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LAND USE DECISION-MAKING: NO GOBBLY  
GOOP IN THE 2006 ANNUAL REVIEW OF  
CASES AND OPINIONS**

**MAY 2006**



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# **TIPS FOR ETHICAL CONSIDERATIONS IN LAND USE DECISION-MAKING: NO GOBBLY GOOP IN THE 2006 ANNUAL REVIEW OF CASES AND OPINIONS**

**Patricia E. Salkin, Esq.  
Associate Dean and Director**

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# ZONING AND PLANNING LAW REPORT

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## TIPS FOR ETHICAL CONSIDERATIONS IN LAND USE DECISION-MAKING: NO GOBBLY GOOP IN THE 2006 ANNUAL REVIEW OF CASES AND OPINIONS

**Patricia E. Salkin**

*Patricia E. Salkin is Associate Dean and Director of the Government Law Center of Albany Law School.*

### Introduction

The 2006 annual review of ethics in land use cases continues to monitor reported cases and opinions documenting allegations of unethical conduct involved in land use planning and zoning decision-making.<sup>1</sup> The majority of the reported cases once again deal with real and perceived conflicts of interest based in part on personal financial interests (e.g., investments in real estate), employment, personal relationships and familial relationships. In addition, there were a number of reported cases addressing bias, prejudice, and bad faith on the part of decision-makers. Compatibility of dual office holding was also the subject of a number of opinions from state attorneys general. These annual ethics updates are designed to provide land use lawyers with fact patterns where ethics allegations are actually raised and the analysis that is used to determine whether the actions complained of constitute illegal and improper conduct. While the facts in each specific case presented are naturally analyzed under relevant state laws, the general principles are, for the most part, instructive, and the concepts are easily transferable from jurisdiction to jurisdiction.

### Conflicts of Interest

In an Iowa case, plaintiff-neighbor unsuccessfully appealed a decision of the zoning officer to the zoning board of adjustment, which had granted his neighbor a building permit when the application included a diagram that was not drawn to scale and it omitted certain required information including the height of the buildings and the planned setbacks.<sup>2</sup> On appeal to the court, the plaintiff alleged that several board members had a conflict of interest in the matter.<sup>3</sup> Specifically, he alleged that one Board member was the brother-in-law of the person who sold the property to the owners who had been granted the permit, and he claimed that this person might be required to subdivide the property and could still be required to do so.<sup>4</sup> In addition, the plaintiff alleged that the Board Chair was both involved with the sale of the property (since he had listed the property and a person from his agency sold it) and that the Chair's comments to other Board members that he knew the property did not need to be submitted to planning and zoning could have tainted the opinion of other Board members.<sup>5</sup> In addition, he alleged that a third Board member was biased because

that Board member made a disparaging comment about a prior interaction between the Plaintiff and the Board, calling the former proceedings “gobbly goop.”<sup>6</sup> The Iowa Court of Appeals upheld the trial court’s determination that the issue of conflicts of interest in this case had not been properly preserved for review by the court since the plaintiff failed to raise the issue at any of the Board hearings.<sup>7</sup> The Court noted that the plaintiff could have also discussed with the Board the need for impartiality of Board members.<sup>8</sup>

A planning and zoning commission chairman in Connecticut was accused of tainting the proceedings because he allegedly owned a house within the proposed development area, and, although he recused himself from the public hearing, the commission meetings and the vote, he participated in the initial workshops on the application.<sup>9</sup> In addition, the plaintiffs alleged that the chairman “exhibited extreme hostility toward them” and that he systematically attempted to inhibit development of the land.<sup>10</sup> Under Connecticut statutes, “no member of any zoning commission or board and no member of any zoning board of appeals shall participate in the hearing or decision of the board or commission of which he is a member upon any matter which he is directly or indirectly interested in a personal or financial sense.”<sup>11</sup> The plaintiffs alleged that the Chairman should have been disqualified, but the Court noted that Connecticut courts have not adhered to a per se rule of invalidation where there is a conflict of interest, and that instead they look to determine whether any participation may have tainted the entire proceeding.<sup>12</sup> The Court was not convinced, based upon the evidence submitted, that the Chairman attempted to influence or sway other members of the commission.<sup>13</sup> Although plaintiffs alleged that an email sent by the Chairman to another member of the Commission was intended to influence a vote, the Court found that the message in the email, which asks other members not to speak with others about the project, simply reminded the commission to follow its already established procedural rules.<sup>14</sup> The Court further determined that since the Chairman was not present to influence votes at Commission meetings, and, absent evidence that demonstrated that his presence and participation at the preliminary workshops affected the ultimate granting of the zoning amendments, the plaintiffs failed to show material prejudice.<sup>15</sup>

### ***Conflicts Based on Employment***

The South Dakota Supreme Court found that an applicant was denied due process because a conflict of interest was created when a city council member was employed by the applicant’s competitor.<sup>16</sup> The appli-

cant was a restaurant owner who appealed to the city council to obtain a building permit and a renewal of his liquor license.<sup>17</sup> One of the Council members was a waitress at a competitor’s restaurant and had received a letter from her employer urging denial of the license, and her employer specifically spoke with her about the application.<sup>18</sup> The building inspector informed the Council that the reason for his denial of the permit request was based on an incomplete and inadequate site plan.<sup>19</sup> The City Council unanimously voted to deny the liquor license renewal, and the record indicated that the decision was made because “questions remained about the business plan,” including whether the owner intended to employ exotic dancers.<sup>20</sup>

The Court noted that due process requires a fair tribunal,<sup>21</sup> and that in administrative hearings a determination must be made as to whether there was actual bias or an unacceptable risk of actual bias.<sup>22</sup> The applicant alleged that the Council Member had a prohibited conflict of interest, not just because her employer was pressuring her decision, but because she could be impacted financially if his business was successful and took business away from her current employer.<sup>23</sup> Furthermore, he argued that since the Council Member received part of her income from tips, reduced patronage at her place of employment could result in a reduction of income.<sup>24</sup> The Court noted that, “public policy demands that officials normally disqualify themselves when they have a business or personal interest in the subject on which they must vote, regardless of whether this creates an actual bias.”<sup>25</sup> Because she had an indirect pecuniary interest in the application, and this interest was different from the interests of the members of the general public, the Court determined that the Council Member should have been disqualified from voting on the application.<sup>26</sup>

The Court next turned to the question of whether the Council Member’s conflict of interest should invalidate the vote and result in a second hearing. In holding that the Plaintiff was entitled to a new hearing, the Court cited the fact that the Council Member had an indirect pecuniary interest and that she neither disclosed the conflict nor recognized that she needed to disqualify herself.<sup>27</sup> The Court further noted that the failure of a Council member to disclose a conflict prevents an applicant or petitioner from an opportunity to weigh the nature of the conflict and to determine whether to waive disqualification.<sup>28</sup> The Court ordered a new hearing and vote “without the disqualified member’s participation and with full disclosure of any conflicts of the remaining members.”<sup>29</sup>

A federal district court in West Virginia was called upon to review claims related to an employment dispute after the Town Treasurer was terminated allegedly because of his investment in real estate which caused him to appear before the Town Council on more than one occasion to speak out against a proposed zoning ordinance which would affect his real estate interests.<sup>30</sup> Although the former Treasurer argued that his termination violated his First Amendment rights and he was denied due process, the Court rejected those claims having determined that the Treasurer was an employee at will and the stated reason for his termination was that the Council had lost confidence in his ability to serve as Treasurer.<sup>31</sup> The Court did not take the opportunity to comment on the merits of the conflicts of interest claim.

### ***Advisory Board Member Conflicts***

While ruling that a petition challenging a planning board's designation of an area as "blighted" for the purposes of redevelopment was time-barred, the Nevada Supreme Court used the occasion to discuss the effects of a conflict of interest on members of advisory commissions.<sup>32</sup> In this case, the plaintiff alleged that two members of Henderson Redevelopment Agency Advisory Committee had a direct interest in the Owner Participation Agreement that was adopted by the Advisory Committee, which, plaintiff further alleged, tainted subsequent redevelopment plan determinations.<sup>33</sup> The Court noted, however, that both of these Advisory Committee members recused themselves before the discussion of the Agreement began, and during the public meeting to vote on the Agreement, neither of the two members was present.<sup>34</sup> Furthermore, the Court stated that even if the two members had participated, that action would not have tainted the voting, because Nevada statutes do not cover conflicts of interest for advisory committee members.<sup>35</sup> Specifically, the Court cited to Nevada Revised Statute 281.4365, which provides in part that a "public officer" does not include "[a]ny member of a board, commission or other body whose function is advisory," and that "public office" does not include an office held by "[a]ny member of a board, commission or other body whose function is Advisory."<sup>36</sup> The Court found that Committee Members' recusal from discussion and voting precludes an appearance of impropriety or unfairness.<sup>37</sup> The Court also relied on the fact that the Advisory Committee had no power other than to make a recommendation to the Redevelopment Agency regarding that Agency's final approval.<sup>38</sup> In noting that citizen participation in advisory committees should be encouraged (even where a likelihood

exists for potential conflicts of interest), the Court determined that "by expressing a conflict and recusing himself or herself from any decision making, voting, or discussion, an advisory committee member avoids the appearance of impropriety."<sup>39</sup>

### ***Familial and Personal Relationships***

In an Illinois case, plaintiffs sought to reverse the Village Board of Trustees' decisions permitting the Village Historical Society to locate the Society's office in a residential district, with the suit based in part on the fact that the spouse of a board member had represented the Society in the sale of the residential property in question and received a commission as a result.<sup>40</sup> Noting that a spouse's financial interest in a venture does not necessarily disqualify a decision-maker,<sup>41</sup> an Illinois Appellate Court found no evidence that the Board Member's vote to approve the special use permit and zoning variance "was influenced or tainted by his wife receiving the commission."<sup>42</sup> Since the Historical Society did not apply for the permit and variance until after they had already purchased the property, the Court stated that, in this instance, the commission that the spouse received was not in any way contingent upon the granting of the requested relief.<sup>43</sup> Furthermore, the Court noted that the Trustee disclosed his wife's involvement as a real estate broker for the Society at a public meeting, and that the

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Plaintiff had simply failed to show any evidence that the Council's determination was impacted by a conflict of interest.<sup>44</sup>

In another case, this one out of Connecticut, plaintiffs, who were opposed to the granting of a variance to an automotive business that allowed the business to establish a vehicle repair facility, alleged, among other things, that one of the Board members had a close personal relationship with the owner of the automotive business and therefore should not have voted on the matter.<sup>45</sup> Specifically, the plaintiffs alleged that the Board member had invited a principal of the applicant company to his own company's party, and that he had demonstrated during the zoning board hearing an "intimate and ongoing knowledge of the applicants' business."<sup>46</sup> While noting as an initial matter that the Plaintiffs failed to adequately brief the conflicts of interest issue,<sup>47</sup> the Court nonetheless stated that even if it were to address the board member's alleged conflict, "the plaintiffs have not demonstrated a bias or predetermination that would have mandated... disqualification."<sup>48</sup> The Court pointed out that bias requires evidence of financial or personal interest, and that in the present case, although the Board member knew a principal of the applicant through a mutual friend, these two individuals never referred work to each other and the Board member was never asked to advocate for the application.<sup>49</sup>

### ***Bias, Prejudice and Bad Faith***

A group of Wyoming landowners challenged the adoption of a county growth management plan on a number of grounds, including an allegation that the County had acted in bad faith or with improper motive.<sup>50</sup> Specifically, the homeowners argued that board was likely improperly influenced when two of the people who spoke against their position were a prominent local attorney and a member of the county planning commission.<sup>51</sup> In addition, they alleged that the County "paid inordinate attention to the concerns of property owners in a neighboring 'upscale residential subdivision.'"<sup>52</sup> The Court acknowledged that the general purpose of zoning is to "conserve and promote the public health, safety and welfare...,"<sup>53</sup> and that the protection of property values and preservation of neighborhood character are proper factors for consideration.<sup>54</sup> The Court stated that to determine whether there is a substantive due process violation, the standard is no longer one of "improper motive," but rather where the action is so arbitrary that it shocks the conscience.<sup>55</sup> The Court further found meritless the landowners' allegations of bad faith and bias resulting from the participation of the local at-

torney and planning commission member, citing the fact that the zoning board member had recused herself from the commission proceedings and did not vote on the matter, and there was no evidence of improper influence by the attorney.<sup>56</sup>

In another case, plaintiffs appealed a zoning commission decision that granted variances necessary to construct a storage facility, alleging, among other things, that the Commission failed to objectively review the zoning applications because the review process was tainted by the inappropriate intertwining of public and private interests.<sup>57</sup> Plaintiffs alleged that even if the Commission members were not aware of their bias, they were so committed to seeing the project become a reality that they were simply incapable of being objective and independent.<sup>58</sup> They further noted that the Town was a co-applicant with the developer, and alleged that the commission was just rubber stamping what the Town and the developer had agreed upon.<sup>59</sup> The plaintiffs also alleged that the 400-page Master Agreement, which addressed, among other things, zoning issues, must have been agreed to long before the zoning applications were filed, evidencing further bias.<sup>60</sup> Lastly, the plaintiffs alleged that the municipality failed to follow certain statutory procedures, showing that they were biased and predisposed to approve the applications.<sup>61</sup> The Court noted that, "there is a presumption that administrative board acting in an adjudicative capacity is not biased," and that to overcome this presumption, plaintiffs have the burden to demonstrate actual bias as opposed to the mere potential for bias unless the facts suggest that the probability of such bias is too high to be constitutionally tolerable.<sup>62</sup> In finding no evidence to support the allegations of bias or predetermination, the Court noted just the opposite—that the record contained ample evidence that the municipal officials did not predetermine applications, and that they repeatedly made comments at public meetings assuring people that they had open minds and that it was not a "done deal."<sup>63</sup>

In a case before the Delaware Superior Court, plaintiffs sought to appeal a determination by the board of adjustment denying their requests for a variance.<sup>64</sup> They alleged, among other things, that the Board abused its discretion when it failed to act as an impartial arbiter.<sup>65</sup> In agreeing with the plaintiffs, the Court found that the Board did overstep its role as neutral arbiter during two hearings, and noted that there was "some evidence to suggest that the Board strong-armed the attorney for the City into taking a position against the settlement."<sup>66</sup> The Court was frustrated that the Board failed to keep a record of one of its hearings,<sup>67</sup> but refused to reverse the decision of the Board solely

on this ground.<sup>68</sup> However, in reversing the Board's decision, the Court found that the evidence indicated that the Board did not act impartially and in fact acted with impropriety.<sup>69</sup> In an effort to seek attorney fees, the plaintiffs brought a subsequent action alleging that the Board members acted in bad faith.<sup>70</sup> The Court noted that "Even though the Board's actions were not justified, this does not mean that the members had engaged in egregious conduct."<sup>71</sup> The Court held that the Plaintiffs failed to prove bad faith, and that bad judgment alone is not equivalent to a sinister motive or dishonest purpose.<sup>72</sup>

Where a former member of the Township Board of Health displayed bias against the applicant and their applications, the New Jersey Superior Court determined that she was disqualified from official or indirect participation as a member of the Township Board of Health and the Township Planning Board from adjudicating any applications or participating in hearings regarding the applicants' property.<sup>73</sup> The Court stated that she could not participate as a member of the boards in hearings concerning the applications, nor could she vote on the applications.<sup>74</sup> However, in her role on the Township Committee, the Court said she would not be precluded from making determinations with respect to ordinances that may apply to the applicant's property along with other properties in the Township.<sup>75</sup>

### ***Ex Parte Communications***

Plaintiffs in a Connecticut case sought to overturn a decision by the planning and zoning commission granting a site plan application that was based in part on information received and considered by the Commission after the close of the public hearings.<sup>76</sup> The Court noted that the determination as to whether an ex parte communication was received, and if so, whether any prejudice resulted, is one that is made on a case-by-case basis.<sup>77</sup> The Plaintiff failed to adequately brief one of its two allegations of ex parte information, and so the Court dismissed that allegation deeming the issue abandoned.<sup>78</sup> As to the second claim, the Court determined that it was an ex parte communication, but that there was no indication or suggestion that the Commission considered or relied upon facts not already in the record of the administrative proceeding.<sup>79</sup> The Court noted that "once an ex parte communication has been established, a presumption of prejudice is deemed to arise..." And the court must then determine whether the challenged action was based upon this information.<sup>80</sup> Therefore, based upon the Court's conclusion that the Commission did not rely on this ex parte communication, and the information in the

document had previously been communicated to the Commission, it held that while the ex parte communication was improper, it did not prejudice the process.<sup>81</sup> In another allegation, the Plaintiffs asserted that the Commission abused its discretion by relying on its own expertise with respect to a technical flooding issue when one Commission member expressed his belief based upon his understanding of floodwater dynamics.<sup>82</sup> The Court found no evidence that the Commission relied on these comments when it approved the site plan.<sup>83</sup>

### **Dual Office Holding**

In determining whether a zoning board had violated state law in appointing one of its own members to the position of Zoning Administrator while the member still held office in the zoning board, the Michigan Court of Appeals determined that the Board violated the applicable state statutes.<sup>84</sup> The Board, in making this appointment, relied on an opinion of the Attorney General that had concluded, under the facts presented, that the county commissioner could serve in both roles.<sup>85</sup> The crux of the allegation was that the county commissioner applied for the zoning administrator position while a member of the body responsible for making the hiring decision.<sup>86</sup> Although the commission member submitted his resignation to be effective before he assumed his new duties as zoning administrator, obviating an incompatibility in dual office holding, the Court determined that a conflict of interest remained during the appointment process.<sup>87</sup>

The Attorney General for the State of Louisiana opined that a person may simultaneously serve as a member of a town council and on a historic preservation committee.<sup>88</sup> The Attorney General pointed out that while a state statute barred full or part-time employment for the subdivision in which a council member held elected office, the statute did not bar a councilperson from holding a part-time appointive office.<sup>89</sup> In another opinion, the Louisiana Attorney General advised that the statute did not bar a parish permit coordinator, which was a full-time position of employment, from also serving part-time as a zoning commissioner for a local town (an appointed position) that made the person a public officer.<sup>90</sup> In a third opinion, the Louisiana Attorney General stated that state law did not prohibit a member of a community school board from serving part-time in an appointed capacity as a member of the same community's zoning commission.<sup>91</sup>

The Attorney General of South Carolina opined that the State's constitutional bar against dual office holding forbade a county planning commission member

from serving as a city council member in that county.<sup>92</sup> The Attorney General determined that a planning and zoning coordinator holds an “office,” which subjects that position to the prohibition against dual office holding under the State constitution.<sup>93</sup> The Attorney General of Alabama advised that while a city council person may not serve as an official on a planning and zoning commission,<sup>94</sup> a public works supervisor may be validly appointed by a mayor to serve on a planning and zoning commission consistent with Alabama state statute.<sup>95</sup>

## Conclusion

From a litigation standpoint, once again the cases this year were decided overwhelmingly in favor of municipal officials. While this does not necessarily mean that the alleged conduct was ethical, it does indicate that certain actions that attract ethics allegations simply do not rise to the level of illegal conduct. As always, the discussion in this article can be used as an effective education tool by land use attorneys who advise planning and zoning boards and other public agencies involved in planning and zoning decision-making. Since each of the scenarios discussed reports on actual 2005 cases and opinions, consider sharing these fact patterns with your boards and asking them what they believe the most appropriate ethical conduct would be and why. This exercise can be an informative and inviting method of providing subtle ethics training in a proactive manner for board members.

## Notes

1. Prior annual reviews by the author can be found at: “Land Use Ethics Update 2005: Conflicts of Interest, Improper Conduct and Other Ethical Considerations,” 28 *Zoning & Planning Law Report* 1 (March 2005); “A Woody Allen Movie, Show Me the Money and Other Ethical Considerations in Land Use Planning,” 27 *Zoning & Planning Law Report* 3 (March 2004); “Ethics Allegations in Land Use Continue to Fill the Court Dockets,” 26 *Zoning & Planning Law Report* 4 (April 2003); “Litigating Ethics Issues in Land Use: 2000 Trends and Decisions,” 24 *Zoning & Planning Law Report* 4 (April 2001); “Municipal Ethics Remain a Hot Topic in Litigation: a 1999 Survey of Issues in Ethics for Municipal Lawyers,” 14 *BYU J. of Pub. L.* 209 (2000); and “1998 Survey of Ethics in Land Use Planning,” 22 *Zoning and Planning Law Report* 4 (April 1999).
2. *Sojka v Zoning Board of Adjustment For Harlan, Iowa*, 698 N.W.2d 336, 2005 WL 973793 (Iowa Ct. of App. 2005).
3. *Sojka*, 2005 WL 973793 at \*7, \*8.
4. *Sojka*, 2005 WL 973793 at \*7.
5. *Sojka*, 2005 WL 973793 at \*7. The Court cited to Iowa Code section 414.8 addressing membership on the Board of Adjustment which provides, in part, “A majority of the members of the Board of Adjustment shall be persons representing the public at large and shall not be involved in the business of purchasing or selling real estate.”
6. *Sojka*, 2005 WL 973793 at \*7.
7. *Sojka*, 2005 WL 973793 at \*8. The Court said, “After the extensive questioning Sokja made no objections to any of the Board members sitting on this case and he proceeded to present his claims. Sokja accepted the Board and cannot be heard to complain about it now.”
8. *Sojka*, 2005 WL 973793 at \*8.
9. *Timber Trails Associates v. Planning & Zoning Com. of Town of Sherman* (2005, Conn Super Ct) 2005 WL 1634086.
10. *Timber Trails Associates*, 2005 WL 1634086 at\*4.
11. *Timber Trails Associates*, 2005 WL 1634086 at\*4, citing Conn. Gen. Stat. § 8-11. In addition, the Court noted that applicable statutes also state that, “No member of any planning commission shall participate in the hearing or decision of the commission of which he is a member upon any matter in which he is directly or indirectly interested in a personal or financial sense.” See, Conn. Gen. Stat. § 8-21.
12. *Timber Trails Associates*, 2005 WL 1634086 at \*4, \*5.
13. *Timber Trails Associates*, 2005 WL 1634086 at \*5. The Court also noted that the Plaintiffs did specifically plead facts alleging the Chairman had a personal or financial interest in the outcome of the vote.
14. *Timber Trails Associates*, 2005 WL 1634086 at \*5.
15. *Timber Trails Associates*, 2005 WL 1634086 at \*6.
16. *Hanig v. City of Winner*, 2005 SD 10, 692 N.W.2d 202 (S.D. 2005).
17. *Hanig*, 692 N.W.2d at 202.
18. *Hanig*, 692 N.W.2d at 204.
19. *Hanig*, 692 N.W.2d at 204.
20. *Hanig*, 692 N.W.2d at 204.
21. *Hanig*, 692 N.W.2d at 204-206. Citing to a previous decision, *Strain v. Rapid City Sch. Bd.*, 447 N.W. 2d 332, 336 (SD 1989), the Court noted, “A fair trial in a fair tribunal is a basic requirement of due process. This applies to administrative agencies which adjudicate as well [as] to courts. Not only is a biased decision maker constitutionally unacceptable, but our system of law has always endeavored to prevent even the probability of unfairness.” *Hanig*, 692 N.W.2d at 205, 206.
22. *Hanig*, 692 N.W.2d at 206.
23. *Hanig*, 692 N.W.2d at 206.
24. *Hanig*, 692 N.W.2d at 206.
25. *Hanig*, 692 N.W.2d at 207. Further, the Court said that the determination as to whether something constitutes a disqualifying conflict of interest requires a fact specific inquiry and “If the circumstances show a likely capacity to tempt the official to depart from his duty, then the risk of actual bias is unacceptable and the conflict of interest is sufficient to disqualify the individual.”
26. *Hanig*, 692 N.W.2d at 207. In this opinion, the Court reviewed the laws in other jurisdictions including New Jersey, Minnesota and Iowa to determine whether a zoning board member or other quasi-judicial officers are subject to disqualification for a conflict of interest. *Hanig*, 692 N.W.2d at 207-209. Furthermore, the dissent argued that the Council Member’s financial interest was de minimus, and that he would not have disqualified her based on this, but noted that the direct contact from her employer was a different matter and that this should have been the basis for disqualification. *Hanig*, 692 N.W.2d at 212-214.
27. *Hanig*, 692 N.W.2d at 210.
28. *Hanig*, 692 N.W.2d at 210.

29. *Hanig*, 692 N.W.2d at 211. The dissent argued that a second hearing was not necessary since every other Council member voted to deny the application, and that “[t]hose votes were for valid reasons...” *Hanig*, 692 N.W.2d at 214.
30. *Mitchell v. Town of Culpeper*, 2005 WL 1902870 (W.D.Va.).
31. *Mitchell*, 2005 WL 1902870 at \*2.
32. *Hantges v. City of Henderson*, 113 P.3d 848 (Nev. 2005).
33. *Hantges*, 113 P.3d at 851.
34. *Hantges*, 113 P.3d at 851.
35. *Hantges*, 113 P.3d at 851.
36. *Hantges*, 113 P.3d at 851.
37. *Hantges*, 113 P.3d at 852. The Court also noted that the Commission considered the Agreement multiple times without the influence of either member, and that “the two commission members were not involved in any negotiations, discussion, or planning involving the OPA or business between the Redevelopment Agency and Commerce.” *Hantges*, 113 P.3d at 852.
38. *Hantges*, 113 P.3d at 852. The Court specifically noted, “We do not reach the effect of a conflict of interest of a board member on a board that has final approval authority.” *Hantges*, 113 P.3d at 853.
39. *Hantges*, 113 P.3d at 852, 853.
40. *Lapp v. Village of Winnetka*, 359 Ill. App. 3d 152, 295 Ill. Dec. 777, 833 N.E.2d 983 (1st Dist. 2005), appeal denied, 217 Ill. 2d 566, 300 Ill. Dec. 367, 844 N.E.2d 39 (2005).
41. *Lapp*, 833 N.E.2d at 997.
42. *Lapp*, 833 N.E.2d at 997.
43. *Lapp*, 833 N.E.2d at 997. Although likely not relevant, the Court did note that the real estate broker donated \$7,000 of her \$12,000 commission to the Historical Society before the matter was voted on by the Village Council. *Lapp*, 833 N.E.2d at 997.
44. *Lapp*, 833 N.E.2d at 997.
45. *Ten Marietta Street, LLC v. Zoning Bd. of Appeals Town of Hamden*, 2005 WL 2856131 (Conn. Super. Ct. 2005).
46. *Ten Marietta Street, LLC*, 2005 WL 2856131 at \*7.
47. *Ten Marietta Street, LLC*, 2005 WL 2856131 at \*7. The Court further noted that they are “‘not required to review issues that have not been properly presented to [it] through an adequate brief....’” *Ten Marietta Street, LLC*, 2005 WL 2856131 at \*7.
48. *Ten Marietta Street, LLC*, 2005 WL 2856131 at \*8.
49. *Ten Marietta Street, LLC*, 2005 WL 2856131 at \*8.
50. *Laughter v. Board of County Com’rs for Sweetwater County*, 2005 WY 54, 110 P.3d 875 (Wyo. 2005).
51. *Laughter*, 110 P.3d at 891.
52. *Laughter*, 110 P.3d at 891.
53. *Laughter*, 110 P.3d at 891, citing Wyo. Stat. Ann. § 18-5-105(a) and Wyo. Stat. Ann. § 18-5-306(a)(vii).
54. *Laughter*, 110 P.3d at 891.
55. *Laughter*, 110 P.3d at 891.
56. *Laughter*, 110 P.3d at 891. The Court concluded, “In the absence of such showing, we will presume neither bad faith nor prejudice, and we have been directed to no evidence showing county conduct that ‘shocks the conscience.’” *Laughter*, 110 P.3d at 891.
57. *Sadler v. Town of West Hartford*, 2005 WL 1155106 (Conn. Super. Ct. 2005).
58. *Sadler*, 2005 WL 1155106 at \*8.
59. *Sadler*, 2005 WL 1155106 at \*8. The opinion notes that one council member stated that typically the Town administration would remain completely neutral, and that the Town manager told the commission that there were some unsettled issues, but suggested that the Commission may have to make a decision while there are still some points of disagreement. *Sadler*, 2005 WL 1155106 at \*8.
60. *Sadler*, 2005 WL 1155106 at \*9.
61. *Sadler*, 2005 WL 1155106 at \*9.
62. *Sadler*, 2005 WL 1155106 at \*9.
63. *Sadler*, 2005 WL 1155106 at \*10. The Court further commented that although the Mayor may have been in favor of the project, this did not prove any bias or predetermination on the part of the decision makers. *Sadler*, 2005 WL 1155106 at \*10.
64. *Brittingham v. Board of Adjustment of City of Rehoboth Beach*, 2005 WL 170690 (Del. Super. Ct. 2005).
65. *Brittingham*, 2005 WL 170690 at \*11-13.
66. *Brittingham*, 2005 WL 170690 at \*12.
67. *Brittingham*, 2005 WL 170690 at \*12. The Court said, “It is impossible to determine exactly what happened during the April Hearing. There was no transcript on the record from it. It was during that hearing that the Board allegedly asked the City Solicitor to write a brief in opposition to the Brittinghams’s position. In addition, it scolded him for the position he had earlier taken.” *Brittingham*, 2005 WL 170690 at \*12.
68. *Brittingham*, 2005 WL 170690 at \*13. The Court noted that in Delaware, “the Court does not have the freedom to remand the case in order to allow the Board to hold further hearings, to make specific fact findings or to reconstruct the record...Reversal would be the Court’s only option.” *Brittingham*, 2005 WL 170690 at \*13.
69. *Brittingham*, 2005 WL 170690 at \*13. The Court said that the Board “did not play fairly when it required the Brittinghams to return for a second hearing, under the guise of tying up procedural loose ends, only to pull the rug out from them and rehear the case in a third hearing. It failed to follow its own rules, and then penalized the Brittinghams for a procedural oversight that was equally its own. Such sleights of hand suggest the sort of impropriety that undermine the public’s faith in the integrity of the public process.” *Brittingham*, 2005 WL 170690 at \*13.
70. *Brittingham v. Board of Adjustment of the City of Rehoboth Beach*, 2005 WL 1653979 (Del. Super. 2005).
71. *Brittingham*, 2005 WL 1653979 at \*3.
72. *Brittingham*, 2005 WL 1653979 at \*3.
73. *Lackland and Lackland v. Readington Tp.*, 2005 WL 3072364 (N.J. Super. Ct. Law Div. 2005).
74. *Lackland*, 2005 WL 3072364 at \*2.
75. *Lackland*, 2005 WL 3072364 at \*2. In addition, the Court noted that it would “not preclude whatever rights she may have as a resident or taxpayer of Readington Township with respect to applications before the Board of Health or Planning Board.” *Lackland*, 2005 WL 3072364 at \*2.
76. *Committee to Save Guilford Shoreline, Inc. v. Guilford Planning and Zoning Com’n*, 2005 WL 1092362 (Conn. Super. Ct. 2005). The Plaintiffs alleged that “after the hearings closed, the commission improperly received hearsay information regarding the endangered species database and a copy of the standard lease.” *Committee to Save Guilford Shoreline, Inc.*, 2005 WL 1092362 at \*13.

77. *Committee to Save Guilford Shoreline, Inc.*, 2005 WL 1092362 at \*13.
78. *Committee to Save Guilford Shoreline, Inc.*, 2005 WL 1092362 at \*14.
79. *Committee to Save Guilford Shoreline, Inc.*, 2005 WL 1092362 at \*14.
80. *Committee to Save Guilford Shoreline, Inc.*, 2005 WL 1092362 at \*14.
81. *Committee to Save Guilford Shoreline, Inc.*, 2005 WL 1092362 at \*15. The Court noted that the government sustained their burden of rebutting the presumption of prejudice in this case because there was “no indication or suggestion that the commission, in forming its conclusions, considered and/or relied upon facts not already in the record of the administrative proceeding.” *Committee to Save Guilford Shoreline, Inc.*, 2005 WL 1092362 at \*15.
82. *Committee to Save Guilford Shoreline, Inc.*, 2005 WL 1092362 at \*15.
83. *Committee to Save Guilford Shoreline, Inc.*, 2005 WL 1092362 at \*15. The Court noted that while a commission of all lay members may not rely entirely upon personal observations alone, a commission must consider the entire record and commissioners may comment on issues during deliberations. *Committee to Save Guilford Shoreline, Inc.*, 2005 WL 1092362 at \*15.
84. *Boyce v. Williams*, 2005 WL 1875561 (Mich. Ct. App. 2005). The relevant statutory provisions were as follows: MCL 46.30a(1) stated “A member of the county board of commissioners of any county shall not be eligible to receive, or shall

not receive, an appointment from, or be employed by an officer, board, committee, or other authority of that county except as otherwise provided by law.” MCL 15.182 stated in part, “[e]xcept as provided in...[MCL 15.183], a public officer or public employee shall not hold 2 or more incompatible offices at the same time.” While MCL 15.183(4)(c) stated that MCL 15.182 does not limit the authority of certain localities to make appointments, MCL 15.183(6) provided that “[t]his section does not allow or sanction activity constituting conflict of interest prohibited by the constitution or laws of this state.”

85. *Boyce*, 2005 WL 187556 at \*8.
86. *Boyce*, 2005 WL 187556 at \*2.
87. *Boyce*, 2005 WL 187556 at \*5.
88. La. Atty. Gen. Op. No. 05-0010 (2005). In addition, L.R.S. 42:64(a)(1) permits local legislative bodies to appoint its members to “boards and commissions created by them and over which they exercise general powers...” and the historic preservation commission is such an entity.
89. La. Atty. Gen. Op. No. 05-0010 (2005).
90. La. Atty. Gen. Op. No. 05-248 (2005).
91. La. Atty. Gen. Op. No. 05-0236 (2005).
92. 2005 WL 2250214 (S.C.A.G.). The South Carolina Constitution provides in part that “no person may hold two offices of honor or profit at the same time....”
93. 2005 WL 2250214 at \*1-\*2.
94. Ala. Op. Atty. Gen. No. 2005-101, 2005 WL 1121869, at \*3 (Ala.A.G.).
95. Ala. Op. Atty. Gen. No. 2005-101, 2005 WL 1121869, at \*3 (Ala.A.G.).

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## **RECENT CASES**

### **Sixth Circuit Upholds Adult Business Licensing Provisions, But Finds Overbreadth in Definitions**

The Sixth Circuit rejected a facial challenge to adult business licensing provisions in the Tennessee Adult-Oriented Establishment Registration Act in *Odle v. Decatur County, Tenn.*, 421 F.3d 386 (6th Cir. 2005). The court found that the Act on its face provided for prompt judicial review of adverse licensing decisions and therefore satisfied the requirements of *City of Littleton, Colo. v. Z.J. Gifts D-4, L.L.C.*, 541 U.S. 774, 124 S. Ct. 2219, 159 L. Ed. 2d 84 (2004). The court also found that the Act, which provided a 120-day grace period for adult businesses seeking judicial review of adverse licensing decisions, satisfied the Littleton requirement of maintaining the status quo while judicial review is pending. The Sixth Circuit concluded that under *Littleton*, the Act was not an unconstitutional prior restraint.

However, the Sixth Circuit struck down a related ordinance enacted by Decatur County on the grounds

of overbreadth because the ordinance would have prohibited nudity or sexually suggestive content in performances that have not been shown to produce harmful secondary effects. The court rejected the remarkable argument that the ordinance could not be overbroad because “there are no theatrical, performance, or entertainment venues in Decatur County where serious literary or theatrical performances are reasonably likely to occur.” The court stated: “[W]e do not think the fact that Decatur County purportedly lacks, at the present time, venues likely to hold performances of literary or artistic value should affect our construction of the ordinance’s plain language.” 421 F.3d at 396.

### **Pennsylvania Court Examines Statutory Requirements Governing Subdivision Denial**

In *Kassouf v. Township of Scott*, 584 Pa. 219, 883 A.2d 463 (2005), the Supreme Court of Pennsylvania addressed “what is required of a municipality pursuant to Section 508 of the Municipalities Planning Code ... when it rejects a subdivision plan submitted by a developer.” The court concluded that the township

commissioners met the requirements of the MPC “by providing sufficient specificity for at least some of the sixteen reasons they gave for rejection of the plan.” 883 A.2d at 466.

Under the MPC, a subdivision denial must include (a) a specification of any defect in the application; (b) a description of the requirements in the applicable statute or ordinance which have not been met; and (c) a citation to the statutes or ordinances relied upon. These requirements are mandatory. The court held that the defects may be set forth in a document incorporated by reference, such as the engineer’s report, but that such incorporation must be done expressly. “If a municipality authority indeed intends for an external document to serve as the substantive explanation of the basis for its decision, it should make that point explicitly in the decision letter, and not ask the applicant, and the court system, to infer the point. Such a plain statement is a very simple task; and because the township commissioners did not make clear that such was their intention here, we must reject appellee’s incorporation by reference argument.” 833 A.2d at 473.

However, the court held that the commissioners’ written decision satisfied the MPC even without reference to the engineer’s report. It found that seven of the commissioners’ reasons met the three requirements stated above. It thoroughly rejected the argument that the denial was insufficient because it contained section numbers without identifying the particular ordinances at issue. Taking one example, the court stated:

Since the only topic addressed in this paragraph is grading, it is obvious that the citation is to the township’s grading ordinance. Any reasonably intelligent person can understand the nature of this finding, assess its accuracy and substantive legal sufficiency, and make a determination of whether to seek reconsideration or appeal. ... [T]he very nature of the township’s objection makes obvious which ordinance is at issue. ... [I]t beggars belief to suggest that appellant was simply clueless as to what the commissioners deemed deficient in his plan, and why. (833 A.2d at 474.)

Finally, the court held that the commissioners did not err or act in bad faith when they did not formally consider additional submissions made by the developer after a deadline set by the commissioners:

[I]t is apparent that appellant was given ample, multiple opportunities to correct the defects in his plan in time to meet the township commissioners’ ... deadline, but failed to do so. We agree with appellee that there is no existing basis in

law to suggest that a developer is entitled to infinite opportunities to address and remedy the defects in a subdivision plan. While reciprocal actions taken in good faith are required of the parties, a reciprocal good faith standard cannot simply eliminate the inherent discretionary powers of a municipality in this area. Appellant’s plan raised multiple issues related to non-compliance with ordinances, and appellant was made aware of these defects on a number of occasions ... That he failed to adequately address them all prior to the ... deadline does not establish bad faith on the part of the township in electing to act without granting him additional time to address the defects. ... Appellant failed to submit a conforming revised plan by the deadline set by the township commissioners after the township engineer had reviewed and commented upon several revisions of appellant’s plan. Given the history of appellant’s application, the township commissioners did not act in bad faith by failing to formally consider appellant’s additional and untimely submission. (833 A.2d at 476.)

## **Oregon Supreme Court Declares Measure 37 is Constitutional**

Measure 37 was approved by the voters in the 2004 General Election, requiring the government to either pay property owners when land use regulations reduced their property value or waive enforcement of the land use regulations. The circuit court concluded the Measure was unconstitutional, but the high court disagreed and decided that Measure 37 does not impose limitations on the government’s exercise of plenary power to regulate land use in Oregon. *MacPherson v. Department of Administrative Services*, 340 Or. 117, 130 P.3d 308 (2006). The trial court had concluded that Measure 37 required the government to “pay to govern” if it wished to enforce a particular land use regulation. However, “Measure 37 is an exercise of the plenary power,” the court stated, “not a limitation on it.” (130 P.3d at 315.)

Challengers to Measure 37 also argued that the initiative violated Article 1, section 20 (privileges and immunities guarantee) and Article 1, section 22 (suspension of laws) in the Oregon Constitution. The state supreme court disagreed. Furthermore, Measure 37 does not violate the procedural or substantive due process guaranteed in the Fourteenth Amendment to the U.S. Constitution. “Whether Measure 37 as a policy choice is wise or foolish, farsighted or blind, is beyond this court’s purview.” (130 P.3d at 302.)

## **Land Use Board of Appeals (LUBA) Erred When it Rejected the Oregon City Commission’s Interpretation of its Own Code**

In *Wal-Mart Stores, Inc. v. City of Oregon City*, 204 Or. App. 359, 129 P.3d 702 (2006), the Oregon Court of Appeals held that the Land Use Board of Appeals erred when it rejected the Oregon City Commission’s interpretation of its own code.

In 2003, the planning commission denied Wal-Mart’s site plan application for a 147,048-square foot discount retail store. On appeal, the city commission upheld the denial. A few months later, Wal-Mart submitted a new application with a revised parking plan. The company also modified the building design to incorporate more of a “main street” theme. The planning manager denied this second application, which was upheld by the city commission on appeal.

LUBA reversed the city commission’s denial because it concluded that it had improperly interpreted Oregon City Municipal Code §17.50.220, which prohibits further applications for similar proposals less than one year from denial of the initial application. The city commission had interpreted that provision as focusing on the “proposal” for development and not on a particular application. The commission believed that Wal-Mart’s second application was for the same proposal that had been denied a few months earlier, and the differences between the two applications were “largely cosmetic changes [that] do not change the ‘substance’ of the use proposed or the impacts of the use on the city.” LUBA rejected the commission’s reasoning. The Oregon Court of Appeals held that the commission’s interpretation of its code was consistent with the underlying policy which is to avoid multiple reviews of the same project. LUBA erred in rejecting the commission’s interpretation.

## **Remand was Proper when Town Failed to Timely File Property Description**

In *City of Bridgeport v. Plan and Zoning Com’n of Town of Fairfield*, 277 Conn. 268, 890 A.2d 540 (2006), the Connecticut Supreme Court remanded a rezoning action because the town failed to file a description of the property boundaries with the town clerk at least ten days before the public hearing.

The City of Bridgeport owns a 320-acre golf course in the Town of Fairfield currently zoned R-2 and R-3. Town officials wanted to rezone the property to the AAA residence zone which requires a minimum lot size of 87,120 square feet, much larger than R-2 and R-3 lot size requirements. The city objected to the rezoning and

argued that the town failed to comply with C.G.S.A. § 8-3(a), which requires a copy of the proposed boundary be filed in the office of the town clerk for public inspection at least ten days before the public hearing. Nevertheless, the town approved the rezoning.

The trial court dismissed the city’s appeals, concluding that the city had waived the claim because it failed to raise it before town officials at the public hearing. On plenary review, the state supreme court reversed. The notice that the town filed with the town clerk referenced the Tax Assessor’s Maps but did not describe the boundaries of the property. This was inadequate, the court concluded, because “mere reference to a map on file in the offices of a separate agency does not constitute adequate notice of the boundaries of the property affected by a proposed zone change.” (890 A.2d 547.)

## **Meeting Notice Posted on Website is Adequate**

In *Central Puget Sound Regional Transit Authority v. Miller*, 128 P.3d 588 (Wash. 2006), the Washington Supreme Court held that a regional transit authority provided adequate notice of public hearing to determine which site to use for a rail station.

Sound Transit wanted to build light rail as an alternative for commuters along the I-5 corridor. The legislature gave it the power to condemn private property and Washington law requires that such agencies develop procedures to give reasonable notice to the public of the public hearings to determine which properties will be needed for the project. Potential condemnees are not entitled to actual individualized notice. Sound Transit posted notice of its meeting times and agendas on its website, but it did not directly notify the media.

A property owner subject to condemnation for a rail station challenged the notice procedures. The Washington Supreme Court, en banc, held that the notice on the agency’s website was adequate and sufficiently specific. The court noted that precedent on this subject is sparse, but concluded that “posting on a public web site is at least as likely to provide the community with notice as the specifically approved notice given to a newspaper, and this was the method Sound Transit had used for years.” (125 P.3d 595.)

## **Douglas County, Nevada’s Sustainable Growth Initiative Survived Summary Judgment**

In *Sustainable Growth Initiative Committee v. Jumpers, LLC*, 128 P.3d 452 (Nev. 2006), reh’g pending,

(Feb. 24, 2006), the Nevada Supreme Court concluded the Sustainable Growth Initiative (SGI), which the voters of Douglas County, Nevada passed in November 2002, survived summary judgment.

The SGI puts a cap on development by limiting new dwelling units built in the county to 280 per year. The development community sought injunctive and declaratory relief, and its application for a temporary restraining order was granted. In February 2003, the trial court granted summary judgment in favor of the development community concluding, among other things, that the SGI was inconsistent with the Douglas County Master Plan and that a permanent injunction of the SGI was appropriate.

On de novo review, the Nevada Supreme Court reversed. The court concluded that the SGI is not inconsistent with the Master Plan as a matter of law. The court considered five purported inconsistencies – the building cap, conservation of natural resources, public facilities and fiscal responsibility, affordable housing, and transferable development rights and development agreement – and found the challengers had not met their summary judgment burden to demonstrate inconsistency as a matter of law. The court said it would not upset the will of the people by holding the SGI invalid and remanded. “Douglas County residents were concerned with maintaining, conserving, preserving and protecting their way of life and, as such, the majority of Douglas County residents voted to keep the rural character of their community.” (128 P.2d 466.)

### **Section 1983 Claims for Damages Related to Special Assessment were Properly Dismissed**

The Eighth Circuit held that §1983 claims against the city for damages related to special assessment were properly dismissed for failure to state a claim for which relief could be granted. *Creason v. City of Washington*, 435 F.3d 820 (8th Cir. 2006).

Three years after the Creasons purchased their property on Steutermann Road, the city imposed a special assessment against them and the other property owners at \$18.04 per lineal foot for improvements made to the road. The city offered the option of offsetting the assessment in exchange for an easement. The Creasons refused the offer, and the city condemned the easement and paid them \$6,780. The special assessment against the Creasons’ property amounted to \$5,258.

The Creasons challenged the special assessment in state court, and the city removed it to federal court.

The Creasons argued the special assessment created an unauthorized cloud and a lien on their title. They sought § 1983 damages, arguing that the special assessment violated their due process and their right to just compensation as well as the equal protection clause, the Uniform Relocation and Real Property Acquisition Policies Act (URA) 42 U.S.C. §§ 4601-4655, and Missouri law. The trial court dismissed their §1983 claims, and concluded the URA does not create a private right of action, and declined to exercise supplemental jurisdiction on their state law claims. The appellate court affirmed, concluding that, even if the special assessment constituted a taking, the Creasons did not allege that they did not receive just compensation. The court held that they also failed to allege they suffered any deprivation to support a procedural due process claim.

### **City of Lake Oswego’s Sign Code Survived Constitutional Challenge**

On de novo review, the Ninth Circuit affirmed the trial court and concluded that the sign code’s restriction on pole signs was narrowly tailored to address the City’s significant interests. *G.K. Ltd. Travel v. City of Lake Oswego*, 436 F.3d 1064 (9th Cir. 2006).

The city passed a sign code “to reduce visual blight and protect traffic and traveler safety.” When the business owner changed the copy on his 42.5 square-foot pole sign, it became a non-conforming sign. The new code prohibited such signs, and the owner was told to remove it. The business owner brought both facial and as applied constitutional challenges. The trial court granted summary judgment in the city’s favor, and the business owner appealed. Furthermore, applying the test from *Ward v. Rock Against Racism*, 491 U.S. 781, 109 S. Ct. 2746, 105 L. Ed. 2d 661 (1989), the court determined the city’s sign code is content neutral and the business owner’s facial challenges failed.

### **Oregon Supreme Court Declares State Sign Regulation Unconstitutional**

The Oregon Supreme Court reversed the Court of Appeals and held that the state’s billboard sign law violates Article I, section 8 of the state constitution in *Outdoor Media Dimensions, Inc. v. Department of Transp.*, 340 Or. 275, 2006 WL 726628 (2006).

The Oregon Motorist Information Act, [ORS 377.700 to 377.840 and 377.992 (1999)] (OMIA) was originally adopted in 1971 to implement the provisions of the federal Highway Beautification Act of 1965 [23 U.S.C.A. § 131] (HBA). The HBA requires each state to provide

“effective control” of outdoor advertising signs or risk losing federal highway funds. The OMIA distinguishes between on-premises signs and outdoor advertising signs, which are signs designed to advertise, inform or attract the attention of the public to goods, products, services, facilities or activities not located on the premises where the sign is located, often called off-premises signs. No permit or fee is required for signs erected on-premises, while a person erecting an off-premises sign must pay a fee and obtain a permit.

A billboard company challenged the OMIA and brought several federal and state constitutional claims. The Oregon Supreme Court rejected many of the claims, but focused on two: (1) whether the state may regulate highway signs by imposing content-neutral restrictions on them, including permit and fee requirements; and (2) whether the OMIA’s distinction between off-premises and on-premises signs violates Article I, section 8 of the Oregon Constitution. The court concluded that the permit and fee requirements are content neutral time, place, and manner restrictions that do not violate Article I, section 8.

Treating on-premises and off-premises signs differently and exempting the first, but not the second, from the OMIA’s permit and fee requirements, is “an impermissible restriction on the content of speech,” the court said, and noted the example of “a gas station visible from a highway may, without a permit, carry the message ‘Gas for Sale,’ but it may not carry the message ‘Eat at Joe’s: 10 Miles Ahead.’” The remedy, the court concluded, is to strike the permit and fee requirement for outdoor advertising signs, rather than declare the entire OMIA invalid.

## **Georgia Supreme Court Reverses Trial Court’s Grant of Writ of Mandamus for Landfill**

The Georgia Supreme Court concluded that the decision of the county board of commissioners to grant or deny a conditional use permit is a discretionary decision and a writ of mandate in favor of the applicant is only warranted if the board’s denial is a gross abuse of discretion. *Jackson County v. Earth Resources, Inc.*, 627 S.E.2d 569 (Ga. 2006).

Earth Resources Inc. sought a conditional use permit to build a construction and demolition landfill on 94.48 acres. The project was not consistent with the comprehensive land use plan, which called for mid-density residential uses. Opponents expressed concerns about truck traffic, the potential for groundwater contamination, and the negative effect on surrounding land values. Following two public hearings, the planning commission recommended denial; and the board of county commissioners denied the application following another public hearing.

The applicant sought and obtained a writ of mandamus, ordering the county commissioners to approve the permit because the applicant had “presented unrefuted expert testimony that it had met all criteria” for the permit. On discretionary appeal, the state’s highest court overturned the writ and held mandamus was only appropriate if the denial of the permit was a gross abuse of discretion. The court concluded that the facts before the board were more than merely “generalized fears,” and, contrary to the applicant’s assertions, the zoning ordinance did not require a permit issue as a matter of right if all criteria were met.

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