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PLANNING AND CONTROL OF LAND DEVELOPMENT: CASES AND MATERIALS

2021 SUPPLEMENT

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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).

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Pg. 69 at the end of Note 6, add: Rosser, *The Euclid Proviso*, ___ Wash. L. Rev. ___ (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).

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Cedar Point Nursery. In *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063 (June 23, 2021), "the Court considered whether the uncompensated appropriation of an easement that is limited in time effects a per se physical taking under the Fifth Amendment. A California access regulation grante[d] labor organizations a 'right to take access' to an agricultural employer's property in order to solicit support for unionization. Cal. Code Regs., tit. 8, §20900(e)(1)(C). The regulation mandate[d] that agricultural employers allow union organizers onto their property for up to three hours per day, 120 days per year. Organizers from the United Farm Workers sought to take access to property owned by two California growers—Cedar Point Nursery and Fowler Packing Company. The growers filed suit in Federal District Court seeking to enjoin enforcement of the access regulation on the grounds that it appropriated without compensation an easement for union organizers to enter their property and therefore constituted an unconstitutional per se physical taking under the Fifth and Fourteenth Amendments. The District Court denied the growers' motion for a preliminary injunction and dismissed the complaint, holding that the access regulation did not constitute a per se physical taking because it did not allow the public to access the growers' property in a permanent and continuous manner. A divided panel of the [Ninth Circuit] Court of Appeals affirmed, and rehearing en banc was denied over dissent." The Supreme Court reversed and remanded holding that California's access regulation constitutes a per se physical taking. Rose Law, Cedar Point Nursery v. Hassid (US 20-107 06/23/2021) Right to Take Access to Agricultural Employers' Property for Union Organizing/Per Se Physical Taking, https://joeroselaw.com/2021/06/cedar-point-nursery-v-hassid-us-20-107-06-23-2021-right-to-take-access-to-agricultural-employers-property-for-union-organizing-pe-se-physical-taking/ (June 23, 2021) .

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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.

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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. 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, petitioned 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 asserts a property interest. New Jersey 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."

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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).

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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.

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.

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. 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."

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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).

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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).

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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).

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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 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).

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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 (2021).

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Pg. 373 at the end of the paragraph, *Sources*, 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).

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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. 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).

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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).

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Pg. 482, add to Note 6: See *int'l Inv'rs. V. Town Plan & Zoning Comm'n of Fairfield*, 246 A.3d 493 (Conn. App. 2021) (upholding condition for completion within a certain time frame under Connecticut Gen. Stat. Sec 8-2(a)), *cert. granted*, 247 A.3d 577 (Conn. March 3, 2021).

Western Land Equities, Inc. v. City of Logan 483

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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).

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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).

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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).

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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").

[2] Without Pre-Set Standards: Contract and Conditional Zoning 534

Collard v. Incorporated Village of Flower Hill 534

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G. Site Plan Review 546

Charisma Holding Corp. v. Zoning Board of Appeals of the Town of Lewisboro 547

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A Note on Alternative Dispute Resolution 566

I. Initiative and Referendum 570

Township of Sparta v. Spillane 572

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City of Eastlake v. Forest City Enterprises, Inc. 580

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J. Strategic Lawsuits Against Public Participation (SLAPP Suits) 589

Tri-County Concrete Company v. Uffman-Kirsch 589

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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).

Chapter 6 • Subdivision Controls and Planned Unit Developments 597

Problem 598

A. Subdivision Controls 599

[1] In General 599

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 .

Connecticut General Statute 601

Notes and Questions 603

A Note on Subdivision Covenants and Other Private Control Devices 605

[2] The Subdivision Review Process 607

Meck, Wack & Zimet, *Zoning and Subdivision Regulation,* in *The Practice of Local Government Planning* 607

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[3] The Scope of Subdivision Control 611

Garipay v. Town of Hanover 612

Notes and Questions 614

B. Exactions: Dedications and Impact Fees 616

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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 .

A Note on the Price Effects of Exactions: Who Pays? 617

[1] Exactions and the Takings Clause 618

Pg. 619 at the end of the paragraph before *Dolan* Revisited add: *See generally,* Timothy M. 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).

[2] *Dolan* Revisited 619

[a] Dedications of Land 622

Sparks v. Douglas County 622

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[b] Impact Fees 627

Homebuilders Association of Tulare/Kings Counties, Inc. v. City of Lemoore 628

Notes and Questions 633

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").

A Note on Statutory Authority for Dedications, In-Lieu Fees and Impact Fees 636

C. Planned Unit Developments (PUDs) and Planned Communities 638

Planned Unit Development as a Zoning Concept, in D. Mandelker, *Planned Unit Developments* 638

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Notes and Questions 640

Pg. 641 at the end of Note 1, add: *See* 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.).

Campion v. Board of Aldermen of the City of New Haven 642

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Sinkler v. County of Charleston 652

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Chapter 7 • Modern Land Use Regulation 661

A. Introduction 661

B. Land Use Regulation and the Environment 662

1. Preserving Agricultural Land 662

Notes and Questions 662

Programs for the Preservation of Agricultural Land 664

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 https://www.planning.org/knowledgebase/farmlandprotection/.

Cordes, *Takings, Fairness and Farmland Preservation* 664

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Stop the Dump Coalition v. Yamhill County 666

Notes and Questions 672

A Note on the Industrialization and Environmental Impacts of Agriculture 672

2. Coastal Zone Management 673

Pg. 674 at the end of the first partial paragraph, add: For an international comparison of coastal zone management, *see* Alterman and Pellach, eds., *Regulating Coastal Zones: International Perspectives on Land Management Instruments* (2021).

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).

Notes and Questions 674

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.

3. Protecting Hillsides 675

[a] Regulations for Hillside Protection 677

[b] Takings and Other Issues 681

C. An Introduction to Growth Management 681

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D. Quota Programs 685

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Construction Industry Association of Sonoma County v. City of Petaluma 686

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E. Phased Growth Programs 691

Golden v. Ramapo Planning Board 692

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Note on Limiting the Availability of Public Services as a Growth Management Tool 702

Notes and Questions 702

F. Adequate Public Facility Ordinances and Concurrency Requirements 704

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Maryland-National Capital Park and Planning Commission v. Rosenberg 706

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Concurrency 712

Problem 715

G. Tier Systems and Urban Service Areas 715

H. Oregon Growth Management 717

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.

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Land Watch of Lane County v. Lane County 721

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I. Growth Management Programs in Other States 729

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J. An Evaluation of Growth Management Programs 734

Chapter 8 • Aesthetics: Design Review, Sign Regulation, and Historic Preservation 735

A. Aesthetics as a Regulatory Purpose 735

Notes and Questions 736

B. Outdoor Advertising Regulation 738

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[1] In the State Courts 738

Metromedia, Inc. v. City of San Diego 740

Notes and Questions 746

A Note on the Federal Highway Beautification Act 749

Add to first paragraph, pg. 750: *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).

[2] Free Speech Issues 750

Metromedia, Inc. v. City of San Diego 753

Notes and Questions 760

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-premise v. off-premise distinction regulation fails intermediate or heightened scrutiny where off premise sign traffic impact not shown to be worse than on premise sign impact).

A Note on Free Speech Problems with Other Types of Sign Regulations 763

C. Urban Design 766

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[1] Appearance Codes 767

State ex rel. Stoyanoff v. Berkeley 767

Notes and Questions 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.

[2] Design Review 774

In re Pierce Subdivision Application 775

Notes and Questions 778

A Note on Design Guidelines and Manuals 781

[3] Urban Design Plans 783

A Note on View Protection 785

D. Historic Preservation 786

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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*, 2021 Pa. Commw. LEXIS 492 (June 9, 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 policy is speculative).

Notes and Questions 787

[1] Historic Districts 788

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*, 2021 Tex. LEXIS 447 (June 4, 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).

Figarsky v. Historic District Commission 790

Notes and Questions 794

[2] Historic Landmarks 798

Notes and Questions 800

A Note on Federal Historic Preservation Programs 803

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[3] Transfer of Development Rights as a Historic
Preservation Technique 804

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*, 2020 VT 15 (Local TDR bylaw regarding planned unit development TDRs complies with Vermont enabling statute and is not unconstitutionally vague).

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