The Takings Denominator in Zoning Lot Merger Cases: *Murr v. Wisconsin*

by Mark White, Esq.

Mark White is a partner with White & Smith, LLC in Kansas City and Charleston. His practice includes drafting zoning and development codes, and assisting local governments with comprehensive plan implementation. He is also an adjunct Professor of Planning at the University of Kansas.

In *Murr v. Wisconsin*, a 5-3 decision, the United States Supreme Court rejected a takings challenge to a zoning “lot merger” provision – a mainstay of residential and environmental zoning regulations. In its first decision since 2001 to tackle an economic regulatory takings claim resulting from a zoning regulation on its merits, the Court handed local governments an important – but not complete – victory. This article explains the complicated fact pattern leading to the decision, and explains its meaning and limitations for future zoning code drafters.

**The Facts**

In 1960, the Murr’s parents bought a long, narrow lot along the St. Croix River (Lot “F”) and built a recreational cabin. The next year, they transferred Lot “F” to their family business and, in 1963, purchased an adjacent lot (Lot “E”) in their own names. The lots share not only a common property line, but also a bluff that bisects the lots and renders parts of the area unbuildable.

In the ensuing decade, the St. Croix River was designated for federal protection under the Wild and Scenic Rivers Act. Wisconsin developed a management plan and implemented regulations for development along the river, including a minimum net lot area requirement of at least one (1) acre of buildable land to either build on or to sell as a lot (the density or minimum lot area requirement). The state and county regulations included two important and parallel provisions to implement the legislation’s environmental objectives and avoid hardship to property owners. First, a grandfathering provision allows one dwelling on undersized lots that were created before the legislation became effective. The second provision denies the grandfathering protection to adjacent lots under common ownership. This requires adjoining lots to combine for purposes of determining net acreage. Therefore, instead of building a dwelling unit on each substandard lot, only a single dwelling is allowed on the combined lot. Property owners can place the dwelling on either lot, or across the lot lines. This type of provision – in common use in local zoning regulations for over a century – avoids the division of lots into substandard lots in order to trigger the grandfather protections and to avoid the minimum lot area regulations.

The parents subsequently transferred Lot “F” to the Murrs in 1994, and Lot “E” in 1995. This brought both lots under common ownership. Together, both lots were 0.98 acres in net lot area – slightly under the legislation’s minimum lot size.
The Slow Evolution of Energy Planning: One State’s Experience
by Edward J. Sullivan, Esq.

Ed Sullivan has retired from active law practice, but continues to teach, write, and present on planning law issues. He is a member of the APA Amicus Curiae and Legislative and Policy Committees.

While Oregon is often seen as a model of active and effective state planning, its planning policies regarding energy sources and the conservation and efficient use of energy are diffuse and incremental, and appear to lack a consistent and cohesive vision.

Energy spurred the rise of industry in the United States, from the use of waterpower and steam for grinding wheat and powering machines to providing energy for cloth manufacturing. Shortly thereafter, the use of coal and oil powered the industrial revolution. Later on, natural gas, hydropower, nuclear power, and renewable energy added to the array of energy sources used to meet our heating, transportation, and manufacturing needs.

As the result of a lack of energy planning mindfulness, Oregon has lost opportunities for energy efficiency, as well as for the formulation of a more coherent approach to energy resource use and development. This article suggests remedies for these problems that might be useful nationally.

Since 1975, Oregon has had a legislatively-adopted energy policy to promote energy efficiency and to develop sustainable energy resources, encouraging an array of permanently sustainable energy resources, energy conservation, elimination of wasteful energy use, efficient transportation systems, and the distribution of energy cost effectiveness information. The state’s energy policy, however, has had little direct impact on its land use policy.

Since the passage of Senate Bill 100 in 1973, Oregon has had a unique, statewide planning policy structure implemented through local comprehensive plans that in turn controls land use regulations and state and local government actions. State land use policy is set out in a series of 19 planning goals. The state planning

Continued on page 16
David L. Callies is the Benjamin A. Kudo Professor of Law, at the University of Hawaii’s William S. Richardson Law School. This article is abbreviated and modified from a longer version published in the Journal of International and Comparative Law earlier this year. The author wishes to acknowledge and thank Brian Connolly, Ed Voss, and Don Elliot, co-panelists in several recent national programs on the Fair Housing Act and the Inclusive Communities Decision, which helped form the basis of this paper.

Derek B. Simon is an associate at Carlsmit Ball, LLP, Honolulu, Hawaii, where he practices land use, real estate, and administrative law, and a 2016 magna cum laude graduate of the University of Hawaii’s William S Richardson School of Law. The author would like to thank his family for their unwavering support and Professor Callies for the opportunity to co-author this article.

II. Fair Housing and Discrimination in Housing

a. Discriminatory Intent
In 1976, the Supreme Court decided Arlington Heights v. MHDC, and held that the U.S. Constitution’s Equal Protection Clause provided relief in cases that involve discrimination in housing if, but only if, the plaintiff alleging discrimination can demonstrate that the defendant local or state government intends to discriminate against the plaintiff. Relying primarily on its decision in Washington v. Davis, decided after the Seventh Circuit Court of Appeals decision but before oral argument in Arlington Heights, the Court reiterated that official action would not be held unconstitutional solely because it resulted in a racially disproportionate impact. In as plain words as can be imagined, the Arlington Heights Court held that “[p]roof of racially discriminatory intent or purpose is required to show a violation
In **Epona, LLC v. County of Ventura**, the 9th Circuit Court of Appeals invalidated a county’s conditional use permitting (CUP) scheme. Michael Fowler, sole member of Epona, LLC, rented out his 40-acre property for weddings. Due to modifications to Ventura County’s zoning regulations, Mr. Fowler was required to obtain a CUP before hosting any additional weddings. Mr. Fowler applied for a CUP, and reviewing officials found that the use would cause no adverse impacts and recommended granting the permit; however, after receiving complaints from neighbors, these same officials denied his application. The County Board of Supervisors upheld the denial. As a result of this decision, Mr. Fowler had to cancel pending reservations for weddings at his property, resulting in reputational harm. Mr. Fowler challenged the permitting scheme in the United States District Court, claiming that it abridged his customers’ right to free speech under the First Amendment. The District Court dismissed his suit and Mr. Fowler appealed to the Ninth Circuit. The Ninth Circuit held that Mr. Fowler had standing to challenge the County’s permitting scheme, noting that vendors have third-party standing to advocate for the rights of their customers and that Mr. Fowler’s “injury” was redressable through elimination of the CUP scheme. The 9th Circuit then held that the County’s ordinance was not a valid time, place, and manner restriction on speech for two reasons: 1) the CUP scheme lacked objective standards and 2) the CUP scheme lacked a specific time limit in which officials had to reach their decision. These deficiencies gave permitting officials “unbridled discretion” in violation of the First Amendment. The 9th Circuit then found that Mr. Fowler could request injunctive relief in district court.

**11th Circuit Court of Appeals (GA), 11th Circuit Court of Appeals Rejects First Amendment Claims Brought by Adult Entertainment Businesses**

In **Flanigan’s Enterprises, Inc. of Georgia v. City of Sandy Springs**, the 11th Circuit Court of Appeals upheld the district court’s dismissal of Plaintiffs’ claims for free-speech violations. Plaintiffs owned strip clubs and adult-oriented sex shops in Sandy Springs, Georgia. In their suit against the City, they claimed that various provisions of the City’s Alcohol, Adult Zoning, and Adult Licensing Codes prohibiting the sale of alcohol also violated their Constitutional rights. On appeal brought by Plaintiffs, the 11th Circuit Court of Appeals considered two issues: first, that the district court used the incorrect level of scrutiny in granting a motion in favor of the City; and second, that the district court incorrectly found that any secondary-effects of adult-oriented businesses the alcohol ban would combat proportionally outweighed the speech silencing caused by the resulting business closures. (The Court declined to hear a third claim that the district court should have required the City to prove its ordinances were the least restrictive means of achieving the city’s goals.) On the first claim, a content-based, adult-entertainment-related law is generally subject to a court’s highest level of scrutiny. However, the 11th Circuit found that if a legitimate interest in combatting adult-entertainment’s harmful secondary effects justified the law, the secondary effects doctrine permits the application of a less strict scrutiny. Next, the Court of Appeals declined to apply the proportionality test to Plaintiff’s claim that the effect of the alcohol ban on Plaintiff’s businesses – their resulting closure – was disproportionate to the amount of secondary effects of adult entertainment that the alcohol ban would combat. This refusal effectively affirmed the lower court’s dismissal of Plaintiff’s claims in favor of the City.

**United States District Court, Southern District of California, Federal District Court in California Dismisses Disparate Treatment Equal Protection Claim Against City**

In June 2010, the City of San Diego’s Neighborhood Code Compliance Department (NCCD) issued two Civil Penalty Notices to the Morrows for grading violations on their property observed by a City Zoning Investigator (CZI). In **Morrow v. City of San Diego**, the Morrows brought suit against the City and claimed they were subject to disparate treatment in violation of the
PLD Legacy Member Spotlight:  
An Interview with Daniel R. Mandelker, Esq. 
by Leonard Cohen

Each issue, our Legacy Member Spotlight column highlights a current PLD member’s career path within the interconnected fields of planning and law.

Daniel R. Mandelker is the Stamper Professor of Law at Washington University Law School in St. Louis, Missouri, where he teaches courses in The Fourteenth Amendment. Environmental and Land Use Litigation, Land Use Law, and State and Local Government. One of the nation’s leading scholars and teachers in land use law, Professor Mandelker is the co-author of a widely-used casebook on land use law, now in its ninth edition, and coauthor of a comprehensive treatise on land use law, currently in its sixth edition. He also focuses on environmental law and state and local government law, co-authoring a casebook on state and local government law, in its eighth edition, and co-authoring a popular treatise on the National Environmental Policy Act, NEPA Law and Litigation.

A former member of the College of Fellows of the American Institute of Certified Planners, Professor Mandelker has lectured at national and international conferences and has served on editorial boards. He is a recipient of the ABA Section on State and Local Government’s Daniel J. Curtin Distinguished Lifetime Achievement Award. Professor Mandelker has consulted with local and state, governments in his areas of expertise. He was the principal consultant and contributor to the American Planning Association’s model zoning and planning legislation project, the principal consultant to a joint ABA committee that prepared a model law on land use procedures adopted by the House of Delegates, and the principal author of comprehensive planning amendments to the New Orleans city charter.

Recently he was a member of a task force of the National Association of Environmental Professionals that prepared a report on Best Practices for Environmental Assessments for the U.S. Council on Environmental Quality. Professor Mandelker received his B.A. and LL. B from the University of Wisconsin, and his J.S.D. from Yale Law School.

The Planning and Law Division is proud to feature Professor Mandelker in its “Member Spotlight” initiative, and congratulates him on a lifetime of exemplary work in the fields of planning and law.

The author, Leonard Cohen, was PLD’s 2015-16 Daniel J. Curtin, Jr. Fellow. Lenny is now a land use attorney at Snyder & Snyder, LLP, in Tarrytown, NY, which focuses on telecommunications, environmental, and energy-related projects.

Professor Mandelker, you’ve been teaching a long time. What are some of the trends you’ve seen develop in land use law over the years and what have been the most radical changes?

When I first started teaching the problem was defending the system. Can we really do historic preservation? Can we regulate growth? Today these basic issues are largely settled, and the issues are fine-tuning. Do growth systems really work, for example, and if not, how can we fix them? The most radical changes are the revival of the takings clause as a limitation on land use regulation, the application of the constitutional Free Speech clause to issues like signage, and the expansion of land use concerns into new areas, like fair housing and telecommunications.

What are some of the key issues you see in land use practice? Zoning practice?

The key issues are how to transform what Don Elliott calls a hybrid land use system, and how to get good process. The old Euclidean system is fading, replaced by new formats like form-based codes. Process is still not what it should be, and the Model Land Use Procedures Act adopted by the American Bar Association provides a good model. It is based on Chapter 10 of APA’s model legislation included in its Growing Smart Legislative Guidebook.

How do you structure your land use law course at Washington University Law School? How would you like to see law schools nationwide improve their land use law courses?

The emphasis is on the cases, but I use them to bring in land use practice issues and use my web site to explain statutes and regulations that are important to the course, such as the model planning and zoning acts. To give students a sense of the real world, I have them do reports on land use issues for a city or county they adopt on the internet, and they can earn bonus grade points with projects such as a field project, in which they find a vacant tract of land and propose and defend a zoning upgrade.

Continued on next page
Can you talk about some of the key issues facing the courts today?

New areas of interest need attention, like religious land use and environmental land use regulation. Federal statutory interventions, like the Fair Housing Act, have unanswered questions, and we still don't have a sound basis for strategies like inclusionary zoning. Exactions have unsettled issues. Old concepts need revising. I recently published an article on spot zoning, for example, that suggests reforms in that doctrine. We can improve on best practices in almost every area.

I know you see the taking clause as an important land use and Constitutional issue. Can you explain to our readers why it's such an important issue? What recent developments have you seen that you believe to be important?

The takings clause is bedrock. Planning and land use regulation affect property rights, and the taking clause sets limits to what can be done ever since Justice Holmes' decision in Pennsylvania Coal. My sense is that the Supreme Court has pretty much closed the door on takings cases. The Lake Tahoe case put an end to per se takings, and the recent Munn case showed the Court is not interested in changing the rules. A major change in the Court's makeup could change this conclusion, but it hasn't happened yet.

What are your thoughts on affordable housing?

There is no silver bullet here. A variety of strategies can add up to progress, though it's not easy. Inclusionary zoning is complex, is not yet fully accepted legally, and works only in a growth environment. There is hope for housing elements in comprehensive plan, which half the states require, and which can set housing needs and guide site selection. Housing appeals laws, that allow developers of affordable housing to appeal adverse decisions, have been adopted in a few states and have had good results.

You've done a massive amount of consulting projects for different entities. Can you share a project or two that had significant land use and zoning implications?

I was principal consultant to Growing Smart, the APA project that produced model land use planning and land use legislation with extensive commentary and advice. This is a major revision that provides a sound basis for statutory change. In New Orleans, I helped write a city charter amendment that made planning mandatory, and requires that zoning must be consistent with the comprehensive plan. It was a big step in recognizing the importance of comprehensive planning.

That's fascinating! Can you think of any other consulting work you've done that our readers would find interesting?

Well, some time ago I spent several years consulting with the Hawaii state planning department on legislation to strengthen their state land use system. We wrote and consulted on legislation on a variety of topics that provided new land use initiatives and helped protect their environment. Working on major land use problems in a fragile state, where land use is a major political issue, was a lifetime experience.

You've had a lot of publications and articles. Can you recommend some of your work that young lawyers and planning professionals should read?

I've written several articles recently they might find interesting on spacing requirements for group homes, zoning barriers to manufactured homes and spot zoning. You can find them in the Urban Lawyer, a publication of the American Bar Association's State and Local Government Law section. They might also look at the latest edition of Street Graphics and the Law, which proposes an imaginative signage system and includes a model sign code. As an APA member, they can download it free from the APA web site.

What advice do you have for young lawyers or planning professionals?

Keep in mind, when you're starting out, that experience and knowledge take time. Frustration can come easily, but don't let it get in the way. Pay attention to detail. Projects and decisions require careful detailing, and too often this doesn't happen. Get your lawyers involved and work with them. I've seen too many cases where ordinances and decisions did not get the right legal attention.

Any final thoughts?

Planning and land use are demanding and important areas of public concern. It is an honor to work on these issues, and what you do affects how we live and how our environment is managed. A job well done is its own reward. ♦
Although the term greyfield was coined over 15 years ago by the Congress for New Urbanism (CNU) and PricewaterhouseCoopers (PwC), the concept and definition of what exactly constitutes a greyfield continues to evolve. Connect Our Future (COF) defines a greyfield as a property that is “underutilized as a result of economic obsolescence,” such as a floundering or failed retail mall with “the potential for profitable redevelopment as a mixed-use neighborhood, sometimes paired with adaptive reuse strategies.” The term greyfield is related to the broader concept of infill development and the terms are often used in conjunction yet are not exactly synonymous. Land use legislation that addresses the growing number of greyfields and the concomitant concern over that amount has lagged behind these market trends and are, thus, not addressing the needs of communities as well as they could be.

Although the term greyfield has existed since 2001, it has yet to become as pervasive as the term brownfield, for example, and relatedly has yet to be high enough on the agenda to be sufficiently addressed. The amount of greyfields, especially in sprawling suburban communities, will only continue to increase as long as the demand for residential housing also continues to shift back toward more urban walkable communities - in other words, if the real estate cycle continues to shift in the direction of its current trajectory. The most common retail example of greyfields, as they have been some of the most severely affected, are suburban shopping and strip malls. The waning popularity of strip malls and stand-alone big box stores, or what have been referred to as dead malls, have been publicized since the early 2000s, yet are only now beginning to be addressed.

The recent downward spiral of the once goliath retail shopping conglomerate, Sears, a company known for innovating and epitomizing the American shopping experience, should signal the increasing importance of developing land use tools, and legislation authorizing those tools, that specifically focus on the redevelopment of greyfields.

In 2016, New York adopted legislation that attempted to address the issue of vacant and abandoned foreclosures. “Abandoned homes are not only eyesores for citizens, but pose safety hazards and drag down values of nearby homes.” This legislation alleviates the burden that falls on taxpayers and citizens in those communities, in addition to causing environmental impacts, by “requiring lenders to inspect and maintain vacant property prior to completion of foreclosure, the implementation of a statewide abandoned property registry and reporting system to monitor vacant properties, and providing an expedited foreclosure process for vacant properties.” Read the Blog Here...

An example of one of the many issues that could arise when attempting to adaptively reuse a greyfield is the former use of the property which, in this case, implicates the public trust doctrine. These issues are discussed in the context of litigation over whether a former portion of Shea Stadium can be redeveloped for retail, rather than its current use as a park. Read the Blog Here...

Municipalities in Long Island, specifically the Towns of Babylon and Hempstead, have recently enacted legislated addressing vacant and abandoned properties in the wake of Cuomo passing the, above referenced Abandoned Property Neighborhood Relief Act of 2016. Interestingly, the two towns have taken slightly different approaches to regulating such properties; one addresses commercial properties, while the other limits itself to residential. Read the Blog Here...

In 2011, the State of New York authorized the creation of land banks. Over the past five years, these non-for-profit land banks have become experts on rehabilitating blighted properties in their localities and returning them back to productive use. The benefits are two-fold as the municipality where these blighted properties are located often spend a significant amount of capitol dealing with such properties that are often no longer paying taxes. This benefit, among many others, has galvanized the State of New York’s commitment to continue funding its land banking system. Read the Blog Here...

On the west coast, communities in Southern California are experimenting with a different approach to redeveloping dead malls. With the overwhelming demand for housing and a relatively low stock in relation to that demand, particularly for low-income and multi-family housing, a public need exists for properties that have outlived their useful lives and current uses to be transformed into places to live. Read the Blog Here...

---

**Connect with PLD on Twitter & Facebook!**

[twitter.com/APAPlanningLaw](twitter.com/APAPlanningLaw)

[facebook.com/PlanningLaw](facebook.com/PlanningLaw)
Alfred Bettman & the Bettman Law Symposium
Understanding the Keynote Planning & Law Session Through the Legacy of Its Namesake
by Marcus Mello

We are pleased to bring you the first edition of “A Page Out of Planning & Law History”—our new series on the historical intersection of planning and law in which we highlight the people, events, and movements that contributed to the growth of these fields.

Marcus Mello was PLD’s 2016-2017 Daniel J. Curtin Fellow, during which time he was also a student at Harvard University’s Graduate School of Design, pursuing dual master’s degrees in architecture and urban planning.

I. Alfred Bettman

Alfred Bettman was born in Cincinnati in 1873 to German immigrants and served as the first president of the American Society of Planning Officials (ASPO) from 1934 through 1938. (ASPO would consolidate with the American Institute of Planners some forty years later to create the American Planning Association). After earning an undergraduate and law degree from Harvard University, he returned to his hometown, where he was eventually appointed as Cincinnati City Solicitor in 1912. Two years later, he helped establish the United City Planning Committee of Cincinnati and later drafted legislation allowing for cities in Ohio to form city and regional planning boards. (Gerkens, L.C. (1983). Bettman of Cincinnati. The American Planner: Biographies and Recollections.)

John Lord O’Brien, in the first sentence of his forward for Bettman’s City and Regional Planning Papers, describes Bettman as man who “led a many-sided life filled with responsibilities.” O’Brien drives home the fact that what Bettman cared most about government was how it impacted human lives. While other lawyers of his time were more preoccupied with academic theory, Bettman sought to legislate systems that had positive outcomes on individual citizens and preserved and strengthened democracy for their sake. While his work helped institute urban planning as a professional practice and form of government, the collective body of his scholarship and legislation can be seen as a field of social improvement. In this light, some consider him a humanitarian. Bettman also acknowledged that while legislation was necessary to put procedural methods in place, the power of public opinion was ultimately most crucial in bringing about a better world. His devotion to morality for the public good comes across in his City and Regional Planning Papers. Bettman was also known as a personable man. In commenting on Bettman’s character, O’Brien states that “his sense of devotion, his modesty, his self-deprecatory humor, his patience, were quite as distinctive as was his courage in facing disagreeable facts without attempting to minimize their effect.” (O’Brien, J.L. (1946). Foreward. City and Regional Planning Papers.)

Bettman’s legacy can be found largely in the words of A Standard City Planning Enabling Act (SCPEA), a model law that was published by the U.S. Department of Commerce in 1928. As a member of the Advisory Committee on City Planning and Zoning (ACCPZ) that drafted the law, Bettman - along with nine other members (including Frederick Law Olmsted) - was instrumental in establishing land use planning as a tool through which local governments could regulate their urban form. (Knack, R., Meck, S., & Stollman, I. (1996). The Real Story Behind the Standard Planning and Zoning Acts of the 1920s. Land Use Law & Zoning Digest.) While the ACCPZ was also responsible for drafting A Standard State Zoning Enabling Act (SSEA), which was printed in 1924, Bettman joined the ACCPZ to work specifically on SCPEA given his experience with drafting planning legislation in his home state of Ohio. Bettman was appointed to the committee by former U.S. President Herbert Hoover, who was Secretary of Commerce at the time. During a time when American cities saw mass influxes of people, Hoover actively worked to improve social conditions and the quality of American life through built space, writing in his administration that “our cities do not produce their full contribution to the sinews of American life and national character. The moral and social issues can only be solved by a new conception of city building.” (Willbur, R. and Hyde, A. (1937). The Hoover Policies.) Bettman, in working to actualize Hoover’s vision, was an instrumental part of setting frameworks for states and local governments

Continued on next page
to adopt planning guidelines to benefit the quality of life for their citizens. SCPEA covered six subjects: “(1) the organization and power of the planning commission, which was directed to prepare and adopt a ‘master plan;’ (2) the content of the master plan fo the physical development of the territory; (3) provision for adoption of a master street plan by the governing body; (4) provision for approval of all public improvements by the planning commission; (5) control of private subdivision of land; and (6) provision for the establishment of a regional planning commission and a regional plan.” (American Planning Association. (2017, December). Standard State Zoning Enabling Act and Standard City Planning Enabling Act.)

Arguably Bettman’s most significant contribution to urban planning, however, came two years before the publication of SCPEA. The case of Village of Euclid v. Ambler Realty Co. likely held a special importance to Bettman as Euclid is located just outside Cleveland in his home state of Ohio. In the Euclid case, Bettman filed a persuasive 137-page amicus curiae brief to the Supreme Court reframing the argument used by the Village of Euclid in lower courts, and drawing key connections between zoning, nuisance law. Lora Lucero details the timeframe of Bettman’s amicus brief in Patricia E. Salkin’s 2005 compilation publication Current Trends and Practical Strategies in Land Use Law and Zoning, stating that, initially, Bettman missed the deadline to file his brief and reached out to his fellow Cincinnatian William Howard Taft, then Chief Justice of the Supreme Court at the time, who allowed him to file it belatedly. Eventually, the case was reargued. In his brief, Bettman argued that single-use zones were necessary to avoid clashes in land uses and that police power should be allowed to prevent developments that negatively affect the safety, welfare, and health of the public. In the Euclid case, the Court found that Ambler Realty did not provide evidence that the Village of Euclid’s zoning ordinance reduced the value of its property in question; rather, the ordinance had a rational basis and was not subject to a claim of takings. (Bettman, A. (1946). City and Regional Planning Papers.) The case paved the way for local governments to adopt zoning ordinances across the United States during a time when zoning was still a new concept.

Bettman’s death came in 1945, nineteen years after the Euclid ruling while traveling aboard a train from Washington, D.C. to Cincinnati. He had just attended the American Institute of Planners Meeting in New York. The Bettman Law Symposium is a testament to Alfred Bettman’s accomplishments and achievements throughout his prominent career.

II. The Bettman Law Symposium & The National Planning Conference

The Bettman Law Symposium, which takes place each year at the American Planning Association’s National Planning Conference - has convened the professional urban planning community in tackling complex legal questions affecting the built environment since its founding. Two things that are clear about “the Bettman” - as it is affectionately known amongst its organizers - are the influence it has had on its attendees and the profound importance of its namesake to the fields of urban planning and law.

The Bettman Symposium is included in the prefaces, footnotes, and references of various books on land use planning and law for its significant contributions to scholarship across both fields. Jerome G. Rose, who served as a professor or urban planning and business law at Rutgers University during his career before his death in 2013, cites the Bettman in his work Legal Foundations of Land Use Planning. He states: “In May 1974, at its Fortieth Annual National Planning Conference in Chicago, the American Society of Planning Officials selected the transfer of development rights (TDR) as the featured subject of discussion for its prestigious Alfred Bettman Symposium. The discussion served the twofold purpose of exposing the enthusiastic response of practicing planners to this new techniques of land-use regulation and also providing an opportunity for those who had been experimenting with the concept to share their findings and to reaffirm their initial observation that ... “Transferable development rights is an idea whose time has come!” (Gerome, J.G. (1979). Legal Foundations of Land Use Planning.) Rose’s mentioning of the Bettman Symposium - which at the time existed as a collective symposia - not only confirms its forty-plus year existence, but regards it as a critical connection point between planning and law.

Indeed, of the most powerful characteristics of the coveted event is that it provides an opportunity for scholars and practitioners to deeply investigate the intersection of two fields that often aren’t in dialogue enough. It also provides student conference attendees with an insight into career pathways by highlighting current topics through which planning and law overlap in intriguing ways. Lora Lucero, who served as an editor and staff liaison to the APA from 2001 to 2010, helping to organize many Bettman sessions, said in an interview for this article that part of the value of

If you are attending the 2018 National Planning Conference in New Orleans, please join us for this year’s Bettman Law sessions:
- Law & Planning for Climate Change (Sunday, 8:30-10 am, Room 005)
- Housing, Health, Equity & Local Control (Sunday, 10:45 am-12:15 pm, Room 005)
- After Inclusive Communities: Disparate Impact Revisited (Monday, 8:30-10 am, Great Hall B)
the Bettman at an event like the National Planning Conference is in that urban planning does not work in a vacuum; it works in an environment that requires a clear understanding of the law. It also serves as a sort of bridge between the APA and the American Bar Association, especially its Section on State and Local Government. Lucero’s aforementioned Current Trends chapter highlights that the event “features speakers, recognized as leaders in their field, sharing important topics in land-use and planning law.”

In addition to providing a platform for leading voices in planning and law, the symposium preserves the honorable career of Alfred Bettman, whose career was devoted to making the case that the practice of city planning, when applied effectively, could work to improve the public good. Many students of law and urban planning may never have come across his name, even when familiar with the landmark Euclid decision. The Bettman Symposium, in this sense, is symbolic - it preserves the namesake of an admirable groundbreaking figure whose work fundamentally improved conditions in cities and towns across the nation, and does so at the country’s most important gathering of urban planning professionals.

Curtin Fellow Report

by Matthew Norchi

PLD Daniel J. Curtin Fellow

I am extremely excited and honored to be serving as the Planning and Law Division’s 2017-2018 Curtin Fellow. I’m a third year dual degree student in law and urban planning at the University of North Carolina. My major interests in the planning and legal fields are affordable housing, inclusive economic development, and land use law.

Newsletter Articles
With regard to my fellowship duties, I have completed a newsletter article examining the efficacy of tiny homes as an affordable housing solution. The article delves into the rise in prominence of tiny homes as a trendy living space and as a proffered tool for communities to address affordable housing. Additionally, the article probes the proffered benefits of tiny homes and explores the legal and institutional hurdles that tiny homes face. Later this spring I will work on another newsletter article for PLD on an as yet undecided topic.

NPC18 Preparation
In addition to the newsletter article, I am also providing assistance to the PLD Leadership team to prepare for the 2018 APA Conference. I have updated the PLD Events flyer to reflect the current events for the year and am helping to compile recent publications from PLD members to be included in a separate flyer for the 2018 conference.

Updated Online Resource: Foundational Land Use Law Cases
Further, I am helping PLD Chair-Elect Evan Seeman compile an update to PLD’s online resource, entitled Foundational Land Use Law Cases, originally created in spring of 2007 by past Curtin Fellow David Gest. The AICP Commission has requested permission from PLD to make this resource available as study guide reference for AICP exam takers. The compilation will highlight and provide background to major legal cases that have impacted the planning field.

Meet Our New Curtin Fellow

The Planning and Law Division welcomes Matthew Norchi as this year’s recipient of the Daniel J. Curtin Fellowship. Matthew Norchi is a third year graduate student at the University of North Carolina at Chapel Hill where he is pursuing a dual degree in law and urban planning. Prior to attending UNC, he received a B.A. in History from the University of South Carolina. Matt is interested in helping to address economic and societal inequality, with particular focuses on equitable land use planning and affordable housing development. This past summer, Matt worked as a summer intern at the City Attorney’s Office in Charlotte, North Carolina. As a Curtin Fellow, Matt hopes to learn from experts in the planning and legal fields and develop a deeper understanding of how planning and legal methods can help further affordable housing and community development.

The purpose of the PLD Daniel J. Curtin, Jr. Fellowship is to foster increased interest in the study of land use planning and its interrelationship with the law at the graduate, and law school levels; increased participation in the planning profession; and ultimately, greater service to communities across the nation.
John R. Nolon is a Distinguished Professor of Law at the Elisabeth Haub School of Law at Pace University where he teaches property, land use, and sustainable development law courses and is also the Founder and Faculty Liaison of the Law School’s Land Use Law Center. In 2009 he was awarded the American Planning Association’s National Leadership Award for a Planning Advocate.

Patricia E. Salkin is Provost of the Graduate and Professional Divisions of Touro College. She most recently served as Dean and Professor of Law at the Touro College Jacob D. Fuchsberg Law Center. Provost Salkin served as an appointed member of the U.S. Environmental Protection Agency’s National Environmental Justice Advisory Council and also on the Board of Directors of the New York Planning Federation.

The APA’s 2002 Growing Smart Legislative Guidebook explains that “states and communities across the country are slowly, but increasingly, realizing that simply responding to natural disasters, without addressing ways to minimize their potential effect, is no longer an adequate role for government.” It further states that “striving to prevent unnecessary damage from natural disasters through proactive planning that characterizes . . . [hazards], assesses a community’s vulnerability, and designs appropriate land use policies and building code requirements is a more effective and fiscally sound approach to achieving public safety goals related to natural hazards.” Vision plans, as well as development and construction regulations, can be used to help mitigate the impacts of natural hazards. Such tools may include building codes, zoning and subdivision regulations, buffer requirements, steep slope ordinances, site plan requirements, conservation and natural resource protection policies, comprehensive plans, floodplain management plans, open space plans, stormwater management plans, and transportation plans.

Examples of regulations that have been used to mitigate the impacts of natural hazards include: limitations on how property may be used in flood zones; setbacks from fault lines (and shorelines and other areas prone to natural disasters), steep slopes, and coastal erosion areas; and overlay zones that introduce additional requirements to help prevent flooding and to protect sensitive environmental areas such as wetlands, tidal basins, dunes, and hillsides. Such regulations were upheld as valid restrictions that were not unjust takings in 2014 by the Alaska Supreme Court in Tweedy v. Matanuska-Susitna Borough Board of Adjustment and Appeals, and in 2013 by the South Dakota Supreme Court in Parris v. City of Rapid City. The APA’s Guidebook recommends the use of overlay districts as a natural hazard mitigation technique, and encourages local governments to develop a list of land uses, building designs, and construction techniques that should be prohibited in each overlay zone. Restrictions in each overlay district should be designed to respond to the unique natural hazards that pose the biggest threats.

Additional development and land use regulations that have not been struck down by the courts and that help mitigate natural hazards include the following:

- Subdivision regulations to limit the intensity of development in areas located within mapped floodplains.
- Subdivision regulations for developments in fire-prone areas to include facilities to suppress wildfires.
- Requirements for applicants to avoid construction that results in encroachments upon watercourses and water bodies, including avoiding the filling or excavation of, or encroachment upon, wetlands and floodplains.

Throughout the site plan review process, conditions for approval can be added to mitigate the impacts of natural hazards. Performance zoning can also be employed as part of a subdivision or site plan review process to aid in disaster mitigation. For example, vegetation requirements such as tree ordinances can help to minimize flooding by preventing the removal of trees or by requiring their replacement. In areas that are prone to wildfires, local governments can mitigate the impact of fires on homes by requiring buffer areas that eliminate natural fuels around residences, including small trees, fallen leaves, branches, pine needles, and the like.
“Cities have the capability of providing something for everybody, only because, and only when, they are created for everybody.” – Jane Jacobs, The Death and Life of the Great American Cities.

Citizen Jane: Battle for the City (“Citizen Jane”), a project sponsored by many donors including The Rockefeller Foundation and the Ford Foundation|Just Films, begins its story with this quote against a deep black background, with Jane Jacobs’s words written in a contrasting stark white color. This highlights what is to come throughout the rest of the movie: a brilliant activist bringing light to the dark and homogenizing world of planning at that particular point in time. Citizen Jane, released in the spring of this year, further goes on to depict Jane Jacobs’s life story and the implications and effects her great words have had on the planning community throughout history.

The movie begins by explaining the detrimental effect the Great Depression had on the world of planning. Cities, especially New York City, over the next years became overcrowded, infested with disease, dirty, and greatly polluted. Slums were also popping up throughout the city and directly opposed the effect the newly built modern skyscrapers were supposed to have on the city’s overall image. The solution? Clean it up. By pushing forward this solution, Robert Moses, an emerging figure from the Progressive Movement, gained his great power over the path planning would take during those next few decades. In essence it was a war on slums, with the battle formation wiping the slate clean and re-creating these neighborhood from scratch.

Most members of the planning community supported Moses’s idealist “Clean it Up” theory until, as Citizen Jane depicts, Jane Jacobs began reminding people what they are losing as a result of this war. They would lose the pulse of these neighborhoods, the creativity, the communal atmosphere, and essentially the entire city. She reminded planners as well as others that the city has a life of its own and that we must learn from it and adapt, not start from scratch. As a result, she became Moses’s direct opponent; a fearsome one at that, due to her firsthand experience with one of the greatest cities of all time. Jacobs lived in New York City’s Greenwich Village. She experienced its culture and the creative possibilities that emerged from it. As an experienced freelance writer and then a staff editor at Architectural Forum, Jacobs was able to beautifully and affecting write about her experiences and the change planning needed to make in order to have our cities stay vibrant and full of culture.

Not only was she a gifted writer, but Jacobs was also a steadfast activist, unbeknownst to her at the time. Before Moses’s departure from New York City’s planning efforts, Jacobs’s own neighborhood, Greenwich Village, was designated for urban renewal and Washington Square Park was planned to have a major highway built through it to better connect the city. Citizen Jane takes the viewer through Jacobs’s efforts to halt any wiping out of her neighborhood for purposes of urban renewal. Through her diligent efforts, strong opposition, and even arrest for starting a riot, Jacobs was able to remove Greenwich Village from urban renewal designation and bring the end of the Moses era in New York City.

The movie ends with another quote from Jacobs’s The Death and Life of the Great American Cities: Under the seeming disorder of the old city, wherever the old city is working successfully is a marvelous order for maintaining the safety of the street and the freedom of the city. It is a complex order. This order is all composed of movement and change. And although it is life, not art, we may fancifully call it the art form of the city and liken it to the dance. Not to a simpleminded precision dance with everyone kicking up at the same time, twirling in unison, and bowing off en masse, but to an intricate ballet in which the individual dancers a and ensembles all have distinctive parts, which miraculously reinforce each other and compose an orderly whole.

What the planning as well as legal community can learn from Citizen Jane is that we cannot shape our future cities without the help of the people actually living in these neighborhoods – the people experiencing its culture, its shortcomings, and its achievements. Citizen Jane so poignantly reminds the planning and legal communities that one of the greatest future challenges we all face in this rapidly urbanizing world is to apply this theme to future projects and

Continued on page 15
requirement. The Murrs planned to relocate and rebuild the cabin and to sell Lot “E” to finance this effort, but were prevented from doing so by the density and lot merger restrictions. The Murrs unsuccessfully sought a variance and sued the state and county, claiming that the density and lot merger restrictions resulted in a taking of Lot “E” Figure 1 illustrates the sequence of events leading to the lots falling into common ownership and triggering these provisions.

**Analysis**
In the context of economic takings claims (as opposed to exactions or physical possession cases), there are several types of cases. The first is a categorical taking, where the regulation effectively denies all use of property. An example is the situation in Lucas v. South Carolina Coastal Council, where a coastal setback encompassed the plaintiff’s entire property and denied all development potential. This is the situation Wisconsin and St. Croix County were attempting to avoid with the grandfathering rule. Without that rule, substandard lots would lose all development potential – exposing the state and local governments to massive liability.

The second type of economic takings claim is a regulation that affects or reduces development potential, but does not deny all use. Since Penn Central Transp. Co. v. New York City, the Court has applied a 3-part ad-hoc analysis to these cases, considering the following questions:

1. What is the regulation’s economic impact?
2. How does the regulation affect the property owner’s reasonable, investment-backed expectations?
3. What is the character of the regulation – for example, does it prevent a serious public harm, or simply regulate aesthetics?

In the context of a lot merger, does the denial of development on one of the lots constitute a categorical taking? Or, does the court consider both lots together to determine the regulation’s overall economic impact? In Murr, the Supreme Court held that – at least under the facts of that case – the lots are aggregated to determine whether there is a taking under the Penn Central analysis. The Court’s assessment was that no taking occurred under this analysis.

**Economic Impact**
In assessing the economic harm, the courts divide the value reduced by the regulation into the value of the property as a whole (the numerator). With respect to a lot merger provision, which property furnishes the denominator – a single parcel affected by the merger, or both parcels considered together? The Court highlighted several tests in deciding whether parcels are aggregated when assessing a regulation’s economic impact.

- **How Property Lines are Treated under State Law.** While a state cannot redefine property rights in a way that precludes a takings claim (for example, by defining scattered, non-adjacent properties as a single parcel), state laws (such as the lot merger regulation) shape the contours of those rights. State law is not a determinative factor that ends the inquiry into parcel aggregation. Here, it was important that the regulations were established long before the parcels merged – giving the Murrs fair warning about how that would affect their plans. The Court noted a “widespread understanding that lot lines are not dominant or controlling in every case.”

- **The Property’s Physical Characteristics.** The tracts’ irregular topography, physical connectivity (including the common bluff and long, narrow shape), and environmental setting favored treating them as a single parcel. The Court noted that property in environmentally sensitive locations is expected to carry a high regulatory burden.

- **Offsetting Benefits.** The regulation’s economic benefits are also relevant. While the regulation limited development, it also preserved views, expanded recreational opportunities, and protected privacy.

*Continued on next page*
Takings Denominator  
continued from previous page

In applying these factors, the Court rejected an analytical sleight of hand known as conceptual severance. The theory of conceptual severance divides the portions of a property subject to regulation and assesses their economic impact separately, awarding compensation for the burdened portion. For example, consider a conventional zoning setback, with no buildings permitted forward of a front, side, or rear setback. Conceptual severance would consider the unbuildable areas within the setback as separately burdened, and therefore subject to compensation.

Noting that courts often reject takings claims involving value reductions of up to 95%, this case did not support a viable economic impact claim. Appraisals indicated that, given the flexibility of siting a dwelling under the merger provision, only a 10% value reduction resulted from combining the lots (see Table 1 below). In fact, the Court noted, development of the merged lots produced a much higher value ($698,300) than the separately regulated and improved Lot “F” and a sellable (although not developable) Lot “E” ($413,000). Therefore, under the specific facts presented in the case, proof of the severe economic harm needed to sustain a takings claim was thin.

Character of Regulation
The Court noted the longstanding use of lot merger provisions throughout the nation, along with their benefits. These provisions enable local governments to protect the rights associated with preexisting substandard lots, while avoiding a proliferation of lots in a way that would defeat the government's environmental objectives. Lot merger avoids gamesmanship by lot aggregations that could occur in advance of the legislation, noting, small lot splits are often an administrative procedure that occurs without much regulatory oversight. A variance process is also available under Wisconsin and County law to identify unique situations that warrant regulatory relief to avoid economic hardships.

The dissenting opinion would have given the definition of parcel lines under state law conclusive effect as the takings denominator. Interestingly, they would have also considered the impact of common ownership on the Penn Central factors. The dissent would have applied a separate Penn Central analysis to Parcel “E”, rather than to the combined parcels. In a more interesting development, Justice Thomas’ concurrence questions the legitimacy of the Court’s entire takings jurisprudence under the doctrine of originalism, limiting takings claims to more traditional eminent domain cases and evaluating regulatory takings claims as due process violations.

5 Things to Know About the Murr Decision
1. There is no bright line rule that adjacent, commonly owned lots are combined for regulatory takings purposes. In deciding whether to apply Penn Central's ad hoc analysis – and in assessing the regulations’ economic impact – the Court looked to background principles of state law. Its analysis on whether to apply an ad-hoc or categorical takings analysis is a bit murky. However, it is likely conventional lot merger regulations,

<table>
<thead>
<tr>
<th>Party</th>
<th>Scenario</th>
<th>Value</th>
</tr>
</thead>
<tbody>
<tr>
<td>State</td>
<td>Separate + each buildable</td>
<td>$771,000</td>
</tr>
<tr>
<td>State</td>
<td>Merged lots as regulated</td>
<td>$698,300 (10% less)</td>
</tr>
<tr>
<td>State</td>
<td>Lot F improved</td>
<td>$373,000</td>
</tr>
<tr>
<td>Murr</td>
<td>Lot E undevelopable, saleable</td>
<td>$40,000</td>
</tr>
</tbody>
</table>

Table 1: Appraisals in Murr Decision

Continued on next page
Takings Denominator
continued from previous page

that apply only to adjacent lots under common ownership, will always trigger the ad-hoc analysis. The first case to apply Murr to a land development regulation to date, Quinn v. Board Of County Commissioners For Queen Anne’s County, applied the ad hoc test with little analysis as to whether that test – or the categorical rule – was the appropriate one. In Queen Anne’s County, the Court applied a lot merger requirement to a sewer extension plan and septic system limit that captured multiple lots that had been acquired by a land speculator. Applying the Murr/Penn Central Analysis, the Fourth Circuit found that it was the unavailability of sewer service – and not the lot merger requirement – that imposed economic hardship. The Court ultimately found that there was no taking, as the plaintiff lacked any entitlement to sewer service.

2. Communities should ensure that their zoning allows development across common lot lines. If setbacks apply to the lot line dividing common lots, development is possible only on one of the lots. This minimizes flexibility for the property owner, enhances the possibility of a successful takings claim, and is probably not needed to accomplish their environmental objectives or sustain the community’s character.

3. Consider moratoria or interim regulations before increasing lot size regulations. In Murr, if the parents had retained ownership of one of the lots, they would have been considered separately owned and independently buildable. The more likely scenario is separately owned lots that are sold in advance of lot size regulations to evade lot merger requirements. If permitted by state law, a moratorium on lot sales and development prior to implementing new regulations can avoid this type of gamesmanship.

4. Make sure your variance provisions are up to date, or consider special rules for administrative appeals of lot merger requirements.

5. While the government prevailed in both Murr and Queen Anne’s County, the case-by-case analysis is not a safe harbor for lot merger requirements. How would the economic impact and investment-backed expectations analysis apply to adjacent lots that lack common topography? What if the requirement disrupts existing development plans that were largely complete before the requirement was adopted? In addition to appeals, communities should consider alternatives to minimum lot area and lot merger requirements either as a backstop to applicants who are captured by those requirements, or as more flexible tools for environmental protection. Examples include aggregate density rules (such as a maximum unit per gross site area) or impervious surface allocations.

While it is likely most communities can now successfully defend minimum lot area and lot merger requirements under the Murr decision, this does not necessarily mean that those requirements are always the best or most effective policy.

Conclusion
Murr is an important victory for local governments, and for planning in particular. The Supreme Court recognized the important public policies underlying environmental regulations, and accorded substantial deference to zoning tools that protect sensitive public resources. In addition, with regard to takings inquiries, it preserved the Penn Central ad-hoc test that is difficult for property owners to overcome. Concerns about the economic impact of regulations need not thwart local efforts to protect resources, but also call for both administrative and substantive flexibility. This was a somewhat narrow majority (5-3), and Judge Gorsuch’s opinions on these matters is yet to be revealed. However, it is good news for local regulations affecting environmental and resource protection, and confirms the legal viability of an important regulatory tool.

Citizen Jane
continued from page 12

policy planning. Not only must we do this for our own American cities, but remind our global sister cities, like the Chinese cites replicating Moses’s homogenous buildings for public housing, that the just “Clean it Up” theory will not and has not worked for city communities; that it is an iterative process between multiple working groups, including, and especially, the people actually living in these neighborhoods.

ELECTIONS ANNOUNCEMENT

Help lead PLD!

PLD will elect new leaders this year and is inviting candidate nominations. If you are interested in running for either the Secretary/Treasurer or the Chair-Elect position, you may sign up at the APA nominations website by May 15. Terms for both positions will begin January 1, 2019 and will run for two years. Candidates must be current APA and PLD members. Online voting will begin in August.

Serving in a PLD leadership position is rewarding and engaging! Please consider submitting your online nomination today.
Energy Planning

continued from page 2

agency, the Land Conservation and Development Commission (LCDC) must certify (or acknowledge) these plans and regulations to be in compliance with the state’s planning goals.

Energy and the Statewide Planning Goals

Two statewide planning goals are relevant to the State’s energy policy. Goal 13 (adopted in December 1974) provides a policy to conserve energy. But unlike most other goals, there are no rules adopted by the LCDC to implement this goal or to detail the obligations it requires. Indeed, Goal 13 was a product of the short-lived Arab Oil Embargo, and was adopted before a statewide energy policy was formulated in 1975. When the energy crisis waned, so did the impetus for a planning response. In the LCDC’s review of the land use plans and regulations of approximately 300 local governments to determine whether they should be acknowledged, there was not a single significant contest over Goal 13. The other applicable goal focuses on specific energy sources (such as geothermal energy, which is part of Goal 5, Natural Resources), rather than on choices among energy alternatives and is therefore not significant.

Regulation of Major Energy Facilities

In 1971, the state legislature created an agency, now called the Energy Facilities Siting Council (EFSC), charged with granting or denying site certificates to nuclear installations and thermal power plants, and adopting and enforcing administrative rules for site certificates and operational requirements for these facilities. Until 1993, EFSC preemption was the rule, and land use impacts were a mere consideration for major energy facilities. State legislation from 1993 provided that applicants might choose alternative means of compliance with the state’s planning criteria. An applicant might choose local approval under an acknowledged plan, EFSC approval under the statewide planning goals by interpreting the local plan, EFSC approval solely under the state’s goals, or EFSC approval under its own criteria (which could exclude the state’s goals).

Other state agencies, such as the Public Utility Commission and the Departments of Environmental Quality and Water Resources, may also have rules that can impact major energy facilities. However, the site certificate process binds state agencies to issue permits and licenses when a site certificate is issued.

The net result under current Oregon law is a muddled approach at the intersection of land use and energy policy, especially with regard to energy facility siting decisions that are based on local and state directions that do not always require compliance with the statewide planning goals (which are designed to set our state land use policy) or with local plans and land use regulations.

Indirectly Derived Energy Policy

There are also a number of indirect formulations and applications of energy policy, such as the following, found in other statutes, rules, and practices of public agencies in Oregon.

1. Transportation and Urbanization - Oregon recognizes that transportation contributes greatly to energy consumption and attempts to reduce that consumption through its land use planning system, in particular through its Transportation Planning Rule (TPR) that reduces vehicle-miles traveled, supports mass transit, promotes connectivity, and assures a more compact urban form.

2. Tax Policy – Tax legislation is also influential. For example, the Oregon Department of Energy administers residential and business energy tax credit programs that allow taxpayers to install improvements to reduce energy consumption and a business energy tax credit program focused on new energy facilities. Similarly, the Department grants incentives related to reductions in energy use by businesses. The state also provides for certain exemptions of land and fixtures from property taxes in relation to the establishment of alternative energy systems.

3. Particular Energy-Related Land Use Controls – Since 2007, the state has required electric utilities to comply with renewable energy portfolio standards including wind, solar, wave (including tidal and ocean thermal), geothermal, biomass, municipal solid waste combustion, and hydrogen gas sources (all preferred over fossil fuels and hydropower sources). Legislative land use directions have also impacted policies regarding some of these sources.

a. Wind Energy - Oregon protects wind energy resources and has provided for wind energy easements as part of its property law regime.

b. Solar Energy - Similarly, Oregon allows for the protection of its solar energy resources and has also provided for solar energy

Continued on next page
Energy Planning
continued from previous page

easements as part of its property law regime.

c. Wave Energy - Oregon regulates wave energy within the limits of its territorial sea through its regulations for siting what it calls ocean renewable energy facilities.

d. Geothermal Energy - Oregon regulates geothermal exploration and development, including its spatial characteristics, and encourages use of this alternative energy resource.

e. Biomass Energy- The state legislature has allowed the administrators of state-managed forests to develop projects focused on biomass energy in order to convert forest waste to energy and encourages private landowners to do the same.

f. Municipal Solid Waste Combustion- Facilities in a metropolitan area accommodating this energy source may be a useful part of a segment of a renewable energy portfolio.

g. Hydrogen Gas Generation- Hydrogen gas is a potentially cheap and useful future fuel source.

4. Regulatory Efforts at Energy Conservation - The Oregon Department of Consumer and Business Services administers a statewide building code to increase energy efficiency in newly constructed, reconstructed, altered, or repaired structures. Public buildings are also subject to specific energy conservation standards.

Oregon requires its public utilities providing natural gas or electricity to make available energy audit and remediation programs for commercial buildings to promote energy conservation. The state also mandates energy audit and remediation programs of investor-owned and public utilities, as well as of oil dealers.

Conclusion

Energy policy in Oregon has significant impacts on land use planning and regulation, but has been incremental, uneven, and oriented towards individual projects or tax benefits. While Oregon's statewide planning goals have otherwise been highly influential in shaping land use decisions, dealing with rural affairs (retaining agricultural and forest lands for resource use, for example), and urban concerns (transportation needs and issues related to rapid urbanization, for example), the goals have been notably ineffective in dealing with the intersection of land use and energy. This outcome may be attributed to the reduction in the need for energy conservation produced by the waning of oil shortages and sharp oil price increases, as well as the continued less-than-enthusiastic public response to climate change and environmental issues (due in part to the perceived large amount of money that is needed to resolve these issues). Just as likely, however, is the fact Oregon has never gotten around to creating a cohesive, integrated energy policy. Here are some ways that Oregon could achieve that objective:

1. Revise the state's energy goal (Goal 13) to include state and federal energy policies, and reference the need to meet climate change challenges. Adopt administrative rules to provide a single policy addressing land use decisions, tax law, and the siting of major energy facilities.

2. Integrate tax and utility rate policy as part of the state's energy planning policy. Just as Oregon favors farm and forest uses on resource lands, and encourages efficient alternative energy use in its tax policies, those objectives should reinforce one other.

3. Develop and implement new planning, energy efficiency and conservation, and tax policies while realizing their interdependency. Moreover, land use planning must integrate both climate change and energy policy considerations into their everyday administration.

While most states do not have a statewide planning program, they probably have an incremental approach to energy policy, adding the latest good idea on energy to existing explicit or implicit energy policies. Unconscious and diffuse incrementalism is an enemy of good planning and policy. If these suggested reforms are undertaken thoughtfully, then the various strands of energy policy and regulation may yet be melded into a useful, coherent whole.

---

UNCONSCIOUS AND DIFFUSE INCREMENTALISM IS AN ENEMY OF GOOD PLANNING AND POLICY.

---

Call for Submissions

Want to contribute to the PLD Newsletter? Send us your proposals for articles, case studies, case law updates, or book reviews. Be creative; think beyond the ordinary and send us something our membership is not likely to find anywhere else.

Submit your proposals to pld.newsletter@gmail.com
Recent Books by PLD Members


Recent Articles by PLD Members

2018


2017


Dwight Merriam, Meeting and Beating the Challenge of Off-Campus Student Housing, *Zoning Practice* (August 2017).


For a full list of publications by PLD members, visit: [www.planning.org/divisions/planningandlaw/member/memberpublications.htm](http://www.planning.org/divisions/planningandlaw/member/memberpublications.htm)

If you are a PLD member and would like us to add your book, article, or other publication to our website, contact Chair-Elect, Evan Seeman, at ESeeman@rc.com.
PLD Announces Winners of 34th Annual Smith-Babcock-Williams Student Writing Competition

PLD sincerely congratulates the winners of this year’s Smith-Babcock-Williams Student Writing Competition for their exemplary contributions to the planning field.

First prize goes to Matthew Scarano for his article “Withholding Municipal Services to Facilitate Coastal Retreat: Legal Risks and Possibilities.” Matt graduated in 2017 from Columbia Law School and will start as a law clerk in the corporate department at Davis Polk in New York City this fall.

Second prize was awarded to Todd Michael Hirsch for his article “Preservation and Progress: An Argument in Favor of Transferable Development Rights.” Todd graduated in 2017 from Boston University School of Law with a J.D. and an LL.M in taxation. This fall, he will start at PricewaterhouseCoopers (PwC) as an associate in the International Tax Services group.

Finally, honorable mention was awarded to Monique M. Trammell for “The Benefits and Implications of Developing Tiny Home Communities.” Monique graduated in 2017 from Gonzaga University School of Law and plans to pursue a career in property law in Phoenix, Arizona.

We express our deep appreciation to Alan Weinstein, the Chair of the SBW Writing Competition Committee, for his continued dedication to this program. Many thanks to all PLD members who supported our competition by passing along the announcement to eligible students and encouraging them to submit entries.

Announcement of Next Competition – deadline is June 5th!

PLD’s 35th Annual Smith-Babcock-Williams Student Writing Competition is open to law students and planning students writing on a question of significance in planning, planning law, land use law, local government law or environmental law. The deadline for entries is June 4, 2018. The winning entry will be awarded a prize of $2,000 and submitted for publication in The Urban Lawyer, the law journal of the American Bar Association’s Section of State & Local Government Law. The Second Place paper will receive a prize of $400 and one Honorable Mention prize of $100 also will be awarded. Click here for official rules and further details.

Please support the Smith-Babcock-Williams Student Writing Competition by sharing this announcement with eligible students and encouraging them to submit entries.
Fair Housing
continued from page 3

of the Equal Protection Clause." Absent that showing, the Court said, the Seventh Circuit’s finding of a "discriminatory 'ultimate effect' is without independent constitutional significance." Indeed, the Court’s decision in Arlington Heights laid the foundation for disparate impact claims under the FHA to become one of the most prevalent mechanisms for fighting modern-day housing discrimination.

b. The FHA and Disparate Impact
In 1968, Congress enacted the FHA “following the urban unrest of the mid-1960s and the chaotic aftermath of the assassination of the Rev. Dr. Martin Luther King, Jr.” The FHA’s goal, as stated within its statutory text, is to provide, “within constitutional limitations, fair housing throughout the United States.” In 1968, Senators Celler and Mondale articulated Congress’s ambitious belief that the FHA’s proscription of discriminatory housing practices would “remove the walls of discrimination which enclose minority groups” and “replace ghettos with truly integrated and balanced living patterns.”

The thrust of the FHA is found within its two primary substantive provisions. First, 42 U.S.C. §3604(a) makes it unlawful “to refuse to sell or rent after the making of a bona fide offer, or refuse to negotiate for the sale or rental of, or otherwise make available or deny, a dwelling to any person because of race, color, religion, sex, familial status or natural origin.” Second, 42 U.S.C. §3606(b), makes it unlawful to “discriminate against any persons in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in the connection therewith.”

Today, the FHA protects the following classes, and no others (in particular, there is no per se protection for economic status): Race; color; religion; sex (but not sexual orientation); family status; national origin; and handicapped status.

c. Disparate Impact and Its Emergence Under the FHA
Prior to Inclusive Communities, the Supreme Court had previously recognized, and upheld, disparate impact claims under a number of statutes, including Title VII of the Civil Rights Act ("Title VII"), the Age Discrimination in Employment Act ("ADEA"), and the Americans with Disabilities Act ("ADA"). The origins of disparate impact claims can be traced to the Court’s decision in Griggs v. Duke Power Company. In Griggs, an employer implemented new policies that required prospective employees, except for the company’s labor department, (or current employees seeking to transfer departments) to have a high school education and to pass two professionally prepared aptitude tests to be eligible for employment. While the new policies were facially neutral, the Court nevertheless found that they violated Title VII because of the long history of inferior education received by African Americans and because the employer failed to establish that either requirement had a demonstrable relationship to successful job performance.

Griggs provided the analytical framework for the Eighth Circuit Court of Appeals’s 1974 decision in United States v. City of Black Jack, which signaled the emergence of disparate impact claims under the FHA. In Black Jack, the Eighth Circuit considered whether a zoning ordinance that prohibited the construction of new multi-family dwellings violated the FHA. The Eighth Circuit reversed the district court’s determination that the ordinance did not have a discriminatory effect and held that the lower court failed to take into account “either the ultimate effect or the historical context of the City’s actions.” Having found that the plaintiffs established a prima facie case of disparate impact, the Court shifted the burden to the City to demonstrate that its conduct was necessary to promote a compelling governmental interest. The Court ultimately invalidated the ordinance and found there was no factual basis to support the City’s assertion that its proffered interests were furthered by the ordinance.

III. Inclusive Communities Project

a. Background and Lower Court Decisions
In March 2008, Inclusive Communities Project, Inc. ("ICP") filed suit against the Texas Department of Housing and Community Affairs ("TDHCA") alleging, inter alia, discrimination under the FHA. ICP is a non-profit organization dedicated to achieving racial and socioeconomic integration in the Dallas metropolitan area.

Continued on next page
In 2012, the district court found that ICP successfully proved a claim of disparate impact under the FHA. On appeal, the Fifth Circuit reversed and remanded the case back to the district court for application of HUD’s regulations, given its “demonstrated expertise with [the] facts.” However, on October 2, 2014, the Supreme Court granted THDCA’s petition for writ of certiorari, which presented to the Court the question of whether disparate impact claims were cognizable under the FHA.

**b. Supreme Court Decision: Disparate Impact Saved? Maybe**

On June 25, 2015, the U.S. Supreme Court handed down its decision in *Inclusive Communities*. The fact that the Court found disparate impact claims cognizable under the FHA was no particular surprise. Eleven Federal Circuit Courts of Appeals opinions had previously done so, and the Supreme Court itself had similarly done so in cases brought under the ADEA, ADA, and Title VII. What is particularly significant, however, is that the last effect the Court’s decision will have on the ability of plaintiffs to prevail on such claims. Under *Inclusive Communities*, the substantiation of a FHA violation through a disparate impact claim requires satisfaction of a three-prong analysis: First, the plaintiff must show that a policy or practice has a disparate impact on a class of persons protected under the FHA: race, religion, national origin, family status, or handicapped status. Second, the defendant must be given an opportunity to rebut the charge of discrimination by demonstrating that the practice or policy is not for discriminatory purposes, but for a benign and neutral public goal or purpose or policy, such as protection of the health, safety, and welfare of the community. Third, the plaintiff alleging discrimination may still succeed if the plaintiff can show there are other, less burdensome methods to accomplish the benign and neutral goals the defendant claims for the purposes of the challenged public policy. Justice Kennedy’s opinion in *Inclusive Communities* concentrated primarily on the first prong, under which a plaintiff must set forth a prima facie violation of the FHA.

First, there is no liability if the allegation of disparate impact is based solely on a showing of statistical disparity. Second, that statistical disparity must also fail if plaintiffs cannot point to a policy of the offending government, rather than a single instance of an action having such a statistically disparate impact. As the Court explained, “racial imbalance alone does not without more establish a prima facie case of disparate impact” and a “fiscal disparity must fail if the plaintiff cannot point a defendant’s policy causing disparity.” The Court characterized this as a “robust causality requirement.”

In consideration of the second and third prongs, the Court ruled that it would be “paradoxical to construe the FHA to impose onerous costs on actors who encourage revitalization of dilapidated housing merely because some other priority might seem preferable.” According to Justice Kennedy, “disparate-impact liability has always been properly limited in key respects that avoid the serious constitutional questions that might arise under the FHA, for instance, if such liability were imposed based solely on a showing of a statistical disparity.” Further, “[d]isparate-impact liability mandates the ‘removal of artificial, arbitrary, and unnecessary barriers,’ not the displacement of valid governmental policies.” Accordingly, “[t]he FHA is not an instrument to force housing authorities to reorder their priorities, [but rather] aims to ensure that those priorities can be achieved without arbitrarily creating discriminatory effects or perpetuating segregation.” Similarly, “[i]t may also be difficult to establish causation because of the multiple factors that go into investment decisions about where to construct or renovate housing units ….” Therefore, while the Court upheld the use of disparate impact claims under the FHA, it also unquestionably elevated a plaintiff’s burden for substantiating such claims.

**IV. Disparate Impact after Inclusive Communities**

*a. Inclusive Communities on Remand and Rehearing*

Continued on next page
The district court’s treatment of Inclusive Communities on remand from the Supreme Court best illustrates how lower courts are construing Inclusive Communities as elevating the burden for plaintiffs, particularly at the prima facie stage. The Court reconsidered whether ICP had established a prima facie case, noting that it had previously granted ICP partial summary judgment “without the benefit of the Supreme Court’s opinion.”

Relying upon Justice Kennedy’s “cautionary language,” the Court concluded that it had not previously “give[n] the prima facie requirement the same emphasis the Supreme Court had given it.” The Court noted that, while ICP had not relied solely on statistical evidence alone, many of the other sources ICP cited also largely relied upon statistical evidence, and thus the Court arguably had “not analyze[d] ICP’s evidence through the prism of the ‘robust causality requirement’ envisioned by the Supreme Court.”

The Court further emphasized that TDHCA also did not have the benefit of the Supreme Court’s decision. Noting that TDHCA “essentially d[id] not contest ICP’s prima facie case,” the Court concluded that “TDHCA should be permitted to challenge ICP’s prima facie showing based on a clearer understanding of the requirements and consequences of ICP’s establishing a prima facie case.” Consequently, “the interests of justice and fundamental fairness require[d] not only that ICP’s disparate impact claim be decided anew under the burden-shifting regimen adopted by HUD and the Fifth Circuit, but that the Court start with whether ICP has established a prima facie case.”

Upon re-briefing and a fresh round of oral arguments, the district court held that ICP had failed to establish a prima facie violation of the FHA and dismissed the entirety of ICP’s disparate impact claim. The Court’s decision was not based on a single deficiency in ICP’s claims, but rather, ICP’s wholesale failure to satisfy the newly-informed disparate impact standard.

First, ICP “failed to point to a specific, facially neutral policy that purportedly caused a racially disparate impact.” Specifically, “[b]y relying simply on TDHCA’s exercise of discretion in awarding tax credits, ICP has not isolated and identified the specific practice that caused the disparity in the location of low-income housing.” Instead, ICP relied upon the “cumulative effects” of TDHCA’s decision-making process over a multi-year period, an argument that has been rejected as insufficient to underlie disparate impact claims in IT HAS BECOME SIGNIFICANTLY MORE DIFFICULT FOR PLAINTIFFS ALLEGING DISCRIMINATION TO SUCCEED THAN IT WAS BEFORE THE COURT WEIGHED IN.

other contexts. ICP’s failure to identify a specific, facially-neutral policy also became apparent when the Court considered what potential remedy would be available in the event that ICP were to prevail. According to the court, Justice Kennedy’s opinion requires that “[r]emedial orders in disparate-impact cases...concentrate on the elimination of the offending practice, and courts should strive to design race-neutral remedies,” and that “lower courts should be careful not to “impose racial targets or quotas,” because doing so “might raise difficult constitutional questions.” In other words, “[t]o remedy disparate impact, the court must craft a race-neutral remedy that removes the offending practice.” Yet, “[a]lthough ICP complains of TDHCA’s exercise of discretion in housing decisions, it does not ask the court to prohibit TDHCA from using its discretion; rather, it asks the court to require that TDHCA exercise its discretion in a specific way: to desegregate housing.” Such a remedy, therefore, would not be race-neutral.

Second, the Court found that ICP’s claim must be dismissed because, “regardless of the label ICP places on its claim, it [wa]s actually complaining about disparate treatment, not disparate impact.” As the Court explained, “[w]here the plaintiff establishes that a subjective policy, such as the use of discretion, has been used to achieve a racial disparity, the plaintiff has shown disparate treatment.” Therefore, because ICP was not complaining about the existence of TDHCA’s discretion, but rather how TDHCA was exercising such discretion, its claim was actually one of disparate treatment.

Third, the Court found that even if TDHCA’s use of discretion is a specific, facially-neutral policy, ICP nevertheless failed to establish a causal relationship between the exercise of that discretion and the racial disparity claimed. Noting that Justice Kennedy cautioned that “[i]t may be difficult [for ICP] to establish causation because of the multiple factors that go into investment decisions about whether to construct or renovate housing units[,]” the Court concluded that “ICP has not proved that TDHCA’s exercise of discretion and not other factors caused the statistical disparity.”

Finally, further buttressing its conclusion, the Court found that, even if ICP could establish that a specific, facially-neutral policy caused the disparity it complained of, ICP failed to prove a statistically significant disparity warranting the imposition of FHA liability. Simply put, the Court concluded that the evidence ICP submitted failed to prove that the statistical disparity would have been lessened if TDHCA did not exercise the discretion that ICP’s claim targeted.

Continued on next page
b. Other Cases Focusing on ICP’s Cautionary Language
The decisions of a significant number of courts that have confronted FHA disparate impact claims subsequent to the Supreme Court’s decision in Inclusive Communities similarly demonstrate that plaintiffs now must carry undeniably heightened burdens simply to proceed past the *prima facie* stage. Generally, plaintiffs’ claims in these cases fail for one or more of the following reasons: (1) failure to satisfy the robust causality requirement; (2) inadequate evidence to demonstrate a statistical disparity; and (3) failure to identify a specific, facially-neutral policy.

Perhaps the most frequent identified deficiency is the failure to satisfy Justice Kennedy’s “robust causality” requirement. For example, in *Azam v. City of Columbia Heights*, the plaintiff alleged that the City’s enforcement of its health and safety codes with respect to his rental properties “ha[d] the effect of making affordable rental dwellings unavailable . . . [resulting in] a disparate impact [on] persons intended to be protected by the [FHA].” In granting the defendant’s motion for summary judgment, the Court for the District of Minnesota found that the plaintiff failed to establish a prima facie case of disparate impact, particularly the “robust causality requirement” and, in any event, failed to submit an alternative practice with a lesser impact.

With regard to a plaintiff’s failure to proffer sufficient evidence to demonstrate a statistical disparity, *City of Los Angeles v. Wells Fargo & Co.* is illustrative. In that case, the City alleged that Wells Fargo’s issuance of “high-cost loans,” that is, loans with interest rates three-percentage points or more above the federally established benchmark, had a disparate impact on racial minorities. The City submitted evidence demonstrating “that an [sic] Hispanic Wells Fargo borrower with average non-race characteristics had a 0.0033% likelihood of receiving a High-Cost Loan, a similarly situated African-American Wells Fargo borrower had a 0.0067% likelihood of receiving a High-Cost Loan, while a similarly situated non-Hispanic white borrower face only a 0.0008% likelihood of receiving a High-Cost Loan.” While the Court noted that evidence is not to be weighed at summary judgment, it also pointed out that the Supreme Court’s “recent guidance in Inclusive Communities precludes the City’s statistical disparity evidence from creating a genuine dispute regarding a prima facie case.” Therefore, the Court concluded, the “difference between 0.0033 percent and 0.0008 percent does not create a genuine dispute such that a jury must decide this issue,” and “comparing thousands of a percentage fails to meet the minimum threshold of Inclusive Communities.”

Similar to the district court’s rehearing in *Inclusive Communities, in City of Joliet, Illinois v. New W., L.P.*, the Seventh Circuit Court of Appeals upheld the district court’s dismissal of the plaintiff’s claim for, *inter alia*, failing to identify a specific, facially-neutral policy. In that case, the City commenced condemnation proceedings against an allegedly dilapidated, crime-ridden apartment complex that was comprised of approximately 95% African Americans. Noting *Inclusive Communities*’ caution that “a one-time decision may not be a policy at all,” the Seventh Circuit upheld the “district court’s findings . . . that the condemnation of [the complex wa]s a specific decision, not part of a policy to close minority housing in Joliet.” The *City of Joliet* Court further noted that “governmental entities . . . must not be prevented from achieving legitimate objectives” and that the city’s condemnation was in furtherance of the goals approved by the Court in Inclusive Communities.

Other important cases include *Ellis v. City of Minneapolis*, finding that, even if plaintiff statistically demonstrated disparate impact, it nevertheless failed to satisfy the “robust causality requirement”; *De Reyes v. Waples Mobile Home Park Limited Partnership*, where plaintiff’s claims challenging mobile home park’s newly instituted identification policy failed to satisfy robust causality requirement; *Cobb County v. Bank of America Corp.*, where the plaintiff failed to demonstrate causal connection between lender’s lending practices and alleged disparity; and *City of Miami v. Wells Fargo & Co.*, where the City failed to meet ICP’s “robust causality requirement,” which requires the City to ‘allege facts at statistical disparity.’

V. Conclusion
Federal remedies for housing discrimination have a long history in the United States. After the Supreme Court required a showing of intentional discrimination as a prerequisite for a constitutional challenge, the emphasis for challenging housing discrimination shifted to the FHA. In a series of federal appellate court decisions over the past 40 years, federal courts established the theory of disparate impact: no need to show intent to discriminate but only that the complained-of action has a discriminatory effect on a class (race, religion, gender, family status, disabilities) protected by the FHA. It is not particularly surprising, therefore, that the Supreme Court upheld this theory in Inclusive Communities.

However, the Court hedged its application with so many conditions and expressed so many concerns that arguably it has become significantly more difficult for plaintiffs alleging discrimination to succeed than it was before the Court weighed in. Such difficulty is apparent in the wave of federal district cases approving government actions and dismissing discrimination claims over the past two years. This trend is nowhere more apparent than in the district court’s decision in Inclusive Communities on remand from the Supreme Court to reverse its previous finding of discrimination after the “guidance” from the Supreme Court.
Constitution’s Equal Protection Clause. The Morrows alleged that the City only prosecuted resident in low-to-moderate income neighborhoods pursuant to the City’s Proactive Code Enforcement Project (PCEP), part of a 2009 Memorandum of Understanding (“MOU”) between the NCCD and the City’s Community Development Block Grant Program. In response, the CZI declared the Morrows were targeted only after they noticed their grading violation on August 1, 2007, well before the MOU was signed and not as proactive enforcement targeting the MOU. The Court further found that the PCEP targeted neighborhoods with higher rates of zoning violations and lower rates of zoning complaints because of their high number of rental units. The program was therefore rationally related to a legitimate state interest in maintaining deteriorating neighborhoods. Lastly, the Court also found the Morrows failed to show that other similarly situated individuals were not prosecuted or to present any evidence of the program’s “discriminatory purpose,” as required under an equal protection claim. For these reasons, the Morrows could not claim they were denied equal protection by the City’s enforcement of the MOU.

**United States District Court, Northern District of Illinois, Federal District Court in Illinois Denies RLUIPA Equal Terms and Equal Protection Claims Arising from Parking Requirements on Church**

In *Immanuel Baptist Church v. City of Chicago*, a United States District Court denied a church’s suit under the RLUIPA. Immanuel Baptist Church was notified by the City that it needed to meet the parking requirement of one off-street parking spot for every eight seats. However, under the Ordinance, other nonreligious assembly uses had different requirements. Cultural exhibits and libraries required no parking for facilities up to 4,000 square feet, and only one parking space per each additional 1,000 square feet. The Church was unable to meet the City’s requirement and was therefore unable to operate. The Church contended that the City’s parking regulations violated the “equal-terms” provision of RLUIPA. The Court found that the burden was on the Church to establish a reasonable inference that the parking needs of churches were comparable to that of libraries or theaters. The Court found that the Church could not show less equal treatment than theaters because theaters were not permitted in the pertinent zoning district. Meanwhile, the Court held that the Church had failed to present facts demonstrating that a library of 4,000 square feet created regular assemblages of people. Therefore, the Church failed to meet its burden, and the Court’s motion for summary judgment on its facial RLUIPA claim was denied. However, the Court granted leave to the Church to file an as-applied RLUIPA claim. The Court argued that the City’s requirements violated its right to equal protection under the 14th Amendment. The Court noted that the City’s Ordinance did not discriminate among religions and did not severely interfere with the practice of religion, triggering rational basis review. The City contended it was rational to distinguish among land uses when determining parking requirements. The Court agreed and granted the City’s motion for summary judgment on the equal protection claim.

**United States District Court, District of Maryland, Federal District Court of Maryland Finds Landowner Did Not Have a Property Interest Created by the Recommendations of a Master Plan, Despite Reliance on Them**

Plaintiffs in *Pulte Home Corporation and Shiloh Farm Investments, LLC v. Montgomery County, Maryland* spent $62 million to purchase land and transferable development rights with the intent to develop. Despite part of the property being wetlands, Plaintiffs relied on Montgomery County’s 1994 Master Plan and 2014 Amendment to do so. They brought suit under 42 U.S.C. § 1983 and alleged substantive and procedural due process violations, equal protection violations, and a takings claim after Montgomery County and other Defendants inhibited the intended development through zoning changes, added restrictions, and the delay or denial of water services to Plaintiff’s property. The Court dismissed all three claims. The Court held that Plaintiff failed to offer sufficient proof of their property interest to proceed with their due process claims. The Court reasoned that the “Notice to Readers” section of the Master Plan empowered Defendants with broad discretion to amend the Master Plan over time. Defendants retained this discretion despite Plaintiffs’ heavy reliance on the Master Plan. Even if Plaintiffs had possessed a valid property interest, Defendants still acted reasonably. First, the Amendments Plaintiffs relied on stated that uncertainty continued “about the ability to protect sensitive resources . . . if full development occurred under the original Plan recommendations.” Second, the Amendment’s explicit purposes included “the preservation of natural resources critical to the County’s well-being.” Plaintiffs’ equal protection

---

**Job Announcements**

*PLD Newsletter Job Announcements* allow planning and law related job seekers and employers to connect.

Please send your job postings to *pld.newsletter@gmail.com* and we’ll include them in our next newsletter.

Be sure to include the name of the employer, position, contact information, and deadline for applications.

---

*Case Digest continued from page 4*
Case Digest

continued from previous page

claim also failed because Plaintiffs did not show how Defendants’ singled out their property from others. The 2014 Amendment clearly distinguished more sensitive watershed lands from other areas. Finally, the Court held Plaintiffs did not experience a taking. First, 93 of 541, or 17.2%, of their acreage could still be developed, and second, for the same reason the Court denied Plaintiffs’ due process claim, Plaintiffs could not have had a reasonable investment-backed expectation.

United States District Court, District of Massachusetts, Federal District Court in Massachusetts Finds City Ordinance Regulating Drones was Preempted

In Singer v. City of Newton, a United States District Court invalidated a City’s Ordinance regulating drones. Plaintiff Michael Singer challenged Newton, MA’s Ordinance, for the sake of residents’ privacy, that all owners of pilotless aircraft (“drones” or “UAS”) register their pilotless aircraft with the City and prohibited the operation of pilotless aircraft out of the operator’s line of sight or in certain areas without permit or express permission. Singer contended that the Ordinance was preempted by federal law because it attempted to regulate an area of law almost exclusively under federal control. Singer first argued that because the federal government regulates unmanned aircraft and local aircraft operations, there was federal intent to occupy the field. However, the Federal Aviation Administration (FAA) states that “State law and other legal protections for individual privacy may provide recourse for a person whose privacy may be affected through another person’s use of a UAS.” Since the FAA explicitly contemplated state law, the Court rejected Singer’s argument that the entire field was exclusive to the federal government. Singer next contended that the challenged sections of the Ordinance obstructed federal objectives and conflicted with federal law. Singer argued that the FAA explicitly has indicated its intent to be the exclusive regulatory authority for registration of pilotless aircraft. Since Newton intended to register all drones, the Court found the Ordinance’s registration requirements were preempted. Next, the Court agreed with Singer that because the FAA mandated that drone operators keep drones below an altitude of 400 feet, Newton’s restriction of any drone use below this altitude was likewise preempted. Lastly, the Court found that the section of the Ordinance that limited the methods of piloting a drone was preempted by federal law. Accordingly, these portions of the Ordinance were severed by the Court.

United States District Court, Eastern District of New York, Federal District Court in New York Holds Garden City’s Proffered Reasons for its Chosen Zoning Change Could Have Been Met by Another Practice that Had a Less Discriminatory Effect

In MHANY Management, Inc. v. County of Nassau, a United States District Court invalidated the rezoning of a lot by Garden City, NY. Garden City decided to rezone a parcel of land called the “Social Services Site.” It rezoned the site to Residential-Townhouse (R-T). MHANY complained that the R-T zoning would not allow for any affordable multifamily housing, but still submitted a bid to build a nonconforming multifamily development on the site. After the contract was awarded to another company, MHANY and New York Communities for Change, Inc. brought suit challenging Garden City’s rezoning of the site as discriminatory. The Court found that Garden City provided several legitimate, non-discriminatory reasons for the rezoning, but failed to meet its burden in demonstrating “the absence of a less discriminatory alternative.” The Second Circuit remanded with instructions to determine whether

Plaintiffs proved that the nondiscriminatory interests advanced by Garden City in support of its zoning shift “could be served by another practice that had a less discriminatory effect.” The Court determined that Plaintiffs met their burden in showing that Residential-Multifamily (R-M) zoning would have served the Defendant’s interests in not overburdening public schools and reducing traffic, and that R-M zoning would have provided for a significantly larger percentage of minority households than R-T zoning. As such, the Court held that R-M zoning controls would have had a less discriminatory effect than R-T zoning controls. Based on the reasoning above, the Court affirmed the holding that the adoption of R-T zoning instead of R-M zoning had a disparate impact on minorities in Garden City.

New York Supreme Court, Appellate Division, New York Appellate Court Finds Development Rights Constitute Real Property for Purposes of RPAPL 1602

In Hahn v. Hagar, the parties were siblings who owned a 101–acre farm in Pleasant Valley, New York. The property had been in the parties’ family for over 240 years. Upon the death of the parties’ mother, a qualified life estate in the property was conferred upon Thomas G. Hahn, Jr., and the remainder (future) interest was left to her four children (including two Plaintiffs and Defendant) in equal shares. Plaintiffs Mr. Hahn, Jr., who held a qualified life estate in the property, and two of his sisters, who held remainder interests, sought authorization pursuant to Section 1602 of the New York Real Property Actions and Proceedings Law (RPAPL) to sell their development rights in order to preserve the property’s future agricultural use. The parties stipulated to a definition of “development rights” that the Court held constituted “real property, or a part thereof,” and that the specific rights or burdens broadly referred to by this term could vary according to contractual terms or applicable

Continued on next page
Case Digest
continued from previous page

governing statutes. Despite this, the Appellate Division affirmed the lower court's dismissal of Plaintiffs' claim. The Court agreed that Plaintiffs failed to establish that the proposed sale of development rights would be expedient or to present sufficient evidence (1) of the value of the underlying property with and without the development rights; (2) that a proposed buyer for the development rights existed; (3) of any other tangible or intangible benefit that could be achieved by a sale of the development rights; or (4) that the sale of the development rights was necessary to preserve the property as an agricultural asset. Accordingly, the Court held that the Supreme Court properly directed the dismissal of the cause of action pursuant to RPAPL Section 1602.

**Michigan Court of Appeals.**

Michigan Appeals Court Finds Local Ordinance Prohibiting the Outdoor Growing of Medical Marijuana Conflicted with Michigan Medical Marihuana Act

In *Charter Township of York v. Miller*, Defendants David and Donald Miller were qualified medical marijuana patients, and Defendant Katherine Null served as David's registered medical marijuana primary caregiver. In 2014, Null directed David to construct a structure in Donald's backyard for the cultivation of medical marijuana for patients connected to Null through registration under the Michigan Medical Marihuana Act (“MMMA”). Plaintiff's zoning ordinance required that medical marijuana be grown inside the house in residential areas. Defendants failed to obtain a construction permit for the medical marijuana outdoor growing facility, never got permits before installing an electrical and watering system, and never obtained a certificate of occupancy. After learning that Defendants had failed to comply with zoning and construction regulations, Plaintiff filed a declaratory judgment action seeking a determination of the validity of its zoning and construction regulations and its right to enforce them as they applied to the cultivation and use of medical marijuana in residential areas. The trial court declared that Plaintiff could not enforce its zoning ordinance's prohibition against outdoor growing of medical marijuana because the ordinance conflicted with the provisions of the MMMA, and was therefore preempted. Plaintiff appealed. The Michigan Court of Appeals found that Plaintiff's prohibition effectively denied registered caregivers the right and privilege that the MMMA permitted. Furthermore, the MMMA did not grant municipalities authority to adopt ordinances that restricted registered caregivers' rights and privileges under the MMMA. Accordingly, the Court of Appeals held the local ordinance was void and preempted by the MMMA.

**New Jersey Superior Court, Appellate Division.**

New Jersey Appeals Court Finds Board Failed to Consider Whether Hardship was Self-Created in Variance Case

In *Yu v. Toms River Planning Board*, the New Jersey Court of Appeals found that a Planning Board failed to consider whether the need for a variance was self-created. In 2014, the Schoelens applied to the Toms River, NJ Planning Board for a minor subdivision with bulk variances to create a new lot out of their two existing lots. Plaintiff Henry Yu and another neighbor objected to the subdivision plan. The Planning Board voted unanimously to grant the application without any discussion of self-created hardship. Plaintiff then filed an action, claiming that the Schoelens had not demonstrated a hardship, that there was no need to have new lot lines drawn so as to require variances for existing sheds, and that any hardship was self-created. Yu also contended that flag lots were not permitted by the zoning ordinance, were completely out of character for the area, and would negatively affect neighboring properties. The Law Division Judge denied Plaintiff’s claim of self-created hardship and held that although the Schoelens “could have originally made a road to divide the property into various neat lots,” their failure to do so did not equate to self-created hardship. Plaintiff appealed. The Appellate Division Court noted that the record reflected that the Schoelens previously subdivided their seven-acre parcel, and that their current two lots were configured exactly as they designed. Based on these facts, the Court found the Planning Board was required to consider whether the claimed hardship was one of the Schoelens' own making. As such, the Planning Board’s failure to apply the correct legal standard deprived its decision of the deference. The Appellate Division Court therefore reversed the Law Division Judge's holding.

**South Carolina Court of Appeals.**

South Carolina Appeals Court Finds Department of Transportation Has Exclusive Authority over the State Highway System

In *County of Charleston v. South Carolina Dept. of Transportation*, the

Continued on next page

---

**Member Activities**

Share your pictures with us!

We want to know what PLD members are up to! Did you see another PLD member at a networking event? Hold an exciting conference? Participate in a Habitat build? Join other PLD members in a 5K walk?

Whatever your story, send your pictures and captions to pld.newsletter@gmail.com and we will publish them in future newsletters.
Announcement of New Student Editorial Board Members

Maximillian Mahalek joins Planning & Law as a Research Editor and Staff Writer. Maximillian graduated from the University of Illinois at Urbana-Champaign in 2014 with a Bachelor of the Arts in Urban Planning and in 2015 with a Master of Urban Planning. Prior to attending law school, he worked as a Community Development Associate with the City of Urbana, IL, and as a Title Litigation Legal Assistant with McCalla Raymer Leibert Pierce, LLC. Maximillian is in his second year at Pace University’s Elisabeth Haub School of Law and expects to graduate in 2019 with a J.D., Certificate in Environmental Law and Real Estate and Land Use Concentration. Maximillian is a member of the Pace Environmental Law Review and worked as a Summer Associate for Pace University’s Land Use Law Center. In this position, he conducted research into the legal obstacles communities may confront as they work to adopt form-based codes, and helped advise communities on how to best overcome these obstacles.

Emma Lagle joins Planning & Law as a Junior Editor and Staff Writer. Emma graduated from SUNY New Paltz in 2014 with a Bachelor of Arts in History and Sociology. Her subsequent experience as a legal assistant in a real estate law firm and work on the Westchester Green Business Certification Program for the Greenburgh Nature Center advanced her interest in land use and sustainable practices. Emma is a second-year law student at Pace’s Elisabeth Haub School of Law, where she has worked as a Summer Associate for Pace University’s Land Use Law Center, is President of the Land Use and Sustainable Development Law Society, and a member of the Pace Environmental Law Review. She expects to graduate in 2020 with a J.D., Certificate in Environmental Law, and a M.E.M. from the Yale School of Forestry & Environmental Studies.

Mark Fanelli joins Planning & Law as a Junior Editor and Staff Writer. Mark graduated from the University of Scranton in 2015 with a Bachelor of Science in Criminal Justice and a minor in History. He is a second-year student at the Elisabeth Haub School of Law at Pace University, where he is expected to graduate in 2019 with a Juris Doctor and a Certificate in Environmental Law. Before attending law school, Mark worked in the private security industry. This past summer, Mark worked as a student associate for the Land Use Law Center and as Professor John Nolon’s Research Assistant. He is currently the Vice President of Pace’s Environmental Law Society and the Land Use and Sustainable Development Law Society. Mark serves as a Junior Associate for Pace’s Environmental Law Review and is currently participating in the Federal Judicial Honors Program.
This report reflects Court decisions issued in the last year in matters where the APA appeared as amicus and where APA amicus briefs were filed (or are expected to be filed) in the last year. It also describes several key cases that were on our watch list for potential participation at the merits stage before the U.S. Supreme Court but which ultimately were not the subjects of successful certiorari petitions.

I. Carruth, et al. v. City of Plano

The APA and other interested groups joined a letter to the Texas Supreme Court, in a case arising from an effort at “ballot box guiding.” The letter sought to persuade the Texas Supreme Court to grant discretionary review over a court of appeals’ decision. The Court has now requested full briefing in the case.

Texas authorizes initiative and referendum, with certain judicially-enforced limitations. A petition to either repeal Plano’s comprehensive plan or to put the plan up for a referendum was submitted to the City Secretary. On counsel’s advice, the secretary did not forward the petition to the City Council for actions (that could have included putting on the ballot or repealing it in its entirety). (Counsel’s advice was that zoning regulations are not subject to a referendum vote.) A mandamus claim directed at the City Secretary and at the City Council followed. The claim against the City Secretary sought to compel her to present the petition to the City Council, and the claim against the City Council sought to require the Council to reconsider the Plan and either put it on the ballot or repeal it in its entirety, and in the interim treat the old plan as the effective one.

In the Texas Court of Appeals’ decision, the court held that “the trial court had subject matter jurisdiction over the petition for a writ of mandamus against the City Secretary,” but that the claims against the City Council were not yet ripe.

The case is an important one in part because it puts the City between a rock and a hard place. Under the City’s charter, if a regulation is removed (or approved) by voters, it can only be reinstated (or repealed) by the voters. Thus, if a comprehensive plan can also be subject to initiative and referendum, one likely effect is that planners would need to make recommendations on permits and zoning applications in the prolonged absence of an effective comprehensive plan.

The Committee authorized the APA to join a letter drafted by Scott Houston of the Texas Municipal League, requesting the Texas Supreme Court to review the Court of Appeals’ ruling in this matter. Members of the committee have contributed analysis for the letter. On January 26, 2018, the Texas Supreme Court ordered full briefing of the case. That does not guarantee that the Court will decide to take the case, but it brings it one step closer to that determination.

II. Murr v. Wisconsin and St. Croix County

The Supreme Court’s Murr v. Wisconsin and St. Croix County case arose from a Wisconsin family’s challenge to the Wisconsin Court of Appeals’ ruling affirming summary judgment in favor of the State and St. Croix County on the Murrs’ claims that state and local regulations took their property without just compensation.

The Murrs own two small, adjacent tax parcels along the Lower St. Croix River. The River forms part of the western border of Wisconsin and has been part of the Wild and Scenic Rivers Act’s protections since 1972. The adoption of the Act prompted Wisconsin and Minnesota state agencies to promulgate regulations of land uses in protected areas along the River (including where the Murr family’s cabin is located). Such regulations also constitute the upper limit on the development that counties may allow in those areas. Those state regulations restrict new development on substandard lots but also include provisions that address circumstances in which adjacent properties have common ownership. They allow adjacent lots under common ownership to be treated as a single parcel for purposes of applying the substandard lot provisions. But because that is dependent on the parcels remaining in common ownership, they effectively limit the ability to sell one substandard parcel to an unrelated party for development.

The Murrs’ certiorari petition was submitted (and granted) before the death of Justice Scalia. The tone of some of the early amicus briefs of property rights organizations
encouraging the Court to accept the case, presented it as a challenge to what is known as the “parcel as a whole” doctrine in takings law. That doctrine limits the ability of parties to successfully claim a taking of their property in situations in which that party owns economically-useful property on the same parcel (or, in some circumstances like adjacent property), where their property may be put to economically-valuable uses if viewed as a whole. Because the “parcel as a whole” doctrine is an essential premise to many kinds of land-use regulations, such as wetlands or historic façade preservation requirements, the prospect that the Court would treat the doctrine as unconstitutional in whole or in part got the attention of many in the planning community. Soon after the grant of certiorari in January 2016, the amicus committee elected to participate as amici.

The Murrs’ merits briefs were not due until April, which was after Justice Scalia’s death. When they were filed, they reflected a less revolutionary approach. For the most part, they were not seeking to overrule the parcel as a whole doctrine, but were instead focused on attacking state or local laws that define the relevant parcel according to things other than plat lines. Put another way, it seeks to undo the effect of state and local laws that directly or indirectly “merge” adjacent parcels in common ownership into a single parcel for purposes of applying takings doctrines.

The APA’s amicus brief was written by Professor Michael Allan Wolf of the University of Florida Law School and Florida practitioner (and committee member) Nancy Stroud, with the special assistance of Professor Brian Ohm, the legal liaison to the board of the Wisconsin chapter. The APA includes a tutorial on how state land-use doctrines already provide meaningful limitations on the ability of regulators to withhold development rights while enabling changing public priorities to influence future uses, then applies those principles to the problem before the Court. The committee was given a useful opportunity to review and comment on outlines and drafts.

On June 23, 2017 the U.S. Supreme Court affirmed the Wisconsin Court of Appeals decision that enforcement of a “lot merger” provision did not result in a compensable taking under the Fifth Amendment. It reaffirmed the traditional “parcel as a whole rule” in takings litigation, but tied the concept to “reasonable expectations about property ownership.” It also identified three factors for measuring a claimant’s expectations: the treatment of the land under state and local law, the physical characteristics of the land, and the effect of restricting use of one land holding on the value of an adjacent holding. Most important, the court declined to accept the property owners’ highly-formalistic approach, which would have invited a new wave of takings challenges to various types of regulations in situations in which their practical effect is not close to confiscatory.

III. Elvis Cruz, et al., v. City of Miami

A Florida statute, Section 163.3215(3), authorizes an aggrieved party to bring an action to challenge a Development Order that “materially alters the use or density or intensity of use on a particular piece of property which is not consistent with the comprehensive plan.” Section 163.3194(3)(a) also requires that a development order or land development regulation be consistent with the comprehensive plan “if the land uses, densities or intensities, and other aspects of development permitted by such order or regulation are compatible with and further” the objectives of the comprehensive plan. Florida’s Second District Court of Appeals recently published a decision narrowly interpreting statutory standing to challenge the consistency requirements of a development plan, as applying only to alleged inconsistent use, density, or intensity of the subject property. See Heine v. Lee County, 221 So.3d 1254, 1257 (Fla. 2d DCA 2017). Then, in October 2017, the Heine decision was interpreted by a lower court in Miami, in a way that construed the consistency requirement even more narrowly. The City had approved a furniture sales showroom for an area guided as residential. But because the circuit court did not consider that the challenge was based on the allegedly inconsistent use, density or intensity of the subject property, it granted summary judgment for the City. Plaintiffs then appealed.

In January 2018 the committee authorized submission of an amicus brief to the Third District Court of Appeals. That brief, which the Florida APA chapter joined, was submitted in early March 2018, and was written by committee member Nancy Stroud. It urges the court to construe the Florida statutes as authorizing court challenges to ensure consistency with any part of an applicable comprehensive plan, not limited to matters related to uses, densities and intensities. It urges the appellate court to allow an affected third party to challenge the consistency of a local government development order with the comprehensive plan if the order materially alters the use or density or intensity of the property (regardless of whether the alleged inconsistency does so as well), and then to use such standing to attack inconsistencies with any element of the comprehensive plan, and with any objective or policy of the plan.

The case is not yet fully briefed.

IV. Knick v. Township of Scott

Within the next week, the Committee will consider whether to participate as an amicus in this matter, pending before the U.S. Supreme Court, on its calendar for consideration in its next term.

Current takings jurisprudence provides that before a property owner can state a ripe claim of a taking without just compensation in violation of the Fifth Amendment, he or

Continued on next page
she must first try and fail to obtain just compensation under reasonably available state law remedies. This is generally known as “prong two” of the ripeness requirements stated in the 1985 Williamson County case, although the requirement predates that decision by many decades. Over the last fifteen or twenty years, many cert petitions have asked the Court to throw out this requirement. In the Court’s 2005 opinions in the San Remo case (which didn’t directly involve ripeness but the effect of a state-court adjudication that resulted from trying to ripen a federal takings claim), four justices (Thomas, Rehnquist, Kennedy and O’Connor) seemed ready to cut back on this requirement, but Justice Scalia didn’t join that opinion.

On March 5, 2018, the U.S. Supreme Court granted a cert petition that presents that question, plus the question of whether, if the requirement stands, it should apply to facial takings claims. The case is Knick v. Township of Scott. It is less of a regulatory takings suit than a physical invasion takings suit. (The Township adopted an ordinance requiring cemeteries to be open to the public.) But petitioners are not just trying to repeal prong two in facial physical invasion cases. If the Supreme Court did so, it would be hard for the Court to limit its reasoning to that context.

The amicus committee will be conferring in the next week about whether to participate as an amicus in this matter.

Because the Court granted certiorari so late in its current term, the case will not be heard until next fall at the earliest, so an extended briefing schedule has been issued. Amicus briefs in support of the Township are likely due at the end of July 2018. Amicus briefs in support of the property owner, or in support of neither side, are likely due in at the end of May 2018.

V. The disappearance of other cases on our “watch list”

The main reason why the committee has been less active in recent months is that key cases that we identified as likely candidates for U.S. Supreme Court or highest-state-court review have fizzled out before reaching that point. For example, in late 2016, we were tracking two decisions by U.S. Courts of Appeals with potential implications for planning, in which a successful certiorari petition was likely because the decisions had either declared unconstitutional, or required the district court to apply strict scrutiny to, federal statutes. Ass’n of Am. Railroads v. U.S. Dep’t of Transp., 821 F.3d 19, 23 (D.C. Cir. 2016) (whether substantive due process is violated when a public entity regulates in a field in which it also competes) and Free Speech Coal., Inc. v. Attorney Gen. United States, 825 F.3d 149, 154 (3d Cir. 2016) (content neutrality). Surprisingly, the Solicitor General’s Office did not petition for certiorari in either case.

A California Court of Appeal decision involving the potential application of the Nollan/Dolan standards to legislatively-mandated in lieu fees for affordable housing, 616 Croft Ave. LLC v. City of West Hollywood, 3 Cal. App. 5th 666 (9th Cir. 2017), was the subject of a March 2017 certiorari petition to the U.S. Supreme Court. After the Supreme Court conferred on the case at four different conferences, the petition was denied on October 30, 2017.

A Ninth Circuit decision involving a First Amendment challenge to Oakland’s regulatory regime for unattended donation bins, Recycle for Change v. City of Oakland, 856 F.3d 666 (9th Cir. 2017), was the subject of a July 28, 2017 petition for certiorari. A grant of certiorari was plausible because the Fifth Circuit and the Sixth Circuit had struck down similar ordinances. On December 11, 2017 the Supreme Court denied certiorari.

For additional information on Committee members and briefs, visit: www.planning.org/amicus
A Florida Court of Appeals decision rejecting a claim of a Lucas taking in part because the city provided the property owner with non-monetary credits, *Ganson v. City of Marathon*, 222 So. 3d 17 (Fla. 3d DCA 2016), was the subject of a September 2017 certiorari petition. The amicus committee conferred in January 2018 about potential participation if certiorari was granted, and was prepared to do so if necessary. However, on January 22, 2018, the Supreme Court denied certiorari.

We continue to invite leads, requests, and other suggestions regarding potential amicus involvement in other cases at the appellate level of particular importance to planning. ♦

---

**PLD Member David Callies Honored with Property Rights Prize**

Long-time PLD member and University of Hawai‘i Law Professor David L. Callies received the 2017 Brigham-Kanner Property Rights Prize from the William & Mary Property Rights Project during the Project’s 14th annual conference held at William & Mary Law School in Williamsburg, Virginia, last October.

The prize is named in honor of the lifetime contributions to property rights of Toby Prince Brigham and Gideon Kanner and is presented annually to a scholar, practitioner or jurist whose work affirms the fundamental importance of property rights. Recently it has gone to legal scholars from Harvard, Yale, Columbia and the University of Michigan. Retired Supreme Court Justice Sandra Day O’Connor was a recipient in 2011.

Callies, a prolific scholar whose work explores land use, property, and state and local government law, has lectured around the world and written or collaborated on more than 90 articles and 20 books. He has been a member of the American Law Institute since 1990 and is the Benjamin A. Kudo Professor of Law at UH Mānoa. Prior to entering academia, he was an attorney in private practice and an assistant state’s attorney.

Callies gained fame as a leading expert on land use and development in Hawai‘i early in his distinguished career, said Lynda L. Butler, Chancellor Professor of Law at William & Mary Law School and director of the school’s Property Rights Project. Callies’ research interests have become truly international in scope over time and encompass land use control, eminent domain, and sustainable development in numerous other countries. Butler noted that the annual Brigham-Kanner conference has been held in China and in The Hague as well as in Virginia.

UH Law Dean Avi Soifer called the prize “a much-deserved honor for Professor Callies” that not only resonates in legal circles, but in the wider business community, “David Callies brings tremendous breadth to our offerings in business and land law,” said Soifer, “and his presence within this constellation of prize winners speaks to the importance of his scholarship. Our students are very fortunate to be receiving world-class instruction in the complex areas in which he excels, from one of the world’s great experts.”

Callies is renowned as a “scholar, teacher, lawyer, mentor,” according to Robert H. Thomas, an attorney and director at Damon Key Leong Kupchak Hastert in Honolulu. “For four decades, David Callies has shaped property law, and the practice of property law, as a legal scholar, practitioner, and advocate. He has devoted his career to a search for understanding the deeper meaning of what it means to own property, and the relationship between property rights and individual liberties. His work has also integrated property law’s traditions with more modern concepts such as environmental concerns and the public trust. A truly deserving prizewinner, David Callies represents the best of the law’s academic and practice sides.”

Michael Berger, a partner in the Los Angeles office of Manatt, Phelps & Phillips who received the Brigham-Kanner Prize in 2014, called Callies “one of the brightest stars in the constitutional property rights firmament.” His lengthy academic career, Berger said, “has been festooned with scholarly explorations of property law that have enriched the scholarly literature and influenced the way that courts have viewed the law. When I learned that he was to be this year’s honoree, all I could do was cheer.”

The Brigham-Kanner Property Rights Prize, which has been awarded annually since 2004, honors the work of Toby Prince Brigham, founding partner of Brigham Moore, LLP, and Gideon Kanner, professor of law emeritus at Loyola Law School in Los Angeles.

Callies’ previous recognitions include The Owners’ Counsel of America’s Crystal Eagle Award, the Lambda Alpha International Member of the Year Award, and the Jefferson Fordham Lifetime Achievement Award, which is conferred by the ABA’s Section of State and Local Government Law. ♦
PLD’s National Planning Conference Guide
Happy Hour
Sunday, April 22, 5:45-7:15 PM (Acme Oyster House, 724 Iberville Street)
Network with PLD members and enjoy great conversation. Appetizers and your first drink are on us!
Located in the French Quarter
Thank you to our happy hour sponsor:

Business Meeting & Reception
Monday, April 23, 4:15-5:45 PM (Hilton Riverside, Fulton)
Connect with other professionals, hear how PLD is doing, and learn more about the benefits of membership!

Thank you to our meeting sponsor:

PLD Endorsed Sessions

Wrangling the Very Complex Zoning Code
Saturday, April 21st, 10:45 AM-12:15 PM (Ernest M. Morial Convention Center, Room 213)
CM-Law 1.5 & CLE 1.5

BETTMAN SYMPOSIUM: After Inclusive Communities: Disparate Impact Revisited
Monday, April 23, 8:30-10:00 AM (Ernest M. Morial Convention Center, Great Hall B)
CM-Law 1.5 & CLE 1.5

Zoning, Takings and Water Resources
Monday, April 23, 8:30-10:00 AM (Ernest M. Morial Convention Center, Room 213)
CM-Law 1.5 & CLE 1.5

Meeting the Need for Accessibility
Monday, April 23, 10:15-11:45 AM (Ernest M. Morial Convention Center, Room 213)
CM-Law 1.5 & CLE 1.5
**PLANNING & LAW**

Use the **Planning & Law Division**'s suggested “Planning & Law Track” to make the most of the 2018 Conference. Learn more about the intersection of planning and law, and get an update on legal issues affecting planning.

**Saturday**

**PLD ENDORSED SESSION**

<table>
<thead>
<tr>
<th>Session Title</th>
<th>Time</th>
<th>Room</th>
<th>CM/Law/CLE</th>
</tr>
</thead>
<tbody>
<tr>
<td>Wrangling the Very Complex Zoning Code</td>
<td>10:45 a.m. - 12:15 p.m.</td>
<td>Room 213</td>
<td>Law 1.5 &amp; CLE 1.5</td>
</tr>
</tbody>
</table>

**Friends at Last: Preservation and Zoning**

1:00 - 2:15 p.m. (Room 219)  
CM 1.25

**Solar Zoning: Rooftops to Solar Farms**

1:00 - 2:15 p.m. (Room R09)  
CM 1.25

**Should Zoning Be Simple?**

2:45 - 4:00 p.m. (Room R06)  
CM 1.25

**Drafting Content-Neutral Sign Codes**

2:45 - 5:15 p.m. (Great Hall B)  
CM 2.25, CM-Law 1.5 & CLE 1.5

**Creation of Open Space in Downtowns**

2:45 - 4:00 p.m. (Room R02)  
CM 1.25

**Sunday**

**BETTMAN SYMPOSIUM: Law and Planning for Climate Change**

8:30 - 10:00 a.m. (Room R05)  
CM-Law 1.5 & CLE 1.5

**BETTMAN SYMPOSIUM: Housing, Health Equity, and Local Control**

10:45 a.m. - 12:15 p.m. (Room R05)  
CM-Law 1.5 & CLE 1.5

**Inclusionary Housing: Tales from the Front**

4:15 - 5:30 p.m. (Room 223)  
CM 1.25

**PLD Happy Hour**

Network with PLD members and enjoy great conversation, Appetizers & your first drink are on us!

5:45-7:15 p.m. (Acme Oyster House, 724 Iberville St.—located in the French Quarter)  
Sponsored by: The United States Sign Council Foundation Inc.

**Monday**

**BETTMAN SYMPOSIUM: After Inclusive Communities: Disparate Impact Revisited**

8:30-10:00 a.m. (Great Hall B)  
CM-Law 1.5 & CLE 1.5

**Legal and Financial Strategies for Conservation**

8:30 - 9:45 a.m. (Room R03)  
CM 1.25

**Living with Your Form-Based Code**

8:30 - 9:45 a.m. (Room 216)  
CM 1.25

**Short-Term Rentals in New Orleans**

8:30 - 9:45 a.m. (Room R07)  
CM 1.25

**Zoning, Takings and Water Resources**

8:30-10:00 a.m. (Room 213)  
CM-Law 1.5 & CLE 1.5

**Best Practices: Regulating Artisanal Food Production**

10:15 - 11:30 a.m. (Room 207)  
CM 1.25

**Meeting the Need for Accessibility**

10:15-11:45 a.m. (Room 213)  
CM-Law 1.5 & CLE 1.5

**Tuesday**

**Sign Regulations that Encourage Creative Design**

8:30 - 9:45 a.m. (Room R09)  
CM 1.25

**From Vacancy to Vitality**

8:30 - 10:00 a.m. (Great Hall B)  
CM-Law 1.5 & CLE 1.5

**How to Evaluate Your Parking Policies**

10:15 - 11:30 a.m. (Room 210)  
CM 1.25

**Zoning for Sustainability**

10:15 - 11:30 a.m. (Room R07)  
CM 1.25

**PLD Business Meeting & Reception**

Connect with other professionals and hear more about the benefits of PLD membership!

4:15-5:45 p.m. (Hilton Riverside, Fulton)  
Sponsored by: Otten Johnson PC

To join the Planning & Law Division:  
www.planning.org/divisions