Lessons from Luminaries of Land Law: Latest and Greatest Decisions

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> nalized in the custom and practice of insurance (where adjusters frequently describe their role as being required to "look for coverage" rather than "look for reasons to deny coverage"). The adjuster, like the insurer, therefore already has obligations to the policyholder. By immunizing the adjuster from a damages action, the *Sanchez* Court merely deprived the policyholder of a legal right that it already possessed, i.e., a right to have the adjuster act in the same manner as the insurer is required to act.

Stempel, 15 Conn. Ins. L.J. at 665–66.

In conclusion, one of the features of life in the 21st century is the increased bureaucratization and compartmentalization of business practices that, if accepted as legal barriers, tend to prevent direct accountability for wrongful conduct. Layers upon layers of bureaucracy impair responsiveness. In the workers' compensation arena, the employer hires an insurer and now the insurer in turn may hire a third-party administrator.

But where there is no direct accountability, service may deteriorate. We all know the potential scenario. The phone rings and no one answers. One is put on hold for hours. The right hand knows not what the left hand is doing. No one is familiar with the file. A person with decision-making authority cannot be found. Delay. Delay. Delay. This type of behavior could lead to bad-faith exposure of an insurance company. The exact same type of behavior should lead to bad-faith exposure when a third-party administrator assumes the functions of the insurer.

I can think of no other area where it is more critical to have direct accountability than in insurance—where issues of extraordinary importance and urgency to the insured are increasingly handled by faceless and insulated third-party bureaucracies. To me, one of the essential functions of our tort system is to ensure that parties responsible for the foreseeable injuries that they cause through their misconduct, particularly those done in bad faith, are held directly accountable.

V. Conclusion.

For the above reasons, we should recognize a potential bad-faith claim against third-party administrators in the insurance context when they, in essence, undertake the essential functions of an insurance company as alleged in this case. This ordinarily requires a fact-based determination. I would so answer the certified question in this case.

Wiggins, J., joins this dissent.

The CARROLL AIRPORT COMMISSION, Appellee,

v.

Loren W. DANNER and Pan Danner, Appellants.

No. 17-1458

Supreme Court of Iowa.

Filed May 10, 2019

Background: Local airport commission petitioned for abatement of a nuisance, seeking to require farmer to cease operation of and remove his 12-story grain leg/bucket elevator near municipal airport despite the Federal Aviation Administration's (FAA) issuance of a no-hazard letter concerning the structure. The District Court, Carroll County, William C. Ostlund, J., granted petition following bench trial and issued an injunction. Farmer appealed. The Court of Appeals, 2018 WL 4360933,

affirmed. Farmer applied for further review, which was granted.

Holdings: As matters of first impression, the Supreme Court, Waterman, J., held that:

(1) Federal Aviation Act did not expressly preempt state and local restrictions on height of structures in or near flight paths;

(2) doctrine of conflict preemption did not apply;

(3) doctrine of field preemption did not apply;

(4) the grain leg/bucket elevator was an aviation hazard constituting a nuisance; but

(5) a $200 daily penalty for each day the nuisance continued to stand unabated was inequitable.

Decision of Court of Appeals vacated; district court judgment affirmed as modified.

1. Appeal and Error ⚿3150

Generally, the Supreme Court's review of a decision by the district court following a bench trial depends upon the manner in which the case was tried to the court.

2. Appeal and Error ⚿3151(1)

If case is tried at law, the Supreme Court's review is for correction of errors at law.

3. Appeal and Error ⚿3151(2)

Supreme Court's review of cases tried in equity is de novo.

4. Aviation ⚿231

Local airport commission's action seeking abatement of a nuisance of farmer's 12-story grain leg/bucket elevator near municipal airport was tried in equity, and therefore Supreme Court's review was de novo, where commission filed the action in equity and sought only equitable relief in the form of a permanent injunction, and the district court struck farmer's jury demand based on its ruling that the action was an action in equity.

5. Appeal and Error ⚿3512

While review of cases tried in equity is de novo, Supreme Court gives weight to the factual findings of the district court, especially with respect to determinations of witness credibility.

6. Federal Courts ⚿3030

Preemption is a question of federal law.

7. Aviation ⚿8

The purpose of the Federal Aviation Act was to centralize in a single authority the power to frame rules for the safe and efficient use of the nation's airspace. 49 U.S.C.A. § 40103(a)(1).

8. Aviation ⚿231

A no-hazard determination of Federal Aviation Administration (FAA) with respect to a structure that interferes with airspace is reviewable as a final agency disposition. 49 U.S.C.A. § 40103(a)(1); 14 C.F.R. § 77.1.

9. States ⚿18.13

Consideration of issues arising under the Supremacy Clause starts with the assumption that the historic police powers of the States are not to be superseded by a federal act unless that is the clear and manifest purpose of Congress. U.S. Const. art. 6, cl. 2.

10. States ⚿18.3

There are two broad categories of preemption, express and implied, and within implied preemption there are two subcategories, conflict preemption and field preemption. U.S. Const. art. 6, cl. 2.

11. States ⚿18.3

"Express preemption" occurs when the federal statutory text clearly provides

that congressional authority is exclusive. U.S. Const. art. 6, cl. 2.

See publication Words and Phrases for other judicial constructions and definitions.

12. States ⚿18.3

Express preemption requires examining the statutory language to determine the legislature's intent. U.S. Const. art. 6, cl. 2.

13. Aviation ⚿231
Municipal Corporations ⚿53
States ⚿18.17

The Federal Aviation Act, stating that "the United States Government has exclusive sovereignty of airspace of the United States," did not expressly preempt state statutes concerning airport hazards and local airport zoning regulations that a local airport commission sought to apply to farmer's 12-story grain leg/bucket elevator near a municipal airport; there was no clear statutory text that Congress intended to make the Federal Aviation Administration's (FAA) authority under the Act exclusive as to restrictions on structures near airports. U.S. Const. art. 6, cl. 2; 49 U.S.C.A. § 40103(a)(1); Iowa Code Ann. §§ 329.2, 330.17(1), 355.12.

14. States ⚿18.5

"Conflict preemption" occurs when a state law conflicts with a federal provision. U.S. Const. art. 6, cl. 2.

See publication Words and Phrases for other judicial constructions and definitions.

15. States ⚿18.5

"Conflict preemption" occurs when compliance with both federal and state regulation is a physical impossibility. U.S. Const. art. 6, cl. 2.

See publication Words and Phrases for other judicial constructions and definitions.

16. States ⚿18.5

Conflict preemption is imminent whenever two separate remedies are brought to bear on the same activity. U.S. Const. art. 6, cl. 2.

17. States ⚿18.5

"Conflict preemption" occurs when a state law is an obstacle to the accomplishment of a federal purpose. U.S. Const. art. 6, cl. 2.

See publication Words and Phrases for other judicial constructions and definitions.

18. States ⚿18.5

Whether a state law is an obstacle to the accomplishment of a federal purpose, and thus preempted under the doctrine of conflict preemption, is to be informed by examining the federal statute as a whole and identifying its purpose and intended effects. U.S. Const. art. 6, cl. 2.

19. Aviation ⚿231
Municipal Corporations ⚿53
States ⚿18.17

Federal Aviation Act did not preempt state statutes concerning airport hazards and local zoning ordinances limiting the height of structures in or near flight paths, pursuant to doctrine of conflict preemption, and therefore the state and local laws could be applied to farmer's 12-story grain leg/bucket elevator near municipal airport notwithstanding Federal Aviation Administration's (FAA) no-hazard determination with respect to the structure; it was possible to comply with the federal law and the more stringent state and local laws without conflict. U.S. Const. art. 6, cl. 2; 49 U.S.C.A. § 40103(a)(1); Iowa Code Ann. §§ 329.2, 330.17(1), 355.12; 14 C.F.R. §§ 77.29(a), 77.31(d).

20. States ⚿18.7

"Field preemption" arises when Congress has enacted a comprehensive scheme. U.S. Const. art. 6, cl. 2.

See publication Words and Phrases for other judicial constructions and definitions.

21. States ⚿18.7

In cases of field preemption, congressional intent to preempt can be inferred from a framework of regulation so pervasive that Congress left no room for the States to supplement it or where there is a federal interest so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject. U.S. Const. art. 6, cl. 2.

22. States ⚿18.7

The key question for field preemption asks at what point the state regulation sufficiently interferes with federal regulation that it should be deemed pre-empted. U.S. Const. art. 6, cl. 2.

23. Aviation ⚿231
Municipal Corporations ⚿53

Doctrine of field preemption did not apply to preclude application of local zoning ordinances limiting the height of structures in or near flight paths to farmer's 12-story grain leg/bucket elevator that was near municipal airport and that was subject of Federal Aviation Administration's (FAA) no-hazard determination; the Federal Aviation Act only set minimum standards and implied that another body could lawfully impose more stringent standards, the FAA's no-hazard determination had no enforceable legal effect, and the no-hazard letter itself admonished farmer that he remained subject to state and local laws. U.S. Const. art. 6, cl. 2; 49 U.S.C.A. § 40103(a)(1); Iowa Code Ann. §§ 329.2, 330.17(1), 355.12; 14 C.F.R. §§ 77.29(a), 77.31(d).

24. States ⚿18.3

There is a presumption against preemption. U.S. Const. art. 6, cl. 2.

25. Aviation ⚿231

Federal Aviation Administration's (FAA) hazard/no-hazard determination with respect to tall structures in flight paths has no enforceable legal effect, and the FAA is not empowered to prohibit or limit proposed construction it deems dangerous to air navigation. 42 U.S.C. § 44718(b)(1); 49 U.S.C.A. § 40103(a)(1); 14 C.F.R. §§ 77.29(a), 77.31(d).

26. Injunction ⚿1007, 1046

Permanent injunctive relief is an extraordinary remedy that is granted only when there is no other way to avoid irreparable harm to the plaintiff.

27. Injunction ⚿1032

A plaintiff seeking permanent injunctive relief must establish (1) an invasion or threatened invasion of a right; (2) that substantial injury or damages will result unless the request for an injunction is granted; and (3) that there is no adequate legal remedy available.

28. Injunction ⚿1032, 1033

In deciding whether to grant a permanent injunction, a court must undertake a comparative appraisal of all of the factors in the case, and consider: (1) the character of the interest to be protected, (2) the relative adequacy to the plaintiff of injunction and of other remedies, (3) plaintiff's delay in bringing suit, (4) plaintiff's misconduct, (5) the relative hardship likely to result to defendant if injunction is granted and to plaintiff if it is denied, (6) the interests of third persons and of the public, and (7) the practicability of framing and enforcing the order or judgment.

29. Injunction ⚿1049

When determining whether a permanent injunction is the proper remedy, the court must weigh the relative hardship to each party.

30. Injunction ⚿1016

Courts must structure a permanent injunction so that it will provide relief to the plaintiff without interfering with the legitimate and proper actions of the person against whom it is granted.

31. Aviation ⚿231

Farmer's 12-story grain leg/bucket elevator near municipal airport was an aviation hazard constituting a nuisance, warranting an abatement via permanent injunction; the other runway would have been risky to use in a strong crosswind common to that location, the structure was not easy to see in certain weather conditions, the higher approach required a steeper descent poorly suited to some types of aircraft, and a distracted pilot could fly into structure, with fatal consequences.

32. Aviation ⚿231

A $200 daily penalty on farmer for each day the nuisance, in the form of his 12-story grain leg/bucket elevator near municipal airport, continued to stand unabated following grant of permanent injunction against it as an aviation hazard was inequitable, even though trial court gave farmer nine months to abate nuisance before the daily penalty started, where farmer's appeal was pending during that period, local airport commission's case was not a slam dunk, farmer had obtained a Federal Aviation Administration (FAA) no-hazard letter and complied with its requirements, the no-hazard letter involved a preemption issue that was a question of first impression, commission failed to appeal the no-hazard determination, and commission waited nearly two years until after letter to file action.

On review from the Iowa Court of Appeals.

Appeal from the Iowa District Court for Carroll County, William C. Ostlund, Judge.

A farmer seeks further review of a court of appeals decision declining to give preemptive effect to a no-hazard determination by the Federal Aviation Administration. **DECISION OF COURT OF APPEALS VACATED; DISTRICT COURT JUDGMENT AFFIRMED AS MODIFIED.**

Steven D. Hamilton of Hamilton Law Firm, P.C., Storm Lake, for appellants.

Gina C. Badding of Neu, Minnich, Comito, Halbur, Neu & Badding, P.C., Carroll, for appellee.

WATERMAN, Justice.

In this appeal, we must determine the legal effect of a "no hazard" letter issued by the Federal Aviation Administration (FAA) to a farmer who built a twelve-story grain leg (bucket elevator) near an airport. The structure intrudes sixty feet into airspace restricted for aviation. Construction was well underway when a member of the local airport commission cried foul. The airport commission informed the farmer he needed a variance and refused to grant one, without waiting for input from federal officials. Shortly thereafter, the FAA investigated and granted a no-hazard determination, approving the structure on the condition the farmer paint it and place blinking red lights on top, which he did. The FAA also adjusted the flight path. This did not satisfy the local commissioners, who two years later filed this action in equity to force the farmer to remove or modify the structure. The farmer raised an affirmative defense that the federal no-hazard determination preempted the local regulations.

The district court, sitting in equity, rejected the preemption defense and issued an injunction requiring the farmer to remove or alter the grain leg at his expense and imposed a daily penalty after a nine-month grace period to abate the nuisance. The farmer appealed, and we transferred the case to the court of appeals, which affirmed the rejection of his preemption defense. We granted the farmer's application for further review.

On our de novo review, we determine that the Federal Aviation Act allows for local zoning regulation, and the no-hazard letter did not preempt the local airport zoning regulations as a matter of law. We affirm the district court's finding the structure constitutes a threat to aviation requiring abatement. But we conclude that the $ 200 daily penalty should be vacated, and the nine-month period to modify or remove the structure shall begin anew when procedendo issues. We affirm the district court judgment as modified.

I. Background Facts and Proceedings.

Loren and Pan Danner, husband and wife, live on a farm they own in Carroll County, Iowa. Loren has been farming this land since 1968. Loren formerly raised livestock but has exclusively grown row crops on the land since 2000. The Danner farm sits under the flight path to the Arthur N. Neu Municipal Airport, a facility managed by the Carroll Airport Commission (the Commission). Local zoning ordinances mandate a protected zone around the airport that extends 10,000 feet horizontally from the end of Runways 13 and 31 into an arc 150 feet above the airport. The Danners' farm sits within this zone.

In 2009, after a particularly good harvest, Loren realized he needed to find a way to more efficiently dry and store harvested grain. He considered multiple options, but ultimately decided to construct a grain leg (also known as a bucket elevator) with attached storage bins. Loren and two farm neighbors built five grain-storage bins of varying sizes on the Danners' farmland. The five bins stand in a semicircle around the grain leg. The grain leg is a 127-foot-tall structure with separate metal tubes sloping down from its top to each storage bin.

The grain leg stands within 10,000 feet horizontally from the end of Runway 31. The top of the structure is 1413.43 feet above mean sea level. The protected airspace above the airport is 1354 feet above mean sea level. The structure reaches a height of 127 feet off the ground. The parties agree the grain leg intrudes within the airport's protected airspace by approximately sixty feet.

In January 2013, before beginning construction of the grain leg, Loren went to Carl Wilburn, the county zoning administrator, to obtain a building permit. Wilburn issued the building permit and granted the Danners an agricultural exemption from the county zoning ordinances. The agricultural exemption, however, did not exempt the Danners from the airport zoning ordinances. The building permit application states, "All farm buildings or structures are subject to the Airport Zoning Ordinances which regulate[ ] height and emissions in and around the airport air space as depicted on the attached diagram[.]" The diagram attached to the permit showed the airport's protected airspace. Despite this warning on the building permit application, neither the Danners nor Wilburn realized that the agricultural exemption did not exempt the grain leg from the airport zoning regulations. For that reason, the Commission was never notified of the Danners' application for a building permit, and the Danners failed to request a variance from the airport zoning ordinance. Construction of the grain leg began in April and was completed in August.

Meanwhile, in June, Commissioner Greg Siemann noticed the grain leg construction and became concerned. The next day, he contacted Wilburn and Greg Schreck, the city zoning commissioner. Wilburn informed Siemann that he had issued a building permit to the Danners with an agricultural exemption and acknowledged he was unaware of the local airport zoning restrictions.

The Commission notified the Danners that the grain leg required a variance from the airport zoning regulations and informed the Danners it would not consent to the violation of the regulations or grant a variance. The Commission asked the FAA to perform an aeronautical study of the grain leg and its impact on aviation safety.

In July, after performing the aeronautical study, the FAA issued a "DETERMINATION OF NO HAZARD TO AIR NAVIGATION" letter, stating in part, "This aeronautical study revealed that the structure does exceed obstruction standards but would not be a hazard to air navigation" if the Danners met certain conditions. The FAA instructed the Danners to paint the structure and add red lights to the top of it. The no-hazard letter warned the Danners,

> This determination concerns the effect of this structure on the safe and efficient use of navigable airspace by aircraft and does not relieve the sponsor of compliance responsibilities relating to any law, ordinance, or regulation of any Federal, State, or local government body.

The Commission did not seek judicial review of the no-hazard determination as permitted under federal law. *See* 14 C.F.R. §§ 77.37, .39, .41 (2013). The Danners complied with the FAA's instructions, adding lights and painting the grain leg. The FAA issued a "Notice to Airmen" (NOTAM) that raised the minimum descent levels for the airport by 100 feet, requiring pilots to approach the airport at a higher altitude.

Two years later, in July 2015, the Commission filed this action on the district court's equity docket alleging the grain leg violated certain building ordinances, city and county zoning ordinances, and airport commission regulations, and constituted a nuisance and hazard to air traffic. The Commission sought equitable relief—an injunction requiring the Danners to modify or remove the grain leg. The Danners filed an answer and jury demand. The Danners raised an affirmative defense of federal preemption. The district court struck the jury demand because the case was filed in equity. The case proceeded to a bench trial.

At trial, the following witnesses testified for the Commission: C. Peter Crawford, the engineer for the airport; John McLaughlin, a meteorologist, pilot, and flight instructor; Donald Mensen, fixed base operator of the airport; Kevin Wittrock, a commissioner and a pilot; and Siemann, an attorney, pilot, and commissioner. Loren Danner testified on his own behalf. No pilot or aviation expert testified for the Danners.

Crawford testified about the engineering survey of the grain leg in relation to Runway 31 of the airport. The survey showed that the grain leg was 7718 feet from the end of Runway 31 and within the airport's protected zone.

The other witnesses gave opinion testimony that the grain leg constituted a hazard to aviation. The pilots testified about their experiences flying over the grain leg when landing at the airport and expressed their concerns for student pilots or pilots distracted while landing. The Commission also presented testimony that the grain leg would jeopardize the airport's ability to secure federal grant money. The record indicates, however, that the airport received two federal grants, one for $ 284,466 and another for $ 263,200, after the Danners installed the grain leg.

Loren testified that it cost approximately $ 274,928 to construct the grain leg, $ 32,942 to install a concrete drive-over pad, and $ 8000 for an electrical contractor. Loren testified that if the height of the grain leg was reduced, he could no longer rely on gravity to move the grain from the distributor to the storage bins. Instead, he

would need to install conveyors. Loren estimated that the cost to tear down the grain leg and rebuild it with conveyors to each of the storage bins in compliance with the zoning regulations would be approximately $ 450,000. These cost figures went unchallenged.

In June 2017, the district court found that the grain leg violated state and local zoning ordinances and constituted a nuisance and an airport hazard under Iowa Code sections 329.2 and 657.2(8) (2015). The court found that the grain leg did not fall within the agricultural exemption to certain zoning laws. The court rejected the Danners' affirmative defense that the no-hazard letter preempted state and local zoning laws, stating,

> While the FAA regulations certainly do apply, the local county regulations can also be in effect. The local regulations take a more stringent stance on what a hazard is and how it could affect the air space. If the FAA regulations contained all airport and safety regulations there would be no need for the State to designate zoning powers to the Commission. The Court finds that these regulations in fact work together and the FAA regulations and letter sent do not preempt the local regulations.

The district court gave no evidentiary weight to the FAA's aeronautical study and no-hazard determination. The district court ordered the Danners to either remove the grain leg or modify its height to comply with the local regulations regarding the airport's protected airspace. The Danners filed a motion for judgment notwithstanding the verdict and a motion for new trial in light of our ruling in *State v. Martinez*, 896 N.W.2d 737 (Iowa 2017) (addressing preemptive effect of federal immigration laws). The district court denied the Danners' motions.

The Commission moved pursuant to Iowa Rule of Civil Procedure 1.904(2) to enlarge the order to set a date certain for abatement and to impose a daily penalty after that date. On September 5, the district court, after conferring with counsel, set May 1, 2018, as the date by which the Danners had to remove the grain leg or lower it by sixty feet, with a $ 200 per diem penalty every day thereafter accruing against the Danners jointly and severally.

The Danners appealed. We transferred the case to the court of appeals. The court of appeals affirmed, concluding that the doctrines of express, implied, and conflict preemption did not apply to the FAA no-hazard determination. The Danners filed an application for further review, which we granted.

II. Standard of Review.

[1–3] The parties disagree as to the standard of review. The Commission contends the case was tried as a law action because the trial court ruled on objections. The Danners contend the case was tried in equity. "Generally, our review of a decision by the district court following a bench trial depends upon the manner in which the case was tried to the court." *Collins Tr. v. Allamakee Cty. Bd. of Supervisors*, 599 N.W.2d 460, 463 (Iowa 1999). If the case is tried at law, our review is for correction of errors at law. *Id.* "Our review of cases tried in equity is de novo." *City of Eagle Grove v. Cahalan Invs., LLC*, 904 N.W.2d 552, 558 (Iowa 2017).

[4, 5] We conclude this case was tried in equity. The Commission filed the action in equity and sought only equitable relief—a permanent injunction. Notably, the district court struck the Danners' jury demand based on its ruling that this is an action in equity. Accordingly, our review is de novo. *Id.* "Nevertheless, we give weight to the factual findings of the district court,

especially with respect to determinations of witness credibility." *Id.*

[6] Preemption, however, is a question of federal law. *See Martinez*, 896 N.W.2d at 746–47; *Freeman v. Grain Processing Corp.*, 848 N.W.2d 58, 75 (Iowa 2014) (reviewing principles of federal preemption). "We review the district court's legal conclusions for correction of errors at law." *Walnut Creek Townhome Ass'n v. Depositors Ins.*, 913 N.W.2d 80, 87 (Iowa 2018).

III. Analysis.

We must decide whether the FAA's no-hazard determination for the Danners' grain leg preempts state and local zoning ordinances limiting the height of structures in or near flight paths. The Danners rely on *Martinez*, contending our recent acknowledgment of the supremacy and sweeping preemptive effect of federal immigration law in that case supports preemption under federal aviation law here. In *Martinez*, we held federal immigration law preempted the state criminal prosecution of an undocumented worker for using false identity papers to gain employment. 896 N.W.2d at 757.[1] Federal immigration and aviation law alike can supersede conflicting local regulations. At first glance, the Danners have more to argue in favor of preemption than Martha Aracely Martinez, who lacked a specific finding in her favor by federal authorities. By contrast, the FAA specifically investigated the Danners' grain leg and issued a no-hazard determination (subject to conditions, which they satisfied). Federal aviation law, however, allows room for local zoning regulation. In our view, *Martinez* is not controlling here, and we will focus our analysis on aviation law and court decisions addressing the legal effect of FAA no-hazard determinations.

We first address the Federal Aviation Act and the federal regulations promulgated to implement the Act's safety standards. We next address Iowa state and local laws regulating structures near airports. We conclude federal law and the FAA no-hazard determination allow for local regulation of tall structures in flight paths, and the district court correctly rejected the Danners' preemption defense.

A. Federal Law.

[7] 1. *The Federal Aviation Act.* The Federal Aviation Act of 1958,[2] codified as amended at 49 U.S.C. Subtit. VII, was created "for the purpose of centralizing in a single authority ... the power to frame rules for the safe and efficient use of the nation's airspace." *Air Line Pilots Ass'n, Int'l v. Quesada*, 276 F.2d 892, 894 (2d Cir. 1960). Pursuant to the Act, "[t]he United States Government has exclusive sovereignty of airspace of the United States." 49 U.S.C. § 40103(a)(1) (2017).

> The Administrator of the Federal Aviation Administration shall develop plans and policy for the use of the navigable airspace and assign by regulation or order the use of the airspace necessary to ensure the safety of aircraft and the efficient use of airspace.

Id. § 40103(b)(1).

The Administrator "shall promote safe flight of civil aircraft in air commerce by prescribing ... regulations and minimum

1. The United States Supreme Court granted certiorari in another case addressing the preemptive effect of immigration law on state criminal prosecutions for identity theft. *State v. Garcia*, 306 Kan. 1113, 401 P.3d 588, 599–600 (2017), *cert. granted in part*, —— U.S. ——, 139 S. Ct. 1317, —— L.Ed.2d —— (2019).

2. Both the Federal Aviation Administration and the Federal Aviation Act are referred to as the FAA. In this opinion, we refer to the Federal Aviation Administration as the FAA and the Federal Aviation Act as the "Aviation Act" or "the Act."

standards for other practices, methods, and procedure the Administrator finds necessary for safety in air commerce and national security." *Id.* § 44701(a)(5). These safety standards apply to airports such as the Arthur N. Neu Municipal Airport. *Id.* § 44701(b). The Administrator is directed to carry out the safety regulation "chapter in a way that best tends to reduce or eliminate the possibility or recurrence of accidents in air transportation." *Id.* § 44701(c).

As one aspect of airport and aircraft safety, the Act regulates the construction of structures that interfere with airspace. This includes prescribing notice requirements for individuals who seek to build or expand a structure. *Id.* § 44718(a). The Act provides for aeronautical studies to determine the impact of the proposed construction. *Id.* § 44718(b). During an aeronautical study, the Secretary of Transportation must

> (A) consider factors relevant to the efficient and effective use of the navigable airspace, including—
>
> (i) the impact on arrival, departure, and en route procedures for aircraft operating under visual flight rules;
>
> (ii) the impact on arrival, departure, and en route procedures for aircraft operating under instrument flight rules;
>
> (iii) the impact on existing public-use airports and aeronautical facilities;
>
> (iv) the impact on planned public-use airports and aeronautical facilities;
>
> (v) the cumulative impact resulting from the proposed construction or alteration of a structure when combined with the impact of other existing or proposed structures; and
>
> (vi) other factors relevant to the efficient and effective use of navigable airspace[.]

Id. § 44718(b)(1)(A)(i)–(vi). To implement the Act's requirements, Congress empowered the FAA to promulgate regulations. *Id.* § 40103(b).

2. *The federal regulations.* Title 14, part 77 of the Code of Federal Regulations sets forth notice requirements for proposed construction, guidance on determining whether proposed construction or an existing structure is an obstruction to air navigation, the aeronautical study and hazard/no-hazard determination process, and the procedure for petitions for review of such determinations. 14 C.F.R. § 77.1 (2018).

The regulations state that obstructions are presumed to be airport hazards unless an aeronautical study determines otherwise. *Id.* § 77.15(b). The FAA uses the safety regulations, as well as FAA policy and guidance materials, to determine whether an obstruction is an airport hazard. *Id.*; *see also id.* § 77.25(c) (noting that obstruction standards may be supplemented by other guidance).

The regulations provide certain height safety standards. The surfaces used to determine height safety requirements include "an initial approach segment, a departure area, and a circling approach area," as well as "[t]he surface of a takeoff and landing area" of an airport. *Id.* § 77.17(a). The regulations also establish certain "imaginary surfaces" in relation to the runways of an airport, which create imaginary arcs within which an object may be an airport hazard. *Id.* § 77.19. The size of the imaginary surface depends upon the type of runway and the types of approaches a pilot can make on the runway. *Id.* The arcs are all 150 feet above the airport elevation, and the radius is either 5000 or 10,000 feet depending on the type of runway. *Id.* § 77.19(a).

If the FAA conducts an aeronautical study to determine whether an object is an airport hazard, it will evaluate the follow-

ing in addition to the factors set out in 42 U.S.C. § 44718(b)(1),

> (4) Airport traffic capacity of existing public use airports and public use airport development plans received before the issuance of the final determination;
>
> (5) Minimum obstacle clearance altitudes, minimum instrument flight rules altitudes, approved or planned instrument approach procedures, and departure procedures;
>
> (6) The potential effect on ATC radar, direction finders, ATC tower line-of-sight visibility, and physical or electromagnetic effects on air navigation, communication facilities, and other surveillance systems;
>
> (7) The aeronautical effects resulting from the cumulative impact of a proposed construction or alteration of a structure when combined with the effects of other existing or proposed structures.

14 C.F.R. § 77.29(a); *see also id.* § 77.25(b).

After an aeronautical study, the FAA makes an initial hazard/no-hazard determination. *Id.* § 77.31. Pursuant to the regulations,

> [a] Determination of No Hazard to Air Navigation will be issued when the aeronautical study concludes that the proposed construction or alteration will exceed an obstruction standard but would not have a substantial aeronautical impact to air navigation. A Determination of No Hazard to Air Navigation may include the following:
>
> (1) Conditional provisions of a determination.
>
> (2) Limitations necessary to minimize potential problems, such as the use of temporary construction equipment.
>
> (3) Supplemental notice requirements, when required.
>
> (4) Marking and lighting recommendations, as appropriate.

Id. § 77.31(d). The no-hazard determination will expire eighteen months after its effective date. *Id.* § 77.33(b).

The regulations provide a procedure to petition the FAA to reconsider or revise the determination, provided that construction has not begun and the petition is submitted at least fifteen days before the determination expires. *Id.* § 77.35(a). This determination will become final unless the FAA grants discretionary review. *Id.* § 77.37, .39 (discussing the procedure for discretionary review). An individual seeking discretionary review must do so within thirty days of the date of the determination. *Id.* § 77.39(a).

[8] The no-hazard determination is reviewable as a final agency disposition. *Aircraft Owners & Pilots Ass'n v. FAA*, 600 F.2d 965, 966 n.2 (D.C. Cir. 1979). FAA no-hazard determinations have been successfully challenged under federal judicial review. *See, e.g.*, *Town of Barnstable v. FAA*, 659 F.3d 28, 35–36 (D.C. Cir. 2011) (vacating FAA no-hazard determination for offshore wind farm); *Clark County v. FAA*, 522 F.3d 437, 443 (D.C. Cir. 2008) (vacating FAA no-hazard determination for wind farm near Las Vegas airport).

In *Aircraft Owners & Pilots Ass'n*, the United States Court of Appeals for the District of Columbia discussed the limited legal effect of a hazard/no-hazard determination:

> Once issued, a hazard/no-hazard determination has no enforceable legal effect. The FAA is not empowered to prohibit or limit proposed construction it deems dangerous to air navigation. Nevertheless, the ruling has substantial practical impact. The Federal Communications Commission, for example, considers the FAA's classification in granting permits for the construction of broadcast towers. The ruling may also affect the ability of a sponsor proposing

> construction to acquire insurance or to secure financing. Primarily, however, the determination promotes air safety through "moral suasion" by encouraging the voluntary cooperation of sponsors of potentially hazardous structures.

600 F.2d at 966–67 (footnotes omitted) (citation omitted).

"Nonetheless, a hazard determination can hinder the project sponsor in acquiring insurance, securing financing or obtaining approval from state or local authorities." *BFI Waste Sys. of N. Am., Inc. v. FAA*, 293 F.3d 527, 530 (D.C. Cir. 2002); *see also White Indus., Inc. v. FAA*, 692 F.2d 532, 533 n.1 (8th Cir. 1982) ("Although the FAA determination has no enforceable legal effect, it does have substantial practical impact as the Federal Communications Commission considers the determination in making its decisions with respect to proposed construction.").

B. Iowa Law. The State of Iowa and Carroll County each have enactments addressing airport hazards. Any city or county with an airport may establish an airport commission to manage and control the airport. Iowa Code § 330.17(1). These commissions have "all of the powers in relation to airports granted to cities and counties under state law, except powers to sell the airport." *Id.* § 330.21. These powers include the authority to make decisions with regard to zoning to prevent airport hazards. *Id.* §§ 329.2–.3. "In the event of any conflict between any airport zoning regulations adopted or established under this chapter and any other regulations applicable to the same area, . . . the more stringent limitation or requirement shall govern and prevail." *Id.* § 329.8.

The Iowa Code defines an airport hazard as

> any structure or tree or use of land which would exceed the federal obstruction standards as contained in 14 C.F.R. § 77.21, 77.23 and 77.25 as revised March 4, 1972, and which obstruct the air space required for the flight of aircraft and landing or take-off at an airport or is otherwise hazardous to such landing or taking off of aircraft.

Id. § 329.1(2).

With regard to airport hazards, section 329.2 states,

> It is hereby found that an airport hazard endangers the lives and property of users of the airport and of occupants of land and other persons in its vicinity, and also, if of the obstruction type, in effect reduces the size of the area available for the landing, taking off and maneuvering of aircraft, thus tending to destroy or impair the utility of the airport and the public investment therein. Accordingly, it is hereby declared:
>
> 1. That the creation or establishment of an airport hazard is a public nuisance and an injury to the community served by the airport in question.
>
> 2. That it is necessary in the interest of public health, safety, and general welfare that the creation or establishment of airport hazards be prevented.
>
> 3. That this should be accomplished, to the extent legally possible, by proper exercise of the police power.
>
> 4. That the prevention of the creation or establishment of airport hazards, and the elimination, removal, alteration, mitigation, or marking and lighting of existing airport hazards are public purposes for which municipalities may raise and expend public funds, as an incident to the operation of airports, to acquire land or property interests therein.

Id.

If an airport hazard exists, the Commission "may maintain actions in equity to restrain and abate as nuisances the creation or establishment of airport hazards appertaining to said airport, in violation of

any zoning regulations adopted or established pursuant to the provisions of this chapter." *Id.* § 329.5; *see also id.* § 657.2(8) ("Any object or structure hereafter erected within one thousand feet of the limits of any municipal or regularly established airport or landing place, which may endanger or obstruct aerial navigation, including take-off and landing, unless such object or structure constitutes a proper use or enjoyment of the land on which the same is located.").

The Code provides a procedure for applying for a variance to zoning laws. *Id.* § 329.11. A variance

> shall be allowed where a literal application or enforcement of the regulations would result in practical difficulty or unnecessary hardship and the relief granted would not be contrary to the public interest, but would do substantial justice and be in accordance with the spirit of the regulations and this chapter; provided, however, that any such variance may be allowed subject to any reasonable conditions that the board of adjustment may deem necessary to effectuate the purposes of this chapter.

Id.

The Carroll County ordinances state with regard to placement of towers and antennas, "All tower height allowances outlined in the preceding sections are subject to approval from the municipal Airport Commission." Carroll County, Iowa, Code of Ordinances § 14.15.040.02.7 (2017) (emphasis omitted); *see also id.* § 14.16.010.04 ("All structures with a height greater than 30 feet shall be reviewed by the Carroll Airport Commission."). An applicant for a building permit must file an application with the county zoning administrator, including "[d]ocumentation that the proposed tower site and height have been approved by the appropriate Airport Commission." *Id.* § 14.15.040.03.5 (emphasis omitted).

The county board of adjustment, in compliance with Iowa Code section 355.12, is permitted to hear cases regarding "[v]ariances to zoning district requirements where there are unusual conditions or circumstances that cause a hardship when the provisions of zoning are strictly applied." *Id.* § 14.18.010.07.3.

> The board shall reject any such application or appeal that is not filed within (10) days of the Zoning Administrator's decision. Also, the secretary shall reject any such application or appeal unless the same are made on prescribed forms properly filled out, with all required data attached.

Id. § 14.18.010.08.4.

The airport zoning regulations define an airport hazard as

> any structure or tree or use of land that would exceed the Federal obstruction standards as contained in 14 CFR 77.21, 77.23, and 77.25, and that obstructs the airspace required for the flight of aircraft and landing or takeoff at an airport or is otherwise hazardous to such landing or taking off of aircraft.

Id. § 171.01(3).

The county airport zoning regulations establish "imaginary surfaces" as required by the federal regulations, creating a protected zone encompassing,

> 1. Horizontal Zone. The land lying under a horizontal plane 150 feet above the established elevations, the perimeter of which is constructed by swinging arcs of 10,000 feet radii from the center of each end of the primary surface of Runways 13 and 31, and 5,000 feet for Runways 3 and 21, and connecting the adjacent arcs by lines tangent to those arcs. No structure shall exceed 150 feet above the established airport elevation in the horizontal zone, as depicted on the Ar-

> thur N. Neu Municipal Airport Height Zoning Map.

Id. § 171.02(1).

The regulations also state,

> 5. Increase in Elevation of Structures. No structure shall be erected in the County that raises the published minimum descent altitude for an instrument approach to any runway, nor shall any structure be erected that causes the minimum obstruction clearance altitude or minimum en route altitude to be increased on any Federal airway in the County.

Id. § 171.02(5).

A landowner may request a variance from these regulations by applying to the board of adjustment and submitting a copy of the application to the Commission. *Id.* § 171.05. The Commission is permitted to give its opinion on the aeronautical effects of a possible variance within fifteen days of receiving its copy of the application. *Id.*

The airport regulations state, similar to the Iowa Code, that with regard to conflicting regulations the more stringent requirement prevails:

> Where there exists a conflict between any of the regulations or limitations prescribed in this chapter and any other regulations applicable to the same area, whether the conflict is with respect to height of structures, the use of land, or any other matter, the more stringent limitation or requirement shall govern and prevail.

Id. § 171.10.

C. Application of Preemption Principles. The Danners argue that the FAA no-hazard determination for their grain leg preempts a contrary determination by the Commission. The Danners contend that allowing local airports to determine what constitutes an airport hazard would impermissibly alter the federal standards. The district court and court of appeals disagreed and determined that federal law allows for overlapping local regulation of hazards. We agree that local regulation of tall structures near flight paths is recognized under federal aviation law.

[9] Under the Supremacy Clause of the United States Constitution, "the Laws of the United States ... shall be the supreme Law of the Land ..., any Thing in the ... Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, cl. 2.

> Consideration of issues arising under the Supremacy Clause "start[s] with the assumption that the historic police powers of the States [are] not to be superseded by ... Federal Act unless that [is] the clear and manifest purpose of Congress."

Abdullah v. Am. Airlines, Inc., 181 F.3d 363, 366 (3d Cir. 1999) (alterations in original) (quoting *Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 516, 112 S. Ct. 2608, 2617, 120 L.Ed.2d 407 (1992)).

> [T]he Supremacy Clause has been interpreted to mean that even if a state statute is enacted in the execution of acknowledged state powers, state laws that "interfere with, or are contrary to the laws of Congress" must yield to federal law.

Martinez, 896 N.W.2d at 746 (quoting *Gibbons v. Ogden*, 22 U.S. 1, 211, 9 Wheat. 1, 82, 6 L.Ed. 23 (1824)). The Supremacy Clause is implemented through the preemption doctrine. *Id.*

We have recognized "[t]here is a presumption against preemption which counsels a narrow construction of preemption provisions." *Huck v. Wyeth, Inc.*, 850 N.W.2d 353, 363 (Iowa 2014) (alteration in original) (quoting *Ackerman v. Am. Cyanamid Co.*, 586 N.W.2d 208, 213 (Iowa 1998)); *see also Freeman*, 848 N.W.2d at 83 (discussing "cooperative federalism" under which the federal law sets a floor, not a ceiling, and states may impose more

stringent protections). That is what we have here under aviation laws regulating the height of structures in flight paths, as we explain below.

[10] There are two broad categories of preemption, express and implied. *Martinez*, 896 N.W.2d at 746. Within implied preemption there are two subcategories, conflict preemption and field preemption. *Id.* We will address express preemption, conflict preemption, and field preemption in turn.

[11, 12] 1. *Express preemption.* "Express preemption occurs when the federal statutory text clearly provides that congressional authority is exclusive." *Id.* Express preemption requires examining the statutory language to determine the legislature's intent. *Id.*

[13] Although the Aviation Act states that "[t]he United States Government has exclusive sovereignty of airspace of the United States," 49 U.S.C. § 40103(a)(1), there is no clear statutory text that Congress intended to make the FAA's authority under the Aviation Act exclusive as to restrictions on structures near airports. We agree with the court of appeals that the Aviation Act does not *expressly* preempt the state statutes and local ordinances at issue here.

[14–18] 2. *Conflict preemption.* "Conflict preemption occurs when a state law conflicts with a federal provision." *Martinez*, 896 N.W.2d at 747. "Conflict preemption occurs when 'compliance with both federal and state regulation is a physical impossibility.' " *Id.* (quoting *Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142–43, 83 S. Ct. 1210, 1217, 10 L.Ed.2d 248 (1963)). "Conflict preemption also is imminent whenever two separate remedies are brought to bear on the same activity." *Id.* "Conflict preemption also occurs when a state law is an obstacle to the accomplishment of a federal purpose." *Id.* "What is a sufficient obstacle is a matter of judgment, to be informed by examining the federal statute as a whole and identifying its purpose and intended effects." *Id.* (quoting *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 373, 120 S. Ct. 2288, 2294, 147 L.Ed.2d 352 (2000)).

[19] The district court concluded that both the federal and local regulations could be in effect and regulate airport hazards without conflict. The district court concluded the Aviation Act did not preempt the local regulations stating,

> The local regulations take a more stringent stance on what a hazard is and how it could affect the air space. If the FAA regulations contained all airport and safety regulations there would be no need for the State to designate zoning powers to the Commission.

The court of appeals determined the doctrine of conflict preemption did not apply because compliance with both statutes was not impossible. Because the state regulations impose a greater burden, it is possible to comply with both the state and federal regulations. This is supported, the court determined, by the statement in the no-hazard determination that "[t]his determination ... does not relieve [the Danners] of compliance responsibilities relating to any law, ordinance, or regulation by any Federal, State, or local government body."

It is possible to comply with the federal, state, and local laws without conflict. We agree with the district court and court of appeals that the doctrine of conflict preemption does not apply in this case.

[20, 21] 3. *Field preemption.* "Field preemption arises when Congress has enacted a comprehensive scheme." *Id.* at 746. In cases of field preemption,

> congressional intent to preempt can be inferred from a framework of regulation

> "so pervasive . . . that Congress left no room for the States to supplement it" or where there is a "federal interest . . . so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject."

Id. at 746–47 (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 67 S. Ct. 1146, 1152, 91 L.Ed. 1447 (1947)).

[22] "[C]oncluding that Congress intended to occupy the field of air safety does not end our task." *Goodspeed Airport LLC v. E. Haddam Inland Wetlands & Watercourses Comm'n*, 634 F.3d 206, 210 (2d Cir. 2011). "The key question is thus at what point the state regulation sufficiently interferes with federal regulation that it should be deemed pre-empted[.]" *Id.* at 211 (alteration in original) (quoting *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 107, 112 S. Ct. 2374, 2387, 120 L.Ed.2d 73 (1992)).

A variety of state and local laws have been preempted by the Aviation Act, including tort law,[3] state regulation of air travel,[4] and noise regulations.[5] However, in *Goodspeed Airport*, the environmental regulation at issue—requiring a permit to cut down trees on wetlands—was not preempted because it did not sufficiently interfere with the federal regulations. *Id.* at 212. The court declined to determine

> whether the FAA Regulations would preempt the state and local laws, regulations, and actions challenged here if the trees were declared hazards and their removal ordered by the FAA. Significantly, in this case the federal government renounced any intention—indeed, questioned whether it had the authority—to declare the trees hazards and/or order their removal.

Id. at 208 n.1.

Courts have found ample room for state and local regulation. *See, e.g.*, *City of*

3. *See, e.g., Montalvo v. Spirit Airlines*, 508 F.3d 464, 468 (9th Cir. 2007) (holding that the Aviation Act preempted state law duty-to-warn claims for passengers who developed deep vein thrombosis on domestic flights); *Abdullah*, 181 F.3d at 371–72 (holding that air safety standards as they relate to a standard of care for state negligence claims were preempted); *In re Sept. 11 Litig.*, 811 F. Supp. 2d 883, 891 (S.D.N.Y. 2011) (finding that federal law preempted state law with regard to the standard of care applicable to the defendant's conduct in allowing terrorists to hijack and crash a plane, noting that if state law controlled "air carriers then would be subjected to an untenable mixture of 50 different state legal regimes, and not to a uniform federal legal regime"); *In re Air Crash Near Clarence Ctr., N.Y., on Feb. 12, 2009*, 798 F. Supp. 2d 481, 486 (W.D.N.Y. 2011) (finding that the FAA preempted state law negligence standard of care). *But see Sikkelee v. Precision Airmotive Corp.*, 822 F.3d 680, 683 (3d Cir. 2016) (holding that the FAA did not preempt design defect claims).

4. *See, e.g., U.S. Airways, Inc. v. O'Donnell*, 627 F.3d 1318, 1329 (10th Cir. 2010) ("Based on the pervasive federal regulations concerning flight attendant and crew member training and the aviation safety concerns involved when regulating an airline's alcoholic beverage service, we conclude that [the state liquor law's] application to an airline implicates the field of airline safety that Congress intended federal law to regulate exclusively. Thus, New Mexico's regulatory efforts are impliedly preempted."); *Air Transp. Ass'n of Am., Inc. v. Cuomo*, 520 F.3d 218, 219 (2d Cir. 2008) (per curiam) (finding that federal law preempted a state law establishing a passenger's bill of rights); *French v. Pan Am Express, Inc.*, 869 F.2d 1, 1 (1st Cir. 1989) (holding that pilot regulation statute was preempted).

5. *See, e.g., City of Burbank v. Lockheed Air Terminal Inc.*, 411 U.S. 624, 638–40, 93 S. Ct. 1854, 1862–63, 36 L.Ed.2d 547 (1973) (concluding that the Aviation Act preempted a city ordinance attempting to control noise by prohibiting aircraft from taking off between 11 p.m. and 7 a.m.); *Burbank-Glendale-Pasadena Airport Auth. v. City of Los Angeles*, 979 F.2d 1338, 1341 (9th Cir. 1992) (finding that local regulations regarding airport noise were preempted).

Cleveland v. City of Brook Park, 893 F. Supp. 742, 751 (N.D. Ohio 1995) ("While it is certainly true that runway placement will have some tangential effect on flight operations, the question of whether and where to construct a runway does not substantially affect the use of airspace. . . . The Federal Aviation Act does not occupy the field of land use regulations in such a way so as to preempt Brook Park's ordinances.").

[23] The court of appeals concluded the doctrine of field preemption did not apply because the Act only sets minimum standards and implies that another body may lawfully impose more stringent standards. The court also noted that the FAA did not intend for the no-hazard determination to supersede state and local law because it has no enforceable legal effect. We agree for the reasons explained below.

4. *Cases addressing the preemptive effect of FAA no-hazard determinations for tall structures in flight paths.* We now turn to the several cases specifically adjudicating whether FAA no-hazard determinations preempt local regulation of the height of structures in flight paths.

The Commission relies on *Commonwealth v. Rogers*, an appeal by a business owner found guilty of violating a state statute by erecting a ninety-five-foot-tall sign that encroached on an airport's approach area, without seeking prior approval from the Pennsylvania Department of Transportation. 430 Pa.Super. 253, 634 A.2d 245, 246–47 (1993). The *Rogers* court, citing to *Aircraft Owners & Pilots Ass'n*, concluded that because FAA hazard/no-hazard determinations had no enforceable legal effect, the ability to prohibit or limit proposed construction because of the hazard it poses to air navigation "has been left to the states." *Id.* at 250. The *Rogers* court concluded, "Thus, although Congress has concerned itself with the hazards posed by tall structures, it has left untouched the legal enforcement of standards, which are peculiarly adapted to local regulation. Therefore, the states may legislate concerning such matters." *Id.* The court noted that "[b]y enacting [the state statute], the legislature empowered [the department of transportation] to enforce mandatory compliance with FAA regulations which are designed to identify potential hazards to air navigation." *Id.* at 253. "Unlike the determination made by the FAA, [the department of transportation's] determination is enforceable, rather than advisory." *Id.* "In order to ensure that landowners will comply with the requirement of prior approval by [the department of transportation], the legislature has mandated that the failure to seek approval is a summary offense." *Id.* The court concluded this was a proper exercise of police power, and "[i]n this manner, [the department of transportation] can ensure that the safety regulations promulgated by the FAA are applied uniformly throughout the Commonwealth to establish a minimum threshold of safety, irrespective of different standards which may be adopted at the local level." *Id.* *Rogers* is distinguishable, however, because the defendant had not actually received an FAA no-hazard determination as to the tall sign at issue.

In *La Salle National Bank v. Cook County*, a developer sought to construct eight-story apartment buildings near a naval air base. 34 Ill.App.3d 264, 340 N.E.2d 79, 81–82 (1975). The developer relied on "a letter it received from the FAA indicating the proposed construction did not violate the height restrictions imposed by FAA on buildings in military airport approach zones." *Id.* at 83. County zoning officials nevertheless denied a required zoning reclassification based on local zoning height restrictions and pilot testimony that the buildings would pose a hazard. *Id.*

at 81, 83–84. The appellate court, concluding that the local standards did not impede aviation, affirmed the rejection of the developer's federal preemption claim. *Id.* at 87–88, 340 N.E.2d 79, 81–82. Similarly, here, the Commission's pilot witnesses testified the grain leg posed a hazard to aviation.

The Commission also relies on *Aeronautics Commission of Indiana v. State ex rel. Emmis Broadcasting Corp.*, 440 N.E.2d 700 (Ind. Ct. App. 1982). There, business owners sought to purchase the assets of a radio station but wanted to move the broadcast tower. *Id.* at 701–02. The prospective purchaser was required to coordinate with the Federal Communications Commission, "vested with authority to regulate the proposed construction and maintenance of broadcast towers[,]" as well as the FAA, vested with the authority to determine "whether a proposed antenna presents a hazard to air navigation." *Id.* at 702 & n.2. The FAA performed an aeronautical study and determined the antenna and tower would not be a hazard to air navigation. *Id.* at 702. However, the aeronautics commission advised the purchaser that it must also obtain a permit pursuant to the Indiana High Structures Safety Act before constructing the tower. *Id.* The aeronautics commission denied the company's application for a permit. *Id.* The Indiana Court of Appeals, relying on *Aircraft Owners & Pilots Ass'n*, concluded that state and local regulations regarding tall structures were not preempted by the Aviation Act. *Id.* at 704–06. The court determined that

> Congress has concerned itself with the potential hazards for air safety created by tall structures, but it has purposely left untouched a distinctive part of the subject—the legal enforcement of standards—peculiarly adapted to local regulation; thus the state may legislate concerning such local matters which Congress could have covered but did not.

Id. at 706.

On the other hand, a federal district court expressly declined to follow *Aeronautics Commission of Indiana* and, instead, held that the FAA's no-hazard determination as to placement of a broadcast tower trumped a contrary local regulatory decision. *Big Stone Broad., Inc. v. Lindbloom*, 161 F. Supp. 2d 1009, 1021 (D.S.D. 2001). There, a radio broadcaster sued members of the South Dakota Aeronautics Commission (SDAC) for injunctive and declaratory relief, challenging the SDAC's denial of a permit to place an 875-foot broadcast tower near a state road used as a flight path for small aircraft. *Id.* at 1011–13. The FAA had issued a no-hazard determination for the tower in that location. *Id.* The *Big Stone* court noted the Indiana Court of Appeals "rooted its rationale" in the FAA's lack of power to compel a state regulator to allow construction of a tower the state deemed hazardous to aviation "notwithstanding a[n] FAA determination to the contrary." *Id.* at 1020–21. The *Big Stone* court "craft[ed] a more limited remedy" by enjoining the SDAC

> from acting to prohibit the construction of proposed broadcast towers when the FAA, in adherence to its statutory and regulatory provisions, determines that the proposed tower poses no hazard to air traffic and safety. In essence, then, the court enjoins [the SDAC] from vetoing a[n] FAA determination of "no hazard" in connection with radio broadcast towers.

Id. at 1021. *Big Stone* has not been followed by other courts. It is also distinguishable. Here, we are reviewing a judgment on a bench trial determining the grain leg is hazardous to aviation and violates local zoning requirements, rather than a district court ruling accommodating

competing federal and state agency decisions. And, unlike *Big Stone*, the Commission was not really "vetoing" the FAA's no-hazard determination because the no-hazard letter itself admonished the Danners that they remained subject to local zoning requirements.

In *Davidson County Broadcasting, Inc. v. Rowan County Board of Commissioners*, the North Carolina Court of Appeals considered whether a county was preempted from regulating air safety. 186 N.C.App. 81, 649 S.E.2d 904, 907 (2007). In that case, a broadcasting company applied for a conditional use permit to construct a 1350-foot radio tower near a private airport. *Id.* at 907–08. After a public hearing, the county board of commissioners denied the permit, finding that the tower would penetrate air traffic patterns at the private airport and would constitute "hazardous safety conditions" in violation of the county zoning code. *Id.* The board reached this decision despite a no-hazard determination from the FAA. *Id.* However, the board noted, "[T]he FAA's review included only flight operations to and from public airports. Miller Airpark is a private airport to which the FAA regulations do not apply." *Id.* at 908. The court found no conflict between the Act and the county zoning law. *Id.* at 911. The court based this conclusion on the language in the no-hazard letter stating that the no-hazard letter "does not relieve the sponsor of compliance responsibilities relating to any law, ordinance, or regulation of any Federal, State, or local government body." *Id.* The same language is found in the FAA's no-hazard letter for the Danners' grain leg.

[24, 25] On balance, we decline to hold the FAA no-hazard determination preempted enforcement of local zoning requirements. We reiterate that "[t]here is a presumption against preemption." *Huck*, 850 N.W.2d at 363 (alteration in original) (quoting *Ackerman*, 586 N.W.2d at 213). Federal courts recognize that the FAA's "hazard/no-hazard determination has no enforceable legal effect" and "[t]he FAA is not empowered to prohibit or limit proposed construction it deems dangerous to air navigation." *Aircraft Owners & Pilots Ass'n*, 600 F.2d at 966–67. Accordingly, that role must fall to state and local government, indicating Congress left room for "cooperative federalism." *See Freeman*, 848 N.W.2d at 83. In our view, the better reasoned authorities discussed above hold state and local regulators can impose stricter height restrictions on structures in flight paths notwithstanding an FAA no-hazard determination. Finally, we rely on the very language of this specific no-hazard determination, which expressly warned the Danners that they still must comply with state and local laws.

D. Whether the District Court's Injunctive Relief Should Be Affirmed. On June 16, 2017, the district court sustained the Commission's petition for abatement, finding the grain leg was an airport hazard constituting a nuisance. The district court ordered the grain leg to be removed or reconstructed at a lower height. The Danners filed a motion for judgment notwithstanding the verdict or for new trial, arguing federal preemption based on our holding in *Martinez*. The Commission filed a motion to set a date by which the grain leg had to be removed and to impose a per diem penalty for each day after the deadline the grain leg continued to stand.

The court rejected the Danners' preemption defense based on *Martinez* and denied their motion for judgment notwithstanding the verdict. The court set a May 1, 2018 removal or modification deadline and, relying on Iowa Code section 329.14, imposed a $ 200 per day penalty commencing May 1, 2018, for each day the nuisance continued to stand unabated. That penalty has continued to accrue dur-

ing this appeal at an annual rate of $ 73,000. On our de novo review, we affirm the nuisance determination and remedy except that we vacate the per diem penalty as inequitable.

[26, 27] "Permanent injunctive relief is an extraordinary remedy that is granted only when there is no other way to avoid irreparable harm to the plaintiff." *Lewis Invs., Inc. v. City of Iowa City*, 703 N.W.2d 180, 185 (Iowa 2005).

> A plaintiff seeking permanent injunctive relief must establish "(1) an invasion or threatened invasion of a right; (2) that substantial injury or damages will result unless the request for an injunction is granted; and (3) that there is no adequate legal remedy available."

City of Okoboji v. Parks, 830 N.W.2d 300, 309 (Iowa 2013) (quoting *Cmty. State Bank, Nat'l Ass'n v. Cmty. State Bank*, 758 N.W.2d 520, 528 (Iowa 2008)).

[28] The court must undertake "a comparative appraisal of all of the factors in the case," and consider the following:

> (a) the character of the interest to be protected,
>
> (b) the relative adequacy to the plaintiff of injunction and of other remedies,
>
> (c) plaintiff's delay in bringing suit,
>
> (d) plaintiff's misconduct,
>
> (e) the relative hardship likely to result to defendant if injunction is granted and to plaintiff if it is denied,
>
> (f) the interests of third persons and of the public, and
>
> (g) the practicability of framing and enforcing the order or judgment.

Helmkamp v. Clark Ready Mix Co., 214 N.W.2d 126, 130 (Iowa 1974) (quoting Restatement (Second) of Torts, Tentative Draft No. 19, § 936(1)).

[29, 30] "When determining whether an injunction is the proper remedy, the court must weigh the relative hardship to each party." *In re Langholz*, 887 N.W.2d 770, 779 (Iowa 2016). Courts must structure permanent injunctions so that it will provide relief to the plaintiff without "interfer[ing] with the legitimate and proper actions of the person against whom it is granted." *Id.* at 779–80.

[31, 32] "In equity cases, especially when considering the credibility of witnesses, [we] give[ ] weight to the fact findings of the district court, but [we are] not bound by them." Iowa R. App. P. 6.904(3)(*g*). The Commission presented credible opinion testimony from experienced pilots familiar with the airport. The district court credited their testimony that the grain leg poses a hazard to aviation there. So do we. The other runway would be risky to use in a strong crosswind common to that location. The structure is not easy to see in certain weather conditions. The higher approach requires a steeper descent poorly suited to some types of aircraft. A distracted pilot might fly into the twelve-story elevator, with fatal consequences. We affirm the district court's finding that the grain leg constitutes a nuisance and hazard to aviation. It is the $ 200 daily penalty accruing during this appeal that gives us pause.

Iowa Code section 329.14 provides, "Each violation of [the airport zoning] chapter or of any regulations, order, or rules promulgated pursuant to this chapter, shall constitute a simple misdemeanor and each day a violation continues to exist shall constitute a separate offense." The statutory fine for a simple misdemeanor is "at least sixty-five dollars but not to exceed six hundred twenty-five dollars." *Id.* § 903.1(*a*).

Although the district court gave the Danners nine months to abate the nuisance before commencing the $ 200 daily penalty, the Danners' appeal was pending during that grace period. The district court did not find the Danners in contempt or in

willful violation of the court's abatement order. The Commission's case against the Danners was no slam dunk. It is undisputed that the Danners fully complied with the FAA directive to paint the structure and place red lights on top. The FAA adjusted the flight path by 100 vertical feet to accommodate the grain leg. The FAA determined that these measures alleviated the danger to aviation posed by the structure.[6] The Commission failed to appeal the FAA no-hazard determination. Further, despite the trial testimony that the grain leg poses a hazard, the Commission waited nearly two years to file this action. The Danners presented uncontroverted testimony that the cost to remove the grain leg and rebuild it elsewhere is roughly $ 450,000 and that it would cost several hundred thousand dollars to modify the grain leg by reducing its height. We reject as speculative the testimony that the grain leg will impede efforts to obtain future grants from the same federal government that deemed the structure nonhazardous, especially since grants of $ 284,466 and $ 263,200 were awarded after the grain leg was built. We factor these considerations into our equitable calibration of the postappeal deadline to bring down the grain leg.

The Danners presented a question of first impression in this jurisdiction as to whether the FAA's aeronautical study and no-hazard determination preempted the Commission's contrary determination that the grain leg is a hazard to aviation. While the district court, court of appeals, and now our court declined to give the FAA letter preemptive effect, this legal issue was not finally resolved until our opinion today. The caselaw in other jurisdictions is conflicting, and the Danners' position had some support. *See, e.g.*, *Big Stone*, 161 F. Supp. 2d at 1021. We find the Danners pursued this appeal to conclusion based on their good faith and objectively reasonable belief in their legal position.

Although we now affirm the district court's nuisance finding, this was a fair fight on the merits. Enforcement of the per diem penalty under these circumstances would have a chilling effect on a litigant's right to appeal a question of first impression in this jurisdiction. The Danners exercised their right to appeal, which has now run its course. We affirm the injunction and hold abatement is required, but conclude it would be inequitable to impose the $ 200 daily penalty on the Danners from May 1, 2018, as originally ordered by the district court until they abate the nuisance. We elect to vacate the daily $ 200 penalty accruing during this appeal. *Cf.* Iowa Code § 329.4(9) (suspending enforcement penalties during appeal from extraterritorial airport hazard determination); *Palmer Coll. of Chiropractic v. Iowa Dist. Ct.*, 412 N.W.2d 617, 622 (Iowa 1987) (holding in contempt proceeding that failure to obey injunction constituted a single continuous violation and setting aside daily penalty); *see also Ventres v. Goodspeed Airport, LLC*, 275 Conn. 105, 881 A.2d 937, 968 (2005) (affirming order suspending per diem penalties during pendency of action).

The district court, to its credit, allowed the Danners a nine-month grace period to abate the nuisance. *See Palmer Coll. of Chiropractic*, 412 N.W.2d at 622 (commending the district court for allowing time to comply with its injunction). We renew this nine-month period from the date procedendo issues.

IV. Disposition.

For the above-stated reasons, we vacate the decision of the court of appeals, vacate

6. Unlike the district court, we give some evidentiary weight to the determination by federal aviation authorities that the grain leg is not a hazard to aviation.

the $ 200 daily penalty, and affirm the district court judgment as modified to require the Danners to abate the nuisance within nine months from the effective date of our opinion.

DECISION OF COURT OF APPEALS VACATED; DISTRICT COURT JUDGMENT AFFIRMED AS MODIFIED.

All justices concur except McDonald, J., who takes no part.

STATE of Iowa, Appellee,

v.

Jane DOE, Appellant.

No. 18-1366

Supreme Court of Iowa.

Filed May 10, 2019

Background: Indigent defendant filed motion to expungement criminal charges. The District Court, Polk County, Becky Goettsch, J., denied expungement, and defendant appealed.

Holding: The Supreme Court, Waterman, J., held that expungement statute survived rational basis review under both the Iowa and Federal Constitutions.

Affirmed.

Wiggins, J., dissented and filed opinion in which Cady, C.J., joined.

Appel, J., filed dissenting opinion.

1. Criminal Law ⚿1139

Appellate courts review constitutional challenges to statutes de novo.

2. Constitutional Law ⚿990, 1030

Statutes are cloaked with a presumption of constitutionality, and challenger bears a heavy burden because it must prove the unconstitutionality beyond a reasonable doubt.

3. Constitutional Law ⚿1031

Party challenging constitutionality of statute must refute every reasonable basis upon which the statute could be found to be constitutional.

4. Constitutional Law ⚿990

If statute is capable of being construed in more than one manner, one of which is constitutional, courts must adopt that construction.

5. Criminal Law ⚿1226(3.1)

There is no constitutional right to expunge one's criminal record, and instead, expungement is a matter of legislative grace.

6. Constitutional Law ⚿3041

On a basic level, both state and federal constitutions establish the general rule that similarly situated citizens should be treated alike. U.S. Const. Amend. 14; Iowa Const. art. 1, § 6.

7. Constitutional Law ⚿3006

Courts generally consider the federal and state equal protection clauses to be identical in scope, import, and purpose. U.S. Const. Amend. 14; Iowa Const. art. 1, § 6.

8. Constitutional Law ⚿3053

Unless a suspect class or a fundamental right is at issue, equal protection claims are reviewed under the rational basis test. U.S. Const. Amend. 14; Iowa Const. art. 1, § 6.

9. Constitutional Law ⚿3826

Since indigent defendant did not allege that fundamental right or suspect class was at issue, appellate court would apply the rational basis test when analyzing defendant's claim that expungement statute, providing that court may expunge

charged. Moreover, under such a rule, most, if not all, constructive amendments would morph from questions of due process and proper pleading into questions of prejudice, thereby effectively eliminating any distinction between constructive amendments and simple variances and overturning decades of settled case law in the process. With respect, I cannot abide such a result.

III. Conclusion

¶82 Today, the majority adopts a rule that effectively allows prosecutors to convict defendants on charges different from those specifically alleged, by name, in the charging instruments. Although this rule is announced in a case involving a habitual criminal count, I do not see why the rule would be limited to this context. Instead, it would appear to apply to any charged crime and, thus, would seem to allow the prosecution in any case to convict a defendant of a charge other than one expressly alleged in a charging instrument, as long as the defendant can be said to have been given notice, either elsewhere in the charging instrument or in discovery, of what the prosecution ultimately proved. Because I believe that such a rule would violate a defendant's right to due process, I cannot subscribe to it.

¶83 For these reasons, I would conclude that when, in connection with habitual criminal counts, the prosecution charges a prior conviction of a specifically identified felony but then proceeds to prove a different felony without timely amending the charging instrument, the prosecution has constructively amended that charging instrument and reversal is required. Accordingly, I would reverse the judgment of conviction on count six and remand this case for further proceedings.

¶84 To this extent, I respectfully dissent from the majority's opinion.

I am authorized to state that JUSTICE HOOD and JUSTICE HART join in this concurrence in part and dissent in part.

2020 CO 52

FOREST VIEW COMPANY and Raymond Decker, Petitioners,

v.

TOWN OF MONUMENT, a Statutory Municipality of the State of Colorado, Respondent.

Supreme Court Case No. 18SC793

Supreme Court of Colorado.

June 8, 2020

Background: Town filed petition in condemnation with regard to parcel of land it had purchased in subdivision for purpose of building water tower, seeking to extinguish restrictive covenant that restricted use of all land in subdivision to residential purposes. Property owners in same subdivision intervened, claiming they were owned reasonable compensation for the decrease in value to their lots and homes due to lifting the restrictive covenant from town's parcel. The District Court, El Paso County, Eric Bentley, J., found that property owners had a compensable property interest. Town appealed. Court of Appeals, Jones, J., 2018 WL 4781388, reversed. Certiorari was granted.

Holdings: The Supreme Court, Hart, J., held that restrictive covenant was not a compensable property interest.

Affirmed.

Samour, J., filed opinion concurring in the judgment only.

Gabriel, J., filed dissenting opinion.

1. Adjoining Landowners ⇦8

Property owners adjacent to a government project that diminishes the value of their property are not entitled to compensation from the government for that diminution.

2. Eminent Domain ⇐261, 262(4)

While the Supreme Court defers to the trial court's findings of fact in condemnation proceedings, it reviews a trial court's legal conclusions de novo.

3. Appeal and Error ⇐3172, 3173

The Supreme Court reviews questions of constitutional and statutory interpretation de novo.

4. Courts ⇐89

The doctrine of stare decisis requires that courts adhere to precedent in order to promote uniformity, certainty, and stability of the law.

5. Courts ⇐89

Courts adhere to the doctrine of stare decisis absent a sound reason for rejecting it.

6. Eminent Domain ⇐2.1

A taking occurs when a government entity clothed with the power of eminent domain substantially deprives a property owner of the use and enjoyment of that property. Colo. Const. art. 2, § 15.

7. Eminent Domain ⇐69

For a landowner to be entitled to compensation under the Colorado Constitution, there must be either a taking or a damaging of private property without just compensation. Colo. Const. art. 2, § 15.

8. Eminent Domain ⇐2.1

A regulatory taking occurs when a government entity does not physically occupy the land, but government action places an impermissible burden on certain landowners, effectively forcing some people alone to bear public burdens that, in fairness and justice, should be borne by the public as a whole. Colo. Const. art. 2, § 15.

9. Eminent Domain ⇐2.1

A regulatory taking can only be established if the regulation imposes a very high level of interference with the property owner's use of the land; a mere decrease in property value is not enough. Colo. Const. art. 2, § 15.

10. Eminent Domain ⇐2.1

The damage clause of the takings clause of the Colorado Constitution only applies to situations in which the damage is caused by government activity in areas adjacent to the landowner's land. Colo. Const. art. 2, § 15.

11. Covenants ⇐84
Eminent Domain ⇐95

Neighboring property owners are not entitled to compensation under the Colorado Constitution when the government uses land it acquires in a manner that violates a restrictive covenant. Colo. Const. art. 2, § 15.

12. Eminent Domain ⇐85

Restrictive covenant on properties in subdivision, which limited construction to single-family residences, was not a compensable property interest in town's eminent domain proceeding, in which town sought to extinguish covenant on parcel of property it purchased in order to build water tower, and thus other property owners in subdivision were not entitled to just compensation due to violation of covenant on town's parcel. Colo. Const. art. 2, § 15.

Certiorari to the Colorado Court of Appeals, Court of Appeals Case No. 17CA1663

Attorneys for Petitioners: Hanes & Bartels LLC, Richard W. Hanes, Brenda L. Bartels, Colorado Springs, Colorado

Attorneys for Respondent: Murray Dahl Beery & Renaud LLP, Joseph Rivera, Lakewood, Colorado

Attorneys for Amicus Curiae Colorado Municipal League: Laurel A. Witt, David W. Broadwell,Denver, Colorado

En Banc

JUSTICE HART delivered the Opinion of the Court.

¶1 The Town of Monument (the "Town") purchased a piece of property on which it planned to build a water tower. Neighboring property owners objected, arguing that the property was subject to a restrictive covenant limiting construction to single-family residences. According to the property own-

ers, if the Town were to violate that covenant by building a water tower, the Town would be taking the restrictive covenant from each of the covenant-subject properties, and it would therefore have to compensate the property owners for the diminution in value caused by that taking.

[1] ¶2 It is well settled that property owners adjacent to a government project that diminishes the value of their property are not entitled to compensation from the government for that diminution. But does the existence of a restrictive covenant change the analysis? We answered this question over half a century ago in the negative, holding in *Smith v. Clifton Sanitation District*, 134 Colo. 116, 300 P.2d 548 (1956), that when state or local government acquires property subject to a restrictive covenant and uses it for purposes inconsistent with that covenant, "no claim for damages arises by virtue of such a covenant as in the instant case, in favor of the owners of other property" subject to the covenant. *Id.* at 550.

¶3 Petitioners here ask us to confine *Smith* to its facts or to overrule it entirely. We decline to do either. Instead, we reaffirm that where a government entity has obtained property for public purposes, the government may use that land for a purpose inconsistent with a restrictive covenant without compensating all of the other landowners who are subject to that restrictive covenant.

I. Facts and Procedural History

¶4 In September 2016, the Town of Monument purchased a parcel of real property ("Lot 6") from private landowners located in Forest View Estates IV, a 39-lot subdivision in El Paso County whose lots are subject to a restrictive covenant.

¶5 The Town intended to build a million-gallon municipal water storage tank on the property, but due to the residential-use limitation in place, the Town felt that it needed to extinguish the restrictive covenant encumbering Lot 6 to proceed with construction. Specifically, the portion of the covenant at issue here stated that "[a]ll lots shall be known and described as residential lots and shall be used only for private, custom, site-built homes," and "[n]o structure shall be erected . . . on any lot other than one single-family dwelling." Believing that it could not construct the water tower without either breaching the covenant or extinguishing the encumbrance, the Town sought to exercise its eminent domain authority.

¶6 In January 2017, the Town filed a petition in condemnation in the El Paso County District Court pursuant to sections 31-15-707(1)(e), C.R.S. (2019), and 38-1-105(5), C.R.S. (2019), which together permit a government entity that has purchased property, instead of acquiring it through its power of eminent domain, to perfect title to that property.

¶7 In February 2017, Forest View Company, Raymond Decker, and John Does 1–40 (the latter all property owners in the same subdivision as Lot 6) (collectively, the "intervenors") intervened in the action, arguing, among other things, that they were owed reasonable compensation for the decrease in value to their lots and homes brought about by lifting the restrictive covenant from Lot 6. The intervenors argued that the covenant encumbering each lot was an independent property interest held by the owner of the lot and that the Town was trying to take that property interest through eminent domain without providing just compensation as required by article II, section 15 of the Colorado Constitution.

¶8 Both the Town and the intervenors agreed that the question of whether the other property owners in the subdivision had to be compensated for any drop in the value of their properties turned on the scope of our holding in *Smith*. The parties stipulated that if *Smith* controlled, then the intervenors had no standing and the condemnation could proceed unimpeded.

¶9 In July 2017, the district court issued an order finding that our holding in *Smith*, particularly the language which stated that "[p]arties may not by contract between themselves restrict the exercise of the power of eminent domain," 300 P.2d at 550, was dicta applicable only to the unique factual context of the case. The court noted that the specific restrictive covenants at issue in *Smith* were recorded "on the eve of filing" the condemna-

tion action in an obvious effort to thwart the government's exercise of eminent domain. Accordingly, the court found that *Smith* was distinguishable and that the Forest Valley Estates restrictive covenants created a compensable property interest for each property owner whose land was subject to those covenants.

¶10 The Town appealed, raising a single issue—whether *Smith* in fact controlled the outcome—and a division of the court of appeals reversed. *Town of Monument v. Colorado*, 2018 COA 148, ¶¶ 3–4, 467 P.3d 1126. The division reasoned that, although the facts in *Smith* were unique, the decision's holding "broadly applies to any situation in which a restrictive covenant such as the one at issue is interposed as an obstacle to a condemning authority's attempt to obtain property for public use through eminent domain." *Id.* at ¶ 14.

¶11 The intervenors petitioned for certiorari review and we granted the petition.[1]

II. Analysis

¶12 We begin by discussing the appropriate standard of review and applicable principles of statutory construction. We then turn to a discussion of our decision in *Smith* to determine whether the rule it espouses is confined to the particular facts of that case. We conclude that it is not. We next explain why the rule in *Smith* is consistent with our interpretation of article II, section 15 of the Colorado Constitution more generally. Finally, we consider the policy implications associated with extending takings jurisprudence to the claims asserted here. Because we conclude that there are no sound reasons to depart from our holding in *Smith*, we affirm the judgment of the court of appeals.

A. Standard of Review and Stare Decisis

[2, 3] ¶13 While we defer to the trial court's findings of fact in condemnation proceedings, we review a trial court's legal conclusions de novo. *Glenelk Ass'n v. Lewis*, 260 P.3d 1117, 1120 (Colo. 2011). Likewise, we review questions of constitutional and statutory interpretation de novo. *Ziegler v. Park Cty. Bd. of Cty. Comm'rs*, 2020 CO 13, ¶ 11, 457 P.3d 584, 588.

[4, 5] ¶14 With regard to case law, the doctrine of stare decisis requires that we adhere to precedent in order to promote "uniformity, certainty, and stability of the law." *People v. Porter*, 2015 CO 34, ¶ 23, 348 P.3d 922, 927 (quoting *People v. LaRosa*, 2013 CO 2, ¶ 28, 293 P.3d 567, 574). We adhere to the doctrine "[a]bsent 'sound reason for rejecting it.'" *Id.* (quoting *People v. Blehm*, 983 P.2d 779, 788 (Colo. 1999)); *see also Creacy v. Indus. Comm'n*, 148 Colo. 429, 366 P.2d 384, 386 (1961) ("Under the doctrine of stare decisis courts are very reluctant to undo settled law.").

B. *Smith v. Clifton Sanitation District*

¶15 In *Smith*, the Clifton Sanitation District (the "District") initially sought to purchase a 21-acre tract of land from its owner, Clyde Peterson, in order to construct a sanitation disposal system for municipal use on that land. 300 P.2d at 548. While the purchase negotiations were ongoing, a group of landowners, including Peterson, executed a restrictive covenant that prohibited use of their land for certain purposes, including the sanitation district's intended use. *Id.* at 549. Peterson ultimately refused to sell the property to the District, and the District filed a condemnation proceeding. *Id.* at 548. The landowners who owned property subject to the restrictive covenant sought to intervene in the condemnation proceeding. *Id.* at 549.

¶16 This court noted that "[i]t requires no imagination to determine why the restrictive covenants were executed and recorded on the eve of the filing of the condemnation case." *Id.* We further opined that "such a scheme"

1. Specifically, we granted certiorari to review the following issue:

> 1. Whether the court of appeals was in error interpreting the Colorado Supreme Court's decision in *Smith v. Clifton Sanitation District*, 134 Colo. 116, 300 P.2d 548 (1956), that a restrictive covenant proscribing certain uses of property is not a compensable property interest in the context of an eminent domain case, and in the process created a significant exception to the takings clause of the Colorado Constitution, Article II, section 15.

as this apparent effort to interfere with the District's plans was "contrary to sound public policy and invalid as against the constitutional and statutory rights of the condemner." *Id.*

¶17 In reaching this conclusion, we stated that:

> We think it is fundamental that where a company, corporation or agency of the state is vested with the right of eminent domain and has acquired property thru [sic] eminent domain proceedings and is using the property for public purposes, no claim for damages arises by virtue of such a covenant as in the instant case, in favor of the owners of other property on account of such use by the condemner. Were the rule otherwise the right of eminent domain could be defeated if the condemning authority had to respond in damages for each interest in a large subdivision or area subject to deed restrictions or restrictive covenants.

Id. at 550. We further concluded that the restrictive covenant in that case was more akin to a negative easement or equitable servitude, "not a positive easement or right in the land itself which would permit of the physical use or occupation of the Peterson land by the other property owners who signed the covenant." *Id.* And while we determined that a right enforceable in equity between the parties to the contract likely existed as a result of the restrictive covenant, parties could not "by contract between themselves restrict the exercise of the power of eminent domain." *Id.*

¶18 As the intervenors rightly point out, our decision in *Smith* is reasonably susceptible of two readings: either as stating a general rule that restrictive covenants are not compensable property interests for purposes of eminent domain, or simply disapproving of the particular circumstances of the restrictive covenant at issue in that case. They cite the language in *Smith* referring to a "scheme . . . contrary to sound public policy and invalid as against the constitutional and statutory rights of the condemner" to argue that our ruling turned on the particular facts of that case. *Id.* at 549; *see also City of Steamboat Springs v. Johnson*, 252 P.3d 1142, 1146 (Colo. App. 2010) (reading *Smith* as limited to its facts and concluding that a restrictive covenant was a compensable property interest). But as the court of appeals here concluded, the " 'scheme'—or, put another way, the property owners' intent—wasn't the fulcrum of the court's decision. Had it been so, the court wouldn't have needed to articulate the rule." *Town of Monument*, ¶ 15.

¶19 We read the rule articulated in *Smith*, which states that "no claim for damages arises by virtue of such a covenant . . . in favor of the owners of other property on account of such use by the condemner," as applicable beyond the facts of that case. 300 P.2d at 550. The question we must answer, then, is whether sound reasons exist for departing from this settled precedent. We conclude that they do not.

C. Claims Cognizable Under Article II, Section 15 of the Colorado Constitution

[6, 7] ¶20 Article II, section 15 provides that "[p]rivate property shall not be taken or damaged, for public or private use, without just compensation." Colo. Const. art. II, § 15. "A taking occurs when a[ ] [government] entity clothed with the power of eminent domain substantially deprives a property owner of the use and enjoyment of that property." *City of Northglenn v. Grynberg*, 846 P.2d 175, 178 (Colo. 1993). For a landowner to be entitled to compensation under our constitution, "there must be either a taking or a damaging of private property without just compensation." *Id.* at 179. We have previously explained that article II, section 15 of the Colorado Constitution encompasses three types of claims: (1) a taking that involves the government's physical occupation of land; (2) a regulatory taking, in which extensive regulatory interference deprives a property owner of all or almost all use of his land; and (3) a damaging, in which governmental activity has damaged an adjacent landowner's land. *Animas Valley Sand & Gravel, Inc. v. Bd. of Cty. Comm'rs*, 38 P.3d 59, 63 (Colo. 2001). The intervenors do not make any of these claims.

¶21 The intervenors have not asserted that the Town is physically occupying their land.

Their claims, rather, might be understood as asserting that the violation of the restrictive covenant on Lot 6 is effectively a physical occupation of the restrictive covenants held by the other landowners who are subject to the covenant. But a restrictive covenant is intangible and cannot be physically occupied. This highlights an essential difference between a positive easement—a right to occupy another person's land for some purpose—and a negative easement—a right to prohibit certain conduct on another person's land—in the takings context. Jon W. Bruce & James W. Ely, Jr., *The Law of Easements & Licenses in Land* § 2:10 (2019) (explaining the distinction between affirmative and negative easements). If the Town, when it acquired Lot 6, intended to extinguish a right of way over Lot 6, then the Town would be physically occupying the land subject to that right of way. Here, however, in violating the restrictive covenant, the Town is not physically occupying any property other than Lot 6.

[8, 9] ¶22 The intervenors' claims are logically more analogous to regulatory taking claims. A regulatory taking occurs when a government entity does not physically occupy the land, but government action places an impermissible burden on certain landowners, effectively "forcing some people alone to bear public burdens that, in fairness and justice, should be borne by the public as a whole." *Bd. of Cty. Comm'rs v. Flickinger*, 687 P.2d 975, 983 (Colo. 1984). However, a regulatory taking can only be established if the regulation imposes a "very high" level of interference with the property owner's use of the land—that is, "a mere decrease in property value is not enough." *Animas Valley Sand & Gravel*, 38 P.3d at 65; *see also Van Sickle v. Boyes*, 797 P.2d 1267, 1271 (Colo. 1990) (noting that landowners do not have a constitutional right to the most valuable use of their property); *Sellon v. City of Manitou Springs*, 745 P.2d 229, 234 (Colo. 1987) (noting the same). Therefore, without evidence of more than diminished property value, regulatory takings law cannot save the intervenors' claims.

[10] ¶23 Finally, the intervenors have not claimed that their land was "damaged" in violation of article II, section 15. In any event, "[t]he 'damage' clause only applies to situations in which the damage is caused by government activity in areas adjacent to the landowner's land." *Animas Valley Sand & Gravel*, 38 P.3d at 63; *see also Pub. Serv. Co. of Colo. v. Van Wyk*, 27 P.3d 377, 388 (Colo. 2001) ("The word 'damaged' is in the Colorado Constitution in order to grant relief to those property owners who have been substantially damaged by public improvements made upon land abutting their lands, but where no physical taking by the government has occurred."); *Troiano v. Colo. Dep't of Highways*, 170 Colo. 484, 463 P.2d 448, 449–50 (1969) (applying "the rule long established in Colorado" that there may be recovery "[w]hen damages are occasioned an abutting owner by an improvement in the street in front of his property" (quoting *City of Pueblo v. Strait*, 20 Colo. 13,36 P. 789, 792 (1894))). Thus, the restrictive covenant holders whose land is not adjacent to Lot 6 could not bring a claim for "damage" to their land.[2]

¶24 The rule we announced in *Smith* is thus consistent with our takings jurisprudence more generally. The intervenors correctly note that a majority (albeit a narrow one) of jurisdictions that have considered this question have reached the opposite conclusion to the one we reached in *Smith*. *Compare Anderson v. Lynch*, 188 Ga. 154, 3 S.E.2d 85, 87 (1939) (holding that owners of adjacent lots did not have a compensable ownership interest in a residential-use restrictive covenant), *and Doan v. Cleveland Short Line Ry. Co.*, 92 Ohio St. 461, 112 N.E. 505, 506–07 (1915) (holding that building restrictions in lot deeds do not apply to any agency vested with the right of eminent domain), *with S. Cal. Edison Co. v. Bourgerie*, 9 Cal.3d 169, 107 Cal.Rptr. 76, 507 P.2d 964, 965 (1973) (holding that property owners are entitled to be compensated for the violation of building restrictions in eminent domain proceedings), *Horst v. Hous. Auth.*, 184 Neb. 215, 166 N.W.2d 119, 121 (1969) (holding that, where taking of land by eminent domain permits use violative of restrictions imposed

2. Because no damage claim was asserted here, we do not consider or express an opinion as to whether the owners of the property immediately adjacent to Lot 6 would have such a claim.

by lawful covenants, there is a taking from property owners for whose benefit the restrictions were imposed), *and Leigh v. Vill. of Los Lunas*, 137 N.M. 119, 108 P.3d 525, 527 (N.M. Ct. App. 2004) (holding that easements in the form of restrictive covenants constitute valuable property rights requiring compensation). *See also* Restatement (Third) of Property: Servitudes § 7.8 reporter's note (Am. Law Inst. 2000) (describing the majority and minority positions); R.E. Barber, Annotation, *Eminent Domain: Restrictive Covenant or Right to Enforcement Thereof as Compensable Property Right*, 4 A.L.R. 3d 1137 (1965) (describing the same). They urge us to join the majority view and conclude that, although it is a different species of claim than any Colorado court currently recognizes, a claim for compensation of the sort asserted here is cognizable under article II, section 15.

D. Strong Policy Concerns Counsel Against Extending Colorado Takings Jurisprudence to Recognize the Claims Asserted Here

¶25 We are sympathetic to the frustration of the intervenors, who will almost certainly see a drop in the value of their properties as a result of the Town's decision to build a water tower on Lot 6. But, as we have previously explained, "[t]akings jurisprudence balances the competing goals of compensating landowners on whom a significant burden of regulation falls and avoiding prohibitory costs to needed government regulation." *Animas Valley Sand & Gravel*, 38 P.3d at 63. When we consider the balance of the burdens that would be faced by a government agency seeking to provide public services against the harm to the property owners if we were to adopt the rule proposed by the intervenors, the balance ultimately weighs against the intervening property owners.

¶26 First, the property owners have not actually had their restrictive covenants taken; they can still enforce those covenants against all other private owners. Second, the harm they have suffered is a diminution in the value of their property. If that is not sufficient to require compensation in the context of a regulatory taking, it is unclear why it would be sufficient in this context.

¶27 Finally, the potential burden on municipalities like the Town were we to reverse *Smith* would be enormous. As we explained in *Smith*, requiring compensation for property owners other than those whose land is being condemned "would place a premium on property owners of adjacent property to attempt to thwart a public improvement by the execution of restrictive covenants and subject the public agency seeking to acquire lands for proper purposes to the payment of speculative and unwarranted damages." 300 P.2d at 550. And, putting aside questions of covenant holders' intentions, the burden on municipalities and other government entities if every holder of a covenant had to be included in a condemnation action involving development that does not conform to a restrictive covenant would be immense.

¶28 Title 38 places a broad range of obligations on a government entity seeking to exercise its eminent domain authority. In order for a petition in condemnation to be filed, the condemning authority must:

- Provide adequate notice "to anyone having an interest of record in the property involved," and "[i]f the property has an estimated value of five thousand dollars or more, such notice shall advise that the condemning authority shall pay the reasonable costs of an appraisal." § 38-1-121(1), C.R.S. (2019).
- Serve a summons and copies of the pleadings to all parties. § 38-1-103(1), C.R.S. (2019); *see also* C.R.C.P. 4(c) (outlining the contents of a summons).
- "[N]egotiate in good faith for the acquisition of any property interest sought prior to instituting eminent domain proceedings." § 38-1-121(3).
- Furnish all interested property owners of record with a written final offer if negotiations fail to reach agreement. § 38-1-121(6).

Once the valuation hearing begins, in cases where the fact finder determines the amount of just compensation exceeds 130% of the condemning authority's final written offer, interested landowners are also entitled to

reasonable attorney's fees. § 38-1-122(1.5), C.R.S. (2019). While in some instances, the number of restrictive covenant holders with whom the government would have to go through this process might be relatively small, in others it might be hundreds or even thousands. As the Supreme Court of Georgia explained in the face of a similar suit:

> Appellees' contention, if carried to its extreme, is that, if there was an addition to the city in which there were 10,000 lots, the city would be required to serve the owner or owners of each lot in a suit to condemn any one of such lots for public purposes. Such contention, if established as the law governing such matters, would be practically to prohibit the city from condemning property so situated for public use; it would at least greatly restrict the rights of the city to condemn property for public purposes. It is apparent that, if it could not do so in cases where the owners of lots are 10,000 or more in number, it could not do so when they are 1,000 or 1,500 in number.

Anderson, 3 S.E.2d at 88.

[11] ¶29 *Smith* established a broad rule that neighboring property owners are not entitled to compensation under the Colorado Constitution when the government uses land it acquires in a manner that violates a restrictive covenant. That rule is consistent with our takings jurisprudence more generally. Moreover, policy concerns about the burdens that a different rule would impose on necessary public improvements militate against reversing course now. We will therefore not depart from the doctrine of stare decisis. Instead, we reaffirm our decision in *Smith*.

III. Conclusion

[12] ¶30 For the reasons set forth above, we conclude that *Smith* is not restricted to its particular facts and that a restrictive covenant of the type at issue in this case is not a compensable property interest in an eminent domain proceeding.

¶31 Accordingly, we affirm the judgment of the court of appeals.

JUSTICE SAMOUR concurs in the judgment only.

JUSTICE GABRIEL dissents.

JUSTICE SAMOUR, concurring in the judgment only.

¶32 I generally agree with Justice Gabriel's well-reasoned dissent. In particular, I believe that his analytical framework is spot on. The only reason I do not join him is because I do not believe the intervenors can prevail here.

¶33 The majority states that there are three types of claims that are available under article II, section 15 of the Colorado Constitution: (1) "a taking," which involves "the government's physical occupation of land"; (2) "a regulatory taking," which occurs when there is extensive regulatory interference that deprives a property owner of all or almost all use of his land; and (3) "a damaging," which entails "governmental activity [that] has damaged an adjacent landowner's land." Maj. op. ¶ 20. Using Justice Gabriel's reasoning, I would adopt the clear majority rule and expand the third category.[1] More specifically, I would conclude that a damages claim is not limited to damages sustained by an *adjacent* landowner's land. *See, e.g.*, *Leigh v. Vill. of Los Lunas*, 137 N.M. 119,108 P.3d 525, 527 (N.M. Ct. App. 2004) (holding that an easement in the form of a restrictive covenant constitutes a valuable property right and, thus, a violation of such a covenant requires compensation). Therefore, I would hold that damages claims by all the intervenors (not just the ones who own property adjacent to Lot 6) are viable in the situation we confront in this case.[2] However, because

1. I agree with the majority that the other two types of claims are not feasible in this case. Maj. op. ¶¶ 21–22. First, the Town is not physically occupying any property other than Lot 6. *Id.* at ¶ 21. Second, a regulatory taking cannot be established where, as here, there is no evidence of more than diminished property value. *Id.* at ¶ 22.

2. To my mind, it makes little sense to limit damages claims to adjacent landowners where, as here, the damage is caused by the government's violation of a restrictive covenant and such a violation affects adjacent landowners and other landowners equally.

the intervenors did not raise any damages claims, the Town of Monument would still prevail.

¶34 Accordingly, though I generally agree with Justice Gabriel's dissent, I concur in the judgment only instead.

JUSTICE GABRIEL, dissenting.

¶35 We granted certiorari to decide whether the division below erred in interpreting our decision in *Smith v. Clifton Sanitation District*, 134 Colo. 116, 300 P.2d 548 (1956), as ruling that restrictive covenants proscribing certain uses of property do not constitute compensable property interests in the context of eminent domain proceedings. Unlike the majority, I do not read *Smith* as broadly concluding that, as a matter of law, restrictive covenants are not compensable property interests. To the contrary, I believe that *Smith* was limited to its facts, and I would follow what appears to be the majority rule in the United States, which recognizes that restrictive covenants generally constitute compensable property interests for purposes of eminent domain proceedings. Accordingly, I would reverse the judgment below.

¶36 I therefore respectfully dissent.

I. Analysis

¶37 I agree with the majority's recitation of the factual and procedural background of this case, and I need not repeat it here. I thus begin by discussing *Smith*, and I explain why I believe that that case was limited to its facts. I then point out why, in my view, we should follow the majority rule and conclude that a restrictive covenant is a compensable property interest for purposes of eminent domain proceedings.

A. *Smith*

¶38 In *Smith*, a sanitation district filed a condemnation petition against a landowner seeking to acquire the landowner's property in order to construct a sanitary disposal system on it. *Id.* at 548. The district filed its petition after negotiations between it and the landowner had failed to produce an agreement as to the value of the land to be taken. *Id.*

¶39 While these negotiations were ongoing, a number of landowners claiming to own land within an eleven-square-mile area adjacent to and including the land that was the subject of the condemnation petition signed restrictive covenants that attempted to prohibit the use of their respective properties for certain purposes, including a sanitary disposal system. *Id.* at 549. These neighboring landowners then sought leave to intervene in the condemnation case for the purpose of filing a cross-petition seeking damages. *Id.* The district court denied the neighboring landowners' motion for leave to intervene, and they appealed to this court. *Id.*

¶40 We affirmed the district court's order. *Id.* at 550. In reaching this conclusion, we began by noting, "It requires no imagination to determine why the restrictive covenants were executed and recorded on the eve of the filing of the condemnation case." *Id.* at 549. The obvious purpose was to circumvent the district's plan to construct a sanitary disposal system. *Id.* We then stated:

> We are of the opinion that *such a scheme as to the one before us* is contrary to sound public policy and invalid as against the constitutional and statutory rights of the condemner. The Sanitation District is a body politic or corporate, with power to condemn lands for proper purposes and we hold that the claims of the intervenors, based upon the covenant, cannot be enforced as against the District. . . .
>
> We think it is fundamental that where a company, corporation or agency of the state is vested with the right of eminent domain and has acquired property thru eminent domain proceedings and is using the property for public purposes, no claim for damages arises by virtue of *such a covenant as in the instant case*, in favor of the owners of other property on account of such use by the condemner. Were the rule otherwise the right of eminent domain could be defeated if the condemning authority had to respond in damages for each interest in a large subdivision or area subject to deed restrictions or restrictive covenants.

Id. at 549–50 (emphases added).

¶41 We thus observed that a party cannot evade the power of eminent domain by way

of agreements such as the ones that the neighboring landowners had signed in the case there before us. *Id.* at 550. To conclude otherwise, we said, "would place a premium on property owners of adjacent property *to attempt to thwart a public improvement* by the execution of restrictive covenants and subject the public agency seeking to acquire lands for proper purposes to the payment of speculative and unwarranted damages." *Id.* (emphasis added).

¶42 Unlike the majority and the division below, I do not read the above-quoted language as establishing a broad rule that, as a matter of law, restrictive covenants are not compensable property interests for purposes of eminent domain proceedings. To the contrary, as the language that I have emphasized above makes clear, our discussion in *Smith* was limited to the neighboring landowners' "scheme" and transparent attempt to "evade" and "thwart" (by way of hastily executed restrictive covenants) the lawful right of the district to exercise its power of eminent domain. We have no such "scheme" or attempt at evasion here. Indeed, the restrictive covenant at issue was adopted before any effort by the Town to condemn the property at issue. And the Town was well aware that the restrictive covenant posed an impediment to its plan to construct a water storage tank. That is why it instituted the present eminent domain proceeding.

¶43 Nor do I agree with the Town's assertion that restrictive covenants are void as against public policy. Given the vast array of restrictive covenants that exist in neighborhood and homeowners' associations throughout this state, adopting so unlimited a rule (which, it appears, would be unprecedented) would throw the property rights of a substantial number of people and entities into chaos. I perceive no basis for doing so, and the Town cites no authority that would support such a result.

B. Restrictive Covenants Are Compensable Property Interests

¶44 The question thus becomes what rule should be applied in Colorado.

¶45 To the extent that we have not done so, I would adopt what appears to be the majority rule in the United States, namely, that a restrictive covenant creates a property interest subject to condemnation and just compensation. *See, e.g.*, *Creegan v. State*, 305 Kan. 1156, 391 P.3d 36, 45 (2017) (describing this rule as "what appears to be the clear majority view from our sister jurisdictions"); *Leigh v. Vill. of Los Lunas*, 137 N.M. 119, 108 P.3d 525, 529 (N.M. Ct. App. 2004) ("[J]urisdictions . . . that consider restrictive covenants to be equitable easements and compensable property interests reflect the 'majority view'; jurisdictions that insist the covenants do not convey property rights, thus refusing compensation, reflect the 'minority view.' ") (quoting 2 Julius L. Sackman, *Nichols on Eminent Domain* § 5.07[4][a], [b], at 5-378-83 (3d ed. 2004)); *see also* Restatement (Third) of Property (Servitudes) § 7.8 cmt. a (2000) ("Restatement (Third)") ("Servitude benefits like other interests in property may be condemned under the power of eminent domain and taken by inverse condemnation.").

¶46 I would adopt this rule for several reasons.

¶47 First, it is consistent with the concept of what a restrictive covenant is. A restrictive covenant is a form of equitable servitude or equitable easement. *See Allen v. Nickerson*, 155 P.3d 595, 599–600 (Colo. App. 2006) (noting that a restrictive covenant is a form of servitude); Restatement (Third), at § 1.1(1)–(2) (noting that a servitude is a legal device that creates rights or obligations that run with land or an interest in land and includes easements, profits, and covenants); *Covenant*, Black's Law Dictionary (11th ed. 2019) (noting that a restrictive covenant is also termed an "equitable easement" or "equitable servitude"); *see also* 9 Richard R. Powell, *Powell on Real Property* ¶ 60.01[6] (2005) (noting that the Restatement (Third) abolished the distinction between easements and covenants). As a result, by definition, a restrictive covenant is an interest in property. *See Wal-Mart Stores, Inc. v. United Food & Commercial Workers Int'l Union*, 2016 COA 72, ¶ 25, 382 P.3d 1249, 1257 (noting that an easement is an interest in land); *Leigh*, 108 P.3d at 529

(concluding that because restrictive covenants are equitable easements under New Mexico law, such covenants, like equitable easements, also constitute property rights subject to condemnation and just compensation).

¶48 Second, concluding that a restrictive covenant constitutes a compensable property interest fully comports with the takings clause of the Colorado Constitution, article II, section 15. That clause provides, "Private property shall not be taken or damaged, for public or private use, without just compensation." *Id.* This clause is broad and subsumes both takings of property and damage to property. In my view, at a minimum, a condemning authority's action to eliminate the protections afforded to a landowner by a restrictive covenant for which the landowner may have paid fair consideration damages that landowner's interest in his or her property rights.

¶49 Third, although I acknowledge the Town's concern that if a restrictive covenant is a compensable property interest, then condemnation proceedings could become more difficult and, perhaps, more expensive, I do not agree that such a burden would be unreasonable or insurmountable. As noted above, a majority of courts in the United States has concluded that a restrictive covenant is a property interest subject to condemnation and just compensation, and I have seen nothing to indicate that the exercise of eminent domain in those jurisdictions has become inappropriately complex or expensive.

¶50 Moreover, as the Nevada Supreme Court stated in rejecting a similar policy argument:

> We do not agree that because a number of persons may be affected by the proceedings it is best to hold the appellants have no right that the law should protect against the sovereign and deny them the right to offer proof of damage. Procedural considerations should not determine the substantive question of whether there is a compensable property interest.

Meredith v. Washoe Cty. Sch. Dist., 84 Nev. 15, 435 P.2d 750, 753 (1968).

¶51 And, in my view, courts can ameliorate the perceived impact on condemnors by placing the burden of proving damages on the landowners who are resisting the taking, as the New Mexico courts have done. *See Leigh*, 108 P.3d at 530–31.

¶52 Finally, the result that I would reach here is consistent with the Town's own conduct in this case. The Town brought this action seeking to use the power of eminent domain to have the district court declare its property free of the restrictive covenant. Having availed itself of the right of eminent domain to eliminate the restrictive covenant at issue, the Town should not now be heard to argue that restrictive covenants are not, in fact, compensable property interests.

¶53 Accordingly, I would conclude that a restrictive covenant is a property interest subject to condemnation and just compensation.

II. Conclusion

¶54 For these reasons, I believe that the division below erred in construing *Smith* as establishing a rule that, as a matter of law, restrictive covenants are not compensable property interests for purposes of eminent domain proceedings. In my view, *Smith* was limited to its facts, and I would follow the majority rule and conclude that the restrictive covenant at issue was, in fact, a compensable property interest for purposes of the present eminent domain proceeding. I would therefore reverse the judgment of the division below.

¶55 Accordingly, I respectfully dissent.

333 Conn. 624

Karl MAYER-WITTMANN, Executor (Estate of Gerda Mayer-Wittmann)

v.

ZONING BOARD OF APPEALS OF the CITY OF STAMFORD et al.

(SC 19972)

Supreme Court of Connecticut.

Argued January 15, 2019

Officially released November 5, 2019

Background: Neighbor sought review of decision of city zoning board of appeals granting landowner's application for variances from setback requirements and height restrictions to reconstruct a sea cottage on his beachfront property after cottage was severely damaged by a hurricane. The Superior Court, Judicial District of Stamford-Norwalk at Stamford, Edward R. Karazin, Judge Trial Referee, 2016 WL 8135390, dismissed. Neighbor appealed.

Holdings: The Supreme Court, Vertefeuille, Senior Justice, held that:

(1) sea cottage's status as a legally nonconforming accessory structure did not terminate due to lack of reconstruction within one year of hurricane, and

(2) landowner established the existence of an unusual hardship warranting approval of application for variances.

Affirmed.

Ecker, J., filed a separately concurring opinion in which Robinson, C.J., joined.

1. Zoning and Planning ⚿1201, 1621

Interpretation of city zoning regulations that were subject of a variance dispute between beachfront property owners presented a question of law over which Supreme Court's review was plenary.

2. Zoning and Planning ⚿1202

Zoning regulations are local legislative enactments and, therefore, their interpretation is governed by the same principles that apply to the construction of statutes.

3. Zoning and Planning ⚿1205

Zoning regulations must be interpreted in accordance with the principle that a reasonable and rational result was intended.

4. Statutes ⚿1342

The process of statutory interpretation involves the determination of the meaning of the statutory language as applied to the facts of the case, including the question of whether the language does so apply.

5. Zoning and Planning ⚿1316

When a legally nonconforming building subject to city zoning regulations applicable to flood prone areas is damaged and the cost of repairs exceeds 50% of the value of the building, the minimum flood elevation requirement applies to the repair of the building, notwithstanding the fact that the building previously had a legally nonconforming status with respect to that requirement, and notwithstanding an article of the regulations which authorizes the reconstruction "as before" of buildings damaged in a calamity within 12 months of the calamity.

6. Zoning and Planning ⚿1316

Sea cottage's status as a legally nonconforming accessory structure with respect to setback and building height requirements did not terminate due to landowner's failure to reconstruct it within one year after it was severely damaged in a hurricane, notwithstanding city zoning regulation authorizing the reconstruction "as before" of buildings damaged in a calamity within 12 months of

calamity, where it was not possible for sea cottage to be reconstructed and used as before it was damaged without any need to apply for variances from minimum flood elevation requirement.

7. Constitutional Law ⚿994

Supreme Court has a duty to construe statutes, whenever possible, to avoid constitutional infirmities.

8. Zoning and Planning ⚿1745

On appeal from a trial court's decision concerning a zoning board's grant or denial of a variance, the Supreme Court must determine whether the trial court correctly concluded that the board's act was not arbitrary, illegal or an abuse of discretion.

9. Zoning and Planning ⚿1642

Courts are not to substitute their judgment for that of a zoning board.

10. Zoning and Planning ⚿1642

Decisions of local zoning boards will not be disturbed so long as honest judgment has been reasonably and fairly exercised after a full hearing.

11. Zoning and Planning ⚿1624, 1746

Upon appeal in a zoning matter, the trial court reviews the record before the zoning board to determine whether it has acted fairly or with proper motives or upon valid reason, and the Supreme Court, in turn, reviews the action of the trial court.

12. Zoning and Planning ⚿1685

Burden of proof to demonstrate that a zoning board acted improperly is upon the plaintiff.

13. Zoning and Planning ⚿1624, 1745

When a zoning appeal to the trial court is based solely on the record, the scope of the trial court's review of the zoning board's decision and the scope of Supreme Court's review of that decision are the same.

14. Zoning and Planning ⚿1465

A "variance" constitutes permission to act in a manner that is otherwise prohibited under the zoning law.

See publication Words and Phrases for other judicial constructions and definitions.

15. Zoning and Planning ⚿1471

Granting of a variance must be reserved for unusual or exceptional circumstances.

16. Zoning and Planning ⚿1479, 1481

An applicant for a variance must show that, because of some peculiar characteristic of his property, the strict application of the zoning regulation produces an unusual hardship, as opposed to the general impact which the regulation has on other properties in the zone.

17. Zoning and Planning ⚿1481

Zoning boards of appeals are authorized to grant variances in cases in which enforcement of a regulation would cause unusual hardship in order to furnish elasticity in the application of regulatory measures so that they do not operate in an arbitrary or confiscatory and, consequently, unconstitutional manner.

18. Eminent Domain ⚿2.10(1)
Zoning and Planning ⚿1055

Land use regulation is constitutionally permissible as long as it does not amount to practical confiscation or inverse condemnation of a property, and a confiscation or inverse condemnation ordinarily does not occur unless the landowner is deprived of any reasonable use of the property. U.S. Const. Amend. 5.

19. Zoning and Planning ⚿1480

Establishing an inverse condemnation is not the only way to establish an unusual hardship, as needed for grant of a vari-

ance; an unusual hardship may also be established when the strict enforcement of a zoning regulation to a particular property would contribute so little to the goals that the regulation was intended to achieve that it would be arbitrary.

20. Eminent Domain ⚿2.10(5)

A landowner has a constitutionally protected property right to the continued use of an existing, legally nonconforming building, and accordingly, the deprivation of that right by regulation would constitute an inverse condemnation, notwithstanding the fact that the landowner could still use the property for some other permitted or legally nonconforming purpose. U.S. Const. Amend. 5.

21. Eminent Domain ⚿81.1

For purposes of takings jurisprudence, the meaning of the term "the property" is flexible. U.S. Const. Amend. 5.

22. Zoning and Planning ⚿1492, 1493

Owner of beachfront property established existence of unusual hardship warranting approval of application for variances from setback requirements and height restrictions to reconstruct his hurricane-damaged sea cottage that was a legally nonconforming accessory structure and that was subject to city regulations applicable to flood prone areas, which required minimum elevation of structures; strict enforcement of regulations would have deprived owner of his constitutionally protected right to continue using sea cottage, and without variances in some form, owner would have been unable to reconstruct sea cottage, resulting in an inverse condemnation of his existing, legally nonconforming use. U.S. Const. Amend. 5.

23. Zoning and Planning ⚿1473

A variance may be granted to continue a nonconforming use if the variance will reduce the nonconformity of the building or use.

24. Eminent Domain ⚿2.1

An unconstitutional confiscation of property by regulation does not become constitutional merely because the regulation affects other properties in the same way. U.S. Const. Amend. 5.

25. Zoning and Planning ⚿1472

An applicant for a variance is not required to reduce all of a building's nonconformities to the maximum extent possible when seeking a variance that will have the effect of reducing a nonconformity of an existing, legally nonconforming building.

Scott T. Garosshen, with whom were Brendon P. Levesque, Hartford, and, on the brief, William I. Haslun II, Greenwich, for the appellant (plaintiff).

James V. Minor, special corporation counsel, with whom, on the brief, was Kathryn Emmett, director of legal affairs, for the appellee (named defendant).

Peter M. Nolin, with whom were Jacqueline O. Kaufman and, on the brief, Timothy A. Smith, Stamford, for the appellee (defendant Paul E. Breunich).

Robinson, C.J., and D'Auria, Mullins, Kahn, Ecker and Vertefeuille, Js.*

VERTEFEUILLE, J.

626 The issue that we must decide in this appeal is whether the named defendant,

* This appeal originally was argued before a panel of this court consisting of Chief Justice Robinson and Justices D'Auria, Mullins, Kahn and Ecker. Thereafter, Justice Vertefeuille was added to the panel and has read the briefs and appendices, and listened to a recording of oral argument prior to participating in this decision.

the Zoning Board of Appeals of the City of Stamford (zoning board), properly granted the application of the defendant Paul E. Breunich for variances to reconstruct a legally nonconforming accessory structure on his property after it was severely damaged by a hurricane. Breunich sought variances from various setback requirements and height restrictions of the Stamford zoning regulations on the ground that, as applied to his property, [627] their strict enforcement would impose an unusual hardship because he could not comply both with those regulations and with the regulations applicable to flood prone areas, which required him to elevate the structure. The Planning Board of the City of Stamford (planning board) unanimously recommended approval of the application, and, after a hearing, the zoning board unanimously approved it. The plaintiff, Karl Mayer-Wittmann, executor of the estate of Gerda Mayer-Wittmann, who owns property adjacent to Breunich's property, appealed from the decision of the zoning board to the trial court, which, after a trial, dismissed the appeal. This appeal followed.[1] We affirm the judgment of the trial court.

The record reveals the following facts that were found by the trial court or that are undisputed. Breunich owns a 0.96 acre beachfront property located at 106 Carter Drive in Stamford. The property, which includes three dwelling structures with a total of five dwelling units, two sheds and a garage, is located within the R-10 single family district, low density zone. Breunich's property is nonconforming to the Zoning Regulations of the city of Stamford (regulations)[2] but, because the property's structures, including the structure the parties refer to as the "sea cottage," were built before the zoning regulations were adopted in 1951, they are legally authorized nonconforming structures under the regulations. See Stamford Zoning Regs., art. IV, § 10 (A) (2015); see also General Statutes § 8-2 (a)[3] (zoning [628] "regulations shall not prohibit the continuance of any nonconforming use, building or structure existing at the time of the adoption of such regulations"). The sea cottage, the building at issue in the present case, is an accessory structure containing a single dwelling unit that is nonconforming in several respects. Specifically, the sea cottage is located twenty-three feet from the rear yard property line, in violation of the thirty foot minimum required by article III, § 4 (AA) (2.4) (e), of the regulations, and it is located four feet, six inches from the side yard property line, in violation of the ten foot minimum required by article III, § 4 (AA) (2.4) (e). In addition, the lowest horizontal structural member of the sea cottage has an elevation of 8.7 feet, although the minimum elevation standard for the structure is sixteen feet under the zoning regulations applicable to flood prone areas.[4] Finally,

1. The plaintiff appealed to the Appellate Court, and we transferred the appeal to this court pursuant to General Statutes § 51-199 (c) and Practice Book § 65-1.

2. The regulations have been amended since the events underlying the present case. All references herein are to the regulations as adopted November 30, 1951, with subsequent amendments through December 31, 2015.

3. Although § 8-2 has been amended by the legislature several times since the events underlying the present case; see, e.g., Public Acts 2017, No. 17-155, § 2; those amendments have no bearing on the merits of this appeal. In the interest of simplicity, we refer to the current revision of the statute.

4. The structure is within the VE and AE Flood Zones under Federal Emergency Management Agency (FEMA) standards, which are incorporated into the regulations. See Stamford Zoning Regs., art. III, § 7.1 (B) (2) (2015) (defining base flood elevation); id., § 7.1 (B) (20) (referring to FEMA's flood insurance rate map, which delineates "special flood hazard areas"); id., § 7.1 (C) (1) (§ 7.1 of

the sea cottage has a height of eighteen feet, ten inches, whereas article III, § 6 (D), of the regulations provides that detached accessory structures may not exceed fifteen feet in height.

The sea cottage was severely damaged by Hurricane Sandy in late October, 2012, and Breunich wishes to rebuild it. Because the cost of repairs exceeds 50 percent of the sea cottage's value, however, the zoning board and Breunich agree that the sea cottage must conform to certain current regulations governing flood prone areas, including the minimum elevation requirement,[629] notwithstanding the fact that the sea cottage is a legally nonconforming structure. See Stamford Zoning Regs., art. III, § 7.1 (B) (43) (2015) (for purposes of zoning regulations governing flood prone areas, "[s]ubstantial [d]amage" is defined as "damage . . . sustained by a structure, whereby the cost of restoring the structure to its pre-damaged condition would equal or exceed 50 percent of the market value of the structure before the damage occurred"); id., art. III, § 7.1 (B) (44) (defining "[s]ubstantial [i]mprovement" to include repairs "the cumulative cost of which equals or exceeds [50] percent . . . of the market value" of structure); id., art. III, § 7.1 (D) (1) (requiring substantial improvements to comply with certain regulations governing flood prone areas); id. (requiring all substantial improvements within special flood hazard area to have lowest floor elevated to minimum elevation standard).[5]

As we indicated, under the regulations applicable to flood prone areas, the minimum flood elevation requirement for the lowest horizontal structural member of the sea cottage is sixteen feet above the base flood elevation, whereas the maximum height allowed in the R-10 zone for accessory structures is fifteen feet. See id., art. III, §§ 6 (D) and 7.1. Because the lowest horizontal structural member of the sea cottage, which is at ground level, is currently 8.7 feet above base flood elevation, elevating the sea cottage by 7.3 feet to satisfy the minimum[630] flood elevation requirement would leave only 7.7 feet of buildable vertical space if the structure also were required to conform to the building height requirement. Accordingly, it would be impossible for the sea cottage to conform to both requirements. Moreover, because the soils on which the sea cottage is currently standing cannot support the foundation that would be required to elevate the sea cottage to the minimum flood elevation, restoration of the sea cottage requires moving it three feet to the north. Accordingly, Breunich applied for variances from the building height and setback requirements of the regulations.

regulations, governing flood prone areas, applies to ''all areas of special flood hazard'' within city); id., § 7.1 (C) (2) (special flood hazard areas are based on base flood elevation data developed by FEMA). Under FEMA standards, the minimum elevation for structures in the VE Flood Zone is fifteen feet. Article III, § 7.1 (B) (32) of the Stamford Zoning Regulations defines ''[m]inimum [e]levation [s]tandard'' as the minimum required by the FEMA standards plus one foot.

5. Breunich also makes a passing reference to article IV, § 10 (B), of the Stamford Zoning Regulations, which provides that ''[t]he total structural repairs and alterations that may be made in a structure which is nonconforming in use only shall not exceed [50] percent . . . of its replacement value at the time of application for the first structural change, unless changed to a conforming use.'' The plaintiff also does not address this regulation at any length but merely notes in a footnote in his reply brief that, assuming that Breunich is correct that the regulation applies, he ''did not request a variance on the basis that his total repairs would exceed 50 percent of the value of the cottage.'' We address the effect of this regulation in footnote 13 of this opinion.

The planning board unanimously recommended that the zoning board approve Breunich's application for variances. After a hearing at which both Breunich and a representative of the plaintiff appeared, the zoning board granted Breunich's application subject to certain restrictions that are not at issue in this appeal. The plaintiff then appealed to the trial court, claiming, inter alia, that the zoning board improperly granted the variances because Breunich had not established that, without them, he would be deprived of the reasonable use of his property, as is required to establish a hardship, or that the variances were the minimum relief necessary. In addition, the plaintiff claimed that any hardship was "personal and self-inflicted" because Breunich failed to rebuild the sea cottage within twelve months of the hurricane. Specifically, he contended that Breunich could have rebuilt the sea cottage pursuant to article IV, § 10 (C), of the regulations,[6] which authorizes the owner of a nonconforming building that has been damaged by flood or other calamity to reconstruct and use [631] the building as before within twelve months of the damage, and that his failure to do so terminated the legal nonconforming status of the sea cottage on October 29, 2013, one year after it was damaged in the hurricane.

The trial court concluded that the zoning board's determinations that the regulations applicable to flood prone areas imposed a hardship on Breunich that justified granting the variances and that the variances were the minimal relief required to alleviate the hardship were supported by the record. The court also agreed with Breunich's claim that the zoning board could have granted the variances on the ground that the variances reduced the sea cottage's nonconformities. Accordingly, the court dismissed the plaintiff's appeal.

On appeal to this court, the plaintiff renews his claims that the zoning board improperly granted the variances because Breunich had not established a hardship by showing that enforcement of the regulations would deprive him of all reasonable use of his property or render his lot completely unusable, and the variances were not the minimal relief required to alleviate any hardship. In addition, the plaintiff again contends that Breunich is barred by article IV, § 10 (C), of the regulations from rebuilding the sea cottage because its legally nonconforming status has terminated. We conclude that the sea cottage retains its status as a legally nonconforming accessory structure and that the zoning board properly granted the variances on the ground that the enforcement of the regulations would create a hardship.

I

Because the question of whether the sea cottage retains its status as a legally nonconforming structure has bearing on the question of whether the zoning board properly granted the variances, we first address the plaintiff's contention that that status terminated one year after the sea cottage was damaged by the hurricane [632] pursuant to article IV, § 10 (C), of the regulations. The defendants contend that that provision does not apply to the sea cottage because the "fundamental predicate" that it was possible, as a matter of law, for the sea cottage to be "reconstructed and used as before" it was damaged; see Stamford Zoning Regs., art. IV, § 10 (C) (2015); without any need to apply for

6. Article IV, § 10 (C), of the Stamford Zoning Regulations provides in relevant part: "Any non-conforming building . . . which has been or may be damaged by . . . flood . . . [or] act of God . . . may be reconstructed and used as before, if reconstruction is started with[in] twelve . . . months of such calamity . . . ."

variances, has not been met.[7] We agree with the defendants.

[1–4] "Because the interpretation of the regulations presents a question of law, our review is plenary.... Additionally, zoning regulations are local legislative enactments ... and, therefore, their interpretation is governed by the same principles that apply to the construction of statutes.... Moreover, regulations must be interpreted in accordance with the principle that a reasonable and rational result was intended .... The process of statutory interpretation involves the determination of the meaning of the statutory language [or the relevant zoning regulation] as applied to the facts of the case, including the question of whether the language does so apply." (Citations omitted; internal quotation marks omitted.) *Graff* v. *Zoning Board of Appeals*, 277 Conn. 645, 652, 894 A.2d 285 (2006).

We begin our analysis with the language of article IV, § 10 (C), of the Stamford Zoning Regulations: "Any non-conforming building ... which has been or may be damaged by ... flood ... [or] act of God ... may be reconstructed and used as before, if reconstruction is started [within] twelve ... months of such calamity ...." Thus, the regulation provides that, when a building has been damaged in a "calamity" and the owner commences reconstruction within twelve [633] months, the building retains its nonconforming status, and the owner is not required to conform the reconstructed building to current regulations or to seek variances from those regulations.

In the present case, the defendants contend that Breunich could not have reconstructed the sea cottage and used it "as before" because the cost of the repairs to the sea cottage exceeds 50 percent of its value and, therefore, the sea cottage is required to conform to the minimum flood elevation requirement of the regulations applicable to flood prone areas.[8] In other words, the defendants appear to contend that, notwithstanding article IV, § 10 (C), of the regulations, which authorizes landowners to reconstruct a damaged nonconforming building "as before" within twelve months of the calamity in which it was damaged, because the cost of repairs exceeds 50 percent of the sea cottage's value, the sea cottage is now categorically required to conform to the minimum flood elevation requirement. The plaintiff contends that, to the contrary, nothing in the regulations applicable to flood prone areas indicates that they are "preeminent among all the zoning regulations ...." Accordingly, the plaintiff contends, Breunich could have reconstructed the sea cottage "as before" pursuant to article IV, § 10 (C), of

7. For purposes of this analysis, we assume, without deciding, that the plaintiff is correct that, when article IV, § 10 (C), of the regulations applies to a legally nonconforming structure that has been damaged by flood or calamity, and the owner fails to start reconstruction within twelve months of the calamity, the building loses its legally nonconforming status.

8. See Stamford Zoning Regs., art. III, § 7.1 (B) (43) (2015) (for purposes of regulations governing flood prone areas, "[s]ubstantial [d]amage" is defined as "damage ... sustained by a structure, whereby the cost of restoring the structure to its pre-damaged condition would equal or exceed 50 percent of the market value of the structure before the damage occurred"); id., art. III, § 7.1 (B) (44) (defining "[s]ubstantial [i]mprovement" to include repairs "the cumulative cost of which equals or exceeds [50] percent ... of the market value" of structure); id., art. III, § 7.1 (D) (1) (requiring substantial improvements to comply with certain regulations governing flood prone areas); id. (requiring all substantial improvements within special flood hazard area to have lowest floor elevated to minimum elevation standard).

the regulations, if he had commenced construction within twelve months of the hurricane, and his failure to do so terminated the legally nonconforming status of the sea cottage in its entirety.

|634 With respect to the defendants' contention that an owner of a damaged, legally nonconforming building must comply with the minimum flood elevation requirement when the cost of reconstructing the building exceeds 50 percent of the building's value, we agree that, unlike other regulations, such as those governing building height and setbacks, the minimum flood elevation requirement applies to the reconstruction of the damaged building under these circumstances. In other words, the building's legally nonconforming status *with respect to that requirement* was lost because the cost of repairs exceeds 50 percent of the building's value. Indeed, the requirement that a damaged building must be repaired in conformance with the minimum elevation requirement if the cost of repairs exceeds 50 percent of the value of the building can apply *only* to buildings that were in existence before the regulations applicable to flood prone areas were adopted, because buildings that were built and damaged *after* their adoption would already conform to the regulations, unless the owner obtained a variance.

In this regard, it is important to recognize that, unlike regulations governing setbacks, building height and property use, which are designed to address concerns that are largely aesthetic in nature, the minimum flood elevation requirements are intended to "promote the health, safety and welfare of the general public, [to] limit public and private property losses and diminish expenditures of public money for costly flood protection projects and relief efforts, and [to] minimize prolonged governmental and business interruptions." Stamford Zoning Regs., art. III, § 7.1 (A) (2015).

The authors of a white paper published by the Center for Energy & Environmental Law at the University of Connecticut School of Law aptly describe the scope of the problems that the zoning regulations applicable to flood prone areas were designed to address and the |635 crucial role that such regulations play. The white paper states that "[c]oastal flooding represents a tremendous threat to Connecticut infrastructure. The Federal Emergency Management Administration . . . estimates that a '100 year flood' in the four Connecticut [s]horeline counties could cause a staggering $3,571,200,000 in damage to residential structures alone. To further exacerbate this problem, climate scientists estimate that by 2100 the inundation levels of this 100 year flood will revisit the Connecticut coast once every seventeen years if greenhouse gas emissions continue at current rates.

"The National Flood Insurance Program . . . offsets some of the financial risk that these floods pose to homeowners. This program, administered by the Federal Emergency Management Agency . . . makes federal flood insurance available to communities that impose a minimum standard of floodplain management regulation, generally imposed through zoning ordinances. Every Connecticut municipality participates in the [program].

"Under the [program], participating municipalities *must* create land use ordinances that *require* habitable portions of new *or substantially improved* residential structures within the Special Flood Hazard Area to be elevated to or above the Base Flood Elevation . . . shown on Flood Insurance Rate Maps . . . . This elevation requirement is intended to minimize flood damage by keeping buildings above anticipated flood levels." (Emphasis added; foot-

notes omitted.) W. Rath et al., "Height Restrictions on Elevated Residential Buildings in Connecticut Coastal Floodplains," Municipal Resilience Planning Assistance Project: Law & Policy White Paper Series (2018) p. 2, available at https://circa.uconn.edu/wp-content/uploads/sites/1618/2018/03/Height-Restrictions-on-Elevated-Buildings.pdf (last visited October 30, 2019). At oral argument before 636this court, counsel for the zoning board represented that the failure of a municipality to create such ordinances or to enforce them in a uniform manner could render not only the particular nonconforming property ineligible to participate in the National Flood Insurance Program, but also could render properties located throughout the entire municipality ineligible for the program. Thus, municipalities have a compelling interest in ensuring uniform compliance with such regulations.

[5] We conclude, therefore, that, when a legally nonconforming building subject to the regulations applicable to flood prone areas is damaged and the cost of repairs exceeds 50 percent of the value of the building, the minimum flood elevation requirement applies to the repair of the building, notwithstanding the fact that the building previously had a legally nonconforming status with respect to that requirement, and notwithstanding article IV, § 10 (C), of the regulations, which authorizes the reconstruction "as before" of buildings damaged in a "calamity" within twelve months of the calamity.

[6] Contrary to Breunich's apparent contention, however, conformance with the minimum flood elevation requirement is not categorically required under these circumstances. Rather, article III, § 7.1 (F), of the regulations, expressly authorizes the zoning board to issue variances from the regulations applicable to flood zone areas. Thus, the plaintiff is correct that Breunich potentially could have restored the sea cottage to its former state. He could have done so, however, only if he obtained a variance from the minimum flood elevation requirement.[9]

637As we have indicated, the purpose of article IV, § 10 (C), of the regulations is to allow landowners to rebuild legally nonconforming buildings that have been damaged in a calamity *without* the need either to conform the building to the regulations or to seek a variance authorizing the nonconformity. We conclude, therefore, that article IV, § 10 (C), of the regulations does not apply to the sea cottage because it would have been impossible for Breunich to reconstruct the building "as before" without either conforming to the minimum elevation requirement or seeking a variance from the regulation. Indeed, the relatively short time frame referenced in the regulation clearly contemplates the situation in which the landowner will *not* be required either to completely redesign the building to conform to new regulations or to go through the lengthy administrative process for obtaining a variance from those regulations in order to secure a building permit.[10]

9. Indeed, the plaintiff makes no claim to the contrary. In response to the defendants' argument that article IV, § 10 (C), of the regulations does not apply to the sea cottage because the building was required to conform to current regulations governing minimum flood elevation, the plaintiff states that the defendants are ''accurate as far as [they go]. It is true that [the regulations governing] substantial improvements [in flood prone areas] . . . apply where the work to be done exceeds 50 percent of the structure's value.'' The plaintiff then contends that the defendants fail to recognize that compliance with these regulations is not *categorically* required but may be subject to a variance.

10. Indeed, to interpret article IV, § 10 (C), of the regulations to apply to situations in which it would be virtually impossible for a land-

See W. Rath et al., supra, p. 3 ("the variance process is time consuming and can be expensive as it requires an individual analysis, a detailed application, and a formal public hearing").

The plaintiff suggests, however, that the continued existence of a legally nonconforming structure and the need for variances are mutually exclusive concepts. In other words, if variances are required to authorize the construction or repair of a building to its former state, the building cannot be legally nonconforming. Accordingly, he contends that, if Breunich was required either to conform the sea cottage to the minimum elevation requirement of the regulations applicable to flood |638 prone areas or to seek a variance from that requirement, it necessarily follows that the sea cottage entirely lost its legally nonconforming status.

[7] We disagree. As we explain in part II of this opinion, a regulation that entirely deprived a building of its legally nonconforming status might be confiscatory as applied and, as such, of questionable constitutionality.[11] It is well settled that "[t]his court has a duty to construe statutes, whenever possible, to avoid constitutional infirmities . . . ." (Internal quotation marks omitted.) *Honulik* v. *Greenwich*, 293 Conn. 641, 647, 980 A.2d 845 (2009); see also *Graff* v. *Zoning Board of Appeals*, supra, 277 Conn. at 652, 894 A.2d 285 (interpretation of zoning regulations "is governed by the same principles that apply to the construction of statutes" [internal quotation marks omitted]). We conclude, therefore, that the purpose of the regulations prohibiting the reconstruction of a building that is nonconforming with the minimum flood elevation requirement to its previous state if the cost of repairs exceeds 50 percent of the value of the building was not to deprive legally nonconforming buildings entirely of their legally nonconforming status but to ensure the maximum possible compliance with the regulations applicable to flood prone areas. In other words, if a building is legally nonconforming with regulations such as setback requirements, and the building is damaged by flood or calamity, the fact that the building cannot be reconstructed without either complying with the minimum flood elevation requirement or obtaining a variance from that requirement or by obtaining a variance from the height restriction does not mean that the reconstructed building must also comply with all other regulations with which it was previously nonconforming. Accordingly, we conclude that the sea cottage retained its status as a legally nonconforming accessory |639 structure with respect to the setback and building height requirements of the regulations.

II

Having concluded that the legally nonconforming status of the sea cottage was not terminated by article IV, § 10 (C), of the regulations, we next address the plaintiff's claims that the zoning board improperly granted Breunich's application for variances because he did not establish a hardship and that, even if he did, the variances were not the minimum relief required to alleviate the hardship. We disagree.

[8–13] "The standard of review on appeal from a zoning board's decision to grant or deny a variance is well estab-

owner to begin repairs of a legally nonconforming building that was damaged in a calamity within twelve months of the damage would be of questionable constitutional validity because it would be confiscatory. See part II of this opinion.

11. But see footnote 13 of this opinion.

lished. We must determine whether the trial court correctly concluded that the board's act was not arbitrary, illegal or an abuse of discretion.... Courts are not to substitute their judgment for that of the board ... and decisions of local boards will not be disturbed so long as honest judgment has been reasonably and fairly exercised after a full hearing.... Upon appeal, the trial court reviews the record before the board to determine whether it has acted fairly or with proper motives or upon valid reasons.... We, in turn, review the action of the trial court.... The burden of proof to demonstrate that the board acted improperly is upon the [plaintiff]." (Citations omitted; internal quotation marks omitted.) *Bloom* v. *Zoning Board of Appeals*, 233 Conn. 198, 205–206, 658 A.2d 559 (1995); see also *Richardson* v. *Zoning Commission*, 107 Conn. App. 36, 42, 944 A.2d 360 (2008) ("[t]rial courts defer to zoning boards and should not disturb their decisions so long as honest judgment has been reasonably and fairly exercised after a full hearing" [internal quotation marks omitted]). "Because the plaintiffs' appeal to the trial court is based solely on the record, the scope of the trial court's review of the board's decision and the scope of our review of that decision are the same." (Internal 640 quotation marks omitted.) *E & F Associates, LLC* v. *Zoning Board of Appeals*, 320 Conn. 9, 14, 127 A.3d 986 (2015).

[14–17] "A variance constitutes permission to act in a manner that is otherwise prohibited under the zoning law of the town.... It is well established, however, that the granting of a variance must be reserved for unusual or exceptional circumstances.... An applicant for a variance must show that, because of some peculiar characteristic of his property, the strict application of the zoning regulation produces an unusual hardship, as opposed to the general impact which the regulation has on other properties in the zone.... Accordingly, we have [concluded that a zoning board of appeals may] grant a variance only when two basic requirements are satisfied: (1) the variance must be shown not to affect substantially the comprehensive zoning plan, and (2) adherence to the strict letter of the zoning ordinance must be shown to cause unusual hardship unnecessary to the carrying out of the general purpose of the zoning plan.... Proof of exceptional difficulty or unusual hardship is absolutely necessary as a condition precedent to the granting of a zoning variance." (Internal quotation marks omitted.) Id., at 15, 127 A.3d 986. Zoning boards of appeals are authorized to grant variances in cases in which enforcement of a regulation would cause unusual hardship in order to "[furnish] elasticity in the application of regulatory measures so that they do not operate in an arbitrary or confiscatory and, consequently, unconstitutional ... manner." *Florentine* v. *Darien*, 142 Conn. 415, 425, 115 A.2d 328 (1955).

In the present case, the plaintiff relies on our cases holding that "[d]isadvantage in property value or income, or both, to a single owner of property, resulting from application of zoning restrictions, does not, ordinarily, warrant relaxation in his favor on the ground of ... unnecessary hardship.... Financial considerations are relevant only in those exceptional situations 641 where a board could reasonably find that *the application of the regulations to the property greatly decreases or practically destroys its value for any of the uses to which it could reasonably be put* and where the regulations, as applied, bear so little relationship to the purposes of zoning that, as to particular premises, the regulations have a confiscatory or arbitrary effect.... Zoning regulations have such an effect in the extreme situation where the application of the regulations renders the property in question practical-

ly worthless." (Citation omitted; emphasis added; internal quotation marks omitted.) *Vine* v. *Zoning Board of Appeals*, 281 Conn. 553, 561–62, 916 A.2d 5 (2007); see also *E & F Associates, LLC* v. *Zoning Board of Appeals*, supra, 320 Conn. at 20, 127 A.3d 986 ("when a property would have economic value even if the zoning regulations were strictly enforced, the fact that a peculiar characteristic of the property would make compliance with the zoning regulations exceptionally difficult if the property were put to a more valuable or desirable use does not constitute either an 'exceptional difficulty' or an unusual hardship"). The plaintiff contends that, if Breunich's application for variances is denied and he is unable to rebuild the sea cottage, he will still be able to use the four other dwelling units and various accessory structures that are located on the property, and, therefore, the strict enforcement of the setback and building height requirements of the zoning regulations would impose no unusual hardship.

[18, 19] In addressing the plaintiff's claim, however, it is important to keep in mind the legal principle underlying the general rule that enforcement of a regulation does not create an unusual hardship warranting a variance if the landowner retains a reasonable use of the property. That underlying principle is that land use regulation is constitutionally permissible as long as it does not amount to practical confiscation or inverse condemnation of a property, and a confiscation or inverse condemnation ordinarily does not occur unless the landowner is deprived of any reasonable use of the property. See *Rural Water Co.* v. *Zoning Board of Appeals*, 287 Conn. 282, 298, 947 A.2d 944 (2008) (" '[a]n ordinance which permanently restricts the use of land for any reasonable purpose . . . goes beyond permissible regulation and amounts to practical confiscation' "); id., at 299, 947 A.2d 944 ("an inverse condemnation occurs when . . . application of the regulation amounted to a practical confiscation because the property cannot be used for any reasonable purpose"). Thus, the tests for unusual hardship and inverse condemnation are one and the same. See *Barton* v. *Norwalk*, 326 Conn. 139, 148 n.6, 161 A.3d 1264 (2017) ("[t]he unusual hardship test in zoning variance cases and the substantial destruction test in inverse condemnation cases require a showing that the property cannot be utilized for any reasonable purpose").[12]

12. We do not suggest that establishing an inverse condemnation is the *only* way to establish an unusual hardship. Our cases indicate that an unusual hardship may also be established when the strict enforcement of a zoning regulation to a particular property would contribute so little to the goals that the regulation was intended to achieve that it would be arbitrary. See *Vine* v. *Zoning Board of Appeals*, supra, 281 Conn. at 561, 916 A.2d 5 (hardship is established "where the regulations, as applied, *bear so little relationship to the purposes of zoning* that, as to particular premises, the regulations have a confiscatory *or arbitrary* effect" [emphasis added; internal quotation marks omitted]). It is clear, however, that an unusual hardship is established if an inverse condemnation is established.

Although all members of this court agree that the trial court correctly concluded that the variances were properly granted, there is disagreement regarding the reasoning supporting that conclusion. Specifically, relying heavily on treatises and cases from other jurisdictions, the concurrence disagrees that the test for unusual hardship and the test for a regulatory taking are the same, and contends that that is the case *only* when the landowner claims that he will suffer a financial hardship if the zoning regulation is strictly enforced. As we indicated, we would agree that a landowner is not required to establish a financial loss rising to the level of a regulatory taking in order to obtain a variance *if* the landowner can establish that the enforcement of the zoning regulation would be arbitrary in the sense that it would not contribute meaningfully to the goals that the regulation was intended to achieve. That is not the case here, however. Increasing the height of the sea cottage to

[20, 21] Just as a landowner has a constitutionally protected right to use his property for *some* reasonable purpose, 643 however; see *Rural Water Co.* v. *Zoning Board of Appeals*, supra, 287 Conn. at 299, 947 A.2d 944; a landowner has a constitutionally protected property right to the *continued* use of an existing, legally nonconforming building. See *Petruzzi* v. *Zoning Board of Appeals*, 176 Conn. 479, 484, 408 A.2d 243 (1979) (" '[a] lawfully established nonconforming use is a vested right and is entitled to constitutional protection' "). Accordingly, the deprivation of that right by regulation would also constitute an inverse condemnation, notwithstanding the fact that the landowner could still use the property for some *other* permitted or legally nonconforming purpose.[13]

27.9 feet, which is 12.9 feet above the maximum allowed height of fifteen feet, will block the views of neighboring properties, which is precisely what the maximum height regulation was intended to prevent. Moreover, if the concurrence were correct that the sea cottage lost its legally nonconforming status because it was more than 50 percent destroyed—which we conclude that it did not; see footnote 13 of this opinion; Breunich would be required to seek variances from *all* of the regulations with which the sea cottage was nonconforming before its destruction, not just those regulations with which the sea cottage is now even more nonconforming. Thus, Breunich would be required to obtain a variance from article III, § 4 (AA) (2.2), of the regulations, which permits only one single family detached dwelling per lot, so that he could maintain three dwelling structures with a total of five dwelling units on the property, as well as two sheds and a garage. Such a variance would clearly increase the population density of the zone, which is precisely what the regulation is intended to prevent.

To the extent that the concurrence suggests that there are considerations *other than* financial loss that can give rise to an unusual hardship warranting a variance, even when granting the variance would have a negative impact on the goals of the zoning scheme, it is entirely unclear to us what those considerations might be or why the concurrence believes that they justify the granting of the variance in the present case. Moreover, the concurrence has not cited any authority for the proposition that a property owner's loss of the right to use the property in a particular manner has ever been considered anything other than a reduction in the *value* of the property—in other words, a financial loss—for zoning purposes in this state.

13. Although the plaintiff makes no claim that Breunich is prohibited from rebuilding the sea cottage pursuant to article IV, § 10 (B), of the Stamford Zoning Regulations, which provides that ''[t]he total structural repairs and alterations that may be made in a structure which is nonconforming in use only shall not exceed [50] percent ... of its replacement value at the time of application for the first structural change, unless changed to a conforming use''; see footnote 5 of this opinion; there is authority for the proposition that such regulations are constitutional because the destruction of more than 50 percent of the value of a nonconforming building or a building with a nonconforming use can deprive the owner of his vested right to continue using the property for that purpose. See *State* v. *Hillman*, 110 Conn. 92, 107, 147 A. 294 (1929) (regulation that prohibited reconstruction of nonconforming building when more than 50 percent of building is destroyed was constitutional as applied). The court in *Hillman* observed that ''[t]he police power has its limitations in the extent of the taking or the diminution of the value of property affected. When it reaches a certain magnitude, in most if not all cases there must be an exercise of eminent domain and compensation to sustain the act. So the question depends upon the particular facts.'' (Internal quotation marks omitted.) Id., at 106, 147 A. 294; see also *Bobandal Realties, Inc.* v. *Worthington*, 21 App. Div. 2d 784, 785–86, 250 N.Y.S.2d 575 (1964) (''Ordinances using 50 [percent] of value or assessed value as a criterion in determining whether an owner shall be permitted to reconstruct a partly destroyed nonconforming building have been held not unreasonable on their face .... The question whether an ordinance using 50 [percent] of [value] as a criterion is unreasonable and confiscatory should not be decided in a vacuum, but only with relation to a specific case in which facts have been presented to show that *in that case* the application of such criterion would destroy so great a part of the value of the nonconforming property that it would be un-

reasonable and confiscatory . . . .'' [Citations omitted; emphasis in original; internal quotation marks omitted.]), aff'd, 15 N.Y.2d 788, 257 N.Y.S.2d 588, 205 N.E.2d 685 (1965). We note that the court in *Hillman* concluded that enforcing the regulation at issue in that case did not have a confiscatory effect after noting that there was no evidence that there would be a significant ''diminution in value of the property . . . .'' *State* v. *Hillman*, supra, at 107, 147 A. 294. Presumably, this was because the defendant landowner could construct a conforming building on the property. Contrary to the concurrence's suggestion, we do not conclude that *Hillman* did not involve the casualty doctrine. See footnote 5 of the concurring opinion. Rather, we conclude that, under the casualty doctrine, the courts must consider the specific facts of the case in determining whether a zoning regulation that prohibits the reconstruction of a nonconforming building that has been destroyed is constitutional as applied.

In the present case, we find the following circumstances to be relevant. First, article IV, § 10 (C), of the regulations expressly allows the owner of a nonconforming building that has been completely destroyed in a calamity to reconstruct the building and use it as before. The record supports the conclusion that Breunich would have taken advantage of that regulation but for the fact that the regulations applicable to flood prone areas prohibited him from doing so. Thus, if article IV, § 10 (B), of the regulations were applied to the sea cottage, the minimum flood elevation requirement would have the effect of depriving Breunich of the clear right to rebuild the sea cottage that he otherwise would have enjoyed. Cf. *Piccolo* v. *West Haven*, 120 Conn. 449, 453–54, 455–56, 181 A. 615 (1935) (when owners of nonconforming building that had been destroyed by fire sought variance to replace destroyed building with building that would have increased nonconformities, and owners could have reconstructed original building within one year under town regulations, variance was not warranted because any hardship was caused by owners' own failure to reconstruct original building within one year). Second, the record supports the conclusion that, in light of the governing regulatory requirements, the need to redesign the sea cottage to conform to those requirements, and the need to obtain variances, Breunich proceeded as expeditiously as reasonably possible to take steps to rebuild the sea cottage. Finally, unlike in *Hillman*, there is no evidence in the present case that Breunich would be able to construct a conforming structure of some type on the property if the variances were denied, and he would therefore lose the *entire* value of the sea cottage. We recognize that there is authority for the proposition that, when a property contains multiple structures, and a nonconforming structure is more than 50 percent destroyed, prohibiting the rebuilding of the structure may not be confiscatory under certain circumstances because the landowner still has a reasonable use of the property. See *State ex rel. Covenant Harbor Bible Camp* v. *Steinke*, 7 Wis. 2d 275, 283, 96 N.W.2d 356 (1959) (as applied to destroyed nonconforming building on property containing multiple buildings, 50 percent rule may be reasonable if building contained separate use, but may not be reasonable if building was ''used jointly with other buildings in a single [nonconforming] use upon one premises''). In our view, however, it would make no sense to conclude that it is confiscatory to prohibit the reconstruction of a destroyed nonconforming building when the building is the only building on the property and it cannot be replaced by a conforming building, but if an identical building on a property containing multiple buildings is destroyed and cannot be replaced, reconstruction can constitutionally be prohibited. The loss is the same in both cases. We conclude that, under these specific circumstances it would be confiscatory to prohibit Breunich from rebuilding the sea cottage pursuant to article IV, § 10 (B), of the regulations.

The concurrence disagrees with this analysis and, again relying on treatises and case law from another state, contends that this court should consider *only* the extent to which a nonconforming building has been destroyed in determining whether the owner continues to have the right to use the property for that purpose, and whether the landowner can replace the nonconforming building with a conforming building is irrelevant. *This* court expressly recognized in *Hillman*, however, that, when a nonconforming structure has been destroyed, whether the application of a zoning regulation that prevents the rebuilding of the structure would be constitutional ''depends upon the particular facts'' of the case. (Internal quotation marks omitted.) *State* v. *Hillman*, supra, 110 Conn. at 106, 147 A. 294. This court in *Hillman* found it significant that there was no evidence in that case that prohibiting the defendant landowner from rebuilding the destroyed nonconforming buildings, which had been used in connection

646The decision of the Commonwealth Court of Pennsylvania in *Jenkintown Towing Service* v. *Zoning Hearing Board*, 67 Pa. Commw. 183, 446 A.2d 716 (1982), is instructive on this issue. The court in that case noted that, although "hardship clearly consists of the virtual unusability of the land in its entirety for any permitted use" if the regulations were strictly enforced and the applicant has sought a variance in order to *bring into being* a nonconforming use or building, in cases involving *existing legally nonconforming uses or structures*, "the land . . . *already has utility*." (Emphasis added.) Id., at 192, 446 A.2d 716. The court then observed 647that, "because any zoning ordinance provision is subject to the grant of a variance in a proper case . . . such restrictions must bow if adhering to them *would threaten the continued existence of the* [*preexisting*] *use* [*or structure*] *itself*." (Emphasis added.) Id., at 193, 446 A.2d 716. As we have explained, this is because such regulations would amount to an inverse condemnation of the landowner's vested property right in the existing, legally nonconforming use or structure, even if the landowner could use the property for some other reasonable purpose.

None of the cases that the plaintiff cites in support of his claim that Breunich was required to establish that he could not use his property for any reasonable purpose if the regulations were strictly enforced involves an application for a variance in order to allow the continuation of an existing, legally noncon-

with the business of ''storing, washing, repairing, burning, and steaming barrels of various kinds and descriptions which had contained commodities such as fish, lard, crisco, oil, cider, pork, etc.''; id., at 96–98, 147 A. 294 (preliminary statement of facts and procedural history); would cause a significant ''diminution in value of the property''; id., at 107, 147 A. 294; presumably because the defendant could replace the destroyed buildings with a conforming building or buildings of comparable value.

The concurrence also contends that prohibiting Breunich from rebuilding the sea cottage would not be unconstitutional because Breunich can still use his property for other purposes. In support of this contention, the concurrence cites *Murr* v. *Wisconsin*, —— U.S. ——, 137 S. Ct. 1933, 198 L. Ed. 2d 497 (2017), for the proposition that the ''test for regulatory taking requires us to compare the value that has been taken from the property with the value that remains in the property . . . .'' (Internal quotation marks omitted.) Id., at 1943–44. The court in *Murr*, however, was not addressing the problem that is before this court, namely, whether prohibiting the rebuilding of a nonconforming building that has been destroyed violates the constitution when the landowner cannot replace the building with another structure that is conforming. Rather, the court was addressing the question of whether it should treat adjacent parcels of land that are owned by the same landowner as a single parcel or as distinct parcels in determining whether a taking has occurred. See id., at 1941. The court declined to adopt a categorical answer to that question but repeatedly emphasized that ''[a] central dynamic of the [c]ourt's regulatory takings jurisprudence . . . is its flexibility''; id., at 1943; and that ''courts must consider a number of factors'' on a case-by-case basis when identifying the property that was taken by regulation and the property that remains. Id., at 1945. Thus, *Murr* is not inconsistent with *Hillman*. We therefore conclude that, when a nonconforming structure has been destroyed and a regulation prohibits the rebuilding of the structure, the difference between the value that was taken from the property, i.e., the value of the destroyed nonconforming structure, and the value that remains, i.e., the value of the structure, if any, that the landowner can build to replace the destroyed structure, is a factor that the courts may consider in determining whether the strict enforcement of the regulation would have a confiscatory effect.

The concurrence insists that, in making the determination as to whether a taking has occurred, the only consideration is whether ''the property,'' i.e., the legally defined parcel of land on which a structure stood, still has value. See footnote 5 of the concurring opinion. *Murr* makes clear, however, that, for purposes of takings jurisprudence, the meaning of the term ''the property'' is flexible. See *Murr* v. *Wisconsin*, supra, 137 S. Ct. at 1943.

forming use or structure. Rather, in each case that he cites in which a variance was found not to be warranted, the applicant sought either to construct a new nonconforming structure or to expand an existing nonconforming structure. *See E & F Associates, LLC* v. *Zoning Board of Appeals*, supra, 320 Conn. at 12, 127 A.3d 986 (applicant sought to expand nonconforming building by adding second story); *Moon* v. *Zoning Board of Appeals*, 291 Conn. 16, 18, 966 A.2d 722 (2009) (applicants sought to add additional living space to second story of nonconforming building); *Francini v. Zoning Board of Appeals*, 228 Conn. 785, 787, 639 A.2d 519 (1994) (applicant sought to build residence on nonconforming lot); *Hyatt* v. *Zoning Board of Appeals*, 163 Conn. 379, 381, 311 A.2d 77 (1972) (applicant sought to build second nonconforming building); *Verrillo* v. *Zoning Board of Appeals*, 155 Conn. App. 657, 664, 111 A.3d 473 (2015) (applicant sought to expand existing nonconforming building); *Horace* v. *Zoning Board of Appeals*, 85 Conn. App. 162, 164, 855 A.2d 1044 (2004) (applicant sought to expand existing [648]nonconforming use); *Munroe* v. *Zoning Board of Appeals*, 75 Conn. App. 796, 798, 818 A.2d 72 (2003) (applicant sought to add second story to existing nonconforming building). In the present case, although conforming the sea cottage to the minimum flood elevation requirement will increase its nonconformity with the regulations governing building height, in contrast to these cases, Breunich is not seeking to "expand" the nonconforming building for his own personal benefit or convenience but is seeking the variances in order to comply with the minimum flood elevation requirement of the regulations applicable to flood prone areas, which is intended to reduce the safety and financial hazards that nonconforming structures present both to landowners and to the general public in the event of a flood. As we explained, the sea cottage is required to conform to that requirement even though the building previously was legally nonconforming. In the absence of either a variance from the building height regulations or the minimum flood elevation requirement, the sea cottage cannot be rebuilt. Thus, the underlying purpose of the variances is not to "expand" the nonconformities of the sea cottage but merely to allow its continued use. Accordingly, we find the cases that the plaintiff cites to be inapposite.

[22] On the basis of the foregoing, we conclude that the zoning board reasonably found that Breunich established the existence of an unusual hardship warranting approval of his application for variances because the strict enforcement of the regulations would have deprived him of his constitutionally protected right to continue using the sea cottage, which is an existing, legally nonconforming accessory structure. As we explained, without variances in some form, Breunich simply would be unable to reconstruct the sea cottage, resulting in an inverse condemnation of his existing, legally nonconforming use. In other words, it would [649]result in an unusual hardship. Such a result is precisely what the zoning board's authority to grant variances was designed to circumvent. See *Florentine* v. *Darien*, supra, 142 Conn. at 425, 115 A.2d 328 (power to grant variances is intended to "[furnish] elasticity in the application of regulatory measures so that they do not operate in an arbitrary or confiscatory and, consequently unconstitutional . . . manner").

[23] To the extent that the plaintiff contends that it was improper for the zoning board to have granted the variances from the regulations governing building height and setbacks because those vari-

ances would have been unnecessary if Breunich had sought a variance from the minimum flood elevation requirement, we disagree. First, considered in light of the compelling public interests that the minimum flood elevation requirement is intended to protect, nothing in the record indicates that conforming the sea cottage to that requirement would entail an unusual hardship, thereby warranting a variance.[14] Second, the plaintiff has cited no authority for 650the proposition that a zoning board of appeals cannot grant a variance from one regulation if granting a variance from another regulation would make the variance from the first regulation unnecessary.

[24] The plaintiff also claims that, to establish an unusual hardship, Breunich was required to show that the hardship arose from some unique or peculiar characteristic of his property. See, e.g., *Moon* v. *Zoning Board of Appeals*, supra, 291 Conn. at 24, 966 A.2d 722 ("[a]n applicant for a variance must show that, *because of some peculiar characteristic of his property*, the strict application of the zoning regulation produces an unusual hardship, as opposed to the general impact which the regulation has on other properties in the zone" [emphasis added; internal quotation marks omitted]); *Francini* v. *Zoning Board of Appeals*, supra, 228 Conn. at 791, 639 A.2d 519 ("[i]t is well settled that the hardship must be different in kind from that generally affecting properties in the same zoning district" [internal quotation marks omitted]); *Plumb* v. *Board of Zoning Appeals*, 141 Conn. 595, 600, 108 A.2d 899 (1954) ("[t]he hardship must be one different in kind from that imposed upon properties in general by the ordinance"). The plaintiff contends that the sea cottage has no such unique or peculiar characteristic, but, to the contrary, its characteristics making full compliance with all zoning regulations difficult are shared by "numerous coastal properties in Stamford," many of which were also damaged by Hurricane Sandy.[15] Even 651if we were to assume,

14. To the extent that it might be claimed that the fact that the soils under the sea cottage would not support the elevated structure would constitute an unusual hardship justifying such a variance, the response to that claim is that that any such hardship could be alleviated merely by moving the sea cottage three feet north.

To the extent that the plaintiff contends that, by submitting a request to move the footprint of the sea cottage three feet north, thereby necessitating the variance from the setback requirements, Breunich lost his constitutionally protected right to continue to use the sea cottage as a legally nonconforming building, we disagree. It is well settled that a variance may be granted to continue a nonconforming use if the variance will reduce the nonconformity of the building or use. See *Vine* v. *Zoning Board of Appeals*, supra, 281 Conn. at 562, 916 A.2d 5 ("the reduction of a nonconforming use to a less offensive prohibited use may constitute an independent ground for granting a variance"). The only effect of moving the sea cottage would be to reduce the rear yard setback nonconformity. Accordingly, we can see no reason why, if the zoning board would have been warranted in granting a variance to the regulation governing building height to accommodate the minimum flood elevation requirement if it had been possible to elevate the sea cottage in its current location, it was barred from granting the application for variances because the sea cottage had to be moved three feet, thereby *reducing* its nonconformity.

15. The authors of the white paper prepared by the Center for Energy & Environmental Law at the University of Connecticut School of Law have observed that applicants seeking variances from zoning regulations governing building height in order to conform to the minimum flood elevation requirement must "demonstrate that the variance is required because of some peculiar characteristic of the property. [This] can be [a] difficult [requirement] to meet when the applicant is one of many similarly situated floodplain property owners." W. Rath et al., supra, p. 3. The authors also note that height restrictions on buildings have the effect of "squeezing [such]

however, that there is nothing unique or peculiar about Breunich's property that renders the strict application of the regulations unusually harsh, and that the problems that he faces in reconstructing the sea cottage are shared by many other owners of damaged buildings in flood prone areas, it would then follow that the strict enforcement of the regulations would also threaten to confiscate the other damaged buildings and structures that, before being damaged, were legally nonconforming with the minimum flood elevation requirements.[16] The plaintiff has cited no authority for the proposition that a variance from a regulation may not be granted to a particular landowner if the regulation has a confiscatory effect not only on his property, but also on other existing, legally nonconforming buildings and structures, because the hardship does not arise from a peculiar or unique characteristic of the landowner's property.[17] An unconstitutional confiscation of property by regulation does not become constitutional merely because the regulation affects other properties in the same way. Accordingly, we reject this claim.

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[25] Finally, we address the plaintiff's claim that the zoning board improperly

property owners between two different regulatory requirements.'' Id.

16. The concurrence would conclude that the sea cottage is unique because it was ''a nonconforming accessory structure located in a highly restrictive flood zone subject to the mandatory flood regulations.'' The plaintiff's point, however, is that many of the buildings that were destroyed by Hurricane Sandy cannot be rebuilt to conform to the flood regulations without obtaining a variance from building height restrictions. See W. Rath et al., supra, app. A, p. 7, quoting Stamford Zoning Regs., art. III, § 3 (A) (16) (b) (2016) (when primary residence is reconstructed to comply with minimum elevation standards, maximum height of new building may be only up to five feet higher than height allowed by zoning regulations). Accordingly, we fail to perceive how the sea cottage was unique. To the extent that the concurrence contends that the plaintiff's situation is different because the sea cottage was an *accessory structure*, and, therefore, in contrast to the application of a regulatory prohibition on rebuilding to primary residences that cannot be rebuilt without obtaining a variance, the application of such a regulation to the sea cottage does not constitute a taking; see footnote 13 of this opinion; the concurrence appears to admit through the back door what it refuses to admit through the front door, namely, the principle that a regulation that prohibits the reconstruction of a nonconforming building that has been destroyed creates a hardship if the building cannot be replaced with a conforming building, notwithstanding the fact that the parcel of property on which the structure was located still has value.

17. We note parenthetically that we are somewhat puzzled by the line of cases holding that a variance is not warranted if the subject property does not have a unique or peculiar characteristic that renders the strict application of the zoning regulations unusually harsh. We have held that the fact that a property *does* have such a unique or peculiar characteristic, standing alone, does not justify the granting of a variance in the absence of proof that the regulation is confiscatory. See *E & F Associates, LLC* v. *Zoning Board of Appeals*, supra, 320 Conn. at 20, 127 A.3d 986 (''when a property would have economic value even if the zoning regulations were strictly enforced, the fact that a peculiar characteristic of the property would make compliance with the zoning regulations exceptionally difficult if the property were put to a more valuable or desirable use does not constitute either an 'exceptional difficulty' or an unusual hardship''). On the other hand, it is clear to us that, if a regulation has a confiscatory effect on a property, it does not follow from the fact that that effect does *not* arise from a unique characteristic of the particular property that no hardship warranting a variance exists. Accordingly, it would appear to us that the question of whether the regulation has a confiscatory effect is dispositive, and it is unclear to us how the unique characteristics of a particular property come into play when determining whether an unusual hardship exists. Because this question is not before us, however, we leave it for another day.

granted Breunich's application for variances because the variances were not the minimum relief required to alleviate the hardship. See, e.g., *L & G Associates, Inc.* v. *Zoning Board of Appeals*, 40 Conn. App. 784, 788, 673 A.2d 1146 (1996) ("[b]ecause a variance affords relief from the literal enforcement of a zoning ordinance, it will be strictly construed to limit relief to the minimum variance which is sufficient to relieve the hardship" [internal quotation marks omitted]). The plaintiff contends that the setback variances that Breunich requested were not the minimum necessary to alleviate any hardship because he could conform the sea cottage to all of the setback requirements by moving it west five and one-half feet and north ten feet. In support of this claim, the plaintiff cites *Green Falls Associates, LLC* v. *Zoning Board of Appeals*, 138 Conn. 653App. 481, 484, 53 A.3d 273 (2012) (applicant sought to build new single-family residence on lot), *Jaser* v. *Zoning Board of Appeals*, 43 Conn. App. 545, 546, 684 A.2d 735 (1996) (applicants sought to construct new single-family residence on lot), and *L & G Associates, Inc.* v. *Zoning Board of Appeals*, supra, at 786, 673 A.2d 1146 (applicant sought to construct new office building on property). All of these cases, however, involved applications for variances to build new nonconforming buildings.[18] As 654we

18. The plaintiff also cites *Hescock* v. *Zoning Board of Appeals*, 112 Conn. App. 239, 962 A.2d 177 (2009), in support of the proposition that the requirement that a variance provide only the minimal relief required to alleviate the hardship also applies to variances that will reduce the nonconformity of an existing nonconforming building. His reliance on this case, however, is misplaced. In *Hescock*, the defendant landowners owned a legally nonconforming house that was damaged in a hurricane and that no longer complied with various building and habitability codes and requirements. See id., at 252, 962 A.2d 177. The house was located 44 feet landward of the mean high tide, in legal nonconformance with a zoning regulation requiring a minimum distance of 100 feet. See id., at 242, 962 A.2d 177. The landowners wanted to build a new house that would be located 47 feet landward of the mean high tide and sought a variance to authorize that nonconformity. See id. The Appellate Court rejected the plaintiffs' contention that the defendant zoning board of appeals had failed to consider a zoning regulation requiring that ''the granted variance be minimal'' on the ground that the board had considered the fact that ''the new house would be as far from the water as possible'' given the configuration of the lot when it granted the variance. Id., at 255, 962 A.2d 177. In addressing the plaintiffs' contention that no hardship had been established, the Appellate Court observed that a reduction in nonconformity can also justify a variance, and concluded that the new house would reduce the existing nonconformities because it would be further from the water than the damaged house and it would eliminate nonconformance with all of the other flood zone regulations. See id., at 260–61, 962 A.2d 177. In the present case, the plaintiff relies on the Appellate Court's conclusion that the variance was the minimum relief required because ''the new house would be as far from the water as possible''; id., at 255, 962 A.2d 177; to support his claim that the zoning board could not grant the variances unless Breunich established that he was reducing all of the sea cottage's nonconformities to the maximum extent possible. The Appellate Court in *Hescock*, however, did not clearly distinguish the variance principles that apply to *new construction* from the principles that apply to *legally nonconforming buildings*. Indeed, the court did not cite any cases at all in support of the proposition that the landowners were required to establish that the variance was the ''minimum necessary'' to relieve hardship. Rather, the court appears to have assumed in that portion of its decision that the application for a variance was for ''new construction''; id., at 254, 962 A.2d 177; and not for the repair or modification of an existing, legally nonconforming building. In contrast, in the portion of its decision addressing the plaintiffs' claim that no hardship existed, the court clearly assumed that the landowners were continuing the use of a legally nonconforming building. See id., at 261, 962 A.2d 177 (''the new construction would reduce and eliminate existing nonconformities''). Accordingly, *Hescock* provides little guidance in the present case.

indicated, the sea cottage is an *existing*, legally nonconforming building, and the setback variances that Breunich sought and that the zoning board granted will allow the building to be moved to a *less* nonconforming location. See footnote 14 of this opinion. The plaintiff has cited no authority that convincingly supports the proposition that, when an applicant seeks a variance that will have the effect of reducing a nonconformity of an *existing*, legally nonconforming building, the variance may not be granted unless the applicant reduces *all* of the building's nonconformities to the maximum extent possible. Indeed, it would make little sense to bar landowners from seeking a variance to reduce a nonconformity of an existing building unless they reduced that conformity—as well as all other nonconformities—to the maximum extent possible.[19] Presumably, *any* reduction in nonconformity could only benefit the zoning scheme. We therefore reject this claim.

For the foregoing reasons, we conclude that the trial court correctly determined that the zoning board properly granted Breunich's application for variances from the regulations and, therefore, properly dismissed the plaintiff's appeal.

The judgment is affirmed.

In this opinion D'AURIA, MULLINS and KAHN, Js., concurred.

ECKER, J., with whom ROBINSON, C. J., joins, concurring in the judgment.

655 Although I agree with the disposition of this appeal, I write separately because I do not agree with substantial aspects of the legal analysis employed by the majority opinion to reach that result. More specifically, I disagree with the constitutional point raised in the final paragraph of part I of the majority opinion, and I further disagree with that portion of part II of the majority opinion suggesting that the issuance of the variances to the defendant Paul E. Breunich was in any way constitutionally compelled such that the denial of the application would have amounted to a practical confiscation or inverse condemnation of his property. I instead would affirm the judgment of the trial court dismissing the appeal of the plaintiff, Karl Mayer-Wittmann, executor of the estate of Gerda Mayer-Wittmann, on the ground that the named defendant, the Zoning Board of Appeals of the City of Stamford (zoning board), did not abuse its discretion when it granted the variances on the basis of its finding that the natural event that severely damaged Breunich's sea cottage, combined with the mandatory flood regulations imposed by the city of Stamford and the Federal Emergency Management Agency (FEMA), combined to create an unusual hardship. I therefore concur in the judgment.

I

My disagreement with the majority arises at two different points in its opinion. First, in the final portion of part I of its opinion, the majority refers to constitutional concerns that would arise were the court to hold that the sea cottage automatically lost its legally nonconforming status either by operation of article IV, § 10 (C), of the Zoning Regulations of the city of Stamford 656 (regulations),[1] or because Breunich was

19. We recognize, of course, that, if a landowner sought a variance to *increase* the nonconformity of an existing, legally nonconforming building, the landowner would be required to establish that the variance was the minimum relief necessary to alleviate the hardship.

1. Article IV, § 10 (C), of the Stamford Zoning Regulations provides in relevant part that "[a]ny non-conforming building ... which

required to obtain variances before the zoning board could authorize reconstruction of the sea cottage.[2] Second, and more prominently, part II of the majority opinion holds that "Breunich established the existence of an unusual hardship warranting approval of his application for variances *because the strict enforcement of the regulations would have deprived him of his constitutionally protected right to continue using the sea cottage*, which is an existing, legally nonconforming accessory structure. . . . [*W*]*ithout variances in some form, Breunich simply would be unable to reconstruct the sea cottage, resulting in an inverse condemnation of his existing, legally nonconforming use*. In other words, it would result in an unusual hardship." (Emphasis added.)

I cannot agree with the majority's constitutional analysis. Indeed, I understand the applicable law, hereinafter referred to as the "casualty doctrine," to say exactly the opposite, namely, that a landowner generally has *no* constitutional right to rebuild a legally nonconforming structure that has been substantially destroyed by fire, flood, or some other comparable force majeure.[3] See generally D. Gross, annot., "Zoning: [657] Right to Repair or Reconstruct Building Operating as Nonconforming Use, After Damage or Destruction by Fire or Other Casualty," 57 A.L.R.3d 419 (1974 and Supp. 2018) (collecting extensive case law from across the country, including Connecticut); 4 E. Ziegler, Rathkopf's The Law of Zoning and Planning (2011) § 74:11, pp. 74-38 through 74-42 (citing cases). The casualty doctrine is no stranger to Connecticut; one of the early cases articulating the doctrine, still cited in modern cases and treatises on the subject, was decided by this very court. See *State* v. *Hillman*, 110 Conn. 92, 107, 147 A. 294 (1929) (rejecting landowner's constitutional attack on zoning regulation that prohibited restoration of legally nonconforming building if more than 50 percent of its assessed value was destroyed by fire). Yet another Connecticut case lends indirect but significant support to the same point by affirming a zoning board's decision denying the landowners' petition for permission to rebuild a legally nonconforming structure that had been destroyed by fire. See *Piccolo* v. *West Haven*, 120 Conn. 449, 455, 181 A. 615 (1935).

This court's decision in *Hillman* provides an early but nonetheless representative illustration of the casualty doctrine at work. Indeed, it continues to be cited as a seminal case on the subject.[4] The defen-

has been or may be damaged by . . . flood . . . [or] act of God . . . may be reconstructed and used as before, if reconstruction is started with[in] twelve . . . months of such calamity . . . ."

2. Invoking the canon of constitutional avoidance in statutory construction, the majority rejects the plaintiff's absolutist construction of the applicable regulations on the ground that "a regulation that entirely deprived a building of its legally nonconforming status might be confiscatory as applied and, as such, of questionable constitutionality."

3. It is undisputed in the present case that the sea cottage sustained damage exceeding 50 percent of its value, which triggers application of the relevant flood zone elevation requirements to restoration of the structure notwithstanding its legally nonconforming status. The majority also correctly notes that article IV, § 10 (B), of the Stamford Zoning Regulations states in relevant part: "The total structural repairs and alterations that may be made in a structure which is non-conforming in use only shall not exceed [50] percent . . . of its replacement value at the time of the application for the first structural change, unless changed to a conforming use. . . ."

4. See, e.g., 6 N. Williams & J. Taylor, American Land Planning Law (Rev. Ed. 2019) § 122:2 (describing *Hillman* as "the first zoning case in Connecticut" and noting that "the opinion specifically approved a prohibition

dant, Isaac Hillman, was a corporate officer of an industrial company that operated within the city of Bridgeport prior to the enactment of zoning regulations in 1925, and then continued to operate as a preexisting nonconforming use after the zoning regulations were adopted. *State* v. *Hillman*, supra, 110 Conn. at 94–98, 147 A. 294 (preliminary statement of facts and procedural history). The next year, [658]a fire destroyed numerous company buildings necessary for the operation of the business, and the company sought to rebuild. The company's application to reconstruct the damaged buildings was denied by the city, however, pursuant to a regulation prohibiting reconstruction of a nonconforming building that is damaged by fire in an amount exceeding 50 percent of the building's value. Id., at 98–99, 147 A. 294 (preliminary statement of facts and procedural history). Hillman was convicted of violating the city's zoning laws after the company failed to relocate and instead continued to operate from its original location using temporarily repaired buildings. Id., at 99, 147 A. 294 (preliminary statement of facts and procedural history). This court rejected the defendant's claim that the operative zoning regulations were unconstitutional "in that they purport to deprive this company and this defendant of his property without just compensation." Id., at 105, 147 A. 294. The court's constitutional analysis concludes that "we are unable to hold that when over [50 percent] of [the company's] buildings are destroyed it was not a fair exercise of the police power to refuse to permit the company to restore the burned building and continue the nuisance in [the newly zoned district]." Id., at 107, 147 A. 294.[5]

[659]As previously noted, the case law from across the country is consistent with our decision in *Hillman* as it relates to the casualty doctrine. The Rathkopf treatise characterizes as "customary" zoning regulations terminating a legal nonconformity in the event of a casualty causing substantial destruction of the nonconforming

against rebuilding a nonconforming establishment'' substantially destroyed by fire).

5. The majority suggests that the casualty doctrine is not operative in *Hillman* and contends that the case instead supports the view that a municipality may prohibit the restoration of a preexisting nonconforming structure only if the landowner is able to replace the structure with a conforming building or buildings of comparable value. I read *Hillman* very differently, as do the treatises cited in part I of this concurring opinion. First and foremost, *Hillman* is a case about loss causation, and it remains an important precedent in that context because it is among the first judicial opinions in the country to articulate the rule that the government acts within constitutional limits when it refuses to permit the restoration of a nonconforming building substantially destroyed by fire. See W. Horton & B. Levesque, ''The Wheeler Court,'' 24 Quinnipiac L. Rev. 301, 329 (2006) (stating that ''Connecticut was leading the country'' when *Hillman* ''sustained a [zoning] regulation prohibiting the rebuilding of a nonconforming factory after a fire destroyed over half the value of the buildings''). Second, in *Hillman*, the constitutional analysis did not turn on the landowner's ability vel non to replace or rebuild the destroyed *buildings*. If the loss to the nonconforming *building* is substantial enough to trigger application of the regulation prohibiting reconstruction, then the constitutional analysis examines the loss in value to the *property* to determine whether a taking has occurred. This point explains why the court in *Hillman* observed that ''[t]here is nothing in the [trial court's] finding showing *the extent of the diminution in value of the property or the business*; it may be that these were small in extent.'' (Emphasis added.) *State* v. *Hillman*, supra, 110 Conn. at 107, 147 A. 294. Applying this observation to the present case, it is clear that Breunich's *property* retains most of its value even without the sea cottage. *Hillman* thus demonstrates that Breunich would have no plausible constitutional claim if the municipal defendants had denied his application.

structure, and describes the underlying logic of such regulations as follows: "In conformity with the philosophy that the spirit of zoning is to restrict, rather than increase, nonconforming uses and to eliminate such uses as speedily as possible, and in order to discourage the reestablishment of nonconforming uses, the investment value of which has been lost to the owner through accident and through no action on the part of the municipality, *it is customary to provide in zoning ordinances a prohibition against the replacement of a nonconforming structure or one employed in a nonconforming use in excess of a specified percentage, this percentage being fixed as equivalent to substantial destruction*." (Emphasis added.) 4 E. Ziegler, supra, § 74:11, p. 74-38.[6]

660 The Rathkopf treatise quotes at length from a case decided by the Colorado Supreme Court explaining why such regulations pass constitutional muster: " 'If a property owner has invested money in improvements in order to put his property to a particular use, which is lawful at that time, and if that use is subsequently outlawed by a zoning ordinance, he loses not only the potential use but also the value of his investment. To impose this additional loss upon him is unreasonable, and therefore he is entitled to continue to use his property as he did before. On the other hand, if the improvements are destroyed or abandoned, he has lost the value of his investment independently of the ordinance and there is no reason why his relationship to the zoning ordinance should be any different [than] that of his neighbor whose property was unimproved . . . . If the owner of a nonconforming use suffers the destruction of his improvements, he becomes the owner of unimproved property. The unimproved property may be restricted as to use without a denial of due process. The effect of the fire which substantially destroyed the service station was to sever the improvements from the real estate. Had the [plaintiff] been denied a building permit for a filling station on unimproved property, no one could contend that it was unreasonable or that it was a denial of due process.' " Id., pp. 74-39 through 74-40, quoting *Service Oil Co.* v. *Rhodus*, 179 Colo. 335, 347–48, 500 P.2d 807 (1972).

The majority contends that the casualty doctrine would not permit the zoning board to deny a variance in the present case because, in the absence of a variance, Breunich would "lose the *entire* value of the sea cottage"; (emphasis in original) footnote 13 of the majority 661 opinion; whereas the cases finding no constitutional violation involve situations in which the landowner remains able to make some other use of the property despite the loss of a building to fire or other casualty. As I pointed out in my discussion of *Hillman*; see footnote 5 of this concurring opinion; the majority's point conflates two different calculations, the loss of value in *the nonconforming building* and the loss of value

6. There are cases to the contrary, but the Rathkopf treatise explains that the exceptions typically involve jurisdictions in which "the zoning enabling act specifies the extent to which municipalities may restrict the right of a nonconforming owner to repair or restore structures which have been accidentally destroyed. Where such a statutory provision protects the right of a nonconforming owner to repair a structure which has been partially destroyed, the provision has been construed to require termination of the nonconforming use only if the structure in which it has been operated is totally destroyed. Where this type of statutory provision exists, the issue in a case involving destruction of a structure housing a nonconforming use is whether the extent of the destruction found is partial or is so extensive as to amount to total destruction." (Footnotes omitted.) 4 E. Ziegler, supra, § 74:11, p. 74-40. The relevant Connecticut statute contains no such provision. See General Statutes § 8-2.

in *the property*. The former calculation is used in many zoning regulations, including Stamford's, to determine whether the landowner has the right, without a variance, to rebuild a nonconforming building after it has been damaged; the latter calculation is used to decide whether just compensation must be paid by a municipality that has prohibited restoration. The fact that the landowner may lose the entire value of the damaged structure is not the critical issue under either calculation. Indeed, the more severe the loss caused by the casualty to the building itself, the *stronger* the case becomes for application of the casualty doctrine because its applicability depends on the loss being caused by a force *other than the zoning regulation*. See, e.g., *Krul* v. *Board of Adjustment*, 122 N.J. Super. 18, 24–25, 298 A.2d 308 (Law. Div. 1972) ("The right to restore or repair thus is limited by the caveat that the structure be only partially destroyed.... Thus where the destruction of a building is only partial, restoration or repair is permitted to protect and maintain that investment in recognition of the right of the property owner to continued protection of his use free of the restriction imposed subsequent to the vesting of that use. If, however, a structure is destroyed totally rather than partially, the property owner in effect holds only vacant land and should be controlled by the existing zoning restrictions in the same manner as other owners of undeveloped land. Under such circumstances the dilemma of the property owner—the loss of his investment—is one created by the unfortunate casualty and [662] not by virtue of the power of government." [Citations omitted.]), aff'd, 126 N.J. Super. 150, 313 A.2d 220 (App. Div. 1973).[7]

7. In a similar vein, the majority opinion states that the present case is distinguishable from *Hillman*, *Piccolo*, and the other casualty doctrine cases because, in contrast to those cases, the landowner here had no options: "[T]here is no evidence in the present case that Breunich would be able to construct a conforming structure of some type on the property if the variances were denied, and he would therefore lose the *entire* value of the sea cottage." (Emphasis in original.) Footnote 13 of the majority opinion. I see two interconnected problems with this contention. First, the idea underlying the casualty doctrine is not that the constitution allows local governments to adopt regulations prohibiting restoration of the nonconforming structure only if the owner is able to recover its loss by building a conforming structure. Instead, as I discussed in the text accompanying this footnote, the underlying idea is that, when the damage caused by the casualty is sufficiently severe, the government does not cause the loss and, therefore, need not permit restoration at all, especially in light of the background principle that nonconformities should be reduced or eliminated over time. See *Salerni* v. *Scheuy*, 140 Conn. 566, 570, 102 A.2d 528 (1954) ("[i]t is a general principle in zoning that nonconforming uses should be abolished or reduced to conformity as quickly as the fair interest of the parties will permit").

Second, even if I were to assume, as the majority does, that the refusal to permit reconstruction of the nonconforming sea cottage in this particular case resulted in Breunich being unable to replace it by building a conforming structure elsewhere on the property—meaning that he has lost "the *entire* value of the sea cottage"—there would still be no viable claim of a *constitutional* violation on this record. (Emphasis in original.) Footnote 13 of the majority opinion. As I noted previously, the takings analysis in this context looks to the diminished value to the entire property, not to the loss in value to the structure (or use) that cannot be restored. This approach is consistent with the treatment of takings more generally, where the constitutional analysis turns on the impact of the regulation on the *total* value of the property, not only the component of the property "confiscated" by the regulation. See *Murr* v. *Wisconsin*, —— U.S. ——, 137 S. Ct. 1933, 1943–44, 198 L. Ed. 2d 497 (2017) (holding that existence of regulatory taking is determined by comparing value that has been taken from property with value that remains in property viewed in its entirety). I have found nothing in the case law to support the majority's suggestion that the *constitutional* analysis is based on the loss of the destroyed building

II

That said, I nonetheless agree with the outcome reached by the majority because I do not believe that 663 our precedent, properly construed, requires a zoning board to deny a variance in all cases where the landowner fails to make the showing necessary to establish a constitutional violation, i.e, that enforcement of the zoning requirement has deprived the property of all reasonable use and value, thereby practically confiscating the property. That strict standard applies to claims based on *economic* hardship, but there are situations where a landowner may establish the necessary hardship without satisfying the constitutional standard, and this is such a case. The sea cottage, a legally nonconforming accessory structure, was severely damaged by a catastrophic natural event; the demands of public health and safety had caused both the local and federal governments to enact flood regulations of such importance that compliance was required, despite the special status accorded to nonconforming structures; "as before" restoration was flatly impossible due to the particular location of the property and related soil conditions; and Breunich, the landowner, had made good faith efforts to reduce the nonconformities to the maximum extent possible under the circumstances. In my view, the zoning board did not act unlawfully when it determined that this confluence of factors combined to subject the landowner, through no fault of his own, to an unusual hardship warranting issuance of the requested variances.

I observe at the outset that the standard of review is correctly summarized by the majority opinion, and must not be overlooked in our consideration of the merits. See *Bloom* v. *Zoning Board of Appeals*, 233 Conn. 198, 205–206, 658 A.2d 559 (1995) ("The standard of review on appeal from a zoning board's decision to grant or deny a variance is well established. We must determine whether the trial court correctly concluded that the board's act was not arbitrary, illegal or an abuse of discretion.... Courts are not to substitute their 664 judgment for that of the board ... and decisions of local boards will not be disturbed so long as honest judgment has been reasonably and fairly exercised after a full hearing.... Upon appeal, the trial court reviews the record before the board to determine whether it has acted fairly or with proper motives or upon valid reasons.... We, in turn, review the action of the trial court.... The burden of proof to demonstrate that the board acted improperly is upon the plaintiffs." [Citations omitted; internal quotation marks omitted.]); see also *Caruso* v. *Zoning Board of Appeals*, 320 Conn. 315, 321, 130 A.3d 241 (2016) ("[a] zoning board of appeals is endowed with a liberal discretion, and its action is subject to review by the courts only to determine whether it was unreasonable, arbitrary or illegal" [internal quotation marks omitted]).[8]

The path to affirmance, in my view, does not require us to ascend to constitutional heights. As the majority correctly points out in quoting *E & F Associates, LLC* v.

itself without reference to the value of the entire property.

8. This situation should not be confused with that in which the hardship claim is made on the basis of economic hardship and the underlying facts indisputably establish that the property retains some economically viable use, in which case the standard of review is plenary. *E & F Associates, LLC* v. *Zoning Board of Appeals*, 320 Conn. 9, 14–15, 127 A.3d 986 (2015) ("[T]he question of whether the board had authority to grant a variance pursuant to [General Statutes] § 8-6 (a) when the property would not lack economic value even if the variance were denied is a question of law. Accordingly, our review is plenary.").

Zoning Board of Appeals, 320 Conn. 9, 15, 127 A.3d 986 (2015), a variance may be granted upon a showing by the landowner that, " 'because of some peculiar characteristic of [the] property, the strict application of the zoning regulation produces an unusual hardship, as opposed to the general impact which the regulation has on other properties in the zone. . . . Accordingly, we have [concluded that a zoning board of appeals may] grant a variance only when two basic requirements are satisfied: (1) the variance must be shown not to affect
665 substantially the comprehensive zoning plan, and (2) adherence to the strict letter of the zoning ordinance must be shown to cause unusual hardship unnecessary to the carrying out of the general purpose of the zoning plan. . . . Proof of exceptional difficulty or unusual hardship is absolutely necessary as a condition precedent to the granting of a zoning variance.' " This legal standard is prescribed by statute; see General Statutes § 8-6 (a) (3);[9] and we must be careful not to change its meaning by judicial gloss.

Under the circumstances of this case, I do not agree with the majority that the statutory hardship standard is effectively "one and the same" as the legal standard establishing a constitutional violation under the takings clause. I certainly understand how the majority arrived at this conclusion, because our cases, especially recently, paint with the same broad brush in describing the hardship doctrine.[10] Unfortunately, some of these
666 cases have overlooked an important doctrinal qualification when they observe that the zoning hardship standard is "the same" as the constitutional takings standard: the (very high) standard applied to adjudicate constitutional claims properly is used to decide variance applications *only when the landowner relies on a claim of economic or financial hardship to justify the variance*.

9. Section 8-6 (a) provides in relevant part: "The zoning board of appeals shall have the following powers and duties . . . (3) to determine and vary the application of the zoning bylaws, ordinances or regulations in harmony with their general purpose and intent and with due consideration for conserving the public health, safety, convenience, welfare and property values solely with respect to a parcel of land where, owing to conditions especially affecting such parcel but not affecting generally the district in which it is situated, a literal enforcement of such bylaws, ordinances or regulations would result in exceptional difficulty or unusual hardship so that substantial justice will be done and the public safety and welfare secured, provided that the zoning regulations may specify the extent to which uses shall not be permitted by variance in districts in which such uses are not otherwise allowed. . . ."

10. See, e.g., *Barton* v. *Norwalk*, 326 Conn. 139, 148 n.6, 161 A.3d 1264 (2017) ("[t]he unusual hardship test in zoning variance cases and the substantial destruction test in inverse condemnation cases require a showing that the property cannot be utilized for any reasonable purpose"); *Caruso* v. *Zoning Board of Appeals*, supra, 320 Conn. at 322–23, 130 A.3d 241 ("Unusual hardship may be shown by demonstrating that the zoning regulation has deprived the property of all reasonable use and value, thereby practically confiscating the property. This contention 'sits at the intersection of two related, yet distinct, areas of law: land use regulation and constitutional takings jurisprudence.' . . . In Connecticut, a taking occurs 'when a landowner is prevented from making any beneficial use of its land—as if the government had, in fact, confiscated it.' . . . Accordingly, a zoning regulation 'permanently restricting the enjoyment of property to such an extent that it cannot be utilized for any reasonable purpose goes beyond valid regulation and constitutes a taking without due process.' . . . The same analysis is used in the variance context because, when the regulation 'practically destroys or greatly decreases [the property's] value for any permitted use to which it can reasonably be put' . . . the loss of value alone may rise to the level of a hardship." [Citations omitted.]).

This critical doctrinal limitation can be discerned by a close reading of most of our zoning cases invoking the heightened standard, because those cases, which usually involve commercial landowners, indicate that the standard applies when the owner's hardship is based on the economic or financial impact of the zoning restriction at issue.[11] The qualification was more clearly
667 evident in some of our earlier cases.[12] I fear that if we are not careful, the qualification is at risk of being forgotten altogether.

The distinction between the constitutional standard and the zoning law standard has been noted by various courts and commentators. See *Belvoir Farms Homeowners Assn., Inc.* v. *North*, 355 Md. 259, 282, 734 A.2d 227 (1999) ("We reject the proposition that the unnecessary or unwarranted hardship standard is equal to an unconstitutional taking standard. If this were true, it would be a superfluous standard because the constitutional standard exists independent of variance standards."); *First North Corp.* v. *Board of Zoning Appeals*, 8 N.E.3d 971, 984 (Ohio 2014) ("[T]he unnecessary hardship standard for granting use variances is not the same as the constitutional taking standard. The 'hardship' standard necessarily admits that there is *some* use for land, but that use works an unnecessary hardship on the
668 landowner. The taking standard ... is

11. See, e.g., *E & F Associates, LLC* v. *Zoning Board of Appeals*, supra, 320 Conn. at 16, 127 A.3d 986 (''considerations of financial disadvantage—or, rather, the denial of a financial advantage—do not constitute hardship, unless the zoning restriction greatly decreases or practically destroys [the property's] value for any of the uses to which it could reasonably be put'' [internal quotation marks omitted]); *Rural Water Co.* v. *Zoning Board of Appeals*, 287 Conn. 282, 295, 947 A.2d 944 (2008) (same); *Vine* v. *Zoning Board of Appeals*, 281 Conn. 553, 561, 916 A.2d 5 (2007) (''Disadvantage in property value or income, or both, to a single owner of property, resulting from application of zoning restrictions, does not, ordinarily, warrant relaxation in his favor on the ground of ... unnecessary hardship.... Financial considerations are relevant only in those exceptional situations where a board could reasonably find that the application of the regulations to the property greatly decreases or practically destroys its value for any of the uses to which it could reasonably be put and where the regulations, as applied, bear so little relationship to the purposes of zoning that, as to particular premises, the regulations have a confiscatory or arbitrary effect.'' [Internal quotation marks omitted.]); *Grillo* v. *Zoning Board of Appeals*, 206 Conn. 362, 369, 537 A.2d 1030 (1988) (same).

12. A good example is the following statement of the hardship doctrine authored by Chief Justice Maltbie in *Devaney* v. *Board of Zoning Appeals*, 132 Conn. 537, 542–43, 45 A.2d 828 (1946): ''Disadvantage in property value or income, or both, to a single owner of property, resulting from application of zoning restrictions, does not, ordinarily, warrant relaxation in his favor on the ground of practical difficulty or unnecessary hardship. Financial considerations alone ... cannot govern the action of the [zoning] board.... Otherwise, there would be no occasion for any zoning law.... There are, however, situations where the application of zoning to a particular property greatly decreases or practically destroys its value for any permitted use and the application of the ordinance bears so little relationship to the purposes of zoning that, as to that property, the regulation is in effect confiscatory or arbitrary.... Provisions authorizing variation in the application of the ordinance are designed to permit changes which will prevent such results.... *Where the only basis of the claim is economic loss from the application of the ordinance*, there rarely would be justification for a variation unless this test is met. *Where other considerations enter into the situation, the question necessarily must be left to the sound discretion of the board, acting within the limitations which we have pointed out, and always with regard to serving the general purposes to accomplish which a zoning ordinance is adopted and to the necessity that all property owners within a zone be treated fairly and equally*.'' (Citations omitted; emphasis added; internal quotation marks omitted.)

one applying to 'a regulation that permanently requires a property owner to sacrifice all economically beneficial uses of his or her land.' ... The difference between the two standards explains why a variance from a zoning ordinance can be granted under conditions in which the application of that particular zoning ordinance would not result in an unconstitutional taking of property." [Citation omitted; emphasis in original.]); *State* v. *Board of Adjustment*, 244 Wis. 2d 613, 642, 628 N.W.2d 376 (2001) ("[t]he unnecessary hardship standard 'is *neither* the same nor as demanding as a takings analysis' " [emphasis in original]); 8 E. McQuillin, Municipal Corporations (3d Ed. Rev. 1991) § 25.167, p. 761 ("[a] condition of difficulty or hardship is not deemed equivalent to a taking of property, in the constitutional sense").[13]

Once the limitation is acknowledged, the legal analysis applicable to the present case becomes straightforward. As previously mentioned, the question is whether the plaintiff has carried his burden of proving that the zoning board abused its discretion when it found that (1) the variances do not substantially affect the comprehensive zoning plan, and (2) adherence to the strict letter of the relevant zoning ordinances causes Breunich to suffer an unusual hardship unnecessary to carrying out the general purpose of the zoning plan. See *E & F Associates, LLC* v. *Zoning Board of Appeals*, supra, 320 Conn. at 15, 127 A.3d 986.

The variance application at issue in this case did not rely at all on a claim of financial deprivation. The basis 669 for the requested variances was not that Breunich's property had lost value or his income would be diminished unless he was allowed to rebuild the sea cottage. His claim, rather, was predicated on the unusual nature of the hardship suffered as a result of the confluence of four factors: (1) the sea cottage is a century old nonconforming structure that will be gone forever if a variance is not granted;[14] (2) the sea cottage is located within the VE and AE Flood Zones under FEMA standards, which are incorporated into the zoning regulations; (3) "it would be impossible for [Breunich] to meet the more stringent flood zone restrictions without further increasing the height of the sea cottage"; and (4) although the zoning regulations

13. Although, to the best of my knowledge, the distinction has not clearly been made in any holding of this court, Justice Shea articulated the point with precision in a dissenting opinion: ''Such a finding was not essential in order to satisfy the requirement of 'unusual hardship' for a variance, because a zoning board of appeals is not restricted to providing relief only in situations where enforcement of the regulations would create a hardship sufficient to constitute an unconstitutional taking.'' *Adolphson* v. *Zoning Board of Appeals*, 205 Conn. 703, 720, 535 A.2d 799 (1988) (*Shea, J.*, dissenting).

14. Breunich's interest in preventing the complete loss of the nonconforming sea cottage is significant, not because it is entitled to constitutional protection under these circumstances, but because it represents something significantly different than a desire to expand a nonconformity or modernize a structure merely to satisfy the personal preferences of the owner. In combination with the other three factors identified here, this consideration distinguishes the present case from situations in which courts have concluded that a hardship has not been established. See *Verrillo* v. *Zoning Board of Appeals*, 155 Conn. App. 657, 691, 111 A.3d 473 (2015) (''The case law is replete with instances in which an applicant predicated its claim of hardship on a desire to expand an existing nonconforming structure for what our appellate courts have characterized as personal considerations, such as the desire to obtain more space or to modernize an antiquated building. It long has been held that 'disappointment in the use of property can hardly constitute practical difficulty or unnecessary hardship within the meaning of a zoning law or regulation.' '').

had been amended to dispense with the need for variances for main houses, the sea cottage is an accessory structure for which a variance is required. Under these unusual factual circumstances, moreover, the zoning board concluded that the requested variances did not undermine the comprehensive zoning plan but, to the contrary, brought "the sea cottage into compliance with the current FEMA and city of Stamford flood regulations."

I would hold that the zoning board was entitled to determine, as it did, that Breunich satisfied the applicable legal standard required to establish an unusual hardship. The sea cottage was severely damaged by a hurricane. It could not be rebuilt exactly as before due to FEMA and city of Stamford flood regulations. These regulations not only relate directly to public health and safety,[15] but, as the majority emphasizes, the failure of a municipality to promulgate and enforce such regulations could render properties throughout the entire municipality ineligible for protection under the National Flood Insurance Program, a federal program making flood insurance available to those who would otherwise be unable to procure it.

This confluence of factors—a catastrophic natural event causing severe damage, property conditions and legal imperatives making "as before" restoration flatly impossible, and good faith efforts by the landowner to reduce the nonconformities to the maximum extent possible under the circumstances—are sufficient, in my view, to warrant the zoning board's finding that Breunich had established the existence of an unusual hardship, and I therefore would affirm the judgment of the trial court dismissing the appeal. I note that two other trial courts recently have reached similar conclusions in similar cases involving the reconstruction of storm damaged, nonconforming beachfront homes. See *Turek* v. *Zoning Board of Appeals*, Superior Court, judicial district of Hartford, Docket No. LND-CV-15-6063404-S (April 4, 2018) (66 Conn. L. Rptr. 363, 361), 2018 WL 2048566; *Kwesell* v. *Zoning Board of Appeals*, Superior Court, judicial district of New Haven, Docket No. NNH-CV-15-6056545–S (May 25, 2017) (64 Conn. L. Rptr. 549, 552–54), 2017 WL 2758785.

Little needs to be said in response to the plaintiff's argument that the zoning board erroneously concluded that the hardship suffered by Breunich was not different in kind from that generally affecting properties in the same zone. See, e.g., *Garibaldi* v. *Zoning Board of Appeals*, 163 Conn. 235, 238, 303 A.2d 743 (1972) ("[i]t is clear that for a hardship to justify the granting of a variance, the hardship must be different in kind from that affecting generally properties in the same zoning district") There is no reason to partake in the majority opinion's willingness to assume the truth in the plaintiff's contention on this point. The plaintiff misapprehends the issue by arguing that there are many other properties in the flood zone required to comply with the applicable flood regulations, there were many other buildings destroyed by Hurricane Sandy, and noth-

15. The trial court recognized this point: "[T]he increased nonconformity does not have the singular purpose of enhancing [Breunich's] personal use of the sea cottage, but instead has the purpose of bringing the sea cottage into compliance with the current FEMA and city of Stamford flood regulations. The only way for [Breunich] to comply with both of these regulations is to increase the height of the structure by elevating the lowest horizontal point of the home an additional eight feet.... The record shows that the usable space of the sea cottage is not increasing, but the existing structure is simply moving upward and three feet north to meet flood requirements.... In addition, the livable space within the sea cottage is not changed as a result of the variance." (Citations omitted.)

ing makes Breunich's case special. The argument misses the fact that Breunich's contention was that his hardship consisted of the unusual confluence of factors and features making his situation different, namely, the hurricane's destruction of a nonconforming accessory structure located in a highly restrictive flood zone subject to the mandatory flood regulations. The plaintiff, for his part, offers nothing but speculative hypotheses to suggest that any significant number of other landowners were similarly affected. On the other hand, the transcript of the zoning board's meeting on Breunich's application reflects both that its members were fully aware of the legal standard requiring an unusual impact on the applicant, and that the board, upon consideration, found that this requirement had been met.[16] See 672*Francini* v. *Zoning Board of Appeals*, 228 Conn. 785, 791, 639 A.2d 519 (1994) (noting that zoning board members "are entitled to take into consideration whatever knowledge they acquire by personal observation" [internal quotation marks omitted]).

For these reasons, I agree with the majority's conclusion that "the trial court correctly determined that the zoning board properly granted Breunich's application for variances from the regulations and, therefore, properly dismissed the plaintiff's appeal." Accordingly, I concur in the judgment.

16. At that meeting, a member of the zoning board observed that Breunich's situation was ''differen[t]'' because it involved an accessory building rather than a ''main house,'' which was subject to different regulations. While they expressed some uncertainty, the members of the zoning board opined that there are ''a few,'' but ''not many,'' such structures in Stamford.

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 18-11977
Non-Argument Calendar

D.C. Docket No. 1:16-cv-00852-TCB

MUNICIPAL COMMUNICATIONS, LLC,

Plaintiff-Appellee,

versus

COBB COUNTY, GEORGIA,
BOARD OF COMMISSIONERS OF COBB COUNTY, GEORGIA,
MEMBERS OF THE BOARD OF COMMISSIONERS OF
COBB COUNTY, GEORGIA,

Defendants-Appellants.

Appeal from the United States District Court
for the Northern District of Georgia

(January 8, 2020)

Before MARTIN, JILL PRYOR, and BRANCH, Circuit Judges.

PER CURIAM:

Cobb County, Georgia, the Cobb County Board of Commissioners, and the members of the Board of Commissioners (collectively "the County") appeal the grant of summary judgment in favor of Municipal Communications, LLC. This case stems from the Board's decision to grant Municipal a special land use permit to construct a telecommunications tower; the permit was granted on the condition that Municipal move the tower 300 feet east of the proposed location. Municipal filed suit arguing that the County's decision was effectively a denial of the permit because the County's proposed site is unavailable. Municipal also argued that the decision was not supported by substantial evidence as required by the Telecommunications Act of 1996.[1] Conversely, the County argued that Municipal failed to prove that the new site is unavailable and that the County's decision to require relocation of the tower was supported by record evidence. The district court granted summary judgment in favor of Municipal. We affirm.

I. BACKGROUND

A. Cobb County's Zoning Ordinance.

[1] As relevant to this appeal, the Telecommunications Act of 1996 provides that "[a]ny decision by a State or local government or instrumentality thereof to deny a request to place, construct, or modify personal wireless service facilities shall be in writing and supported by substantial evidence contained in a written record." 47 U.S.C. § 332(c)(7)(B)(iii).

Cobb County's zoning ordinance provides that before constructing a wireless tower over 35 feet in height, a person must apply for and obtain a special land use permit. Cobb County Code § 134-273(1)-(2). The local Zoning Division may retain the services of "consultants, engineers, or other experts in the area of radio frequency engineering or other relevant fields to assist the county in analyzing the application." *Id.* § 134-273(3)(m). Then, the planning division and zoning division staff analyze the application and recommend either granting or denying the application. *Id.* § 134-122. The Cobb County Planning Commission[2] then holds a public hearing and makes a recommendation to the Board of Commissioners. *Id.* § 134-123(b). Finally, the Board of Commissioners holds a public hearing and votes on whether to grant the application. *Id.* § 134-124. The county code lists fifteen factors that the Board of Commissioners must consider when deciding whether to grant the permit. *Id.* §§ 134-37(e), 134-273.[3]

[2] The Planning Commission is an advisory commission that assists the governing authority (the Board of Commissioners) in administering and enforcing the Zoning and Planning Act. *See* Cobb County Code §§ 134-61, 134-64, 134-65.

[3] The fifteen factors are: "(1) Whether or not there will be a significant adverse effect on the neighborhood or area in which the proposed use will be located; (2) Whether or not the use is otherwise compatible with the neighborhood; (3) Whether or not the use proposed will result in a nuisance as defined under state law; (4) Whether or not quiet enjoyment of surrounding property will be adversely affected; (5) Whether or not property values of surrounding property will be adversely affected; (6) Whether or not adequate provisions are made for parking and traffic considerations; (7) Whether or not the site or intensity of the use is appropriate; (8) Whether or not special or unique conditions overcome the board of commissioners' general presumption that residential neighborhoods should not allow noncompatible business uses; (9) Whether or not adequate provisions are made regarding hours of operation; (10) Whether or not adequate

B. Municipal's Application for a Special Land Use Permit.

On August 25, 2015, SouthernLINC Wireless, Inc. submitted an application for a special land use permit with the Zoning Division to build a cellular tower on a site that it was leasing on the property of Wildwood Baptist Church. The church was surrounded by residential properties and an elementary school. While the application was pending, SouthernLINC assigned its rights, title, and interest in the lease to Municipal, and Municipal became the applicant.

The County hired CityScape Consultants to conduct an independent evaluation of the application. At CityScape's suggestion, SouthernLINC, and later Municipal, agreed to reduce the height of the tower from 190 feet to 165 feet and to camouflage it to look like a pine tree. In its final report, CityScape concluded that Municipal's application met the relevant zoning ordinance requirements and recommended approval.

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controls and limits are placed on commercial and business deliveries; (11) Whether or not adequate landscape plans are incorporated to ensure appropriate transition; (12) Whether or not the public health, safety, welfare or moral concerns of the surrounding neighborhood will be adversely affected; (13) Whether the application complies with any applicable specific requirements set forth in this chapter for special land use permits for particular types of uses; (14) Whether the applicant has provided sufficient information to allow a full consideration of all relevant factors; (15) In all applications for a special land use permit the burden shall be on the applicant both to produce sufficient information to allow the county fully to consider all relevant factors and to demonstrate that the proposal complies with all applicable requirements and is otherwise consistent with the policies reflected in the factors enumerated in this chapter for consideration by the county."

After Municipal amended its application to reflect the changes recommended by CityScape, the County's planning division and zoning division staff reviewed the application. The staff concluded that the application satisfied all of the applicable zoning ordinance requirements and recommended approval. However, the staff also proposed that the County attach a condition to the permit requiring Municipal to move the tower 300 to 400 feet to the east, which would place it in a thick grove of trees near the center of the property. On February 10, 2016, Municipal filed a supplement to its application informing the zoning department that the staff's proposed location was unavailable because the church would not lease the site. Municipal explained that the church would not allow the tower on that site because it would create a large area in the center of the property that could not be developed in the future. Municipal further explained that moving the tower would make it less visible for neighbors to the west, but more visible for neighbors to the east and for travelers on Wade Green Road. Municipal also explained that the move was unnecessary because the proposed site was already farther away from the nearest neighbors than many other towers the County had previously approved.

On February 2, 2016, the Planning Commission held a public meeting on Municipal's application. At the meeting, Municipal's attorney reiterated Municipal's objections: the proposed condition to move the tower 300 feet to the

east would not make the tower less visible and the church would not allow Municipal to move the tower.[4] She further explained that the church would not allow Municipal to move the tower because it would preclude development of that area in the future. Finally, she noted that moving the tower 300 feet would require Municipal to start the process of receiving other regulatory approvals—including approval from the Federal Communications Commission—all over again.

The expert consultant from CityScape explained at the meeting that the tower was necessary to fill a cellular service coverage gap in the area, and the County's zoning division manager explained that Municipal had satisfied all of the zoning ordinance requirements. Eighteen local residents attended the meeting in opposition to the tower, and six of those residents spoke, disputing the existence of a coverage gap and expressing general aesthetic concerns[5] and the potential for the

[4] Although Municipal's attorney did, early in her remarks before the Planning Commission, say, "Number one, we can, but number two, it's not going to achieve anything if we did move it," in context it is clear this was a misstatement. The attorney clarified moments later that requiring Municipal to move the tower "ensures essentially a denial of [the] application because the current property owner will not allow us to move [the tower] to that location." Then, in response to a question from the Planning Commission's chairman, the attorney explained that "one of the main reasons" for Municipal's objection to the condition is the fact that "the church has said no, emphatically no." This reading of the attorney's statements is also consistent with Municipal's written objections to the condition.

[5] The first resident to speak, C.N., stated that he represented residents of seven neighborhoods, and explained that the residents opposed the tower because "such a tower would inflict an unsightly and wholly adverse impact on the aesthetics and character of the neighborhood. . . . This is a view the residents and visitors to Cobb County will see. Welcome to Cobb County, home of the mega tree." Another resident, E.W., stated that her yard is a private, "real-world escape place to relax and enjoy the natural beauty around us. . . . This tower will be visible from our entire yard. There will be no escaping this totally unnatural towering

tower to impact property values negatively. Prior to voting on the recommendation to make to the Board, one of the planning commission members posed the question "whether or not as a community you-all have looked at the staff recommendations and had any thoughts about whether or not moving it to a different location on the property would change your feelings about the request." Resident C.N., who was the spokesperson for seven neighborhoods, stated "[w]ell without appearing to be very rigid, we don't want a tower, no way, no how between—in our seven residential neighborhood area from the Cherokee County line on Wade Green to Wooten Lake Road." The commissioner stated that her understanding then was that the community did not want the tower anywhere on the church property, even if it was moved 300 feet to the east and was less visible, and resident C.N. confirmed that was correct. During their deliberations, the planning commissioners acknowledged that Municipal had demonstrated the tower was needed and met all of the applicable zoning requirements. The planning commissioner from the relevant district questioned whether moving the tower would make any difference to the tower's visibility. Nevertheless, she moved for a vote to recommend granting the application subject to the relocation condition. The Planning Commission unanimously approved the recommendation.

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fake pine tree." Resident J.C., noted that "[i]t's important to protect the quality of life and the aesthetics of residential neighborhoods."

The Board held a hearing on Municipal's application on February 16, 2016. Twenty-eight residents attended the hearing in opposition to the application. Municipal's attorney explained the need for the tower to provide greater cell coverage in the area. She also described an appraiser's report that had been submitted to the County, which explained that the tower would not harm property values and discussed nearby towers that had not caused a reduction in property values. Municipal's attorney further explained that moving the tower would increase visibility for some neighbors and that, in any event, the church would not allow the tower to be placed on the alternative site. Two of the residents spoke in opposition to the application at the hearing. One asserted that there was no demonstrated gap in coverage and the tower was not necessary. The other resident urged that if the Board "must approve" the application that it do so with the condition that the tower be moved 300 feet to the east so that they would not "have to look at it every time we walk out of our house." Additionally, a local realtor spoke on behalf of the residents in opposition to the application and expressed a generalized concern that the tower would impact property values negatively.

The independent consultant from CityScape spoke and supported the conclusion that the tower was necessary. Specifically, he confirmed that there was a "substantial gap" in coverage in the area, and that other siting areas had been considered but were not adequate to meet the service goals. When asked whether

moving the tower 300 feet to the east would harm the applicant, the consultant explained he perceived no engineering or coverage issues related to moving the tower. The consultant observed that moving the tower into more tree cover would "shield the portion of the tower that's in the trees," although a large, unshielded portion would still remain above the tree cover. He also noted that "[i]f you're moving away from the homes 300 feet, . . . you're going to probably reduce the visibility because you're moving further away. Of course, you're moving towards others, so . . . that's kind of more of . . . an opinion for you, [the Board] to assess."

Finally, the members of the Board spoke. Commissioner Birrell concluded that the tower was necessary to fill a gap in coverage and that it met all zoning requirements, but she also acknowledged the general aesthetic and property value concerns that had been raised. With respect to property values, Birrell said, the effect of cell towers on property values "is really subjective." As an example, she noted that despite the presence of one very prominent tower in the area, homes surrounding it were still "million-dollar homes and some more." She stated that "it does depend on, you know, the buyer, and I just—I mean, it's subjective. And we can't really say that it definitely impacts one way or the other. And there are cases where it does affect." Birrell then stated that she believed moving the tower 300 feet would reduce visibility, which "would help preserve the neighborhood and address some of the aesthetic concerns that the neighbors have[.]" Accordingly,

she made a motion to approve Municipal's application subject to the condition that the tower be moved 300 feet to the east. Commissioner Cupid acknowledged that the proposed tower would impact residents' views, but emphasized that it was not like traditional cell towers, and because it is to be designed to look like a tree, "it's not going to bear that same detriment in your view as you might associate with the traditional cell phone tower." Commissioner Weatherford stated that he did not see any reason to move the tower, noting that "[i]t seems to do nothing, except change a different view and closer to the road." He noted that he had approved a cell tower near his own home, and "you can barely see it, and it becomes invisible after a while." He explained he supported the tower "as it meets some of the best qualifications I've seen in my years of doing this as far as fall zone and impacting of neighbors[,] . . . but I really don't see a reason to move it 300 feet." The Board then unanimously voted to approve the application with the relocation condition. The Board did not issue any additional formal writing explaining its decision.

On March 16, 2018, Municipal filed its complaint in the district court alleging that the Board's decision was effectively a constructive denial of Municipal's application and was unsupported by substantial evidence in violation of the Telecommunications Act of 1996. The parties filed cross-motions for summary judgment. The district court granted summary judgment in favor of Municipal, concluding that the Board's approval of the permit with the condition

attached constituted a denial of the permit and was unsupported by substantial evidence. The district court ordered the County to issue Municipal a special land use permit without the relocation condition. The County appeals.

II. STANDARD OF REVIEW

We review *de novo* a district court's order granting a motion for summary judgment and construe "all reasonable doubts about the facts in favor of the non-movant." *Browning v. Payton*, 918 F.2d 1516, 1520 (11th Cir. 1990) (quoting *Tackitt v. Prudential Ins. Co. of Am.*, 758 F.2d 1572, 1574 (11th Cir. 1985)). We also review *de novo* the district court's determination that the Board's decision was not supported by "substantial evidence" and apply the same standard—§ 332's "substantial evidence" standard—that the district court applied. *Am. Tower LP v. City of Huntsville*, 295 F.3d 1203, 1207 (11th Cir. 2002).

III. DISCUSSION

The Telecommunications Act of 1996 "generally preserves 'the traditional authority of state and local governments to regulate the location, construction, and modification' of wireless communications facilities like cell phone towers, but imposes 'specific limitations' on that authority." *T-Mobile S., LLC v. City of Roswell*, 574 U.S. 293, 300 (2015) (quoting *Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 115 (2005)). One of those limitations is that "[a]ny decision by a State or local government or instrumentality thereof to deny a request to place, construct,

or modify personal wireless service facilities shall be in writing and supported by substantial evidence contained in a written record." 47 U.S.C. § 332(c)(7)(B)(iii). Although a locality must make its reasoning available in writing, there is no specific requirement regarding the format that writing must take, and a locality can rely on a detailed hearing transcript in order to support its decision as the County did here. *T-Mobile S.*, 574 U.S. at 303.

The substantial evidence standard under 47 U.S.C. § 332(c)(7)(B)(iii) is the same as the substantial evidence standard used by courts to review agency decisions. *Michael Linet, Inc. v. Vill. Of Wellington, Fla.*, 408 F.3d 757, 762 (11th Cir. 2005). "Substantial evidence" is defined as "more than a mere scintilla but less than a preponderance." *Id.* As the party seeking to overturn the Board's decision, Municipal bears the burden of proving that the decision was not supported by substantial evidence. *Id.*

It is well-established in this Circuit that "[a] blanket aesthetic objection does not constitute substantial evidence under § 332. Such a standard would eviscerate the substantial evidence requirement and unnecessarily retard mobile phone service development." *Id.* Nevertheless, we have noted that "[a]esthetic objections coupled with evidence of an adverse impact on property values or safety concerns can constitute substantial evidence." *Michael Linet*, 408 F.3d at 762; *see also Preferred Sites, LLC v. Troup Cty.*, 296 F.3d 1210, 1219 (11th Cir. 2002)

(explaining that "[a]esthetic concerns may be a valid basis for denial of a permit *if* substantial evidence of the visual impact of the tower is before the board").[6] Thus, while in certain circumstances particularized aesthetic concerns may be a valid basis for the denial of an application, "[m]ere generalized concerns regarding aesthetics . . . are insufficient to create substantial evidence justifying the denial of a permit under [the Telecommunications Act]." *Preferred Sites*, 296 F.3d at 1219.

In this case, the County raises two arguments on appeal. First, the County argues that its decision to deny the application was justified because Municipal did not meet its burden of providing sufficient information to show that the alternate site was unavailable. Second, the County argues that the Board's decision to deny Municipal's application was supported by substantial record evidence as required by the Telecommunications Act. We address those arguments in turn.

A. Whether Municipal Provided Sufficient Information.

The County argues that it was justified in denying Municipal's application because Municipal failed to meet its burden of producing sufficient information to show that the alternative site was unavailable. Cobb County's zoning ordinance provides that "[i]n all applications for a special land use permit the burden shall be on the applicant both to produce sufficient information to allow the county fully to

[6] Because the case at hand concerns only those general aesthetic concerns, we do not reach the question of the extent to which particularized aesthetic objections could suffice in a different case.

consider all relevant factors and to demonstrate that the proposal complies with all applicable requirements and is otherwise consistent with the policies reflected in the factors enumerated in this chapter for consideration by the county." Cobb County Code § 134-37(e)(15).

The district court concluded that it is "undisputed that Municipal substantially complied with the requirements of the local zoning ordinance." However, the County did argue in its motion for summary judgment that Municipal failed to meet its burden of providing sufficient information because it did not submit documentation showing the proposed site was unavailable. Thus, we disagree that it is undisputed that Municipal "substantially complied." What is undisputed, however, is that Municipal repeatedly represented throughout the application process that the church would not lease the new location to it and it could not move the tower, and no County representative, Board Commissioner, or Planning Commission member or staff person, ever alleged, or even remotely suggested, that Municipal had failed to meet its burden of providing sufficient information in compliance with the County's zoning ordinance.[7] Indeed, the

[7] In fact, the CityScape consultant, the County's planning division and zoning division staff, the County's zoning division manager, the Planning Commissioners, and at least two Board members unequivocally stated that Municipal met all applicable zoning requirements. Additionally, the fact that the County did not question the representation that the cell tower could not be moved despite numerous opportunities to do so further undermines its argument. Specifically, after the planning and zoning division staff proposed moving the tower, Municipal filed a supplement to its application informing the County that the proposed location was

County did not articulate this reason as a basis for its decision until after the commencement of this action in the district court.[8] The County cannot "rely on [a] rationalization[] constructed after the fact" and then cherry-pick from the record evidence that supports it. *See Preferred Sites*, 296 F.3d at 1220 n.9 (rejecting the appellant's stated reasons for denial of an application where the "reasons . . . were not espoused prior to the commencement of [the] action," as the "[a]ppellant may not rely on rationalizations constructed after the fact to support the denial of [a]ppellee's application"); *see also T-Mobile S.*, 574 U.S. at 304 n.3 (noting that a process in which the locality could wait until a lawsuit is commenced to proffer reasons for its decision is unworkable and would "turn judicial review on its head").[9] Accordingly, the County cannot now rely on Municipal's alleged failure

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unavailable because the church would not lease it. Then at the Planning Commission meeting, Municipal explained again that the church would not allow it to move the tower. Finally, at the Board hearing, Municipal reiterated that the church would not lease the new location. At any of these points, had the County been concerned about the veracity of Municipal's representation that it could not move the tower, the County could have requested documentation. And even if the Board did not consider the issue until it was raised by residents at the Board meeting, it still could have at that point requested documentation.

[8] The County asserts that the record as a whole demonstrates that from the beginning the Board disputed Municipal's representation that the new location was unavailable because the church was not willing to lease it, citing statements made by residents at the Board hearing, which indicated that a lease between the church and Municipal had not been finalized. However, the record as a whole demonstrates that, notwithstanding the residents' comments, no Commissioner ever questioned Municipal about its representation that the proposed relocation site was unavailable or even remotely suggested that Municipal needed to require proof of such.

[9] The County argues that an applicant "cannot make a naked request to construct a telecommunications tower, i.e., appear empty-handed before the zoning authority, and then complain that the zoning authority's simple 'no' answer is not supported by substantial

to produce evidence concerning the unavailability of the new location as a basis for its decision.

B. Whether the County's Decision is Otherwise Supported by Substantial Evidence.

The County argues that the district court erred in its determination of whether the decision was supported by substantial evidence because the district court considered only the statements of members of the Board, instead of the record as a whole. Specifically, the County maintains that when the record is considered as a whole, substantial evidence supports the Board's decision to attach the condition that Municipal move the tower 300 feet to the east, referring to letters submitted from neighboring residents expressing aesthetic concerns, as well as concerns that the tower would decrease property values and impact the neighborhood's safety. The County correctly notes that when assessing if substantial evidence supports the Board's decision, we are required to look at the whole record, but we do so only in light of the locality's stated reasons for its decision. *Am. Tower*, 295 F.3d at 1209 n.8; *see also SEC v. Chenery Corp.*, 318 U.S. 80, 95 (1943) (holding that "an administrative order cannot be upheld unless the grounds upon which the agency acted in exercising its powers were those upon

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evidence." *AT&T Wireless PCS, Inc. v. Town of Porter*, 203 F. Supp. 2d 985, 994 (N.D. Ind. 2002). But Municipal did not appear empty-handed. It submitted an extensive application and supplemented that application with new information numerous times, including by informing the County about the unavailability of the proposed site.

which its action can be sustained"). Here, the County proffered a transcript of the minutes from the Board hearing as the reasoning for the Board's decision. The transcript reveals that the Board acknowledged in passing that numerous residents had submitted letters and expressed various concerns surrounding the tower. When explaining his or her decision, however, no Commissioner indicated that they specifically relied on those letters or concerns or specified what other record evidence they found persuasive. Rather, each Commissioner focused on the aesthetic concerns that were a focal point of the planning commission meeting and the Board hearing. Although the County urges us to consider additional evidence in the record which could have otherwise supported the Board's decision, we cannot do so.[10] Like the district court, our review, is circumscribed by the applicable standard of review. To be clear, although "[w]e look at the whole record . . . we cannot displace the Board's fair estimate of conflicting evidence and cannot freely re-weigh the evidence. We only determine whether substantial evidence exists to support the local board's decision." *Am. Tower*, 295 F.3d at 1209 n.8; *see also Preferred Sites*, 296 F.3d at 1220 n.9 (explaining that the "[a]ppellant may not rely on rationalizations constructed after the fact to support the denial of [a]ppellee's application").

[10] We express no opinion as to whether the record evidence not clearly relied upon by the Board would have constituted substantial evidence.

For the reasons that follow, the Board's decision was not supported by substantial evidence. Commissioner Birrell stated that the tower was necessary to meet a gap in cell coverage and that Municipal met all applicable zoning requirements. But she also noted the community's general aesthetic concerns and concerns about a possible decrease in property values. As to the property values issue, she ultimately concluded that the Board of Commissioners could not determine one way or the other the tower's effect.[11] Nevertheless, she stated that she believed moving the tower 300 feet would reduce visibility, which "would help preserve the neighborhood and address some of the aesthetic concerns that the neighbors have[.]"

Similarly, Commissioner Cupid stated that she "support[ed] Commissioner Birrell's analysis" and "under[stood] the concerns of the neighbors." However, she also noted that the proposed tower was "not the traditional cell phone tower that we typically see on the side of the interstate" and would not "bear that same detriment in your view as you might associate with the traditional cell phone tower." Commissioner Weatherford emphatically supported the need for the

[11] The County disputes the district court's finding that Commissioner Birrell dismissed adverse effects on property values, arguing that Commissioner Birrell actually stated that the tower would affect property values. However, read in context, what Commissioner Birrell said is that "there are cases where [a tower] does affect" property values but because purchasing decisions are subjective, the Board could not make a determination one way or the other as to the effect of *this* tower.

tower, but dismissed aesthetic concerns, explaining that in his experience with a similarly designed tower, "you can barely see it, and it becomes almost invisible after a while." He also unequivocally stated that he saw no "reason to move it 300 feet." In light of the Commissioner's statements, the only reasons clearly expressed by the Board that could support denying Municipal's application were generalized aesthetic concerns. While the County's local zoning laws permit it to consider aesthetic impact of the tower, we have held that blanket generalized aesthetic objections, standing alone—like those proffered here—are not enough to constitute substantial evidence under § 332. *See Preferred Sites*, 296 F.3d at 1219. Accordingly, we conclude that the Board's decision was not supported by substantial evidence.

IV. CONCLUSION

The judgment of the district court is **AFFIRMED**.

parent "will not be excused from showing interest in [a] child's welfare by whatever means available[,]" even if "his options for showing affection [were] greatly limited." *See In re R.R.*, 180 N.C. App. 628, 634, 638 S.E.2d 502, 506 (2006) (citation omitted) (rejecting respondent-father's argument that "he did not willfully abandon the child because he was not given the opportunity to participate in the child's life").

The trial court's findings of fact establish that respondent made no effort whatsoever during the statutory period to participate in Brian's life. These findings are supported by clear, cogent, and convincing evidence. Petitioner filed her initial petition to terminate respondent's parental rights in December 2018, which was dismissed and subsequently refilled by petitioner in February 2019. After respondent was served with the first petition to terminate his parental rights in December 2018, he discussed with his attorney that he could go to Family Abuse Services to set up visitation with Brian. Nonetheless, respondent never went to Family Abuse Services to do so. Respondent was released from custody in December 2018, so, contrary to respondent's argument, his incarceration would not have hindered visitation. Though respondent was out of jail and fully aware that he could exercise visitation rights, he did not visit Brian. Thus, after being made aware that petitioner was seeking to initiate proceedings to terminate his parental rights, and after being given a second chance to prioritize his responsibility to care for Brian, respondent took no action because he had "so much going on at one time." Additionally, respondent neither sent Brian any gifts or cards nor inquired about Brian's welfare despite having petitioner's parents' address. Respondent also was not prohibited from contacting them. The trial court properly determined that respondent willfully chose not to see Brian.

The trial court's findings of fact demonstrate that respondent "willfully withheld his love, care, and affection from [Brian] and that his conduct during the determinative six-month period constituted willful abandonment." *In re C.B.C.*, 373 N.C. 16, 23, 832 S.E.2d 692, 697 (2019) (citation omitted). The trial court appropriately found grounds to terminate respondent's parental rights under N.C.G.S. § 7B-1111(a)(7). We affirm.

AFFIRMED.

374 N.C. 133

PHG ASHEVILLE, LLC, Petitioner

v.

CITY OF ASHEVILLE, Respondent

No. 434PA18

Supreme Court of North Carolina.

Filed April 3, 2020

Background: Hotel developer petitioned for writ of certiorari seeking review of city's denial of application for conditional use permit to an eight-story hotel in city's central business district but outside traditional downtown core. The Superior Court, Buncombe County, No. 17 CVS 01188, William H. Coward, J., reversed and remanded. City appealed. The Court of Appeals, 822 S.E.2d 79, affirmed. City petitioned for discretionary review, which was allowed.

Holdings: The Supreme Court, Ervin, J., held that developer presented competent, material, and substantial evidence that proposed hotel satisfied relevant ordinance standards for grant of conditional use permit.

Modified and affirmed.

Earls, J., filed dissenting opinion in which Hudson, J., joined.

1. Zoning and Planning ⚿1345

A "conditional use permit" is one issued for a use which the ordinance expressly permits in a designated zone upon proof that

certain facts and conditions detailed in the ordinance exist.

See publication Words and Phrases for other judicial constructions and definitions.

2. Zoning and Planning ⚿1422

In considering an application for a conditional use permit, a local governmental board must determine whether the applicant has produced competent, material, and substantial evidence tending to establish the existence of the facts and conditions which the ordinance requires for the issuance of the permit, and in the event the applicant satisfies this initial burden of production, then prima facie he is entitled to the issuance of the requested permit.

3. Zoning and Planning ⚿1422, 1429

Once a conditional use permit applicant establishes prima facie that he is entitled to the permit, any decision to deny the application should be based upon findings contra which are supported by competent, material, and substantial evidence appearing in the record, with the local governmental board lacking the authority to deny a permit on grounds not expressly stated in the ordinance.

4. Zoning and Planning ⚿1625, 1703

In reviewing a town board's decision concerning application for conditional use permit, the superior court sits in the posture of an appellate court and does not review the sufficiency of evidence presented to it but reviews that evidence presented to the board.

5. Constitutional Law ⚿4096
Zoning and Planning ⚿1625, 1632, 1703

In reviewing a town board's decision concerning application for conditional use permit, the superior court is charged with (1) reviewing the record for errors of law; (2) insuring that procedures specified by law in both statute and ordinance are followed; (3) insuring that appropriate due process rights of a petitioner are protected including the right to offer evidence, cross-examine witnesses, and inspect documents; (4) insuring that decisions of town boards are supported by competent, material, and substantial evidence in the whole record; and (5) insuring that decisions are not arbitrary and capricious. U.S. Const. Amend. 14; N.C. Gen. Stat. Ann. § 160A-393(k)(1)(b).

6. Zoning and Planning ⚿1625

The exact nature of the standard of review to be utilized by the superior court on appeal of a local governmental board's decision concerning application for conditional use permit depends upon the particular issues presented on appeal.

7. Zoning and Planning ⚿1656

If a petitioner asserts that the local governmental board has committed an error of law in its decision concerning application for conditional use permit, that contention is subject to de novo review by the superior court, and the court considers the matter anew and freely substitutes its own judgment for that of the board.

8. Zoning and Planning ⚿1703

If a petitioner asserts that a local governmental board's decision concerning application for conditional use permit was either (1) arbitrary or capricious or (2) not supported by competent, material, or substantial evidence, the superior court is required to conduct a whole record review under which the court examines all competent evidence to determine whether the board's decision is supported by substantial evidence.

9. Zoning and Planning ⚿1642

Under the whole record test, the superior court is not allowed to replace local governmental board's judgment as between two reasonably conflicting views concerning application for conditional use permit, even though the court could justifiably have reached a different result had the matter been before it de novo.

10. Zoning and Planning ⚿1725

Any order that the superior court enters in the course of reviewing a local governmental board's decision relating to the issuance of a conditional use permit must set forth sufficient information in its order to reveal the scope of review utilized and the application of that review.

11. Zoning and Planning ⚿1747

If appellate review of a superior court's order concerning an appeal of a local governmental board's decision on conditional use permit application is requested, the Court of Appeals examines the superior court's order for errors of law, with that process being a twofold task: (1) determining whether the superior court exercised the appropriate scope of review and, if appropriate, (2) deciding whether the court did so properly. N.C. R. App. P. 16(a).

12. Zoning and Planning ⚿1745

Supreme Court is required to make the same inquiry that the Court of Appeals is called upon to undertake in reviewing a superior court's order concerning an appeal of a local governmental board's decision on conditional use permit application. N.C. R. App. P. 16(a).

13. Zoning and Planning ⚿1422

The extent to which an applicant has presented competent, material, and substantial evidence tending to satisfy the standards set out in the applicable ordinance for the issuance of a conditional use permit is a question directed toward the sufficiency of the evidence presented by the applicant and involves the making of a legal, rather than a factual, determination.

14. Zoning and Planning ⚿1422

Developer presented competent, material, and substantial evidence to city council that its proposed eight-story hotel in city's central business district but outside traditional downtown core satisfied the relevant standards in city's land use ordinance for grant of conditional use permit, by presenting testimony from architects, an appraiser, a traffic engineer, a certified planner, and developer's vice president, and thus city lacked authority to deny developer's application for conditional use permit absent any competent, material, and substantial evidence presented in opposition to developer's showing.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 822 S.E.2d 79 (N.C. Ct. App. 2018), affirming an order entered on 2 November 2017 by Judge William H. Coward in Superior Court, Buncombe County. Heard in the Supreme Court on 6 January 2020.

Fox Rothschild LLP, Greensboro, by Kip D. Nelson and Thomas E. Terrell, Jr., for petitioner-appellee.

Poyner Spruill LLP, by Andrew H. Ertes-chik, Chad W. Essick, Raleigh, Nicolas E. Tosco, Colin R. McGrath, Raleigh, and N. Cosmo Zinkow, for respondent-appellant.

ERVIN, Justice.

The question before us in this case is whether the City of Asheville properly denied an application for the issuance of a conditional use permit submitted by PHG Asheville, LLC, seeking authorization to construct a hotel in downtown Asheville. The trial court and the Court of Appeals both held that the City had improperly concluded that PHG had failed to present competent, material, and substantial evidence tending to show that the proposed hotel satisfied the standards for the issuance of a conditional use permit set out in the City's unified development ordinance. In seeking relief before this Court, the City argues that the Court of Appeals ignored this Court's precedents concerning the manner in which applications for the issuance of conditional use permits should be evaluated, incorrectly applied the applicable standard of review, and erroneously disregarded the City's findings of fact. After carefully reviewing the record, briefs, and arguments of the parties, we conclude that PHG presented competent, material, and substantial evidence that the proposed hotel satisfied the relevant conditional use permit standards set out in the City's unified development ordinance and that the record did not contain any competent, material, and substantial evidence tending to establish that the proposed development failed to satisfy the applicable ordinance standards. Therefore, the City lacked the authority to deny the requested conditional use permit. As a result, we affirm the Court of Appeals' decision.

On 27 July 2016, PHG submitted a conditional use permit application to the City's planning department in which it requested

authorization to construct an eight-story, 185-room, 178,412 square-foot hotel and an adjoining structure containing 200 parking spaces on a tract of real property located at 192 Haywood Street. The 2.05-acre tract upon which the proposed hotel was to be located was contained in the Patton/River Gateway portion of the "Central Business District," which is outside the "Traditional Downtown Core." According to the Downtown Master Plan that the City had adopted in March 2009, the Patton/River Gateway area "should ... accommodate significant residential and extended-stay hotel development," with "some [of this development to occur] in taller buildings."

As a result of the size of the proposed development and its presence in the Downtown Design Review Overlay portion of the Central Business District, section 7-5-9.1 of the City's unified development ordinance required PHG to undertake a Level III site plan review of the project. The Level III site plan review process required the holding of a pre-application conference involving area representatives; staff review of the application; and review by the Technical Review Committee, the Downtown Commission, and the Planning and Zoning Commission prior to final review by the Asheville City Council. The Technical Review Committee and the Downtown Commission each recommended approval of the project subject to variances to be approved by the Planning and Zoning Commission and the making of certain modifications to the project by PHG. The Planning and Zoning Commission granted two variances relating to the project that modified the proposed lot frontage and the height of the street wall before unanimously recommending approval of the conditional use permit to the City Council.

On 24 January 2017, PHG's application for a conditional use permit came before the Asheville City Council for a quasi-judicial public hearing. According to Section 7-16-2 of the City's unified development ordinance:

> (c) *Conditional use standards.* The Asheville City Council shall not approve the conditional use application and site plan unless and until it makes the following findings, based on the evidence and testimony received at the public hearing or otherwise appearing in the record of the case:
>
> (1) That the proposed use or development of the land will not materially endanger the public health or safety;
>
> (2) That the proposed use or development of the land is reasonably compatible with significant natural and topographic features on the site and within the immediate vicinity of the site given the proposed site design and any mitigation techniques or measures proposed by the applicant;
>
> (3) That the proposed use or development of the land will not substantially injure the value of adjoining or abutting property;
>
> (4) That the proposed use or development of the land will be in harmony with the scale, bulk, coverage, density, and character of the area or neighborhood in which it is located;
>
> (5) That the proposed use or development of the land will generally conform with the comprehensive plan, smart growth policies, sustainable economic development strategic plan, and other official plans adopted by the city;
>
> (6) That the proposed use is appropriately located with respect to transportation facilities, water supply, fire and police protection, waste disposal, and similar facilities; and
>
> (7) That the proposed use will not cause undue traffic congestion or create a traffic hazard.

At the hearing before the City Council, PHG presented the testimony of three expert witnesses, including Tommy Crozier, a licensed real estate appraiser with over fifteen years' experience in conducting property appraisals, and Kevin Dean, a registered professional engineer.

In his testimony, Mr. Crozier addressed the third standard set out in the City's ordinance, which required consideration of whether the proposed hotel would significantly injure the value of adjoining or abutting properties. Mr. Crozier testified that

three properties adjoined the tract upon which the proposed hotel would be located, including an apartment building, a church, and a multi-center office building. According to Mr. Crozier, "the three adjoining properties are valued for tax purposes under $3 million," while the construction of the hotel would cost about $25 million. Mr. Crozier described the situation at issue in this case as a textbook example of the principle of progression, in which "lower valued properties are enhanced by the value of higher value[d] properties." On the basis of his examination of recent land sale transactions in the vicinity of the proposed hotel, Mr. Crozier opined that "values have increased substantially over the last few years" as a result of the construction of other hotels in the area. As a result, Mr. Crozier concluded that "[t]he proposed subject hotel will not impair the value of adjoining or abutting property" and "should meaningfully enhance the values of surrounding properties."

At the conclusion of Mr. Crozier's testimony, Vice Mayor Gwen Wisler asked Mr. Crozier whether he had considered comparable sales data involving transactions in other cities in which two hotels had been located within a quarter mile from a new hotel. After acknowledging that he had not included data of that nature in his report, Mr. Crozier stated that "there is so much demand for new hotel rooms in the market that [this new hotel] will not impact the value negatively of any of the hotels around here" in light of the fact that downtown hotel occupancy in Asheville is around 80 to 85 percent even though occupancy rates in an efficient market at equilibrium would be approximately 65 percent. For example, Mr. Crozier testified that, following the opening of the Hyatt Place in downtown Asheville, the business of the adjoining Hotel Indigo had increased by about ten percent.

In his testimony, Mr. Dean addressed the issue of whether construction and operation of the proposed hotel would result in any undue traffic congestion or create a traffic hazard. Mr. Dean testified that he had consulted with the City's traffic engineer, who had informed him that he only needed to provide a trip generation table and the anticipated distribution of those trips in order to satisfy the relevant ordinance requirement. Based upon the industry standards applicable to traffic studies, Mr. Dean determined that new traffic at nearby intersections resulting from the construction and operation of the proposed hotel would represent less than five percent of the total traffic that passed through that intersection and would only increase the overall traffic delay at nearby intersections by approximately four seconds. In order to make these determinations, Mr. Dean testified that he had "collected peak hour traffic counts on November 10th of [2016]" and "performed a trip generation for the site based on [the] Institute of Transportation Engineer[s'] data" and information generated by appropriate software. As a result, Mr. Dean concluded that "the proposed use will not cause undue traffic congestion or create a traffic hazard."

At the conclusion of Mr. Dean's testimony on direct examination, Councilman Cecil Bothwell asked Mr. Dean why he had based his analysis upon conditions experienced on November 10th, which was a Thursday, rather than conditions in the summer or in September or October, when Asheville experiences higher tourist-related traffic levels. In response, Mr. Dean testified that "traffic [studies] are only supposed to be counted between Tuesdays and Thursdays to get a typical weekday condition that's not affected by a Monday or Friday variation," that the use of this approach is "industry standard," and that traffic engineers are generally required to only conduct traffic assessments on Tuesdays through Thursdays. In addition, Councilman Bothwell questioned Mr. Dean about the queuing that already occurs at intersections near the hotel and whether the new entrance to the hotel would exacerbate existing conditions. After acknowledging that he could not argue with the Councilman Bothwell's "anecdotal stories," Mr. Dean stated that "the amount of traffic that's going to be added is only supposed to be [a] negligible increase to any [queues] that you would see" and will not "cause any undue additional issues."

Vice Mayor Wisler asked further questions about the time of day upon which Mr. Dean's

study focused, about whether Mr. Dean had taken the times at which people check into and out of a hotel into account, and whether Mr. Dean had studied conditions in the summer, during which the City experienced its highest levels of traffic. In response, Mr. Dean stated that he had collected the data upon which his study was based on "a typical weekday in November" by measuring traffic from 7:00 a.m. to 9:00 a.m. and from 4:00 p.m. to 6:00 p.m., periods which "generally represent[ ] the peak hour" of the streets that were at issue in his study. At that point, Vice Mayor Wisler asked whether Mr. Dean had taken Mr. Crozier's appraisal, which mentioned certain hotels and apartments that were either planned to be built or had just been added, into account in conducting his study. Mr. Dean replied by stating that he had not considered the information to which Vice Mayor Wisler alluded and that he had, instead, examined the impact of the proposed hotel upon existing traffic conditions. In addition, Mr. Dean stated that, if there is a higher amount of traffic near the hotel originating from sources other than the hotel itself than was contemplated in his study, the traffic resulting from the construction and operation of the hotel would constitute a smaller percentage of the overall traffic and have a smaller percentage impact upon overall traffic conditions.

Three members of the public spoke in favor of the approval of the conditional use permit. Another member of the public asked a procedural question without supporting or opposing the issuance of the permit. Charles Rawls, a native of Asheville and resident of the nearby Montford community, expressed uncertainty concerning whether he opposed the project and posed certain questions about traffic-related issues. With respect to the extent to which traffic would be entering and exiting the proposed parking deck onto North French Broad Road, Mr. Rawls commented that, "heading south on French Broad, there is a hill there that is a blind hill" that might create an issue for persons who lacked familiarity with the area. In addition, Mr. Rawls asked "how much of the traffic coming and going to that parking garage would be happening at peak hours so that it might affect the safety of the public" and whether Mr. Dean had observed the angle and sight limitations relating to that hill. In response, Mr. Dean stated that he had not seen that hill and that "[w]e did not conduct a sight distance check, which is typically what's required." According to Mr. Dean, the North Carolina Department of Transportation "typically requires driveways to meet certain sight distance requirements" and that he had not conducted the "check" in question because his firm had not been involved in designing the site. No one presented any evidence in opposition to the approval of the proposed conditional use permit.

After Mayor Esther Manheimer closed the evidentiary hearing, Vice Mayor Wisler immediately moved that PHG's conditional use permit application be denied on the grounds that the applicant had failed to meet the first, second, third, fourth, fifth, and seventh standards set out in the City's unified development ordinance and Councilman Keith Young seconded the motion. At that point, Councilman Bothwell expressed agreement with the assertion that PHG had failed to satisfy the traffic-related standard and thanked Mr. Rawls for "discover[ing] the lack of the sight distance examination." At that point, the City Council voted unanimously to deny the conditional use permit application.

On 14 February 2017, the City entered a written order that contained forty-four findings of fact in support of its decision to deny the issuance of the requested conditional use permit on the basis of its failure to satisfy six of the seven standards set out in the City's unified development ordinance. Among other things, the City Council found as a fact that:

> 18. An appraiser, Tommy Crozier, testified on behalf of the Applicant and presented an "Expert Report," which purported to show that CUP Standard 3 was met, *i.e.*, that the development of the Hotel would "not substantially injure the value of adjoining or abutting property." However, Mr. Crozier's testimony and the Expert Report do not contain facts and data sufficient to prove that there would not be a substantial adverse impact on such values following construction of the Hotel.

19. Mr. Crozier's testimony and the Expert Report state generally, and the Council accepts as fact, that the values of property in this area of Asheville (northwest downtown) have been increasing in recent years, and that recent sales prices exceed the assessed tax values of properties in the area. There was, however, no evidence to establish the date of the tax appraisals or evidence that would indicate how these tax values would have any relevance to CUP Standard 3. There was no evidence, through facts and data, to indicate how the Hotel would affect or impact such an increase in value (assuming such an increase would continue) on the adjacent and adjoining properties.

20. There was no sales data presented and there are no comparable sales in the Expert Report, which provide information about the sale prices of properties adjacent to hotels in Asheville, or elsewhere, before and after a hotel was constructed on the tract in question. In fact, there was no data through, e.g., comparable sales, that could show the before and after value of properties adjacent to any hotels in the City, even though the Expert Report indicates there have been multiple hotels constructed in the City in recent years, and at least two in the immediate area.

21. That property values are increasing in the area generally over time does not establish the impact of this Hotel on the adjoining and adjacent tracts, nor whether the value of those particular tracts would suffer an adverse impact if the Hotel is constructed.

22. There was no data or comparable sales to substantiate Mr. Crozier's claim that the Hotel Indigo was in part, the reason for the recent increase in property values in this area of downtown Asheville, or to show such increases were higher or lower than in other parts of the City during the same time period.

23. There was no evidence or data that could show the impact on the value of adjacent properties, when the proposed Hotel would be the third hotel in a several block radius. It appears that additional hotels could increase the value of other nearby hotels, but no facts or data were provided that could establish that property with other uses would not be substantially diminished.

24. The Expert Report also contains the following statements, which brings the reliability of the Expert Report into question:

> a. "The information contained in the Report or upon which the Report is based has been gathered from sources the Appraiser assumes to be reliable and accurate. The owner of the Property may have provided some of such information. Neither the Appraiser nor C&W [Cushman & Wakefield] shall be responsible for the accuracy or completeness of such information, including the correctness of estimates, opinions, dimensions, sketches, exhibits and factual matters. . . . . [sic]"
>
> b. "This report assumes that the subject will secure an affiliation with Embassy Suites or a similar chain. If the subject does not maintain a similar affiliation, it could have a negative impact on the subject's market value."
>
> c. "Our financial analyses are based on estimates and assumptions which were developed in connection with this appraisal engagement. It is, however, inevitable that some assumptions will not materialize and that unanticipated events may occur which will cause actual achieved operating results to differ from the financial analyses contained in the report, and these difference[s] may be material. It should be further noted that we are not responsible for the effectiveness of future management and marketing efforts upon which the projected results contained in this report may depend."

25. The CUP application does not request that the Hotel be only an Embassy Suites hotel or a "similar chain."

26. The methodologies employed, and data provided, by the Applicant's witness, Mr. Crozier, were inadequate to allow Council to find that the Hotel would not substantially injure the value of adjoining properties.

27. There is significant traffic in downtown Asheville near and around the Property in September and October, and in the summer months. The vehicular traffic in the area will increase if the Hotel is constructed.

28. The Applicant presented the testimony of a traffic engineer, Kevin Dean, as well as Mr. Dean's written "Traffic Assessment." The Traffic Assessment did not provide any facts or data which could show the level of traffic or traffic counts for any time of the year, except during a four hour period during the day on November 10, 2016, which was a Thursday. The level of traffic in this area is much higher at other times of the year, particularly the summer months; however, there were no traffic counts or any traffic data provided for any date other than November 10.

29. Mr. Dean was not aware of the environmental conditions on November 10, 2016, or whether such conditions could have affected traffic volumes on that date.

30. The Applicant's traffic counts were done on November 10, 2016 between the hours of 7 a.m. and 9 a.m., and between the hours of 4 p.m. and 6 p.m. Under industry standards, this is apparently "assumed" to be the time of highest traffic on nearby streets, but there was no evidence which could establish this would be the case for this area of Asheville.

31. The number of trips generated from the Hotel in the Traffic Assessment was also derived from an industry standard, and not the actual trips expected from this Hotel at this location. Hotels in downtown Asheville have an occupancy rate in excess of 85%, but the general rate for an efficient market is 65%. The Traffic Assessment did not take this expected higher occupancy of the Asheville market into account.

32. The Applicant did not submit any traffic data for Friday through Sunday, even though those are typically the days that tourists visit the City and traffic volumes are higher.

33. The estimated traffic counts used for the Traffic Assessment and Mr. Dean's opinion, were also these on a "typical weekday." There was no weekend data collected, even though this is the time that most tourists visit the Asheville downtown.

34. Without accurate traffic counts for any days other than Thursday November 10, there is no data or evidence to determine whether the additional trips generated by the Hotel (as well [as] those from the other tourists which the Hotel will attract but who do not stay at the hotel) would not decrease the existing level of service to an unacceptable level. The Level of Service Summary in the Traffic Assessment was not based on complete information or data.

35. There was no data or evidence presented that could show what the level of traffic would be with three hotels (Indigo, Hyatt and Embassy Suites) located within a several block area for Friday, Saturday and Sunday during the summer months or other high traffic periods.

36. The Traffic Assessment did not account for traffic that will be generated by future hotels and apartments in the downtown area that are planned and approved, but which are not yet fully constructed and operational.

37. The proposed Hotel includes a twenty-foot wide driveway, which provides street access to and from the parking structure and North French Broad Avenue.

38. There is a blind hill with limited visibility in the vicinity of the Hotel's parking deck[ ] entrance and exit onto North French Broad Avenue. To determine whether the addition of that entrance/exit would cause a safety issue would require a "sight distance check." A sight distance check was not a part of the Traffic Assessment and no other evidence was presented to show the parking deck entrance or exit would not endanger driver or pedestrian safety. The Traffic Assessment did no analysis relating to traffic safety as it relates to vehicles entering and exiting this driveway.

Based upon these findings of fact, the City Council concluded that PHG had failed to produce competent, material, and substantial evidence that the hotel (1) "will not material-

ly endanger the public health or safety;" (2) "is reasonably compatible with significant natural and topographic features of the site and within the immediate vicinity of the site given the proposed site design and any mitigation techniques or measures proposed by the applicant;" (3) "will not substantially injure the value of the adjoining or abutting property;" (4) "will be in harmony with the scale, bulk, coverage, density, and character of the area or neighborhood in which it is located and, moreover, the evidence instead showed the Hotel would not be in harmony with the scale, bulk, coverage and character of the area and neighborhood;" (5) "will generally conform to the comprehensive plan, smart growth policies, sustainable economic development strategic plan and other official plans adopted by the City and, moreover, the evidence instead showed the Hotel would not generally conform to the City's 2036 Vision Plan;" and (6) "will not cause undue traffic congestion or create a traffic hazard."

On 16 March 2017, PHG filed a petition seeking the issuance of a writ of certiorari pursuant to N.C.G.S. § 160A-393 authorizing judicial review of the City Council's decision to deny its permit application in which PHG alleged that the City Council had (1) "erred as a matter of law by not accepting PHG's evidence as competent, material, and substantial evidence entitling PHG to a permit;" (2) made findings of fact not supported by substantial evidence; and (3) made findings of fact that were arbitrary and capricious.[1] On the same day, the requested writ of certiorari was issued. The issues raised by PHG's petition were heard before the trial court at the 2 October 2017 civil session of Superior Court, Buncombe County. On 2 November 2017, the trial court entered an order determining that PHG was entitled to the issuance of the requested conditional use permit and ordered that this matter be "remanded to the City of Asheville City Council with the directive that it grant PHG's application and issue it a Conditional Use Permit at its next regularly scheduled meeting."

In support of this decision, the trial court concluded that, contrary to the City Council's decision, the evidence submitted in support of PHG's request for the issuance of a conditional use permit "was competent, material and substantial and sufficient to establish a *prima facie* case of entitlement to a conditional use permit" and that, "[i]n deciding otherwise, the Council [had] made an error of law." In addition, the trial court concluded that "the [C]ity's decision was not supported by substantial evidence appearing in the record" and was, instead, "arbitrary and capricious." The trial court further determined that the testimony of Mr. Rawls concerning traffic safety-related issues was "incompetent as a matter of law" and that the City Council had failed to recognize that "PHG had only a burden of production, and not a burden of persuasion" at the first stage of this proceeding. The City noted an appeal to the Court of Appeals from the trial court's order.

In seeking relief from the trial court's order before the Court of Appeals, the City argued that the trial court had applied an incorrect standard of review when it "expressly and erroneously applied *de novo* review in evaluating whether the evidence was 'sufficient.' " In addition, the City contended that the trial court had erred by concluding that PHG had met its burden of eliciting competent, material, and substantial evidence tending to show that the hotel would not substantially injure the value of adjoining or abutting properties; cause undue traffic congestion or a traffic hazard; or be in harmony with the scale, bulk, coverage, density, and character of the area or neighborhood in which the proposed hotel was intended to be located.[2] Finally, the City contended that the trial court had erred by considering the recommendations that had been made by vari-

1. PHG also alleged that the City Council had violated its due process rights by pre-judging the permit request. However, the trial court did not agree, and this issue was not appealed.

2. The City failed to argue before the Court of Appeals that the trial court had erred by concluding that PHG had satisfied its burden of producing competent, material, and substantial evidence addressing the three ordinance criteria that are not discussed in the text of this opinion, thereby abandoning its right to challenge the trial court's decision with respect to those criteria on appeal. *See* N.C.R. App. P. 28(a) (stating that "[i]ssues not presented and discussed in a party's brief are deemed abandoned").

ous City committees and advisory boards and by holding that the City Council's decision was arbitrary and capricious.

In rejecting the City's challenge to the trial court's order, the Court of Appeals began by concluding that the trial court had correctly applied the appropriate standard of review. *PHG Asheville, LLC v. City of Asheville*, 822 S.E.2d 79, 86 (N.C. Ct. App. 2018) (stating that "[t]he superior court's order shows it did not weigh evidence, but properly applied *de novo* review to determine the initial legal issue of whether Petitioner had presented competent, material, and substantial evidence"). According to the Court of Appeals, "[t]he City Council's 44 findings of fact were unnecessary, improper, and irrelevant" because "[n]o competent, material, and substantial evidence was presented to rebut Petitioner's *prima facie* case, and no conflicts in the evidence required the City Council to make findings to resolve any disputed issues of fact." *Id.* The Court of Appeals reached this conclusion based upon N.C.G.S. § 160A-393(*l*)(2), which provides that "findings of fact are not necessary when the record sufficiently reveals the basis for the decision below or *when the material facts are undisputed and the case presents only an issue of law*." *Id.* (cleaned up) (quoting N.C.G.S. § 160A-393(*l*)(2) (2017)). For that reason, the Court of Appeals held that any "whole record" review that the trial court might have conducted had been rendered unnecessary in light of its determination that PHG had presented competent, material, and substantial evidence that sufficed to establish the existence of a *prima facie* case of entitlement to the issuance of the permit and that no competent, material, and substantial evidence had been presented in opposition to PHG's request. *Id.* at 87. More specifically, the Court of Appeals held that Mr. Crozier's report and related testimony "constitute[d] material, as well as competent and substantial, evidence to show *prima facie* compliance with criteria 3," *id.* at 90, and that "[n]o competent, material, and substantial expert evidence *contra* was presented at the hearing to show [that] Crozier's analysis was unsound or utilized an improper methodology." *Id.* at 89 (stating that "[t]he City Council's lay notion that Crozier's analysis is based upon an inadequate methodology does not constitute competent evidence under the statute to rebut his expert testimony and report"). Similarly, the Court of Appeals concluded that "[n]o competent, material, and substantial evidence was presented to refute Dean's traffic analysis," that Mr. "Dean [had] testified [that] his study was conducted in accordance with industry standards and used standard industry data and methods," and that "[t]he speculations of lay members of the public and unsubstantiated opinions of City Council members do not constitute competent evidence contra under the statutes and precedents to rebut Dean's traffic analysis." *Id.* at 91. As a result, for all of these reasons, the Court of Appeals affirmed the trial court's order. On 9 May 2019, this Court allowed the City's discretionary review petition.

In seeking to persuade us to overturn the Court of Appeals' decision, the City argues that, pursuant to this Court's holding in *Mann Media*, "a local government may deny a conditional use permit if, at the permit hearing, the developer is unable to definitively address whether the proposed development presents a safety risk" and "that this rule applies even when the safety risk is raised by members of the public whose testimony is ultimately inadmissible," citing *Mann Media, Inc. v. Randolph Cty. Planning Bd.*, 356 N.C. 1, 16–17, 565 S.E.2d 9, 19 (2002). In the City's view, "there is no meaningful difference between *Mann Media* and this case" given that, in *Mann Media*, members of the public raised concerns about ice falling from a tower while, in this case, a member of the public raised a safety issue concerning the presence of a blind hill near a parking garage. The City argues, that, just like in *Mann Media*, "PHG's witness could not state with certainty—much less 'satisfactorily ... prove' or '*guarantee*'—that the proposed development would not create a 'safety risk' " and that PHG's failure to adequately address this safety issue necessitated denial of PHG's permit, quoting *Mann Media*, 356 N.C. at 17, 565 S.E.2d at 19. In addition, the City argues that, "when the local government assesses the evidence at the permit hearing, the local government may rely on its knowledge of the local com-

munity," citing *Humble Oil & Refining Co. v. Bd. of Aldermen*, 284 N.C. 458, 468, 202 S.E.2d 129, 136 (1974). The City contends that, "instead of allowing local knowledge to inform local permitting decisions, the Court of Appeals expressly constrained local governments from considering that local knowledge." As a result, the City contends that the Court of Appeals' decision conflicts with our decisions in *Mann Media* and *Humble Oil* and that, "[i]f left undisturbed[, it] would usher in a new era of perfunctory, rubber-stamp review" of conditional use permits by local governing bodies.

Secondly, the City argues that "the Court of Appeals erred in its treatment of the City Council's factual findings." In the City's view, the City Council's findings of fact concerning traffic congestion and traffic hazards and its findings of fact concerning the effect of the proposed hotel upon the value of surrounding properties had ample record support.[3]

In seeking to convince us to affirm the Court of Appeals' decision, PHG argues that "an applicant is entitled to a conditional use permit if the applicant meets its prima facie burden" of producing competent, material, and substantial evidence in support of each condition set out in the applicable land use ordinance. According to PHG, "the applicant only has a burden of production" rather than a burden of persuasion, with this burden of production having been "deliberately and appropriately [set at a] low [level] in conditional use permit cases because [the City] has already legislatively determined that the proposed use is an acceptable use at the location, subject to meeting the standards of a [conditional use permit]." For that reason, PHG contends that the issue of whether an applicant has met its initial burden to produce competent, material, and substantial evidence is a legal question subject to *de novo* review and that a reviewing court "is not bound by a municipality's factual findings" in making that decision. As a result, PHG asserts that "the City Council erred in denying the conditional use permit" because it met its burden of production regarding both traffic and property values and because "[t]he City Council's findings were not based on competent, material, and substantial evidence."

[1] As this Court said just over forty years ago, "[t]he granting of a special exception is apparently not too generally understood." *Woodhouse v. Bd. of Comm'rs*, 299 N.C. 211, 218, 261 S.E.2d 882, 887 (1980) (quoting *Syosset Holding Corp. v. Schlimm*, 15 Misc.2d 10, 159 N.Y.S.2d 88, 89 (1956), *modified and aff'd*, 4 A.D.2d 766, 164 N.Y.S.2d 890 (1957)). "A conditional use permit 'is one issued for a use which the ordinance expressly permits in a designated zone upon proof that certain facts and conditions detailed in the ordinance exist.' " *Id.* at 215–16, 261 S.E.2d at 886 (quoting *Humble Oil*, 284 N.C. at 467, 202 S.E.2d at 135).

By the time that a case arising from an application for the issuance of a conditional use permit reaches this Court, the proceeding in question has been subject to several levels of examination and review. As an initial matter, the application must be considered by the applicable local governmental body. *See* N.C.G.S. § 160A-388(a), (c) (2019). In the event that the local governmental body denies the application, the applicant has the right to seek judicial review of that decision by the superior court. *See id.* §§ 160A-388(e2)(2), -393. At the conclusion of that process, a disappointed litigant is entitled to seek appellate review of the trial court's decision in accordance with the relevant statutory provisions and the North Carolina Rules of Appellate Procedure.

[2, 3] At each step in this multi-level process, a distinct legal standard is applicable. According to well-established North Carolina law, the local governing board "must follow a two-step decision-making process in granting or denying an application for a [conditional] use permit." *Mann Media*, 356 N.C. at 12, 565 S.E.2d at 16. As an initial matter, the

3. The City has abandoned the contention that it advanced before the Court of Appeals that the trial court had erred by reversing the City Council's determination that PHG failed to meet its burden of producing competent, material, and substantial evidence that the development of the hotel would be in harmony with the scale, bulk, coverage, density and character of the area or neighborhood in which it is located by failing to bring that contention forward for our consideration in its new brief before this Court. *See* N.C.R. App. P. 28(a)

local governmental body must determine whether "an applicant has produced competent, material, and substantial evidence *tending to establish* the existence of the facts and conditions which the ordinance requires for the issuance of a [conditional] use permit." *Humble Oil*, 284 N.C. at 468, 202 S.E.2d at 136 (emphasis added). In the event that the applicant satisfies this initial burden of production, then "*prima facie* he is entitled to" the issuance of the requested permit. *Id.* At that point, any decision to deny the application "should be based upon findings contra which are supported by competent, material, and substantial evidence appearing in the record," *id.*, with the local governmental body lacking the authority to "deny a permit on grounds not expressly stated in the ordinance" given that "it must employ specific statutory criteria which are relevant." *Woodhouse*, 299 N.C. at 218–19, 261 S.E.2d at 887.

[4, 5] The superior court " 'sits in the posture of an appellate court' and 'does not review the sufficiency of evidence presented to it but reviews that evidence presented to the town board.' " *Mann Media*, 356 N.C. at 12–13, 565 S.E.2d at 17 (quoting *Coastal Ready-Mix Concrete Co. v. Bd. of Comm'rs*, 299 N.C. 620, 626–27, 265 S.E.2d 379, 383 (1980)). In reviewing the local governmental body's decision, the superior court is charged with:

> (1) Reviewing the record for errors in law,
>
> (2) Insuring that procedures specified by law in both statute and ordinance are followed,
>
> (3) Insuring that appropriate due process rights of a petitioner are protected including the right to offer evidence, cross-examine witnesses, and inspect documents,
>
> (4) Insuring that decisions of town boards are supported by competent, material[,] and substantial evidence in the whole record, and
>
> (5) Insuring that decisions are not arbitrary and capricious.

Id. at 13, 565 S.E.2d at 17 (quoting *Coastal Ready-Mix*, 299 N.C. at 626, 265 S.E.2d at 383); *see also* N.C.G.S. § 160A-393(k)(1)(b) (2019) (providing that the superior court should insure that the local governmental body's decision concerning a conditional use permit was not "[i]n excess of the statutory authority conferred upon the city, including preemption, or the authority conferred upon the decision-making board by ordinance").

[6–10] The exact nature of the standard of review to be utilized by the superior court in any particular case "depends upon the particular issues presented on appeal." *Mann Media*, 356 N.C. at 13, 565 S.E.2d at 17 (quoting *ACT-UP Triangle v. Comm'n for Health Servs.*, 345 N.C. 699, 706, 483 S.E.2d 388, 392 (1997)). In the event that the petitioner asserts that the local governmental body has committed an error of law, then that contention is subject to *de novo* review. *Id.* Under the well-established *de novo* standard of review, "the superior court 'considers the matter anew and freely substitutes its own judgment for the [local governing board's] judgment.' " *Mann Media*, 356 N.C. at 13–14, 565 S.E.2d at 17 (cleaned up) (quoting *Sutton v. N.C. Dep't of Labor*, 132 N.C. App. 387, 389, 511 S.E.2d 340, 341 (1999)). The extent to which "the record contains competent, material, and substantial evidence is a conclusion of law, reviewable de novo." N.C.G.S. § 160A-393(k)(2) (2019).[4] In the event that the petitioner contends that the local governmental body's decision was either (1) arbitrary or capricious or (2) not supported by competent, material, or substantial evidence, the superior court is required to

4. PHG filed a motion seeking to have the City's appeal dismissed on the grounds that it had been rendered moot as a result of the enactment of Session Law 2019-111 on 28 June 2019, which added the language quoted in the text to N.C.G.S. § 160A-393(k)(2). *See* An Act to Clarify, Consolidate, and Reorganize the Land-Use Regulatory Laws of the State, S.L. 2019-111, § 1.9, https://perma.cc/G86W-WPR6. In PHG's view, the enactment of this legislation "definitively answered the principal question presented in this appeal: what is the appropriate standard of review for whether an applicant has met its prima facie burden of producing competent, material, and substantial evidence?" We are not persuaded by this argument. As an initial matter, S.L. 2019-111 states that it "clarif[ies] and restate[s] the intent of existing law and appl[ies] to ordinances adopted before, on, and after the effective date." *Id.* at § 3.1. In addition, the content of the applicable standard of review is not determinative in this instance. As a result, we deny PHG's motion to dismiss the City's appeal.

conduct a whole record review. *Mann Media*, 356 N.C. at 13, 565 S.E.2d at 17. In conducting a whole record review, the reviewing court "must 'examine all competent evidence' (the 'whole record') in order to determine whether the [local governing body's] decision is supported by 'substantial evidence.' " *Id.* at 14, 565 S.E.2d at 17 (quoting *ACT-UP Triangle*, 345 N.C. at 706, 483 S.E.2d at 392). Under the whole record test, the reviewing court is not allowed "to replace the board's judgment as between two reasonably conflicting views, even though the court could justifiably have reached a different result had the matter been before it *de novo*." *Id.* at 14, 565 S.E.2d at 17–18 (quoting *Thompson v. Wake Cty. Bd. of Educ.*, 292 N.C. 406, 410, 233 S.E.2d 538, 541 (1977)). Any order that the superior court enters in the course of reviewing a local governmental board's decision relating to the issuance of a conditional use permit "must set forth sufficient information in its order to reveal the scope of review utilized and the application of that review." *Id.* at 13, 565 S.E.2d at 17 (citation omitted).

[11, 12] In the event that appellate review of the superior court's order is requested, the appellate court "examines the trial court's order for error[s] of law," with that "process ha[ving] been described as a twofold task: (1) determining whether the trial court exercised the appropriate scope of review and, if appropriate, (2) deciding whether the court did so properly." *Id.* at 14, 565 S.E.2d at 18 (quoting *ACT-UP Triangle*, 345 N.C. at 706, 483 S.E.2d at 392). In the event that the case under consideration reaches this Court after a decision by the Court of Appeals, the issue before this Court is whether the Court of Appeals committed any errors of law. N.C.R. App. P. 16(a). For that reason, this Court is required to make the same inquiry that the Court of Appeals was called upon to undertake in reviewing the trial court's order. As a result, we will now examine whether the trial court utilized the appropriate standard of review and, if so, whether it did so properly.

As the record that is before us in this case clearly reflects, the trial court appropriately engaged in both *de novo* and whole record review. *Mann Media*, 356 N.C. at 15, 565 S.E.2d at 18 (stating that a "court may properly employ both standards of review in a specific case" as long as "the standards are to be applied separately to discrete issues" and the trial court "identif[ies] which standard(s) it applied to which issues" (citations omitted)). In addressing the issue of whether PHG adduced sufficient evidence to satisfy the applicable burden of production, the trial court stated that:

> Exercising de novo review, the Court concludes as a matter of law that the evidence presented by PHG and other supporting witnesses was competent, material and substantial and sufficient to establish a *prima facie* case of entitlement to a conditional use permit. In deciding otherwise, the Council made an error of law. A court reviews "de novo the initial issue of whether the evidence presented by a petitioner met the requirement of being competent, material, and substantial." *Blair Investments, LLC. v. Roanoke Rapids City Council*, 231 N.C. App. 318, 321, 752 S.E.2d 524, 527 (2013).

Thus, the trial court engaged in *de novo* review in analyzing PHG's challenge to the City Council's determination that PHG had failed to make the necessary *prima facie* showing of entitlement to the issuance of the requested conditional use permit.

[13] As this Court has clearly held, the extent to which an applicant has presented competent, material, and substantial evidence tending to satisfy the standards set out in the applicable ordinance for the issuance of a conditional use permit is a question directed toward the sufficiency of the evidence presented by the applicant and involves the making of a legal, rather than a factual, determination. *See Styers v. Phillips*, 277 N.C. 460, 464, 178 S.E.2d 583, 586 (1971) (stating that "[w]hether there is enough evidence to support a material issue is always a question of law for the court"). For that reason, we have previously analogized an applicant's burden of producing competent, material, and substantial evidence to support the issuance of a conditional use permit to the making of the showing necessary to overcome a directed verdict motion during a jury trial. *Humble Oil*, 284 N.C. at 470–71, 202 S.E.2d at 137 (stating that "[s]ubstantial evidence is more than a mere scintilla" and

"must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury" (citation omitted)).

In concluding that PHG presented sufficient evidence to support the issuance of the requested conditional use permit, the trial court recognized that "PHG submitted a large volume of evidence that its hotel project met all ordinance standards" and that the evidence that PHG elicited "included [testimony from] five witnesses [three of whom] were received as experts, without objection, and who presented live testimony and ample reports, also received without objection." In addition, the trial court noted that "no competent evidence opposing the ... application appear[ed] in the record." The Court of Appeals held that "[t]he superior court's order shows it did not weigh evidence, but properly applied *de novo* review to determine the initial legal issue of whether Petitioner had presented competent, material, and substantial evidence." *PHG Asheville*, 822 S.E.2d at 86. We agree with the Court of Appeals that the trial court utilized the appropriate standard of review with respect to this issue and did so properly.[5]

[14] As the record reflects, PHG presented the testimony of two architects, an appraiser, a traffic engineer, a certified planner, and the Vice President of PHG who, between them, presented evidence concerning each of the standards enunciated in the relevant portion of the City's land use ordinance. Mr. Crozier and Mr. Dean, whose testimony is at issue in the case as it has been presented to us, were each qualified as experts in their respective fields. Both Mr. Crozier and Mr. Dean submitted voluminous reports that contained extensive data detailing the basis for their conclusions. Mr. Crozier's appraisal report and testimony provided ample support for PHG's contention that the proposed hotel would not substantially injure the value of adjoining or abutting properties by detailing recent land sales in the area near the proposed hotel development and applying the principle of progression before concluding that the construction and operation of the proposed hotel would not injure the value of adjoining or abutting properties and would, instead, cause their values to increase. Similarly, Mr. Dean's traffic study and testimony provided ample support for PHG's contention that the proposed hotel

5. This Court did hold in *Mann Media* that, "[u]nder the whole record test, in light of petitioners' inability satisfactorily to prove that the proposed use would not materially endanger public safety, we are not permitted to substitute our judgment for that of [the governing board]" and "hold that petitioners failed to meet their burden of proving this first requirement and did not establish a *prima facie* case." *Mann Media*, 356 N.C. at 17, 565 S.E.2d at 19. The Court engaged in whole record review in *Mann Media* because the wording of the superior court's order "suggest[ed] that the superior court applied both [*de novo* and whole record review] simultaneously in several instances," a fact that left us "unable to conclude that the superior court consistently exercised the appropriate scope of review." *Id.* at 15, 565 S.E.2d at 18. Even so, we concluded that no remand was necessary "because the central issue presented by [the governing board] and argued by both parties on appeal is whether there was competent, material, and substantial evidence to support [the governing board's] denial of a [conditional] use permit," with "[r]esolution of this issue involv[ing] evaluation of evidence used by [the governing board] to deny the application" and with "the entire record of the hearing [being] before us." *Id.* As a result, the Court applied the whole record test in *Mann Media* "in the interests of judicial economy," *id.* at 16, 565 S.E.2d at 19, rather than because it was fundamentally altering the existing process for judicially reviewing challenges to the denial of conditional use permits and implicitly overruling decisions discussed in the text and cited without exception in *Mann Media* for the purposes for which we have cited them in this opinion, such as *Humble Oil*. *Id.* at 12, 565 S.E.2d at 16. In view of the fact that the trial court appropriately separated the issue of whether PHG had established the required *prima facie* case from the other issues that were before it at that time, there was no need for either the Court of Appeals or this Court to refrain from utilizing the ordinarily applicable standard of review, which *Mann Media* did nothing to change. In addition, the City has not cited any statutory provision or decision of this Court that in any way suggests that the manner in which its conditional use permit ordinance is couched has any effect upon the manner in which a decision refusing to issue a conditional use permit should be reviewed by either the trial or appellate courts. As a result, the issue of whether the applicant for a conditional use permit made out the necessary *prima facie* case does not involve determining whether the applicant met a burden of persuasion, as compared to a burden of production, and is subject to *de novo*, rather than whole record, review during the judicial review process.

would not cause undue traffic congestion or create a traffic hazard in light of the City staff's statement that "all we needed to provide was the trip generation table . . . as well as our anticipated distribution of those trips." Mr. Dean's analysis, which was performed in accordance with industry standards and utilized rates and equations developed by the Institute of Traffic Engineers, concluded that the traffic caused by the proposed development would result in only a "minimal impact" and would "only increase the overall delay at [nearby] intersections by about four seconds." We agree with the trial court and the Court of Appeals that the evidence that PHG presented before the City Council sufficed to satisfy its burden of producing competent, material, and substantial evidence tending to show that it satisfied the relevant ordinance standards.

In light of the fact that PHG had made a sufficient showing to survive what amounted to a directed verdict motion and the City does not contend that the record contains any "evidence contra," the City Council's inquiry should have ended at this point. *See* N.C.G.S. § 160A-388(e2)(1) (2019) (stating that "[t]he board shall determine contested facts and make its decision within a reasonable time" by entering an order that "reflect[s] the board's determination of contested facts and their application to the applicable standards"); *see also id.* § 160A-393(*l*)(2) (stating that "findings of fact are not necessary when the record sufficiently reveals the basis for the decision below or when the material facts are undisputed and the case presents only an issue of law"). Instead, however, the City Council concluded that PHG had failed to make the necessary *prima facie* showing and attempted to support this determination with a series of findings of fact that rested upon incompetent testimony and questioned the credibility of the testimony provided by PHG's witnesses.

In defense of the approach that it took in considering PHG's application, the City argues that the Court of Appeals disregarded the findings of fact that are contained in its order and argues that the effect of the Court of Appeals' decision was that, "if no one shows up to oppose a project and introduce evidence in opposition, every new development would be a fait accompli." However, the basis upon which the City seeks to have its decision upheld rests upon a misapprehension of the applicable law, under which "[a] denial of the permit should be based upon findings contra which are supported by competent, material, and substantial evidence appearing in the record." *Humble Oil*, 284 N.C. at 468, 202 S.E.2d at 136. In other words, given that PHG elicited sufficient evidence to satisfy its burden of production to show an entitlement to the issuance of the requested conditional use permit, the City Council did, in fact, lack the authority to deny PHG's application in the absence of competent, material, and substantial evidence tending to support a different outcome.

The findings of fact contained in the City's order are simply inadequate to support the result that the City Council ultimately reached. As an initial matter, we note that the City Council's findings concerning property values and traffic-related issues lack any support in the admissible and competent evidence. Simply put, given the absence of any evidence that tended to conflict with Mr. Crozier's appraisal study, there were no factual issues relating to the property value issue which the City Council needed to resolve. Instead, the City Council's findings of fact fault Mr. Crozier for failing to include information that he had no reason, based upon an examination of the relevant ordinance language, to conclude would be needed or even relevant. For example, the City Council states in Finding of Fact No. 19 that "[t]here was no evidence, through facts and data, to indicate how the Hotel would affect or impact such an increase in value" despite the fact that the City's unified development ordinance merely required PHG to produce evidence tending to establish that the proposed development would not substantially injure the value of adjoining or abutting properties without making any mention of a requirement that the applicant establish the amount by which the proposed development would affect the value of surrounding properties. Similarly, in Finding of Fact No. 20, the City Council faulted Mr. Crozier for failing to present comparable sales data relating to properties in other parts of Asheville or in entirely different cities. The fundamental

problem with the City Council's justifications for refusing to credit the testimony of Mr. Crozier is that it held PHG to a burden that is simply not reflected in or supported by the relevant ordinance provisions. *See Woodhouse*, 299 N.C. at 219, 261 S.E.2d at 887–88 (stating that "[t]o hold that an applicant must first anticipate and then prove or disprove each and every general consideration would impose an intolerable, if not impossible, burden on an applicant for a conditional use permit," with an applicant not being required to "negate every possible objection to the proposed use").

The same deficiencies are present in the City Council's findings concerning traffic-related issues. Once again, no competent, material, or substantial evidence was presented in opposition to the conclusions drawn in Mr. Dean's analysis. In spite of the fact that Mr. Dean's uncontested testimony established that his traffic study had been performed in accordance with industry standards, the City Council questioned the credibility of the results reached in his study on the grounds that he had failed to base his study upon conditions specific to Asheville. Among other things, the City Council criticized Mr. Dean for failing to base his traffic study upon data relating to conditions on the weekend or during the summer or fall seasons when tourist-related traffic in Asheville is at its height. Once again, the City Council's findings reflect an insistence upon the presentation of evidence that is never mentioned in the City's land use ordinance, which is a standard to which the applicant cannot lawfully be held. In addition, the City Council's findings also rested upon the testimony of Mr. Rawls, who raised questions about limitations upon the ability of persons exiting the hotel's parking garage to see up and down an adjoining street in spite of the fact that the General Assembly had determined that lay testimony concerning traffic conditions is not competent in conditional use permit proceedings. *See* N.C.G.S. § 160A-393(k)(3)(b) (2019) (stating that "[t]he term 'competent evidence,' as used in this subsection, shall, regardless of the lack of a timely objection, not be deemed to include the opinion testimony of lay witnesses as to . . . [t]he increase in vehicular traffic resulting from a proposed development [which] would pose a danger to the public safety"). As a result, the City Council's traffic-related findings do not justify a decision to reject Mr. Dean's analysis of the impact of the proposed hotel on traffic in the surrounding area.

A city council is, of course, entitled to rely upon the special knowledge of its members concerning conditions in the locality which they serve. However, this principle does not justify the City Council's decision to deny PHG's permit application in this case. In *Humble Oil*, a town alderman opposed the issuance of a conditional use permit for a filling station in Chapel Hill, stating that the intersection near the proposed station "had been dangerous for twenty-eight years." *Humble Oil*, 284 N.C. at 469, 202 S.E.2d at 136. Before holding that this statement and others like it were nothing more than "conclusions unsupported by factual data or background" so as to be "incompetent and insufficient to support the Aldermen's findings," *id.*, we stated that

> [i]f there be facts within the special knowledge of the members of a Board of Aldermen or acquired by their personal inspection of the premises, they are properly considered. However, they must be revealed at the public hearing and made a part of the record so that the applicant will have an opportunity to meet them by evidence or argument and the reviewing court may judge their competency and materiality.

Id. at 468, 202 S.E.2d at 136.

As we have already noted, several members of the City Council mentioned facts within their special knowledge about the city that they represented during the quasi-judicial hearing held for the purpose of considering PHG's application. Among other things, various members of the City Council questioned Mr. Dean concerning the manner in which he conducted his traffic study, with their questions raising issues about the extent to which his study should have been based upon conditions existing at a different date and time. Aside from the fact that Mr. Dean was able to answer and provide reasonable explanations for his answers, nothing in the relevant ordinance provision required Mr. Dean to have anticipated these questions

and to have conducted his study in the manner that these questions seemed to believe to have been appropriate without sufficient advance notice to have permitted him to present any necessary rebuttal evidence. As a result, nothing in the special facts known to the members of the City Council in this case justified the making of a decision that PHG had failed to satisfy its burden of production or to reject PHG's permit application.

Finally, the City argues that this Court's decision in *Mann Media* requires a decision in its favor. In *Mann Media*, the Randolph County Planning Board denied an application for the issuance of a conditional use permit authorizing the construction and operation of a broadcast tower based upon concerns that ice would fall from the necessary support beams. *Mann Media*, 356 N.C. at 3–5, 565 S.E.2d at 11–12. After determining that the evidence presented in opposition to the issuance of the proposed permit constituted incompetent "anecdotal hearsay," *id.* at 17, 565 S.E.2d at 19, this Court held that "petitioners [had] failed to carry their burden of proving that the potential of ice falling from support wires of the proposed tower was not a safety risk" in light of the fact that the applicant had "candidly acknowledged his inability to state with certainty that ice would not travel a greater distance in the event of wind or storm," *id.*, and that, for that reason, "petitioners [had] failed to meet their burden of proving this first requirement [that the proposed tower would not materially endanger public safety] and did not establish a *prima facie* case." *Id.* The same result would not be appropriate in this case given that nothing in the relevant ordinance provision, particularly given the advice that Mr. Dean received from the City staff, set forth any requirement that the sort of sight distance study that the City Council wanted to have been conducted was required in order to obtain the issuance of the requested conditional use permit. If Department of Transportation regulations do require a sight distance survey, it is not the City Council's role to enforce those regulations in the guise of implementing the City's ordinances relating to conditional use permits.

Thus, we hold that the Asheville City Council made a legislative decision to allow certain uses by right in specified zones "upon proof that certain facts and conditions detailed in the ordinance exist." *Woodhouse*, 299 N.C. at 215–16, 261 S.E.2d at 886 (quoting *Humble Oil*, 284 N.C. at 467, 202 S.E.2d at 135). The effect of the making of this decision was to bind the Asheville City Council to the use of quasi-judicial procedures and to exclusive reliance upon the substantive standards enunciated in the relevant provisions of its land use ordinance in determining whether conditional use permit applications should be granted or denied. *See id.* at 219, 261 S.E.2d at 887 (stating that, "[w]here a zoning ordinance specifies standards to apply in determining whether to grant a [conditional] use permit and the applicant fully complies with the specified standards, a denial of the permit is arbitrary as a matter of law" (quoting *Hay v. Township of Grow*, 296 Minn. 1, 206 N.W.2d 19, 22 (1973)). As a result, in the event that an applicant for the issuance of a conditional use permit presents competent, material, and substantial evidence tending to show that it has satisfied the applicable ordinance standards, it has made out a *prima facie* case of entitlement to the issuance of the conditional use permit, with any decision to deny the permit application being required to rest upon contrary findings of fact that have adequate evidentiary support. In view of the fact that PHG presented competent, material, and substantial evidence that its proposed hotel satisfied the relevant ordinance standards and the fact that no competent, material, and substantial evidence was presented in opposition to PHG's showing, the City simply lacked the legal authority to deny PHG's application. As a result, subject to the modified logic set forth in this opinion, we affirm the Court of Appeals' decision.

MODIFIED AND AFFIRMED.

Justice EARLS dissenting.

Here the majority overrules this Court's decision in *Mann Media, Inc. v. Randolph Cty. Planning Bd.*, in which the Court held that the question of whether a petitioner meets its burden of establishing a prima facie case for a conditional use permit is reviewed—not de novo—but rather under the whole record test, pursuant to which "we are

not permitted to substitute our judgment for that of" the local government. 356 N.C. 1, 17, 565 S.E.2d 9, 19 (2002) ("Under the whole record test, in light of petitioners' inability satisfactorily to prove that the proposed use would not materially endanger public safety, we are not permitted to substitute our judgment for that of respondent. Accordingly, we hold that petitioners failed to meet their burden of proving this first requirement and did not establish a *prima facie* case."). In my view, under the whole record test, the Asheville City Council's determination that PHG Asheville, LLC (PHG), failed to meet its burden of establishing that the proposed use would not cause undue traffic congestion or a traffic hazard was not arbitrary or capricious. I would therefore reverse the decision of the Court of Appeals, which affirmed the superior court's reversal of the City Council's denial of PHG's application. Accordingly, I respectfully dissent.

While "[z]oning ordinances list uses that are automatically permitted in a particular zoning district," which "are . . . referred to as 'uses by right,' " "[m]any zoning ordinances also allow additional uses in each district that are permitted only if specific standards are met; these are what are known as *special* and *conditional* uses." David. W. Owens, *Land Use Law in North Carolina*, at 159 (2d ed. 2011). As the majority notes, "[a] conditional use permit 'is one issued for a use which the ordinance expressly permits in a designated zone upon proof that certain facts and conditions detailed in the ordinance exist.' " *Woodhouse v. Bd. of Comm'rs of Nags Head*, 299 N.C. 211, 215–16, 261 S.E.2d 882, 886 (1980) (quoting *Refining Co. v. Bd. of Aldermen*, 284 N.C. 458, 467, 202 S.E. 2d 129, 135 (1974)). Notably, "[t]he standards underlying such permits include those that require application of some degree of judgment and discretion, as opposed to permitted uses where only objective standards are applied." Owens, *Land Use Law in North Carolina*, at 159.

When determining whether to grant a conditional use permit, the local government's authorized board [1] "operates as the finder of fact" and "must follow a two-step decision-making process" in making its determination:

> If "an applicant has produced competent, material, and substantial evidence tending to establish the existence of the facts and conditions which the ordinance requires for the issuance of a special use permit, *prima facie* he is entitled to it." If a prima facie case is established, "[a] denial of the permit [then] should be based upon findings contra which are supported by competent, material, and substantial evidence appearing in the record."

Mann Media, 356 N.C. at 12, 565 S.E.2d at 17 (alterations in original) (quoting *Humble Oil & Ref. Co. v. Bd. of Aldermen of Chapel Hill*, 284 N.C. 458, 468, 202 S.E.2d 129, 136 (1974)). The "board sits in a quasi-judicial capacity" and

> must insure that an applicant is afforded a right to cross-examine witnesses, is given a right to present evidence, is provided a right to inspect documentary evidence presented against him and is afforded all the procedural steps set out in the pertinent ordinance or statute. Any decision of the town board has to be based on competent, material, and substantial evidence that is introduced at a public hearing.

Id. at 12, 565 S.E.2d at 16–17 (quoting *Coastal Ready-Mix Concrete Co. v. Bd. of Comm'rs of Nags Head*, 299 N.C. 620, 626, 265 S.E.2d 379, 383 (1980)). The board "is 'without power to deny a permit on grounds not expressly stated in the ordinance' and it must employ specific statutory criteria which are relevant." *Id.* at 12, 565 S.E.2d at 16–17 (quoting *Woodhouse*, 299 N.C. at 218–19, 261 S.E.2d at 887); *see also* Owens, Land Use Law in North Carolina, at 160 n.8 ("While the standards for the permit involve application of a degree of discretion, the applicant is entitled to the permit upon establishing that the standards will be met.").

This Court addressed the standard of review applicable to the denial of a conditional or special use permit in *Mann Media*. There, the petitioners sought a special use permit to construct a broadcast tower in an area of

1. "North Carolina law allows the final decision on a special or conditional use permit to be assigned to the governing board, the board of adjustment, or the planning board." Owens, *Land Use Law in North Carolina*, at 160.

Randolph County zoned for residential and agricultural use. *Mann Media*, 356 N.C. at 2, 565 S.E.2d at 11. Randolph County's zoning ordinance provided that a special use permit may be granted for public utilities, including broadcast towers, to be built in residential/agricultural areas, but required Randolph County's Planning Board (the Planning Board) to find four factors before granting the permit:

> (1) that the use will not materially endanger the public health or safety if located where proposed and developed according to the plan as submitted and approved;
> (2) that the use meets all required conditions and specifications;
> (3) that the use will not substantially injure the value of adjoining or abutting property, or that the use is a public necessity; and
> (4) that the location and character of the use if developed according to the plan as submitted and approved will be in harmony with the area in which it is to be located and in general conformity with the Land Development Plan for Randolph County.

Id. at 11, 565 S.E.2d at 16. After hearing the petitioners' evidence, the Planning Board found, *inter alia*, that "ice has formed and fallen from the other towers within the county's zoning jurisdiction causing damage and is likely to do so from the proposed tower." *Id.* at 3, 565 S.E.2d at 12. The Planning Board denied the permit, determining that the proposed use would materially endanger the public safety, would substantially injure the value of adjoining or abutting property, and would not be in harmony with the surrounding area. *Id.* at 4, 565 S.E.2d at 12. On appeal, the superior court reversed, concluding that the Planning Board's decision was not supported by competent, material, and substantial evidence. *Id.* at 7–8, 565 S.E.2d at 14. In particular, the superior court determined that any evidence presented to the Planning Board concerning ice damage at other towers was incompetent, and therefore the Board's reliance on such evidence was arbitrary and capricious. *Id.* at 7–8, 565 S.E.2d at 14. A majority panel at the Court of Appeals affirmed the superior court, and the petitioners sought further review in this Court. *Id.* at 9, 565 S.E.2d at 15.

This Court stated that in appeals from denials of conditional use permits, the "superior court 'sits in the posture of an appellate court' and 'does not review the sufficiency of evidence presented to it but reviews that evidence presented to the town board.' " *Mann Media*, 356 N.C. at 12–13, 565 S.E.2d at 17 (quoting *Coastal Ready-Mix Concrete Co.*, 299 N.C. at 626–27, 265 S.E.2d at 383). The superior court's role consists of:

> (1) Reviewing the record for errors in law,
> (2) Insuring that procedures specified by law in both statute and ordinance are followed,
> (3) Insuring that appropriate due process rights of a petitioner are protected including the right to offer evidence, cross-examine witnesses, and inspect documents,
> (4) Insuring that decisions of town boards are supported by competent, material and substantial evidence in the whole record, and
> (5) Insuring that decisions are not arbitrary and capricious.

Id. at 13, 565 S.E.2d at 17 (quoting *Coastal Ready-Mix Concrete Co.*, 299 N.C. at 626, 265 S.E.2d at 383). The Court explained that the applicable standard of "judicial review 'depends upon the particular issues presented on appeal.' " *Id.* at 13, 565 S.E.2d at 17 (quoting *ACT-UP Triangle v. Comm'n for Health Servs.*, 345 N.C. 699, 706, 483 S.E.2d 388, 392 (1997)). Specifically, "[w]hen the petitioner 'questions (1) whether the agency's decision was supported by the evidence or (2) whether the decision was arbitrary or capricious, then the reviewing court must apply the "whole record" test.' " *Id.* at 13, 565 S.E.2d at 17 (quoting *ACT-UP Triangle*, 345 N.C. at 706, 483 S.E.2d at 392). On the other hand, "[i]f a petitioner contends the [b]oard's decision was based on an error of law, 'de novo' review is proper." *Id.* at 13, 565 S.E.2d at 17 (quoting *Sun Suites Holdings, LLC v. Bd. of Aldermen of Garner*, 139 N.C. App. 269, 272, 533 S.E.2d 525, 527–28 (2000)). The Court stressed that "[t]hese standards of review are distinct," explaining:

> Under a *de novo* review, the superior court "consider[s] the matter anew[ ] and freely substitut[es] its own judgment for the agency's judgment." "When utilizing the whole record test, however, the reviewing court must ' "examine all competent evi-

> dence (the 'whole record') in order to determine whether the agency decision is supported by 'substantial evidence.' " ' " "The 'whole record' test does not allow the reviewing court to replace the [b]oard's judgment as between two reasonably conflicting views, even though the court could justifiably have reached a different result had the matter been before it de novo."

Mann Media, 356 N.C. at 13–14, 565 S.E.2d at 17–18 (alterations in original) (citations omitted). The Court further elaborated that under the whole record test, a "finding must stand unless it is arbitrary and capricious," and that in making this determination

> the reviewing court does not have authority to override decisions within agency discretion when that discretion is exercised in good faith and in accordance with law. The "arbitrary or capricious" standard is a difficult one to meet. Administrative agency decisions may be reversed as arbitrary or capricious if they are "patently in bad faith," or "whimsical" in the sense that "they indicate a lack of fair and careful consideration" or "fail to indicate [ ]any course of reasoning and the exercise of judgment.[ ]"

Id. at 16, 565 S.E.2d at 19 (alterations in original) (citations omitted).

Applying these standards, the Court first examined the Planning Board's finding that the proposed broadcast tower would "materially endanger the public safety" due to the risk of ice falling from the tower. *Id.* at 16, 565 S.E.2d at 19. The Court stated:

> In this finding, respondent cited evidence of ice building up and falling from other towers. Our review of the record indicates that this evidence, consisting principally of ice brought before respondent in a cooler and anecdotal hearsay, was not competent. Even so, the record also indicates that petitioners failed to carry their burden of proving that the potential of ice falling from support wires of the proposed tower was not a safety risk. Petitioner Mann testified that while the tower itself would have deicing equipment, the support wires would not. Although he opined that any ice forming on the wires would slide down the wires, he candidly acknowledged his inability to state with certainty that ice would not travel a greater distance in the event of wind or storm. While Mann argued that the prevailing winds at the site are from a direction that would blow any ice away from nearby buildings and dwellings, he could not guarantee that falling ice would not be a risk. Other evidence in the record shows that numerous permanent structures lie in close proximity to the proposed tower site.
>
> Respondent's finding that petitioners failed to establish that there would be no danger to the public from falling ice is neither whimsical, nor patently in bad faith, and it is not indicative of a lack of any course of reasoning or exercise of judgment. The burden is on petitioners to meet the four requirements of the Ordinance before finding that a *prima facie* case has been established, and respondent did not state in its written order that petitioners made a *prima facie* case. Under the whole record test, in light of petitioners' inability satisfactorily to prove that the proposed use would not materially endanger public safety, we are not permitted to substitute our judgment for that of respondent. Accordingly, we hold that petitioners failed to meet their burden of proving this first requirement and did not establish a *prima facie* case.

Id. at 17, 565 S.E.2d at 19. The Court ultimately [2] reversed the decision of the Court of

2. Having concluded that the Planning Board's finding that the petitioners failed to establish a prima facie case with respect to the ordinance's first requirement was not arbitrary or capricious under the whole record test, the Court was ''not obligated to address the remaining three requirements under the Ordinance.'' *Mann Media*, 356 N.C. at 17, 565 S.E.2d at 19 (citing *Coastal Ready-Mix*, 299 N.C. at 632–33, 265 S.E.2d at 386). Nonetheless, ''in the interests of completeness,'' the Court addressed the third requirement (''that the use will not substantially injure the value of adjoining or abutting property'') and because the petitioners' expert failed to address ''*adjoining or abutting* properties,'' the Court held that ''under the whole record test, ... petitioners failed to meet the Ordinance's third requirement.'' *Id.* at 18, 565 S.E.2d at 20. The Court also addressed the fourth requirement (''that the location and character of the use if developed according to the plan as submitted and approved will be in harmony with the area in which it is to be located and in general conformity with the Land Development Plan for Randolph County'') and determined that the su-

Appeals and remanded for further remand with directions for the superior court to enter judgment affirming the Planning Board's denial of the special use permit. *Id.* at 19, 565 S.E.2d at 21.

Here, Asheville's ordinance provides that the "City Council *shall not* approve the conditional use application . . . *unless and until it makes the following findings*," including, *inter alia*, "[t]hat the proposed use will not cause undue traffic congestion or create a traffic hazard." (Emphases added.) Thus, as was the case in *Mann Media*, in order to establish a "*prima facie* case" for the conditional use permit under Asheville's ordinance, an applicant must not only meet a burden of production—evidence from which the fact-finder *could* make the requisite findings—but also a burden of persuasion—evidence from which the fact-finder *does* make the requisite findings.[3] *See Mann Media*, 356 N.C. at 17, 565 S.E.2d at 19 (stating that where the ordinance required the Planning Board to find four factors before granting the permit, "[t]he burden is on petitioners to meet the four requirements of the Ordinance before finding that a *prima facie* case has been established, and respondent did not state in its written order that petitioners made a *prima facie* case," and "hold[ing] that petitioners failed to meet their burden of proving this first requirement and did not establish a *prima facie* case."); Owens, *Land Use Law in North Carolina*, at 163 (stating that "the ordinance standards" at issue in *Mann Media* "required a finding that the use 'will not endanger the public health or safety" and that "[t]he [C]ourt upheld the permit denial based on a failure of the petitioner to meet the *burden of proof*[4] on this general standard" (emphasis added)); *see also, e.g.*, *Harding v. Bd. of Adjustment of Davie Cty.*, 170 N.C. App. 392, 394, 612 S.E.2d 431, 434 (2005) (holding that where Davie County's ordinance provided that a special use permit "shall not be granted unless" the Board of Adjustment made the requisite findings, the Board of Adjustment properly placed the burdens of production and persuasion on the applicant). Accordingly, the City Council properly noted in its order that "[t]he Applicant bears the burden of proving to the City Council, by competent, material and substantial evidence, that the proposed Hotel meets the seven CUP standards in the UDO."

Following the hearing, the City Council determined, *inter alia*, that PHG failed to prove that the proposed use "will not cause undue traffic congestion or create a traffic hazard," and made the following relevant findings:

> 8. The Property's primary frontage is along Haywood Street, which borders the Property's entire northern property line.

perior court properly applied *de novo* review to this issue because it agreed with the Court of Appeals that, as a matter of law, "[t]he inclusion of a use as a conditional use in a particular zoning district establishes a prima facie case that the permitted use is in harmony with the general zoning plan." *Id.* at 19, 565 S.E.2d at 20 (quoting *Mann Media, Inc. v. Randolph Cty. Planning Bd.*, 142 N.C. App. 137, 139, 542 S.E.2d 253, 255 (2001)). Yet, because the Court determined that the petitioners failed to establish a *prima facie* case as to the first and third requirements of the ordinance, it was unnecessary to address whether sufficient evidence was presented to rebut the petitioners' *prima facie* showing with respect to the fourth requirement. *Id.* at 19, 565 S.E.2d at 20.

3. Admittedly, a "*prima facie* case" is typically synonymous with a burden of production. Nonetheless, regardless of terminology, it is clear under *Mann Media* that when an ordinance specifically requires the local board to in fact make necessary findings before a permit may permissibly be granted, the applicant must meet more than the burden of production before "*prima facie* he is entitled to" the permit. *Mann Media*, 356 N.C. at 12, 565 S.E.2d at 167.

4. "The burden of proof includes both the burden of persuasion and the burden of production." Black's Law Dictionary 209 (11th ed. 2019); *see also, e.g., Scarborough v. Dillard's, Inc.*, 363 N.C. 715, 729, 693 S.E.2d 640, 648 (2009) (Timmons-Goodson, J., dissenting) ("The burden of proof in any case includes both the burden of production and the burden of persuasion. The burden of production, also known in North Carolina as the 'duty of going forward,' is '[a] party's duty to introduce enough evidence on an issue to have the issue decided by the fact-finder, rather than decided against the party in a peremptory ruling' such as a directed verdict or a judgment notwithstanding the verdict[.] The burden of persuasion, meanwhile, is the 'party's duty to convince the fact-finder to view the facts in a way that favors that party.' . . . The burden of persuasion is also often 'loosely termed [the] burden of proof.' " (citations omitted)).

The Property also has frontage along Carter Street, which borders the Property's entire western property line, and North French Broad Avenue, which is the only key pedestrian street which borders the Property. The Hotel is oriented towards Haywood Street.

. . . .

11. Ninety percent of the existing improvements in the area are one and two story structures and approximately 72 percent of those structures are less than 10,000 square feet. The Hotel would constitute the third hotel within a several block radius (approximately ¼ mile). The addition of this third hotel would change the visual character of the area, and would create a cluster of hotels in the immediate vicinity, where there were previously smaller buildings and more diverse uses.

. . . .

16. There is a significant amount of pedestrian traffic in the area near and around the Carter Street Driveway.

17. The Carter Street Driveway is 28 feet wide, which is wider than the 24 foot driveway width allowed by City Standards. The Applicant obtained a modification from the City's Transportation Department Director to allow for the wider driveway. The Transportation Department Director's written decision to allow the modification, however, does not address the impact of the wider driveway on the public health and safety and there was no evidence presented that would indicate the wider driveway would provide the same level of protection to the public, particularly pedestrians, as a driveway which would comply with City requirements.

. . . .

27. There is significant traffic in downtown Asheville near and around the Property in September and October, and in the summer months. The vehicular traffic in the area will increase if the Hotel is constructed.

28. The Applicant presented the testimony of a traffic engineer, Kevin Dean, as well as Mr. Dean's written "Traffic Assessment." The Traffic Assessment did not provide any facts or data which could show the level of traffic or traffic counts for any time of the year, except during a four hour period during the day on November 10, 2016, which was a Thursday. The level of traffic in this area is much higher at other times of the year, particularly the summer months; however, there were no traffic counts or any traffic data provided for any date other than November 10.

29. Mr. Dean was not aware of the environmental conditions on November 10, 2016, or whether such conditions could have affected traffic volumes on that date.

30. The Applicant's traffic counts were done on November 10, 2016 between the hours of 7 a.m. and 9 a.m., and between the hours of 4 p.m. and 6 p.m. Under industry standards, this is apparently "assumed" to be the time of highest traffic on nearby streets, but there was no evidence which could establish this would be the case for this area of Asheville.

31. The number of trips generated from the Hotel in the Traffic Assessment was also derived from an industry standard, and not the actual trips expected from this Hotel at this location. Hotels in downtown Asheville have an occupancy rate in excess of 85%, but the general rate for an efficient market is 65%. The Traffic Assessment did not take this expected higher occupancy of the Asheville market into account.

32. The Applicant did not submit any traffic data for Friday through Sunday, even though those are typically the days that tourists visit the City and traffic volumes are higher.

33. The estimated traffic counts used for the Traffic Assessment and Mr. Dean's opinion, were also these on a "typical weekday." There was no weekend data collected, even though this is the time that most tourists visit the Asheville downtown.

34. Without accurate traffic counts for any days other than Thursday November 10, there is no data or evidence to determine whether the additional trips generated by the Hotel (as well those from the other tourists which the Hotel will attract but who do not stay at the hotel) would not decrease the existing level of service to an unacceptable level. The Level of Service Summary in the Traffic Assessment was not based on complete information or data.

35. There was no data or evidence presented that could show what the level of traffic would be with three hotels (Indigo, Hyatt and Embassy Suites) located within a several block area for Friday, Saturday and Sunday during the summer months or other high traffic periods.

36. The Traffic Assessment did not account for traffic that will be generated by future hotels and apartments in the downtown area that are planned and approved, but which are not yet fully constructed and operational.

37. The proposed Hotel includes a twenty-foot wide driveway, which provides street access to and from the parking structure and North French Broad Avenue.

38. There is a blind hill with limited visibility in the vicinity of the Hotel's parking deck's entrance and exit onto North French Broad Avenue. To determine whether the addition of that entrance/exit would cause a safety issue would require a "sight distance check." A sight distance check was not a part of the Traffic Assessment and no other evidence was presented to show the parking deck entrance or exit would not endanger driver or pedestrian safety. The Traffic Assessment did no analysis relating to traffic safety as it relates to vehicles entering and exiting this driveway.

39. The Hotel will have 5,000 square feet of meeting space, which would potentially attract visitors to the Hotel, other than guests staying at the Hotel. This meeting space use was not included in the Traffic Assessment nor included in the traffic analysis.

40. The Hotel would bring more than 50,000 new visitors to the City each year. Not all of these new visitors would be patrons of the Hotel, but would frequent downtown businesses and, therefore, add to the already dense downtown area. The Traffic Assessment did not account for any traffic caused by additional visitors, other than an estimate of trips by Hotel patrons and employees.

41. The Hotel parking deck would have 200 vehicular parking spaces. The Hotel contains 185 rooms and will have 75 employees. There are insufficient spaces in the proposed Hotel parking deck to accommodate this number of guests and employees, even if they all do not drive automobiles to the Hotel.

42. There is currently a shortage of public parking in downtown Asheville and there are often insufficient parking spaces to meet the demand. The development of the Hotel would exacerbate the parking shortages in the area, because of the limited number of parking spaces planned in the parking deck and the Applicant's failure to provide sufficient parking to accommodate all of its guests and employees.

As in *Mann Media*, we review the City Council's determination of whether PHG established a *prima facie* case and met its burden of proof under the ordinance under the whole record test, pursuant to which a finding "must stand unless it is arbitrary and capricious." *Mann Media*, 356 N.C. at 16, 565 S.E.2d at 19.

An examination of the record establishes that, at the hearing, PHG presented evidence noting that Asheville is not only "a tourist destination," but "is the hub of both commercial and tourist activity in Western North Carolina" and is "defined by its picturesque mountainous landscape." The report of PHG's real estate appraiser, Tommy Crozier, provided that the site of the proposed hotel "has an excellent location across from the Hotel Indigo and the new Hyatt Place hotel," and further that "[i]n the current market cycle, several large scale redevelopments downtown have been completed or are planned for near-term construction," including three recently opened hotels and six hotels currently in development among the "[n]otable projects." PHG acknowledged a concern with the proliferation of hotels in downtown Asheville, with its representatives stating that "[w]e know that there are questions about the overbuilding of hotels in downtown Asheville" and "[w]e do realize there's a lot of other hotels." PHG asserted that its proposed hotel is "a little bit different from some of the offerings at some of the other hotels" and addresses "an important niche in the hospitality of downtown Asheville" in that, in addition to its 185 rooms and its "detached, multi-level parking garage," it

has "5000 square feet of meeting space, that will, hopefully, essentially will create its own demand." This meeting space would constitute "the second largest meeting space for hotels specifically in the downtown market area," according to PHG, and would "help [ ] to capture additional meetings and events that otherwise may move to Greenville or other cities." Crozier testified that "this hotel will generate somewhere north of 50,000 new visitors a year."

Additionally, PHG presented testimony from Kevin Dean, an engineer, who analyzed five intersections near the site of the proposed hotel and prepared a "traffic assessment" summarizing his findings. Dean's assessment "present[ed] trip generation, distribution, and traffic analyses of the existing and existing + site conditions" and states that "all of the study intersections are expected to continue to operate at acceptable levels of service with only minor increases in delay" and that "simulations show no queuing issues at any of the study intersections or on any of the I-240 ramps." At the hearing, Dean was asked about his decision to pick a Thursday in November to examine the potential for traffic congestion in downtown Asheville:

> COUNCILMAN BOTHWELL: My question, my first question is, why did you pick November 10th, a Thursday, to do your traffic study?
>
> MR. DEEN[5]: Traffic studies are -- traffic counts are only supposed to be counted between Tuesdays and Thursdays to get a typical weekday condition that's not affected by a Monday or Friday variation. So that's industry standard. We are required, typically, to only count on Tuesdays, Wednesdays, or Thursdays.
>
> . . . .
>
> COUNCILMAN BOTHWELL: I am wondering about the choice of November, too. I mean, we have, say, September and October, we have a lot of tourist traffic here. Summertime it's jammed all the time.
>
> MR. DEEN: Sure.
>
> COUNCILMAN BOTHWELL: And your report says there's no expectation of [queuing].
>
> MR. DEEN: Sure.
>
> COUNCILMAN BOTHWELL: But there is also [queuing] at where you turn off of Montford and then go to North French Broad, it sometimes backs up all the way across the bridge.
>
> MR. DEEN: Okay.
>
> COUNCILMAN BOTHWELL: And, again, with traffic coming from the eastbound exit with -- when you get to that light and turn left into the hotel. --
>
> MR. DEEN: Okay.
>
> COUNCILMAN BOTHWELL: -- to the new entrance --
>
> MR. DEEN: Sure.
>
> COUNCILMAN BOTHWELL: -- won't that cause [queuing] on Haywood Street waiting to turn into the left?
>
> MR. DEEN: So I can't argue with your anecdotal stories. What I can tell you is the amount of traffic that's going to be added is only supposed to be negligible increase to any cues that you would see. I mean, five seconds -- five percent of the intersection or less. I think it's closer to three percent at that intersection, which is very mild.
>
> COUNCILMAN BOTHWELL: Okay
>
> MR. DEEN: So I would just go to say that it's not going to cause any undue additional issues.

When asked whether his assessment took into account the current development in that area, including the "other hotels and other apartments, et cetera, that are either planned or just recently added," Dean stated "[w]e did not." According to Dean, any potential increase in traffic from other development in the area, though unaccounted for by his traffic assessment, would only lessen the impact of the proposed hotel. Dean testified:

> MR. DEEN: . . . Now, like you said, there are other developments that would come in that would be growth that would be inherent to an area. But what I would argue would be that if we don't include that traffic, our site will appear to have a greater impact than it will at those times.

5. The transcript of the hearing misspells Mr. Dean's name as "Deen."

So if there's more traffic, if there's more traffic on the network, then our 70 trips will be a smaller percentage than they are today. Does that make sense?

. . . .

MR. DEEN: Okay. And I would argue that if the volumes were truly higher than our site, traffic would be an even smaller percent than it already was.

MAYOR MANHEIMER: That doesn't make sense.

A member of the public, Charles Rawls, raised the issue of a potential "blind hill" near the hotel's proposed parking garage, "turn[ing] from Haywood Street heading south on French Broad." Mr. Dean, when asked if he had studied whether the entrance and exit of the hotel's proposed two hundred space parking garage could adversely affect safety, stated:

I have not. We did not conduct a sight distance check, which is typically what's required. But DOT typically requires driveways to meet certain sight distance requirements, whether vehicles are stopping or turning or making decisions, like you said, a vehicle entering a driveway. So DOT typically requires certain standards to be met. We didn't do that because we weren't involved in the actual design of the site.

The City Council also asked PHG about issues with parking, of which PHG acknowledged, "of course we're aware that there are parking issues in the area." In particular, the City Council asked about the capacity of the hotel's proposed parking deck:

COUNCILMAN SMITH: How many spaces are there?

MR. OAST: 200.

COUNCILMAN SMITH: And 185 rooms and how many employees?

MR. WALDEN: Roughly 75.

COUNCILMAN SMITH: Where are the employees going to park?

MR. WALDEN: In that general area.

COUNCILMAN SMITH: Okay. So there will be an impact. That's another impact. That's helpful to know.

. . . .

COUNCILMAN YOUNG: And approximately 75 employees?

MR. WALDEN: Yes, Sir.

COUNCILMAN YOUNG: And the employees will probably park in the adjacent area?

MR. WALDEN: Yes.

PHG, which also owns the recently opened "Hyatt Place" across the street from the proposed hotel, confirmed that some of the Hyatt Place's employees were using the site of the proposed hotel for parking:

COUNCILWOMAN MAYFIELD: Where do your employees who work at this Hyatt Place park? Do they park in that hotel's deck?

MR. WALDEN: They park on site here at Hyatt Place, and then they do use part of our -- our lot right now across the street, as well as the -- around the surrounding area.

. . . .

COUNCILMAN YOUNG: So when it's built, if it's built, the adjacent -- the parking that your employees use across the street now will go away.

MR. WALDEN: Yes.

COUNCILMAN YOUNG: And on top of that will go away, you would also incur parking from the current employees that will be employed by the Embassy now. So the people across the street parking would lose their parking now, and the current employees would also have to find parking.

MR. WALDEN: Yes, sir, but in a very limited capacity.

. . . .

COUNCILWOMAN MAYFIELD: I'm not hearing you say directly that you will provide parking for all of you employees in that -- in that deck.

And so the concern is that this -- this hotel would be adding to the -- would be bringing more people there on a daily basis, the workers who work at the hotel --

MR. WALDEN: Right.

COUNCILWOMAN MAYFIELD: -- and not provide them a place to park, which would make parking in that area even more difficult.

MR. WALDEN: Sure.

COUNCILWOMAN MAYFIELD: So that's a concern.

MR. WALDEN: Sure.

COUNCILWOMAN MAYFIELD: Is that a valid concern, or can you tell us that

you[r] employees will have a place to park in that deck on a regular basis and will not be adding to the already overloaded shortage -- that's not - - adding to the shortage of parking that's already there.

MR. WALDEN: I do not feel that our employees would add to that burden. I feel that it's sufficient within the amount of spaces that we have. With valet and a number of spots, I do not feel that it would add an additional burden to the parking situation.

In my view, the City Council's finding that PHG failed to establish that the proposed use "will not cause undue traffic congestion or create a traffic hazard" "is neither whimsical, nor patently in bad faith, and it is not indicative of a lack of any course of reasoning or exercise of judgment." *Mann Media*, 356 N.C. at 17, 565 S.E.2d at 19. Rather, the City Council's decision was based on legitimate concerns that were insufficiently addressed by PHG's evidence, including the exacerbation of the acknowledged parking issues in the area, the potential hazard created by the hotel's driveway, and the impact of recent and planned hotels and other developments on traffic congestion in the area, which was not considered in Mr. Dean's traffic assessment.

In that latter respect, Mr. Dean suggested that any traffic congestion unaccounted for in his assessment would only lessen the proposed hotel's impact on traffic because the hotel's impact would then amount to a smaller percentage of overall traffic in downtown Asheville. This assertion, however, does not address what is required by the ordinance. For example, it does not address whether Mr. Dean's earlier conclusions that "study intersections are expected to continue to operate at acceptable levels of service with only minor increases in delay" and that "simulations show no queuing issues at any of the study intersections" would be affected when the impact of the proposed hotel is assessed in conjunction with the realities of the traffic impact from the major developments not considered by Mr. Dean's assessment.

Moreover, Mr. Dean also failed to explain why it was appropriate to use a Thursday in November to examine the potential for traffic congestion in downtown Asheville, "the hub of . . . tourist activity in Western North Carolina." While the majority assigns some talismanic quality to Mr. Dean's assertion that this was an "industry standard," Mr. Dean never elaborated on the nature of this standard or, more importantly, explained why this undefined "industry standard" was an appropriate method of addressing the specific requirement in *this* municipal ordinance—that is, whether the proposed hotel in downtown Asheville, along with its "detached, multi-level parking garage" and "5000 square feet of meeting space, that . . . will create its own demand," will cause undue traffic congestion or create a traffic hazard. Absent such an explanation, it was not arbitrary or capricious for the City Council to find unpersuasive the use of a weekday in November to assess potential traffic congestion in downtown Asheville.

The majority, noting that "[w]hen an applicant has produced competent, material, and substantial evidence tending to establish the existence of the facts and conditions which the ordinance requires for the issuance of a special use permit, [p]rima facie he is entitled to it," *Humble Oil*,[6] 284 N.C. at 468, 202 S.E.2d at 136, asserts that PHG was only required to meet a burden of production to

6. In *Humble Oil,* the Court determined that the Board of Alderman's denial of the petitioner's permit application must be set aside because the Board did not refer the application to the Planning Board for review before acting on it, as required by the ordinance. *Humble Oil,* 284 N.C. at 466-68, 202 S.E.2d at 135–36. The Court did not address whether the petitioner met its prima facie burden and the Court's only references to "de novo" were in its statements that on remand the Board of Alderman must "consider Humble's application De novo." *Id.* at 471, 202 S.E.2d at 138. The Court did "deem it expedient" to also address on appeal the Board's finding that the proposed use "would materially increase the traffic hazard and danger to the public at this intersection" and to determine whether the finding "is arbitrary in that it is unsupported by competent, material, and substantial evidence." *Id.* at 468, 202 S.E.2d at 136. The Court determined that the anecdotal evidence purportedly supporting this finding was "unsupported by factual data or background," and therefore incompetent and insufficient to support the finding. *Id.* at 469, 202 S.E.2d at 136. Unlike the Asheville City Council's finding here that PHG did not meet its prima facie burden because it "failed to produce competent, material and substantial evidence that the Hotel *will not* cause undue traffic congestion or create a traffic hazard," which is

establish a *prima facie* case. This ignores the plain language of Asheville's ordinance ("The Asheville City Council *shall not approve* the conditional use application ... *unless and until it makes the following findings*" (emphases added)), which, like the ordinance in *Mann Media*, places the burden of persuasion on the applicant, requiring the applicant to prove to the fact-finder—here the City Council—each of the necessary standards. *See Mann Media*, 356 N.C. at 17, 565 S.E.2d at 19 (stating that "[t]he burden is on petitioners to meet the four requirements of the Ordinance before finding that a *prima facie* case has been established, and respondent did not state in its written order that petitioners made a *prima facie* case," and that "petitioners failed to meet their burden of proving this first requirement and did not establish a *prima facie* case"). In other words, "the facts and conditions which the ordinance requires for the issuance of" the permit are that the City Council specifically makes the seven relevant findings, including that "[t]hat the proposed use will not cause undue traffic congestion or create a traffic hazard."

Moreover, the majority ignores that under *Mann Media*, the City Council's determination of whether PHG established a *prima facie* case is reviewed under the whole record test, pursuant to which "we are not permitted to substitute our judgment for that of respondent." *Id.* at 17, 565 S.E.2d at 19; *see also id.* at 17, 565 S.E.2d at 19 (stating that "[u]nder the whole record test, [a] finding must stand unless it is arbitrary and capricious" and that the Planning Board's "finding that petitioners failed to establish that there would be no danger to the public from falling ice is neither whimsical, nor patently in bad faith, and it is not indicative of a lack of any course of reasoning or exercise of judgment."). Instead, the majority erroneously applies de novo [7] review and substitutes its own judgment for that of the City Council.

"The 'arbitrary or capricious' standard is a difficult one to meet." *Id.* at 16, 565 S.E.2d at 19. Because the City Council's finding that PHG failed to prove that the proposed use will not cause undue traffic congestion or create a traffic hazard "is neither whimsical, nor patently in bad faith, and it is not indicative of a lack of any course of reasoning or exercise of judgment," it is not arbitrary or capricious and therefore "must stand." *Id.* at 16, 565 S.E.2d at 19.[8] As such, the Court of

based on the absence of evidence, the Board of Alderman's finding in *Humble Oil* is an affirmative finding (''*would materially increase* the traffic hazard and danger'') purporting to be based on evidence in the record contrary to the petitioner. The significance of this distinction is illustrated in *Mann Media*, in which the Court held that the Planning Board's affirmative finding ''that ice has formed and fallen *from the other towers* ... and is likely to do so from the proposed tower, and *would therefore materially endanger* the public safety'' was based on anecdotal hearsay and not supported by competent evidence; yet, the Court held that in light of the petitioners' inability to state with sufficient certainty that there was no danger from ''the potential of ice falling *from support wires of the proposed tower*,'' under the whole record test, the Planning Board's ''finding that petitioners failed to establish that there *would be no danger* to the public from falling ice is neither whimsical, nor patently in bad faith, and it is not indicative of a lack of any course of reasoning or exercise of judgment.'' *Mann Media*, 356 N.C. at 16–17, 565 S.E.2d at 19 (emphases added).

7. Notably, the legislature recently amended N.C.G.S. § 160A-393(k), providing that ''[w]hether the record contains competent, material, and substantial evidence is a conclusion of law, reviewable de novo.'' PHG contends that this ''clarifying'' amendment renders the appeal moot because it answers ''[t]he central question'' here of ''what standard of review applies to a municipality's denial of a conditional use permit when the denial is based on an alleged failure to present a prima facie case.'' Yet, the question of ''[w]hether the record contains'' a sufficient quantum of evidence is an inquiry into a party's burden of production. Asheville's ordinance, like the ordinance in *Mann Media*, specifically requires the applicant to meet a burden of persuasion, mandating that the ''City Council *shall not approve* the conditional use application ... *unless and until it makes the following findings*.'' (Emphases added.) Thus, as in *Mann Media*, the ''*prima facie* case'' in this particular context requires an applicant to meet, not a burden of production (i.e. producing evidence from which the City Council *could* find that the proposed use will not cause undue traffic congestion), but a burden of persuasion (producing evidence from which the City Council *does* find that the proposed use will not cause undue traffic congestion). The City Council's finding in this respect is reviewed under the whole record test. *Mann Media*, 356 N.C. at 17–18, 565 S.E.2d at 20.

8. Because PHG failed to prove this requirement of the ordinance, it is unnecessary to address the remaining requirements. *Mann Media*, 356 N.C.

Appeals and superior court should be reversed, and the decision of the City Council denying the conditional use permit should be affirmed. Accordingly, I dissent.

Justice HUDSON joins in this dissenting opinion.

374 N.C. 238

STATE of North Carolina

v.

Kenneth Vernon GOLDER

No. 79PA18

Supreme Court of North Carolina.

Filed April 3, 2020

Background: Following denials of motions to dismiss charges filed at close of State's case and at close of evidence, defendant was convicted in the Superior Court, Wake County, Henry W. Hight, Jr., J., of obtaining property by false pretenses, accessing a government computer, unlawfully altering court records, and unlicensed bail bonding. Defendant appealed, and the The Court of Appeals, 257 N.C.App. 803, 809 S.E.2d 502, affirmed. Defendant and State both filed petitions for discretionary review.

Holdings: The Supreme Court, Hudson, J., held that:

(1) Court of Appeals' determination that defendant did not argue plain error did not impermissibly announce new rule that challenges to sufficiency of evidence were reviewable for plain error;

(2) defendant adequately preserved for appellate review challenges to sufficiency of evidence simply by filing motions to dismiss at close of State's case and at close of evidence, abrogating *State v. Walker*, 252 N.C. App. 409, 798 S.E.2d 529;

(3) substantial evidence supported finding that defendant aided and abetted employee in county clerk's office in scheme to exploit bail forfeiture statute, as required for State to survive motions to dismiss; and

(4) substantial evidence supported finding that defendant obtained thing of value in course of scheme, as required to support denial of motion to dismiss charge for obtaining property by false pretenses.

Modified and affirmed.

1. Criminal Law ⇐1179

The Supreme Court reviews the decision of the Court of Appeals to determine whether it contains any errors of law. N.C. R. App. P. 16(a).

2. Criminal Law ⇐1036.8

Court of Appeals' determination that defendant did not argue plain error did not impermissibly announce new rule that challenges to sufficiency of evidence were reviewable for plain error; rather, Court merely cited to appellate rule governing plain error review. N.C. R. App. P. 10(a)(4).

3. Criminal Law ⇐1036.1(1), 1038.1(2)

An appellate court will apply the plain error standard of review to unpreserved instructional and evidentiary errors in criminal cases. N.C. R. App. P. 10(a)(4).

4. Criminal Law ⇐1044.1(7), 1044.2(2)

By filing motions to dismiss charges at close of State's case and again at close of evidence, defendant adequately preserved for appellate review claims that State's evidence was insufficient to support convictions for obtaining property worth over $100,000 under false pretenses, accessing government computer, and altering court records, on theory of aiding and abetting, and that evidence was insufficient to show that he obtained thing of value, as required to support conviction on obtaining property charge, even if

at 17, 565 S.E.2d at 19 (stating that ''petitioners failed to meet their burden of proving this first requirement and did not establish a prima facie case,'' and that ''[b]ecause of this holding, we are not obligated to address the remaining three requirements under the Ordinance'').

John R. Nolon

December, 2020

"***Emergencies and the Police Power: Property Claims in Times of Crisis***"

How far can the police power be stretched to protect the public against dangers? This paper evaluates the scope of state and local authority to respond to emergencies and the implications for private property rights—asking, how far is too far? What is the scope of implied limitations on private property rights in times of crisis? When does the diminution of existing property rights require compensation? Can local governments respond to a crisis without delegated authority or in defiance of state mandates? What rights do property owners/landlords/tenants have to respond in times of crisis?

Introduction: After reviewing property rights under English common law, this paper mentions the contributions to this topic of several US Supreme Court opinions ranging from 1906 to 2002: a century's worth of balancing property rights and the public interest, setting the stage for a discussion of state law and executive orders that require the pubic to stay at home, wear masks, close or limit their businesses, suspend the right to evict tenants, and other mandates imposed to respond to the pandemic.

In the Beginning, public liberty and property rights were subject to the police power; The concept of the police power, that is of the government's power to regulate behavior and property, is derived from the Greek word *polis* for city or *polity*, and from the Latin word *polita*, meaning citizenship, and from the French *police*, which means government.

William Blackstone's Commentaries on the Common Law of England demonstrate that personal liberties under the common law of England were limitable by government regulation. In 1769, he reported that the police power of the state gave the enforcement authorities of the Crown the right to exercise the means by which *"the individuals of the state, like members of a well-governed family, are bound to conform their general behavior to the rules of propriety, good neighbourhood, and good manners, and to be decent, industrious, and inoffensive in their respective stations."* This offers some historical perspective on the notions of some, during this pandemic period, who object to governors, in lieu of kings, exercising the police power to direct the pubic to shelter in place, wear masks, and forgo trips to the movies and bars in modern neighborhoods. Governor Kevin Stitt said last week that

he is opposed to ordering masks because "You can't pick and choose what freedoms you are going to give people." NY Times, 7/17/20 p. A9.

More to the point of the regulation of property, Blackstone commented that property *"consists in the free use, enjoyment, and disposal of all his acquisitions, without any control of dominion, save only the laws of the land."*

1922 Penn Coal v. Mahon: Involved the regulation by the laws of the land, that is the State of Pennsylvania, of coal mining. The case was initiated, not by the coal industry against a state statute that regulated mining, but by a bill in equity brought by a property owner asking the court to enjoin coal mining under his house. In the Pennsylvania courts, the case must have been styled Mahon v. Penn Coal.

150 years after Blackstone's definition of property rights, Penn Coal dealt with the laws of Pennsylvania, adopted by its legislature which, under its constitution, was granted the police power to adopt legislation to protect the health, safety, welfare, and morals of the people of the state. The legislature was concerned about the subsidence of streets, homes, and businesses caused by the extraction of coal from the support estate, a separate estate from the surface and subsurface estates, as defined by Pennsylvania common law. The Kohler Act restricted the mining companies from extracting coal from the support estate, thus preventing subsidence to protect the public safety.

We did not know in 1922, when the case was decided, that a police power regulation could be a regulatory taking. Challenges to property regulations prior to that time were based on the deprivation of due process, that is, the claim that the law did not achieve a valid public objective. We do not hold our land, from Blackstone forward, subject to irrational and arbitrary laws, only laws that protect the public health, safety, welfare, or morals. The Fifth Amendment, applied to the states by the Fourteenth Amendment, prevented the **deprivation of property without due process.** By showing that a law did not reasonably protect the public, one could win a due process claim. The remedy was invalidation of the law by the court, freeing the property owner from its constraints.

The **taking of property** is an altogether different thing. As Justice Holmes declared in the Penn Coal case, when a regulation goes too far it can be the equivalent of a physical taking, which is also prevented by the Fifth and Fourteenth Amendments, unless it is for a public purpose and accompanied by just compensation.

The Court held that the Kohler Act cannot be sustained as an exercise of the police power. "*The general rule at least is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking*." It noted that the Act cannot be justified as a protection of public safety, which is secured by notice requirements to affected owners prior to the commencement of mining.

Holmes understood that the plaintiff, Mahon, had either sold the support estate to the defendant coal company or had bought only the surface estate from it. "As applied to this case, he noted, *"the statute is admitted to destroy previously existing rights of property and contract. The question is whether the police power can be stretched so far."* He wrote that the Act "*purports to abolish what is recognized in Pennsylvania as an estate in land-a very valuable estate-and what is declared by the Court below to be a contract hitherto binding the plaintiffs. If we were called upon to deal with the plaintiffs' position alone we should think it clear that the statute does not disclose a public interest sufficient to warrant so extensive a destruction of the defendant's constitutionally protected rights. This is the case of a single private house. ... A source of damage to such a house is not a public nuisance even if similar damage is inflicted on others in different places. The damage is not common or public"*

So far as private persons or communities have seen fit to take the risk of acquiring only surface rights, we cannot see that the fact that their risk has become a danger warrants the giving to them greater rights than they bought.

So the holding of the Court is to deny the bill of equity asking the Court to enjoin the mining of the support estate. The holding was not that it was a taking, but rather that the Mahon should not be awarded an injunction as a remedy; to do so might have constituted a taking. The Court held that the police power could not be stretched this far. The effect of the holding was to invalidate the Kohler Act as it applied to the plaintiff's property. It was not a valid exercise of the police power. It does reflect on takings by noting, *"To make it commercially impracticable to mine certain coal has very nearly for constitutional purposes as appropriating or destroying it. This we think that we are warranted in assuming that the statute does."* The remedy was invalidation of the law as applied to Mahon and by extension others who might challenge it; this is a due process remedy. The state of Pennsylvania was not before the court and could not be ordered to pay just compensation.

1906 Strickley v. Highland Boy Gold Mining Co. Justice Holmes wrote the opinion in Strickley v. Highland Boy Gold Mining, 16 years before Mahon. In this case, the rights of a private owner to enjoin a police power law in Utah were similarly

limited. In *Strickley*, an easement over the plaintiff's property was condemned by the state and conveyed to his neighbor, a private mining company. The complaint was that this was done solely for private benefit and was not, therefore, a public use under the Fifth and Fourteenth Amendments. The condemnation was done under a Utah statute that asserted that the public welfare of the state demanded that mining operations in the mountains have access to rail lines in its valleys. **Justice Holmes** wrote "*In the opinion of the state legislature and the Supreme Court of Utah, the public welfare of that State demands that aerial lines between the mines on its mountain sides and the railways in the valleys below should not be made impossible by the refusal of a private owner to sell the right to cross his land. The Constitution of the United States does not require us to say that they are wrong."* So the taking of private property and conveyance of it to another private party is not unconstitutional. This should have been noted in the much-maligned Kelo case.

1915: Hadacheck v. Sebastian and Reinman v. Little Rock. Let's look at the legitimacy of using the police power to prevent use of property that constitutes a nuisance or that simply causes injury to others. In 1915, seven years before Penn Coal, two cases of the Court were decided that bear on this point: Hadacheck v. Sebastian and Rienman v. Little Rock. In Penn Coal, by declaring that the Mahon's did not prove a public nuisance, the Court could not sustain it as such as a valid exercise of the police power. The Court in these two 1915 cases, however, validated property restrictions of land uses that it found injurious to the public. In Hadacheck the city prohibited the operation of a brick kiln in a three square mile area, and, in Reinman, a livery stable in certain parts of the city. The owners attacked the laws on a number of grounds including that they were arbitrary and unreasonable. Justice McKenna wrote for the majority, *'It is to be remembered that we are dealing with one of the most essential powers of government,—one that is the least limitable. It may, indeed, seem harsh in its exercise, usually is on some individual, but the imperative necessity for its existence precludes any limitation upon it when not exerted arbitrarily. A vested interest cannot be asserted against it because of conditions once obtaining."*

The Hadacheck Court commented on its earlier ruling that year in Reinman. *"The circumstances of the case were very much like those of the case at bar, and give reply to the contentions of petitioner, especially that which asserts that a necessary and lawful occupation that is not a nuisance per se cannot be made so by legislative declaration. There was a like investment in property, encouraged by the then conditions; a like reduction of value and deprivation of property was asserted against the validity of the ordinance there considered; a like assertion of an arbitrary exercise of the power of prohibition. Against all of these contentions, and causing the rejection of them all, was adduced the police power. There was a*

prohibition of a business, lawful in itself, there as here. It was a livery stable there; a brickyard here. They differ in particulars, but they are alike in that which cause and justify prohibition in defined localities,—that is, the effect upon the health and comfort of the community."

In Reinman itself, the Court wrote: "*granting that the business was not a nuisance per se, it was clearly within the police power of the state to regulate it, 'and to that end to declare that in particular circumstances and in particular localities a livery stable shall be deemed a nuisance in fact and in law.' And the only limitation upon the power was stated to be that the power could not be exerted arbitrarily or with unjust discrimination"*

Blackstone had a commentary on this matter as well (1753 Vol 2, Ch. XIII Nuisances) *"And by consequence it follows, that if one does any other act, in itself lawful, which yet being done in that place necessarily tends to the damage of another's property, it is a nuisance: for it is incumbent on him to find some other place to do that act, where it will be less offensive."*

1928 Miller v. Schoene

Six years after Penn Coal, the Supreme Court took up this issue of limiting the use of property because of its damaging effect on one's neighbor. In Miller v. Schoene, 1928, the Court held that the Takings Clause did not require the State of Virginia to compensate the owner of cedar trees for the value of the trees that the State had ordered destroyed under the Cedar Rust Act. The trees needed to be destroyed to prevent a disease from spreading to nearby apple orchards, which represented a far more valuable resource. In upholding the state action the Court held *"We need not weigh with nicety the question whether the infected cedars constitute a nuisance according to the common law, or whether they may be so declared by statute. (Citing Hadacheck.) For where, as here, the choice is unavoidable, we cannot say that its exercise, controlled by considerations of social policy which are not unreasonable, involves any denial of due process. The injury to property here is no more serious, nor the public interest less, than in Hadacheck…*."

"*And,"* the Miller v. Schoene Court continued, "*where the public interest is involved, preferment of that interest over the property interest of the individual, to the extent even of its destruction, is one of the distinguishing characteristics of every exercise of the police power which affects property." Citing* Mugler v. Kansas, Hadacheck v. Los Angeles*;* Village of Euclid v. Ambler Realty Co.*; and* Reinman v. Little Rock.

1926 Euclid v Ambler Realty

These cases make it easier to understand the famous 1926 case of Euclid v. Ambler Realty, which sustained the constitutional validity of zoning. The Court noted, ***"****The matter of zoning has received much attention at the hands of commissions and experts, and the results of their investigations have been set forth in comprehensive reports. These reports which bear every evidence of painstaking consideration, concur in the view that the segregation of residential, business and industrial buildings will make it easier to provide fire apparatus suitable for the character and intensity of the development in each section; that it will increase the safety and security of home life, greatly tend to prevent street accidents, especially to children, by reducing the traffic and resulting confusion in residential sections, decrease noise and other conditions which produce or intensify nervous disorders, preserve a more favorable environment in which to rear children, etc."*

In Euclid another Due Process Claim was Defeated: *"it is enough for us to determine, as we do, that the ordinance in its general scope and dominant features, so far as its provisions are here involved, is a valid exercise of authority."*

The case articulated the Court's presumption of Validity of police power enactments and the heavy burden of proof on challengers: "*the reasons [offered by the Village] are sufficiently cogent to preclude us from saying, as it must be said before the ordinance can be declared unconstitutional, that such provisions are clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare."*

Euclid also demonstrates that the Scope of Constitutional principles expands and contracts in a changing world: *"while the meaning of constitutional guaranties never varies, the scope of their application must expand or contract to meet the new and different conditions which are constantly coming within the field of their operation. In a changing world it is impossible that it should be otherwise. But although a degree of elasticity is thus imparted, not to the meaning, but to the application of constitutional principles, statutes and ordinances, which, after giving due weight to the new conditions, are found clearly not to conform to the Constitution, of course, must fall. … Regulations, the wisdom, necessity, and validity of which, as applied to existing conditions, are so apparent that they are now uniformly sustained, a century ago, or even half a century ago, probably would have been rejected as arbitrary and oppressive."*

1988 Pennell v. San Jose

The City of San Jose enacted a rent-control ordinance to alleviate the problem of skyrocketing rent prices due to the growing shortage of housing. The issue was whether the ordinance violated the Fourteenth Amendment's Due Process Clause? The Court held that the ordinance was rationally crafted to protect the financial investments of landlords while simultaneously preventing tenants from becoming victims of burdensome rent increases. The Ordinance's purpose of preventing unreasonable rent increases caused by the city's housing shortage is a legitimate exercise of appellees' police powers. The takings claim was deemed to be premature.

2002 Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency

Temporary Suspension of Right to Development land is not a Taking: In Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency 2002 SCOTUS held that a 32 month moratorium on all development was not a regulatory taking. The purpose of the moratorium was to give the Agency time to deal with the threat posed by land development to the clarity of Lake Tahoe, which had begun to cloud as early as the late 1950s.

Sterk and Krier Study: Tahoe and the other takings cases discussed here do not offer much hope for takings claims succeeding when brought against regulations brought to challenge public health emergencies. A study of 2000 state and lower federal takings cases done by professors Sterk and Krier establishes that the Supreme Court's categorical rules established by those seminal cases govern almost no state takings cases and that takings claims based on government regulation almost invariably fail.

I'll end with a comment on the Role of Local Governments – Recall that San Jose adopted a rent control ordinance. Little Rock and Los Angeles, in Reinman and Hadacheck adopted nuisance prevention ordinances. In most states, local governments have the authority to govern local property and affairs and to regulate and prevent nuisance like activity.

This local power resides in local governmental charters, in home rule provisions of the state constitutions or home rule authority granted by their state legislatures, or through special and general enabling acts. Local governments are not sovereign, they can be preempted by the state legislature. And, if not preempted, they can regulate similar topics if their regulations are more restrictive than state law. This explains both why local pandemic regulations are prevented or, in some cases, allowed. In a Georgia case that was settled in the Fall of 2020, Governor Brian

Kemp sued Mayor Bottoms of Atlanta, for imposing a mask mandate. The claimed that the mayor "does not have the legal authority to modify, change or ignore governor Kemp's orders." NY Times 7/17/20, p. A9. (OCGA § 38-3-28 - Gives the Governor power to suspend municipal orders that are "contradictory" to any state law or to his executive orders.)

How to create a uniform or at least coordinated response to the corona virus?
All of this begs two questions:
First, how to create a uniform or coordinated system of fighting the pandemic, since the police power discussed here is that retained by the states under the Tenth Amendment and
Second, the question of federal power to override this state power and create a uniform system of mandates that controls both state and local governments.

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This paper does not cover the seminal takings cases of Loretto, Lucas, Nollan/Dolan, and Penn Central, but rather focuses on due process and the police power. There are a number of reasons for this including, first, that an understanding of the power to govern is step one, due process claims is step two, and takings jurisprudence step three. Also, the abstract of a law review article below suggests that this is the correct prioritization.

AN EMPIRICAL STUDY OF IMPLICIT TAKINGS
JAMES E. KRIER & STEWART E. STERK
ABSTRACT
Wm & Mary Law Review Vol. 58 #1.

Takings scholarship has long focused on the niceties of Supreme Court doctrine, while ignoring the operation of takings law "on the ground"—in the state and lower federal courts, which together decide the vast bulk of all takings cases. This study, based primarily on an empirical analysis of more than 2000 reported decisions over the period 1979 through 2012, attempts to fill that void. This study establishes that the Supreme Court's categorical rules govern almost no state takings cases, and that takings claims based on government regulation almost invariably fail. By contrast, when takings claims arise out of government action other than regulation, landowners enjoy modest success. In particular, when government actions are taken by officials who are not politically accountable, state courts are more likely to scrutinize those actions. This pattern is consistent with what we believe to be the courts' basic project in this area: to develop doctrine that acknowledges the importance of property rights while also accommodating the needs of an activist

state. By and large, political processes, not judicial doctrine, are left to serve as the primary check on government activity.