

January 2014 | Vol. 66, Issue 1 | Cases 1–25
Issues and decisions that impact the built and natural environments

PLANNING & ENVIRONMENTAL LAW

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Cover Photo

Ethel R. Lawrence Homes is an award-winning affordable rental apartment housing complex located in upscale Mount Laurel Township.
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Abstracted and/or Indexed in: ABI/INFORM Complete, ABI/INFORM Trade & Industry, Academic OneFile, Current Abstracts, Expanded Academic ASAP, General OneFile, GreenFILE, InfoTrac Custom, LegalTrac, ProQuest Central, Student Resource Center College (with Expanded Academic ASAP, TOC Premier and TRIS [Transportation Research Information Services]) Electronic Bibliographic Data Base.

Planning & Environmental Law (ISSN 1548-0755—formerly *Zoning Digest* 1949–1973 and *Land Use Law & Zoning Digest* 1973–2003) is published monthly except in December for a total of 11 issues per year by Taylor & Francis Group LLC, 325 Chestnut St., Suite 800, Philadelphia, PA 19106.

US Postmaster: Please send address changes to *Planning & Environmental Law* c/o Taylor & Francis Group LLC, 325 Chestnut Street, Philadelphia, PA 19106.

Annual Subscription, Volume 66, 2014. Print ISSN 1548-0755 Online ISSN 1556-8601. Institutional subscribers: \$545, £279, €436. An institutional subscription to the print edition includes free access to the online edition for any number of concurrent users across a local area network.

Production and Advertising Office: 325 Chestnut Street, Philadelphia, PA 19106. Tel: 215-625-8900, Fax: 215-625-8563. Production Editor: Catherine Ott.

Subscription Offices USA/North America: Taylor & Francis Group LLC, 325 Chestnut Street, Philadelphia, PA 19106. Tel: 215-625-8900, Fax: 215-625-2940. **UK/Europe:** Taylor & Francis Customer Service, Sheepen Place, Colchester, Essex, CO3 3LP, UK. Tel: +44-(0)-20-7017-5544, Fax: +44-(0)-20-7017-5198. **Missing and damaged print issues:** Contact societies@tandf.co.uk with the full journal title, year, volume and issue number, your name, mailing address, and account order number if applicable. For a complete guide to Taylor & Francis Group's journal and book publishing programs, online subscriptions, and details on advertising in our journals, visit our website: www.taylorandfrancis.com.

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December 2013



Published by Routledge for the American Planning Association

EDITOR'S NOTE

Another issue of *PEL* focusing on New Jersey? Why all the attention? While there is no plan to narrow this publication's national focus, New Jersey is certainly having a moment. One of the early smart growth states, and on the front lines of climate change and sea-level rise, New Jersey has had practice in tackling tough new trends. Its affordable housing rules, while not replicated anywhere, have long been of national interest and continuing local dispute.

The state's *Mount Laurel* doctrine, originating in local exclusionary zoning, has again reached the state's supreme

court. *PEL* Reporter Stuart Meck, FAICP, shares with us the long and complicated history of the doctrine, its implementation through the Council on Affordable Housing, the council's controversial changes to local affordable housing requirements, the state's attempt to appropriate local housing trust funds, and Governor Christie's effort to dissolve the council. Professor Meck provides a careful analysis of the forces resulting in the most recent court decisions, the current state of affordable housing in New Jersey, and predictions and recommendations for the state's near future. New Jersey's "moment" has been

a long time in the making. As the state moves forward with its planning for affordable housing, now is the time to consider where we've been.



Molly Stuart
Editor

BIG DECISIONS

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COMMENTARY

New Jersey's *Mount Laurel* Doctrine and Its Implementation: Under Attack, But Safe (for Now)

Stuart Meck, FAICP

I watched my fifty-two boys narrowly; watched their faces, their walk, their unconscious attitudes: for all these are a language—a language given us purposely that it may betray us in times of emergency, when we have secrets which we want to keep. I knew that that thought would keep saying itself over and over again in their minds and hearts, *All England is marching against us!* and ever more strenuously imploring attention with each repetition, ever more sharply realizing itself to their imaginations, until even in their sleep they would find no rest from it, but hear the vague and fitting creatures of the dreams say, *All England—All England!— is marching against you!*

—The Battle of the Sand-Belt, Chapter XLII, in MARK TWAIN, A CONNECTICUT YANKEE IN KING ARTHUR'S COURT (1917, Harper & Brothers Edition), at 430.

In the year 2013, it seemed like all New Jersey was marching against the *Mount Laurel* anti-exclusionary zoning doctrine and how it was to be put into effect—the governor, the legislature, many developing suburban municipalities, and even the independent agency established to oversee its implementation, the Council on Affordable Housing (COAH). Indeed, COAH itself, ignoring minimal procedural due process, would attempt to seize the monies municipalities had set aside in municipal affordable trust funds collected from development fees on residential construction to help the production of low- and moderate-income housing.

At the same time, both the legislature and the governor had taken action to abolish COAH. And COAH had adopted a controversial type of allocation procedure to establish municipal obligations for affordable housing, called “growth share,” the rules for which had been struck down by an appellate court once, had been revised and readopted, and were being challenged in a lawsuit that had reached the New Jersey Supreme Court, where, due to abstentions, only five of its seven members could vote on the constitutionality of the allocation.

This commentary reviews the origins of the *Mount Laurel* doctrine in New Jersey, the only state to establish a constitutional (as opposed to statutory) obligation for municipalities that zone to provide realistic opportunities for low- and moderate-income housing on a regional fair-share basis. It describes the creation of COAH in the 1985 Fair Housing Act. It then turns to the “growth share” concept, which had its origins in a 1997 article in this journal, under its prior name, *Land Use Law & Zoning Digest*. It then analyzes the three lawsuits decided in 2013 and briefly assesses the impact of the system on the elimination of exclusionary zoning and the production of affordable housing. Finally, it speculates on what might happen and what should happen in the foreseeable future.

The *Mount Laurel* Doctrine

The *Mount Laurel* doctrine refers to the holdings in two New Jersey Supreme Court rulings decided on state constitutional grounds. In the first, *Southern Burlington County NAACP v. Township of Mount Laurel (Mount Laurel I)*,¹ the court held that if a “developing community” regulates land uses, it must use its delegated

zoning power so as to afford a “realistic opportunity for the construction of its fair share of the present [indigenous] and prospective [future] regional need for low and moderate income housing.” *Mount Laurel I* didn’t address how that need was to be calculated for the township but did observe how much vacant land was zoned for half-acre lots (4,600 acres) as well as industry (4,121 acres, with only 100 acres actually occupied by industrial uses) and how difficult it was for apartments having more than one bedroom to gain approval, on the theory that larger apartments attract families with school-age children, which would raise costs without commensurate revenue.

In the second decision, *Southern Burlington County NAACP v. Township of Mount Laurel (Mount Laurel II)*,² the court expanded the *Mount Laurel* doctrine to all municipalities, rather than just developing ones. Every municipality’s land use regulations must provide a realistic opportunity for at least some part of its resident poor who occupied dilapidated housing, the court said. It relied on a document prepared by the state’s Division of State and Regional Planning, the State Development Guide Plan (SDGP), to identify which areas of

the state were growth areas and in which areas growth was to be limited or discouraged, such as prime farmland, conservation areas, parts of the Pinelands in the central part of the state, and certain areas along the coast.

Municipalities that were part of growth areas would shoulder a greater part of a region's prospective or future need as well as present need, and those that were not in growth areas would at least have to address present need. The court saw the SDGP as a mechanism to provide direction on the courts in formulating remedies. "The obligation to encourage lower income housing will hereafter depend on rational long-range land use planning (incorporated into the SGDP) rather than upon the sheer economic forces that have dictated whether a municipality is 'developing.'"³

The ruling went into great detail regarding how a municipality was to meet its *Mount Laurel* obligation. This included removing excessive zoning restrictions and exactions and using affirmative measures such as encouraging or requiring the use of available state or federal housing subsidies, providing incentives for or requiring private developers to set aside a portion of their developments for lower-income housing (mandatory set-asides), zoning substantial areas for mobile homes, establishing maximum-square-footage zones where developers could not build housing units with more than a certain area or build anything other than lower-income housing or housing that included a specified portion of lower-income housing, and "least cost housing," the least expensive housing that builders could provide after removal by a municipality of *all* excessive restrictions and exactions and after thorough use by a municipality of all affirmative devices that might lower costs.⁴

But the most powerful vehicle was the supreme court's endorsement of the builder's remedy—essentially a court-granted authorization to build affordable housing—conferred by a judge where a developer succeeded in *Mount Laurel* litigation and proposed a project containing a substantial amount of lower-income housing. It was to be granted unless the defendant

municipality could establish that "because of environmental or other substantial planning concerns, the plaintiff's proposed project is clearly contrary to sound land use planning."⁵

The decision concluded with the court's strong invitation for action by the legislature: "... [W]hile we have always preferred legislative to judicial action in this field, we shall continue—until the Legislature acts—to do our best to uphold the constitutional obligation that underlies the *Mount Laurel* doctrine. That is our duty. We may not build houses, but we do enforce the Constitution."⁶

THE FAIR HOUSING ACT AND COAH

Mount Laurel II and the builder's remedy caused an onslaught of litigation—by one estimate 140 builder's remedy lawsuits against 70 municipalities⁷ from 1983 to 1985 and that finally stirred the New Jersey Legislature, which had previously side-

and the general public. COAH has several major responsibilities: (1) defining housing regions; (2) calculating the present and prospective need for low- and moderate-income housing at the state and regional levels; (3) allocating a fair share of that need to each municipality in each region; (4) offering "substantive certification" of municipalities that voluntarily elect to address their fair share of their region's need for affordable housing after they petition COAH and submit housing elements and fair-share plans for COAH's approval; (5) overseeing the administration of municipal housing trust funds; and (6) providing review and mediation if an objection to a petition for substantive certification is filed with COAH or before a plaintiff can challenge in court a municipality's zoning ordinance with respect to the opportunity to provide for low- or moderate-income housing.

Substantive certification of municipal housing plans provides an affirmative

Municipalities that were part of growth areas would shoulder a greater part of a region's prospective or future need as well as present need . . .

stepped the matter. In 1985 it passed the Fair Housing Act (FHA)⁸ along with the State Planning Act,⁹ which established a State Planning Commission (SPC) and directed the SPC to formulate and adopt a new State Development and Redevelopment Plan, which replaced the SDGP and was to figure into the administration of the fair-share allocation system. The FHA created COAH, an administrative alternative to the courts, which had overseen the implementation of the *Mount Laurel* doctrine on a case-by-case basis using special planning masters. In 1986, the New Jersey Supreme Court ruled that the FHA was facially constitutional.¹⁰

COAH is a 12-member body appointed by the governor on the advice and consent of the state senate. The COAH chair is the Commissioner of Community Affairs. Other members represent municipalities, providers, and users of affordable housing,

defense to the use of the builder's remedy, fending off the possibility that a builder will challenge the municipality in court; the FHA authorizes the use of mediation and administrative law judges to resolve disputes over municipal housing plans, including site-specific issues over proposed affordable housing projects, which, in certain circumstances, could effectively equate to the builder's remedy. Ultimately, under the procedural rules, COAH can accept, reject, or modify an administrative law judge's ruling and issue its own decision.¹¹

COAH can also dismiss a petition for or revoke substantive certification, and then the municipality may be subject to a builder's remedy.¹² Where a municipality has failed or decided not to obtain substantive certification from COAH, a builder or developer can go directly to court and ask for permission to build affordable housing through the builder's remedy. All of this is

accomplished through rulemaking, and the rules are lengthy and complex.

The objective, of course, was to keep disputes over affordable housing plans and projects out of court and not necessarily, in this Reporter's opinion, to ensure the production of affordable housing easily or in a timely manner. An entire cottage industry of attorneys, professional planners, and other experts has been created as a result of the FHA and the *Mount Laurel* doctrine, which is good or bad or inevitable, depending on one's point of view. Nonetheless, affordable housing projects can take years to get built.

For example, the plaintiffs in the original *Mount Laurel* lawsuit dating from 1973 entered into a settlement agreement with the township in 1985. A nonprofit organization was formed to build housing there in 1986, built affordable housing elsewhere in the interim to raise funds for the Mount Laurel Township project, and finally filed plans for the affordable housing development, to be known as the Ethel R. Lawrence Homes (after one of the class-action plaintiffs in the initial 1973 case), a 100 percent low- and moderate-income housing development, in 1996. The township planning board gave approval to the project in April 1997. Construction began in 1999, and the units were available for occupancy in 2000.¹³

THE ORIGINS OF GROWTH SHARE AND THE CAVEAT ON ITS APPLICATION

A central and controversial issue has always been the calculation of present and prospective need and its allocation from regional totals to individual municipalities. The basic methodology evolved from *AMG Realty v. Twp of Warren*¹⁴ in 1984, decided by Judge Eugene Serpentelli, one of a special panel of three trial court judges appointed by the supreme court to hear *Mount Laurel* cases. This is a remarkable decision because of the court's ability to sift through the subtleties of the arguments of the professional planners who offered opinions on how the calculation and allocation should occur. From it, based on a consensus report from planners on both sides of the

case, the court devised a methodology, and applied it to the Township of Warren, granting a builder's remedy in the process. In an appendix to the opinion, the court showed, for informational purposes only, how the methodology would work for the state as a whole.

AMG Realty did not involve COAH but influenced the development of its need determination and regional allocations. Based on it (and available data), COAH went on to establish individual affordable housing goals for all of the municipalities in the state in two six-year rounds, 1987 to 1993 and 1993 to 1999. They differed slightly, but they tended to favor higher allocations of affordable units in wealthy communities with large amounts of undeveloped land, especially nonresidential land.

In a 1997 article in *Land Use Law & Zoning Digest*, John M. Payne, a professor

of law at Rutgers-Newark Law School and one of the lawyers who handled the litigation that resulted in the *AMG* case described above, declared that he had "enthusiastically promoted the approach I am about to repudiate."¹⁵ He went on to argue that fair-share methodology was "essentially a preemptive strike on the planning process. It demands that housing needs be considered first, without integrating housing policy considerations into the myriad other policy issues that inform a good local, county, or state plan."¹⁶ He contended the COAH rules in effect at the time emphasized the availability of vacant land and largely avoided redevelopment possibilities. Consequently, the allocation formula produced "big numbers," which caused municipalities to freeze "like deer in the headlights, [because] they can see only the worst case scenario—the overbuilding that comes with inclusionary development."¹⁷

Growth share would be a *reaction* to growth, establishing the affordable housing obligation *after* the growth had occurred . . .

ity's "fair share obligation would not be derived from a formula, but instead would be a simple obligation to allocate a share of whatever growth actually occurs to low- and moderate-income housing. This means all of the growth, residential and nonresidential, and it also means new development that occurs on raw land as well as redevelopment of previously used land."¹⁸ Because growth share depends on a set of ratios that take into account actual increases in residential units and employment from new jobs in nonresidential development, Payne did recognize, presciently, that the objection to growth share "is that it appears to validate exclusionary practices, undoing all that has been accomplished in the last 20 years. The concern is that a municipality could choose not to grow at all, in effect choosing to stay exclusionary."

Although Payne's proposal was well in-

tioned, it sidestepped two critical issues: the nature of land use planning and the nature of housing growth. Growth share would be a *reaction* to growth, establishing the affordable housing obligation *after* the growth had occurred, while land use planning begins from the premise that it is possible to forecast population and employment and, from those forecasts, project both future residential and nonresidential land use needs at different density and intensity levels.¹⁹ It also neglected to account for regional demand for housing. For example, if a large factory opens in one municipality, it may generate demand for housing of various types in surrounding municipalities, but, under growth share, only the host municipality would be responsible for the demand the new jobs create.

But growth share got legs and was the basis for the next round of rule making, which was to have begun in 1999 for Round 3, but was not completed until 2004.

The Round 3 formula developed by the Rutgers Center for Urban Policy Research calculated fair-share obligations as the total of (1) a rehabilitation share (present need); (2) the remaining prior round (1987–1999) obligation; and (3) growth share. For every eight market-rate units built, one affordable unit must be built. The nonresidential component of growth share is based on a set of ratios between new built area and affordable housing units and varies by type of use. Alternately, the rules allowed an affordable housing calculation based on the number of jobs actually created; each 25 jobs would create an obligation for one affordable unit. The two components were then added together to calculate the growth-share component of the housing obligation.²⁰

An intermediate appeals court ruled that version of the growth-share rules was valid in part and invalid in part, and remanded the matter to COAH in 2007.²¹ COAH was directed to respond and to come up with new rules within six months. In a highly complex decision, the court's chief objection to the growth-share rules was that they violated both the *Mount Laurel* doctrine and the FHA. The flaw in the growth-share rules, the court said, was that "[b]ecause a municipality's actual growth share obligation is directly linked to the number of housing units that are built in a municipality and the number of jobs generated by non-residential development, each municipality controls its destiny . . ."²² The obligation to provide additional affordable housing only occurred after market-rate units were built.

PROPOSED CHANGES TO THE FHA

From the very start of his term, New Jersey Gov. Chris Christie has been hostile to both COAH and to the *Mount Laurel* doctrine. At a town hall meeting in Mount Laurel Township in 2012, he called *Mount Laurel* "the 'stupid case' that had made New Jersey a more expensive place to live. The state constitution doesn't say New Jerseyans have a 'right to affordable housing.'"²³ Shortly after he took office in 2010, he convened a Housing Opportunities Task Force to recommend changes to the FHA.²⁴

On January 10, 2011, the New Jersey Legislature passed an amended version of S-1/A-3347, a bill that made numerous changes to the FHA, many of them recommendations from the Housing Opportunities Task Force. Its most striking change was to abolish COAH and transfer its functions to the New Jersey Department of Community Affairs, which was not a task force recommendation. Gov. Christie conditionally vetoed the bill in a 49-page document issued on January 24, 2011. His objections to the 109-page bill, as it had been amended through negotiations between the Senate and Assembly, were that it:

- required 10 percent of all the housing units in every municipality in the state to be affordable;
- necessitated that 25 percent of the affordable housing obligation be met by inclusionary development, legislating sprawl by increasing the amount of mandated new housing by 500 percent to 700 percent;
- caused towns to have to pay for two planners—one to draft the plan and the other to certify it meets the requirements of the bill;
- provided no meaningful protection against builder's remedy lawsuits; and
- required towns in the Highlands, Pinelands, Fort Monmouth, and Meadowlands districts to have 15 percent to 20 percent of all new construction as affordable.²⁵

Rather than amend S-1 to satisfy the governor's extensive set of objections, the chief sponsor, Senator Raymond Lesniak, withdrew the bill on February 7, 2011, and the legislature took no further action.

THE THREE LAWSUITS

From this maelstrom of action and inaction, three lawsuits resulted, all of them reaching the New Jersey Supreme Court. This commentary will deal with them in

the order they were decided, although of the three, the New Jersey Supreme Court's decision on the validity of growth share was the cliffhanger.

(1) Abolishing COAH

After vetoing S-1/A-3347, in June 2011, Gov. Christie issued Reorganization Plan 001–2011 that abolished COAH and transferred its responsibilities to the Department of Community Affairs.²⁶ He did so under the Executive Reorganization Act of 1969,²⁷ an unusual statute (at least to this Reporter) that allows the governor to abolish and reorganize certain agencies without seeking legislative approval.

The Fair Share Housing Center (FSHC) of Cherry Hill, New Jersey, an advocacy group that has played a major role in the *Mount Laurel* litigation, immediately challenged the Reorganization Plan, winning at the intermediate appeals level. The precise question was whether the governor could abolish an agency that was established by the legislature through the FHA expressly to oversee the state's response to the *Mount Laurel* decisions.

In a decision on July 11, 2013 affirming the lower court decision, the New Jersey Supreme Court, in an opinion written by Chief Justice Stuart Rabner, found that the governor did not have the authority to do so:

The Legislature created COAH to ensure that municipalities fulfill their constitutional obligation to provide affordable housing. Because COAH is an executive agency, the Constitution required the Legislature to place COAH 'within' an Executive Branch department. . . . At the same time, the Legislature took steps to make COAH independent and insulate it from complete Executive control. To achieve that aim, the Legislature included a term of art in COAH's enabling legislation when it placed COAH 'in, but not of,' the Department of Community Affairs (DCA). That phrase has long been understood to signify an agency's

independence. To achieve that aim, the Legislature has used the designation to create dozens of independent offices.²⁸

Thus, the court blocked the governor's end run around the legislature, but the ruling politely "offer[ed] no opinion as to whether COAH's structure should be abolished, maintained as is, or modified. That is a policy decision left to the Governor and the Legislature and guided by the Constitution. This case instead is about the process that the two branches must follow if they decide to alter COAH."²⁹

(2) Transferring "Uncommitted" Municipal Housing Trust Fund Monies to the State

The FHA established a "New Jersey Affordable Housing Trust Fund"³⁰ that is financed through a statewide fee on non-residential development and gives COAH oversight over municipal housing trust funds that are established under the act and financed through locally enacted development fees.³¹ Monies from the municipal and state trust funds may be used to assist affordable housing projects, but state approval must be obtained before the monies can actually be spent.

COAH never did adopt regulations describing what it meant to have monies "committed" under the FHA. The monies represented an estimated \$165 million. In 2012 COAH's acting executive director sent municipalities with trust funds a letter establishing a deadline of August 13, 2012, to turn over funds. In July 2012, FSHC, supported by an amicus curiae brief from the New Jersey State League of Municipalities, sought an injunction to prevent COAH from taking funds back, contending that, under a series of line-item vetoes by Gov. Christie of the 2013 budget, the affordable housing trust fund monies would be transferred to the state's general fund and could be used for purposes other than affordable housing.³²

But the appeals court did not agree with the "global" nature of FSHC's request and instead issued in July a more limited injunction that directed that the affected municipalities must have adequate notice

and an opportunity to contest the transfer and demonstrate before COAH that the funds have indeed been committed.³³ However, in a follow-up to this decision in August 2012, the appeals court concluded that COAH's acting executive director did not have the authority to make the request to turn over the uncommitted funds; only COAH could do that.³⁴

On May 1, 2013, COAH finally met and adopted a resolution that required municipalities to turn over funds that were not committed for expenditure. The superior court's appellate division immediately stayed that resolution on May 13, 2013.³⁵ The New Jersey Supreme Court modified the stay in part on May 28, 2013, allowing COAH to gather and evaluate municipali-

ties' submissions but leaving in place the interim stay enjoining the transfer of funds in effect.³⁶ Based on the supreme court's decision, the appellate division vacated its original order and modified it to bring it in line with the supreme court's directive; the court was especially critical of COAH's "ad hoc procedures established through litigation," forcing the court "to establish a process that at least comports to rudimentary notions of due process."³⁷

... COAH finally met and adopted a resolution that required municipalities to turn over funds that were not committed for expenditure.

(3) The Validity of Growth Share
After the 2007 appeals court decision striking down the first version of the growth-share rules, COAH retained faculty from the University of Pennsylvania and Econo-sult, a Philadelphia-based consulting firm, among others, to reexamine the growth-share concept and provide data and analysis to back it up. In September 2008, COAH adopted the second version of the rules, which retained the growth-share approach, with changes including an increase in the ratio of affordable housing required based on actual development.³⁸

An appeals court invalidated the Third Round rules for a second time in 2010 and

the judge, Stephen Skillman, affirming in part and reversing in part, remanded the matter back to COAH with five months to try again.³⁹ Skillman's decision is an extraordinarily thorough and unflinching analysis of the rules, and provided a firm basis for what was to occur when the matter came before the New Jersey Supreme Court.

When the New Jersey Supreme Court heard the case, an extraordinary number of parties participated. Again, the plaintiffs were the FSHC and the New Jersey Building Industry Association, and the defendant was COAH. In addition, there were a number of attorneys representing individual municipalities, groups of municipalities, the New Jersey State League of

Municipalities, and the National Association of Industrial and Office Properties as respondents or cross-appellants. Eight organizations or groups of organizations submitted amicus curiae briefs, including the New Jersey Chapter of the American Planning Association, the American Planning Association, in conjunction with New Jersey Future, and the Housing and Community Development Network of New Jersey.⁴⁰

Some one and a half years elapsed between the deadline for the submission of briefs in June 2011 and the oral argument before the New Jersey Supreme Court on November 14, 2012. The New Jersey Supreme Court released its decision on September 26, 2013.

In the 3-2 decision, written by Justice Jaynee LaVecchia, the court concluded that the growth share rules violated the FHA, which incorporated the *Mount Laurel* doctrine, and were *ultra vires*.⁴¹ After a review of the backdrop of cases and development of administrative rules, the court homed in on the central weaknesses of growth share. The court observed that even if a

municipality were allocated a large projected growth-share obligation, if growth fell below that rate, its actual growth-share obligation would be reduced to reflect that slowed residential and job growth. That result, said the court, was facially inconsistent with the FHA's command to COAH to develop criteria establishing municipal determinations of present and prospective fair share of housing that results in firm, fair-share obligations, against which the municipality's housing element was to be designed and reviewed for substantive certification purposes.⁴²

The court pointed out that the FHA "sets forth the framework of a remedy that precludes COAH from taking the liberty to fashion a new growth share methodology that 1) allows for the devising of residential and commercial affordable housing ratios for projected need that are not tied to a regional need for affordable housing, and 2) leaves open-ended how or whether projected need for a housing region will be fulfilled."⁴³ The FHA, the court stated, was replete with references tying affordable housing obligations to a region, not obligations formed on a statewide basis. And, it required a specifically allotted number of units for satisfaction of both present and prospective need based on a housing region.

The court commented on Professor Payne's original article in *Land Use Law & Zoning Digest*:

Indeed, under a 'pure' growth share approach as originally espoused by Professor Payne, the methodology appears to entirely forgive municipalities their prior round obligations, thus rewarding those municipalities that have managed to evade the COAH process through delay or other bad faith tactics. . . . Furthermore, it would permit a municipality to remain wholly exclusionary by choosing not to grow.⁴⁴

Consequently, the court found that the rules were not severable and wholly invalid and remanded the case to the appellate

division, with a five-month period for COAH to devise new rules.

Still, after reflecting on the Round 1 and Round 2 methodologies, the court left open the door for the legislature to come up with new approaches that would satisfy the *Mount Laurel* doctrine (but without saying what those approaches might be):

We do not pretend to know what form or forms of alternative remedies might be devised that would suitably further the constitutional goal of addressing the prospective need for affordable housing. But, that should not prevent policymakers from considering the benefits of an alternate remedy that accounts for current economic conditions, the building that has occurred already in this state, the present-day space availability and redevelopment options, and the wisdom of requiring building in all municipalities of the state within fixed periods. Those are questions for policymakers—should our Legislature choose to address the topic.⁴⁵

THE IMPACT OF THE FHA

Of New Jersey's 566 (now 565, because of a 2013 merger between Princeton Borough and Princeton Township) municipalities, 245 received substantive certification under Round 2 and 68 received certification under Round 3.⁴⁶ In March 2011, the Department of Community Affairs reported that since the FHA was enacted, there had been 109,557 proposed affordable units, of which 60,242 have been built. Similarly, there have been 25,034 units proposed for rehabilitation, with 14,854 units completed as affordable rehabbed units.⁴⁷ These totals exclude units that were built as a result of builder's remedy lawsuits and not under COAH supervision.

There has been no stand-alone empirical study on the specific impact of the FHA and its administration. However, an empirical study published by the Lincoln Institute for Land Policy⁴⁸ in 2009 ex-

amined, among other areas, the impact of state smart growth programs on housing affordability for the period 1990 to 2000. The study compared Florida, New Jersey, Maryland, and Oregon against Colorado, Indiana, Texas, and Virginia.

The specific indicator for affordability (or its lack thereof) is the share of households in a community whose housing cost burden exceeded 30 percent of household income, and how that share changed over the decade by each county (i.e., if the figure is 10 percent in 1990 and 15 percent in 2000, then the affordability problem was worsening). The study used multiple regressions to analyze the determinants of change in the shares of cost-burdened owners and renters. It assumed that smart growth programs, which tend to constrain availability of land for development absent a planning requirement for affordable housing, were associated with increased shares of cost-burdened households. The study observed the following:

Regressions that hypothesized a uniform effect from smart growth programs found a statistically significant relationship. Smart growth programs were associated with increased shares of cost-burdened households. Additional regressions that allowed each state to have an independent effect found that the shares of cost-burdened owners and renters increased the most in Oregon and the least in Texas. But New Jersey and Florida—smart growth states that both require affordable housing elements in local plans—performed better than Oregon and Maryland for owners, and better than Oregon, Maryland, Virginia, and Colorado for renters.⁴⁹

The study noted that during the period from 1990 to 2000, New Jersey added more than 24,000 units of new construction and rehabilitated units under the COAH program. "While New Jersey's housing costs were high, its rental cost

burden increased less during the 1990s than in the other smart growth states. . . . In terms of ranks, New Jersey had the largest share of counties adding rental units over the decade.”⁵⁰ The study undertook a pooled regression analysis using Texas as the constant, and its results showed that New Jersey performed better than the three other smart growth states and as well as Colorado and Virginia, but not Indiana, in terms of renter affordability, although the results were not statistically significant for New Jersey.⁵¹

Collectively, this suggests that, for New Jersey, injecting affordable housing, particularly rental affordable housing, into a housing market that has historically been underserved by rental housing, especially in suburban areas, will have a positive effect on the renter’s cost burden. A more aggressive program, with more new units built or rehabilitated, might have had a stronger effect.

Is the *Mount Laurel* anti-exclusionary zoning doctrine actually causing an elimination of exclusionary zoning in New Jersey? It doesn’t seem so, based on limited evidence. A 2011 report (the “Hasse report”) by John Hasse, AICP, and others, of the Rowan University Geospatial Research Laboratory, evaluated this issue and concluded that, at least within Monmouth and Somerset counties, exclusionary zoning still exists.⁵²

Using a geographic information system analysis, the Hasse report determined that New Jersey’s residential development has, contrary to the State Development and Redevelopment Plan (a document that has not been readopted since 2001), followed a low-density, sprawling pattern that reflects continued exclusionary zoning. Further, commercial and industrial land uses have been more consistent with the state plan, the Hasse report stated, than residential, suggesting the continuation of municipal zoning that welcomes retail and office development while discouraging high-density residential development. Many higher density zones that do exist are identifiably zones where *Mount Laurel* housing exists within the state plan’s “smart growth” areas.

This implies, the report observed, that absent *Mount Laurel*, residential develop-

ment would be even less dense and less coordinated with the location of jobs than current patterns indicate. The Hasse report concluded the case study counties were over zoned for commercial and industrial development in terms of the number of jobs those areas may generate relative to the future housing that will be built under current zoning. More specifically, the jobs–housing balance in each of the two counties clearly favored jobs over housing. A general rule of thumb in the planning literature, the Hasse report observes, recommends a jobs-to-housing units ratio of 1.5 to 1 with a range anywhere from 1.3:1 to 1.7:1. Monmouth County zoning, according to the report, had the potential to create enough commercial and industrial floor area for 223,450 jobs with a maximum housing build-out of 33,177 housing units, a ratio of 6.74:1.⁵³ This ratio of nearly seven jobs for every new home suggests that the zoning of commercial and industrial land is not balanced with the zoning of residential lands in Monmouth County.

In Somerset County, the results were even worse. The Hasse report’s analysis showed that Somerset County’s zoning has the capacity to provide housing for 14,802 new residential units. At the same time it has the capacity for nearly a quarter-million jobs as indicated by zoned commercial and industrial floor area, resulting in a jobs–housing ratio of 16.7:1. The report’s analysis of build-out potential for commercial and industrial lands in Somerset County again demonstrates that municipalities have significantly over zoned for commercial and industrial and under zoned for higher density residential development, with *Mount Laurel*-related developments providing an exception to the general rule.⁵⁴

WHAT MIGHT HAPPEN

As this commentary is being written in late October and early November 2013, there are at least two theories of what might happen in the coming months. The first is that the legislature may consider a bill, perhaps based on the ill-fated S-1 vetoed by the governor, to abolish COAH and transfer its function to the Department of Community Affairs. Nonetheless, there is

value in having an independent body, rather than a state department, oversee a matter as important as the provision of affordable housing and to serve as an advocate for it. Of course, all of this depends on who sits on COAH and who appoints them.

The legislature tends to take up controversial issues between the November elections and the start of a new term in January, and this is when such an initiative might occur. The contents of such a bill would be anyone’s guess; however, the legislature rarely looks outside the state for examples of other potential systems and, as noted above, has never conducted its own comprehensive review of how the FHA has worked, other than listening to testimony from advocates on both sides of the issue.

The other theory is that COAH (if it still exists) may actually do what the New Jersey Supreme Court has directed: return to the methodologies of Rounds 1 and 2, since they represent judicially endorsed approaches (and, in economic terms, sunk costs), and produce new numbers on municipal affordable housing obligations and new rules for Round 3. This would depend on whether the chair of COAH, a department head in the governor’s cabinet, calls the council together and COAH begins the process in earnest to meet the supreme court’s five-month deadline.

Should COAH fail to do so (which will probably be the case), an effort to subject COAH to a contempt of court action could occur, and the independent New Jersey courts might take over the matter with the help of a special master, ignoring COAH’s inaction. Given that there have been no legitimate Round 3 rules since 1999, there are methodological problems with this as well—notably when to begin Round 3 itself and what data to use. Some data are easier to obtain than they were in 1987, such as the amount of undeveloped land, because of the existence of geographic information systems statewide.

WHAT SHOULD HAPPEN

This commentary shows what happens when complex legislation is enacted to solve a problem to which there is long-standing and entrenched resistance.

However, some of the intricacies of the legislation and its implementing rules are absolutely necessary, such as state review of expenditures from housing trust funds and restrictions placed by COAH to ensure that affordable units, both rental and for sale, remain affordable and are occupied by people who need affordable housing.

The *Mount Laurel* doctrine is not going to vanish, and the New Jersey courts have been consistent, for the most part, in interpreting and applying it. It clearly has had success via the FHA or the use of the builder's remedy but not as much as it could have, especially over the last 13 years, and, of course, even less since 2008 when the Great Recession affected housing values and markets.

Still, there are improvements that can be made;⁵⁵ this Reporter has made his opinions known on a number of occasions.⁵⁶ Here is a sampling of what could be done to make the FHA and its administration more effective.

1. Make the FHA statewide in application, rather than merely a law that is intended to be an escape from the dreaded builder's remedy. It is surprising that many municipalities have elected *not* to come under COAH's umbrella. However, unless the FHA is made statewide in application, municipalities that fail to provide realistic affordable housing opportunities effectively shift the prospective need in their regions to municipalities that do provide opportunities for the construction of affordable housing. That's wrong, and easily correctable through legislation.

2. Change the structure of COAH itself so that a public member is always chair, rather than the Commissioner of Community Affairs. While the governor appoints the members, COAH's chair must be someone who can act independently rather than fail to act when action is required. COAH needs to be an advocate for affordable housing, and that requires a chair who will be an advocate for it as well.

3. Emphasize actual housing production rather than planning for housing produc-

tion. Much of the objection to COAH involves its planning requirements. In theory, affordable housing plans updated at regular 10-year intervals by competent, ethical, professional planners should not require substantive certification by COAH and should not require second-guessing except in extreme circumstances. Municipalities should only have to file their housing plans with COAH and undergo a simple review that determines whether all the statutory requirements have been satisfied. That's it.

4. Deemphasize reliance on the State Development and Redevelopment Plan. This may be heresy, but the existing state plan does not contain enough detail, particularly for density and land use intensity, to justify much reliance on it. The state plan has always been treated as an indicative rather than as a directive document. Mandated regional plans and regional planning agencies, such as those for the Highlands, the Meadowlands, and the Pinelands, trump the state plan and have more regulatory clout. Support for state planning traditionally waxes and wanes and the only official state plan in place with a map dates from 2001, which is hardly useful.⁵⁷

5. Unless someone comes up with something a *lot* better that passes state constitutional muster at the same time, continue to use the methodology from Rounds 1 and 2 to establish present and prospective need on a regional fair-share basis. It took nearly 14 years and millions of dollars to determine that the growth share methodology, no matter how elaborate its analytical underpinnings were, didn't cut it under the FHA and the *Mount Laurel* doctrine because the concept ignored the prospective needs of the housing region. And, for the same reason, forget using flat percentages of affordable housing units as a proportion of total housing units to set obligations that ignore prospective regional need.

6. Push the decision on individual projects involving affordable housing down to the planning board or board of zoning adjustment level, give the board the broad ability to grant variances as necessary⁵⁸ and issue a

single permit to make the project possible, establish a strict time limit on decision making, and provide for a prompt on-the-record appeal—that means no trials—to an independent body other than COAH itself when: (1) the municipality hasn't met its fair-share obligation and (2) when the board denies the approval when it imposes conditions that make the project infeasible or uneconomic. In this regard, New Jersey should look to the experience with housing appeals acts in states such as Massachusetts, Rhode Island, Connecticut, and Illinois,⁵⁹ as well as the effectiveness of Oregon's Land Use Board of Appeals, a state body of three attorneys appointed by the governor with the consent of the senate, which hears appeals from all land use decisions, whether quasi-judicial or legislative.⁶⁰

These simple, straightforward recommendations will, no doubt, receive widespread support.

ENDNOTES

- 336 A.2d 713 (N.J. 1975), appeal dismissed and cert. denied, 423 U.S. 808 (1975).
- 456 A.2d 390 (N.J. 1983).
- Id.*, at 418.
- Id.*, at 442-453.
- Id.*
- Id.*, at 490.
- Mallach, *The Tortured Reality of Suburban Exclusion: Zoning, Economics, and the Future of the Berenson Decision*, 4 PACE ENVTL. L. REV. 37, 119 (1986) (more than 140 builder's suits against 70 municipalities between 1983 and 1985).
- N.J. STAT. ANN. §§ 52:27D-301 *et seq.*
- N.J. STAT. ANN. §§ 52:18A-196 *et seq.*
- Hills Dev. Co. v. Township of Bernards, 510 A.2d 621 (N.J. 1986).
- N.J. ADMIN. CODE §§ 5:96-9.1 to 9.2 (Third Round Procedural Rules).
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- D. MASSEY, ET AL., CLIMBING MOUNT LAUREL: THE STRUGGLE FOR AFFORDABLE HOUSING AND SOCIAL MOBILITY IN AN AMERICAN SUBURB (2013), 52-61. This ground-breaking study, using a mixed methods analysis, examines the positive impact of a 100 percent affordable housing project in Mount Laurel Township on the lives of its residents and the lack of negative impact on the township and surrounding area.
- 504 A.2d 692 (N.J. Super., Law Div. 1984).
- Payne, *Remedies for Affordable Housing: From Fair Share to Growth Share*, LAND USE L. & ZONING DIG., June 1997, at 3, 3. For the backstory on the development of the growth-share concept, see Kinsey, *The Growth Share Approach to Mount Laurel Housing Obligations: Origins, Highjacking, and Future*, 63 RUTGERS L. REV., 867, 870-873 (2011).

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17. *Id.*, at 6.
18. *Id.*
19. See, e.g., P.R. BERKE ET AL., URBAN LAND USE PLANNING, 5th ed. (2006); A.C. NELSON, PLANNER'S ESTIMATING GUIDE: PROJECTING LAND-USE AND FACILITY NEEDS (2004).
20. Council on Affordable Housing, COAH Procedures and Methods, N.J. REG. (December 20, 2004), Appendix B, Number Calculation Example, 35 N.J. REG. 5863, and Appendix E, UCC [Uniform Construction Code] Use Groups for Projecting and Implementing Nonresidential Components of Growth Share, 36 N.J. REG. 5894.
21. *In the Matter of the Adoption of N.J.A.C. 5:94 and 5:95*, 914 A.2d 348 (N.J. App. Div. 2007).
22. *Id.*, 914 A.2d at 377.
23. Katz, *Christie reopens criticism of Democrats at Mt. Laurel town hall*, PHILADELPHIA INQUIRER, October 12, 2012, available at http://articles.philly.com/2012-10-12/news/34388528_1_christie-town-hall-senate-democrats.
24. See Housing Opportunities Task Force, Housing Opportunities Task Force Report: Findings and Recommendations (March 10, 2010), available at http://nj.gov/governor/news/reports/pdf/20100323_COAH.pdf.
25. Governor Chris Christie Calls Current COAH Legislation Inadequate, press release, January 24, 2011, available at <http://www.state.nj.us/governor/news/news/552011/approved/20110124b.html> (linking to the full text of the conditional veto).
26. Governor Christie Takes Action to Streamline State Government Through Common Sense Reorganization Plans, press release, available at <http://www.state.nj.us/governor/news/news/552011/approved/20110629d.html>.
27. N.J.S.A. §§ 52:14C–1 to –11.
28. *In re Plan for the Abolition of the Council on Affordable Housing*, 70 A.3d 559, 561 (2013) (citations omitted).
29. *Id.*, at 562.
30. N.J.S.A. § 52:27D-320.
31. N.J.S.A. § 52:27D-329.2
32. Brief for Fair Share Housing Center, *In re Failure of Council on Affordable Housing to Adopt Trust Fund Regulations*, N.J. Super. Ct., Appellate Div., Docket No. A-5257-11 (July 6, 2012).
33. Order on Emergent Application, *In re Failure of Council on Affordable Housing to Adopt Trust Fund Commitment Regulations*, N.J. Super. Ct., Appellate Div. Docket No. A-5257-11 (July 13, 2012).
34. Order on Emergent Application, *In re Plan for the Abolition of Council on Affordable Housing*, N.J. Super. Ct., Appellate Div., Docket No. A-63-1-10T4 (August 10, 2012).
35. Order on Emergent Application, *In re Failure of Council on Affordable Housing to Adopt Trust Fund Commitment Regulations*, N.J. Super. Ct., Appellate Div., Docket No. A-5257-11 (May 13, 2013).
36. Order, *In re Failure of Council on Affordable Housing to Adopt Trust Fund Commitment Regulations*, New Jersey Supreme Court, Docket No. M-1335 (May 28, 2013).
37. Order on Emergent Application, *In re Failure of Council on Affordable Housing to Adopt Trust Fund Commitment Regulations*, N.J. Super. Ct., Appellate Div., Docket No. A-5257-11 (June 7, 2013), at 2.
38. N.J. ADMIN. CODE, Ch. 5:96 (Procedural Rules) and Ch. 5:97 (Substantive Rules), available at <http://www.state.nj.us/dca/services/ps/hss/statsandregs/596.pdf> and <http://www.state.nj.us/dca/services/ps/hss/statsandregs/597.pdf>. The Rutgers Center for Urban Policy Research was not involved in the second version of the Round 3 rules. As noted, COAH contracted with other consultants for supporting data and analysis. See N.J. ADMIN. CODE, Ch. 5:97—Appendix F—Consultants' Reports, available at <http://www.state.nj.us/dca/services/ps/hss/statsandregs/597f.pdf>.
39. *In re Adoption of N.J.A.C. 5:96 & 5:97*, 6 A.3d 445 (N.J. App. Div. 2010).
40. This brief, which was written by Kenneth Zimmerman, Catherine Weiss, and Michael J. Hahn, Michael T.G. Long, and Ryan J. Cooper at Lowenstein Sandler of Roseland, New Jersey, appears at <http://www.planning.org/amicus/pdf/matterofnjac.pdf>. This Reporter, who serves on the housing committee of the New Jersey Chapter of the American Planning Association, was a contributor to the brief, which was on the winning side.
41. *In re Adoption of N.J.A.C. 5:96 & 5:97*, 74 A.3d 893 (N.J. 2013).
42. *Id.*, at 909.
43. *Id.*, at 913.
44. *Id.*, at fn. 15.
45. *Id.*, at 913.
46. COAH Status and Information, available at <http://www.state.nj.us/dca/services/ps/hss/transinfo/reports/units.pdf>.
47. Proposed and Completed Affordable Units, available at <http://www.state.nj.us/dca/services/ps/hss/transinfo/reports/units.pdf>.
48. G.K. INGRAM, ET AL., SMART GROWTH POLICIES: AN EVALUATION OF PROGRAMS AND OUTCOMES (2009), available at http://www.lincolnst.edu/pubs/1571_Smart-Growth-Policies. Stuart Meck and Timothy McKinnon, of the Bloustein Survey Research Center, were the coauthors of the housing analysis in Chapter 6.
49. *Id.*, 142–143.
50. *Id.*, at 85.
51. *Id.*, at 83 and Table 6.14, at 84.
52. J. HASSE, J. REISER, and A. PINCHACZ, *Evidence of Persistent Exclusionary Effects of Land Use Policy Within Historic and Projected Development Patterns in New Jersey: A Case Study of Monmouth and Somerset Counties*, (Final Draft, June 2011), available at http://gis.rowan.edu/projects/exclusionary/exclusionary_zoning_final_draft_20110610.pdf.
53. *Id.* at 19, citing J. WETZ, THE JOBS-HOUSING BALANCE, Planning Advisory Service Report No.516 (American Planning Association 2003), available at <http://www.planning.org/pas/reports/subscribers/pdf/PASS16.pdf>. The Hasse report was undertaken as a contract research project for the Fair Share Housing Center, an advocacy organization, in Cherry Hill, N.J.
54. *Id.*, at 21.
55. For Professor Payne's critique of the implementation of Mount Laurel II through the FHA and the performance of COAH itself, see Payne, *The Unfinished Business of Mount Laurel II*, in T.N. CASTANO AND D. SATTIN, EDS., MOUNT LAUREL AT 25: THE UNFINISHED AGENDA OF FAIR SHARE HOUSING (2008), 5–19, available at <http://www.princeton.edu/research/prior-publications/conference-books/mt-laurel-complete-final.pdf>. This was his final article on the topic.
56. Meck, *A Simpler, More Workable Fair Housing Solution*, TIMES OF TRENTON, February 15, 2011, A.9.
57. A proposed "State Strategic Plan" to replace the 2001 plan was released in a final draft dated October 1, 2011, but it lacks a plan map and has not been adopted by the State Planning Commission. available at http://www.state.nj.us/state/planning/final-plan/final_spp_november%208_pub.
58. MASS. GEN. L. CH. 40B, §§ 20–23; CONN. GEN. STAT. ANN. Ch. 126a, § 8–30(g); R.I. GEN. L., Ch. 53, §§ 45-53-1 *et seq.*; 310 ILL. COM. STAT. §§ 67/1 *et seq.*
59. In New Jersey, a board of zoning adjustment can grant density variances, eliminating the need for rezoning, although the criteria for granting such a variance are opaque. N.J. STAT. ANN. § 40:55D-70(d).
60. OR. REV. STAT. § 197.810.

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JUDICIAL DECISIONS | 66 PEL 1 – 66 PEL 2

Annexation

66 PEL 1, TEXAS

Owner of annexed property lacked standing to challenge contents of annexation petition and affidavits

A petition requesting annexation of 40.88 acres in Parker County was signed by 12 individuals and stated that the signatures represented the majority of the qualified voters living within the area sought to be annexed, which was contiguous with the corporate limits of the Town of Annetta and not within the extraterritorial jurisdiction of any other municipality. The town annexed the vacant tract. The owner of the land challenged the annexation under Local Gov't Code 43.028, for failure to obtain the owner's consent. The owner also claimed to have established a nonconforming use as a manufactured home community prior to annexation and inverse condemnation. The owner asserted that it had spent several thousand dollars in preparing the property for use as a mobile home community and that neighbors had sought annexation in an effort to prohibit the property's use as a manufactured home community. The trial court ruled in favor of the city and awarded attorney fees. The appeals court affirmed, first declining to dismiss the appeal although the property had been sold in foreclosure, the owner's LLC charter was dissolved, and the city had released its claim to attorney fees. Section 43.024 supported the annexation; the mere traversing of a road does not render tracts geographically separate and prevent their annexation together. The owner lacked standing to challenge the adequacy of the affidavits that led to the annexation ordinances. The only proper method for attacking the validity of a city's annexation of territory is by a *quo warranto* proceeding, unless the annexation is wholly void. Defects in the "process of adopting an annexation ordinance" cannot be challenged outside of a *quo warranto* proceeding. The owner's claims about the contents of the annexation petitions and affidavits relate to procedures in adopting the annexation ordinance rather than whether the city acted without the color of law, which would make its action void. Because governmental proceedings that could have impacted and validated the owner's rights to develop its property as a manufactured home community were available but had not been initiated at the time the owner

brought its claims of nonconforming use and inverse condemnation, those claims were not ripe. *Waterway Ranch, LLC v. City of Annetta, Court of Appeals of Texas [intermediate court], Decided August 22, 2013, 2013 WL 4473713*

Civil Rights

66 PEL 2, MISSISSIPPI

Fifth Circuit rejects developer's "reverse discrimination" claim based on denial of water service

In 2006 Gulfport issued a "will-serve" letter to the Roundhill developer, affirming that water and sewer services were available to the property; the parties entered into a Wastewater Service Agreement. Mississippi officials approved the sewer plan; Gulfport prepared a list of items the developer had to complete. The city ordered installation of a water meter on Roundhill. There is some evidence that the water system was partially active in 2007, but the developer never paid for water service. In 2008 Gulfport issued a will-serve letter to the 781 development, neighboring Roundhill and on the same water line. After 781's development changed in 2009, Gulfport refused to issue a new will-serve letter. At a 2010 hearing, 781 was denied a conditional use permit on the basis that "the development is incompatible with the neighborhood." Gulfport representatives referred to traffic and parking, light and noise, danger to children posed by vehicles, fire protection, crime, and consistency with other city development plans. One Gulfport representative spoke of crime problems at a Federal Emergency Management Agency park in Gulfport, a park with predominantly black residents located in an area that otherwise had primarily white residents. A November 2006 ordinance had increased the fire flow requirements for residential developments such as Roundhill and 781 from 500 gallons per minute (gpm) to 1,000 gpm. In 2009 Gulfport received a hydraulic analysis that stated the fire flow capacity for the line serving Roundhill and 781 was only 600 gpm. In 2010 Gulfport denied final approval of water service to Roundhill. In 2011, after filing suit, Gulfport began supplying water to Roundhill from a new line constructed by the county. In 2012 Gulfport excavated the line that had been found insufficient to serve Roundhill and found a nearly closed water valve. After the

valve was open, the water line could supply the Roundhill property. The district court granted summary judgment in favor of Gulfport on all claims arising from its denial of water service to Roundhill. The Fifth Circuit affirmed, rejecting equal protection claims under 42 U.S.C. § 1982 for lack of standing. The developer did not claim status as a racial minority, but alleged that Roundhill was denied water service because of the development's proximity to 781, which was a housing development allegedly likely to be occupied by a majority of black residents, essentially claiming that Roundhill was denied water service so that denial of service to 781 would not appear to be motivated by race. Rejecting claims under the Fair Housing Act, 42 U.S.C. § 3602(i)(1), the court stated that the developer failed to identify a "specific test, requirement, or practice" that was responsible for disparate impact and failed to show "deliberate discrimination." The evidence did not support that any city official acted with racial motivations. There is no evidence Gulfport knew of the closed valve so that denial was pretextual. The court also rejected a "class of one" claim of selective enforcement. Claims of breach of express contract, breach of implied contract, and equitable estoppel failed for lack of evidence of an actual contract for water service. The will-serve letter contemplated several additional steps. Mississippi provides for governmental immunity in breach of implied-contract suits involving issuance, denial, suspension, or revocation of any privilege, ticket, pass, permit, license, certificate, approval, order, or similar authorization, Miss. Code . § 11-46-9(1)(h). The developer did not argue that it detrimentally relied on the will-serve letter. Gulfport's fire flow ordinance is not irrational or arbitrary or in violation of substantive due process rights, and violates no recognized property right under state law, for purposes of procedural due process. The developer did not exhaust administrative remedies as necessary for a takings claim.

L & F Homes and Dev., LLC v. City of Gulfport, United States Court of Appeals, Fifth Circuit [intermediate court], Decided August 7, 2013, 2013 WL 4017711

JUDICIAL DECISIONS | 66 PEL 3 – 66 PEL 7

Constitutional Law—First Amendment

66 PEL 3, NEW YORK

District court rejects most “Occupy Wall Street” claims concerning denial of access and eviction from protest sites

A group of Occupy Wall Street protestors, elected officials, and journalists filed suit, claiming violation of their federal First and Fourth Amendments rights, violation of their New York State constitutional rights, conspiracy to violate their constitutional rights, and state tort law claims. The protestors had gathered or attempted to gather in a number of Manhattan locations, including the plaza at One Chase Manhattan Plaza, which is not subject to written easements for public use; the Mitsui atrium at 100 William Street, a “privately owned public space,” required to be open to the public from 7 a.m. to midnight; the World Financial Center’s Winter Garden; Zuccotti Park; and Grand Central Terminal. On several occasions, individual plaintiffs were either refused entry to properties or were forcibly removed from the properties and in some cases arrested. The federal district court severed claims against the municipal transportation authority from claims against the police and private parties and declined to dismiss a claim that a police officer violated the First Amendment rights of a photographer whose camera was confiscated and who was held for 18 hours, released, rearrested, and held for an additional 24 hours. While the photographer did not establish that his treatment was “custom or policy” for purposes of vicarious liability or conspiracy, he plausibly alleged that the officer violated his First Amendment rights. The photographer’s expressive activity was not merely chilled but was completely frustrated for the period of his arrest. The court dismissed remaining claims, holding that a privately owned plaza is not subject to First Amendment protections. Privately owned space does not lose its private character merely because the public is generally invited to use it for designated purposes. The plaintiffs did not allege that the city was in any way controlling or maintaining the properties at issue. The owners’ summoning of police or requesting that police take action to disperse protestors from their property did not suffice to constitute joint action or to convert the private parties into state actors for Section 1983

purposes. The evictions from the Brookfield and Mitsui properties did not involve improper abdication of decision-making authority from police to a private party that would give rise to an inference of joint action.

Rodriguez v. Winski, United States District Court, S.D. New York [trial court], Decided September 26, 2013, 2013 WL 5379880

Economic Development

66 PEL 4, NEW JERSEY

New Jersey Economic Development Authority’s approval of hub tax credit for Prudential’s relocation from Gateway Center to new construction was reasonable

Prudential currently leases about 900,000 square feet of office space in three of the four buildings that comprise the Gateway Center, near Pennsylvania Station in downtown Newark. Prudential’s leases expire in December 2014. Prudential and Gateway have not reached a renewal agreement. Prudential hired JLL to provide real estate brokerage consulting services. JLL, which had also done work for the New Jersey Economic Development Authority (Authority), submitted a request for proposal to Gateway. Instead of continuing to lease space in the Gateway Center, Prudential now intends to relocate to a \$444 million, 650,000-square-foot office tower it plans to construct on Broad Street in Newark, a site in an area designated as in need of redevelopment. The Broad Street tower will accommodate all of Prudential’s employees currently working in the Gateway Center as well as 400 new employees. In New Jersey, Prudential employs approximately 7,435 people, including a total of 4,740 at various locations in Newark, 2,000 of which are in the Gateway Center. Prudential applied to the Authority for a hub tax credit pursuant to the Urban Transit Hub Tax Credit Act (the Act), N.J.S. 34:1B–207 to–209.4. Hub tax credits are granted by the Authority when a business makes a capital investment of at least \$50 million in a facility located within a half-mile radius of an urban transit hub rail station; the business must employ at least 250 full-time employees at the facility and must demonstrate that the capital investment will yield a “net positive benefit” to both the state and the eligible municipality. Following remand and an amended application, the Au-

thority granted a hub tax credit of \$210,828,357. The appellate court granted expedited review and affirmed the approval. The court rejected Gateway’s argument that the Authority was required to consider the impact of Prudential’s move on commercial space vacancy, resulting in lost revenue for landlords and ultimately causing a reduction in state, county, and municipal taxes. It was not unreasonable for the Authority to determine that tax revenue generated by new jobs and construction, and not the impact on the commercial real estate market, would be used in the computation of the net benefits test. The act and its regulations do not distinguish between new jobs that result from business growth and those caused by the tax credit; it does not require proof that the jobs were “at risk.” Based in part on the representations by authorized officials of the city, the Authority reasonably determined that the public safety burden on police and fire departments would not be significant. There is no indication in the record that the Authority’s net benefit analysis was tainted by its relationship with Prudential’s consultant JLL.

In the Matter of Prudential Fin. Inc. Urban Transit Hub Tax Credit Program Application, Superior Court of New Jersey, Appellate Division [intermediate court], Decided August 22, 2013, 2013 WL 4459004

Eminent Domain

66 PEL 5, CALIFORNIA

Owners were not entitled to precondemnation damages where taking occurred in 2008, following a substantial loss in value that affected the real estate market as a whole

The McNamaras bought 1.24 acres in Prunedale near Highway 101 in 1982. In 2002 they began planning to build a home and attended a meeting held by the Department of Transportation (DOT) concerning a freeway bypass project. They learned that the project lacked funding. In 2002 DOT determined that the Prunedale Improvement Project (PIP) “was the way to go” and began environmental review. In 2003 DOT informed the McNamaras that funding issues remained. The McNamaras broke ground in November 2003. In October 2003 DOT held a public meeting about the PIP. The McNamaras were not aware of the meeting. DOT’s Decem-

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ber 2003 draft relocation study identified the McNamaras' property as a "full take." The McNamaras moved into their home in September 2004 and first learned of the PIP in 2005. In August 2005 they were notified of a public hearing, where they learned that the PIP threatened their home. After the McNamaras urged DOT to save their home, DOT redesigned the PIP. The redesign would block access to the home's front door during several years of construction and placed the right-of-way 21 feet from the front door. DOT did not disclose these facts to the McNamaras but told them that it had "minimized the impacts." The final environmental impact report was approved, and, in September 2006, DOT acquired neighboring property. DOT informed the McNamaras that they were then acquiring only full takes and their property was not a full take. The McNamaras understood this to mean that DOT would be taking only property near the frontage road, which would allow them to remain in their home. In 2007 DOT sent the McNamaras a Notice to Appraise, stating that DOT did not need all of their property. A survey crew staked the property. McNamara saw that the house would be uninhabitable. He notified DOT that the "partial take" would destroy his septic system; would prevent access to the well, the source of water to three properties; and would cut off access to the front door, the garage, and the driveway during three to four years of construction. The McNamaras could not purchase another home until DOT paid them for their property. They never tried to rent or sell the house. The McNamaras found DOT's initial offer "insulting." The appraiser had substantially reduced the value, finding that the home was "functionally obsolete" and using an incorrect number of bedrooms. The McNamaras pointed out the errors, but no changes were made. In July 2008, DOT filed its complaint to take the McNamara property. The McNamaras sought just compensation, litigation expenses, and precondemnation damages, based on allegations of unreasonable delay or unreasonable conduct by DOT that had caused them additional damage. They moved out of their home in January 2009. The trial court awarded the McNamaras \$1.6 million plus \$603,636 in attorney fees, with expert witness and appraiser fees and costs of \$30,107.22. The appeals court reversed. The McNamaras were not eligible for precondemnation

damages for market decline in absence of *de facto* taking: a "physical invasion or direct legal restraint" prior to the statutory valuation date. The McNamaras failed to produce any evidence that their property's value was damaged "as a result of" DOT's actions rather than by general decline in the property value. Because this was not a *de facto* taking claim, the McNamaras were required to bear the loss in the property's value caused by a general decline in the real estate market. This is not a case like where the owners were unable to use the property during the precondemnation period. The trial court's award of litigation expenses was expressly premised on its erroneous belief that DOT was liable for precondemnation damages.

Dept. of Transp. v. McNamara, Court of Appeal of California [intermediate court], Decided August 14, 2013, 18 Cal.App.4th 1200

Eminent Domain

66 PEL 6, MISSOURI

"Heritage value" statute, adding 50 percent of the fair market value of a property that has been owned within the same family for 50 or more years, is constitutional

St. Louis County determined that it was necessary to condemn 15 acres in Chesterfield for the Page/Olive connector of the Highway 141 extension project. The 15-acre tract was deeded to Arthur Novel in 1904. Arthur and his wife lived on and farmed the property until their deaths, but it has been vacant since 1968. There is no house on the property, which was heavily wooded with a creek, a steep bluff, and sloping terrain. The trial court authorized acquisition of the property. Because the property owners and the city were unable to agree on proper compensation, the trial court appointed commissioners who held a hearing and awarded the Novels \$320,000 as damages. The Novels filed exceptions to the award and requested a jury trial. Before trial, the commissioners amended their report with a finding that the Novels had owned the property for more than 50 years. The Novels then sought assessment of "heritage value," pursuant to RSMo sections 523.061, 523.039, which define "heritage value" as 50 percent of the fair market value of a property that has been owned within the same family for 50 or more years. The

trial court awarded heritage value of \$160,000, resulting in an award of \$480,000. A jury assessed damages for the Novels at \$1.3 million. The court added \$650,000 for heritage value to the jury's verdict and assessed interest. The state's highest court affirmed, holding that, despite inaudible recordings and hearings not recorded, the record was sufficient. The county's claims concerning errors in the trial court's evidentiary rulings on admissibility of expert testimony, issues of unwillingness to sell, Novel's opinion on value, and the jury's knowledge of the heritage value were either not preserved or not prejudicial. The jury verdict was not excessive so as to require a new trial and the heritage value statutes are constitutionally valid. The heritage value statute was irrelevant to the jury's task of determining fair market value of the property, so exclusion of evidence of heritage value statute from the jury's consideration was proper. The heritage value statute did not impermissibly alter the definition of "just compensation." Supreme Court decisions support the proposition that a legislature may compensate losses and damages beyond those traditionally included in its interpretation of "just compensation." Payment of heritage value does not amount to use of public funds to confer an unconstitutional private benefit and the statute does not give the judge the jury's responsibilities in determining just compensation in violation of the constitution.

St. Louis County v. River Bend Estates Homeowners' Ass'n, Supreme Court of Missouri [highest court], Decided September 10, 2013, 2013 WL 4824030

Eminent Domain

66 PEL 7, VIRGINIA

Norfolk Redevelopment and Housing Authority lacked statutory authority to acquire nonblighted property after July 1, 2010

In 1998 the City of Norfolk approved the Hampton Boulevard Redevelopment Project (Project) created by the Norfolk Redevelopment and Housing Authority (NRHA) under the authority of Code §§ 36-49 and 36-51. NRHA's approval of the Project was based upon a redevelopment study that determined that the Project area was blighted due to incompatible land uses, disrepair, environmental risks, demographic changes, and high crime rates. The Project area

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was selected to assist in the orderly expansion of Old Dominion University (ODU), a public university adjacent to the Project. Area properties were classified as good, fair, or poor. The “poor” classification indicated a structure with extensive exterior deterioration and an unlikely economic feasibility of rehabilitation; 20 percent of the properties were classified as poor. In 1999 challenges concerning individual properties, the circuit court held that the area designated for the Project was blighted. Rejecting a challenge to a subsequent petition to condemn other properties in 2009, the trial court held that the doctrine of *stare decisis* prevented these landowners from relitigating the 1999 determination that the Project was blighted and that NRHA did not act in an arbitrary or unreasonable manner. The court also confirmed that the area was blighted and rejected a challenge to ODU’s agreement to pay NRHA a commission for the acquisition of property within the Project area. In 2010 NRHA filed a petition to condemn a 10-unit apartment building. The parties stipulated that the property was within the Project area but was not blighted. The owner argued that Code § 1–219.1 (enacted in 2007) precluded the NRHA from acquiring unblighted property after July 1, 2010. The trial court authorized the condemnation. The highest court reversed, holding that NRHA did not have statutory authority, after July 1, 2010, to acquire by eminent domain nonblighted property by merely filing petition for condemnation prior to July 1, 2010. Application of that statute did not deprive NRHA of any vested right in nonblighted property. There are no vested rights in a potential result in pending litigation and enactment of the statute affected the potential result of NRHA’s petition for condemnation. NRHA did not hold any rights to the property when the law became applicable.

PKO Ventures, LLC v. Norfolk Redev. and Housing Auth., Supreme Court of Virginia [highest court], Decided September 12, 2013, 747 S.E.2d 826

Eminent Domain

See **66 PEL 8**, *TransCanada Keystone Pipeline is a “common carrier” for purposes of condemning easements for oil pipeline*

Energy

66 PEL 8, TEXAS

TransCanada Keystone Pipeline is a “common carrier” for purposes of condemning easements for oil pipeline

TransCanada, an oil pipeline company, filed a petition seeking to exercise the power of eminent domain to acquire an easement for a 36-inch diameter buried pipeline for the transmission of crude petroleum across rural real property owned by Crawford, under authority statutorily granted to common carriers, Tex. Nat. Res. Code § 111.002(1),(6). The statute defines a common carrier as one who “owns, operates, or manages a pipeline or any part of a pipeline in the State of Texas for the transportation of crude petroleum to or for the public for hire, or engages in the business of transporting crude petroleum by pipeline.” The trial court appointed special commissioners to assess the condemnation damages due the landowner. After due notice of a hearing, which Crawford did not attend, the commissioners awarded the easements to TransCanada and assessed damages of \$10,395.00. Crawford appealed the award in the county and raised a claim that because TransCanada is an interstate pipeline that contemplates the transmission of crude oil, it is not a common carrier under the statute. The trial court granted TransCanada summary judgment, awarding a 50-foot-wide, nonexclusive, permanent easement. The court of appeals affirmed, holding that the pipeline was a “public use” under the state constitution and that TransCanada’s status as an interstate carrier does not impair its status as a common carrier. TransCanada produced undisputed evidence, through sworn affidavit and deposition testimony, that it will ship crude petroleum for one or more customers who will retain ownership of the oil.

Crawford Family Farm P’ship v. Transcanada Keystone Pipeline, L.P., Court of Appeals of Texas [intermediate court], Rehearing Overruled September 17, 2013, 2013 WL 4519769

Energy

See **66 PEL 17**, *City’s issuance of permit to allow drilling did not constitute inverse condemnation where owner acquired property subject to mineral severance rights*

Environment

See **66 PEL 19**, *Kansas Supreme Court remands Prevention of Significant Deterioration permit for new coal-fired electric generator at Holcomb facility*

66 PEL 25, *Environmental organizations did not establish redressibility element of standing to challenge Total Maximum Daily Loads for discharges into waters near Cape Cod and Nantucket*

Environmental Impact Statements

66 PEL 9, CALIFORNIA

Neither Northeast Embarcadero Study nor term sheet to guide negotiations with potential developer committed the city to a course of action requiring California Environmental Quality Act review

The 8 Washington project site, near the ferry building in San Francisco, is a 3.2-acre triangular parcel bounded by the Embarcadero, Washington Street, and Drumm Street. It includes three private parcels owned by the Golden Gateway Center and one public parcel (Lot 351) owned by the Port of San Francisco. Lot 351 was created by removal of the Embarcadero Freeway after the 1989 earthquake and is currently used as a surface parking lot with 110 spaces. Adjacent to Lot 351 on the parcels owned by the Golden Gateway Center is a private athletic club that includes nine tennis courts, two swimming pools, a 17-space parking lot, and several buildings. In 1990 city voters approved Proposition H, which required the port to initiate a public process to prepare a land use plan for port properties within 100 feet of San Francisco Bay. This process resulted in the Port of San Francisco Waterfront Land Use Plan, which was adopted by the Port Commission after the Planning Commission certified a final environmental impact report (EIR). The plan directs the port to explore the possibility of obtaining economic value from Lot 351 by combining it with the adjacent Golden Gateway residential site (8 Washington Street) to expand opportunities for mixed residential and commercial development. After issuing two requests for proposals, the city received only one response, in which the developer proposed to

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combine the Golden Gateway Center parcels with Lot 351 as one mixed use project, replacing the existing parking lot and outdoor tennis and swim facility with two 84-foot-tall, eight-story buildings containing approximately 170 residential units, ground-floor retail, up to 520 underground parking spaces, an open space corridor accessible to the public, an indoor fitness center, and a new outdoor health club with six tennis courts and two swimming pools. In response to community concerns, the Port Commission funded a Planning Department study, the Northeast Embarcadero Study, which was completed by May 2010 and was the product of three community workshops that elicited more than 300 public comments. The study recommends increasing allowable building heights in portions of the 8 Washington project site. Meanwhile, the developer and the port entered into an exclusive negotiation agreement, with a five-page term sheet intended to set forth general negotiating principles for the 8 Washington project. Neither the study nor the term sheet was binding; the EIR process for the 8 Washington project is ongoing. Objectors challenged the Northeast Embarcadero Study and the term sheet, contending that these actions created bureaucratic and financial momentum that amounts to an approval of the 8 Washington project in violation of the California Environmental Quality Act (CEQA, Pub. Resources Code, § 21000). The trial court ruled in favor of the city. The court of appeal affirmed. The study's recommendations were only recommendations, far short of committing the city to the 8 Washington project or to amending height limitations in the zoning code or in any other adopted plans. The study falls within an exemption for feasibility and planning studies found in CEQA Guidelines section 15262. The plain language of the term sheet expressly provides that it is not an approval and is not intended to be binding until the parties execute the transaction documents and complete environmental review under CEQA.

Neighbors to Preserve the Waterfront v. City and County of San Francisco, Court of Appeal of California [intermediate court], Decided August 26, 2012, 2013 WL 4523591

Environmental Impact Statements

66 PEL 10, MASSACHUSETTS

Court upholds environmental review of National Emerging Infectious Diseases Laboratories at the Boston University Medical Center in Boston's South End

The National Institutes of Health (NIH) plays a leading role in developing diagnostics, vaccines, and therapeutics to combat emerging and reemerging infectious diseases, including those that can be used as agents of terrorism. NIH decided to fund the new National Emerging Infectious Diseases Laboratories (BioLab) at the Boston University Medical Center in Boston's South End and Roxbury neighborhoods. The proposed facility will house Biosafety Level-3 and Biosafety Level-4 laboratories to research extremely dangerous pathogens, such as Ebola virus, for biodefense purposes. Area residents and the Conservation Law Foundation sought an injunction, arguing that NIH failed to comply with the National Environmental Policy Act (NEPA), 42 U.S.C. § 4321. The federal district court granted summary judgment upholding the decision, stating that NIH met its NEPA obligation to take a hard look at environmental consequences of its decision to build the BioLab in Boston. The community's concerns about the wisdom of locating the facility in a highly populated urban area are understandable, but a Final Supplementary Risk Assessment (FSRA) was prepared after a state court found noncompliance with the Massachusetts Environmental Policy Act, Mass. Gen. Laws ch. 30 §§ 61–62H. The FSRA's methodology was scrutinized and approved by two sets of independent experts. It took four years to prepare and consists of 2,700 pages. The FSRA evaluates the risks of release and exposure to the public of 13 different pathogens to be handled at the BioLab under multiple release scenarios including terrorist attack, laboratory accidents, transportation accidents, and natural disasters such as an earthquake. These analyses were also applied to alternative sites in Tyngsborough, Massachusetts (the suburban site), and Peterborough, New Hampshire (the rural site). The report includes a sealed threat assessment for malevolent acts and addresses the impact on low-income, minority, and medically vulnerable populations. The FSRA reports that the risk of infections to the public resulting from accidents or malevolent acts "is extremely

low, or beyond reasonably foreseeable," and the probability of secondary infections is so low that none is likely to occur for any of the pathogens over the proposed 50-year lifetime of the BioLab. The report acknowledged that the estimated likelihood of infections or fatalities is "generally slightly greater" at the Boston location than at the alternative sites, but the differences among the three sites "are not substantial." The court noted security safeguards built into the facility, the low amounts of pathogens that will be present, and the culture of biosafety and training that will be integrated into everyday practice at the BioLab. The court recognized a shortcoming in the FSRA: its inability to analyze certain issues that could potentially increase the risk of transmitting dangerous pathogens among the public in a highly populated urban area, but NIH explained that the scientific literature did not support analyzing these issues quantitatively. The statement of purpose in the environmental impact statement (EIS) demonstrated a continuing need to build additional biosafety laboratory space. The university's sale of a potential suburban location and a hospital's withdrawal of funding did not constitute changed circumstances requiring reevaluation of the EIS's alternatives analysis. NIH obtained sufficiently meaningful input from the public. NEPA does not dictate whether a government agency may fund a project like the BioLab but only prescribes the necessary process for "preventing uninformed—rather than unwise—agency action."

Allen v. Nat'l Insts. of Health, United States District Court, D. Massachusetts [trial court], Decided September 30, 2013, 2013 WL 5434817

Environmental Impact Statements

66 PEL 11, WASHINGTON

Environmental impact statement was required before Washington State Parks and Recreation Commission approved expansion of ski area

The Washington State Parks and Recreation Commission manages state parkland. Mount Spokane State Park encompasses about 14,000 acres. Mount Spokane 2000 (MS), a nonprofit ski resort, has leased 2,300 acres since 1951 and has developed 1,450 acres as an alpine ski facility, leaving 850 undeveloped acres (potential alpine ski expansion area (PASEA)). In 2008 MS submitted, then abandoned, a plan to de-

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velop most of the 850 acres. In August 2010, the commission prepared a facilities master plan. MS was no longer pursuing expansion, so the plan did not classify the PASEA. In December 2010, MS submitted a new conceptual plan for ski runs over 279 acres, with 571 acres left in a natural condition for lower impact activities such as snowshoeing. Commission staff prepared a plan, considering several scenarios, including authorizing no development or different levels of low-impact activities, and gave MS an environmental checklist under the State Environmental Policy Act (SEPA), Chapter 43.21C RCW, which incorporated environmental reports and analyses from the 2010 master planning process. After staff reviewed the completed checklist, it determined that a mitigated determination of nonsignificance was appropriate under SEPA for MS's concept and the proposed management classifications, with a condition that MS prepare an environmental impact statement (EIS) when it submitted a detailed development proposal. After public comment, the commission classified the proposed ski area as recreation, except that treed islands between runs were classified as Resource Recreation, allowing development of one lift and seven ski runs, subject to project-level environmental review and approval by the director of parks and recreation. The staff report noted that the PASEA supports sensitive plant associations and habitats suitable for endangered species and that PASEA habitat retains its integrity given limited past disturbance and connectivity to other functional habitats. As climatic conditions change, the report noted, PASEA (especially high areas) may serve as a critical refuge. The report acknowledged that protecting significant features and removing those of lesser significance may undermine their biological integrity by reducing connectivity. The Washington Department of Fish and Wildlife stated that the expansion will effectively eliminate nearly 300 acres of old-growth forest habitat and reduce the ecological value of remaining habitat and that completing the EIS later will not effectively mitigate all probable significant, adverse environmental impacts. The Department of Natural Resources stated that the proposal would adversely impact wildlife habitat. The Lands Council sought review. The trial court dismissed, holding that the Lands Council had standing, but that the Commission had properly followed SEPA. The appeals court affirmed with respect to

standing, rejecting an argument that any injury to Lands Council is only threatened and not immediate or specific. The approval violated SEQA. Approval of the classification was effectively the commission's decision to approve expansion. The purpose of the director's review of the final plan is not to revisit the commission's decision but to review the precise location and configuration of the runs, analogous to construction-level review of grading plans and similar matters for an already approved development. In May 2011, the principal features of the expansion and its environmental impacts could be reasonably identified and the agency was actively preparing to make a decision; an EIS, which the commission acknowledged was necessary, would have made an important contribution to the decision.

Lands Council v. Wash. State Parks Recreation Comm'n, Court of Appeals of Washington [intermediate court], Decided September 17, 2013, 309 P.3d 734

Environmental Impact Statements

66 PEL 12, WASHINGTON

Memorandum of Understanding concerning possible future construction of sports stadium is not an "action" subject to State Environmental Protection Act

About three years after the city lost the Seattle Supersonics, Hansen, a private investor and basketball enthusiast, acquired land on which he proposes to develop and operate a new sports arena south of downtown Seattle near the existing football and baseball stadiums. The use is permitted in the district. Hansen planned to raise more than \$500 million in private funds to develop the facility, purchase a professional basketball team, and seek a partner to recruit a hockey team. Hansen approached the city of Seattle and King County proposing that they participate in the development and ownership of the arena on his property. In December 2012, King County and the city signed a Memorandum of Understanding (MOU) that contemplates the use of public funds for an arena on Hansen's proposed site. The MOU is a binding agreement as to the process the parties will follow to complete necessary reviews, including conducting environmental reviews, fulfilling conditions precedent, and approving the transaction documents defined in the agreement, but many of its terms become

obligations of the parties only after several contingencies occur. The memorandum lays out the particulars of how the venture will be financed and operated if King County and Seattle ultimately participate. Environmental review of the proposal as required by the State Environmental Protection Act (SEPA), chapter 43.21C RCW, is under way. The union sought to invalidate the MOU. The union represents 3,000 longshoremen who work at the Port of Seattle and opposes construction of an arena in industrial south Seattle because of concern that the construction and additional traffic will disrupt the movement of freight and drive away maritime business and jobs. The trial court rejected the challenge on summary judgment. The court of appeals affirmed. The MOU does not predetermine where an arena will be built or even that an arena will be built at all. Whether the city and county will agree to Hansen's proposal is a decision expressly reserved until after environmental review is complete. It does not license, fund, or undertake an activity that will directly modify the environment, nor does it purchase, sell, lease, transfer, or exchange natural resources. Because there has not yet been a government "action" as that term is defined by SEPA, the courts are not a forum for the union's opposition to Hansen's proposal.

Int'l Longshore and Warehouse Union, Local 19 v. City of Seattle, Court of Appeals of Washington [intermediate court], Decided September 9, 2013.

Highways and Streets

See 66 PEL 5, Owners were not entitled to precondemnation damages where taking occurred in 2008, following a substantial loss in value that affected the real estate market as a whole

Historic Preservation

66 PEL 13, KANSAS

In determining whether to allow construction of parking on historic site, city was required to take a "hard look" and determine that no feasible alternatives were possible

A church owns land known as Bethany Place in Topeka that is included on the Register of Historic Kansas Places, which shields Bethany Place from further development unless the protections of the Historic Preservation Act (HPA), K.S. 75-2715, are satisfied. The church's

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cathedral building and 89-space parking lot are adjacent to Bethany Place but are not part of the historic site. The property is in a residential neighborhood next to Topeka High School. The church requested a building permit for a parking lot on Bethany Place with 10 handicap and 33 standard parking stalls. A church representative later testified that the church was “critically short of disabled access space” and estimated its true parking needs at 194 spaces. The proposal included removal of trees and shrubs and laying the parking lot across the historic site’s green space. The State Historic Preservation Office (SHPO) was notified of the request, investigated, and concluded that the parking lot would damage or destroy the Bethany Place site and “drastically changes the relationship between the two historic buildings on the site.” The SHPO recommended altering the project to use the city right-of-way by designing parking stalls directly adjacent to Polk Street and possibly 8th Street. The Topeka Planning Department recommended denial in light of alternatives but did not explain the alternatives. In preparation for the scheduled hearing, city personnel submitted: the planning department letter; the SHPO’s first letter, but not a second letter rejecting the church’s request for reconsideration; and an e-mail from the city forester describing trees that would need to be removed. The proposal was hotly disputed. The council approved the application, finding that there are no feasible and prudent alternatives and that all possible planning has been undertaken to minimize harm to the historic property. The trial court reversed and ordered the permit set aside, finding that the decision did not satisfy the “hard look” test. The appeals court reversed. The state’s highest court reinstated the trial court decision, first finding that individual owners of property located within 500 feet of the historic site were “persons aggrieved” and had standing under the HPA and that a historic preservation group met the traditional test for associational standing to seek judicial review. The city council failed to take a “hard look” at all relevant factors in regard to possible alternatives, as required under precedent interpreting the HPA. The court held, as a matter of first impression, that a governing body is required, before issuing permit for a project that will encroach upon, damage, or destroy historic property, to establish that no feasible and prudent alternatives exist and that all possible planning has been done to minimize harm to the

historic property. The court noted that the council acts in a quasi-judicial role with statutory obligations regarding investigation of facts and the evaluation of those facts; the hard-look test is a natural articulation for how a court should determine whether a governing body’s investigations and decision making under the act are supported by the evidence or are arbitrary or capricious. The court noted the absence of technical, design, and economic considerations submitted to the council regarding potential alternatives, although several alternatives were suggested either before the meeting or by project opponents at the meeting. The city was in the best position to furnish the information needed and the council’s failure to adequately perform its investigatory role renders its determination arbitrary.

Friends of Bethany Place, Inc. v. City of Topeka, Supreme Court of Kansas [highest court], Decided August 23, 2013, 2013 WL 4499116

Housing

66 PEL 14, CALIFORNIA

City housing agency, charged with discrimination against people with disabilities, may not obtain indemnification from owners of housing projects

The plaintiff, a nonprofit community-based organization, sued, alleging violations of Section 504 of the Rehabilitation Act, 29 U.S.C. §§ 701 *et seq.*; Title II of the Americans with Disabilities Act (Title II or ADA), 42 U.S.C. § 12131 *et seq.*; the Fair Housing Act; and California Government Code § 11135, alleging that owners of multifamily residential properties and CRA/LA Designated Local Authority, a public entity of the City of Los Angeles (CRA/LA), and Los Angeles have engaged in a “pattern or practice” of discrimination against people with disabilities. The plaintiff claims that none of the 61 projects have sufficient units accessible to people with mobility, auditory, or visual impairments to provide people with disabilities with meaningful access to the program. The 61 owner-defendants received federal funds from or through the city and CRA/LA. The city defendants claimed indemnification or contribution from the owner defendants. Dismissing the crossclaims for indemnification or contribution, the federal trial court first noted that analysis of claims for indemnification under Section 504, the ADA,

and the state law is similar: The private owners cannot be liable pursuant to claims against the municipal defendants. The main focus of this lawsuit is the legality of the overall housing program, not shortcomings in a particular building. The relevant duties and obligations are imposed only on the government defendants, not private owners. Nothing in Section 504 of the ADA, Department of Housing and Urban Renewal manuals, or ADA regulations creates a right to indemnity or contribution in favor of the city. State law claims for indemnity are preempted by those federal laws.

Indep. Living Center of S. Cal. v. City of Los Angeles, United States District Court, C.D. California [trial court], Decided September 19, 2013, 2013 WL 5424291

Housing

See **66 PEL 7**, *Norfolk Redevelopment and Housing Authority lacked statutory authority to acquire nonblighted property after July 1, 2010*

Inverse Condemnation

66 PEL 15, LOUISIANA

Owner’s claims under 42 U.S.C. § 1983, based on city’s demolition of her home without notice, were not ripe because she has not sought compensation through state procedures

From 1975 to 2009, Steward owned a home in New Orleans. The structure suffered damage during Hurricane Katrina, and Steward lacked funds to complete renovations. In January 2009, the city scheduled Steward’s home for a blight and code enforcement hearing to determine whether it should be declared blighted or a public nuisance. Steward learned of the hearing when the *Times-Picayune* newspaper published notice of the hearing date. She attended the hearing and stated that she was waiting for Road Home funds to provide her with the financial resources to renovate her home. The city suspended administrative fines and rescheduled the hearing for 60 days later. At the second hearing, Steward again requested additional time; the city again suspended fines and continued the hearing for 60 days later. Instead of waiting for the next hearing, however, the city demolished Steward’s home on March 24. Steward was given no notice of the demolition, nor was she given notice that

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the building was in imminent danger of collapse or that an emergency situation otherwise existed, which would have permitted demolition in the absence of her consent. Steward sued under 42 U.S.C. § 1983, alleging constitutional violations and Louisiana state law claims. The district court scheduled a hearing on the city's motion to dismiss, but Steward failed to file a motion in opposition at least eight days before the hearing, as required by the local rules. The district court deemed the motion unopposed and dismissed the case five days before the hearing date. Steward timely moved for reconsideration. Her counsel explained that the failure to respond resulted from staffing turnover and incorrectly calendared deadlines. The district court denied Steward's motion. The Fifth Circuit affirmed, noting "a troubling lack of clarity in the district court's disposition of the case," but nonetheless finding the claim for taking without just compensation not ripe for adjudication and the due process claims subsumed within the unripe takings claim. A takings claim is generally not ripe for review until the claimant has sought and been denied just compensation through the appropriate state procedures. Steward did not deny that Louisiana provides a cause of action for inverse condemnation, nor did she provide any details concerning her assertion that the city would refuse payment in her case should she establish an entitlement to it. Steward did not allege any facts to support her substantive due process claim to separate it from her takings or procedural due process claims.

Steward v. City of New Orleans, United States Court of Appeals, Fifth Circuit [intermediate court], Decided August 2, 2013, 2013 WL 3964005

Inverse Condemnation

66 PEL 16, TEXAS

Aquifer authority is liable for inverse condemnation based on its implementation of statutory permitting scheme

In 1979 the Braggs purchased the 60-acre Home Place Orchard, over the Edwards Aquifer in South Texas, as their homestead and a commercial pecan orchard. They cleared and planted 1,820 pecan seedlings. In 1980 the Braggs drilled an Edwards Aquifer well and installed an irrigation system. In 1983 they purchased the 42-acre D'Hanis Orchard, containing 1,500 pecan trees. Initially, the D'Hanis trees were adequately ir-

rigated from shallow, non-aquifer wells. When that source became inadequate, the Braggs obtained a permit to drill an Edwards Aquifer well from the Medina County Groundwater Conservation District. They completed the D'Hanis well in 1995. In 1993 the legislature enacted the Edwards Aquifer Act (effective in 1996), creating the Edwards Aquifer Authority to manage groundwater withdrawals by a permit system. The authority is responsible for "protect[ing] terrestrial and aquatic life." The act established an aquifer-wide cap on withdrawals by nonexempt wells of 450,000 acre-feet of water per year through 2007 and 400,000 acre-feet per year thereafter. The permit system gives preference to "existing users," defined as people who have withdrawn and beneficially used water from the aquifer on or before June 1, 1993. The authority may grant initial regular permits only to existing users who can establish that historical use by "convincing evidence." The act, which contains a complex system for calculating permitted withdrawals, provides that "just compensation be paid if implementation of [the act] causes a taking of private property or the impairment of a contract in contravention of the Texas or federal constitution." The Braggs applied for permits for their orchards, specifying their use of groundwater for 1996 rather than the historical period. Based on their use of water in 1972 through 1993 on the Home Place, they obtained a permit for 120.2 acre-feet of Aquifer water per year. The D'Hanis Orchard application was denied. The trial court held that the authority's actions resulted in a regulatory taking and awarded compensation. The appeals court remanded, first holding that the authority is a proper party to a takings suit instituted under the act, even though its actions may not have been discretionary, and even if the state might be a proper party. Where a regulatory taking results from an unreasonable interference with the right to use and enjoy the property, a 10-year statute of limitations for an adverse possession claim applies, but the Braggs' regulatory-takings claims did not accrue until the authority made its final permitting decisions. The permitting system did result in compensable regulatory taking of the orchards. The investment-backed expectations of the Braggs were reasonable, but the proper time for determining the value of groundwater rights that were taken was the time at which statutory provisions that dictated those decisions were applied to the properties and just

compensation would be determined by reference to the best and highest use of the properties as commercial pecan orchards, and by valuing the orchards immediately before and immediately after the act was applied.

Edwards Aquifer Auth. v. Bragg, Court of Appeals of Texas [intermediate court], Decided August 28, 2013, 2013 WL 4535935

Inverse Condemnation

66 PEL 17, TEXAS

City's issuance of permit to allow drilling did not constitute inverse condemnation where owner acquired property subject to mineral severance rights

Walton owns the surface estate of 35.4 acres in Midland. Endeavor owns an oil and gas lease that includes Walton's tract. The city initially denied Endeavor's application for a permit to drill on the land. Endeavor filed suit, claiming inverse condemnation. Endeavor and the city reached a settlement agreement, and the city granted the permit. Walton alleged that granting Endeavor a permit to drill constitutes a regulatory taking under the Texas constitution. He asserted that granting the permit to drill on his property constituted a physical invasion of his surface estate and that a provision of the permit that required drilling a water well for maintaining trees (required as part of landscaping requirements imposed on the permit) constituted an invasion of his groundwater. The trial court rejected the claims. The appeals court affirmed, reasoning that the permit did not grant any affirmative rights to Endeavor to occupy or use Walton's property. The permit did not authorize Endeavor to undertake any action that was not otherwise authorized, and it did not shield Endeavor from any liability to Walton. The permit did not deprive Walton of all economically beneficial use of the property to the extent that he was only left with a token interest; he acquired the property subject to the mineral severance in favor of Endeavor.

Walton v. City of Midland, Court of Appeals of Texas [intermediate court], Decided August 30, 2013, 2013 WL 4654506

Inverse Condemnation

See **66 PEL 18**, *Township is not liable for flooding based on failure to upgrade stormwater drain pipe*

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Municipal Liability

66 PEL 18, OHIO

Township is not liable for flooding based on failure to upgrade stormwater drain pipe

Jochum owns property in Jackson Township, where he had lived for 32 years. In 1978 he successfully sued to compel the township to construct a stormwater pipeline to alleviate flooding at his house. A pipeline was installed. Jochum alleges that the township issued an excessive number of building permits for construction of homes after the installation, disrupting the natural flow and absorption of natural surface water, so that the stormwater pipe in the public right-of-way in front of his home could no longer adequately handle water flow, causing flooding of his property. He installed sump pumps to pump water out of his basement. The township eventually installed a small pipeline in his front yard and connected it to the right-of-way pipeline to allow Jochum to attach his hose from the sump pumps directly into the pipeline. Jochum sued for mandamus, trespass, nuisance, and negligence, and claimed that the resultant flooding occurring on his property constituted a taking of his property for public use. The trial court found that the township was immune from liability and also that the takings claim failed as a matter of law. The appeals court affirmed, holding that the township was immune from liability under the Political Subdivision Tort Liability Act, R.C. 2744.02(A). Rejecting an argument that the function at issue was proprietary, the court stated that failure to upgrade is different from the failure to maintain or perform upkeep. Jochum indicated that he wanted the township to install a pipe "to a size appropriate to manage the increased water flow" and, when asked how big of a pipe should be installed, stated that "[t]hat is for the hydraulics engineer to figure out." The Ohio constitution requires a property owner to prove something more than damage to his property in order to demonstrate a compensable taking; an invasion must appropriate a benefit to the government at the expense of the property owner, or at least preempt the owner's right to enjoy his property for an extended period of time, rather than merely inflict an injury that reduces its value.

Jochum v. Jackson Twp., Court of Appeals of Ohio [intermediate court], Decided August 19, 2013, 2013 WL 4471092

Parks

See **66 PEL 11**, *Environmental impact statement was required before Washington State Parks and Recreation Commission approved expansion of ski area*

Pollution

66 PEL 19, KANSAS

Kansas Supreme Court remands Prevention of Significant Deterioration permit for new coal-fired electric generator at Holcomb facility

In 2006 Sunflower asked the Kansas Department of Health and Environment (KDHE) for a prevention of significant deterioration (PSD) permit for construction of three new coal-fired electric generators at the site of its existing facility in Holcomb. Public hearings were conducted. Under the Clean Air Act (CAA), 42 U.S.C. § 7401, and the Kansas Air Quality Act (KAQA), K.S. 65-3001, an applicant for a PSD permit must demonstrate that the project will not cause air pollution in excess of any national ambient air quality standard even if the standard has not been incorporated into Kansas's state implementation plan for reaching those standards, unless the federal regulatory requirements specifically provide otherwise. Although KDHE staff recommended the permit be issued, the secretary of KDHE denied the permit based on the level of greenhouse gas (carbon dioxide) emissions. In 2007 neither the U.S. Environmental Protection Agency (EPA) nor KDHE had placed specific limitations on carbon dioxide emissions, but the secretary had declared carbon dioxide emissions an imminent and substantial hazard to public health and the environment and invoked K.S.A. 65-3012 to "take such action as may be necessary to protect the health of persons or the environment." While litigation was pending, then-Gov. Parkinson and Sunflower entered into a settlement agreement with conditions for resuming KDHE's consideration of the application. The agreement called for reduction of the size of the planned expansion and development of wind resources and energy efficiency programs. In 2009 the Kansas Legislature enacted K.S.A. 2012 Supp. 65-3029, which provides that the secretary shall timely approve a PSD permit consistent with the settlement agreement. The legislature also amended the powers of the secretary, including limiting the emergency power upon which

the secretary had relied. Sunflower submitted supplemental materials to KDHE in 2009 and 2010 to update its application, partly because of changes in federal requirements that became effective after the first permit had been denied. KDHE issued a draft PSD permit and published a notice of public hearings. During the comment period, the EPA discovered errors in Sunflower's air quality impact modeling. Sunflower submitted a new modeling analysis. KDHE issued a new draft PSD permit and another notice of hearings. KDHE received numerous comments, including from Sierra Club. Sunflower provided KDHE with proposed responses to the comments. KDHE staff recommended the permit be issued, and on December 16, 2010, the secretary of KDHE issued the final PSD permit for construction of Holcomb 2. The state's highest court reversed, first holding that Sierra Club had standing under the CAA and KAQA, having participated in hearings and having submitted affidavits from members living in proximity to the facility concerning health impacts. KDHE erroneously interpreted and applied the CAA and Kansas law when it failed to apply EPA regulations regarding one-hour emission limits for nitrogen dioxide and sulfur dioxide during the permitting process. The regulations became effective before the permit issued, and CAA, KAQA, and implementing regulations required KDHE to apply them during the permitting process. A claim that KDHE erred in its application of hazardous air pollution emission requirements was rendered moot by the remand because the EPA has adopted new regulations that must be applied. The court rejected arguments that KDHE erred in its analysis of the best available control technology and that the procedure followed by KDHE violated the CAA. *Sierra Club v. Moser, Supreme Court of Kansas [highest court], Decided October 4, 2013*

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See **66 PEL 22**, *Planning and Zoning Commission lacked authority to waive parking setback and landscaped buffer requirements in granting special exception*

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66 PEL 11, *Environmental impact statement was required before Washington State Parks and Recreation Commission approved expansion of ski area*

Public Utilities

See **66 PEL 2**, *Fifth Circuit rejects developer’s “reverse discrimination” claim based on denial of water service*

66 PEL 23, *Regional Sewer District exceeded its authority in establishing a regional stormwater management program to be funded by fees on property owners*

66 PEL 24, *Moratoria, enacted to address over-capacity sewer system, may not be applied to lots previously approved for development*

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See **66 PEL 11**, *Environmental impact statement was required before Washington State Parks and Recreation Commission approved expansion of ski area*

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See **66 PEL 9**, *Neither Northeast Embarcadero Study nor term sheet to guide negotiations with potential developer committed the city to a course of action requiring California Environmental Quality Act review*

Signs and Billboards

66 PEL 20, TENNESSEE

The Tennessee Department of Transportation acted within its authority in denying permits for billboards within 660 feet of I-240, zoned for residential and agricultural uses, with a planned development overlay for commercial use

In 2006 Thomas applied to the Tennessee Department of Transportation (TDOT) for state outdoor advertising permits for two back-to-back billboards to be constructed off of Steve Road on I-240 in Shelby County. The manager of the TDOT Beautification Office processed

the applications and determined the Steve Road locations were subject to Shelby County’s comprehensive zoning ordinance: One was zoned Multiple Dwelling Residential and Flood Plain and the other Agriculture and Flood Plain, and they were subject to a Planned Development Overlay, the “Steve Road PD,” (PD) which authorized single-family residential housing, a day care center, mini-storage units, and billboards. All of the other PD uses had to be developed before construction of billboards. Shelby observed that all of the proposed locations were within 660 feet of I-240; were surrounded by homes and apartments on three sides with the fourth side facing I-240; that beyond the homes and apartments were heavily wooded, undeveloped areas; and that there was no commercial activity in the area. Shelby concluded that none of the proposed locations met the zoning requirements in TN Code § 54–21–103 and TDOT Rule 1680–2–3–.03(1)(a)1, both of which require that billboards located within 660 feet of an interstate highway be located in areas zoned for industrial or commercial use. TDOT Rule 1680–2–3–.02(29) defines “Zoned Commercial or Zoned Industrial” as “those areas in a comprehensively zoned political subdivision set aside for commercial or industrial use pursuant to the state or local zoning regulations, but shall not include strip zoning, spot zoning, or variances granted by the local political subdivision strictly for outdoor advertising.” An administrative law judge granted summary judgment to Thomas based upon her finding that the proposed locations did meet the definition of “Zoned Commercial or Zoned Industrial.” The commissioner reversed, and a trial court held that “TDOT acted within its statutory authority in denying the petitioner’s application for permits.” The appeals court affirmed. The federal Highway Beautification Act requires states to provide for “effective control” of billboard construction and maintenance or risk a 10 percent reduction in federal funding for highway improvements, 23 U.S.C. § 131; to comply, Tennessee enacted the Billboard Regulation and Control Act of 1972, TN Code §§ 54–21–101. The commissioner is required to limit billboard construction within 660 feet of interstates or primary highways to those areas zoned commercial or industrial under state law. While the states have full authority to create commercial and industrial zones for billboard construction, federal regulations disqualify sites “created primarily

to permit outdoor advertising structures,” or if the commercial or industrial activities are “limited” or only “permitted as an incident to other primary land uses.” The proposed locations were subject to a planned development permit, but that does not place the four locations in an area “zoned commercial or industrial.” Substantial evidence supported the finding that the proposed billboard locations are in areas that are comprehensively zoned for “residential,” “agricultural,” and “floodplain uses” and that the Steve Road PD relied upon by Thomas limits his commercial activities to those incidental to the primary land uses. Although the planned development permit authorizes limited commercial activity, it does not change the zoning of the locations to commercial or industrial, and it does not alter TDOT’s responsibility regarding the construction of billboards.

Thomas v. Tenn. Dep’t of Transp., Court of Appeals of Tennessee [intermediate court], Decided August 12, 2013, 2013 WL 4068178

Social Equity

66 PEL 21, CALIFORNIA

Receipt of state funds by local enforcement agency was not receipt of funds by city so that approval of solid waste facility was subject to law prohibiting discrimination in state-funded activities

In 2010 the Los Angeles City Council certified an Environmental Impact Report and approved Waste Management’s request to build a new 104,000-square-foot solid waste transfer station, an expanded materials recycling facility, and an expanded green waste processing center at the Bradley Landfill site in Sun Valley. The challenged facilities all fall within the definition of solid waste facilities, Pub.Res.Code, § 40194. The city planning department acted as lead agency for preparing documents to ensure compliance under the California Environmental Quality Act (CEQA), Pub. Resources Code § 21000, and processed the applications and approvals. The city did not consider siting the challenged facilities in another location. Comunidad, a community organization, sued to prevent construction of the challenged facilities in Sun Valley where members of Comunidad live. The trial court entered summary judgment in favor of the city. The court of appeal affirmed in part, first holding

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that the approval was not covered by a statute, Gov't Code § 11135, prohibiting discrimination in state-funded activities. Comunidad, which alleged that the planned facility would have a disproportionate impact on Latinos, did not show that any conduct related to the challenged facilities by the planning department was funded by the state. The court rejected an argument that the planning department is part of a comprehensive waste management program such that receipt of state funds by the local enforcement agency demonstrates receipt of funds by the city. The broader interpretation, urged by Comunidad, would require finding that a number of city programs were state-funded, which would be inconsistent with the statute. The court reversed dismissal of the CEQA claims. The dismissal was based on Comunidad's one-week delay in requesting a hearing. Even though CEQA requires the expedited prosecution of claims arising under it, a trial court may grant a motion for discretionary relief based on excusable neglect. Comunidad counsel was diligent in prosecuting the case, and the motion for relief was filed a week after the hearing request, well within a reasonable time; the city did not suffer prejudice from Comunidad's one-week delay. The delay was caused by an isolated mistake in an otherwise vigorous and thorough presentation of Comunidad's claims; the lead attorney made a single calendaring error, not a series of errors resulting from disorganization.

Comunidad en Accion v. Los Angeles City Council, Court of Appeal of California [intermediate court], Decided September 20, 2013

Social Equity

See **66 PEL 14**, *City housing agency, charged with discrimination against people with disabilities, may not obtain indemnification from owners of housing projects*

Special Exceptions

66 PEL 22, CONNECTICUT

Planning and Zoning Commission lacked authority to waive parking setback and landscaped buffer requirements in granting special exception

The defendant owned a 4.027-acre parcel and obtained, from the Monroe Planning and Zoning Commission, a zone change for the 1.15-acre easternmost portion from "Residential and

Farming District C(RC)" to "Design Business District 1(DB1)" and a special exception and site plan approval in order to construct a McDonald's restaurant. The easternmost 0.65-acre portion of the property, which abuts Main Street, was already designated as DB1. The westernmost portion of the property is landlocked, contains wetlands, and is bordered exclusively by properties in the RC zone. Neighboring owners claimed that the commission lacked authority to waive ordinance parking area setback and landscaped buffer requirements. The trial court dismissed an appeal. The appeals court reversed in part, first holding that the matter was not moot, despite the subsequent rezoning of abutting property. A necessary prerequisite to application of the ordinance parking setback and landscaped buffer requirements is the presence of an abutting property that is in a residential zone. The commission lacked authority to waive the requirements. The uniformity requirement in General Statutes § 8-2 precludes case-by-case variance of regulatory requirements by the zoning commission in a given district. Noting that the commission acts in an administrative capacity in granting a special exception, the court rejected an argument that the decision to vary the requirements fell within the reasonable discretion afforded the commission when acting in a legislative capacity. A special exception must satisfy standards set forth in the zoning regulations. The notice of the proposed zone change complied with the requirements of General Statutes § 8-3(a); the defendant filed in the town clerk's office a detailed metes-and-bounds description of the boundaries of the portion of the property that it sought to have rezoned, measured from all cardinal points. Anyone interested in the precise action sought could have consulted that map.

Mackenzie v. Planning and Zoning Comm'n of the Town of Monroe, Appellate Court of Connecticut [intermediate court], Decided October 15, 2013, 2013 WL 5530596

Special Purpose Districts

66 PEL 23, OHIO

Regional sewer district exceeded its authority in establishing a regional stormwater management program to be funded by fees on property owners

In 1972 the sewer district was established as a political subdivision of the state. A 1975 court order constitutes its charter, under which the

district has authority under Chapter 6119 of the Ohio Revised Code to plan, finance, construct, maintain, operate, and regulate local sewerage collection facilities and systems within the district, including storm and sanitary sewer systems. Member communities are in Cuyahoga, Summit, Lorain, and Lake Counties. The charter provides that "the District shall not assume ownership of any local sewerage collection facilities and systems nor shall the District assume responsibility or incur any liability for the planning, financing, construction, operation, maintenance, or repair of any local sewerage collection facilities and systems unless . . . provided for in a written agreement," but provides the district with regulatory authority over "all local sewerage collections facilities and systems in the District, including both storm and sanitary sewer systems." The district may "assume the responsibility for operating, maintaining, and repairing local sewerage collection facilities" or construct local facilities "when requested to do so by a local community and upon mutually agreeable terms." In 2010 the district board of trustees amended its Code of Regulations by enacting a Stormwater Management Code, which created a Regional Stormwater Management (RSM) Program for "planning, financing, design, improvement, construction, inspection, monitoring, maintenance, operation and regulation" of its own regional stormwater system. The district intends to fund RSM projects with a stormwater fee based on the square feet of a property's impervious surfaces. The district sought a judgment declaring that it had the authority to implement its RSM program with respect to all member communities. The 56 member communities were defendants. The trial court allowed property owners to join the action. The trial court held that the sewer district had the authority under R.C. Chapter 6119 and its charter to enact its RSM program, that the fee was authorized and not restricted by the charter, and that the fee was not an unauthorized tax and did not violate equal protection rights. The appeals court reversed in part, holding that R.C. Chapter 6119 does not authorize the district to implement a "stormwater management" program to address flooding, erosion, and other stormwater issues or to claim control over a "Regional Stormwater System." There was no service connection being made from the properties to a water resource project, and the stormwater management plan plays only an incidental role

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in municipal compliance with Clean Water Act obligations; the wastewater fee was not for the “use or service” of a “water resource project.” By implementing the fee, the district effectively claimed a share of community dollars, while other public entities such as school districts struggle to obtain public funding. While noting the district’s many accomplishments within the region, the court stated that the expansive scope of the “regional stormwater system” was beyond the scope of sewage treatment and wastewater-handling facilities under the charter. Any expansion of the district’s powers, including the allowance for implementation of a stormwater management program and its parameters, are matters that must be determined by the legislature.

Ne. Ohio Reg’l Sewer Dist. v. Bath Twp., Court of Appeals of Ohio [intermediate court], Decided September 26, 2013, 2013 WL 5436646

Standing

See **66 PEL 1**, *Owner of annexed property lacked standing to challenge contents of annexation petition and affidavits*

66 PEL 25, *Environmental organizations did not establish redressibility element of standing to challenge Total Maximum Daily Loads for discharges into waters near Cape Cod and Nantucket*

Subdivision

See **66 PEL 24**, *Moratoria, enacted to address over-capacity sewer system, may not be applied to lots previously approved for development*

Taxation

See **66 PEL 4**, *New Jersey Economic Development Authority’s approval of hub tax credit for Prudential’s relocation from Gateway Center to new construction was reasonable*

Transportation

See **66 PEL 20**, *The Tennessee Department of Transportation acted within its authority in denying permits for billboards within 660 feet of I-240, zoned for residential and agricultural uses, with a planned development overlay for commercial use*

Vested Rights

66 PEL 24, TEXAS

Moratoria, enacted to address over-capacity sewer system, may not be applied to lots previously approved for development

BMTP Holdings (BMTP) is a residential developer that obtains municipal approval of plats to divide property and build community infrastructure such as roads, storm drains, curbs, and taps into the municipality’s sewer system. BMTP then sells the subdivided property to builders. BMTP began subdividing the South Meadows Estates property before 2003. In 2006 the city approved the final plat for phase five of South Meadows Estates. The city manager executed the plat, indicating acceptance and eligibility for filing with the county clerk’s office. Infrastructure for the fifth phase was completed in May 2006. At about the same time, engineers informed the city that the sewer system was over capacity and could pose problems if the volume of sewage continued to increase. The engineers recommended a temporary moratorium on sewer tap permits. The city enacted a moratorium on June 5, to last 120 days, specifically exempting pending applications and completed but inactive sewer tap construction. The moratorium contained an appeal process and some findings but no findings or summary showing that the moratorium was limited to property that had not been approved for development. Shortly after the enactment, the city manager delivered the final approved plat to BMTP and stated that the city intended to enforce that moratorium against South Meadows Estates. The city extended the moratorium seven times, each time for a 120-day period, once exempting 15 lots in South Meadows Estates that BMTP had contracted to sell before the moratorium and once including a finding that the city was taking steps to become a member of the Waco Metropolitan Area Regional Sewerage System. The city asserted that the seven lots remaining in phase five would not be exempted because they had only been approved for subdivision, not construction. BMTP asserted that the value of the seven lots fell 83 percent while the moratorium and extensions were in effect. BMTP sought a declaratory judgment that the moratorium could not be

enforced against its remaining seven lots, adding a claim for inverse condemnation. The trial court granted summary judgment to the city and awarded attorney fees and costs. The court of appeals reversed, holding that Local Gov’t Code § 212.135 prohibits municipalities from enforcing moratoria against approved developments and remanding the inverse condemnation claim. The highest court affirmed, first holding that the issue was ripe, based on the doctrine of futility. BMTP was not required to submit sewer connection application or seek a waiver before filing suit. Property approved for subdivision is exempt from any development moratorium based on shortages of public facilities. Municipalities must ensure that essential public facilities are available to their residents. To assist in accomplishing this goal, municipalities may, under Chapter 212 of the Local Government Code, enact temporary moratoria on “property development” if they can demonstrate the moratoria are needed to prevent a shortage of essential public facilities. A municipality may not, however, enact such a moratorium unless it contains a summary of evidence showing that it is limited to property that has not been approved for development, which the statute defines to include subdivision or construction. With respect to the inverse condemnation claim, the trial court must resolve factual disputes pertaining to the extent of the government’s interference with the owner’s use and enjoyment of its property before the merits of the takings claim are judicially addressed. *City of Lorena v. BMTP Holdings, LP, Supreme Court of Texas [highest court], Decided August 30, 2013*

Waste Disposal

See **66 PEL 18**, *Township is not liable for flooding based on failure to upgrade stormwater drain pipe*

66 PEL 21, *Receipt of state funds by local enforcement agency was not receipt of funds by city so that approval of solid waste facility was subject to law prohibiting discrimination in state-funded activities*

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Water and Watercourses

66 PEL 25, MASSACHUSETTS

Environmental organizations did not establish redressibility element of standing to challenge Total Maximum Daily Loads for discharges into waters near Cape Cod and Nantucket

Environmental groups challenged the U.S. Environmental Protection Agency's (EPA) approval of 13 Total Maximum Daily Loads (TMDLs), which are documents that set forth how much pollution a body of water can receive without negatively affecting its designated uses under the Clean Water Act, 33 U.S.C. §§ 1313(d)(1)(C). The TMDLs were initially prepared by the Massachusetts Department of Environmental Protection and submitted to the EPA for approval. They cover waters in the areas of Cape Cod and Nantucket. The plaintiffs claim that the EPA erred in approving the TMDLs, which caused the waters covered by the TMDLs to become increasingly polluted by nitrogen, negatively affecting their recreational, aesthetic, and commercial interests in the waters. Specifically, they allege that the TMDLs failed to classify septic systems, certain stormwater systems, and wastewater treatment facilities (sources) as "point sources," and failed to assign the sources to the Wasteload Allocation category in the TMDLs, instead classifying the sources as "non-point sources," and assigning them to the Load Allocation (LA) category in the TMDLs. A point source is a discernable and discrete conveyance of pollutants; a nonpoint source is a source of pollution not associated with a discrete conveyance. By approving classification of the sources as nonpoint sources that were assigned to the LA, the EPA allowed the sources to be subject only to discretionary state regulation, rather than the mandatory federal pollution permitting system, called the National Pollution Discharge Elimination System, which governs point sources. The plaintiffs also claimed that the EPA ignored the effects of

climate change on the embayments. The EPA has published a report entitled "National Water Program Strategy Response to Climate Change," indicating that increased air temperatures will result in higher water temperatures, which "foster harmful algal blooms and change the toxicity of some pollutants." The district court rejected the claims on summary judgment. After examining affidavits submitted by individual members of the plaintiff organizations, the court concluded that those were not "materials of evidentiary quality" and were insufficient to satisfy the constitutional requirements for standing. While the plaintiffs may have established genuine issues concerning injury-in-fact, there was nothing to allow a reasonable fact-finder to conclude that the claimed injury would likely be redressed by a favorable decision. The affidavits did not assert any connection between the declarants' injuries and the EPA's alleged failure to consider the effects of climate change when approving the TMDLs; with respect to causation, their opinions about the effects of the EPA's regulation of the sources do not constitute admissible evidence. Reclassification of the sources would not immediately change the amount of nitrogen authorized to be emitted into the waters. There was no evidence that the EPA would not permit the same levels of nitrogen to be emitted into the waters if the federal agency, rather than the state, regulated the sources.

Conservation Law Found., Inc. v. U.S. Env'tl. Prot. Agency, United States District Court, D. Massachusetts [trial court], Decided August 29, 2013, 2013 WL 4581218

Water and Watercourses

See **66 PEL 16**, *Aquifer authority is liable for inverse condemnation based on its implementation of statutory permitting scheme*

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Neither Northeast Embarcadero Study nor term sheet to guide negotiations with potential developer committed the city to a course of action requiring California Environmental Quality Act review
(Cal. App. 2013) 66 PEL 9

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Housing [Social Equity]

City housing agency, charged with discrimination against people with disabilities, may not obtain indemnification from owners of housing projects (U.S. Dist., C.D.Cal. 2013) 66 PEL 14

Social Equity [Waste Disposal]

Receipt of state funds by local enforcement agency was not receipt of funds by city so that approval of solid waste facility was subject to law prohibiting discrimination in state-funded activities (Cal. App. 2013) 66 PEL 21

Connecticut**Special Exceptions [Procedure, Administrative]**

Planning and Zoning Commission lacked authority to waive parking setback and landscaped buffer requirements in granting special exception (Conn. App. 2013) 66 PEL 22

Kansas**Historic Preservation**

In determining whether to allow construction of parking on historic site, city was required to take a “hard look” and determine that no feasible alternatives were possible (Kan. 2013) 66 PEL 13

Pollution [Environment]

Kansas Supreme Court remands Prevention of Significant Deterioration permit for new coal-fired electric generator at Holcomb facility (Kans. 2013) 66 PEL 19

Louisiana**Inverse Condemnation [Procedure, Judicial]**

Owner's claims under 42 U.S.C. § 1983, based on city's demolition of her home without notice, were not ripe because she has not sought compensation through state procedures (U.S. App., 5th Cir. 2013) 66 PEL 15

Massachusetts**Environmental Impact Statements**

Court upholds environmental review of National Emerging Infectious Diseases Laboratories at the Boston University Medical Center in Boston's South End (U.S. Dist., D.Mass. 2013) 66 PEL 10

Water and Watercourses [Environment; Standing]

Environmental organizations did not establish redressibility element of standing to challenge Total Maximum Daily Loads for discharges into waters near Cape Cod and Nantucket (U.S. Dist., D.Mass. 2013) 66 PEL 25

Mississippi**Civil Rights [Public Utilities]**

Fifth Circuit rejects developer's “reverse discrimination” claim based on denial of water service (U.S. App., 5th Cir. 2013) 66 PEL 2

Missouri**Eminent Domain**

“Heritage value” statute, adding 50 percent of the fair market value of a property that has been owned within the same family for 50 or more years, is constitutional (Mo. 2013) 66 PEL 6

New Jersey**Economic Development [Taxation]**

New Jersey Economic Development Authority's approval of hub tax credit for Prudential's relocation from Gateway Center to new construction was reasonable (N.J. App. 2013) 66 PEL 4

New York**Constitutional Law—First Amendment [Public Land]**

District court rejects most “Occupy Wall Street” claims concerning denial of access and eviction from protest sites (U.S. Dist., S.D.N.Y. 2013) 66 PEL 3

Ohio**Municipal Liability [Inverse Condemnation; Waste Disposal; Water and Watercourses]**

Township is not liable for flooding based on failure to upgrade stormwater drain pipe (Ohio App. 2013) 66 PEL 18

Special Purpose Districts [Public Utilities; Waste Disposal]

Regional sewer district exceeded its authority in establishing a regional stormwater management program to be funded by fees on property owners (Ohio App. 2013) 66 PEL 23

Tennessee**Signs and Billboards [Transportation]**

The Tennessee Department of Transportation acted within its authority in denying permits for billboards within 660 feet of I-240, zoned for residential and agricultural uses, with a planned development overlay for commercial use (Tenn. App. 2013) 66 PEL 20

Texas**Annexation [Standing]**

Owner of annexed property lacked standing to challenge contents of annexation petition and affidavits (Tex. App. 2013) 66 PEL 1

Energy [Eminent Domain]

TransCanada Keystone Pipeline is a “common carrier” for purposes of condemning easements for oil pipeline (Tex. App. 2013) 66 PEL 8

Inverse Condemnation [Water and Watercourses]

Aquifer authority is liable for inverse condemnation based on its implementation of statutory permitting scheme (Tex. App. 2013) 66 PEL 16

Inverse Condemnation [Energy]

City's issuance of permit to allow drilling did not constitute inverse condemnation where owner acquired property subject to mineral severance rights (Tex. App. 2013) 66 PEL 17

Vested Rights [Public Utilities; Subdivision]

Moratoria, enacted to address over-capacity sewer system, may not be applied to lots previously approved for development (Tex. 2013) 66 PEL 24

Virginia**Eminent Domain [Housing]**

Norfolk Redevelopment and Housing Authority lacked statutory authority to acquire nonblighted property after July 1, 2010 (Va. 2013) 66 PEL 7

Washington**Environmental Impact Statements [Parks; Public Land; Recreation]**

Environmental impact statement was required before Washington State Parks and Recreation Commission approved expansion of ski area (Wash. App. 2013) 66 PEL 11

Environmental Impact Statements

Memorandum of Understanding concerning possible future construction of sports stadium is not an “action” subject to State Environmental Protection Act (Wash. App. 2013) 66 PEL 12



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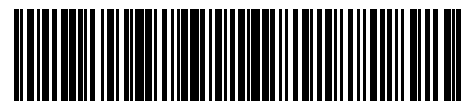
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15480755 (2014) 66 (1)