Planning and Control of Land Development

CASES AND MATERIALS

TENTH EDITION

2023 SUPPLEMENT

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Pg. 11, at the end of the first paragraph after "contaminants to the single family ideal," add: Brady, *Turning Neighbors into Nuisances*, 134 Harv. L. Rev. 1609 (2021) (discussing the legal history of the apartment).

Pg. 32, add to the list of *Sources*: Jennifer s. Vey and Nate Storring, Hyperlocal: Place Governance in a Fragmented World (Oct. 25, 2022).

Pg. 33, in the second paragraph after the citation to Levmore, add: *see also* Ely, "All Temperate and Civilized Governments;" a Brief History of Just Compensation in the Nineteenth Century, Brigham-Kanner Property Rights Journal, Volume 10, Vanderbilt Law Research Paper No. 21-08, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3790638 (February 22, 2021) (exploring the origins of just compensation). *See also Preston Hollow Capital, LLC v. Cottonwood Dev. Corp.*, 23 F.4th 550 (5th Cir. 2022) (holding that a government must be acting in its sovereign capacity to effect a taking).

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Pg. 43, at the end of the citation to Tutt in the next to last paragraph of Note 4, add: *See also* Root, Thomas and Gorsuch Say Kelo Eminent Domain Ruling 'Was Wrong the Day It Was Decided' and 'Remains Wrong Today', Reason: Free Minds and Free Markets, https://reason.com/2021/07/02/thomas-and-gorsuch-say-kelo-eminent-domain-ruling-was-wrong-the-day-it-was-decided-and-remains-wrong-today/ ; Connecticut Law Review Library, OpenCommons@UConn, https://opencommons.uconn.edu/law_review/index.2.html (for more than one-half dozen articles discussing the *Kelo* decision). *See also Cardiff Wales, LLC v. Washington Cnty. Sch. Dist.*, 2022 UT 19, 511 P.3d 1155 (2022) where a Utah statute required that if a condemner does not actually use property it acquired "under a threat of condemnation," it must try and sell it back to the former owner. The statute defined "threat of condemnation" as when "an official body of the state or a subdivision of the state, having the power of eminent domain, has specifically authorized the use of eminent domain to acquire the real property." The Utah Supreme Court determined the phrase "specifically authorized" to mean any specific threat to take (i.e. the condemner must do something more than indicate it is thinking about eminent domain, but need not take the final step in approving an eminent domain lawsuit).

Pg. 45, at the end of the third paragraph, *Judicial Takings?*, add: *See* "The Dawn of a Judicial Takings Doctrine: Stop the Beach Renourishment v. Florida Department of Environmental Protection," 75 U. Miami L. Rev. 798 (2021); *Anderson v. United States*, 23 F.4th 1357 (Fed Cir. 2022) (holding that railroad acquired fee simple interest, rather than an easement with a reversionary interest, so that takings claimant had not cognizable property interest and therefore no government taking).

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Pg. 69, at the end of Note 6, add: Rosser, *The Euclid Proviso*, 96 Wash. L. Rev. 811 forthcoming 2021 (arguing that the Euclid Proviso, which allows regional concerns to trump local zoning when required by the general welfare should play a larger role in zoning's second century); Brady, *Turning Neighbors into Nuisances*, 134 Harv. L. Rev. 1609 (2021) (discussing the legal history of the apartment).

Pg. 84, at the end of Note 1, add: *See FBT Everett Realty, LLC v. Massachusetts Gaming Comm'n, 489 Mass.* 702, 187 N.E.3d 373 (Mass. 2022) ("All three factors in the multifactor Penn Central test 'should be taken into account' when determining whether a challenged regulation amounts to a taking"). *Knight v. Metro*, No. 21-6179 (6th Cir. 2023) (sidewalk ordinance considered an automatic taking and must be evaluated under the Nollan "nexus and rough" proportionality test not the Penn Central "balancing test").

Pg. 87, after Note 7 and the *Loretto* section, add a new paragraph: Consider the following recent cases: *Alabama Association of Realtors, et al. v. Department of Health and Human Services, et al.*, 141 S. Ct. 2485, 2489 (2021). The Supreme Court held that the Center for Disease Control did not have statutory authority to impose an eviction moratorium (or that if it did then the statute was unconstitutional). Although the case did not contain a takings claim, the per curium opinion cited to *Loretto* in emphasizing that prohibiting landlords from evicting delinquent tenants infringes upon the fundamental right to exclude. "Despite the CDC's determination that landlords should bear a significant financial cost of the pandemic, many landlords have modest means. And preventing them from evicting tenants who breach their leases intrudes on one of the most fundamental elements of property ownership—the right to exclude." *See also Community Housing Improvement Program v. City of New York*, no. 20-cv-366, (2d Cir. Feb. 6, 2023) (city's rent stabilization laws are not a physical or regular taking and meet the rational basis test). *Behrens v. United States*, No. 22-1277 (Fed. Cir. Feb. 13, 2023). Does using a railroad easement for a recreational trail effect a taking?

- The Federal Circuit examined the abandonment of a 144.3-mile corridor previously used in the 1990s by the St. Louis, Kansas City, and Chicago Railroad Company. Contrary to the norm, the majority of the deeds conveying the easements had no limitation of the grant to use for railroad purposes. The successor-in-interest to the railroad sought approval to discontinue service and consummate abandonment of the easement. NITU followed, as did an agreement for the Missouri Department of Natural Resources to operate and maintain a recreational path on the easement. CFC takings claim followed.

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- Plaintiffs moved for summary judgment on liability, asserting that the railroad originally acquired mere easements, pursuant to Missouri law; that the railroad's easements were limited to railroad purposes; and that the conversion of the easements for a public recreational trail was beyond the scope of easements, and thus constituted a taking. The government then cross-moved for summary judgment on the ground that the deeds granted an easement broad enough to allow for interim trail use and railbanking.
- The CFC determined that under a Missouri easement statute, the easements did in fact contemplate trail use. Thus, the plaintiffs takings claim had no merit. Conversely, the Federal Circuit disagreed with the CFC's assertion. The Federal Circuit first looked at the Missouri easement statute and highlighted the provision that explained whether there was any defined scope of how broad the granted easements were.
    - [t]o take and hold such voluntary grants of real estate and other property as shall be made to it to aid in the construction, maintenance and accommodation of its railroads; but the real estate received by voluntary grant shall be held and used for the purpose of such grant only....
- From there, the Federal Circuit determined that any acquisition that was not railroad related would fall outside of the easement's scope. Thus, the recreational trail was not considered a railroad purpose. Therefore, the Federal Circuit reversed and remanded the case.

Pg. 108, at the end of Note 2, add: *See F.P. Dev., LLC v. Charter Twp. of Canton, Michigan*, 16 F.4th 198, 208 (6th Cir. 2021) (finding that tree ordinance, as applied, was an unconstitutional condition under *Nollan*, *Dolan*, and *Koontz*).

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Pg. 111, at the end of A *Note on* Nollan and Dolan *Applied*, create a new paragraph and add the following: Recently, in *Pietsch v. Ward Cty.*, 991 F.3d 907 (8th Cir. 2021), Landowners brought procedural due process claim alleging that county's ordinance requiring them to dedicate a predetermined fee title right of way to the county as a condition for approval of their plat application violated their procedural due process rights. The Eighth Circuit Court of Appeals found that this was "an impermissible attempt to recast a Takings claim" thereby "conflat[ing] takings and due process law." The court further stated that the landowners "thus have a remedy for unconstitutional exactions under the Takings clause. . . . They cannot claim a redundant remedy under the due process clause." *Id.* at 909.

Pg. 119, as the first sentence under the header "[4] The Inverse Condemnation Remedy": In *Wittman v. City of Billings*, 405 Mont. 111, 512 P.3d 1209 (2022), the Montana Supreme Court clarified its approach to inverse condemnations: a plaintiff must "demonstrate a public project was deliberately planned and built in such a way that the taking or damaging of private property was foreseeable, and, as planned and built, the project damaged the plaintiff's property."

Guzzo v. Town of St. John, 203 N.E.3d 1055 (Ind. Ct. App. 2023) (under the state's takings law, government entitles must compensate property owners pursuant to relevant statutory calculation for residential property even if the property is not being used as a residential dwelling).

Pg. 139, Note 3, at the end of the last paragraph add: *Cedar Point Nursery v. Hassid,* 141 S. Ct. 2063, 2072 (2021) ("access regulation appropriates a right to invade the growers' property and therefore constitutes a *per se* physical taking. The regulation grants union organizers a right to physically enter and occupy the growers' land for three hours per day, 120 days per year. Rather than restraining the growers' use of their own property, the regulation appropriates for the enjoyment of third parties the owners' right to exclude"). *Ideker Farms, Inc. v. United States*, No. 21-1949 (June 16, 2023) (temporary, but recurring, government caused flooding deemed a categorical taking and does not fall under the Penn Central test).

Pg. 140, at the end of Note 5, add: Stein, *Swallowing Its Own Tail: The Circular Grammar of Background Principles Under Lucas,* 71 Fla. L. Rev. F. 246 (2021).

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Pg. 153, at the end of Note 1, add: *Williams v. Alameda County*, No. 3:22-cv-01274-LB, 2022 WL 17169833 (N.D. Cal. Nov. 22, 2022) (rejecting takings and due process arguments relating to COVID-19 eviction moratorium).

Pg. 159, Note 2, at the end of the last paragraph add: *D.C. Preservation League v. Mayor's Agent for Historic Preservation*, 282 A.3d 578 (D.C. 2022) (municipal appeal officer issuing demolition permit on grounds of unreasonable hardship failed to articulate scope of property in the denominator, whether property lacks any economically viable use, and whether denial of demolition permit would be the cause of the lack of any economically viable use, requiring remand for consideration of such issues).

Pg. 160, as a new paragraph at the end of the paragraph on *Federal takings legislation*, add the following: *PennEast Pipeline Co., LLC v. New Jersey, No*., 2021 WL 2653262 (U.S. June 29, 2021) (federal eminent domain against land in which the state has an interest). **"**In *PennEast Pipeline Co. v. New Jersey*, the Court considered the following issues: (1) Whether the Natural Gas Act delegates to Federal Energy Regulatory Commission certificate-holders the authority to exercise the federal government's eminent-domain power to condemn land in which a state claims an interest; and (2) whether the U.S. Court of Appeals for the 3rd Circuit properly exercised jurisdiction over this case. Congress passed the Natural Gas Act in 1938 to regulate the transportation and sale of natural gas in interstate commerce. To build an interstate pipeline, a natural gas company must obtain from the Federal Energy Regulatory Commission a certificate reflecting that such construction "is or will be required by the present or future public convenience and necessity." 15 U. S. C. §717f(e). As originally enacted, the NGA did not provide a mechanism for certificate holders to secure property rights necessary to build pipelines, often leaving certificate holders with only an illusory right to build. Congress remedied this defect in 1947 by amending the NGA to authorize certificate holders to exercise the federal eminent domain power, thereby ensuring that certificates of public convenience and necessity could be given effect. See §717f(h). FERC granted petitioner PennEast Pipeline Co. a certificate of public convenience and necessity authorizing construction of a 116-mile pipeline from Pennsylvania to New Jersey. Several parties, including respondent New Jersey, petitione for review of FERC's order in the D. C. Circuit. The D. C. Circuit has held those proceedings in abeyance pending resolution of this case. PennEast filed various complaints in Federal District Court in New Jersey seeking to exercise the federal eminent domain power under §717f(h) to obtain rights-of-way along the pipeline route approved by FERC. As relevant here, PennEast sought to condemn parcels of land in which either New Jersey or the New Jersey Conservation Foundation

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moved to dismiss PennEast's complaints on sovereign immunity grounds. The District Court denied the motion, and it granted PennEast's requests for a condemnation order and preliminary injunctive relief. The Third Circuit vacated the District Court's order insofar as it awarded PennEast relief with respect to New Jersey's property interests. The Third Circuit concluded that because §717f(h) did not clearly delegate to certificate holders the Federal Government's ability to sue nonconsenting States, PennEast was not authorized to condemn New Jersey's property. The Supreme Court reversed holding that section 717f(h) authorizes FERC certificate holders to condemn all necessary rights-of-way, whether owned by private parties or States."

Pg. 175, at the end of Note 3, add: *Two Parks, LLC v. Kershaw Cty., S.C.,* No. CV 3:18-2576-MGL, 2021 WL 492439, at *5 (D.S.C. Feb. 10, 2021) (class of one Equal Protection case in which the district court upheld the denial of a rezoning application). *Brookwood Dev., LLC v. City of Ridgeland, Mississippi*, 2022 WL 1752273 (S.D. Miss. May 31, 2022) (denial of conditional use permit, without sufficient facts or allegations that parties who received conditional use permit were similarly situated, was insufficient for "class of one" equal protection claim).

Pg. 183, Note 2, add after "see Sword & Shield"*:* Katherine M. Crocker, Reconsidering Section 1983's Nonabrogation of Sovereign Immunity, 73 Fla. L. Rev. 523 (2021).

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Pg. 183, at the end of Note 2, add: *Omar Islamic Ctr. Inc. v. City of Meriden*, No. 3:19-CV-00488 (SVN), 2022 WL 4599150 (D. Conn. Sep. 30, 2022) (analyzing Section 1983 action in same manner as general constitutional claim; (city amended zoning regulations to make religious group's claim of facially discriminatory regulations moot as to declaratory relief).

Pg. 190, at the end of the second paragraph in Note 2 in which *A.A. Profiles, Inc. v. Cty of Ft. Lauderdale* is discussed, add: In *S. Grande View Dev. Co., Inc. v. City of Alabaster, Alabama*, 1 F.4th 1299 (11th Cir. 2021), a real estate developer brought a § 1983 action after the city rezoned a parcel owned by the developer. The developer alleged that the city ordinance was a regulatory taking without just compensation. The court found that the case was ripe for adjudication even though the developer did not apply for a variance because the city passed a specific ordinance, over the developer's objection, that targeted the developer's parcel and without allowing the developer a means of relief under state law. *And see Beach v. City of Galveston, Texas*, 2022 WL 996432 (5th Cir. 2022) (property owner's takings claim was not ripe as the plaintiff failed to demonstrate that the government reached a conclusive position as to the plaintiff's property). *And see Barber v. Charter Twp. Of Springfield, Michigan*, 31 F.4th 382 (6th Cir. 2022) (takings claim for injunctive relief was ripe when county and township reached a final decision to remove dam near landowner's property and invested in the removal project; the owner did not have to wait until the dam was removed).

Pg. 190, at the end of Note 2, add the following as a new paragraph: *Pakdel v. City & Cty. of San Francisco, California*, 141 S. Ct. 2226 (2021), partial owners of a multi-unit residential building owned as tenants in common brought a § 1983 against the city for a regulatory taking without just compensation. The owners alleged that the city ordinance, "conditioning the conversion of the building to a condominium arrangement on the owners offering the tenant in their unit a lifetime lease" was an unconstitutional regulatory taking. The Court found that the city denied the owners' request for a property-law exemption from the ordinance and that city's position was definitive, either the owners would face an enforcement action if they did not execute the lifetime lease. The Court held that the owners did not have to comply with administrative procedures and exhaust the state administrative remedies in order to satisfy the finality requirement for bringing a regulatory taking claim when the government has reached a conclusive position.

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Pg. 190, at the end of Note 2, add: *Kleinknecht v. Ritter*, 2023 WL 380536 (2d Cir. 2023) (for a takings claim to be ripe, party only needs to demonstrate that there has been a final decision).

- Richard and Suzanne Kleinknecht appealed a lower court's decision to dismiss a complaint against the Incorporated Village of Lloyd Harbor, New York and others as unripe. The Kleinknechts argued their Section 1983 claim alleging a taking under the Fifth and Fourteenth Amendments was ripe because at the time this lawsuit was filed the village had issued a final decision preventing them from constructing a dock on their waterfront property. "A [p]laintiff seeking to bring a takings claim need only show a final decision for the claim to be ripe," the court explained. "A decision [wa]s final when 'there [wa]s no question about how the regulations at issue appl[ied] to the particular land in question.'" But "[s]o long as 'avenues still remain[ed] for the government to clarify or change its decision,' the decision [wa]s not final and a takings claim [wa]s not ripe," it added. While the complaint referenced a taking began in 2011 and continued to date, it also alleged a separate taking for the denials of the 2011, 2014, and 2016 applications. "With respect to the 2011 Application, there can be no doubt that the Planning Board definitively decided that the Kleinknechts were not entitled to relief from the restriction in their deed that prohibited them from building a dock," the court found. With the 2014 application, the building department denied the application in light of its noncompliance with the zoning code. "And when the Kleinknechts sought a variance, the ZBA promptly rejected that request, leaving the Kleinknechts with no other avenues by which to seek a clarification or change of the Village's decision. Clearly, this constituted a final decision by the Village," the court added.
- And, the Kleinknechts also received a final decision on the 2016 application. "We see no daylight between the Village Attorney's letter, which stated that the Building Department lacked authority to grant the application, and a letter expressly denying the application. There are no magic words necessary for a decision to satisfy the final-decision requirement, and to the extent that the Kleinknechts could have sought a variance from this decision, doing so surely would have been futile given the Village Attorney's blanket assertion that the 'Building Inspector is not authorized to issue any building permits for the encumbered portion of the Kleinknecht property,'" the court reasoned. *See also G Woodmere LLC v. Town of Hempstead*, 2022 WL 17359339 (E.D. N.Y. 2022) (taking and equal protection claims not ripe for adjudication until final decision could be made on application as it was not possible to know whether the zoning went too far as the court could not know far the regulation went); *Arizona Mills v. Ariz. Bd. of Tech. Registration*, 514 P.3d 915, 923–24 (Ariz. 2022) ("Although the Uniform Declaratory Judgments Act . . . is remedial and therefore liberally construed, the standing and ripeness doctrines apply to complaints initiated under the act.").

[3] Barriers to Judicial Relief: Abstention 191

Pg. 191, at the end of Note 4, add the following: LeBlanc, *Property Rights Are Constitutional Rights:* Knick v. Township of Scott, 48 S.U.L. Rev. 257 (2021) (Comment examining courts' increasing willingness to rule in favor of government over property owners).

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Pg. 191, Note 4, add: Julia Mahoney and Ann Woolhandler, Federal Courts and Takings Litigation, 97 Notre Dame L. Rev. 679 (2022); Ilya Somin, *The Normality of Knick: A Response to Sterk and Pollack*, 72 Fla. L. Rev. F. 38 (2021); Stewart E. Sterk & Michael C. Pollack, *A Knock on* Knick*'s Revival of Federal Takings Litigation*, 72 FLA. L. REV. 419, 419 (2020); *And see Beach v. City of Galveston, Texas*, 2022 WL 996432 (5th Cir. 2022) (property owner's takings claim was not ripe as the plaintiff failed to demonstrate that the government reached a conclusive position as to the plaintiff's property).

Pg. 191, at the end of Note 4, add: *Consolidated Towne East Holdings, LLC v. City of Laredo*, No. 04-22-00130-CV (Tex. Ct. App. July 12, 2023) (consolidated takings challenge not ripe until party applies for annexation to determine what the actual fee amount will be).

Pg. 193, as the last paragraph before the *Problem*, add the following:

Recently, in *SI Res. Inc. v. City of Manchester, Missouri*, No. 4:20CV1465 JCH, 2021 WL 1238213 (E.D. Mo. Apr. 2, 2021), the court stated the following regrading *Younger* abstention: The Eighth Circuit considers three issues when deciding whether *Younger* abstention is appropriate.

> First, does the underlying state proceeding fall within one of the . . . "exceptional circumstances" where *Younger* abstention is appropriate? Second, if the underlying proceeding fits within a *Younger* category, does the state proceeding satisfy what are known as the "*Middlesex*" factors? And third, even if the underlying state proceeding satisfies the first two inquiries, is abstention nevertheless inappropriate because an exception to abstention applies?

After determining that the *Younger* exception applies to a state court action, the court has to "consider the three 'additional factors' that the Supreme Court articulated in *Middlesex*, 457 U.S. at 432. Before invoking *Younger*, a federal court must consider: (1) whether there is an ongoing state proceeding that is judicial in nature, (2) which implicates an important state interest, and (3) provides an adequate opportunity to raise federal challenges."

Pg. 197, at the end of the paragraph that begins, "As one might suspect," add the following: Nolon, *Death of Dillon's Rule: Local Autonomy to Control Land Use*, __ Pace L. Rev. __ (forthcoming 2021) (analyzing the extent to which the narrow construction Rule has served as a clutch on the exercise of local land use authority despite the fact that it has been has been overruled by constitutional provisions, state legislation, and judicial decisions in at least 40 states) , https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3709379.

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Pg. 200, at the end of Note 4, add: *See also* Serkin, *The Wicked Problem of Zoning*, 73 Vand. L. Rev. 1879 (2020) (identifying different goals zoning can serve, demonstrating that zoning disputes are seldom simple, and arguing that such disputes are more easily resolved by focusing explicitly on the pace of neighborhood change).

Pg. 217, Note 6, after "For two helpful articles, see": Daniel R. Mandelker, Standing in Land Use Litigation, 56 Real Prop. Tr. & Est. L.J. 237 (2021).

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Pg. 217, at the end of Note 6, add: *See also Montrief v. Macon Twp. Bd. of Trustees,* No. 360437 (Mich. Ct. App., 2023) (notice requirements within local ordinances must be strictly followed and the failure to do so could give a property owner standing to bring a civil claim).
Lockerbie Glove Co. Town Home Owner's Ass'n, Inc. v. Indianapolis Historic Preservation Comm'n, 194 N.E.3d 1175 (Ind. Ct. App. 2022) (homeowners' association and townhome residents must allege injury to demonstrate statutory standing granted to "any interested person").
Boyajian v. Zoning Bd. of Appeals of Ardsley, 210 A.D.3d 1079 (N.Y. App. Div. 2nd Dept. 2022) (owner of property abutting gas station did not have standing to challenge zoning board of appeals determination that nonconforming use of the subject property as a gas station had not been abandoned).
Baldwin v. Sharon Standing Building Comm., 2023 WL 2490990 (Mass. Land Ct. 2023) (alleged harms that zoning decision will increase traffic resulting in safety concerns and cause a need for additional parking found not sufficient to establish standing as building committee demonstrated that the traffic would not be a concern and that the project's parking requirements complied with the town's zoning laws).

- "Standing to challenge such a decision is limited to persons who are aggrieved by the decision of the permit-granting authority," the court explained. More specifically, "'standing to challenge a zoning decision is conferred only on those who can plausibly demonstrate that a proposed project will injure their own personal legal interests and that the injury is to a specific interest that the applicable zoning statute, ordinance, or bylaw at issue is intended to protect.'"
- A presumption of standing existed when an owner's property abutted the property impacted by a zoning decision. That presumption receded, though, "when the party defending the decision challenge[d] the plaintiff's standing with 'any additional evidence' showing that the plaintiff [wa]s not aggrieved." And, once a defendant offered such rebuttable-presumption evidence, the burden shifted to the abutter to prove they had standing. This required a showing "'by direct facts and not by speculative personal opinion—that [their] injury [wa]s special and different from the concerns of the rest of the community.'"

Saugatuck Dunes Coastal Alliance v. Saugatuck Tp., 2022 WL 2903871 (Mich. 2022) (three criteria must be met for a party to be recognized as aggrieved for purposes of determining standing in a challenge to a zoning decision: (1) participation in the challenged proceedings by taking a position on the contested proposal and/or decision; (2) claim some protected interest or right would be or likely be affected by a challenged decision; and (3) some evidence of special damages arising from the decision as an actual or likely injury on the asserted right or interest that is more significant than the effects that others in the local community will face).

- An environmental organization, along with local residents of Saugatuck Township, Michigan, filed suit alleging that the township zoning board of appeals (ZBA) erred in finding the organization lacked standing to appeal the grant of conditional, preliminary approval and then the final approval of a proposed residential site condominium project that included a marina and boat basin with boat slips. The state appeals court affirmed the ZBA's finding that the organization lacked standing to appeal the conditional, preliminary and final approvals. The organization then appealed to the state's highest court.
- The Saugatuck Dunes Coastal Alliance (SDCA) contended the lower court erred in finding that, under the Michigan Zoning Enabling Act (MZEA), it lacked standing to appeal the Saugatuck Township Planning Commission's decisions. The court agreed, finding that prior lower and appeals court decisions on which the ZBA had relied "repeatedly and erroneously read the term 'party aggrieved' too narrowly."

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- "Specifically, we hold that the MZEA does not require an appealing party to own real property and to demonstrate special damages only by comparison to other real-property owners similarly situated," the court concluded. Accordingly, the court overruled existing case law "to the limited extent that they require (1) real-property ownership as a prerequisite to being 'aggrieved' by a zoning decision under the MZEA and (2) special damages to be shown only by comparison to other real-property owners similarly situated."
- in *Epstein v. Zoning Bd. of Falmouth*, 101 Mass. App. Ct. 1113, 193 N.E.3d 470 (2022), the zoning board was able to rebut the adjoining owners' presumption of standing because the adjoining owners claims of aggrievement relied on personal opinion and speculation.
- *Boyajian v. Zoning Bd. of Appeals of Ardsley*, 2022 NY Slip Op 06799 (App. Div. 2nd Dept.) (injury from proximity to subject property does not alone confer standing; there must also be a direct harm or injury different from that of the public at large).
- *Lockerbie Glove Company Town Home Owner's Ass'n, Inc. v. Indianapolis Historic Preservation Comm'n*, 194 N.E.3d 1175 (Ind. Ct. App. 2022) (homeowners' association and townhome residents did not allege sufficient injury to demonstrate statutory standing to challenge local historic commission decisions, granted to "any interested person");
- *61 Crown Street, LLC v. N.Y. State Office of Parks, Recreation & Historic Preservation*, 207 A.D. 3d 837 (3d Dep't 2022) (property owners close in proximity to site receiving state approval for redevelopment lack standing where they failed to claim sufficient economic or other injury);
- *Michigan Saugatuck Dunes Coastal Alliance v. Saugatuck Twp.*, 983 N.W.2d 798 (Mich. 2022) ("party aggrieved" by zoning board decision must have participated in the challenged proceedings, claim some protected interest or property right that will be or is likely to be affected by the challenged decision, and must show special damages, but need not demonstrate property ownership).
- *Indian EP MSS LLC v. Merrillville Bd. of Zoning Appeals*, 192 N.E.3d 981 (Ind. Ct. App. 2022) (self-storage company did not have standing to appeal granting of variance that would allow another firm to operate a self-storage company because injury from competition is not a specialized injury).

Pg. 223, at the end of Note 6, add: *Arcadians for Environmental Preservation v. City of Arcadia*, 88 Cal. App. 5th 418 (2023)

- Plaintiff only made general statements of opposition to City's project, but did not raise any cognizable claims regarding the project's Class I exemption. Thus, Plaintiff did not exhaust administrative remedies when challenging the City's approval of a homeowner's development project on the ground that a Class 1 categorical exemption was inapplicable. Plaintiff argued that statements in the written administrative appeal were sufficient to fairly apprise the City of the objection to the exemption. These included references to environmental impacts and a request that the City prepare an EIR, which implicitly challenged reliance on the exemption.

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The court rejected this argument. The cited statements were only general complaints in opposition to the project and were only general references to potential environmental impacts that even when considered together, did not come close to meeting the exhaustion requirement mandated by CEQA. The court noted that the exhaustion requirement is met when the exact issue is presented to the agency or is raised in the administrative proceeding and is sufficiently specific to fairly apprise the agency of the substance of the objection so that it has an opportunity to evaluate and respond to the challenge. Because plaintiff did not make specific challenges to the project's Class 1 exemption and did not raise any other CEQA challenges during the administrative hearings, it failed to meet the exhaustion requirement.

Pg. 248, at the end of Note 1, add: *See also Korey v. Plan. & Zoning Comm'n of Hunting Valley*, 2022-Ohio-4390, at *P5 (Ct. App.) (zoning ordinance provisions on residential density reasonable and not arbitrary, and thus constitutional, when consistently applied across jurisdiction, and historic significance of property does not by itself allow preemption of local zoning regulations).

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Pg. 251, as the last paragraph before the *Gardner* case, add:

Agriculture and Marijuana: For an interesting decision as the intersection of marijuana growth and agricultural districts, see *Valley Green Grow, Inc. v. Town of Charlton*, 99 Mass. App. Ct. 670 (2021) (marijuana cogeneration facility was an incidental activity allowed in agriculture and horticulture districts even though town's planning board argued it was light manufacturing).

Pg. 264, at the end of the paragraph under [a] *Separation of Single-family and Multifamily Uses*, add: *1000 Friends of Oregon v. Clackamas Cnty.*, 520 Or. Ct. App. 444 (2022) (short term rental use for dwelling units and guest houses were not a permitted use of farm and forest land).

Nekrilov v. New Jersey, 45 F.4th 662 (3d Cir. 2022) (city ordinance severely limiting short-term rentals was not a taking).

Purple Munky Property Co., LLC v. Walnut Tp., Fairfield County, Ohio, 2023 WL 3069752 (S.D. Ohio 2023) (although local zoning ordinance did not expressly ban short term property rentals, the requested preliminary injunction to allow use of properties to be short term rentals was denied as the properties were subject to the zoning districts and permitted uses in effect at the time the properties were acquired).

- On January 2023, Purple Munky received final notice letters from the Walnut Township (Ohio) zoning inspector stating that the intended rental activity would violate the Walnut Township Zoning Resolution of 2015. Each notice stated it couldn't operate the properties as "tourist homes" because the residential districts in which the properties were located weren't zoned for tourist home use. Purple Munky sought a preliminary injunction to require the township to allow it to rent the properties on a short-term basis. Purple Munky claimed that because the resolution was silent on STRs, its desired use should be permitted. While it was "correct that the [r]esolution d[id] not contain any reference to STRs," it was "incorrect" to interpret "that silence" to indicate "permission."

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Pg. 264, at the end of the first paragraph under *[b] Short Term Rentals*, add: *Schroeder v. City of Wilmington*, 2022-NCCOA-210, 282 N.C. App. 558 (2022) (state statutory preemption of provision of city zoning ordinance requiring registration of short-term rental properties did not extend to other provisions not closely intertwined with registration requirement); *Draper v. City of Arlington*, 629 S.W.3d 777 (Tex. App. 2021), *review denied* (Jan. 28, 2022) (Ordinance amending city's zoning code to allow short-term rentals only in new short-term rental zone and in high- and medium-density residential areas rationally related to legitimate government objectives within city's police powers).

Pg. 268, insert a new paragraph before Section [c] and add the following: *Recent cases:* In *Calvey v. Town Bd. of N. Elba*, No. 820CV711TJMCFH, 2021 WL 1146283, at *2 (N.D.N.Y. Mar. 25, 2021), the plaintiffs challenged local legislation requiring "property owners to acquire a 'revocable short-term rental permit' to use a 'dwelling unit ... for short-term rental purposes.'" A fee was required for the permit. The plaintiffs raised numerous claims including violation of their equal protection rights, substantive due process rights and also raised a regulatory taking claim. In *Styller v. Zoning Board of Appeals*, No. SJC-12901 (June 7, 2021), The court held that the plaintiff's "occasional" use of a home to rent to others short-term is not a legal primary use of property in a "single residence' zoning district). *And see Keen v. City of Manhattan Beach*, 77 Cal. App. 5th 142, 292 Cal. Rptr. 3d 366 (2d Dist. 2022) (finding that the City ordinance banning short-term rentals was clearly invalid as the City did not obtain the Coastal Commission's approval which was a clear requirement under an already established, and still binding, zoning ordinance code). *Heyman v. Cooper*, 31 F.4th 1315 (11th Cir. 2022) (short-term rentals were not permitted nonconforming uses of development code that banned short-term rentals in residential zones).

Pg. 280, Note 1 at the end of the paragraph add: *See also Horizon House, Inc. v. East Norriton Twp.*, 2022 WL 2916680 (E.D. Pa. 2022) (ordinance requiring group home to obtain special exception and submit additional floor plans and other information not required to be submitted by people seeking a permit for single-family home violates Fair Housing Act because it creates a disparate impact on individuals with disabilities).

Pg. 282, Note 10, add: Cienkus, *Deinstitutionalization or Transinstitutionalization? Barriers to Independent Living for Individuals with Intellectual and Developmental Disabilities*, 36 Notre Dame J.L. Ethics & Pub. Pol'y 315 (2022).

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Pg. 291, after "Sources", add: Sullivan, *Personal, Not Real: Manufactured Housing Insecurity, Real Property, and the Law*, 18 Ann. Rev. L. & Soc. Sci. 119 (2022).

Pg. 293, at the end of the *Note on Home Occupations*, add the following new paragraph:

Recent cases: Seacoast Canine, LLC v. Traister, 2022 WL 542607 (Mass. Land Ct. 2022) (ZBA's decision requiring Seacoast Canine LLC to obtain a special permit to operate a dog daycare business was in error as a customary home occupation (CHO) exception applied); *Wortham v. Village of Barrington Hills*, 2022 IL App (1st) 210888 (1st. Dist. 2002) (short-term rental use was not a permitted home occupation under the Zoning Code as the outward appears made it clear that the rental use was a vacation rental and not a home occupation); *Heyman v. Cooper*, 31 F.4th 1315 (11th Cir. 2022) (short-term rentals were not permitted nonconforming uses of development code that banned short-term rentals in residential

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Pg. 315 at the end of the *Note on the History of Nonconforming Uses*, add a new paragraph:

Recent cases: Parker v. Zoning Comm'n of Town of Washington, 209 Conn. App. 631 (2022) (a nonconforming use may be established not only from a pre-existing use, but from a use allowed under the terms of a settlement agreement and not necessarily constructed); *Huang v. City of Waltham Zoning Bd. of Appeals*, 2022 WL 444464 (Mass. Land Ct. 2022) (property that was a nonconforming rooming house that received a special permit to modify the nonconforming use to become an assisted living facility could not go back to being a nonconforming rooming house after the assisted living facility use had been abandoned); *Beach v. City of Galveston, Texas*, 2022 WL 996432 (5th Cir. 2022) (plaintiff's discontinued use of the nonconforming property for a period of six months or longer, as per the zoning standards, created a rebuttable presumption that the plaintiff intended to abandon the property despite the fact that the "abandonment" only occurred because of the destruction of Hurricane Ike in September 2008); *Heyman v. Cooper*, 31 F.4th 1315 (11th Cir. 2022) (short-term rentals were not permitted nonconforming uses of development code that banned short-term rentals in residential zones).

Pg. 324, at the end of Note 4, add: *Matter of Town of Southampton v. New York State Dept. of Environmental Conservation*, 205 N.E.3d 426 (2d Dep't 2023) (statute prohibiting conservation agency from issuing mining permits if local ordinance prohibits mining does not apply to permits for non-conforming uses). The Court of Appeals held that the Department Environmental Conservation (DEC) may process renewal and modification applications when those applications seek to mine land that falls within the scope of an undisputed prior nonconforming use, thus modifying the judgment of the courts below and the DEC and remitting for further proceedings. At issue was whether the DEC was barred from processing applications, including applications for renewal and modification permits, for permits to mine in covered counties when "local zoning laws or ordinances prohibit mining uses within the area proposed to be mined" see New York Environmental Conservation Law 23-2703(3). Petitioners here sought to annul a modified permit granted to Respondent, the owner and operator of a sand and gravel mine. The applications at issue implicated some prior nonconforming uses that were undisputed and others that were disputed but not resolved. Supreme Court denied the petition, and the appellate division modified and affirmed. The Court of Appeal affirmed as modified, holding that because prior nonconforming use was not taken into account by either DEC or the courts below, remand to the DEC was required for further proceedings.

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Pg. 339 at the end of the first paragraph and before the section that begins, *The problem*, add: *See* The United States Dep't of Justice, Civil Rights Division, *Report on the Twentieth Anniversary of the Religious Land Use and Institutionalized Persons Act,* https://www.justice.gov/crt/case-document/file/1319186/download (Sept. 22, 2020).

Pg. 339, at the end of the second full paragraph, add: *County of San Bernadino v. Mancini*, 83 Cal. App. 5th 1095, 299 Cal. Rptr. 3d 413 (2022) (considering, but rejecting, argument of selective enforcement for reasons of religious discrimination because appellants provided no evidence of such discrimination).

Pg. 339 at the end of the last paragraph in the section that begins, *The problem*, add: *See Congregation Rabbinical Coll. of Tartikov, Inc. v. Vill. of Pomona,* No. 07-CV-6304 (KKM), 2021 WL 1222159, at *1 (S.D.N.Y. Mar. 31, 2021) (requested unpaid attorney's fees of $5.4 million in "complex" RLUIPA case reduced by the court to $2.5 million due to mixed success) Note: Village paid over $5 million to defend itself. *St. Paul's Found. v. Baldacci*, No. 19-CV-11504-DJC, 2021 WL 2043398, at *8 (D. Mass. May 21, 2021) (holding that plaintiff did not establish that Town's conditional refusal to reinstate building permit was arbitrary and capricious). *And see Congregation Rabbinical Coll. Of Tartikov, Inc. v. Vill. of Pomona*, NY, 2022 WL 1697660 (plaintiff's assertion that their free exercise and free association rights were violated by the Village and its Board of Trustees failed as the court lacked subject matter jurisdiction because the plaintiff's claims were merely conjecture). *And see Canaan Christian Church v. Montgomery County, Maryland*, 491 F. Supp. 3d 39 (D. Md. 2020) (upholding, after rational basis review, county zoning ordinance regarding impervious surface where there was no evidence of discriminatory intent and where ordinance did not differentiate on the basis of religion). *And see Tracer Lane II Realty, LLC v. City of Waltham*, 489 Mass. 775, 187 N.E.3d 1007 (2022) (although originally passed to prevent municipalities from restricting educational and religious uses, the scope of the Dover Amendment's protection expanded to "help promote solar energy generation throughout the Commonwealth").

Pg. 342, in the RLUIPA section after "Land use restrictions on religious uses also are subject to attack under federal law, most recently the Religious Land Use and Institutionalized Persons Act (RLUIPA), as well as federal constitutional claims based on equal protection or the Free Exercise Clause", add: For a recent RLUIPA and First Amendment case, see *Pass-A-Grille Beach Cmty. Church, Inc. v. City of St. Pete Beach, Fla.*, 515 F. Supp. 3d 1226, 1232–33 (M.D. Fla. 2021) (finding "Church has established a substantial burden under Midrash. Under the City's current interpretation of its parking ordinances, the Church is not permitted to allow people to use its own parking lot – for free or for a fee – unless the people are parking there for a 'legitimate church purpose.' What might constitute a 'legitimate church purpose' is up to the City, not the Church. This is certainly more than an 'incidental effect' or 'inconvenience'"). For a recent equal protection article, see Noah Kane, *Treat Thy Neighbor As Thyself? Equal Protection and the Scope of RLUIPA's Equal Terms Clause*, 43 Cardozo L. Rev. 823, 824 (2021). *See also* Report on the Twentieth Anniversary of the Religious Land Use and Institutionalized Persons Act September 22, 2020, https://www.justice.gov/crt/case-document/file/1319186/download.

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Pg. 346, Note 1, after "*Substantial burden under RLUIPA*, add: *Adam Community Center v. City of Troy*, 2022 WL 4541630 (E.D. Mich. 2022) (when examining whether there is direct or circumstantial evidence to support an RLUIPA discrimination claim, a court will look at the following factors: (1) the series of events leading to the land use decision; (2) the context of the decision; (3) whether the decision process stayed in line with established norms; (4) whether there were any statements made by the decision-making body and community members; (5) the decision-making reports; (6) whether a discriminatory impact was foreseeable; and (7) whether there were any less discriminatory options available).

Pg. 350, Note 5 before the last paragraph inset the following as a new paragraph: *Alive Church of the Nazarene, Inc. v. Prince William County*, 50 F.4th 92 (4th Cir. 2023)

- The state of Virginia allowed localities to "regulate, restrict, permit, prohibit, and determine … [t]he use of land, buildings, structures and other premises for agricultural, business, industrial, residential, flood plain and other specific uses[.]" Through that authority, and to "create an environment favorable for the continuation [of] farming and other agricultural pursuits," the County had zoned certain areas within its bounds as "A-1, Agricultural" land. The land within the Agricultural District—including ACN's 17-acre property—was bound by the requirements of the Prince William County Code (the Agricultural Zoning Ordinance (AZO)) and the County's general zoning requirements.
- The AZO was designed to "encourage conservation and proper use of large tracts of real property in order to assure available sources of agricultural products, to assure open spaces within reach of concentrations of population, to conserve natural resources, prevent erosion, and protect the environment; and to assure adequate water supplies." Pursuant to the AZO, the County allowed 14 uses to operate by right in the Agricultural District, subject to strict development standards.
- Also, the County allowed 35 nonagricultural "special uses"—including religious institutions—to operate within the Agricultural District after a site-specific review and subject to conditions outlined in a SUP.
- Concerning the 14 by-right uses, which included farm wineries, limited-license breweries, and agricultural operations, the state code indicated that all agricultural operations would carry out agritourism activities, which were defined as "any activity carried out on a farm or ranch that allows members of the general public, for recreational, entertainment, or educational purposes, to view or enjoy rural activities, including farming, wineries, ranching, horseback riding, historical, cultural, harvest-your-own activities, or natural activities and attractions." And within the Agricultural District certain nonagricultural activities, like outdoor meetings, tent revivals, or business events, required a property owner to apply for a Temporary Activity Permit (a TAP), which would be granted only if "the proposal w[ould] not impair the purpose and intent of the zoning ordinance, and when the use [wa]s not so recurring in nature as to constitute a permanent use not otherwise approved on a site planning"
- To qualify for a farm winery or limited-license brewery, an organization had to be:
    - • located on a producing farm, vineyard, or orchard;
    - • produce its respective beverages on-site; and
    - • be licensed by the Virginia Alcohol Beverage Control Board (the ABC Board).

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- And to preserve the economic vitality of the Virginia wine and beer industries, state law prohibited localities from regulating the "[u]sual and customary activities and events" at farm wineries and limited-license breweries "unless there is a substantial impact on the health, safety, or welfare of the public." Also, in accordance with state law, the County authorized farm wineries and limited-license breweries to host special events (such as weddings, banquets, and conferences, of up to 150 people) without obtaining a TAP or a SUP to do so. Here, ACN complained about the County's requirement for it to obtain a SUP to operate within the Agricultural District and took issue with the requirement for it to obtain a farm winery or limited brewery license from the ABC Board to congregate on its land before complying with its SUP.
- Ultimately, the court ruled allowing religious institutions to conduct worship services did "not further the purpose of the [AZO]," which promoted farming. "Specific to the Church, allowing services would not increase its ability to continue farming its land. Accordingly, we cannot agree with the Church that it is similarly situated to farm wineries and limited-license breweries with regard to the Ordinance. The Church has failed to meet its initial burden of proof by providing a similarly situated comparator with which it has been treated unequally and has thereby failed to state a RLUIPA equal terms claim," the court ruled.
- The court also rejected ACN's claim that the County discriminated against it in violation of RLUIPA. Under that federal law, it was unlawful for a government to "'impose or implement a land use ordinance that discriminate[d] against any assembly or institution on the basis of religion or religious denomination.'"
- ACN didn't meet its burden of showing "evidence of discriminatory intent to establish a claim." Nothing in the facts suggested the County had enacted the AZO for religious motives, so the nondiscrimination claim was not sufficient and could not proceed.
- The court also rejected ACN's substantial-burden claim. RLUIPA stated that no land use ordinance could be imposed in a way that resulted in "a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the government demonstrates that imposition of the burden on that person, assembly, or institution … [wa]s in furtherance of a compelling governmental interest; and [wa]s the least restrictive means of furthering that compelling governmental interest."
- "To determine whether an impermissible burden has been imposed, we ask (1) whether the impediment to the organization's religious practice is 'substantial,' and (2) whether the government is responsible for the impediment," the court explained.
- Here, the impediment was not absolute. Such an impediment would only exist generally if the "land use restrictions wholly prevent[ed] a religious organization from building any house of worship on its property, rather than simply imposing limitations on the building."
- And, even if ACN could have established that it faced an absolute impediment to religious practice, its claim failed because it was a "self-imposed" hardship. "[I]f a religious institution acquire[d] land knowing that it [wa]s subject to certain restrictions, any burden resulting from those restrictions ha[d] not been imposed by the government; but rather, the burden [wa]s self-imposed," the court explained.
- The bottom line: ACN recognized it could and would use its property for religious purposes *without* any license from the ABC Board when it complied with the SUP. "The Agricultural Zoning Ordinance thus does not require the Church to seek out new property, or even to adjust its plans to erect its buildings. Rather, the Church must simply comply with the terms of its SUP. In all of these circumstances, the Church's substantial burden claim fails," the court ruled.

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Pg. 356, at the end of the paragraph before [2] Transit-Oriente Development, add: *Georgia. Visible Props., LLC v. Vill. of Clemmons*, 876 S.E.2d 804, 809 (N.C. App. 2022) (discussing permissible uses in special overlay district intended to promote mixed uses including commercial, office, and residential uses).

Pg. 356 at the end of the last sentence of the first paragraph which begins, *See Haro v. City of Solana Beach*, add: *Oak Harbor Main St. Ass'n v. City of Oak Harbor*, 16 Wash. App. 2d 1035 (mixed use housing project case in which the Association objected to the City Council's decision approving the housing project, arguing in part, that the City Council engaged in *de facto* rezoning).

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Pg. 370, in a new paragraph after Note 4, add: *Sources*: There is an abundance of historical and contemporary literature on exclusionary zoning and race. As an example: Gray, *Planned Destruction: A Brief History on Land Ownership, Valuation, and Development in the City of Richmond and the Maps Used to Destroy Black Communities*, https://storymaps.arcgis.com/stories/600d5cb0e0454b1a809da6d4f31db8ca (July 22, 2020); Plummer and Popovich, *How Decades of Racist Housing Policy Left Neighborhoods Sweltering*, The New York Times, https://www.nytimes.com/interactive/2020/08/24/climate/racism-redlining-cities-global-warming.html (August 2020); Whittemore *Exclusionary Zoning Origins, Open Suburbs, and Contemporary Debates*, Journal of the American Planning Association, 87:2, 167-180, DOI: 10.1080/01944363.2020.1828146, https://www.tandfonline.com/doi/full/10.1080/01944363.2020.1828146?scroll=top&needAccess=true

Pg. 373, at the end of the paragraph, *Source*s, add: Lemar, *The Role of States in Liberalizing Land Use Regulations*, 97 N.C. L. Rev. 293 (2019); Symposium, *Regulatory Reform and Affordable Housing, Cityscape: A Journal of Policy Development and Research*, Vol. 23, No. 1 (2021); Nolon, *Pandemics and Housing Insecurity: A Blueprint for Land Use Law Reform*, 46 Vt. L. Rev. 422 (2022).

Pgs. 372-373, at the end of *Sources*, add: Freemark, Urban Institute, November 15, 2022, Influencers, Bias, and Equity in Rezoning Cases: An Evaluation of Developer-Initiated Zoning Changes in Louisville, Kentucky, https://www.urban.org/research/publication/influencers-bias-and-equity-rezoning-cases .

Pg. 386, at the end of the first paragraph and before Section *[a]*, add: *See* Desegregate Connecticut, https://www.desegregatect.org/ (for recent mapping and legislation).

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Pg. 387, insert a new paragraph before [i] "Bottom Up": The California Housing Element Requirement: *Sources*: For recent cases see, *Matter of Save Sag Harbor v. Village of Sag Harbor*, 2023 NY Slip Op. 50347(U) (NY Sup Ct Suffolk County Apr. 10, 2023) (court determined that local law designed to promote affordable housing was improperly adopted pursuant to SEQRA due to no discussion by the board members or the public about the potential environmental impacts of the proposed law).

Ruegg & Ellsworth v. City of Berkeley, No. 2487258 (1st Dist., Mar. 14, 2023) (local zoning ordinances and the Housing Accountability Act (HAA) expressly prohibit local agencies from disapproving affordable housing developments projects unless the agencies make specified written findings of their reasoning).

Town of Westborough by and through Select Board v. Northland TPLP LCC, 2022 WL 16578825 (D. Mass. 2022) (federal court did not have subject matter jurisdiction to hear a case about town attempting to block a developer from converting affordable housing units to market-rate dwelling as the developer applied for a permit under state law).

Pg. 391, in the first paragraph under Housing Appeals Board section, immediately after this text: *It has been adopted subsequently in two neighboring states: Connecticut, Conn. Gen. Stat. Ann. Ch. 126a, § 8-30g; Rhode Island, R.I. Gen. L. Ch. 53 § 45–53-1 et seq.*, add: New Hampshire, N.H. Rev. Stat. Ann. § 679:1 *et seq.* (effective July 1, 2020). New Hampshire now is the third neighboring state to Massachusetts to adopt the appeals approach.

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Pg. 401, at the end of the first paragraph, add: *Perricone-Bernovich v. Tohill*, 843 F. App'x 419, 420 (2d Cir. 2021) (alleging disability discrimination and that variance denial was arbitrary and capricious); *May v. Spokane Cty.*, 481 P.3d 1098, review granted sub nom. *May v. Cty. of Spokane*, 489 P.3d 258 (Wash. 2021) (holding that striking a voided provision in a recording instrument, such as a racially restrictive covenant, is self-executing). For age-restricted development cases: *See also High St., LLC v. Borough of Helmetta Plan. Bd.*, 2022 WL 710788 (N.J. Super Ct. App. Div. 2022) (planning board's denial of age-restricted development was arbitrary and capricious for unreasonably rejecting expert testimony and refusing to respond to applicant's offers to revise its development in response to concerns). *And see Pinnacle Treatment Centers, Inc. v. City of Crown Point, Indiana,* 2022 WL 1079187 (N.D. Ind. 2022) (holding that under the FHA, an "aggrieved person" is someone "who to have been injured by a discriminatory housing practice; or believes that such person will be injured by a discriminatory housing practice that is about to occur") and Where Do We Go Berkeley v. California Dep't of Transportation, 32 F.4th 852 (9th Cir. 2022) (district court requirement of California DOT to give six months for residents of homeless encampments relocate and find housing before clearing the encampments under ADA was vacated because "there is no serious question that the ADA requires such a lengthy delay").

Pg. 403, in the second paragraph, after "Courts grant standing to developers and organizations who complain of discrimination directed to a specific parcel of land. *ACORN v. County of Nassau*, 2006 U.S. Dist. LEXIS 50217 (E.D.N.Y. 2006)", add: *Highview Properties D.H.F. Inc. v. Town of Monroe*, 2022 WL 2022 WL 2079085 (S.D.N.Y. June 9, 2022) (developer lacked standing to bring – on behalf of Hasidic Jewish population – religious discrimination claims against town moratorium, denial of developer's variance from the moratorium, and enactment of local laws reducing density).

Pg. 404, at the end of the top paragraph, add: *See also Yim v. City of Seattle*, 63 F.4th 783 (9th Cir. 2023) (court determined that city's ordinance totally prohibiting landlords from requesting information pertaining to the criminal background of potential tenants was not narrowly tailored to the city's goals of housing access and reduction of racial discrimination as other cities enacted similar ordinances that did not completely foreclose a landlord's ability to request information regarding criminal history).

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Pg. 439, Note 2, add: *See S. Cal. Rental Hous. Ass'n v. Cnty. of San Diego*, 550 F.Supp.3d 853 (S.D. Cal. 2021) (no physical taking claim resulting from the County's moratorium on tenant evictions due to the COVID-19 pandemic). *And see Nowlin v. Pritzker*, 34 F.4th 629 (7th Cir. 2022) action from business challenging the constitutionality of executive orders requiring certain businesses to restrict operations in light of the COVID-19 pandemic did not state plausible regulatory takings claim); 640 *Tenth, LP v. Newsom*, 78 Cal. App. 5th 840, 294 Cal. Rptr. 3d 123 (4th Dist. 2022), as modified on denial of reh'g (June 9, 2022), review filed (June 22, 2022) (rejected challenge to state order prohibiting indoor and outdoor dining to restaurant under the Penn Central regulatory takings factors as the plaintiffs did not allege a physical invasion by the government nor that there was an actual economic harm suffered). *But see Heights Apartments, LLC v. Walz*, 30 F.4th 720 (8th Cir. 2022) (holding that the residential eviction moratorium during the COVID-19 pandemic was a regulatory taking as the moratorium provided a benefit only to a narrow class of the public, thus failing to meet the character of the government action element of the *Penn Central* test).

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Pg. 463, following *Cochran v. Fairfax County Bd of Zoning Appeals*, add: *Earley v Board of Adjustment of Cerro Gordo County*, 955 N.W.2d 812 (IA 2021) (overturning lower courts' conclusions that area variances require a lesser standard than use variance; unnecessary hardship applies to both under state statute and rejecting suggestion that there should be a distinction). *And see Empire Acquisition Grp., LLC v. Town of Seekonk Zoning Bd. of Appeals*, 2022 WL 2256904 (Mass. Land Ct. June 23, 2022) (ZBA made sufficient findings to justify a denial of a zoning variance request as the plaintiff was unable to prove that its property was unique as to its soil conditions compared to the surrounding land as the aerial photography contained in the record was unable to demonstrate which properties contained wetlands, which did not, and whether the plaintiff's property was unique).

Pg. 466, add to end of note 1, See *McDonald v D.C. Board of Zoning Adjustment*, 291 A. 3d 1109 (DC App. 2023). Court upheld DC Bd of Zoning Adjustment grant of a "practical difficulty" variance for a continuing care retirement community (CCRC). BOA properly applied the criteria that there not be "substantial detriment to the public good" as the CCRC and the landowner church qualify as serving a public need. The CCLC's need for additional stories and lot occupancy also created an exceptional condition justifying findings of a practical difficulty under the code.

Pg. 473, Note 4, add: When the code provision on which a conditional use is granted is found to be void, then the conditional use permit based upon the provision also becomes invalid. *See Citizens Against Linscott/Interstate Asphalt Plant v. Bonner County Board of Commissioners*, 168 Idaho 705 (2021).

Pg.479, note 1, after second paragraph add: The type of condition challenged may determine the proper method of challenging, as in *Hall County v Cook Communities*, 2023 Ga. App. LEXIS 355 (June 29, 2023). A challenge to a County condition to a Planned Residential Development rezoning, which condition required off-site improvements and density restrictions, is a challenge to the County's legislative decision because it alleges unconstitutional restriction on the use of property. Thus, the challenge may be brought as a direct action in superior court, not as a petition for writ of certiorari.

Pg. 480, Note 1, after *Waste Connections of Tenn*, case, add: *See also Catherine H. Barber Memorial Shelter, Inc. v. Town of N. Wilkesboro Bd. of Adjustment of the Town of N. Wilkesboro*, 576 F. Supp.3d 318 (W.D. N. C. 2021) (denial of conditional use permit for homeless shelter not supported by competent substantial evidence.

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Pg. 482, add to Note 6: *See Int'l Inv'rs. v. Town Plan & Zoning Comm'n of Fairfield*, 277 A. 3d 750 (Conn. 2022), reversing 246 A.3d 493 (Conn. App. 2021) (reversing zoning commission condition for completion within a certain time frame for a conditional use under Connecticut Gen. Stat. Sec 8-2(a) because it conflicted with statutory period governing development for site plan permit).

Pg. 491, Note 2, following *Colonial Inv. Co.* case add: *Brown v. Carson*, 872 S.E. 2d 695 (Ga. 2022) (potential buyer did not acquire vested right based on county planning director's statement of the present zoning in effect, reversing court of appeals), and the follow-up in *Carson v. Brown*, 883 Se.E.2d 908 (Ga. App. 2023), upholding county refusal to accept an application for a land disturbance permit as a valid moratorium was in effect when the application was submitted.

Pg. 492, Note 5, add to end of the paragraph: *But see St. Martin Parish Government v. Champagne*, 304 So. 3d 931 (LA App. 2020) (multiple permits issued in error for lakeside bait shop/grocery/operating for many years vested right to continue operating).

Pg. 503, add to Note 1, first full paragraph: See *Campbell Woods Homeowners' Association, Inc. et al. v. Village of Mt Pleasant et al.*, 396 Wis. 2d 194 (Ct. App. 2021) (upholding rezoning where it was in the public interest, not solely for benefit of the property owner, consistent with long range planning and use of surrounding land).

Pg. 504, Note 2, following *Childress* case add: *Yacht Club by Luxcom, LLC v. Village of Palmetto Bay Council*, 316 So. 3d 748 (Fla. 3d DCA 2021) (zoning amendment to allow yacht club was not impermissible reverse spot zoning as it was "fairly debatable" and reviewed under substantial competent evidence standard).

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Pg. 505, Note 4, add: e. *Tillman v. Planning & Zoning Comm'n of City of Shelton*, 266 A.2d 792 (Conn. 2021) (no spot zoning because planned development district zoning conformed with comprehensive plan and incorporated a large area of 121 acres).

Pg. 517, second paragraph after *Coral Reef Nurseries* case, add: See also *Catherine H. Barber Mem'l Shelter, Inc. v. Town of N. Wilkesboro Bd. of Adjustment of N. Wilkesboro*, 576 F. Supp. 3d 318 (W.D.N.C. 2021) (right of homeless shelter applicant for conditional use permit to cross-examine witnesses under North Carolina law). *See also Green Genie, Inc. v. City of Detroit*, No. 21-10790, 2022 WL 1138022 (E.D. Mich. Apr. 18, 2022), app. filed May 17, 2022 (no due process violation as the plaintiff's permit application was subjected to repeated exhaustive examinations by both administrative and judicial authorities, all of which upheld the denial of the special land use application); aff'd 63 F.4th 521 (6th Cir. 2023); *Tri-Taylor Cmty. Ass'n v. Zoning Bd. of Appeals of City of Chicago*, 2022 IL App (1st) 200884-U (holding that objectors were not denied due process by mid-hearing alterations to proposed special use plans).

Pg. 518, add to end of second paragraph: The appearance of impropriety or controversy is not enough. *Paris City Commission v. Vance*, 2023 Ky. App. LEXIS 6 (January 20, 2023), Rezoning from conservation zone to light industrial was not arbitrary and capricious, where supported by the City Commission by 33 findings of fact generally focused on the economic benefits of the rezoning, although the details of the underlying development deal, including a non-disclosure deal with the purchaser and the city, may have been controversial. See also *Matter of Bistany v. City of Buffalo*, 210 A.D.3d 1535 (N.Y. App. Div. 2022) (Planned Unit Development, recommended by City Planning Board, subsequently was approved by the City Common Council after a public hearing. Two days later the Council reconsidered the PUD at a special session and approved the PUD with certain amendment not considered at its prior session. Amendments did not need to be reviewed by the Planning Board prior to their adoption).

Pg. 518, par. Open Meetings, add following *Tuzeer case: cf. Berry v. Board of Supervisors*, 884 S.E.2d 515 (Va. 2023) held that an updated zoning ordinance adopted during the Covid-19 pandemic in an electronic meeting failed to comply with the state open meetings law known as the Virginia Freedom of Information Act, as its adoption was not time sensitive, and thus the ordinance was void ab initio.

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Pg. 519, add to the end of first paragraph: Even the appearance of bias, where the board member vote was unnecessary for approval because it was unanimous, required the recusal of the board member in *Pascal v. City of Pittsburgh Zoning Bd. of Adjustment*, 259 A.3d 375 (Pa. 2021) (Due process requires a fair trial in a fair tribunal and the appearance of bias denies the applicant due process). *And see Titan Concrete, Inc. v. Town of Kent*, 202 A.D.3d 972, 163 N.Y.S.3d 554 (2d Dep't 2002) (holding that the New York Supreme Court properly granted the plaintiff's petition to the extent it sought to invalidate the local law based on the conflict of interest when the Town Supervisor did not completely recuse herself from any discussion with respect to the local law).

Pg. 520, Note 1, add to recent cases: *Petrovich Dev. Co., LLC v. City of Sacramento*, 48 Cal. App. 5th 963 (2020) (councilmember's right to state views of matters of public importance crosses the line where he actively campaigns for votes of other councilmembers and advises opponents with talking points; councilmember should have recused himself and actions denied applicant a fair hearing); *Gates v. City of Pittsburgh Planning Comm'n*, 229 A.3d 50 (Pa. Commw. Ct. 2020) (disqualification of commissioner whose participation gave appearance of possible prejudice does not required reversal of decision where there is no allegation that she controlled or unduly influenced other commission members).

Pg. 533, add to Note 4: See *Hartshorne v. City of Whitefish*, 486 P.3d 693 (Mont. 2021) (upholding a conditional use "district" as a statutorily acceptable "floating zone").

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Pg. 553, third paragraph after "It is stated in the *Synder* case, reproduced supra", the following: although in 2023 the Florida statute was amended to restrict consistency challenges issues of use, density and intensity or use. See chapter 2023-115, Law of Florida, section 10, amending section 163.3215(3), Florida Statutes.

Pg. 560, Note 2, end of first paragraph add: Contrast the Florida statutory requirement that development orders must be consistent with all of the comprehensive plan policies and objectives, in *Imhof v. Walton County*, 328 So.3d 32 (Fla. Dist. Ct. App. 1st Dist. 2021).

Pg. 595, end of Note 1, add: For a recent example of a court dismissing a SLAPP suit because of the developer's bad faith, see *MCB Woodbury Developer, LLC v. Council of Owners of the Millrace Condo.*, Inc., 265 A.3d 1140 (Md. 2021) (granting defendant homeowner association motion to dismiss in part because of developer bringing lawsuit in retaliation for HOA opposition to development efforts).

Pg. 596, add to Note 3: *Kosor v. Olympia Companies, LLC et al.*, 478 P.3d 390 (Nev. 2020) (applying Nevada anti-SLAPP legislation [NRS 41.660], finding that homeowner's criticisms of homeowners association and manager of residential community during open meetings, in pamphlets and letters posted on line in a social media platform, were protected against defamation suit by the legislation because made in direct connection with an issue of public interest in a place open to the public or in a public forum; discussing extensively what constitutes an online media public forum).

Pg. 596, add to end of Note 4: See also *Crosby v. Town of Indian River Shores*, 358 So. 3d 444 (Fla. App. 2023). State anti-SLAPP statute does not protect a governmental entity from lawsuits filed by its citizens.

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Pg. 601, immediately before the paragraph that begins "Recent updates in modern legislation" add: The Partition of Heirs Property Act (Uniform Law Commission) – responds to the problem of property owned in common by heirs because of intestate succession and abuse of the system by outside persons recruiting an heir to seek partition, with the result of the property being sold for well under market value and preventing accumulation of wealth. This was often done in rural communities and involved families of color. The proposal provides a number of due process protections to assure that all parties receive their fair share of proceeds. *See* https://www.uniformlaws.org/committees/community-home?CommunityKey=50724584-e808-4255-bc5d-8ea4e588371d .

Pg. 606, at the end of the second full paragraph, add: "Covenants will apply only if imposed and filed before a lot is transferred. *Phillips v. Hatfield*, 624 SW3d 464 (Tenn. 2021)."

Pg. 617, before the Note add: at the end of the paragraph before *Dolan* Revisited add: For a California perspective, *see* California Department of Housing and Community Development, *Fees and Exactions* (2017) at https://www.hcd.ca.gov/community-development/building-blocks/constraints/fees-and-exactions.shtml .

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Pg. 619, at the end of the paragraph before *Dolan* Revisited add: An unconstitutional exaction may also include a requirement to reserve certain land in a development for a time for the use of a public agency. *Symes Development & Permitting LLC v. Town of Concord*, 579 F. Supp. 2d 546 (D. Mass., 2022). *See generally,* Mulvaney, *The State of Exactions*, 61 Wm. & Mary L. Rev. 169 (2019) (reviewing 130 takings cases to date citing *Koontz* to determine if judicial scrutiny of exactions takings cases increased after the decision).

Pg. 626, at the end of Note 1, add: In *Alliance for Responsible Planning v. Taylor*, 278 Cal. Rptr.3d 376 (Cal. App., 2021) the Court found the exaction of traffic improvements beyond the impact of the project effected an unconstitutional taking.

Pg. 635, at the end of Note 4, add: *AMCAL Chico LLC v. Chico Unified Sch. Dist.,* 57 Cal. App. 5th 122, 270 Cal. Rptr. 3d 868 (2020) ("showing of a reasonable relationship between a development and the costs of increased school district services, as required to justify school impact fee, may properly be derived from districtwide estimations concerning anticipated new residential development and impact on school facilities").

Pg. 641 at the end of Note 1, add: *See* Daniel R. Mandelker: New Perspectives on Planned Unit Developments, 52 Real Property, Probate, and Trust Law Journal 229 (2017) (discussing the zoning review process for these developments); *Rice v. Village of Johnstown*, 2021 WL 632905 (Feb. 18, 2021) (PUD submitted to Village Planning and Zoning Commission, along with annexation proposal denied. Under local ordinance, there was no appeal to the Village governing body. Federal court dismissed claims at summary judgment, finding no injury in fact or right to relief arising from the denial, as the parcel had not been annexed. Moreover, the Village did not cause the injury, as the parcel was not under its jurisdiction. The denial was affirmed.); *Matter of Riedman Acquisitions, LLC v. Town Bd. of Town of Mendon*, 2021 NY Slip Op 02953, (May 7, 2021) (Town may not cancel sewer agreement unilaterally when its terms require mutuality. Revived PUD application may employ that agreement.).

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Pg. 649, Note 1, add: *See also Rice v. Village of Johnstown*, Ohio, 30 F4th 584 (6th Cir., 2022) (issue of unlawful delegation of annexation and PUD rezoning powers to Village Planning and Zoning Commission moot when ordinance amended to make Commission's final actions recommendations to governing body).

Pg. 652, Note 6, add at end: Some PUD decisions combine legislative decisions with planning decisions made by subordinate agencies. In *Riedman Acquisitions, LLC v. Town Board of Town of Mendon*, 2021 WL 1826664 (NYAD 4 Dept. 5/7/2021), the Town legislative body declined to enter into a sewer services agreement to purchase sewer capacity from another town, as approved by its planning board, resulting in continuation of a previous agreement that allowed cancellation only by both parties. The Court found the Town Board could veto the proposed agreement.

Pg. 663, add a second paragraph to Note 4 to say: Conflicts over permitting of non-agricultural uses in agricultural zones abound. A statute may allow energy facilities in that zone. See Dovetail Energy, LLC v. Bath Township Board of Zoning Appeals, (Ohio App., 2022) or housing needs may make an overnight homeless camp an "unusual and reasonable" use. *Ho'omoana Found. V. Land Use Commission*, 509 P3d 1129 (Haw. App., 2022). However, a denial of a permit may be upheld for incompatibility with comprehensive plan or anticipated externalities. *WSPR Enterprise LLC v. Town of Spring Prairie*, 2022 WL 833653 (E.D. Wis.) and *Matter of Impact Power Solutions, LLC*, 2022 WL 1448223 (Minn. App.). *Matter of Impact Power Sols., LLC*, 2022 WL 1448223 (Minn. Ct. App. 2022) (upholding denial of solar farm conditional use permit in agricultural zone as the initial denial was "reasonably related to the health, safety and general welfare of the community"). *Zappia v. Town of Old Orchard Beach*, 2022 ME 15 (Me. 2022) (holding that the zoning ordinance precluding accessory structures in a "required front yard" does not preclude a greenhouse in a front yard, provided that setback requirements are met). *WSPR Enter. LLC v. Town of Spring Prairie*, 2022 WL 833653 (E.D. Wis. 2022) (upholding the denial of a rezoning application to permit a gravel pit in agricultural zone).

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Pg. 664, at the end of the second paragraph, add the following as a new paragraph: For an analysis of the agricultural lands programs elsewhere in the United States, *see* Metropolitan Council for the Minneapolis-St. Paul Region, *2019 Agricultural Preserves Program* at https://metrocouncil.org/Communities/Publications-And-Resources/ANNUAL-REPORTS/2019-Metropolitan-Agricultural-Preserves-Report.aspx, Daniels, *Assessing the Performance of Farmland Preservation in America's Farmland Preservation Heartland: A Policy Review*, 33 Society & Natural Resources, 758 (2020) with regard to Maryland and Pennsylvania and Connecticut Department of Agriculture, *Farmland Preservation Program* at https://portal.ct.gov/DOAG/ADaRC/ADaRC/Farmland-Preservation. *See also* American Planning Association, *Farmland Preservation* at

Pg. 674, add the following as a new paragraph immediately before the Notes and Questions: Oregon's planning system involves four binding planning goals for its coast: Goal 16 – Estuarine Resources. *See* Sullivan, *Protecting Oregon's Estuaries*, 23 Ocean & Coastal L.J. 373 (2018). Goal 17 – Coastal Shorelands. *See* Sullivan, *Shorelands Protection in Oregon*, 33 J. Env. L. & Lit. 129 (2018). Goal 18 – Beaches and Dunes. *See* Sullivan, *Land Use Conflict Management in Beaches and Dunes Areas*, 55 Willamette L. Rev. 93 (2018-2019). Goal 19 – Ocean Resources. *See* Sullivan, The Role of State Planning Law in the Regulation and Protection of Ocean Resources, 24 Ocean and Coastal L. J. 136 (2019).

Pg. 674, add the following as a new paragraph immediately before the Notes and Questions: Oregon's planning system involves four binding planning goals for its coast: Goal 16 – Estuarine Resources. See Sullivan, Protecting Oregon's Estuaries, 23 Ocean & Coastal L.J. 373 (2018). Goal 17 – Coastal Shorelands. See Sullivan, Shorelands Protection in Oregon, 33 J. Env. L. & Lit. 129 (2018). Goal 18 – Beaches and Dunes. See Sullivan, Land Use Conflict Management in Beaches and Dunes Areas, 55 Willamette L. Rev. 93 (2018-2019). Goal 19 – Ocean Resources. See Sullivan, The Role of State Planning Law in the Regulation and Protection of Ocean Re-sources, 24 Ocean and Coastal L. J. 136 (2019).

Pg. 675, at the end of Note 1 add the following as a new paragraph: In *Mountainlands Conservancy, LLC v. California Coastal Commission*, 47 Cal. App. 5th 214 (2020). Vintners challenged a local coastal program proposed by Los Angeles County and approved by the California Coastal Commission that prohibited new vineyards within a certain coastal zone area. While state coastal policies included preservation of the "maximum amount of prime agricultural land" and otherwise supported "feasible" agricultural use, the court found that the term "feasibility" includes "economic, environmental, social, and technological factors" that the Commission considered in its finding that the area was mostly "unsuitable" for agriculture had the potential to severely disturb natural areas, reduce biodiversity, and impact freshwater resources.

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Pg. 718, after the citation to *The Quiet Revolution Goes West: The Oregon Planning Program 1961-2011*, add: Much of the more recent legislative and judicial activity in Oregon land use has been focused on housing. For a summary of this recent activity, *see* Adams-Schoen and Sullivan, *Reforming Restrictive Residential Zoning: Lessons From an Early Adopter*, Journal of Affordable Housing and Community Development Law (forthcoming, 2021); *Will States Take Back Control of Housing from Local Governments?*, 43 Zoning and Planning Law Report, No. 7 (July, 2020); and *The Challenge of Housing Affordability in Oregon: Facts, Tools and Outcomes*, (with Diller), 27 *Journal of Housing and Community Development* 183 (2018). The most significant of these changes was the passage of HB 2001 in 2019, which, among other things, required: [1] As of July 1, 2021, that cities of 10,000 or more to allow duplexes in single family zones in which a single-family detached house is allowed by right. [2] As of July 1, 2022, that cities of 25,000 or more allow triplexes, quadplexes, townhomes and cottage clusters in single-family zones in areas in which a single-family detached house is allowed by right. The details of these requirements are set out in the *Reforming Restrictive Residential Zoning* article.

Pg. 736, following *R.H. Gump* case, add: *see also Crown Castle Fiber LLC v. City of Charleston*, 2021 U.S. Dist. LEXIS 27906 (D.S.C. Feb. 15, 2021) (substantial competent evidence of aesthetic impacts on historic areas sufficient to deny cell tower).

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Pg. 750, add to first paragraph: *See also L.D. Mgmt. Co. v. Thomas*, 456 F. Supp. 3d 873 (W.D.Ky. 2020) (striking down Kentucky state law in its entirety).

Pg. 752, following second full paragraph, add: In *City of Austin v. Reagan National Advertising of Austin*, 142 S. Ct. 1464 (2022), the U.S. Supreme Court handed down its decision in the closely watched case of City of Austin v. Reagan National Advertising of Austin. The case was of particular interest because it implicated the constitutionality of not only many state and local sign regulations but also the federal Highway Beautification Act, which regulates billboards along certain federal highways and distinguishes between on- and off-premises signs. The fact that this case was a majority, rather than a plurality, decision may provide some predictability in future First Amendment litigation over signs. It also throws into question many of the post-Reed content-based decisions

In *City of Austin*, the U.S. Supreme Court held that outdoor advertising regulations, which distinguished between billboards for goods and services available on premises (onsite advertising) and those that advertised the same when not on premises (offsite advertising), were content-neutral and thus not subject to strict scrutiny under the First Amendment. The City of Austin allowed on-premises signs to be digitalized but not off-premises signs. Reagan Advertising sued in federal court, contending these regulations violated the First Amendment because they distinguished between the two kinds of signs without passing strict scrutiny, citing the Court's decision in *Reed v. Gilbert*, 576 U.S. 155 (2015) as authority. *Reed* held that local sign regulations making distinctions among various categories of non-commercial signs for purposes of lawful duration in place (for example, allowing directional signs for church meetings a shorter period of time than signs for elections or general political or social expression) violated the First Amendment unless the regulations passed strict scrutiny. The trial court disagreed, upholding Austin's outdoor advertising regulations, but the Fifth Circuit reversed, relying on *Reed* and terming the distinction between on- and off-premises "content-based" and subject to strict scrutiny.

The Court's majority opinion by Justice Sotomayor rejected the Fifth Circuit view that a sign regulation cannot be content-neutral if its application requires reading the sign, terming this "too extreme an interpretation of this [C]ourt's precedent," as Austin's off-premises distinction required an examination of a sign "only in service of drawing neutral, location-based lines." In contrast to the sign regulation at issue in *Reed*, the Austin ordinance was "agnostic as to content" and did not warrant application of strict scrutiny. The regulations in Reed treated some types of non-commercial speech (political signs) more favorably than others (temporary directional signs). Singling out specific subject matter for differential treatment was not present in the Austin regulations, as there were no content discrimination classifications among the regulated messages. Instead, the distinctions were based on the location of the sign and thus like "time, place and manner" restrictions that the Court has upheld. The majority opinion used restrictions on solicitation, under which content must be examined, as an example. Indeed, the Court had upheld billboard regulations that would ultimately prohibit all off-premises advertising but exempted on-premises advertising in *Metromedia, Inc. v. San Diego*, 453 U.S. 490 (1981). Only regulations that discriminate based on "the topic discussed or the idea or message expressed" are content-based and subject to strict scrutiny. In contrast, longstanding precedent of the Court recognized the distinction and their "commonsense" result. Justice Breyer concurred, but added that he believed the reasoning in *Reed* was incorrect, suggesting that a "bright line" rule was inappropriate and that the Court should instead use "rules of thumb" that examine whether First Amendment interests are harmed in a manner disproportionate to the relevant regulatory objectives. The Austin regulations pass muster under this test. Justice Alito concurred in the judgment but dissented in part because the Fifth Circuit did not apply tests that must be met to establish that a law is facially unconstitutional. Moreover, sign digitalization is not based on

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"content, topic or subject matter," and because most of the signs at issue already existed off-premises, digitalization was the only issue. The Court remanded the decision for further proceedings to address allegations that the regulations had impermissible purposes or justifications that would violate intermediate scrutiny.

This text is drawn principally, with permission, from Ed Sullivan, "United States Supreme Court Upholds Austin, Texas Sign Ordinance in Split Decision: *City of Austin v. Reagan Nat'l Advert. of Austin, LLC*, 142 S. Ct. 1464 (2022) Oregon Real Estate and Land Use Digest (2022).

Pg. 760, add to Note 1, after the second sentence: See *City of Austin, Texas v. Reagan Nat'l Advert. of Austin*, LLC, 142 S. Ct. 1464, 1474 n.5 (2022) (In Parts I-IV, "the relevant portion of the opinion was also joined by a fifth".)

Pg. 762, add to the end of Note 4 after *Thomas v. Bright*: *see also L.D. Mgmt. Co. v. Thomas,* 456 F. Supp. 3d 873 (W.D.Ky. 2020) (striking down Kentucky state law in its entirety finding on -premises v. off-premises distinction regulation fails intermediate or heightened scrutiny where off- premises sign traffic impact not shown to be worse than on premises sign impact.

Pg. 762, strike third full paragraph. Add to second paragraph after second sentence: *City of Austin v. Reagan National Advertising of Austin,* 142 S. Ct. 1464 (2022) reaffirmed that a location-based distinction between off-premises signs and on-premises signs is not content-based. Later cases follow *City of Austin. See, e.g., Outfront Media, LLC v. City of Grand Rapids*, No. 357319, 2022 Mich. App. LEXIS 4717 (Ct. App. Aug. 11, 2022); *Reagan Outdoor Advertising, Inc v. City of Austin*, 2023 WL 270582 (5th Cir. 2023); *Adams Outdoor Advert. Ltd. P'ship v. City of Madison*, Wisconsin, 2023 WL 33962 (7th Cir. Jan. 4, 2023). *See also Geft Outdoor, LLC v. Monroe Cnty*., 62 F.4th 321 (7th Cir. 2023) (On challenge that billboard ordinance variance procedure was facially violating First Amendment by distinguishing on-site from off-site signs, court found that it was not an unconstitutional prior restraint on speech but is content neutral and narrowly tailored to serve a significant government interest. Variance procedure authorized the county to approve signs on a case-by-case basis for structural sign restrictions including height, size and digital infrastructure.)

Pg. 763, following title: *Flags*: *Shurtleff v. City of Bos., Massachusetts*, 142 S. Ct. 1583 (2022) (city's refusal to allow Christian organization to raise flag as part of city program allowing private organization to use one of three flag poles in city hall plaza for duration of an organization's event violated First Amendment where it amounted to impermissible discrimination based on religion).

Prior restraint: *Florida Beach Advertising, LLC v. City of Treasure Island*, 2021 WL 50466 (M.D. Fla. Jan. 6, 2021) (local sign licensing law struck down as prior restraint where there was no time limit on the licensing process, criteria for approval were lacking, and local officials had unfettered discretion on whether to grant variances).

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Pg. 766, Sources, add: Daniel Mandelker, Free Speech Law for On-Premise Signs (4th Ed. 2022, U.S. Sign Council Foundation); Daniel R. Mandelker, The Changing Landscape for Billboard Regulation, Prob. & Prop., March/April 2022, at 40.

Pg 771, add to Note 1: A more recent federal case highlights the debate about the validity of aesthetic regulation within the constitutional right to free expression, due process and equal protection, with the court upholding the Town of Palm Beach design review standards for residential property. In *Burns v. Town of Palm Beach*, 999 F.3d 1317 (11th Cir. 2021), a homeowner was denied plans to tear down a beachfront residence and replace it with a mid-century modern structure twice its size. The Town's Architectural Review Commission found that the new structure was not "in harmony with the proposed development on land in the general area … (and) excessively dissimilar in relation to any other structure existing . . . within 200 feet of the proposed site" in terms of architecture, arrangement, mass and size. The homeowner claimed that the new structure was his protected means of expression, that the Town design code was void for vagueness, and that he had been intentionally treated differently from others similarly situated. Both the majority opinion and the dissent extensively reviewed the facts of the case, and despite the dissent's impassioned argument regarding architecture as expression and the need to apply strict scrutiny to the government action, the majority found that the code and its application met the judicial standards for upholding the Commission decision, especially as the new residence could not be seen because of landscape buffering.

Pg. 772, add to note 3: *Cf. Botts Marsh LLC v. City of Wheeler*, 326 Or. App. 215 (Or. Ct. App. 2023). City's design review regulation advising that "monotony of design shall be avoided. Variety of detail, form, and site design shall be used to provide visual interest" is exceedingly vague, and fails to give fair notice as to what is required of the applicant. Furthermore, city's interpretation adopting a standard that "no more than 25% of all buildings in the development shall replicate the same roofline or footprint" was implausible.

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D. Historic Preservation 786

Pg. 787, after *Historic preservation planning*, add a new paragraph: *Standing to enforce preservation ordinances*. Historic districts and landmarks have multiplied as the cultural, economic and city-building importance of preservation has become evident. However, the enforcement of ordinances by private parties is difficult to achieve because courts rarely grant them special standing to sue, instead relying on the typical zoning standard that requires plaintiffs to have a direct interest, greater than that of the community at large. *See, e.g., Historic Alexandria Foundation v. City of Alexandria*, 858 S.E.2d 199 (Va. 2021) (Justice Hugo Black home; Foundation did not have standing to challenge city council decision allowing renovation of home in city's Old and Historic District. Allegations of vital interest in protecting city historic properties, ownership of property within 1,500 feet, and advocacy including award of recognition to the subject property is insufficient to establish particular harm different than what would be suffered by the public at large). *See also Gates v. City of Pittsburgh Historic Review Commission*, 254 A.3d 803 (Pa. Commw. Ct. 2021)(owners of property within two blocks of property within Deutschtown Historic District lack standing to challenge the neighboring property's grant of a certificate of appropriateness to alter windows; challengers is not sufficiently aggrieved when allegations do not assert direct and immediate effect but only speculative harm); *Tenth Street Residential Association v. City of Dallas*, 968 F.3d 492 (5th Cir. 2020) (neighborhood association lacked standing to challenge certificate of appropriateness for demolition of abandoned single family home in the Tenth Street Landmark Historic District, one of the few remaining Freedmen's Towns in the nation and the only remaining one in Dallas. The challenge, based on the Fair Housing Act and equal protection, alleged discrimination in city provision of services where homes in predominantly non-black historic district did not suffer the same excessive demolitions that Tenth Street suffered. The association did not allege a sufficient injury in fact based on its mission to preserve structures in the district; possible additional demolitions caused by city

Notes and Questions 787

[1] Historic Districts 788

Pg. 789, third paragraph after *Reiter* case, add: A certificate of appropriateness may be required for exterior improvements including landscaping. *See Stevens v City of Columbus*, 2022 WL 2966396 (6th Cir. CA 7/27/2022) (construction of retaining walls and change in landscaping affect exterior of property designed to be exposed to public view and are not unconstitutionally vague or impermissible delegation of legislative power).

Pg. 789, add to end of last paragraph: Whether the historic preservation ordinance is considered "zoning" varies from state to state, but can have relevance for some purposes, such as notice procedures and consistency with a comprehensive plan. *See Powell v. City of Houston*, 678 S.W. 3d 838 (Tex. 2021) (not zoning for purposes of city charter provision requiring voter referendum for approval, but zoning for purposes of the state zoning statute requiring consistency with a comprehensive plan).

Mountaineer Pest Servs., LLC v. City of N. Augusta, 2022 WL 214526 (D.S.C. 2022) (denial of request to remove historic overlay district regarding parcels of property, where other nearby properties had such requests approved, was not a violation of the Equal Protection clause where plaintiff could not show that it was treated differently than other properties or that there was intentional discrimination behind the denial).

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Pg. 806, last line, after Ky. Rev.Stat.Ann. § 100.208, add: TDRs may be used for a variety of preservation and conservation purposes. See, e.g. Vt. Stat. Ann. Tit. 24, § 4423 (Planned Unit Development. *See also In re Snyder Group, Inc. PUD Final Plat*, 233 A.3d 1077 (Vt. 2020) (Local TDR bylaw regarding planned unit development TDRs complies with Vermont enabling statute and is not unconstitutionally vague).