 25+ years no longer applies." App. 188a; *see also* App. 99a.

C. The Court of Federal Claims' Findings

Based on the evidence at trial, the Court of Federal Claims, having jurisdiction pursuant to 28 U.S.C. § 1491(a)(1), found that the Commission had suffered a taking for which the United States owed just compensation. App. 161a. After careful consideration of the law and the facts, the court held that "the government's temporary taking of a flowage easement over the Management Area resulted in a permanent taking of timber from that property." App. 129a. In reaching this conclusion, the Court of Federal Claims

made several important findings. Based on numerous precedents from the Supreme Court and the Federal Circuit, it first considered the character of the taking and determined that the Commission had shown that the Corps' releases constituted a taking rather than "isolated invasions that merely constitute a tort." App. 89a (internal quotes omitted). It further found that the government's deviations "so profoundly disrupted certain regions of the Management Area that the Commission could no longer use those regions for their intended purposes, *i.e.*, providing habitat for wildlife and harvest." App. 92a. The court next looked to the foreseeability of the Commission's injury and determined that "the effect of deviations in the Management Area was predictable, using readily available resources and hydrologic skills." App. 99a. Lastly, with respect to causation, the Court of Federal Claims held that the frequency and pattern of flooding demonstrated that the Corps' deviations caused the flooding in the Management Area. App. 114a. The court further determined that the timber survey conducted by the Commission served as "persuasive proof[]" that the increased flooding during the growing seasons resulted in increased timber mortality. App. 122a.

D. The Federal Circuit's Decision

The government appealed and the Commission cross-appealed to the Federal Circuit, and on March 30, 2011, a divided panel (2-1), over a strong dissent by Judge Newman, reversed the judgment of the Court of Federal Claims. In the opinion authored by Judge Dyk with Judge Whyte (sitting by designation from the U.S. District Court for the Northern District of California), the panel majority acknowledged that "if

a particular government action would constitute a taking when permanently continued, temporary action of the same nature may lead to a temporary takings claim." App. 18a (citing *First English Evangelical Lutheran Church of Glendale v. Cnty. of Los Angeles*, 482 U.S. 304, 328 (1987)). It then reached the conclusion that "cases involving flooding and flowage easements are different." App. 18a.

Relying solely on older flooding cases that discuss flowage easements, the panel majority ruled that government-induced flooding that is not inevitably recurring occupies only the category of a tort and cannot, as a matter of law, be a taking. App. 21a-22a. Applying that rule to the Commission's case, the panel majority reasoned that it "need not decide whether the flooding on the Management Area was sufficiently substantial to justify a takings remedy or the predictable result of the government's action, because the deviations were by their very nature temporary and, therefore, cannot be inevitably recurring or constitute the taking of a flowage easement." App. 22a (internal quotes omitted). Encapsulating the binary "yes it's possible/no it isn't" nature of its "permanent/temporary" test, the panel majority explained that the "[t]he condition leading to the 'intermittent, but inevitably recurring' flooding . . . must be permanent. Otherwise, it could not be 'inevitably recurring.'" App. 21a.

Judge Newman strongly disagreed and stated in her dissent that the majority's focus on the temporal aspect of the government's intrusion alone "contradicts the entire body of precedent relating to the application of the Fifth Amendment to government-induced flooding." App. 37a. Citing *Loretto v. Teleprompter*

Manhattan CATV Corp., 458 U.S. 419, 426 (1982) and other relevant precedents, she reasoned that all cases involving temporary government invasions—including flooding cases—are subject to a "complex balancing process." App. 32a. Judge Newman further explained that "no court has held that flooding damage is never compensable if the flooding is eventually stopped, whatever the injury." App. 36a. In particular, she pointed to *Cooper v. United States*, 827 F.2d 762 (Fed. Cir. 1987), as recognizing that flood-induced destruction is a permanent injury that is compensable under the Fifth Amendment. App. 35a. She also criticized the majority's singular focus on whether the Corps' flood control policy was permanent or temporary, stating:

> The question is not solely whether the Corps' departure from the flood control policy of the Water Control Manual was permanent or was abated after six years, but whether the increased flooding caused significant injury before the flooding was abated, such that, on balance, the Fifth Amendment requires just compensation.

App. 36a.

In consideration of these strongly differing opinions, the Commission requested rehearing *en banc*; however, the Federal Circuit denied both panel and *en banc* rehearing on August 11, 2011, in another markedly divided (7-4) decision. No majority opinion was given. Judge Dyk, joined by Judges Gajarsa and Linn, issued a concurring opinion reasoning that the panel majority's opinion did not create a blanket rule that would allow the federal government to avoid

takings liability for any flood-control policy that it labels as "temporary." App. 168a. Hypothetically, the concurrence posited that fifty consecutive and identical one year deviations that cause flooding "might properly be viewed as permanent or 'inevitably recurring'" if the government had adopted them with the intent to create a permanent or recurring condition. App. 169a.

Judge Moore responded in her dissenting opinion joined by Judges O'Malley and Reyna, "With all due respect, the question of whether eight years of deviations are similarly adequate is best left to the fact finder – the Court of Federal Claims." App. 174a-175a. She further pointed out that allowing the Corps' "temporary" label for its deviations to control the takings analysis "elevates form over substance and leads to untenable results with enormous future consequences." App. 171a. Judge Moore questioned: "If a [permanent] flowage easement which is terminated after eight years can be a compensable taking, why can't an eight year flowage easement or eight consecutive one year flowage easements?" App. 174a. Characterizing the majority's holding as "a rigid, unworkable, and inappropriate black letter rule," she concluded that determining whether government action constitutes a tort or a taking requires a "flexible case-by-case approach considering the character of the government action as a whole, the nature and extent of the flooding that was caused, and the resultant damage that occurred." App. 176a.

Judge Newman also authored a written dissent to the denial of the Commission's request for rehearing. In it, she agreed with Judge Moore's dissent and reiterated her previous opinion that the panel majority

has created a *per se* rule (i.e., an injury caused by temporary flooding cannot be a taking) that is "contrary to law and precedent" of the Supreme Court and Federal Circuit. App. 178a. With respect to Judge Dyk's statement that the panel majority has created no such rule, she responded that "a single judge [from the panel] cannot rewrite the words and change the ruling of the court's issued opinion. If anything, such an attempted qualification adds confusion, not clarity, to this precedential decision." App. 179a. Judge Newman added that the panel majority has also created a new rule that it is not necessary in temporary flooding cases to apply the established balancing test to determine whether a compensable taking has occurred. App. 178a-179a. She then cited *Cooper* again as an example where a taking of destroyed timber was found to have occurred although it was always understood that the Corps' project and its effect on the river would not be permanent. App. 179a.

REASONS FOR GRANTING THE PETITION

The Federal Circuit's decision carved out a whole category of physical invasions that the government can make without incurring liability under the Takings Clause. The Takings Clause does not exempt any kind of government action inflicting permanent injury solely because it is not permanent. The Commission petitions the Court to grant review and then reverse and remand for the Federal Circuit to review the Court of Federal Claims' trial judgment under the established analysis.

Once the concept of a physical, government taking was accepted as a claim, the law quickly recognized

that such claims must be viewed on the basis of all the particular facts and circumstances of each. The Federal Circuit's decision upends the Court's bedrock standards and grants the government authority to repeatedly invade by flooding, no matter who it injures, no matter how much damage it permanently and foreseeably causes, and no matter what the other circumstances might be, so long as the government's actions are deemed "only temporary." *E.g.*, App. 27a ("Because the deviations from the 1953 plan were only temporary, they cannot constitute a taking."); App. 169a (Dyk, J., Gajarsa, J., and Linn, J., concurring in denial of rehearing) (hinging the possibility of liability on whether the government intends to create a "permanent or recurring condition"). This decision deserves this Court's review for three reasons.

First, the Federal Circuit's decision cannot be squared with this Court's precedent and so, because of the Federal Circuit's unique jurisdiction, it topples the established Fifth Amendment protections for a large majority of landowners and users within reach of a federal flood control project.[1] *Second*, the Federal Circuit's decision threatens serious practical impacts. *Third*, this petition presents a clean vehicle, unburdened by factual disputes, to clarify that courts must consider all the facts instead of applying a one-factor analysis.

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[1] Only claims against the United States for less than $10,000, and claims against the Tennessee Valley Authority, are excluded from the Court of Federal Claims' and, thus, the Federal Circuit's exclusive jurisdiction. *See* 28 U.S.C. §§ 1295(a)(3), 1346(a)(2), 1491(a)(1), (c).

A. The Court Should Grant Review To Clarify that No Physical Invasion is Exempt from the Takings Clause Solely for Lack of Permanency.

The Federal Circuit's decision contravenes established Supreme Court precedent. This case presents the opportunity to explain that while each physical invasion is different, the Fifth Amendment suffers no *per se* rules permitting any one mode of invasion simply because the government does not permanently repeat it. That the Federal Circuit is sharply divided over this case highlights how much this Court's unifying final word is needed.

1. The Federal Circuit's Permanency Rule Conflicts with Important Takings Decisions from This Court and Lower Courts.

This Court has long recognized that the government can physically take property through temporary actions, even after only a few years of rolling or repeat government actions. In 1946, the Court found a taking in *Causby v. United States* where a one-year airport lease with six-month renewals (beginning in 1942) led to airplane overflights that partially destroyed the landowners' use and enjoyment—they could no longer raise chickens. 328 U.S. 256, 258-59 (1946); *c.f. Kimball Laundry Co. v. United States*, 338 U.S. 1, 3, 13 (1949) (requiring additional elements of compensation for a temporary taking when the government expressly condemned a laundry business on a year-to-year basis from 1942 to 1946). The Court in *Causby* held that the Court of Claims had properly found an easement taken. 328

U.S. at 267. After considering other circumstances in the case, the Court concluded that the only question left was whether the "easement taken [was] a permanent or a temporary one," because there was no real finding of fact as to whether the government intended to permanently use the airport. *Id.* at 268. Precedent, therefore, holds that analyzing whether a property interest has been permanently or temporarily taken actually goes to the proper amount of just compensation, rather than serving as a one-factor *per se* test for whether a compensable taking has occurred. *E.g.*, *Kimball Laundry Co.*, 338 U.S. at 12-14.

It is likewise well-established that the government may take property by imposing reversible flood conditions. *See United States v. Dickinson*, 331 U.S. 745, 751 (1947); *c.f. San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621, 657-58 (1981) (Brennan, J., dissenting with Stewart, J., Marshall, J., and Powell, J.) ("Nothing in the Just Compensation Clause suggests that 'takings' must be permanent and irrevocable."). Takings can be reversed or abandoned, rendering them temporary. *United States v. Dow*, 357 U.S. 17, 26 (1958); *see also Hendler v. United States*, 952 F.2d 1364, 1376 (Fed. Cir. 1991) ("All takings are 'temporary' in the sense that the government can always change its mind at another time."). The Federal Circuit itself once held that temporary, seasonal flooding caused by a construction blockage can take timber, even when the Corps of Engineers considers the blockage temporary and works to clear it. *Cooper v. United States*, 827 F.2d 762, 763-64 (Fed. Cir. 1987). If the damage is foreseeable, as the Court of Federal Claims found here, no precedent allows the government to physically invade and avoid just compensation solely because its actions are temporary

or because it chooses to abandon what it takes. *C.f.* App. 36a (Newman, J., dissenting).

In the context of recurring flooding, this Court recognized that "such temporary limitations are subject to a more complex balancing process to determine whether they are a taking." *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 436 n.12 (1982). In the Commission's case, a member of the panel majority defended its decision by quoting a different line in *Loretto* that in flooding cases, "a taking has always been found only" in the situation of "a permanent physical occupation . . . ." App. 166a (Dyk, J., et al., concurring in denial of rehearing *en banc*). Standing alone without the rest of the opinion, one might read that line to say that a flood is only a taking when it constitutes a permanent physical occupation, as the panel majority ruled. But *Loretto* plainly says otherwise. The issue decided there was whether small cable boxes installed permanently on a building constituted a *per se* taking. *Loretto*, 458 U.S. at 426. Concluding that it did, the Court discussed flood cases—among others—and noted that permanent and exclusive floods are the only instances where a taking is always found. *Id.* at 428. In other words, only permanent and exclusive occupations constitute *per se* takings. *Loretto* made clear, as Judge Newman pointed out in dissent, that anything less requires looking at all the facts and applying a "complex balancing process." App. 178a-179a (citing *Loretto*, 458 U.S. at 436 n.12).

Even claims for regulatory takings that arise from *temporary* interferences are recognized; they just require an assessment of all the facts. *See Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning*

Agency, 535 U.S. 302, 335 (2002). In *Tahoe-Sierra*, the Court faced a claim that a temporary building moratorium was a *per se* temporary taking. *Id.* at 318. The Court ruled that the claim must be analyzed according to the *Penn-Central* balancing test. *Id.* at 342 (citing *Penn-Cent. Transp. Co. v. City of New York*, 438 U.S. 104 (1976)). It expressly "[did] not hold that the temporary nature of a land-use restriction precludes finding that it effects a taking . . . ." *Id.* at 337. Instead, the action's temporal scope "should not be given exclusive significance one way or the other." *Id.* The *Penn-Central* balancing test, even when applied to a temporary regulation like in *Tahoe-Sierra*, would consider as "particular[ly] significan[t]" the "economic impact of the regulation on the claimant." *Penn-Cent. Transp. Co.*, 438 U.S. at 124. If a temporary regulatory claim would consider the impact, it is astounding that the Federal Circuit refused to consider the impact of a temporary physical invasion, especially here where it wiped-out huge swaths of timber and crucial habitat managed for wildlife. *C.f. Loretto*, 458 U.S. at 433 (reiterating that physical invasions are "unusually serious" compared to regulatory interferences); *Pumpelly v. Green Bay Co.*, 80 U.S. (13 Wall) 166, 177-78 (1871) (reasoning that it would be "curious and unsatisfactory" if the Takings Clause were understood to allow the government to "inflict irreparable and permanent injury to any extent" because it somehow "refrain[s] from the absolute conversion of real property").

To hold that *any* form of physical invasion by the government is not protected by the Fifth Amendment based solely on its intended duration falls far short of fulfilling the purposes of the Takings Clause. That Clause requires just compensation to "bar Government

from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960); *see also Dickinson*, 331 U.S. at 748 ("The Fifth Amendment [Takings Clause] expresses a principle of fairness . . . ."). The Federal Circuit's decision squarely contradicts that purpose. Here, it renders irrelevant six years of actual invasions and massive, foreseeable damage. Holding that the government may freely invade temporarily by any mode allows it to do for free what *Armstrong* said the Takings Clause was designed to prevent.

2. The Federal Circuit Inferred a Separate Standard for Flood Cases by Severing Them from the Rest of This Court's Decisions.

While the Federal Circuit recognized that this Court's more recent decisions hold that temporary government action "[i]n general" can lead to a taking, it separated them from older flooding cases that discussed "inevitably recurring" floods. *See* App. 18a. The Federal Circuit then conceived a *per se* rule from those older cases and held that this rule survived every contrary modern decision of this Court addressing temporary takings like *Tahoe-Sierra* and its doctrinal predecessor in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987) (holding that the government must pay just compensation even if it rescinds a regulatory taking). Read carefully, the flooding cases just do not stand for the Federal Circuit's rule.

The *Barnes* case, on which the panel majority relied heavily, considered *all* the facts before concluding that

crop damage—which is different from the Commission's situation in that, for example, a single flood would erase a harvest—was consequential until the flooding became "inevitably recurring." *See Barnes v. United States*, 538 F.2d 865, 872 (Ct. Cl. 1976). What the Federal Circuit overlooked in the Commission's case is that *Barnes* did not address a situation of temporary government action. The Commission's situation was not before the *Barnes* court. Likewise, the *Cress* case—where the phrase "inevitably recurring" first arose—*did* find a taking and actually faced facts that established "inevitably recurring" floods. *See United States v. Cress*, 243 U.S. 316, 328 (1917); *c.f. also United States v. Kansas City Life Ins. Co.*, 339 U.S. 799, 801 (1950).

The *Sanguinetti* case—which did not find a taking—considered a host of other factors, such as the speculative nature of plaintiff's evidence and the fact that the government there had actually over-engineered its structure to *prevent* floods in rains beyond the maximum recorded. *See Sanguinetti v. United States*, 264 U.S. 146, 147 (1924). Thus, *Sanguinetti* came nowhere near to identifying any single, dispositive factor. The panel majority similiarly overstated *National By-Product*s by providing only a partial quote, ignoring the court's statement in that case that "[t]he [inevitably recurring] distinction . . . is, of course, not a clear and definite guideline. *Compare Nat'l By-Prods. v. United States*, 405 F.2d 1256, 1273 (Ct. Cl. 1969) *with* App. 20a (citing *Nat'l By-Prods.*, 405 F.2d at 1273, for the proposition that "plaintiff must establish that flooding will 'inevitably recur'").

In a footnote, the Federal Circuit additionally distinguished its own opinion in *Cooper*—the flooding precedent most factually similar to the Commission's claims. *Compare* App. 26a n.7 *with* App. 35a (Newman, J., dissenting) (discussing *Cooper*, 827 F.2d at 763-764, as "[b]inding precedent that directly contravenes the court's decision today"). In *Cooper*, the Federal Circuit addressed a 1979 construction blockage that imposed seasonal flooding while the Corps of Engineers tried to clear it. 827 F.2d at 763-764. The Corps succeeded in clearing the blockage in 1984, but the intermittent flooding had killed the plaintiff's timber by then. *Id.* *Cooper* ruled that the government had taken the timber. *Id.* At a minimum, it plainly held that temporary government conditions that intermittently flood *can* take timber. *Cooper*, 827 F.2d at 763. Thus, *Cooper* refutes the Federal Circuit's *per se* rule in this case.

The Federal Circuit majority distinguished *Cooper* on the grounds that it "did not discuss the tort versus taking distinction." App. 27a n.7. That distinction disregards the Federal Circuit's holding that the temporary situation actually inflicted a taking. The Federal Circuit further distinguished *Cooper* on the grounds that it did not analyze whether the government appropriated a "flowage easement." App. 26a n.7. That distinction renders inapplicable the entire line of cases ruling that the government can gain a public benefit by destroying someone else's property. *See, e.g.*, *Armstrong*, 364 U.S. at 48; *see also United States v. Welch*, 217 U.S. 333, 339 (1910) (stating that if the United States only destroyed an interest in land, it "may as well be a taking as would be an appropriation for the same end"). Invoking that line of cases with Federal Circuit decisions in *Cooper*

and *Ridge Line, Inc.*, the Commission argued that even if the Corps' flooding had not appropriated a flowage easement (which it had), the Corps took its property by preempting its use and enjoyment. *See Ridge Line, Inc. v. United States*, 346 F.3d 1346, 1356 (Fed. Cir. 2003). The Federal Circuit's treatment of *Cooper* thus avoided the Commission's preemption theory altogether and allowed the panel majority to rest its decision entirely on "inevitably recurring" language in cases like *Barnes* that actually found a taking of a permanent flowage easement.

The United States itself has never advocated for a *per se* rule. *See* App. 178a (Newman, J., dissenting) (recognizing that "[e]ven the government is uncomfortable with the court's new rule"). As appellant, it argued that the temporary nature of the government's actions was just one factor in the "correct question." App. 192a-193a. That the Federal Circuit applied a *per se* rule that not even the United States advanced as the appellant and treated older flooding cases like *Cress*, *Sanguinetti*, and *Barnes* as dispositive and superseding even later decisions shows how much this Court's reasoned clarity is needed. If each mode of invasion takes the parties down a separate rabbit-hole with its own constitutional precepts, no one can reasonably predict where it will go.

B. The Federal Circuit's Decision Threatens Serious Implications of Unrestricted Government Authority for Temporary Flood Control.

By divining a one-factor rule for flooding, the Federal Circuit carved out a whole category of physical invasions from the Takings Clause's protections.

There is no reasonable way to read the panel majority's decision except as declaring, as a matter of law, that the Takings Clause does not provide compensation when temporary government actions cause flooding that eventually stops. The court squarely ruled that it did not have to consider whether the government's flooding "was sufficiently substantial to justify a takings remedy or the predictable result of the government's action," because the government's actions were "temporary." App. 22a (internal quotes omitted); *see also* App. 23a ("[W]e must focus on whether the government flood control policy was a permanent or temporary policy. Releases that are ad hoc or temporary cannot, by their very nature, be inevitably recurring."); *c.f. also* App. 36a-37a (Newman, J., dissenting); App. 171a-173a (Moore, J., O'Malley, J., Reyna, J., dissenting).

The Federal Circuit's permanency rule means that the government may temporarily manipulate flooding regimes to benefit anyone it chooses and cause substantial, foreseeable damage to others without ever paying just compensation. The Constitution has never endured any such rule, and for good reason. The government is already immune in tort for damages caused by flood control projects. *See* 33 U.S.C. § 702c; *but see Cent. Green Co. v. United States*, 531 U.S. 425, 436 (2001); *United States v. Sponenbarger*, 308 U.S. 256, 264-70 (1939). Thus, under the Federal Circuit's ruling, the Corps need only refuse to make a decision on how it will act even one year from now to avoid any liability. *See* App. 171a (Moore, J., et al. dissenting) ("To allow the government's 'temporary' label for the release rate deviations to control the disposition of this case elevates form over substance and leads to untenable results with enormous future

consequences."). This potentially affects everyone and everything, including wildlife and habitat, that lies up- or downstream of a federal flood control project.[2]

In the Commission's case, its damages include more than $5.6 million worth of timber, $176,428 worth of regeneration costs, and the loss of crucial bottomland hardwood habitat used by migratory birds, wildlife, and recreationists. The Federal Circuit should have to confront the question of whether the government may occupy the Commission's property and inflict such massive and foreseeable damage over the course of eight years without paying just compensation. So far it has not, outside the dissenting opinions of four of its judges who would have found a taking. App. 36a ("No error has been shown in the trial court's view of the facts and law."), App. 172a ("There is no error in [the trial court's] decision.").

C. The Federal Circuit's Permanency Rule is a Legal Issue that is Cleanly Presented for This Court's Review.

The legal issue here is narrow and cleanly presented. Though the Court of Federal Claims compiled an extensive record in this case and made numerous factual findings, on appeal only the dissenting opinions considered all the facts and the merits of the trial court's judgment. *See* App. 36a (agreeing that the Court of Federal Claims properly

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[2] While the Tennessee Valley Authority is excepted from the Court of Federal Claims and, thus, Federal Circuit's exclusive jurisdiction, this decision is at least highly persuasive for those takings claims.

ordered the United States to pay just compensation), App. 172a (same); *c.f. also* App. 30a (Newman, J., dissenting from panel majority, stating that her "colleagues [on the panel] do not dispute" the lower court's findings of permanent damage, preemption of use, and foreseeability), App. 171a (Moore, J., et al. dissenting) ("The facts of this case are quite simple."). The panel majority did not consider any facts other than the temporal scope of the flooding. Thus, the physical takings issue presented for this Court's review is a narrow question of law, not burdened by factual disputes or collateral issues. *C.f.* App. 176a (Moore., J., et al., dissenting from denial of rehearing *en banc* "[b]ecause we miss the opportunity to correct this error of law"). The Commission asks only that the Court instruct the Federal Circuit to consider all the facts and apply the complex balancing test prescribed for claims that fall short of a *per se* taking.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be granted.

Respectfully Submitted,

JULIE DEWOODY GREATHOUSE
Counsel of Record
MATTHEW N. MILLER
KIMBERLY D. LOGUE
PERKINS & TROTTER, PLLC
101 Morgan Keegan Dr., Ste. A
Little Rock, AR 72202
(501) 603-9000
jgreathouse@perkinstrotter.com

JAMES F. GOODHART
JOHN P. MARKS
ARKANSAS GAME &
FISH COMMISSION
#2 Natural Resources Drive
Little Rock, Arkansas 72205
Telephone: (501) 223-6327

Counsel for Petitioner

November 9, 2011

2012 WL 1961402 (U.S.) (Appellate Petition, Motion and Filing)
Supreme Court of the United States.

Coy A KOONTZ, Jr., Petitioner,
v.
ST. JOHNS RIVER WATER MANAGEMENT DISTRICT, Respondent.

No. 11-1447.
May 30, 2012.

On Petition for Writ of Certiorari to the Supreme Court of the State of Florida

Petition for Writ of Certiorari

Brian T. Hodges, Pacific Legal Foundation, 10940 NE 33rd Place, Suite 210, Bellevue, WA 98004, Telephone: (425) 576-0484, Facsimile: (425) 576-9565, E-mail:, bth@pacificlegal.org.

Paul J. Beard II, Counsel of Record, Pacific Legal Foundation, 930 G Street, Sacramento, California 95814, Telephone: (916) 419-7111, Facsimile: (916) 419-7747, E-mail: pjb@pacificlegal.org.

Michael D. Jones, P.O. Box 196130, Winter Springs, FL 32719, Telephone: (407) 359-9908.

Christopher V. Carlyle, The Carlyle Appellate, Law Firm, 1950 Laurel Manor Drive, Suite 130, The Villages, FL 32162, Telephone: (352) 259-8852, Counsel for Petitioner.

***i** QUESTIONS PRESENTED

For over eleven years, a Florida land use agency refused to issue any of the permits necessary for Coy A. Koontz, Sr., to develop his commercial property. The reason was because Koontz would not accede to a permit condition requiring him to dedicate his money and labor to make improvements to 50 acres of government-owned property located miles away from the project - a condition that was determined to be wholly unrelated to any impacts caused by Koontz's proposed development. A Florida trial court ruled that the agency's refusal to issue the permits was invalid and effected a temporary taking of Koontz's property, and awarded just compensation. After the appellate court affirmed, the Florida Supreme Court reversed, holding that, as a matter of federal takings law, a landowner can never state a claim for a taking where (1) permit approval is withheld based on a landowner's objection to an excessive exaction, and (2) the exaction demands dedication of personal property to the public.

The questions presented are:

1. Whether the government can be held liable for a taking when it refuses to issue a land-use permit on the sole basis that the permit applicant did not accede to a permit condition that, if applied, would violate the essential nexus and rough proportionality tests set out in *Nollan v. California Coastal Commission,* 483 U.S. 825 (1987), and *Dolan v. City of Tigard,* 512 U.S. 374 (1994); and

2. Whether the nexus and proportionality tests set out in *Nollan* and *Dolan* apply to a land-use exaction that takes the form of a government demand that a permit applicant dedicate money, services, ***ii** labor, or any other type of personal property to a public use.

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*1 PETITION FOR WRIT OF CERTIORARI

As personal representative of the Estate of Coy A. Koontz, Sr.,1 Coy A. Koontz, Jr. (hereinafter, "Koontz"), respectfully petitions for a writ of certiorari to review the judgment of the Florida Supreme Court.

OPINIONS BELOW

The opinion of the Florida Supreme Court is reported at *St. Johns River Water Management District v. Koontz,* 77 So. 3d 1220 (Fla. 2011), and is reproduced in Petitioner's Appendix (Pet. App.) at A. The Florida Supreme Court's decision denying rehearing and/or clarification is reported at __ So. 3d __ , 2012 Fla. LEXIS 1 (Fla. 2011). The opinion of the District Court of Appeal of the State of Florida, 5 So. 3d 8 (Fla. Ct. App. 2009), is reproduced in Pet. App. at B. The opinion of the Circuit Court of the Ninth Judicial Circuit in and for Orange County, Florida, is not published, but is reproduced in Pet. App. at D.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1257(a). Koontz filed an inverse condemnation lawsuit in the Florida state courts challenging the District's permit decisions as violating the Fifth and Fourteenth Amendments of the United States ***2** Constitution, among other laws. Koontz prevailed in the Florida trial and appellate courts, but the Florida Supreme Court reversed in an opinion dated November 3, 2011. The Florida Supreme Court's decision became final on January 4, 2012, when the court denied Koontz's motion for reconsideration and/or clarification. On March 30, 2012, Justice Thomas granted Petitioner's application to extend the time within which to file the petition to June 1, 2012. *Koontz v. St. Johns River Water Management District,* No. 11A909.

CONSTITUTIONAL PROVISIONS AT ISSUE

The Takings Clause of the United States Constitution provides that "private property [shall not] be taken for public use without just compensation." U.S. Const. amend. V.

The Fourteenth Amendment to the United States Constitution provides, in relevant part, that no state shall "deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1.

*3 STATEMENT OF THE CASE

A. St. Johns River Water Management District Denies Koontz's Land-Use Permits, After He Refuses to Perform Costly Off-Site Work on the District's Property As the "Price" of Permit Approval

Koontz owned 14.2 acres of vacant land in Orange County, Florida. Pet. App. A-5. Zoned for commercial use, the property is immediately south of State Road 50 and immediately east of State Road 408 - two major roadways. *Id.* Koontz sought to improve 3.7 acres of the property, which surrounding residential and commercial development, road construction, and other government projects had seriously degraded. Pet. App. D-3. Although the site had become unfit for animal habitat, most of it lay officially within a habitat protection zone subject to the St. Johns River Water Management District's jurisdiction. *Id.* Of the site's 3.7 acres, 3.4 were deemed to be wetlands, and 0.3 were uplands.2 Pet. App. A-5.

In 1994, Koontz applied to the District for permits to dredge and fill 3.25 acres of wetlands. Pet. App. A-4 - A-6. As mitigation for the proposed project's disturbance of wetlands, Koontz agreed to dedicate the remainder of his property - almost 11 acres - to the State for conservation. Pet. App. A-6. But the District was not satisfied with nearly 80% of Koontz's land and leveraged its permitting power to press Koontz for ***4** more: It demanded that Koontz enhance 50 off-site acres of wetlands on the District's property located between 4-1/2 and 7 miles away, by replacing culverts and plugging some ditches. Pet. App. A-6, D-4. The cost of the off-site work was estimated to be in the range of $10,000 (the District's estimate) to between $90,000 and $150,000 (Koontz's expert's estimate). Pet. App. D-4. The District never demonstrated how the off-site improvement of 50 acres of wetlands on government lands was related in nature or extent to the alleged impact of the Koontz's dredge-and-fill activities on little more than three acres of degraded wetlands. Pet. App. D-11.

Koontz refused the District's demand. Because of his refusal to comply, the District denied outright his permit applications. Pet. App. A-6. The District would not issue permits unless and until Koontz submitted to its off-site-work condition. *Id.*

B. Koontz Sues for Inverse Condemnation Under *Nollan* and *Dolan*, and Prevails in the Trial and Appellate Courts

Koontz brought an inverse-condemnation suit against the District in the Florida trial court. He alleged that the District's off-site improvements condition was unconstitutional under the Fifth and Fourteenth Amendments, as interpreted in *Nollan v. California Coastal Commission,* 483 U.S. 825 (1987) and *Dolan v. City of Tigard,* 512 U.S. 374 (1994). Pet. App. D-4. *Nollan* and *Dolan* provide the framework for assessing the constitutionality of extortionate conditions imposed by land-use agencies in the permitting process.

***5** In *Nollan*, a state land-use agency, the California Coastal Commission, required the Nollans, owners of beach-front property, to dedicate an easement over a strip of their private beach as a condition of obtaining a permit to rebuild their home. *Nollan,* 483 U.S. at 827-28. The condition specifically was justified on the grounds that "the new house would increase blockage of the view of the ocean, thus contributing to the development of 'a 'wall' of residential structures' that would prevent the public 'psychologically … from realizing a stretch of coastline exists nearby that they have every right to visit,' " and would "increase private use of the shorefront." *Id.* at 828-29 (quoting Commission). The Nollans refused to accept the condition and brought a federal taking claim against the Commission in state court to invalidate the condition. *Id.* at 828. The Nollans argued that the condition was unlawful, because it bore no connection to the impact of their proposed remodel.

This Court agreed, holding that the Commission's easement condition lacked an "essential nexus" to the alleged social evil that the Nollans' project caused. *Id.* at 837. The Court found that because the Nollans' home would have no impact on public beach access, the Commission could not justify a permit condition requiring them to dedicate an easement over their property. *Id.* at 838-39. Without a constitutionally sufficient connection between a permit condition and a project's alleged impact, the easement condition was "not a valid regulation of land use but 'an out-and-out plan of extortion.' " *Id.* at 837 (citations omitted).

Similarly, in *Dolan,* 512 U.S. 374, this Court defined how close a "fit" is required between a permit condition and the alleged impact of a proposed land ***6** use. There, the city imposed conditions on Dolan's permit to expand her store that required her

to dedicate some of her land for flood-control and traffic improvements. *Id.* at 377. Dolan refused the conditions and sued the city, alleging that they effected an unlawful taking and should be enjoined.

This Court held that the city had established a connection between both conditions and the impact of Dolan's proposed expansion under *Nollan*, but nevertheless held that the conditions were unconstitutional. *Id.* at 394-95. Even when an "essential nexus" exists, the Court explained, there still must be a "degree of connection between the exactions and the projected impact of the proposed development." *Id.* at 386. There must be rough proportionality - i.e., "some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development." *Id.* at 391. This Court held that the city had not demonstrated that the conditions were roughly proportional to the impact of Dolan's expansion and struck them down. *Id.* at 394-95.

Applying *Nollan* and *Dolan*, the trial court found that the District "did not prove the necessary relationship between the condition of off-site mitigation and the effect of development." Pet. App. D at 11. The court explained that the District failed to show either an "[essential] nexus between the required off-site mitigation and the requested development of the tract []" as required in *Nollan*, or "rough proportionality to the impact of site development," as required in *Dolan*. *Id.* Accordingly, the trial court concluded that the District's "denial of the Koontz ***7** permit application … was invalid" and "resulted in a regulatory taking." *Id.*

On remand from the trial court, the District concluded that the proposed development would have substantially less impacts on wildlife habitat than it had previously thought and issued the permits to Koontz. Pet. App. A-7. The trial court subsequently awarded Koontz $376,154 in damages for the District's temporary taking of his property, which spanned the eleven years during which the District unlawfully withheld permit approval. *Id.* Pet. App. C-1 - C-2. The District appealed. Pet. App. A-7.

On appeal, the District did not argue that its condition requiring Koontz to perform off-site work on its property satisfies *Nollan* and *Dolan*. Pet. App. B-5 - B-6. Instead, the District argued that *Nollan* and *Dolan* apply only to permit approvals that contain unconstitutional conditions - not to permit denials that result from the property owner's refusal to accede to unconstitutional conditions. Because the District issued no permits until after the trial court invalidated the condition, it supposedly imposed no exaction, making *Nollan* and *Dolan* review unavailable to Koontz. Pet. App. B-6. Observing that the argument raised "a question that has evoked considerable debate among academics," the appellate court rejected the District's argument. Pet. App. B-6 - B-7. The court relied on *Dolan*, along with various federal and state supreme court decisions, to conclude that the "essential nexus" and "rough proportionality" tests apply equally to conditions attached to a permit approval and to conditions whose rejection results in a permit denial. Pet. App. B-7 ("Although the *Dolan* majority did not expressly address the issue, the precise argument was ***8** addressed by the dissent and, thus, implicitly rejected by the majority" (citing *Dolan,* 512 U.S. at 408 (Stevens, J., dissenting))).

Moreover, the District unsuccessfully argued that the trial court erred in applying *Nollan* and *Dolan* to a condition requiring Koontz to "expend money to improve land belonging to the District." Pet. App. B-9 - B-10. According to the District, *Nollan* and *Dolan* can be applied only to those land-use exactions that compel a dedication of real property as a condition for permit approval. *Id.* Again, the court recognized that this question is the subject of broad debate and a nationwide split of authority. *Id.* at 10, 11-12, 21-22, 24-27. But, "[a]bsent a more definitive pronouncement from [this Court]," the court of appeal concluded that *Nollan* and *Dolan* apply to all property exactions - without distinction - and upheld the trial court's judgment. *Id.* at 10.

C. The Florida Supreme Court Refuses to Apply *Nollan* and *Dolan* to the District's Permit Condition and Reverses

The Florida Supreme Court accepted the District's petition for review. Pet. App. A-1. The supreme court noted that this Court "has only commented twice on the scope of the *Nollan/Dolan* test," and that "[s]tate and federal courts have been inconsistent with regard to interpretations of the scope of [that test]." Pet. App. A-15, A-17. In light of the lack of definitive

guidance from this Court, and the court conflicts regarding the scope of *Nollan* and *Dolan*, the supreme court resigned itself to simply applying a very narrow and cramped interpretation of those cases. Because *Nollan* and ***9** *Dolan* happened to involve exactions of easements imposed as part of permit approvals, the supreme court held that those cases could apply only to those kinds of exactions. Pet. App. A-18 ("Absent a more limiting or expanding statement from the United States Supreme Court with regard to the scope of *Nollan* and *Dolan*, we decline to expand this doctrine beyond the express parameters for which it has been applied by the High Court."). Importantly, the Florida Supreme Court did not consider the logic or purpose of the "essential nexus" and "rough proportionality" tests set forth in *Nollan* and *Dolan* - *i.e.*, to prevent land-use agencies from engaging in "out-and-out plan[s] of extortion," in whatever form, during the permitting process. *Nollan,* 483 U.S. at 837. Thus, the Florida Supreme Court adopted two per se rules of federal takings law:

> [U]nder the takings clauses of the United States and Florida Constitutions, the *Nollan/Dolan* rule with regard to "essential nexus" and "rough proportionality" is applicable only where the condition/exaction sought by the government involves a dedication of or over the owner's interest in real property in exchange for permit approval; and only when the regulatory agency actually issues the permit sought, thereby rendering the owner's interest in the real property subject to the dedication imposed.

Pet. App. A-19. The court overturned the lower court's conclusion that the District's refusal to issue the permits effected a temporary regulatory taking. Pet. App. A-21.

***10** Koontz now respectfully asks this Court to issue a writ of certiorari and provide much-needed direction on the important questions of federal law decided below.3

REASONS FOR GRANTING THE WRIT

I

THE FLORIDA SUPREME COURT'S REFUSAL TO APPLY *NOLLAN* AND *DOLAN* SCRUTINY TO UNCONSTITUTIONAL EXACTIONS WHOSE REJECTION RESULTS IN PERMIT DENIALS RAISES AN IMPORTANT QUESTION OF FEDERAL LAW THAT THIS COURT SHOULD SETTLE

The Florida Supreme Court carved out a massive exception to *Nollan* and *Dolan*: Unconstitutional conditions whose rejection by the property owner results in a permit denial are immune from those decisions' heightened scrutiny. If it stands, the court's opinion threatens to effectively strip millions of Florida property owners of the important protections afforded by *Nollan* and *Dolan* - and the Takings Clause's guarantee that governments are barred "from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." ***11** *Armstrong v. United States,* 364 U.S. 40, 49 (1960). To avoid *Nollan* and *Dolan* under the Florida Supreme Court's decision, land-use agencies carefully will couch their demands for land, money, or labor as conditions precedent to permit approval; in this way, agencies will be able to bully landowners into "agreeing" to otherwise unconstitutional conditions as the heavy price of permit approval.

Three Justices of this Court have made clear that the timing of an otherwise unlawful condition - whether it is imposed before or after permit approval - does not matter. *Lambert v. City & County of San Francisco,* 529 U.S. 1045, 1048 (2000) (Scalia, J., dissenting from denial of cert.). And they have made clear that the relevance of such a distinction raises an important question of federal law "that will doubtless be presented in many cases." *Id.* at 1049.

In *Lambert*, a San Francisco hotel owner sought to convert residential rooms into tourist rooms. As a condition of permit approval, the city demanded that the owner pay $600,000 in mitigation for the lost residential units. The owner refused, and the city denied the permit application. The owner sued the city, challenging the constitutionality of the mitigation requirement under *Nollan* and *Dolan.* The trial and appellate courts ruled against the owner, on the same grounds that the

Florida Supreme Court did in this case: Even though there was evidence that the city's permit denial was motivated by the owner's refusal to submit to its $600,000 demand, the courts concluded that, technically, no exaction had been imposed, since the permit had been denied. *Id.* at 1045-46.

This Court denied the property owner's writ of certiorari petition, which generated a three-Justice dissent. Joined by Justices Kennedy and Thomas, ***12** Justice Scalia rejected the distinction between permit denials and approvals, as a basis for applying *Nollan* and *Dolan.* Justice Scalia explained:
The court's refusal to apply *Nollan* and *Dolan* might rest on the distinction that it drew between the grant of permit subject to an unlawful condition and the denial of a permit when an unconstitutional condition is not met …. From one standpoint, of course, such a distinction **makes no sense**. The object of the Court's holding in *Nollan* and *Dolan* was to protect against the State's cloaking within the permit process an 'out and out plan of extortion' …. There is no apparent reason why the phrasing of an extortionate demand as a condition precedent rather than a condition subsequent should make a difference.

Id. at 1047-48 (emphasis added); *see also* Mark W. Cordes, *Legal Limits on Development Exactions: Responding to Nollan and Dolan,* 15 N. Ill. U. L. Rev. 513, 551 (1995) (The nexus and proportionality tests were intended to curtail the "common municipal practice of using the development exaction process as a means to capture already targeted tracts of land without paying just compensation[.]").

If a land-use agency imposes an exaction as a condition of obtaining permit approval, it still should have to establish the exaction's relationship to the impact of the proposed project. As the Justices observed,

> [w]hen there is uncontested evidence of a demand for money or other property - and ***13** still assuming that denial of a permit because of failure to meet such a demand constitutes a taking - it should be up to the permitting authority to establish either (1) that the demand met the requirements of *Nollan* and *Dolan*, or (2) that denial would have ensued even if the demand had been met.

529 U.S. at 1047-48.

Neither *Nollan* nor *Dolan* supports the distinction that the Florida Supreme Court made between conditions precedent and conditions subsequent. The question in *Nollan* and *Dolan* was whether the government could lawfully demand property as a condition of development; it was not whether the government's actual taking of property was unlawful. *Nollan,* 483 U.S. at 827; *Dolan,* 512 U.S. at 377. Both cases involved agency decisions that conditioned the issuance of a permit upon the dedication of a property interest to a public use. Neither landowner was required to actually dedicate the demanded property as a prerequisite to asserting a takings claim. *Nollan,* 483 U.S. at 828-30; *Dolan,* 512 U.S. at 382-83. And in both cases, this Court held that the constitutional violation occurred at the moment an unlawful demand was made. *Nollan,* 483 U.S. at 837; *Dolan,* 512 U.S. at 390. Similarly, Koontz's constitutional claim should not hinge on whether the District actually acquired his labor or money, but on whether the District's demands interfered with his right to make productive use of his property for its intended purpose as commercial land.

Finally, the Florida Supreme Court's distinction between conditions precedent and conditions subsequent ignore the theoretical foundations of ***14** *Nollan* and *Dolan.* Both are "a special application of the 'doctrine of unconstitutional conditions,' " *Lingle v. Chevron U.S.A. Inc.,* 544 U.S. 528, 547 (2005), which holds that the government may not withhold a discretionary benefit on the condition that the beneficiary surrender a constitutional right. *See, e.g., Marshall v. Barlow's Inc.,* 436 U.S. 307, 315 (1978) (holding that a business owner could not be compelled to choose between a warrantless search of his business by a government agent or shutting down the business); *Miami Herald Publ'g Co. v. Tornillo,* 418 U.S. 241, 255 (1974) (holding a Florida statute unconstitutional as an abridgment of freedom of the press because it forced a newspaper to incur additional costs by adding more material to an issue or remove material it desired to print). In the context of a land-use exaction, the "government may not require a person to give up the constitutional right … to receive just compensation when property is taken for a public use - in exchange for a discretionary benefit [that] has little or no relationship to the property." *Lingle,* 544 U.S. at 547 (citing *Dolan,* 512 U.S. at 391).

A violation of the unconstitutional conditions doctrine occurs the moment the government demands that a person surrender a constitutional right in exchange for a discretionary government benefit. *See* Kathleen M. Sullivan, *Unconstitutional Conditions,* 102 Harv. L. Rev. 1413, 1421-22 (1989) (The unconstitutional conditions doctrine is violated "when the government offers a benefit on the condition that the recipient perform or forgo an activity that a preferred constitutional right normally protects from government interference."). Thus, it has never mattered to this Court whether the government ***15** ultimately grants or denies the conditioned benefit. *See, e.g., Perry v. Sindermann,* 408 U.S. 593, 597-98 (1972) (refusal to renew professor's employment contract in retaliation for professor's critical testimony regarding the university's board of regents violated unconstitutional conditions doctrine); *Sherbert v. Verner,* 374 U.S. 398, 404-06 (1963) (denial of unemployment benefits held unconstitutional where government required person to "violate a cardinal principle of her religious faith"); *Speiser v. Randall,* 357 U.S. 513, 526 (1958) (denial of tax exemption for applicants' refusal to take loyalty oath violated unconstitutional conditions doctrine); *Frost & Frost Trucking Co. v. Railroad Comm'n,* 271 U.S. 583, 590, 593-94 (1926) (decision prohibiting use of public highways unless private carrier assumes the duties and burdens of common carrier violated unconstitutional conditions doctrine). Indeed, when formulating the rough proportionality test, this Court relied on a decision that applied an early version of the nexus and proportionality standards to invalidate a permit denial. *See Dolan,* 512 U.S. at 390 n.7 (citing *McKain v. Toledo City Plan Commission,* 270 N.E.2d 370, 374 (Ohio 1971) (Denial of a permit based on failure to dedicate property that was not sufficiently related to the proposed development amounts to a confiscation of private property)).

It should not make any difference, therefore, whether the District approved or denied Koontz's permit. The fact remains that the District violated the Constitution the moment it conditioned permit approval upon the dedication of Koontz's money and labor to a public project that was determined to be wholly unrelated to the impacts of his proposal. The District should not be allowed to dodge liability where, ***16** for over eleven years, it decided to withhold all permit approvals necessary for Koontz to use his property because he refused to accede to the District's unlawful exaction. This Court should grant Koontz's petition to decide this important question.

II

THERE IS A CONFLICT AMONG THE LOWER COURTS ABOUT WHETHER THE *NOLLAN* AND *DOLAN* STANDARDS APPLY TO EXACTIONS OF MONEY OR OTHER PERSONAL PROPERTY

The Florida court held that the nexus and proportionality standards of *Nollan* and *Dolan* can never be applied to dedications of money or other personal property. Pet. App. A-19 - A-21. This issue has been the subject of a significant, nationwide split of authority that has been widening among the state courts of last resort and federal circuit courts of appeals for almost two decades.4 Pet. App. A-17 - A-18. Most courts find *Nollan* and *Dolan* applicable to all forms of property dedications, including money.5 A ***17** significant minority, however, hold that the nexus and proportionality tests apply only to dedications of real property.6 This deep and irreconcilable split of authority is firmly entrenched, and it cannot be resolved without this Court's clarification.

*18 A. The Florida Court's Rule Conflicts with the Fifth Amendment and the Purpose of *Nollan* and *Dolan*

The choice of some lower courts to carve out certain land-use exactions from constitutional scrutiny, based solely on the type of private property demanded, ignores the plain language of the Takings Clause and this Court's precedents. The Fifth Amendment protects all private property, including money and personal property, from uncompensated takings. U.S. Const. amend. V; *Webb's Fabulous Pharmacies, Inc. v. Beckwith,* 449 U.S. 155, 162 (1980) (money); *Ruckelshaus v. Monsanto Co.,* 467 U.S. 986, 1003 (1984) (tangible and intangible goods); *Village of Norwood v. Baker,* 172 U.S. 269, 279 (1898) ("[T]he exaction from the owner of private property of the cost of a public improvement in substantial excess of the special benefits accruing to him is, to the extent of such excess, a taking, under the guise of taxation, or private property for public use

without compensation."). The central question in any *Nollan* and *Dolan* challenge is whether, if the property demand were imposed directly, the government would have to pay just compensation. *Lingle,* 544 U.S. at 547. If so, the demand, whether for real or personal property, falls within the purview of *Nollan* and *Dolan. Id.* This question does not turn on the type of property being exacted, but on the impact that the exaction has on Koontz's rights in his private property and the question of who should bear the cost of the District's public improvement projects. *Id.* at 542-43.

As stated above, this Court's application of the unconstitutional conditions doctrine in *Nollan* and *Dolan* was intended to protect against the compelled ***19** waiver of the right to compensation, which occurs whenever the government demands an excessive or unrelated dedication of property in exchange for a permit approval. *Id.* at 547. A rule that the right to just compensation will be safeguarded only when the government targets real property finds no support in this Court's unconstitutional conditions precedents. *See Frost & Frost Trucking Co. v. Railroad Comm'n,* 277 U.S. 583, 593-94 (1926) (invalidating state law that required trucking company to dedicate personal property to public uses as a condition for permission to use highways); *Baltic Min. Co. v. Mass.,* 231 U.S. 68, 83 (1913) ("[A] state may not say to a foreign corporation, you may do business within our borders if you permit your property to be taken without the due process of law[.]"). Nor is the Florida court's rule supported by *Dolan*, which relied on cases that invalidated land-use exactions requiring the applicant to pay for unrelated, off-site public improvement projects when developing the proportionality test. *Dolan,* 512 U.S. 389-90 at n.7 (citing *J.E.D. Assocs. v. Atkinson,* 432 A.2d 12, 15 (N.H. 1981); *Divan Builders v. Planning Bd. of the Township of Wayne,* 334 A.2d 30, 40 (N.J. 1975)).

The fact that *Nollan* and *Dolan* both involved dedications of real property, which if imposed directly would have effected a physical taking, does not dictate the conclusion that any other type of property dedication must be categorically excluded from scrutiny under the nexus and proportionality tests. *Lingle,* 544 U.S. at 547 (explaining that the nexus and proportionality tests were applied to the exactions in *Nollan* and *Dolan* because they involved "dedications of property so onerous that, outside the exactions context, they would be deemed per se physical ***20** takings"). Just like real property, one's money or other personal property can be subject to a physical taking. *See Brown v. Legal Foundation of Washington,* 538 U.S. 216, 231-32, 234 (2003) (likening a government act compelling the transfer of private funds to a public use to a physical taking); *see also Pioneer Trust & Sav. Bank v. Mt. Prospect,* 176 N.E 799, 801-02 (Ill. 1961) (invalidating a permit condition requiring the developer to dedicate property for recreational and educational facilities because the dedication was the functional equivalent of forcing the landowner to pay for public improvements), (*cited by Dolan,* 512 U.S. 389-90 at n.7). Accordingly, this Court has never limited the nexus and proportionality tests to dedications of real property; instead, it has consistently explained that *Nollan* and *Dolan* apply to a "dedication of property," "dedication of private property," or "excessive exactions." *See Lingle,* 544 U.S. at 547; *Del Monte Dunes,* 526 U.S. at 702-03; *Dolan,* 512 U.S. at 390. Many lower courts, nonetheless, continue to hold to the contrary.

Moreover, the Florida court's conclusion that *Nollan* and *Dolan* apply only to compelled dedications of real property cannot be squared with this Court's grant of certiorari and remand in *Ehrlich v. City of Culver City,* 15 Cal. App. 4th 1737, 1743 (1993), *vacated and remanded,* 512 U.S. 1231 (1994). In *Ehrlich*, the owner of a private tennis club and recreational facility applied to the City of Culver City for an amendment to a general plan, a zoning change, and amendment of the specific plan to allow replacement of the tennis club and recreational facility with a condominium complex. *Id.* The City approved the application conditioned upon the payment of ***21** certain monetary exactions, including a $280,000 fee to pay a portion of the cost of replacing the lost recreational facilities. *Id.* The California appellate court rejected the property owner's *Nollan*-based regulatory takings challenge, holding that monetary exactions are not subject to heightened scrutiny under the nexus test. *Id.* This Court granted certiorari, vacated the lower court's judgment, and remanded the case for consideration under *Dolan. Ehrlich,* 512 U.S. at 1231. On remand, the California Supreme Court held that the nexus and proportionality tests apply equally to land-use exactions that require a property owner to dedicate land or pay fees. 911 P.2d 429, 444 (Cal. 1996) ("[I]t matters little whether the local land use permit authority demands the actual conveyance of the property or the payment of a monetary exaction."); *see also San Remo Hotel v. City & County of San Francisco,* 41 P.3d 87, 102 (Cal. 2002) ("Though the members of this court disagreed on various parts of the analysis, we unanimously held that this ad hoc monetary exaction was subject to *Nollan/Dolan* scrutiny.").

Since *Ehrlich*, however, this Court has denied every petition for a writ of certiorari asking whether *Nollan* and *Dolan* apply to

non-real property exactions. These petitions included cases where the lower court applied *Nollan* and *Dollan* to a monetary exaction and in cases where the lower court refused to subject such exactions to the nexus and proportionality tests. *See, e.g.*, *Twin Lakes Dev. Corp. v. Town of Monroe,* 801 N.E.2d 821, 825 (N.Y. 2003), *cert. denied,* 541 U.S. 974 (2004) (*Dolan*'s rough proportionality test applies to an exaction of park fees); *McClung v. City of Sumner,* 548 F.3d 1219, 1224 (9th Cir. 2008), *cert. denied,* ***22** 129 S. Ct. 2765 (2009) (holding that *Nollan* and *Dolan* are limited to dedications of real property). Faced with an irreconcilable conflict on a question of federal takings law, lower courts, like the Florida court below, have repeatedly indicated that, due to a lack of guidance from this Court, they are simply having to choose sides in a deepening split of authority. Pet. App. A-19; Pet. App. B at 10-12, 21-22, 24-27; *see also West Linn Corporate Park, LLC v. City of West Linn,* 240 P.3d 29, 45 (Or. 2010), *cert. denied,* 132 S. Ct. 181 (2011) (explaining that, without guidance from the U.S. Supreme Court, it would strictly limit *Nollan* and *Dolan* to their facts). This is a wholly inappropriate basis upon which to deny a person's right to seek compensation for a violation of his or her rights under the Takings Clause and warrants certiorari.

B. *Del Monte Dunes* Did Not Limit *Nollan* and *Dolan*

Confusion about whether *Nollan* and *Dolan* apply to exactions of personal property is driven primarily by this Court's discussion of the nexus and proportionality tests in *City of Monterey v. Del Monte Dunes at Monterey, Ltd.,* 526 U.S. 687, 702-03 (1999); Pet. App. A-18 - A-19. In *Del Monte Dunes*, a property owner submitted a series of applications for a permit to build a multi-family residential complex on a coastal property zoned for such use. 526 U.S. at 695-98. The city delayed and denied every permit application for a variety of reasons (*id.*), and the landowner sued alleging two different regulatory takings theories: (1) that the reasons the city provided for its denials lacked a sufficient nexus to the government's stated objectives under *Nollan*; and (2) that the permit denial deprived the property owner of all economically viable ***23** use under *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003 (1992).7 *Del Monte Dunes,* 526 U.S. at 700-01.

The jury delivered a general verdict that the government's actions effected a temporary regulatory taking and awarded compensation. *Id.* The Ninth Circuit Court of Appeals upheld the verdict, concluding that there was sufficient evidence in the record to support the jury's verdict on either regulatory takings theory. *Id.* at 701-02 (citing *Del Monte Dunes,* 95 F.3d at 1430-34). In doing so, however, the Ninth Circuit posited that the evidence could have also established a violation of *Dolan*'s rough proportionality test. This Court granted certiorari, in part, to determine whether the Ninth Circuit "erred in assuming that the rough-proportionality standard of [*Dolan*] applied to this case." *Id.* at 702.

This Court briefly discussed the rough proportionality test, noting that, although all regulatory takings claims include consideration of whether the burden being placed on a landowner is proportional, *Dolan*'s "rough proportionality" test was specifically developed to address excessive land-use exactions and was not readily applicable to cases where the landowner challenges the application of a general land use regulation to deny a permit application. *Id.* at 703 (*Dolan* "was not designed to address, and is not readily applicable to … [a situation where] the landowner's challenge is based not on ***24** excessive exactions but on denial of development."); *see also id.* at 733 (Souter, J., concurring in part and dissenting in part) (agreeing with lead opinion "in rejecting extension of 'rough proportionality' as a standard for reviewing land-use regulations generally"). Ultimately, however, this Court held that it was unnecessary to address whether the Ninth Circuit erred when it considered *Dolan* because there was substantial evidence on the record demonstrating that the city's decision to deny the permit lacked a sufficient nexus to the government's stated objectives:8

Del Monte provided evidence sufficient to rebut each of [the City's] reasons [for denying the final proposal]. Taken together, Del Monte argued that the City's reasons for denying their application were invalid and that it unfairly intended to forestall any reasonable development of the [property]. In light of evidence proffered by Del Monte, the City has incorrectly argued that no rational juror could conclude that the City's denial of Del Monte Dune's application lacked a sufficient nexus with its stated objective.

***25** *Id.* at 703 (quoting *Del Monte Dunes,* 95 F.3d at 1431-32).

Just like *Del Monte Dunes*, the trial court in this case concluded that the District's proffered reason for denying Koontz's permit applications - his refusal to accede to the off-site improvement condition - lacked the required nexus linking the project impacts to the government's stated objectives:

> St. Johns Water Management District did not prove the necessary relationship between the condition of off-site mitigation and the effect of development. There was neither a showing of nexus between the required off-site mitigation and the requested development of the tract, nor was there a showing of rough proportionality to the impact of site development. … St. Johns District's required conditions of unspecified but substantial off-site mitigation resulted in a regulatory taking. It is the opinion of this Court that the denial of the Koontz permit application by the St. Johns Water Management District was invalid[.]

Pet. App. D-11. Koontz clearly stated a cognizable claim for a regulatory taking under this Court's precedents and the Takings Clause of the U.S. Constitution. *Lingle,* 544 U.S. at 548 ("[A] plaintiff seeking to challenge a government regulation as an uncompensated taking of private property may proceed … by alleging … a land-use exaction violating the standards set forth in *Nollan* and *Dolan.*"); *First English Evangelical Lutheran Church v. County of Los Angeles,* 482 U.S. 304, 318 (1987) (Temporary takings "are not different in kind from permanent takings, for ***26** which the Constitution clearly requires compensation. The only difference is that a temporary taking puts private property to public use for a limited period of time.").

The Florida court, however, focused narrowly on the one sentence from *Del Monte Dunes* where this Court explained that it had not applied the proportionality test outside the context of land-use exactions, to hold that *Del Monte Dunes* had "specifically limited the scope of *Nollan* and *Dolan* to those exactions that involve[] the dedication of real property for a public use." Pet. App. A-19; *see also McClung,* 548 F.3d at 1227 (citing *Del Monte Dunes* as having limited *Nollan* and *Dolan*); *Sea Cabins,* 548 S.E.2d at 603 n.5 (same). By overlooking the actual holding of *Del Monte Dunes*, the Florida court reached an opposite conclusion on facts similar to those in *Del Monte Dunes.* The decision below creates more confusion on a constitutional test that is already the subject of a deeply entrenched split of authority and warrants certiorari.

C. Resolving the Split of Authority Is Necessary and Warranted in This Case

This petition provides the Court with a good opportunity to address the split of authority on the scope of *Nollan* and *Dolan* because it presents the issue as a pure question of law. There is no question that, if *Nollan* and *Dolan* apply to the District's off-site improvement demand, a taking occurred. The petition, therefore, squarely asks whether *Nollan* and *Dolan* apply to development conditions that compel a landowner to dedicate his or her personal property to ***27** the public. This question arises frequently, particularly in regard to conditions compelling an applicant to make off-site public improvements, and is the subject of a nationwide split of authority. *See, e.g., Toll Bros., Inc. v. Board of Chosen Freeholders of Burlington,* 944 A.2d 1, 4 (N.J. 2008) (The government "may only impose off-tract improvements on a developer if they are necessitated by the development."); *Town of Flower Mound v. Stafford Estates Ltd. P'ship,* 135 S.W.3d 620, 635, 639-42 (Tex. 2004) ("For purposes of determining whether an exaction as a condition of governmental approval of development is a compensable taking, we see no important distinction between a dedication of property to the public and a requirement that property already owned by the public be improved."); *West Linn Corporate Park, LLC v. City of West Linn,* 428 Fed. Appx. 700, 702 (9th Cir. 2011) (nexus and proportionality tests do not apply to an exaction requiring landowner to dedicate money to off-site public improvements). And several lower courts, including the Florida court below, have indicated that they will not reconsider their positions on this question unless and until this Court clarifies that the nexus and proportionality tests protect all private property. Pet. App. A-19; *West Linn,* 240 P.3d at 45.

***28 CONCLUSION**

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Footnotes

1 Coy Koontz, Sr., owned the subject property and filed the present lawsuit. When Koontz, Sr., passed away in the midst of litigation, his estate - as represented by his son, Koontz, Jr. - became the successor to the property and to his interest in the litigation.

2 After the inverse condemnation trial, the District determined that the development would only disturb approximately 0.8 acres of degraded wetlands. St. Johns River Water Management District's Opening Brief on the Merits at 5-8 (Fla. Sup. Ct., Nov. 12, 2009).

3 While this case was on appeal, the Estate of Coy A. Koontz, Sr., sold the subject property. The Estate, however, remains the judgment creditor and retains standing to petition the Florida Supreme Court's decision.

4 This split of authority arose almost immediately after this Court issued its decision in *Dolan* and has continued to grow since then. *See Manocherian v. Lenox Hill Hospital,* 643 N.E.2d 479, 483 (N.Y. 1994), *cert. denied,* 514 U.S. 1109 (1995) (*Dolan* applied to rent stabilization ordinance); *Waters Landing Ltd. P'ship v. Montgomery County,* 650 A.2d 712 (Md. 1994) (holding that *Dolan* cannot be applied to a monetary exaction).

5 *See, e.g., Toll Bros., Inc. v. Board of Chosen Freeholders of Burlington,* 944 A.2d 1, 4 (N.J. 2008); *Town of Flower Mound v. Stafford Estates Ltd. P'ship,* 135 S.W.3d 620, 635, 639-40, 641-42 (Tex. 2004); *Twin Lakes Dev. Corp. v. Town of Monroe,* 801 N.E.2d 821, 825 (N.Y. 2003), *cert. denied,* 541 U.S. 974 (2004); *Krupp v. Breckenridge Sanitation District,* 19 P.3d 687, 697-98 (Colo. 2001); *Home Builders Association of Dayton and the Miami Valley v. City of Beavercreek,* 729 N.E.2d 349, 353-56 (Ohio 2000); *Benchmark Land Co. v. City of Battleground,* 972 P.2d 944, 950-51 (Wash. Ct. App. 2000) *aff'd,* 49 P.3d 860 (Wash. 2002) (affirmed on non-constitutional grounds); *Dowerk v. Charter Township of Oxford,* 592 N.W.2d 724, 728 (Mich. Ct. App. 1998); *Curtis v. Town of South Thomaston,* 708 A.2d 547, 660 (Me. 1998); *National Association of Home Builders of the United States v. Chesterfield County,* 907 F. Supp. 166, 167 (E.D. Va. 1995), *aff'd,* 92 F.3d 1180 (4th Cir. 1996) (unpublished), *cert. denied,* 519 U.S. 1056 (1997); *Northern Illinois Home Builders Association, Inc. v. County of Du Page,* 649 N.E.2d 384 (Ill. 1995); *City of Portsmouth v. Schlesinger,* 57 F.3d 12, 16 (1st Cir. 1995); *Manocherian v. Lenox Hill Hospital,* 643 N.E.2d 479, 483 (N.Y. 1994), *cert. denied,* 514 U.S. 1109 (1995); *Trimen Development Co. v. King County,* 877 P.2d 187, 191 (Wash. 1994).

6 *See e.g., West Linn Corporate Park, LLC v. City of West Linn,* 428 Fed. Appx. 700, 702 (9th Cir.), *cert. denied,* 132 S. Ct. 578 (2011); *West Linn Corporate Park, LLC v. City of West Linn,* 240 P.3d 29, 45 (Or. 2010); *McClung v. City of Sumner,* 548 F.3d 1219, 1224 (9th Cir. 2008), *cert. denied,* 556 U.S. 1282 (2009); *Krupp v. Breckenridge Sanitation District,* 19 P.3d 687, 695-97 (Colo. 2001); *Sea Cabins on the Ocean IV Homeowners Ass'n v. City of N. Myrtle Beach,* 548 S.E.2d 595, 603 n.5 (S.C. 2001); *Home Builders Ass'n of Central Arizona v. City of Scottsdale,* 930 P.2d 993, 1000 (Ariz.), *cert. denied,* 521 U.S. 1120 (1997); *Clajon Production Corp. v. Petera,* 70 F.3d 1566, 1579 (10th Cir. 1995); *McCarthy v. City of Leawood,* 894 P.2d 836, 845 (Kan. 1995); *Waters Landing Ltd. P'ship v. Montgomery County,* 650 A.2d 712 (Md. 1994).

7 While Del Monte Dune's lawsuit was pending, the city purchased the property. 526 U.S. at 700. Accordingly, the property owner's claims were considered as alleging a temporary taking. *Id.* at 704; *see also City of Monterey v. Del Monte Dunes at Monterey, Ltd.,* 95 F.3d 1422, 1425-26 (9th Cir. 1996).

8 The decision speaks to both *Nollan*'s nexus requirement and the requirement that the decision substantially advance a legitimate government interest. *Del Monte Dunes,* 526 U.S. at 701, 704. In *Lingle*, this Court excised the "substantially advances" requirement from the nexus and proportionality tests. *Lingle,* 544 U.S. at 545-48 (The question whether a regulation substantially advances a legitimate government interest is properly part of a due process analysis; it "has no proper place in our takings jurisprudence."). The "substantially advance a legitimate government" inquiry is now properly considered as part of a due process analysis. *Lingle,* 544 U.S. at 545-48.

Supreme Court of Florida

No. SC09-713

ST. JOHNS RIVER WATER MANAGEMENT DISTRICT,
Petitioner,

vs.

COY A. KOONTZ, etc.,
Respondent.

[November 3, 2011]

LEWIS, J.

This case is before the Court for review of the decision of the Fifth District Court of Appeal in St. Johns River Water Management District v. Koontz, 5 So. 3d 8 (Fla. 5th DCA 2009) (Koontz IV). In its decision, the Fifth District construed provisions of the state and federal constitutions. The district court also certified a question to be of great public importance, which we have rephrased as follows:

> DO THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE X, SECTION 6(a) OF THE FLORIDA CONSTITUTION RECOGNIZE AN EXACTIONS TAKING UNDER THE HOLDINGS OF NOLLAN V. CALIFORNIA COASTAL COMMISSION, 483 U.S. 825 (1987), AND DOLAN V. CITY OF TIGARD, 512 U.S. 374 (1994), WHERE THERE IS NO COMPELLED DEDICATION OF ANY INTEREST IN REAL PROPERTY TO PUBLIC USE AND THE ALLEGED

> EXACTION IS A NON LAND-USE MONETARY CONDITION FOR PERMIT APPROVAL WHICH NEVER OCCURS AND NO PERMIT IS EVER ISSUED?[1]

We have jurisdiction. See art. V, § 3(b)(3)-(4), Fla. Const.

We rephrase the certified question to reflect that the issue presented by this case is controlled by the existing interpretation of the United States Constitution by the United States Supreme Court. This Court has previously interpreted the takings clause of the Fifth Amendment and the takings clause of the Florida Constitution coextensively. See, e.g., Tampa-Hillsborough County Expressway Auth. v. A.G.W.S. Corp., 640 So. 2d 54, 58 (Fla. 1994) ("We acknowledge that in striking down the offending portion of the statute in Joint Ventures, we referred to

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1. The original certified question provided:

> WHERE A LANDOWNER CONCEDES THAT PERMIT DENIAL DID NOT DEPRIVE HIM OF ALL OR SUBSTANTIALLY ALL ECONOMICALLY VIABLE USE OF THE PROPERTY, DOES ARTICLE X, SECTION 6(a) OF THE FLORIDA CONSTITUTION RECOGNIZE AN EXACTION TAKING UNDER THE HOLDINGS OF NOLLAN [n.1] AND DOLAN [n.2] WHERE, INSTEAD OF A COMPELLED DEDICATION OF REAL PROPERTY TO PUBLIC USE, THE EXACTION IS A CONDITION FOR PERMIT APPROVAL THAT THE CIRCUIT COURT FINDS UNREASONABLE?
>
> [N.1.] Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 107 S. Ct. 3141, 97 L. Ed. 2d 677 (1987).
>
> [N.2.] Dolan v. City of Tigard, 512 U.S. 374, 114 S. Ct. 2309, 129 L. Ed. 2d 304 (1994).

Koontz IV, 5 So. 3d at 22.

the takings clauses of our state and federal constitutions."); Joint Ventures, Inc. v. Dep't of Transp., 563 So. 2d 622, 623 (Fla. 1990) ("We answer the question in the affirmative, finding those subsections invalid as a violation of the fifth amendment to the United States Constitution and article X, section 6(a) of the Florida Constitution."). We also rephrase the question to address the two actual factors to which the doctrine of exactions was expanded by the Fifth District—application of the doctrine to an alleged exaction that does not involve the dedication of an interest in or over real property; and application of the doctrine where an exaction does not occur and no permit is issued by the regulatory entity.

For the reasons expressed below, we answer the rephrased question in the negative and quash the decision under review.

BACKGROUND

This case has an extended procedural history. Prior to the issuance of the decision that is currently before the Court, issues related to the regulation of this property were before the Fifth District Court of Appeal on three occasions. During the first appeal, the Fifth District reversed a determination by the trial court that the claim of Coy A. Koontz, Sr. (Mr. Koontz) was not ripe for adjudication and remanded the matter for a trial on whether the actions of the St. Johns River Water Management District (St. Johns) effected a taking of Mr. Koontz's property. See Koontz v. St. Johns River Water Mgmt. Dist., 720 So. 2d 560, 562 (Fla. 5th DCA

1998) (Koontz I), review denied, 729 So. 2d 394 (Fla. 1999). After the trial court determined that a taking had occurred, St. Johns twice attempted to appeal that determination, but the Fifth District dismissed both appeals, concluding that the orders issued by the trial court did not constitute final orders or appealable non-final orders. See St. Johns River Water Mgmt. Dist. v. Koontz, 861 So. 2d 1267, 1268 (Fla. 5th DCA 2003) (Koontz II); St. Johns River Water Mgmt. Dist. v. Koontz, 908 So. 2d 518, 518 (Fla. 5th DCA 2005) (Koontz III). After the trial court entered a judgment assessing damages in favor of Coy A. Koontz, Jr., as personal representative of the Estate of Mr. Koontz, St. Johns filed an appeal to review that judgment. See Koontz IV, 5 So. 3d at 8.

The decision resulting from that appeal in Koontz IV provides the following background:

> This case involves a landowner, Mr. Koontz, who, in 1994, requested permits from [St. Johns] so that he could develop a greater portion of his commercial property than was authorized by existing regulation. . . . Based on the permit denial, Mr. Koontz brought an inverse condemnation claim asserting an improper "exaction" by [St. Johns].
>
> In the most general sense, an "exaction" is a condition sought by a governmental entity in exchange for its authorization to allow some use of land that the government has otherwise restricted. Even though the government may have the authority to deny a proposed use outright, under the exactions theory of takings jurisprudence, it may not attach arbitrary conditions to issuance of a permit.
>
> In relating the circumstances giving rise to this case, the trial court explained:

> The subject property is located south of State Road 50, immediately east of the eastern extension of the East-West Expressway in Orange County. The original plaintiff, Coy Koontz, has owned the subject property since 1972. In 1987, a portion of the original acreage[2] adjacent to Highway 50 was condemned, leaving Mr. Koontz with 14.2 acres. There is a 100-foot wide transmission line easement of Florida Power Corporation running parallel to and about 300 feet south of Highway 50, that is kept cleared and mowed by Florida Power. . . .
>
> . . . .
>
> All but approximately 1.4 acres of the tract lies within a Riparian Habitat Protection Zone (RHPZ) of the Econlockhatchee River Hydrological Basin and is subject to jurisdiction of the St. Johns River Water Management District.
>
> In 1994, Koontz sought approval from [St. Johns] for a 3.7 acre development area adjacent to Highway 50, of which 3.4 acres were wetlands and .3 acres were uplands.

In his concurring opinion in Koontz II, Judge Pleus explained the positions [advanced] by the parties during the permit approval process:

> Koontz proposed to develop 3.7 acres closest to Highway 50, back to and including the power line easement. In order to develop his property, he sought a management and storage of surface waters permit to dredge three and one quarter acres of wetlands. A staffer from St. Johns agreed to recommend approval if Koontz would deed the remaining portion of his property into a conservation area and perform offsite mitigation by either replacing culverts four and one-half miles southeast of his property or plug certain drainage canals on other property some seven miles away. Alternatively, St. Johns demanded

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1. Mr. Koontz owned a total of 14.9 acres in Orange County. See Koontz I, 720 So. 2d at 561.

> that Koontz reduce his development to one acre and turn the remaining 14 acres into a deed-restricted conservation area. Koontz agreed to deed his excess property into conservation status but refused St. Johns' demands for offsite mitigation or reduction of his development from three and seven-tenths acres to one acre. Consequently, St. Johns denied his permit applications.
>
> Id. at 1269 (Pleus, J., concurring specially). In its orders denying the permits, [St. Johns] said that Mr. Koontz's proposed development would adversely impact Riparian Habitat Protection Zone ["RHPZ"] fish and wildlife, and that the purpose of the mitigation was to offset that impact.
>
> After hearing conflicting evidence, the trial court concluded that [St. Johns] had effected a taking of Mr. Koontz's property . . . . In reaching this conclusion, the trial court applied the constitutional standards enunciated by the Supreme Court in Nollan and Dolan. In Nollan, with respect to discretionary decisions to issue permits, the Supreme Court held that the government could impose a condition on the issuance of the permit without effecting a taking requiring just compensation if the condition "serves the same governmental purpose as the developmental ban." 483 U.S. at 837. This test is referred to as the "essential nexus" test. In Dolan, the Court added the requirement that, for such a condition to be constitutional, there must also be a "rough proportionality" between the condition and the impact of the proposed development. 512 U.S. at 390-91.

Koontz IV, 5 So. 3d at 9-10 (footnotes omitted) (citations omitted).

After the circuit court determined that St. Johns had effected a taking of Mr. Koontz's property, statutory law required St. Johns to take one of three possible actions: (a) agree to issue the permit; (b) agree to pay damages; or (c) agree to modify its decision to avoid an unreasonable exercise of police power. See § 373.617(3), Fla. Stat. (2002). Here, St. Johns chose to issue the permits to Mr. Koontz after it received additional evidence which demonstrated that the amount of

wetlands on Mr. Koontz's property was significantly less than originally believed. The circuit court subsequently awarded Mr. Koontz $376,154 for a temporary taking of his property by St. Johns.

On appeal, St. Johns first contended that the trial court lacked subject matter jurisdiction to consider Mr. Koontz's exactions claim because the statute under which the claim was asserted, section 373.617, Florida Statutes (1993), limited circuit court review to cases in which a constitutional taking has actually occurred. See Koontz IV, 5 So. 3d at 10. St. Johns asserted that although an exactions claim is a form of taking and is cognizable under section 373.617, no exaction occurred here because nothing had been taken from Mr. Koontz. See id. at 10-11. The original limitations applicable to the property were never challenged. The Fifth District Court of Appeal framed this challenge as "whether an exaction claim is cognizable when, as here, the land owner refuses to agree to an improper request from the government resulting in the denial of the permit." Id. at 11. The district court concluded that the United States Supreme Court had implicitly determined in Dolan v. City of Tigard, 512 U.S. 374 (1994), that an exaction occurs under such circumstances. See 5 So. 3d at 11.

St. Johns also contended that an action for inverse condemnation lacked merit because the condition proposed by St. Johns did not involve a physical dedication of land but instead would have caused Mr. Koontz to expend money for

improvement of land belonging to St. Johns if accepted. See id. at 12. The Fifth District Court of Appeal also rejected this assertion and concluded that the United States Supreme Court had implicitly decided this issue adverse to St. Johns in Ehrlich v. City of Culver City, 512 U.S. 1231 (1994). See 5 So. 3d at 12. In Ehrlich, the United States Supreme Court vacated a lower court decision that approved the conditioning of a permit on the payment of money to build tennis courts and purchase artwork and remanded the case for reconsideration in light of Dolan. See id. (citing Ehrlich, 512 U.S. 1231). The Fifth District concluded that in the absence of a more definite pronouncement from the United States Supreme Court on this issue, the distinction advanced by St. Johns was not legally significant. See Koontz IV, 5 So. 3d at 12. The Fifth District affirmed the trial court judgment awarding compensation to Mr. Koontz. See id.

In dissent, Judge Griffin asked, "[i]n what parallel legal universe or deep chamber of Wonderland's rabbit hole could there be a right to just compensation for the taking of property under the Fifth Amendment when no property of any kind was ever taken by the government and none ever given up by the owner?" Id. at 20 (Griffin, J., dissenting). Judge Griffin asserted that whether a taking has occurred depends on whether a landowner gives up any protected interest in his or her land:

> If [a protected interest is given up], whether temporarily or permanently, the landowner is entitled to compensation as set forth in

> the "taking" cases. If, however, the unconstitutional condition does not involve the taking of an interest in land, the remedy of inverse condemnation is not available. In this case, the objected-to condition that was found to be an exaction was not an interest in land; it was the requirement to perform certain off-site mitigation in the form of clean-up of culverts and ditches to enhance wetlands several miles away.

Id. at 18 (Griffin, J., dissenting). Judge Griffin also reasoned that whether a condition that has been rejected can constitute a taking was not resolved in Dolan, and that a taking does not occur under such circumstances:

> In this case, if Mr. Koontz had given in to [St. Johns'] condition, gotten his development permit and done the off-site mitigation, he would be entitled to recover the value of the off-site mitigation. If he elected to refuse the offer, he had a judicial remedy to invalidate the condition . . . . The parcel of land for which he sought the development permit was not, however, in any wise "taken" by [St. Johns]. The only way a "taking" can even be conceptualized in such a circumstance is by adopting the view that by proposing an "unconstitutional condition" that was rejected, [St. Johns] forfeited its right (and duty) to protect the public interest to refuse the permit at all.

Id. at 20-21 (Griffin, J., dissenting).

St. Johns subsequently filed a motion for certification, which the Fifth District Court of Appeal granted. See id. at 22. The district court then certified a question to this Court as one of great public importance.

ANALYSIS

Standard of Review and Constitutional Provisions

As a preliminary matter, the interpretation of a constitutional provision is a question of law that is reviewed de novo. See Fla. Dep't of Rev. v. City of Gainesville, 918 So. 2d 250, 256 (Fla. 2005).

The Fifth Amendment to the United States Constitution provides that private property shall not be taken for public use without just compensation. See amend. V, U.S. Const. The Fifth Amendment is applicable to the states through the Fourteenth Amendment. See Palazzolo v. Rhode Island, 533 U.S. 606, 617 (2001). The purpose behind the takings doctrine is to prevent government from forcing an individual to bear burdens that should be carried by the public as a whole. See Armstrong v. United States, 364 U.S. 40, 49 (1960). The takings provision of the Florida Constitution provides: "No private property shall be taken except for a public purpose and with full compensation therefor paid to each owner or secured by deposit in the registry of the court and available to the owner." Art. X, § 6(a), Fla. Const. As previously discussed, this Court has interpreted the takings clauses of the United States and Florida Constitutions coextensively. See A.G.W.S. Corp., 640 So. 2d at 58; Joint Ventures, 563 So. 2d at 623.

Takings Under Supreme Court Case Law

The United States Supreme Court has stated that the takings clause of the Fifth Amendment does not prohibit the taking of private property by the government, but instead places conditions on the exercise of that power. See First

English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304, 314 (1987). The clause is not intended to limit government interference with property rights, but rather to secure compensation where otherwise proper interference amounts to a taking. See id. at 315.

Outside the special context of land-use exactions (discussed below), the United States Supreme Court has recognized two types of regulatory actions that generally constitute per se takings under the Fifth Amendment. First, if government action causes a permanent physical invasion of private property, the government must provide just compensation to the owner of the property. See Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982) (taking occurred where state law required landlords to allow cable companies to install cable equipment in their apartment buildings). Second, a government regulation that completely deprives an owner of all economically beneficial use of his or her property effects a Fifth Amendment taking. See Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1019 (1992). In Lucas, the United States Supreme Court held that the government must pay just compensation for such "total regulatory takings," id. at 1026, except to the extent that the owner's intended use of his or her property is restricted by nuisance and property law. See id. at 1026-32.

Aside from regulations that allow physical invasions of private property or deprive a property owner of all beneficial property use, regulatory takings

challenges are governed by the standard articulated in Penn Central Transportation Co. v. New York City, 438 U.S. 104 (1978). The United States Supreme Court in Penn Central acknowledged that it had previously been unable to establish any "set formula" for evaluating regulatory takings claims, but identified a number of factors that have particular significance. Id. at 124. The United States Supreme Court stated that the primary factor to consider is "[t]he economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations." Id. The Supreme Court also concluded that the character of the governmental action, such as whether the action constitutes a physical invasion or merely impacts property interests, can be relevant to a determination of whether a taking has occurred. See id. The Penn Central standard has served as the principal guide for assessing allegations that a regulatory taking has occurred where the government action does not fall within the physical-invasion or Lucas takings categories.

With regard to the doctrine of exactions, in the late 1980s and early-to-mid 1990s, the United States Supreme Court issued two decisions, Nollan v. California Coastal Commission, 483 U.S. 825 (1987), a California case that involved a beach pass-through easement, and Dolan v. City of Tigard, 512 U.S. 374 (1994), an Oregon case that involved storm-water and bike-path land dedications. These cases arose from landowner requests for building permits to expand the structures

located on their real property. In response, the pertinent governmental entities approved the permits, but conditioned that approval on the receipt of exactions.

In Nollan, the California Coastal Commission approved the Nollans' request for a building permit subject to the dedication of an easement that would allow the public to pass across the beach that was owned by the Nollans behind their home. See 483 U.S. at 828. The Nollans proceeded to build their expanded home but legally contested the exaction imposed as an uncompensated taking. See id. at 828-30. On certiorari review, the United States Supreme Court articulated an "essential nexus" test, which required a government entity to establish that the condition imposed for approval of a building permit (i.e., the exaction) served the same public purpose that would have supported a total ban of the proposed development. See 483 U.S. at 836-37. Thus, if (as the Commission asserted) the public's right to view the shore from the street was the supporting reason for denying the Nollans' permit, the proposed condition/exaction must directly relate to and further this supporting reason. See id. at 835-38. For example, a height restriction on the proposed development to preserve the view corridor might satisfy the requirement. See id. at 836. However, the easement at issue in Nollan, which would allow members of the public to pass across beach owned by the Nollans, failed this test because the right of the public to view the shore from a nearby street was not served by the ability of individuals to traverse up and down the Nollans'

beach property. See id. at 838-39. Thus, the United States Supreme Court concluded that if the State of California desired an easement across the Nollans' property, the State must pay compensation for that easement. See id. at 841-42.

On certiorari review in Dolan, the Court expanded upon Nollan to not only require an "essential nexus" between the permit-approval condition upon the land and the alleged public problem caused by the proposed development, but also to require "rough proportionality" between the condition placed on the land and the extent of the impact of the proposed development. See 512 U.S. at 391. For example, where (as in Dolan) one asserted impact of the development was increased traffic congestion, and the permit-approval condition on the property was the dedication of land for a bike path, the government must demonstrate that the additional number of vehicle and bicycle trips generated by the development are reasonably related to the government's requirement for dedication of a bicycle path easement over the property. See id. at 387-88, 395-96. Similar to Nollan, the government entity in Dolan approved the requested permit subject to contested conditions on the land (i.e., storm-water and bike-path land dedications), and the landowner filed an action claiming that these conditions over the land constituted uncompensated takings. See Dolan, 512 U.S. at 379-83.

In the sixteen years since the Supreme Court issued Dolan, the High Court has only commented twice on the scope of the Nollan/Dolan test. In City of

Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 698 (1999), the developer submitted nineteen different site plans to the City of Monterey for development of an oceanfront parcel of land. Each time, the city rejected the plan and imposed even more rigorous conditions upon the developer. See id. at 697-98. When the developer concluded that the city would not permit development under any circumstances, it filed suit in federal court contending that the final denial of development constituted a regulatory taking of the property. See id. at 698. The United States Supreme Court concluded that the Nollan/Dolan exactions standard was inapplicable to the actions of the city:

> [W]e have not extended the rough-proportionality test of Dolan beyond the special context of exactions—land-use decisions conditioning approval of development on the dedication of property to public use. See Dolan, [512 U.S.] at 385; Nollan v. California Coastal Comm'n, 483 U.S. 825, 841 (1987). The rule applied in Dolan considers whether dedications demanded as conditions of development are proportional to the development's anticipated impacts. It was not designed to address, and is not readily applicable to, the much different questions arising where, as here, the landowner's challenge is based not on excessive exactions but on denial of development. We believe, accordingly, that the rough-proportionality test of Dolan is inapposite to a case such as this one.

Id. at 702-03 (emphasis supplied). More recently, in Lingle v. Chevron U.S.A., Inc., 544 U.S. 528 (2005), the United States Supreme Court rejected a takings test that it had previously adopted in Agins v. City of Tiburon, 447 U.S. 255 (1980). See Lingle, 544 U.S. at 548 ("We hold that the 'substantially advances' formula is not a valid takings test . . . ."). The Agins standard had been mentioned in both

Nollan and Dolan, which caused the Supreme Court to expressly note that its rejection of that standard had no impact on the holdings of these two more recent cases. See id. at 546-48. In the context of this discussion, the Supreme Court reasoned that Nollan and Dolan involved Fifth Amendment takings challenges to adjudicative land-use exactions—more specifically, government demands that landowners dedicate easements over their land to allow the public access across their property as a condition of obtaining development permits. See id. at 546. The Court further stated that it refined the Nollan "essential nexus" test in Dolan by holding that

> an adjudicative exaction requiring dedication of private property must also be " 'rough[ly] proportiona[l]' . . . both in nature and extent to the impact of the proposed development." 512 U.S., at 391; see also Del Monte Dunes, supra, at 702 (emphasizing that we have not extended this standard "beyond the special context of [such] exactions").

Id. at 547 (alterations in original) (emphasis supplied).

The Scope of the Nollan/Dolan Test

State and federal courts have been inconsistent with regard to interpretations of the scope of the Nollan/Dolan test, even after the decisions in Del Monte Dunes and Lingle. The divide is most clearly evident on the issue of whether the test applies to conditions that do not involve the dedication of land or conditions imposed upon the land.

One line of cases holds that the Nollan/Dolan standard applies solely to exactions cases involving land-use dedications. See, e.g., McClung v. City of Sumner, 548 F.3d 1219, 1228 (9th Cir. 2008) (distinguishing monetary conditions from conditions on the land); Clajon Prod. Corp. v. Petera, 70 F.3d 1566, 1578 (10th Cir. 1995); Sea Cabins on the Ocean IV Homeowners Ass'n v. City of N. Myrtle Beach, 548 S.E.2d 595, 603 n.5 (S.C. 2001) (holding that Del Monte Dunes clarified that Nollan and Dolan only apply to physical conditions imposed upon land).

The other line of cases holds that the Nollan/Dolan test extends beyond the context of the imposition of real property conditions on real property. For example, the California Supreme Court has held that non-real property conditions can constitute a taking where the condition is imposed on a discretionary, individualized basis. See Ehrlich v. City of Culver City, 911 P.2d 429, 444 (Cal. 1996). However, in Town of Flower Mound v. Stafford Estates Ltd Partnership, 135 S.W.3d 620, 640-41 (Tex. 2004), the Texas Supreme Court expanded application of the test further, holding that Nollan and Dolan can apply to certain non-real property conditions that arise from generally applicable regulations.

Despite the varied interpretations of the scope of Nollan/Dolan, we must follow the decisions of the United States Supreme Court with regard to Fifth Amendment takings jurisprudence. See Chesapeake & O. Ry. Co. v. Martin, 283

U.S. 209, 220-21 (1931) (state courts are bound by United States Supreme Court's interpretations of federal law); Carnival Corp. v. Carlisle, 953 So. 2d 461, 465 (Fla. 2007) (state courts are generally not bound by the decisions of the lower federal courts on questions of federal law). Moreover, the Supreme Court itself has specifically stated that when it denies certiorari review, that denial "imports no expression of opinion upon the merits of the case." Teague v. Lane, 489 U.S. 288, 296 (1989) (quoting United States v. Carver, 260 U.S. 482, 490 (1923)). Thus, we decline to interpret a decision of the United States Supreme Court not to review a case that addresses an exactions issue as an approval of the merits or holding of the underlying decision in that case.

Instead, we are guided only by decisions in which the Supreme Court has expressly applied, or commented upon the scope of, exactions takings. Nollan and Dolan both involved exactions that required the property owner to dedicate real property in exchange for approval of a permit. See Dolan, 512 U.S. at 380; Nollan, 483 U.S. at 827. Additionally, in both cases the regulatory entities issued the permits sought with the objected-to exactions imposed. See Dolan, 512 U.S. at 379; Nollan, 483 U.S. at 828. Moreover, in Del Monte Dunes and Lingle, the United States Supreme Court specifically limited the scope of Nollan and Dolan to those exactions that involved the dedication of real property for a public use. See Lingle, 544 U.S. at 546-47; Del Monte Dunes, 526 U.S. at 702-03. Absent a more

limiting or expanding statement from the United States Supreme Court with regard to the scope of Nollan and Dolan, we decline to expand this doctrine beyond the express parameters for which it has been applied by the High Court.[3] Accordingly, we hold that under the takings clauses of the United States and Florida Constitutions, the Nollan/Dolan rule with regard to "essential nexus" and "rough proportionality" is applicable only where the condition/exaction sought by the government involves a dedication of or over the owner's interest in real property in exchange for permit approval; and only when the regulatory agency actually issues the permit sought, thereby rendering the owner's interest in the real property subject to the dedication imposed.

It is both necessary and logical to limit land-use exactions doctrine to these narrow circumstances. Governmental entities must have the authority and flexibility to independently evaluate permit applications and negotiate a permit award that will benefit a landowner without causing undue harm to the community

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3. Our holding today is consistent with the 2011 decisions of two federal appellate courts, both of which held that Nollan and Dolan are inapplicable to cases that do not involve the dedication of real property for a public use. See Iowa Assurance Corp. v. City of Indianola, 650 F.3d 1094, 1096-97 (8th Cir. 2011) (ordinance which required an enclosed fence to surround areas where two or more race cars are present not subject to a Nollan/Dolan exactions analysis); West Linn Corporate Park, LLC v. City of West Linn, 428 F. App'x 700, 702 (9th Cir. 2011) (refusing to extend Nollan/Dolan where city required developer to construct several off-site public improvements but did not require dedication of developer's interest in real property), petition for cert. filed, 80 U.S.L.W. 3135 (U.S. Sept. 6, 2011) (No. 11-299).

or the environment. If a property owner is authorized to file an inverse condemnation claim on the basis of the exactions theory any time regulatory negotiations are not successful and a permit is denied, two undesirable outcomes inevitably ensue. First, the regulation of land use, deemed by the United States Supreme Court to be "peculiarly within the province of state and local legislative authorities," would become prohibitively expensive. Warth v. Seldin, 422 U.S. 490, 508 n.18 (1975); see also Tahoe-Sierra Preserv. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 324 (2002) ("Land-use regulations are ubiquitous and most of them impact property values in some tangential way—often in completely unanticipated ways. Treating them all as per se takings would transform government regulation into a luxury few governments could afford.").

Second, and as a result of the first consequence, agencies will opt to simply deny permits outright without discussion or negotiation rather than risk the crushing costs of litigation. Property owners will have no opportunity to amend their applications or discuss mitigation options because the regulatory entity will be unwilling to subject itself to potential liability. Land development in certain areas of Florida would come to a standstill. We decline to approve a rule of law that would place Florida land-use regulation in such an unduly restrictive position.

Based on the above analysis, we conclude that the Fifth District in Koontz IV erroneously applied the Nollan/Dolan exactions test to the offsite mitigation

proposed by St. Johns. Since St. Johns did not condition approval of the permits on Mr. Koontz dedicating any portion of his interest in real property in any way to public use, this analysis does not apply. Further, even if we were to conclude that the Nollan/Dolan test applied to non-real property exactions—which we do not—Mr. Koontz would nonetheless fail in his exactions challenge because St. Johns did not issue permits, Mr. Koontz never expended any funds towards the performance of offsite mitigation, and nothing was ever taken from Mr. Koontz. As noted by the United States Supreme Court, Nollan and Dolan were not designed to address the situation where a landowner's challenge is based not on excessive exactions but on a denial of development. See Del Monte Dunes, 526 U.S. at 703. Here, all that occurred was that St. Johns did not issue permits for Mr. Koontz to develop his property based on existing regulations and, therefore, an exactions analysis does not apply. See id. ("[T]he rough-proportionality test of Dolan is inapposite to a case such as this one.").

CONCLUSION

Based on our analysis in this case, we answer the rephrased certified question in the negative, quash the decision of the Fifth District in Koontz IV, and remand for proceedings consistent with this opinion. We emphasize that our decision today is limited solely to answering the rephrased certified question. We decline to address the other issues raised by the parties.

It is so ordered.

PARIENTE, LABARGA, and PERRY, JJ., concur.
QUINCE, J., concurs in result only.
POLSTON, J., concurs in result only with an opinion, in which CANADY, C.J., concurs.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION, AND IF FILED, DETERMINED.

POLSTON, J., concurring in result only.

I agree with St. Johns River Water Management District's argument that underlying the landowner's claim for regulatory taking is an attack on the propriety of agency action. Therefore, under these circumstances, the landowner is required to exhaust administrative remedies under chapter 120, Florida Statutes, before bringing this regulatory taking action pursuant to section 373.617, Florida Statutes. See § 373.617(2), Fla. Stat. (2002) ("Review of final agency action for the purpose of determining whether the action is in accordance with existing statutes or rules and based on competent substantial evidence shall proceed in accordance with chapter 120."); Key Haven Associated Enters., Inc. v. Bd. of Trs. of the Internal Improvement Trust Fund, 427 So. 2d 153, 159 (Fla. 1982).

Accordingly, I would quash the Fifth District's opinion but not reach the certified questions as phrased by the Fifth District or the majority.

CANADY, C.J., concurs.

Application for Review of the Decision of the District Court of Appeal - Certified Great Public Importance

Fifth District - Case No. 5D06-1116

(Orange County)

William H. Congdon and Kathryn L. Mennella, Palatka, Florida,

for Petitioner

Christopher V. Carlyle and Shannon McLin Carlyle and The Carlyle Appellate Law Firm, The Villages, Florida, and Michael D. Jones of Michael D. Jones and Associates, P.A., Winter Springs, Florida,

for Respondent

Harry Morrison, Jr. and Kraig A. Conn, Tallahassee, Florida, Virginia Saunders Delegal, on behalf of Florida Association of Counties, Inc. and Florida League of Cities, Inc.; Pamela Jo Bondi, Attorney General, Scott D. Makar, Solicitor General, and Courtney Brewer, Deputy Solicitor General, Tallahassee, Florida, on behalf of the Attorney General, Thomas M. Beason, General Counsel and Meredith C. Fields, Assistant General Counsel, Tallahassee, Florida, on behalf of Florida Department of Environmental Protection, Kevin X. Crowley of Pennington Moore, Wilkinson, Bell and Dunbar, P.A., Tallahassee, Florida, on behalf of the Northwest Florida Water Management District, William S. Bilenky General Counsel, and Joseph J. Ward, Assistant General Counsel, Brooksville, Florida, on behalf of the South Florida Water Management District, and the Southwest Florida Water Management District; E. Thom Rumberger and Noah D. Valenstein of Rumberger, Kirk and Caldwell, Tallahassee, Florida, on behalf of National Audubon Society; David L. Powell, Gary K. Hunter, Jr., and Mohammad O. Jazil of Hopping Green and Sams, Tallahassee, Florida, on behalf of Association of Florida Community Developers, Inc.; Amy Brigham Boulris and John W. Little, III of Brigham Moore, LLP, Coral Gables, on behalf of Florida Home Builders and National Association of Homebuilders, Keith C. Hetrick, General Counsel, Tallahassee, Florida, on behalf of Florida Homebuilders Association; and Steven Geoffrey Gieseler and Nicholas M. Gieseler, Stuart, Florida, on behalf of Pacific Legal Foundation,

As Amici Curiae

Per Curiam

SUPREME COURT OF THE UNITED STATES

STEVEN LEFEMINE, DBA COLUMBIA CHRISTIANS FOR LIFE *v.* DAN WIDEMAN ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 12–168. Decided November 5, 2012

PER CURIAM.

This case concerns the award of attorney's fees in a suit alleging unconstitutional conduct by government officials. The United States Court of Appeals for the Fourth Circuit held that a plaintiff who secured a permanent injunction but no monetary damages was not a "prevailing party" under 42 U. S. C. §1988, and so could not receive fees. That was error. Because the injunction ordered the defendant officials to change their behavior in a way that directly benefited the plaintiff, we vacate the Fourth Circuit's decision and remand for further proceedings.

* * *

Petitioner Steven Lefemine and members of Columbia Christians for Life (CCL) engage in demonstrations in which they carry pictures of aborted fetuses to protest the availability of abortions. On November 3, 2005, Lefemine and about 20 other CCL members conducted such a demonstration at a busy intersection in Greenwood County, South Carolina. Citing complaints about the graphic signs, a Greenwood County police officer informed Lefemine that if the signs were not discarded, he would be ticketed for breach of the peace. Lefemine objected, asserting that the officer was violating his First Amendment rights, but the threat eventually caused him to disband the protest. See *Lefemine* v. *Davis*, 732 F. Supp. 2d 614, 617–619 (SC 2010).

A year later, an attorney for Lefemine sent a letter to

Dan Wideman, the sheriff of Greenwood County, informing him that the group intended to return to the same site with the disputed signs. The letter cautioned that further interference would cause Lefemine "'to pursue all available legal remedies.'" *Id.*, at 619. Chief Deputy Mike Frederick responded that the police had not previously violated Lefemine's rights, and warned that "'should we observe any protester or demonstrator committing the same act, we will again conduct ourselves in exactly the same manner: order the person(s) to stop or face criminal sanctions.'" *Ibid.* Out of fear of those sanctions, the group chose not to protest in the county for the next two years. See *ibid.*

On October 31, 2008, Lefemine filed a complaint under 42 U. S. C. §1983 against several Greenwood County police officers alleging violations of his First Amendment rights. Lefemine sought nominal damages, a declaratory judgment, a permanent injunction, and attorney's fees. See 732 F. Supp. 2d, at 620. Ruling on the parties' dueling motions for summary judgment, the District Court determined that the defendants had infringed Lefemine's rights. See *id.*, at 620–625. The court therefore permanently enjoined the defendants "from engaging in content-based restrictions on [Lefemine's] display of graphic signs" under similar circumstances. *Id.*, at 627. The court, however, refused Lefemine's request for nominal damages, finding that the defendants were entitled to qualified immunity because the illegality of their conduct was not clearly established at the time. See *ibid.* The court as well denied Lefemine's request for attorney's fees under §1988, stating that "[u]nder the totality of the facts in this case the award of attorney's fees is not warranted." *Ibid.*

The Fourth Circuit affirmed the denial of attorney's fees on the ground that the District Court's judgment did not make Lefemine a "prevailing party" under §1988. 672

F. 3d 292, 302–303 (2012).* The court reasoned that the relief awarded did not "'alte[r] the relative positions of the parties'": The injunction prohibited only "unlawful, but not legitimate, conduct by the defendant[s]," and merely "ordered [d]efendants to comply with the law and safeguard [Lefemine's] constitutional rights in the future. No other damages were awarded." *Ibid.* Lefemine sought a writ of certiorari to review the Fourth Circuit's determination that he was not a prevailing party under §1988.

The Civil Rights Attorney's Fees Awards Act of 1976, 90 Stat. 2641, 42 U. S. C. §1988, allows "the prevailing party" in certain civil rights actions, including suits brought under §1983, to recover "a reasonable attorney's fee." A plaintiff "prevails," we have held, "when actual relief on the merits of his claim materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff." *Farrar* v. *Hobby*, 506 U. S. 103, 111–112 (1992). And we have repeatedly held that an injunction or declaratory judgment, like a damages award, will usually satisfy that test. See, *e.g.*, *Rhodes* v. *Stewart*, 488 U. S. 1, 4 (1988) (*per curiam*).

Under these established standards, Lefemine was a prevailing party. Lefemine desired to conduct demonstrations in Greenwood County with signs that the defendant police officers had told him he could not carry. He brought this suit in part to secure an injunction to protect himself from the defendants' standing threat of sanctions. And he succeeded in removing that threat. The District Court held that the defendants had violated Lefemine's rights and enjoined them from engaging in similar conduct in the

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*The defendants did not appeal the District Court's judgment that they had violated Lefemine's First Amendment rights, so the Court of Appeals took as a given that a violation had occurred. See 672 F. 3d, at 299, n. 5.

future. Contrary to the Fourth Circuit's view, that ruling worked the requisite material alteration in the parties' relationship. Before the ruling, the police intended to stop Lefemine from protesting with his signs; after the ruling, the police could not prevent him from demonstrating in that manner. So when the District Court "ordered [d]efendants to comply with the law," 672 F. 3d, at 303, the relief given—as in the usual case involving such an injunction—supported the award of attorney's fees.

Because Lefemine is a "prevailing party," he "should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust." *Hensley* v. *Eckerhart*, 461 U. S. 424, 429 (1983) (internal quotation marks omitted). Neither of the courts below addressed whether any special circumstances exist in this case, and we do not do so; whether there may be other grounds on which the police officers could contest liability for fees is not a question before us. Accordingly, the petition for certiorari is granted, the judgment of the Fourth Circuit is vacated, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.