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Case Law Panel: 2020 Land Use Conference

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Potpourri for $100

Forest View Co. v. Town of Monument, 464 P3d 774 (CO Supreme Court)

- Town condemned land for a water tower and petitioned court to extinguish subdivision covenant restricting land to residential use
- Property owners claimed compensation due to reduced property values from non-residential use of the property.

HELD

- No compensation due
- This is a mere diminution in property value, not the “very high level of interference with the property owner’s use of the land” required to find a regulatory taking
- More broadly, governments use of its own land acquired through eminent domain is not required to comply with restrictive covenants.

Potpourri for $100

Mayer-Wittman v. Stamford Zoning Bd. of Appeals, 218 A3d 37 (CT Supreme Court)

- Nonconforming accessory 'sea cottage' was severely damaged by flood.
- Nonconformity regulations allowed rebuilding "as before" within 12 months
- Applicant missed that deadline and applied received height and setback variances to rebuild in slightly different location
- Neighbor challenged – claiming that nonconforming status ended after 12 months

HELD

- Nonconforming status did not end after 12 months
- The right to rebuild "as before" assumes that it could be rebuild "as before" – but it could not
- Regulations required that rebuilt sea cottage be raised further above flood elevation, which meant the cottage would exceed the maximum accessory structure height in the zone district, and soils would only support stronger foundation if cottage moved 3 feet.
- Since variances would be needed, the 12 month "as before" deadline did not apply.

Potpourri for $100

Municipal Communications, LLC v. Cobb County (11th Circuit Ct. of Appeals)

- Company applied to build a new cell tower 165 feet high on property leased from church
- Independent consultant confirmed the tower was necessary to fill a gap in coverage
- In special permit process, staff recommended and County approved the permit with a condition that tower look like a tree and be moved 300 feet into a clump of trees
- Company challenges condition because church will not lease the recommended site and claims the condition is not supported by substantial evidence under the TCA

HELD

- Company wins – the 300 foot relocation condition is invalid
- Although company never submitted documents from the church refusing to lease the recommended site, no one raised that issue in any of the hearings – and it cannot be raised now – you cannot go hunting back through the record to find a reason you could have relied on but did not rely on.
- The substantial evidence must match the reasons given for the County's decision – in this case it was clear the original location met zoning standards but the relocation was attached for purely aesthetic concerns – and generalized aesthetic objections – standing alone – do not constitute substantial evidence under §322 of the Telecommunications Act

Potpourri for $100

PHG Asheville, LLC v. City of Asheville, 374 S.E.2d 755 (NC Supreme Court)

- Developer applied for special use permit to build 8 story hotel in downtown area – but away from the traditional core.
- Developer provided expert testimony as to how the application met the 7 criteria for a conditional use permit – and City officials cross-examined the experts
- City Council unanimously denied the permit and issued 44 findings as to why the 7 conditions had not been met – and developer challenges the denial

HELD

- Developer wins – denial overturned
- Under North Carolina law, applicant must submit "competent, material, and substantial" evidence to establish a prima facia case for a special use permit
- If developer does so, the government must submit "competent, material, and substantial" evidence" that the application does not meet those standards
- Developer met its burden, but City did not – it pointed out its disagreements with the applicant's expert but did not introduce evidence to support its conclusions

Potpourri for $100

Carroll Airport Commission v. Danner, 927 NW2d 635 (Iowa Supreme Court)

- Farmer wanted to build a 12-story grain elevator and obtained a “no hazard” determination from the FAA
- Local airport commission determined it was a nuisance to air safety and applied for a permanent injunction
- Farmer claimed the FAA determination preempted local height regulations

HELD

- Farmer loses and must remove the elevator
- FAA hazard review does not preempt local height controls – which include the ability to determine a height nuisance – because it is possible to comply with both FAA determinations and local controls by complying with the stricter of the two
- Airport commission could conclude the elevator was an air traffic safety nuisance even if the FAA disagrees
- Daily fines for failure to comply were unreasonable and waived due to pending appeals