# Recent Developments in Land Use Law

**Moderator**:
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**Panelists**

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# Dwight H. Merriam FAICP, Esq.

# *Knick* Picking Regulatory Takings:
## Did the Court Right a Wrong, or Wrong a Right?

## …and What Is the Impact on Local Regulation?

**Dwight Merriam**

**December 5, 2019**

# Rose Mary Knick Lived on a Farm…


POSTED
PRIVATE PROPERTY
HUNTING, FISHING, TRAPPING OR
TRESPASSING FOR ANY PURPOSE
IS STRICTLY FORBIDDEN
VIOLATORS WILL BE PROSECUTED
Name
Address

# That Had Some Old Graves


PATRICK WILLIAMS
Born
In Co. Tirone Ire.
May 1793.
Died
In Division Me.
Aug. 1869.
MARY,
Wife of
Patrick Williams
DIED
Nov. 16, 1864
Æt. 65.

# The Township of Scott Enacted an Ordinance

**“[a]ll cemeteries . . . be kept open and accessible to the general public during daylight hours.”**

**The township issued a notice of violation**

# Knick Sued

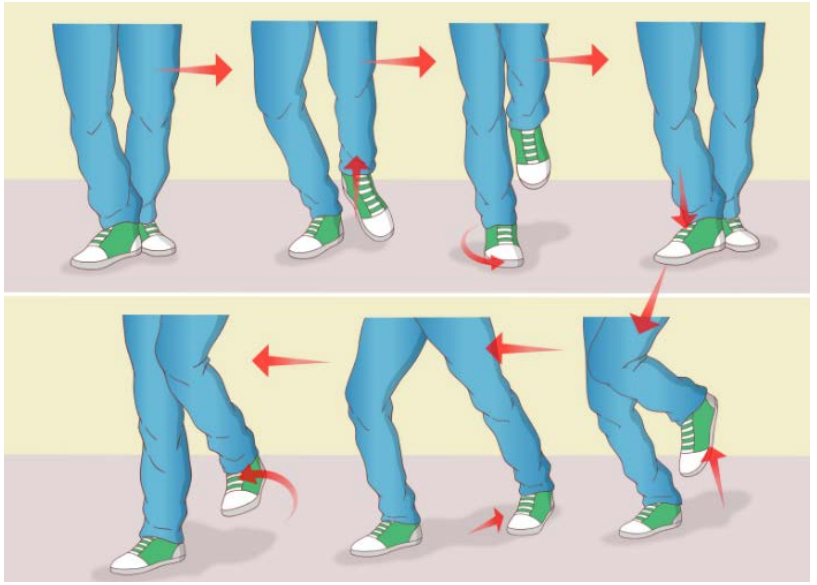
- In state court seeking declaratory and injunctive relief
- The Township withdrew the violation and stayed the ordinance
- Knick then sued in federal court under 42 U. S. C. §1983, alleging that the ordinance violated the Takings Clause of the Fifth Amendment

# Section 1983 provides:

**"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law . . . ."**

# The Federal District Court Dismissed on Ripeness Grounds

- What is “ripeness”?
  - Two prongs
    - Final decision
    - State compensation
- What is the “ripeness shuffle”?



# When Did the Taking Occur?

- When the ordinance was enacted?

or…

- When Knick had exhausted her attempts to be compensated in the state courts?

# *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985)

**A property owner has not suffered a violation of the Fifth Amendment until a state court has denied a claim for just compensation under state law *in state court*.**

# *Knick* Court Holds:

**"We now conclude that the state-litigation requirement imposes an unjustifiable burden on takings plaintiffs, conflicts with the rest of our takings jurisprudence, and must be overruled. A property owner has an actionable Fifth Amendment takings claim when the government takes his property without paying for it."**

**“Fidelity to the Takings Clause and our cases construing it requires overruling Williamson County and restoring takings claims to the full-fledged constitutional status the Framers envisioned when they included the Clause among the other protections in the Bill of Rights.”**

**“Contrary to Williamson County, a property owner has a claim for a violation of the Takings Clause as soon as a government takes his property for public use without paying for it. The Clause provides: “[N]or shall private property be taken for public use, without just compensation.” It does not say: “Nor shall private property be taken for public use, without an available procedure that will result in compensation.”**

# “A bank robber might give the loot back, but he still robbed the bank.”

“A later payment of compensation may remedy the constitutional violation that occurred at the time of the taking, but that does not mean the violation never took place. The violation is the only reason compensation was owed in the first place. …

**…The availability of a subsequent compensation remedy for a taking without compensation no more means there never was a constitutional violation in the first place than the availability of a damages action renders negligent conduct compliant with the duty of care.”**

# Questions Raised

- Can the 5-4 decision be explained as a conservative-liberal issue?
- Is *Knick* in derogation of stare decisis?
- Will federal courts be flooded with new takings cases?
- Will federal courts become immersed in small-time, local issues?

# What Can We Expect?

- More federal court property lawsuits
- Wider range of issues challenged
- NY rent control lawsuit
- Bell Atlantic v. Twombly, 550 U.S. 544 (2007) and Ashcroft v. Iqbal, 556 U.S. 662 (2009),

  aka "Twiqbal"
- Public use and injunctions?
- State law inverse claims?
- Attorneys' fees!

# What Can We Do?

- Local adjudicatory relief
  - Finality prong
- Alternative dispute resolution
- Voluntary purchase
  - Fair market value plus cost of legal and time cost
- Incentives to dedicate
- Preserve development rights
- Eminent domain

# YIMBY

Dwight Merriam

December 5, 2019


@DougDeMuro

# YIMBY

- **Two big developments**
  - **Minneapolis 2040 Plan**

minneapolis 2040

  - **Oregon state requirements**

Greenwood Avenue Cottages in Shoreline, WA: eight small homes on four standard lots. (Photo: Ross Chapin Architects)

# Minneapolis

- **Approved by Metropolitan Council**

GOALS

« Previous | Next »

**3. Affordable and accessible housing: In 2040, all Minneapolis residents will be able to afford and access quality housing throughout the city.**

Photo: Photo by Tela Chhe (via flickr.com)

## ACTION STEPS

**The City will seek to accomplish the following action steps to increase the supply of housing and its diversity of location and types.**

a. Allow housing to be built in all areas of the city, except in Production and Distribution areas.

b. Allow the highest-density housing in and near Downtown.

c. Allow multifamily housing on public transit routes, with higher densities along high-frequency routes and near METRO stations.

d. In neighborhood interiors that contain a mix of housing types from single family homes to apartments, allow new housing within that existing range.

e. In neighborhood interiors farthest from downtown that today contain primarily single-family homes, achieve greater housing supply and diversity by allowing small-scale residential structures with up to three dwelling units on an individual lot.

f. Encourage inclusion of units that can accommodate families in new and rehabilitated multifamily housing developments.

**In neighborhood interiors farthest from downtown that today contain primarily single-family homes, achieve greater housing supply and diversity by allowing small-scale residential structures with up to three dwelling units on an individual lot.**

# Oregon

80th OREGON LEGISLATIVE ASSEMBLY--2019 Regular Session

**Enrolled**

**House Bill 2001**

Sponsored by Representative KOTEK; Representatives FAHEY, HERNANDEZ, MARSH, MITCHELL, POWER, STARK, WILLIAMS, ZIKA (Presession filed.)

- https://www.curbed.com/2019/7/1/20677502/oregon-yimby-single-family-zoning-nimby-rent-control
- https://olis.leg.state.or.us/liz/2019R1/Downloads/MeasureDocument/HB2001

**Except as provided in subsection (4) of this section, each city not within a metropolitan service district with a population of more than 10,000 and less than 25,000 shall allow the development of a duplex on each lot or parcel zoned for residential use that allows for the development of detached single-family dwellings. Nothing in this subsection prohibits a local government from allowing middle housing types in addition to duplexes.**

(a) “Cottage clusters” means groupings of no fewer than four detached housing units per acre with a footprint of less than 900 square feet each and that include a common courtyard.

(b) “Middle housing” means:

(A) Duplexes;

(B) Triplexes;

(C) Quadplexes;

(D) Cottage clusters; and

(E) Townhouses.

# fini...

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# *Michael Allan Wolf*

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# *Is Zoning Really about Use and not Ownership? Two Recent Cases on Short-Term Rentals*

*Michael Allan Wolf*
*Richard E. Nelson Eminent Scholar Chair in Local Government*
*University of Florida Levin College of Law*

*18th Annual Alfred B. DelBello Land Use and Sustainable Development Conference: Building the Infrastructure for our Sustainable FuturePace Law School*
*December 5, 2019*

UF Levin College of Law
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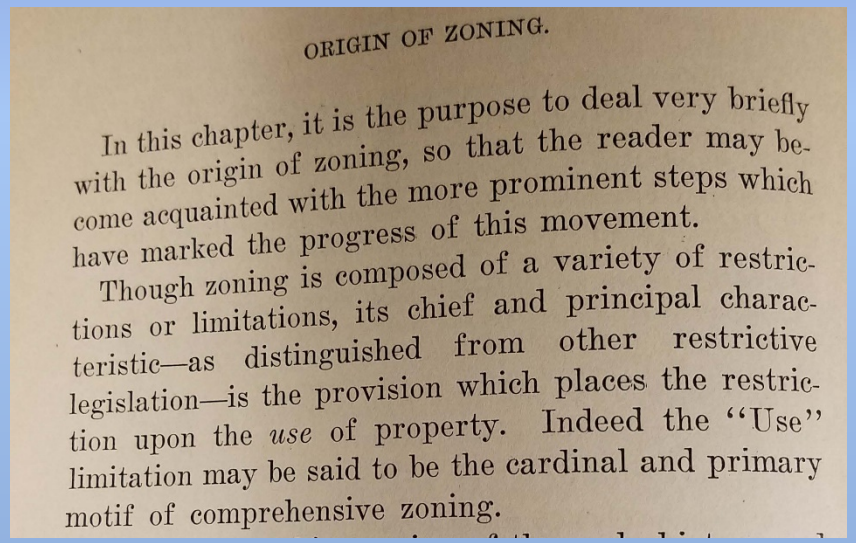
American zoning law features another maxim—that zoning concerns use, not ownership—which serves as a kind of leitmotif for the entire field. . . .
[T]he use-not-ownership maxim would appear in numerous decisions from throughout the nation, in cases involving not only conditions and nonconformities, but also certificates of occupancy, residential use restrictions, change of ownership of an approved development, state immunity from zoning ordinances, owner occupation requirements, development by multiple owners, conditional use permits, and short-term rentals.

Michael Allan Wolf, *A Common Law of Zoning*, 61 ARIZ. L. REV. 771, 805, 806-07 (2019)

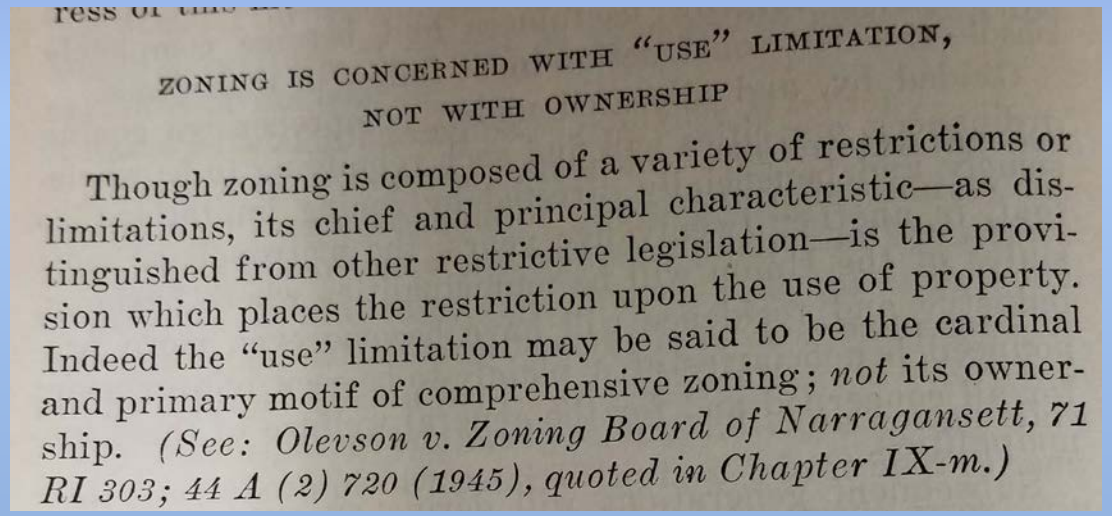


ORIGIN OF ZONING.

In this chapter, it is the purpose to deal very briefly with the origin of zoning, so that the reader may become acquainted with the more prominent steps which have marked the progress of this movement.

Though zoning is composed of a variety of restrictions or limitations, its chief and principal characteristic—as distinguished from other restrictive legislation—is the provision which places the restriction upon the *use* of property. Indeed the "Use" limitation may be said to be the cardinal and primary motif of comprehensive zoning.

JAMES METZENBAUM, THE LAW OF ZONING (1930)



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ZONING IS CONCERNED WITH "USE" LIMITATION, NOT WITH OWNERSHIP

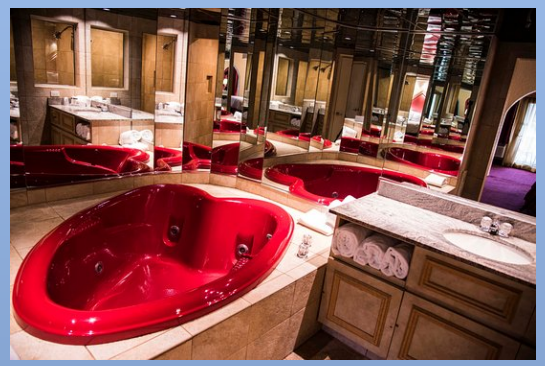
Though zoning is composed of a variety of restrictions or limitations, its chief and principal characteristic—as distinguished from other restrictive legislation—is the provision which places the restriction upon the use of property. Indeed the "use" limitation may be said to be the cardinal and primary motif of comprehensive zoning; *not* its ownership. *(See: Olevson v. Zoning Board of Narragansett, 71 RI 303; 44 A (2) 720 (1945), quoted in Chapter IX-m.)*

JAMES METZENBAUM, THE LAW OF ZONING (2d ed. 1955)

# *Slice of Life, LLC v. Hamilton Township Zoning Hearing Board*, 207 A.3d 886 (Pa. 2019)

At all times relevant to the pending matter, the Property was owned by Appellee Slice of Life, LLC ("Slice of Life"), a limited liability corporation formed, organized and existing under the laws of Pennsylvania. Appellee Val Kleyman ("Kleyman" and together with Slice of Life, "Appellees") is the sole member of Slice of Life. Kleyman, who lives in Brooklyn, New York, has never lived at the Property or considered it to be his personal residence. Rather, Slice of Life purchased the Property as an investment property that was to be used exclusively for short-term rentals.

On May 22, 2014, a Hamilton Township zoning officer issued an enforcement notice to Appellees based upon Appellees' use of the Property "as [a] Hotel and/or other types of transient lodging, Rental of Single Family Residential Dwelling for transient tenancies," in violation of the permitted uses for Zoning District A. Township's Exhibit 1 (Enforcement Notice). The notice instructed Appellees that they must "Cease Use as a hotel/transient rental facility" by May 31, 2014. . . .



*Slice of Life, LLC v. Hamilton Township Zoning Hearing Board*, 207 A.3d 886 (Pa. 2019)

The requirement that courts strictly construe a zoning ordinance does not mean that they must ignore uses that clearly fall outside those that are permitted by the ordinance. The use of the Property is not by a "family" because the users do not function as a "family" as defined by the Ordinance. There is no ambiguity in the language of the Ordinance because there is no ambiguity in the phrase "single housekeeping unit" that is at the heart of the definition of "family." Zoning District A permits the use of a single-family detached dwelling. This requires use by a single housekeeping unit. This Court has clearly and straightforwardly defined single housekeeping unit as precluding purely transient use.

The use in the case at bar is purely transient. Individuals rent the premises for a minimum of two nights and up to one week at a time. Kleyman estimated that the Property was rented twenty-five separate times over a one-year period. As Kleyman acknowledged during his testimony, this fits squarely within the common usage of the word "transient." The use is not as a single-family dwelling, i.e., use by a single housekeeping unit, and therefore, is not a permitted use in Zoning District A.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*Morgan County v. May*, 824 S.E.2d 365 (Ga. 2019)

May built a vacation home in Morgan County, and in 2008 she began renting her house to others, typically for periods of about a week. The County's zoning ordinance in effect at that time did not contain any specific language addressing rentals of any duration for houses in May's zoning district. In practice, the County took the position that fewer-than-30-day rentals were prohibited but rentals for 30 days or longer were permitted. In October 2010, the County amended its zoning ordinance to explicitly prohibit most "short-term rentals," which were defined as rentals for fewer than 30 consecutive days. May had continued to rent her house, and in August 2011, after she again rented her house for seven nights, the County issued her a citation for violating the amended zoning ordinance, thereby initiating a misdemeanor criminal proceeding against her.

*Morgan County v. May*, 824 S.E.2d 365 (Ga. 2019)

[T]he County's "actually live" versus "temporary sojourn" view of what makes a dwelling "residential" does not make clear that seven-night rentals are prohibited. As the trial court aptly said in its order dismissing May's citation, "The County's definitions within definitions fail to provide any sort of practical guidelines to enable a homeowner to determine at *what point* a structure ceases to be 'residential.' " (emphasis supplied). . . . [W]e agree with the trial court's determination that the County's old zoning ordinance was unconstitutionally vague as applied to seven-night rentals of May's property. As a result, the old ordinance cannot be applied to that use of May's property, meaning that her use of her house for such a rental was grandfathered and not subject to the short-term rental ban in the amended ordinance.

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**John R. Nolon Esq.,**

**Distinguished Professor of Law**

**Elisabeth Haub School of Law at Pace University**

**Counsel to the Land Use Law Center**

# New York Case Law
# 1950-1985
# John R. Nolon

# Rodgers v. Tarrytown (1951) Floating Zone?

Property owners have no vested rights in current zoning of their neighborhoods

Equal protection: the line has to be drawn somewhere

Zoning in accordance with a comprehensive plan cannot be spot zoning

“The village's zoning aim being clear, the choice of methods to accomplish it lay with the board. “

# Goldblatt v. Hempstead (1961; SCOTUS 1962)

Changed conditions call for change plans.

Depriving most beneficial uses does not make it unconstitutional.

Nor does significant diminution in value: see Hadacheck (1915) $800,000/60,000

Presumption of constitutionality.

Burden of proof on plaintiff to show law doesn't accomplish a valid public purpose.

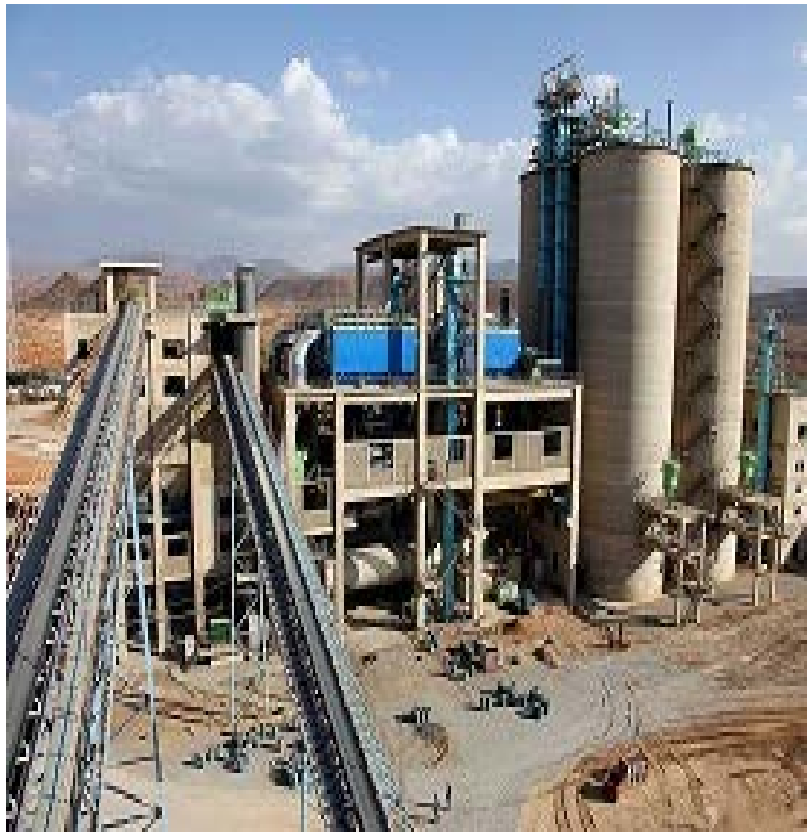
# Boomer v. Atlantic Cement Co. (1970)

This (harm to the public) is an area beyond the circumference of one private lawsuit.

Solution is regulation. Feds cover point sources

What about nonpoint sources?

Focus on State and Local Government.



# Golden v. Ramapo (1972)The Origin of Smart Growth

Huge tool box of SG techniques

Growth control is not ultra vires, but sprawl cannot be solved by Ramapo alone;

Statewide or regional control of planning is needed to prevent parochial effects

We can't wait in the wistful hope that such planning will soon bear fruit

# Udell v. Haas (1968)

Zoning must conform to a comprehensive plan, but what if none exists?

the court must examine all relevant evidence including the zoning map

Bovee v. Hadley (2018) site plan law stated its goals

# Berenson v. New Castle (1975)

Zoning must consider regional needs

Developers are proxies

Multifamily can be less expensive

No obligation to make it affordable

Should be regional planning

Until then court must assess reasonableness

Absence of standards; still hoping wistfully

# Penn Central v. NY City (1977 – SCOTUS 1978)

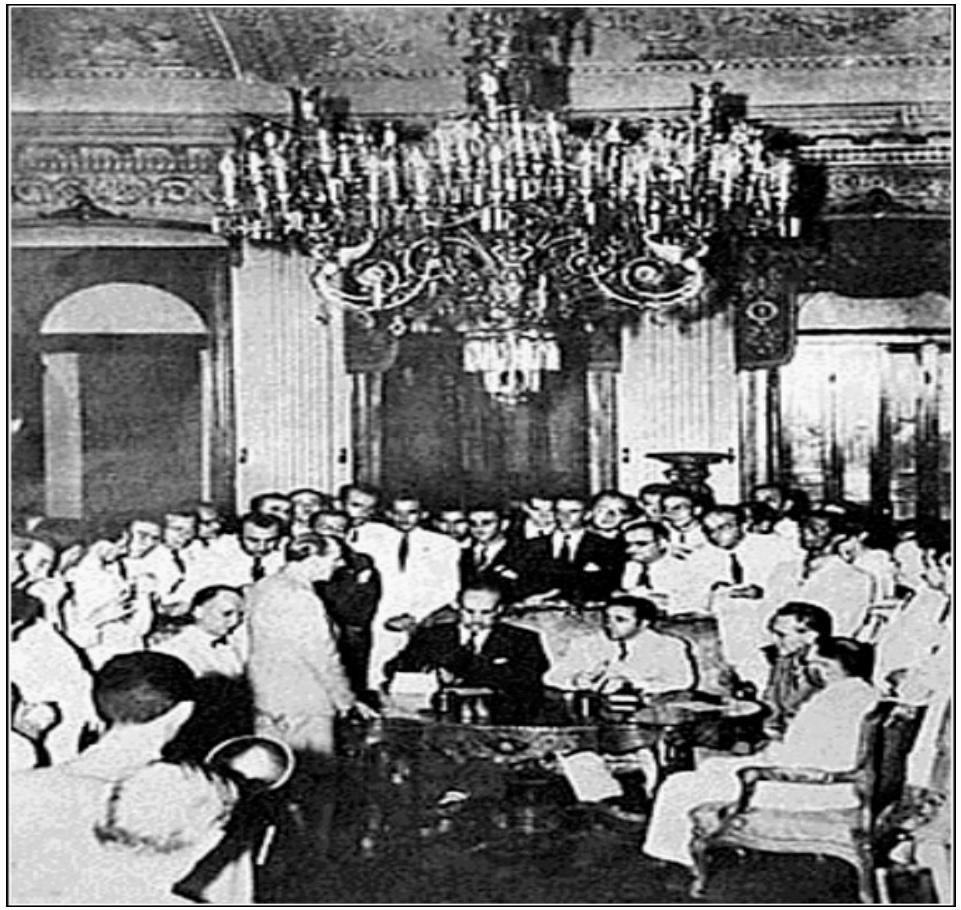
- Land use regulation often diminishes the value of the property to the landowner.
- Constitution is offended when that diminution leaves the owner with no reasonable use of the property.
- "For this case, and for the cases which may follow in its wake, deference to the unknown must be accorded."

# Sun Beach v. Anderson (Ap. Div.) (1983)

It is obvious that protection of the environment for the use and enjoyment of this and all future generation far overshadows the rights of developers

***Ten years later***

***1992***



# Precedents for the Future


- ✓ Flexibility – tools for new circumstances
- ✓ Financial proof required by plaintiff
- ✓ Fairness – rights of future generations
- ✓ Future – deference to the unknown
- ❑ Fix-it - needed by the Legislature – Still wistfully hoping….meanwhile:
- ❑ Focus – Federal/State/Local Collaborative subsidiarity

# Don Elliott, FAICP

## Director, Clarion Associates

## Denver, CO

# Case Law Panel: 2019 Land Use Conference

**Don Elliott, FAICP, Esq.**

Director

Clarion Associates

Denver, CO

CLARION

# Potpourri for $100

**Thomas v. Bright (U.S. App. 6th Cir, 2019)**

- Tennessee Billboard Act requires a permit for any sign along a state road – unless you meet one of the exceptions – one of which is the "on-premises" exception
- Applicant erects a sign supporting the U.S. Olympic Team (which has no relationship to his property) without a permit – and state orders sign removed
- Act challenged as content-based regulation.

**HELD**

- Yes, it's content-based regulation and therefore in violation of Reed v. Gilbert
- Justice Alito's Reed concurrence stating that an on-premise/off-premises distinction would not violate Reed was just his dicta.
- The law fails "strict scrutiny" because it is not narrowly tailored.
  - Pregnancy clinic could have a non-commercial sign regarding abortion, but the neighboring property that does not have any pregnancy –related services could not
  - Pet store could have a commercial sign encouraging purchase of its puppy mill puppies, but neighbor cannot erect a non-commercial sign against puppy mills

# Potpourri for $100

**New Hampshire Alpha of SAE Trust v. Town of Hanover, 207 A.3d. 219 (N.H. 2019)**

- Town has a requirement that a fraternity must be operated "in conjunction with another use"
- 86-unit student housing that was once – but no longer – recognized as a fraternity by Dartmouth College is notified that no longer meets the definition and cannot operate as a fraternity
- Ordinance challenged as an "unlawful delegation" because it delegates to Dartmouth College a land use decision that should properly lie with the appointed or elected officials of the Town

**HELD**

- If the College's decision was the only factor, this would be an unlawful delegation, but there were other factors
- Since the facility once accepted fire services from the College – and then stopped doing so -- so the trial court could find the "in conjunction with" standard was not met independently of the College's actions.

# Potpourri for $100

**Similar issues presented in:**

**Counceller v. Columbus Planning Commission, 42 NE3d 146 (Ind. App. 2015)**

- City has a requirement that 75% of the property owners in a subdivision must approve any lot split (as a condition of City approval of the lot split)
- Applicant's neighbors object to his three-lot split.
- Ordinance challenged as an "unlawful delegation" of City decision-making authority to private property owners

**HELD**

- Normally, this would be an unlawful delegation – you cannot let private property owners make a decision that belongs to the City.
- But there was an escape clause – the applicant could have requested a waiver from the 75% requirement, and if approved the City could approve the subdivision.
- So the City retained the final authority, and all is well.

# Final Fun

**Sherman v. Brown, 2019 WL 334366 (Mass. Land Ct. 2019)**

- After property owner was granted variance to split one lot into two – probably leading to construction of another home – abutting kennel owner appealed on grounds that the additional lot would cause more nuisance calls complaining about her barking dogs.

**HELD**

- Nope, additional barking dog complaints to the kennel is not enough injury to give standing for the appeal.

**Institute for Neuro-Integrative Dev. V. Town of Fairfield, 207 A.3d 1053 (Conn. App. 2019)**

- After church obtains approval for a private school to be accessed primarily through a major entrance on one side, neighbors appeal on grounds that this will lead to traffic congestion on a small secondary entrance on another side of the property (that the church had promised to discourage as a church access route in the past).

**HELD**

- Church wins. Testimony of neighbors who were not experts as to traffic was "speculation" about the "mere possibility" of congestion and traffic and did not constitute substantial evidence to support the denial of a special exception for a private school.

# Recent Developments in Land Use Law

**Moderator**:

**Michael D. Zarin**

Partner, Zarin & Steinmetz

# Land Use Luminaries at Rest

# Land Use Law Center
# 25th Anniversary
# Wine & Cheese Reception

- *When?*
  - *Now*
- *Where?*
  - *JI-Rotunda*
- *What?*
  - *California Wines*
  - *Artisanal Cheeses*
  - *Charcuterie*
  - *Crackers*
  - *Fruit*
  - *Crudités*