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# ZONING AND PLANNING LAW REPORT

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## EXHAUSTION OF ADMINISTRATIVE REMEDIES AND THE RELIGIOUS LAND USE AND INSTITUTIONALIZED PERSONS ACT

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Within the past few years, I have learned that there are a few rules to follow when representing a religious entity in a land use dispute with a community depending on where the community is located. First, determine how the circuit defines the term “substantial burden” as there are now four separate schools of thought of its application. Second, prepare for the unexpected hostile response and address the reasons why a church needs to vindicate its rights against a community in federal court. Third, prepare at the outset of the case for a motion to dismiss based on exhaustion of remedies.

I have never understood the rationale behind the requirement that a “typical” land use plaintiff must exhaust administrative remedies before filing suit in federal court when asserting a takings claim. The articulated reasons, as set forth in *Williamson County Regional Planning Com’n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 105 S. Ct. 3108 (1985) and later in *McCarthy v. Madigan*, 503 U.S. 140, 112 S. Ct. 1081 (1992), may have made academic sense, but in practice have served as an artificial bar to land holders in

pursuing litigation against communities who violate their constitutional rights.

In recent years, communities have argued that the exhaustion of remedies requirement also applies to claims brought under the Religious Land Use and Institutionalized Persons Act, 42 U.S.C.A. §§2000cc et. seq. For the most part, these arguments have been rejected because of the well-established principle that one does not need to exhaust administrative remedies after their civil rights are violated. *Patsy v. Board of Regents of State of Fla.*, 457 U.S. 496, 102 S. Ct. 2557, 29 Fair Empl. Prac. Cas. (BNA) 12, 29 Empl. Prac. Dec. (CCH) P 32821 (1982). Because it is clear that a violation of RLUIPA is a civil rights violation, whether it is free exercise of religion, establishment of religion or equal protection, courts summarily rejected the exhaustion argument. See *Dilaura v. Ann Arbor Charter Tp.*, 30 Fed. Appx. 501 (6th Cir. 2002), where the Sixth Circuit Court of Appeals rejected the exhaustion argument and held that exhaustion of administrative remedies is not required when pursuing a RLUIPA claim and *Konikov v. Orange County, Fla.*, 410 F.3d 1317 (11th Cir. 2005), where

the Eleventh Circuit Court of Appeals rejected an exhaustion argument when it determined that a county's decision to enforce an ordinance against religious free exercise is analogous to cases where the Supreme Court held that a plaintiff need not exhaust administrative remedies before bringing a § 1983 claim citing *Patsy, supra*.

However, there is shift in thinking among the lower court's holding that a religious entity must exhaust all administrative remedies before pursuing a RLUIPA claim. The rationale for exhaustion of remedies in traditional land use claims (takings) is based on two assumptions. First, that exhaustion of remedies preserves the authority of an administrative agency. This rationale is based upon the belief that administrative agencies, rather than courts, ought to have primary responsibility for local land use decision. It is also based on a judicial guttural belief that an administrative agency ought to have opportunity to correct its own mistakes with respect to programs it administers before it is taken to federal court. The second rationale is based on judicial efficiency, since, when agency has opportunity to correct its own errors, a judicial controversy may be mooted or at least piecemeal appeals may be avoided. The argument is that when a controversy survives judicial review, exhaustion of administrative procedures may produce valuable record for subsequent judicial consideration.

### Ripeness vs. Exhaustion of Remedies

There is a difference between ripeness and exhaustion of remedies. Ripeness is the *ability* to bring a claim. This involves a two-part process, the first part being Art. III standing. The authority to bring a claim or defense under RLUIPA is derived from the statute itself. "A person may assert a violation of this chapter as a claim or defense in a judicial proceeding and obtain appropriate relief against a government. Standing to assert a claim or defense under this section shall be governed by the general rules of standing under Article III of the Constitution." 42 U.S.C.A. §2000cc-2(a). A person has Art. III standing if (1) "he has suffered injury in fact," (2) that is fairly traceable to the challenged action of the defendant, and (3) the injury likely will be redressed by a favorable decision of the court. *Allen v. Wright*, 1984-2 C.B. 106, 468 U.S. 737, 750, 104 S. Ct. 3315, 3324, 18 Ed. Law Rep. 82, 84-2 U.S. Tax Cas. (CCH) P 9611, 54 A.F.T.R.2d 84-5361 (1984); *Lujan v. Defendants of Wildlife*, 504 U.S. 555, 560, 112 S. Ct. 2130, 2136, 34 Env't. Rep. Cas. (BNA) 1785, 22 Envtl. L. Rep. 20913 (1992). The injury must affect the party claiming relief in a personal and individual way that is legally cognizable. *Lujan*, 504 U.S. at 560. These typical standing requirements are relaxed when the allegedly unconstitutional statute casts a chilling effect upon a protected activity. *Lujan*, 504 U.S. at 560. Simply put, the cause of action arises at the point the burden is imposed.

Second, an injury alone does not give rise to a RLUIPA claim. The injured party must fall within one of the categories. First, where "the substantial burden is imposed in a program or activity that receives Federal financial assistance, even if the burden results from a rule of general applicability" 42 U.S.C.A. §2000cc(1)(a). Second, "the substantial burden affects, or removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes, even if the burden results from a rule of general applicability;" 42 U.S.C.A. §2000cc(2)(b). Third, "the substantial burden is imposed in the implementation of a land use regulation or system ... that permit the government to make, individualized assessments of the proposed uses for the property involved." 42 U.S.C.A. §2000cc (2)(c). If the injured party meets any or all of these three situations, then the claim is actionable.

### Exhaustion of Administrative Remedies

In order to "exhaust administrative remedies," a land holder must apply for a use or special use permit, or a request a zoning variance, to a planning commission have denied, then appeal the decision typically to a Zoning Board of Appeals (ZBA), before a takings claim would become actionable.

Exhaustion of administrative remedies is addressed in RLUIPA and has not generally been found to be a requirement because of the "individualized assessment" portion of the Act. This section, found in 42 U.S.C.A. §2000cc(a)(2)(C), provides that "the substantial burden is imposed in the implementation of a land use regulation or system of land use regulations, under which a government makes, or has in place formal or informal procedures or practices that permit the government to make, individualized assessments of the proposed uses for the property involved." Most courts have interpreted this portion of the Act to mean that when a community denies a religious organization's application for a use, conditional use or zoning variance for land, the individualized assessment has occurred, and RLUIPA is triggered. See, for example, *Guru Nanak Sikh Soc. of Yuba City v. County of Sutter*, 456 F.3d 978 (9th Cir. 2006).

Thus, exhaustion of remedies occurs at the time of an individualized assessment (the point of the burden), not *after* the zoning application denial. This is consistent with the decision in *Patsy* wherein the Supreme Court held that "[b]ased on the legislative histories of both § 1983 and § 1997e, we conclude that exhaustion of state administrative remedies should not be required as a prerequisite to bringing an action pursuant to a § 1983." Because exhaustion was never intended, all Congress needed to put in RLUIPA was that there be a mechanism for individualized assessments in place.

## The Illogical Trend

Nonetheless, courts have confused ripeness and exhaustion of remedies in the context of a zoning case. The case of *Grace Community Church v Lenox Township, Michigan, Case No. 2:06-cv-13526*, U.S. District Court, E.D. Mi. S.Div., Case No., (Borman, J.) (2007), app. pending Sixth Circuit Court of Appeals, Case No. 07-2509, is an illustrative decision that confused ripeness and exhaustion of remedies in the context of a RLUIPA case.

By way of background, Grace Community Church was originally established in 1996 in New Haven, Michigan. The Church originally provided traditional worship services on Sundays and Wednesday nights; then, beginning in 2000, it changed its focus to provide spiritual counseling of individuals struggling with addiction problems based on Christian principles. The Church established a home for four men as a test run of their transitional housing service, also known as a Christian Discipleship Training Center. This facility was very successful prompting the addition of five more homes. The Christian Discipleship Training Center quickly became the central focus of Grace Church's ministry.

Grace Church subsequently sold its separate homes and purchased a large parcel of property in Lenox Township that was originally built as a Catholic Seminary and Monastery, a place to train pastors and priests. Thereafter, it was used as an adult nursing home for residential care. Grace Church intended to use the property as an expanded residential facility and consolidate its entire ministry under one roof.

In December 2004, Grace Church, through Pastor William Pacey, applied for the appropriate special land use permits from Lenox Township so Grace Community Church could operate legally as a Church and residential property. The Township planner recommended approval of the site plan and special approval land use. Thereafter, Grace Church appeared at several meetings of the Township's Planning Commission from April through June 2005. The Planning Commission considered the application at its April 25, 2005, meeting, its May 23, 2005, meeting and approved the special approval land use at its June 27, 2005 meeting. Thereafter, on July 27, 2005, the Planning Commission recalled the site plan for consideration indicating that site plan approval was for using the property as a church, only, and not for a Christian Discipleship Training Center. The Planning Commission decided not to make a decision and tabled the site plan for consideration for one more month.

On August 22, 2005, the Planning Commission considered the site plan, again, then ultimately approved the site plan for special land use approval allowing the Christian Discipleship Training Center with restrictions. One of the conditions required Grace Church to screen all residents and to assure the Township that the facility shall not be "used to house persons undergoing alcohol and/or drug rehabilitation."

A problem arose the following month when the a member of the township board, who is also a member of the planning commission, obtained a police report submitted by an individual participating in the Christian Discipleship Center, but complained of the methodology of the treatment. She reported she *thought* she would receive drug and alcohol treatment, but *did not*. That was the complaint. She described her activity at Grace Community Church as "we would work out in back picking corn in the cornfield, and also picking tomatoes, peppers, etc" and further stated, "[e]very time I was there we did not discuss anything about drugs." In fact, the complainant could not have been clearer that Grace Community Church did NOT provide rehabilitation counseling: "We *never* sat down and talked about my drug problem."

She further attested upon admission to the Christian Discipleship Program that she would only receive spiritual training, not drug and alcohol counseling, at the Grace Church. This information was provided to and rejected by the Township. Michigan District Court Judge Denis Leduc confirmed that Rev. Pacey had never received any court referrals, and specifically stated that she had not been referred to Grace Church by the 41st District Court for any drug or alcohol counseling nor would anyone else ever be. He later stated at a meeting in September 2007:

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I think that somehow this issue got confused perhaps because I was one of the underlying land contract vendors that this was going to be used for drug and alcohol referrals. *That was never my understanding with Reverend Pacey.* There apparently was a young woman who made some complaints to the local sheriff's department in August of 2005 . . . *but that's not anyone who ever was referred by me. I've never referred anyone for drug and alcohol counseling to Grace Church.* I will not do that. . . . I think that it is regrettable if there was any confusion on anybody's part, but we have no intent in the 42-1 District Court to refer anybody to this or any other religious facility and would never do so in the future. . . .

Even though it was clear that no drug and alcohol counseling occurred which would violate one condition of the use permit, the Planning Commission unilaterally revoked Grace Church's special land use permit on the belief that drug and alcohol counseling occurred on the site. Revocation of the special land use permit, which is an individualized assessment of Grace Church's activity made in light of Defendant's land use restrictions, burdened Grace Church's religious exercise even more severely than imposing the conditions in the first place, since revocation completely precludes Grace Church from exercising its religious rights.

The case was filed and after minimal discovery, both parties submitted summary judgment motions. The Court granted summary judgment for the Township concluding that an appellate case directly on point, *DiLaura*, was not persuasive because the Court who decided the case relied on a case that had been overturned by the Second Circuit (*Murphy I*) in reaching its conclusion that exhaustion of administrative remedies is not required in bringing a RLUIPA claim.

In deciding *DiLaura*, the Sixth Circuit did rely on *Murphy I* for this rule, but it also relied on a United States Supreme Court case, *Patsy v. Board of Regents of State of Fla.*, 457 U.S. 496, 102 S. Ct. 2557, 29 Fair Empl. Prac. Cas. (BNA) 12, 29 Empl. Prac. Dec. (CCH) P 32821 (1982), which espoused that same rule and has been relied on by the Sixth Circuit, the Eastern District of Michigan, as well as other district courts. *DiLaura*, 30 Fed. Appx. at 505; see also *Crow v. City of Springfield, Ohio*, 15 Fed. Appx. 219 (6th Cir. 2001) (citing *Patsy* and noting "it is true that as a general principle, parties may litigate constitutional deprivation claims in federal court regardless of whether they took advantage of a State court or State administrative procedure"); *Bannum, Inc. v. City of Louisville, Ky.*, 958 F.2d 1354 (6th Cir. 1992); *Cramer v. Vitale*, 359 F. Supp. 2d 621, 627 (E.D. Mich. 2005) (citing *Patsy* for the rule that there is no requirement that a plaintiff exhaust administrative remedies before bringing an action under § 1983).

In *DiLaura*, the Court was faced with a similar situation to Grace Church. The DiLauras sought to use a large house in Ann Arbor as a religious retreat on behalf of a Catholic lay organization devoted to promoting group prayer. 30 Fed. Appx. at 503. The house would have several guests a week come and stay overnight for purposes of prayer and fellowship. Mr. DiLaura wrote a letter to the Ann Arbor Township zoning officer requesting the use, which was denied. The DiLauras filed an application for a variance, which was also denied. After suit was filed, the U.S. District Court granted the township's motion to dismiss for lack of subject matter jurisdiction on the ground that the DiLauras' claims were not ripe for adjudication because they had not applied for a "conditional use permit." 30 Fed. Appx. at 504.

The Court of Appeals reversed the district court and reinstated the religious freedom claims brought by the plaintiffs because "the conflict [was] fully manifested, and Plaintiffs [had] suffered a quantifiable harm." 30 Fed. Appx. at 504. The Court held that the previous RFRA claim was to be adjudicated according to RLUIPA, that plaintiffs had standing under RLUIPA based on their respective interests in the property, *that exhaustion of administrative remedies was not required for RLUIPA claims brought as part of a § 1983 action*, that a claim for injunctive relief against enforcement of pre-RLUIPA zoning decision is prospective, not retroactive, and that plaintiffs stated a claim under the interstate commerce prong of RLUIPA substantial burden provisions based on the fact that guests could travel in interstate commerce to attend a retreat. The *DiLaura* Court explained that:

First, the district court asserted that the conflict was not ripe because the DiLauras had not "sought a 'conditional use'" permit from the town board. This is not a requirement in § 1983 actions, whether alleging constitutional violations or statutory claims. See, e.g., *Murphy v. Zoning Commission of the Town of New Milford*, 148 F. Supp. 2d 173, 185 (D. Conn. 2001) (Religious Land Use and Incarcerated Persons Act (RLUIPA) claim brought via § 1983 did not require application for a variance or even a first appeal to the zoning board); see also *Patsy v. Board of Regents of the State of Florida*, 457 U.S. 496, 102 S.Ct. 2557, 73 L.Ed.2d 172 (1982) (exhaustion of remedies not required for filing a § 1983 claim). Moreover, the DiLauras have in fact already gone through the appeals process as directed and have applied for a variance, which the Township denied.

30 Fed. Appx. at 504-05.

The *Grace* decision clearly conflicts with the Sixth Circuit's ruling in *DiLaura* and the Supreme Court's decision in *Patsy*. The *Patsy* Court relied on several past cases where the Supreme Court rejected similar invitations to impose an exhaustion requirement before filing a 1983 action. *Cramer*, 359 F. Supp. 2d at 628 (citing *Patsy*, 457 U.S.

at 500). The *Patsy* Court noted that in *Steffel v. Thompson*, 415 U.S. 452, 472-473, 94 S. Ct. 1209 (1974), it held:

When federal claims are premised on [§ 1983]—as they are here—we have not required exhaustion of *state judicial or administrative remedies*, recognizing the paramount role Congress has assigned to the federal courts to protect constitutional rights.

*Patsy*, 457 U.S. at 500. The Supreme Court further noted that “[t]he very purpose of § 1983 was to interpose the federal courts between the States and the people, as guardians of the peoples federal rights—to protect the people from unconstitutional action under color of state law, ‘whether the action be executive, legislative, or judicial.’” 457 U.S. at 503. *Patsy* also found Congressional intent to be determinative on this issue. The Supreme Court gleaned from legislative history that:

Congress has taken the approach of carving out specific exceptions to the general rule that federal courts cannot require exhaustion under § 1983. It is not our province to alter the balance struck by Congress in establishing the procedural framework for bringing actions under § 1983.

*Patsy*, 457 U.S. at 511-12. Based on this Supreme Court precedent, RLUIPA, a federal claim brought via 42 U.S.C.A. § 1983, should not be interpreted in a manner inconsistent with *Patsy*.

While the Second Circuit in *Murphy II* has held contrary to *DiLaura*, the Eleventh Circuit has twice held in favor of *DiLaura*. In *Konikov v. Orange County, Fla.*, 410 F.3d 1317 (11th Cir. 2005), the Eleventh Circuit determined a county’s decision to enforce an ordinance against religious free exercise means that:

[R]ipeness is apparent because the zoning code at issue has, in fact, been applied to Konikov. The Code Enforcement Board, after its March 22 hearing, found Konikov in violation and fined him for failing to bring his property into compliance. He suffers from an actual, concrete injury. The imposition of the fine indicates that the Code Enforcement Board had made a final decision to apply the Code to Konikov. Therefore, his as-applied claims are ripe for our review. As for the distinct question of whether a plaintiff must exhaust administrative remedies before bringing a § 1983 claim, *Patsy v. Florida Board of Regents* has already answered in the negative. 457 U.S. 496, 102 S. Ct. 2557 (1982).” (Citations omitted).

410 F.3d at 1322. In *Konikov*, the Court determined that fairly read, it appears at least for the substantial burden prong, that the RLUIPA legislative history anticipates that persons will apply for land use permission and, if denied, they will be in a position to bring their RLUIPA claim. See *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1227, 1235 n.17 (11th Cir. 2004). Moreover, once a reli-

gious applicant applies and is turned down or after a local government enforcement action is started to prevent or restrict free exercise, it seems far less clear that the *Williamson County* approach (relied on by *Murphy II*; see *Williamson County Regional Planning Com’n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 105 S. Ct. 3108 (1985)) is correct. Nothing in the legislative history suggests successive applications or ripening measures are required prerequisites to a successful RLUIPA claim. 410 F.3d at 1322.

In *Grace Church*, ripeness is apparent because the zoning conditions were applied to Grace Church, the Township found it was in violation, denied its application and precluded Grace Church from use of its property, thus Grace Church has suffered from an actual, concrete injury. The denial and refusal of use indicates the Defendant made a final decision, and *Grace Church’s* as-applied claims are ripe for review.

In *Grace Church*, the Court cited *Murphy v. New Milford Zoning Com’n*, 402 F.3d 342 (2d Cir. 2005) (*Murphy II*), for the proposition that for a land use claim under RLUIPA to be ripe, a plaintiff must demonstrate a final decision from the state by “submitting at least one meaningful application for a variance.” 402 F.3d at 348 (citing *Williamson County*, 473 U.S. at 190). In holding that the plaintiff’s claim was not ripe, the *Williamson County* Court took pains to distinguish the concept of *finality* from the somewhat related but distinct concept of *exhaustion of state remedies*. See *Williamson County*, 473 U.S. at 192-93. The reason the Court in *Williamson County* required the plaintiff to pursue state remedies first was not so that plaintiff could obtain a judgment about whether the Planning Commission’s actions had violated its rights; that would be an exhaustion issue. See *Montgomery v. Carter County, Tennessee*, 226 F.3d 758, 765, 31 Env’tl. L. Rep. 20118, 2000 FED App. 0325P (6th Cir. 2000) (discussing *Williamson County* and stating that “[w]hile it appears that the State provides procedures by which an aggrieved property owner may seek a declaratory judgment regarding the validity of zoning and planning actions taken by county authorities, respondent would not be required to resort to those procedures before bringing its § 1983 action, because those procedures are clearly remedial”).

As opposed to *finality*, the Supreme Court has held that *exhaustion*, “generally refers to administrative and judicial procedures by which an injured party may seek review of an adverse decision and obtain a remedy if the decision is found to be unlawful or otherwise inappropriate, and is not required before a plaintiff may bring a suit predicated upon 42 U.S.C. § 1983.” *Montgomery*, 226 F.3d at 765 (citing *Williamson County*, 473 U.S. at 193). *Finality*, on the other hand, “is concerned with whether the initial decision maker has arrived at a definitive position on the issue that inflicts an actual, concrete injury....” 226 F.3d at 765. The purpose of the final decision requirement is to ensure that the Court

will know the nature and extent of permitted development before adjudicating the validity of the regulation that purports to limit it. See *First English Evangelical Lutheran Church of Glendale v. Los Angeles County, Cal.*, 482 U.S. 304, 107 S. Ct. 2378, 26 Env't. Rep. Cas. (BNA) 1001, 17 Env'tl. L. Rep. 20787 (1987).

The holding of *Williamson County*, therefore, is that Fifth Amendment *takings* claims do not ripen in zoning cases until (1) there has been a final decision by the relevant state decision-maker; and (2) the property owner has utilized appropriate state inverse condemnation procedures (or other comparable alternatives). See *Montgomery*, 226 F.3d at 765. The requirement that takings claims be ripe, however, is not the same as an exhaustion requirement. See *Williamson*, 473 U.S. at 192-94.

Even in applying *Williamson County's* ripeness standard to the case at hand, Grace Church's RLUIPA claim goes to a substantive issue, thus *finality*, not *exhaustion*, would be required. See *Bowers v. City of Flint*, 325 F.3d 758, 762, 2003 FED App. 0108P (6th Cir. 2003) (a claim alleging harm or deprivation of property is substantive, and, so, a final judgment (but not exhaustion) is required). Finality was all that could have been required under a *Williamson County* analysis, and Township made it clear that a final decision had been reached.

The definite *finality* of the Township's decision to deny Grace Church's SUP, based on alleged violations of specially-imposed conditions, is also supported by the Sixth Circuit in *Bigelow v. Michigan Dept. of Natural Resources*, 970 F.2d 154, 159, 23 Env'tl. L. Rep. 20059 (6th Cir. 1992). The Court in *Bigelow* concluded:

What is needed before litigation can proceed in a case such as this is that proceedings have reached some sort of an impasse and the position of the parties has been defined. We do not want to encourage litigation that is likely to be solved by further administrative action and we do not want to put barriers to litigation in front of litigants when it is obvious that the process down the administrative road would be a waste of time and money. *We believe that finality, not the requirement of exhaustion of remedies, is the appropriate determinant of when litigation may begin.* By finality, we mean that the actions of the city were such that further administrative action by Bannum would not be productive.

970 F.2d at 158. Under this definition, it is clear that the Township's decision regarding Grace Church was and remains final. Grace Church made a meaningful application for a special land use permit to the Planning Commission, and its decision to deny Grace Church its requested permit constituted a final decision.

### Conclusion

The *Grace Church* case is a prime example of a Court confusing the issues of finality and exhaustion requirements. It

is important to distinguish between the two concepts, as the U.S. Supreme Court was careful to do in *Williamson County*. It has been shown by the Sixth Circuit (*DiLaura, Montgomery, and Bigelow*) and the U.S. Supreme Court (*Patsy*) that *exhaustion* is not required when bringing a RLUIPA claim, which is predicated upon 42 U.S.C.A. § 1983.

There are cases in which exhaustion of remedies makes sense, such as the prisoner context. However, because the violation of rights occurs at the moment when the individualized assessment occurs to a religious entity, exhaustion of remedies makes no sense. Assuming exhaustion of remedies is required, the result will be communities using the process to stall a project, drive up cost, impose needless delays and use its undefined "police powers" to make sure that a Church will never locate in a community. That is unfortunate. Undisputed research confirms that religious organizations provide both economic and non economic benefits for the community. Much like strong school systems, many families and individuals consider the presence of local religious organizations when making decisions about moving to communities and purchasing property. Community contributions such as volunteerism, mental and physical health, reduced crime, increased education, and social networks are all components of the "social capital" concept that numerous social science researchers have identified as having a significant impact on successful communities and societies. Social capital is the outcome of trust, social networks, and social health, and it encourages economic and social opportunities for communities.

Clarity should be forthcoming in the area of exhaustion of remedies soon. Until then, be aware of the issue when litigating a RLUIPA claim.

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### RECENT CASES

#### **California Coastal Commission has no authority to declare property an environmentally sensitive habitat area (ESHA) during administrative appeal, but does have such authority prior to certification of the local coastal program.**

In two recent cases, the issue of what authority the California Coastal Commission has to designate environmentally sensitive habitat areas (ESHA) was raised. The commission ruled against the proposed development in both cases and unilaterally designated the property as an ESHA. The California Court of Appeals concluded in the first case that the commission lacked the authority because the matter was up on administrative appeal to the commission based on a certified local coastal program. "Nothing in the statutory scheme [of the Coastal Act] grants the commission the authority to make changes to the content of [the city's] land

use plan during an appeal from [the city's] grant of a CDP." The application was sent back to the commission to rehear it based on the city's certified plan. *Security Nat. Guar., Inc. v. California Coastal Com'n*, 159 Cal. App. 4th 402, 71 Cal. Rptr. 3d 522 (1st Dist. 2008).

However, in the second case, *Douda v. California Coastal Com'n*, 159 Cal. App. 4th 1181, 72 Cal. Rptr. 3d 98 (2d Dist. 2008), as modified on denial of reh'g, (Mar. 4, 2008) the appellate court concluded the commission had the authority under the California Coastal Act to designate the ESHA because the community did not have a certified coastal program:

Once a local coastal program is certified, the issuing agency has no choice but to issue a coastal development permit as long as the proposed development is in conformity with the local coastal program.... In other words, an issuing agency cannot deviate from a certified local coastal program and designate an additional environmentally sensitive habitat area. But prior to the certification of a local coastal program, the issuing agency has a different task. It must determine whether the proposed development, inter alia, is in conformity with the provisions of Chapter 3 of the Coastal Act, which includes section 30240.159 Cal. App. 4th at 1192.

### **Mediated settlement agreement between developer and Plan Commission must be approved at a public meeting consistent with Open Door Law.**

After the Plan Commission denied developer's primary plat for a residential subdivision, he filed a complaint. The trial court ordered the parties to mediate. The parties signed a settlement agreement on July 24, 2006 which provided that the Plan Commission would approve the agreement at its next regular meeting or at a special meeting called earlier. When the Plan Commission failed to act, the developer filed a motion to enforce the settlement agreement and requested costs and attorney fees from the mediation. The trial court found that the Plan Commission had acted in bad faith for failing to approve the settlement agreement until its October 25, 2007 meeting after granting its attorneys full settlement authority; and ordered the Plan Commission to pay mediation costs of \$1,578.55, but that sanctions and attorneys fees were not available pursuant to Ind. § 34-13-3-4.

The Indiana Court of Appeals affirmed in part and reversed in part. The court agreed that the Plan Commission was immune from sanctions under the alternative dispute resolution rules; but the Plan Commission's failure to approve the plat until an open meeting was not "bad faith" required for award of attorney fees. The mediation agreement could at most be a "provisional agreement subject to review and approval by the Plan Commission at an open meeting.

... The better practice is to include language in a settlement agreement that the agreement is contingent upon compliance with the Open Door Law and that it must be approved at an open meeting." *Lake County Trust Co. v. Advisory Plan Com'n of Lake County, Indiana*, 883 N.E.2d 124 (Ind. Ct. App. 2008).

### **Town's ban on directional signs in areas zoned agricultural is not preempted by state law that authorizes such signs.**

Plaintiff wanted to erect a sign along the federal-aid highway directing travelers to an attraction he owns. The property is zoned agricultural and the town's zoning ordinance prohibits his sign and so he sought a declaratory judgment from the circuit court that he had a right to erect his sign. The circuit court agreed and issued a judgment in his favor.

On appeal, the judgment was reversed. Plaintiff argued that the town's ban was preempted by state law which was enacted in response to the federal law (23 U.S.C. § 131) which encourages states to adopt standards applicable to signs viewable from interstate and federal-aid highways. The federal law authorizes the Department of Transportation to reduce federal-aid highway funds to a state if the DOT determines that the state has not made provision for effective control of the erection and maintenance of signs which are within six hundred and sixty feet of the highway. In turn, the state of Wisconsin enacted Wis. Stat. § 84.30 which generally prohibits signs along the highway with the exception of directional signs "which are required or authorized by law, and which comply with rules which shall be promulgated by the Wisconsin DOT... but such rules shall not be inconsistent with, nor more restrictive than, such national standards...."

Since his directional sign would have been permitted under the state rules, plaintiff argued the local ban on such signs was preempted. However, the court concluded that the condition "required or *authorized by law*" is independent from the second condition which requires that the state rules not be inconsistent with, nor more restrictive than, such national standards...." Since the local sign code banned directional signs on agricultural lands, it was not *authorized by law*, and there was no preemption problem. *Donaldson v. Town of Spring Valley*, 2008 WI App 61, 2008 WL 732001 (Wis. Ct. App. 2008).

### **Construction permits issued for renovation of former Italian Embassy into residential condominiums are properly revoked after the property is designated an historic landmark.**

The owner of the former Italian Embassy in Washington, D.C., designed in the Italian Renaissance Revival Style, wished to partially demolish the building and reconstruct

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a portion of it into residential condominiums. Although the property wasn't designated as a historic building initially, there was some concern that it might qualify for designation. In an attempt to work with the local preservation league, the owner met and negotiated an agreement to preserve some of the historic interior features of the property, and the league agreed not to file for a landmark designation.

On January 26, 2005, the owner applied for a permit to subdivide the property for sale as seventy-nine condominium units which was granted in July, with the approval of the Historic Preservation Review Board (HPRB). In September 2005, the owner applied for construction permits to alter and renovate the existing buildings and to build new structures. Those permits were issued in December. However, the Historic Preservation Officer filed an application on January 6, 2006, to designate the property a historic landmark and in February 2006, the HPRB approved the application and further recommended its nomination to the National Register of Historic Places. The owner received notification that his property was designated a historic landmark on March 6, 2006. The HPRB determined that the construction permits had been issued in error and should be voided. The owner requested, but was denied, relief from the Mayor's Agent.

Petition for relief to the D.C. Court of Appeals was denied. The court determined that the landmark designation

application was deemed a "pending application" on January 6, 2006 when it was filed, and the property was "protected" by the Historic Landmark and Historic Protection Act of 1978 as of that date. The Act requires the HPRB to hold a hearing and make a decision on the application within 90 days, which it did in this case. Therefore, the HPRB and the Mayor's Agent, contrary to the owner's argument, had jurisdiction to review the construction permits for consistency with the purposes of the Act. The owner sought equitable relief based on laches and estoppel, but the court declined, noting that "laches and estoppel are to be narrowly applied against the government." Finally, the owner argued that the denial of permits amounted to an unconstitutional taking, but the court disagreed.

The owner claimed he had spent \$4.7 million in design costs, \$2.9 million in rezoning the site, and \$4 - \$5 million in redesign. The owner failed to establish that the property lost any reasonable economic use because the property remains available for use as it was originally intended. The owner argued that the landmark designation had frustrated his investment-backed expectations for the property, but the court was not persuaded such expectations were reasonable. The owner took a risk despite knowing that the property might qualify as a historic landmark. *Embassy Real Estate Holdings, LLC v. District of Columbia Mayor's Agent for Historic Preservation*, 944 A.2d 1036 (D.C. 2008).

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