Managing Growth with Fairness: The Regulatory Takings Test of Smart Growth Policies

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Table of Contents

INTRODUCTION

Controlling or managing urban growth is fast becoming the primary concern for local government and has captured the interest of more than just our elected officials. Residents are also concerned with what many in urban and regional policy circles are referring to as urban sprawl; a fear that if metropolitan growth is left unchecked, quality of life will diminish and affect how and where people live. Of equal concern, however, are the ways in which communities are addressing this sort of development and most other forms of metropolitan growth. Properly managing development patterns in US metropolitan areas is quickly dominating land use policy discussions. *Smart growth* is the phrase most recognized in the struggle to balance development pressures with quality of life concerns held by residents in these areas. While government officials, developers, and residents accept the fact that growth issues need to be addressed, many are concerned that smart growth policies will impinge on the rights of private property owners, affecting a person's or entity's ability to use land to its fullest economic potential, however that potential is defined. Often, the identification of full economic potential *is* the issue–how do we define it?

What, then, do smart growth and growth management legislation have to do with the issue of takings? Broadly defined within the United States Constitution, a *taking* is seizure of private land by a public entity for which just compensation is required. More specifically, a regulatory taking results when a government regulation diminishes the value of private property in an unjust manner. Property rights advocates are concerned that smart growth initiatives and growth management legislation will become too restrictive, resulting in regulatory takings. However, the unfolding dialogue on smart growth and urban sprawl has provided communities with an unprecedented opportunity to explore new programs that balance private and public interests in innovative ways. The recent the US Supreme Court landmark decision, *Tahoe-Sierra Preservation Council Inc. v. Tahoe Regional Planning Agency*,[1] awarded what many are saying is much needed federal support for planning. In that decision the Court acknowledged that a regional planning agency could place temporary limits on development as long as the regulating body can demonstrate a sound and legitimate purpose. The case has further established the legal platform upon which the land use regulations that underlie smart growth strategies can be placed.

Historically, state and federal court interpretations of local land use regulations require that local land use laws meet certain standards of fairness. Accordingly, the concern with fairness to individuals should be incorporated into local efforts to protect the community and the environment in order to ensure sound land use regulations that protect and promote community quality of life. Consequently, the central issue in most regulatory takings claims is the fair distribution of private and public costs. Growth management regulations are intended to protect the public from excessive costs of cumulative private actions. Likewise, regulatory takings claims seek to protect private property owners from bearing more than their fair share of the

1 534 US 1063 (2002)

public costs. The apparent conflict is overstated, though, since the intended effect of many land use controls and growth management efforts is` to protect and increase the value of private property.

The argument is clear: the constitutional principle that limits government regulation of private property seems both right and important. Under the Fifth Amendment of the United States Constitution, private property is protected from seizure by the government without just compensation. On the other hand, local governments need to be able to protect public health and safety, community, and overall property values through land use controls in order to promote stable, healthy neighborhoods and communities. The challenge to government officials in crafting land use regulations is finding that appropriate balance between private interest and the greater public good.

Communities concerned about their future are utilizing growth management policies in their land use regulations to help direct where new growth should occur. These policies use various tools to achieve their objectives, including the transfer of development rights, temporary moratoria, inclusionary zoning, and impact fees, that are designed to work alongside the more traditional land use strategies like zoning and comprehensive plans. Growth management objectives typically direct new growth to areas where denser development is more acceptable given infrastructure capacity and community willingness to welcome the higher population density. The principle objectives of growth management are to reduce public expenditures on infrastructure construction and maintenance while placing limits on growth in areas that are culturally or environmentally less suitable.

This practice guide will offer an introduction to and review of current Federal and State takings law as it affects growth management and smart growth policy tools. Taking a case-by-case look at both takings and planning legislation, this guide will apply the regulatory takings test to the current growth situation and offer suggestions for developing land use policies that address both sprawl and regulatory fairness. Readers should keep in mind that state law governs most land use regulations, thus, this guide is best accompanied by an analysis of land use case laws specific to the reader's location. In the appendix of this document are reviews of land use cases for the 8 states in EPA Region 4 (Alabama, Florida, Georgia, Kentucky, Mississippi, North Carolina, South Carolina, and Tennessee). The guide is designed primarily for local governments including planners and other local development officials in EPA Region IV; planning commissioners and county officials will also find the material useful. Even readers with little familiarity with land use planning tools or takings law should find this guide useful and instructive, offering the facts behind the issues of property rights and planning conflicts as they have been represented in the press.

BACKGROUND ON REGULATORY TAKINGS

The Fifth Amendment of the United States Constitution states, in part, "…nor shall private property be taken for public use, without just compensation."[2] The clause establishes the relationship between the government and private property owners–literally interpreted; when the government physically takes private property, it must fairly compensate the property owner for the property seized. The primary way in which physical takings occur is through eminent domain or the act of physical government seizure of private property for legitimate public purpose. Governments are justified in such acts through the exercise of their police powers as a means for promoting overall health, safety, and welfare of the community.

The takings issue has evolved over time from actual physical seizures of private property to a question of whether governmental regulation of property can constitute a taking under the Fifth Amendment. The principle of regulatory taking was established by the US Supreme Court in 1922 when in the landmark decision establishing limits for land use regulations, *Pennsylvania Coal Co. v. Mahon*,[3] it held that, "…while property may be regulated to a certain extent, if a regulation goes too far, it [the regulation] will be recognized as a taking."[4] Local governments have the authority to regulate the use of land under the police power, but when property owners believe that a governmental body has over-regulated their property, they may bring a regulatory takings claim, seeking compensation.[5] Thus, governmental bodies must work to draft property regulations that promote public benefits while remaining sensitive to the concerns of the individual property owner.

Since establishing the concept of a regulatory taking, the Court has struggled to establish rules to analyze when a regulation "goes too far." In 1992, the US Supreme Court handed down a landmark decision in *Lucas v. South Carolina Coastal Council* that established a nexus test used to determine when legislation is considered a regulatory taking.[6] Two situations have been found to be categorical takings, that is, a taking in all instances:

1. When government regulation authorizes the permanent physical occupation of land;[7]

2. When the regulation denies an owner <u>all</u> economically beneficial use of the land in question.[8]

2 US Constitution amend. V.

3 260 US 393, 413 (1922)

4 *Pennsylvania Coal Co. v. Mahon*, 260 US 393, 413 (1922)

5 *Id.*

6 *Lucas v. South Carolina Coastal Council*, 505 US1003 (1992).

7 See *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 US419 (1982) for legal reasoning.

8 See *Lucas v. South Carolina Coastal Council*, 505 US1003 (1992) for legal reasoning.

The Regulatory Takings Test

If the regulation does not deny the owner all economically beneficial use of property, then the regulation is reviewed under a balancing test, which applies three factors:[9]

1. The character of the government action;
2. The economic impact of the action;
3. The extent of interference with investment-backed expectations.

In all instances, the regulation must substantially advance a legitimate state interest, a factor that allows courts to scrutinize the governmental purpose underlying the regulation. Legitimate state interests are found in the police powers that promote protection of the public welfare, health, environment, or safety.

APPLICATION OF TAKINGS TESTS TO PLANNING TOOLS

The application of takings tests to planning tools provides an important measure of balance for local communities seeking to approach land use regulations from a smart growth policy perspective. The key lessons for local governments that arise from takings decisions reinforce the elements that ought to guide good decisions. For the most part, local governments continue to have access to all of the tools that may assist communities in managing growth. Nonetheless, there are some important principles that have come out of takings decisions that local governments need to follow in the design and implementation of land use and other property-related regulations.

Transfer of Development Rights

Transfer of Development Rights (TDR) programs attempt to regulate growth by allowing landowners to sever development rights from a parcel of land, and then permitting the trading and transferring of those rights. Under such programs, landowners transfer unused development rights in protected areas to landowners in designated areas who may then use the transferred rights for more dense development in the area receiving the right. Under a TDR program, the owner of the transfer site purchases the unused development rights of the protected site from its owner. The owner of the protected site may also be given a right to develop elsewhere. Land uses protected through the use of TDRs have included agricultural lands, coastal and wetland areas, and historic sites.

TDR programs place restrictions on the development of the protected site. A takings claim may be avoided, though, because the owner of the protected site is compensated through the transfer of the development right for not developing the property. Regardless, the owner of the protected site may claim that when the value of the rights transferred is less than the value of the development rights at the original site, a taking has occurred. Courts recognize that land use

9 See *Penn Central Transportation Co. v. New York City*, 438 US 104 (1978) for legal reasoning.

regulations usually diminish the value of land. However, if the owner of the protected site is left with reasonable use of the land, the diminished value should not constitute a taking.

In *Gardner v. New Jersey Pinelands Commission*[10], the Supreme Court of New Jersey recognized that diminished value of land itself does not constitute a taking nor does impairment of the marketability of land. In this case, the Court found that the state's Pinelands Protection Act, which limited residential development in certain areas and provided for marketable development credits, did not constitute taking. A landowner whose farm was part of the pinelands region subject to protection under the statute sought compensation, arguing that the land-use restrictions resulted in an unlawful taking of the property since residential development was severely restricted on the land. The New Jersey Supreme Court found that the landowner retained viable and economically beneficial uses of the land since the owner was permitted to continue the use of the land as farmland. That those values do not equal the former maximum value of the land if it were less regulated or unregulated was not a factor in the decision, "for there exists no constitutional right to the most profitable use of property."[11]

An owner may also challenge a TDR as a taking because of the uncertainty of selling the right, arguing that the uncertainty impairs the value of the rights even before they are severed. In the State of New Jersey, a county government created a TDR program for the protection of agricultural lands, establishing a publicly funded TDR bank with the function of buying and selling rights when the market demand was low. County residents challenged the establishment of the TDR bank but the New Jersey State Court upheld the legitimacy of its existence.[12] The Court reasoned that establishing a bank provides a more predictable market for the TDR, protecting against impaired values and thus a takings challenge.

The US Supreme Court, in *Penn Central Transportation Co. v. City of New York*,[13] briefly addressed the issue of TDRs within the context of an historic preservation law being challenged by Penn Central as a taking. The law in question allowed development rights which could not be used in a preserved landmark–the Grand Central Terminal in Midtown Manhattan–to be transferred to a nearby site under the same ownership. The Supreme Court upheld the law since Penn Central was not denied all economic use of the site. The Court stated that the TDR mitigated whatever financial burden the preservation had imposed on the developer who was unable to develop an office tower above the terminal and that the TDR was to be taken into account when considering the impact of the landmark preservation law.[14]

Temporary Moratorium

Temporary moratoria are used by planners to preserve the status quo while formulating a more permanent development strategy. For example, a city may impose a moratorium on development in a district to study its ability to absorb growth, to make improvements in water and sewage

10 593 A.2d 251 (N.J. 1991)

11 *Gardner v. New Jersey Pinelands Commission*, 593 A.2d 251 (N.J. 1991)

12 *Matlock v. Board of Chosen Freeholders*, 466 A.2d 83 (N.J. 1983)

13 438 US104 (1978)

14 Id.

treatment systems, or to allow time to review plans for land adjacent to an interstate highway. These interim development controls are essential to preventing the hasty adoption of permanent controls. Temporary moratoria allow time for citizen involvement, public debate, and full consideration of all issues under review.

However, a landowner seeking to develop a property may argue that a temporary moratorium that prevents development of a property (however temporary) is a taking of the property for which the landowner should be compensated. The argument is that the landowner has been deprived of all economically viable use of the property for the time period of the moratorium. In the recent decision, *Tahoe-Sierra Preservation Council Inc. v. Tahoe Regional Planning Agency*,[15] the US Supreme Court refused to adopt a *per se* rule that temporary moratoria on development will in all cases effect takings that require compensation under the Fifth Amendment. The court acknowledges that an owner may be deprived of all economic use of property for the duration of the moratorium, but it also recognized that property values might continue to increase despite the limitations placed on development.

In the case in point, Lake Tahoe has been described as "uniquely beautiful," a lake with exceptional clarity attributable to the absence of algae. Increased development in the Lake Tahoe Basin has threatened the lake's clarity and unusual beauty. The Tahoe Regional Planning Agency imposed two moratoria on development in the Lake Tahoe Basin. As part of a Tahoe Regional Planning Compact, the Tahoe Regional Planning Agency prohibited new development in the area while it was in the process of adopting a land-use plan for the area. Hundreds of landowners who (prior to the Compact) had purchased property in the area for the purpose of constructing single-family homes brought a regulatory takings claim against the agency.

The Court declined to apply the *per se* test to the moratorium challenge, even if the moratorium deprives an owner of all economic use of property for its duration. Instead, it held that a multi-factor balancing approach applies to analyzing whether a temporary moratorium amounts to a taking. The duration of the moratorium on development is one of the important factors that a court must consider when applying a balancing test. A moratorium that lasts for more than one year will be viewed skeptically.

Although the Court did not list other factors to be analyzed, courts are likely to consider whether the moratorium advances a legitimate state interest. The governmental authority must demonstrate a need for the moratorium on development and show that its underlying planning purpose can be met.

Impact Fees and Exactions

As property tax bases shrink, impact fees and exactions are commonly used by local authorities to finance public facilities and infrastructures. Because a new development often generates the

15 534 US 1063 (2002)

need for expanded public facilities and infrastructure, conditions may be placed on the developer's approval for subdivision development. The conditions may be dedication of land for public use such as a park, construction of improvements such as roads, or the payment of impact fees to finance public infrastructure such as new schools or sewage treatment facilities. The idea behind impact fees and exactions is that development must pay for itself. In other words, the developer pays a proportionate share of the infrastructure costs caused by the new development. If the land dedication or impact fee is not specifically related to the need for new infrastructure serving the new development, the developer may claim that a regulatory taking has occurred.

When governmental exactions in the form of land dedications are challenged as takings, their validity is measured using a two-part test that evaluates the connection between the need created by the development and the condition imposed; the condition imposed must address the need created by the development. First, an essential *nexus* (or causal connection) must exist between the legitimate government interest and the exaction on which the government conditioned development. The municipality must clearly state the connection between the development and the public problem it seeks to alleviate by imposing an exaction. The second step is to determine whether the condition bears a "rough proportionality" to the burden created by the development. Under this second step, the municipality must perform a quantitative analysis demonstrating that the dedication is in proportion to the impact of the proposed development. At each step, the governmental body imposing the exaction is required to document the necessary connections.

The *nexus* requirement can best be understood by looking at the US Supreme Court case, *Dolan v. City of Tigard*,[16] which established the "rough proportionality" test. The landowner in that case applied for a permit to expand her plumbing and electric supply store and to pave a 39-space parking lot. The landowner's permit was conditioned by the city on, among other things, a dedication of land for a pedestrian/bicycle path. The city justified the dedication on the basis that the bike path would alleviate the impact of increased traffic caused by the expansion. When Dolan was denied a variance from the conditions imposed on her expansion, she challenged them as a taking.

In ruling on her takings claim, the Supreme Court found that reducing traffic congestion was a legitimate public purpose. The Court also found a connection between the creation of the bike path and reducing traffic control. However, the Court held that the city did not meet the burden of demonstrating that the additional vehicle and bicycle traffic congestion generated by the landowner's building expansion related to the condition of dedicating a bike path. The city failed to explain how the increased traffic caused by the expansion of Dolan's supply store would be diminished by a bike path. The city did not articulate an individualized and quantifiable relationship between the exaction and the problem it sought to rectify.

The law is less clear on whether the two-part test applies to impact fees–that is–when the city conditions development on the payment of monetary exactions rather than on the dedication of

16 514 US374 (1994)

land. The US Supreme Court in *City of Monterey v. Del Monte Dunes of Monterey, Ltd.*,[17] stated that it had not extended the rough-proportionality test of *Dolan* beyond land-use decisions conditioning approval of development on the dedication of property to public use. However, earlier state court decisions did apply the two-part test. The California Supreme Court in *Ehrlich v. City of Culver City*,[18] a case involving exactions to fund the placement of public art in lieu of placing art on the regulated parcel, applied the two-part test to certain types of impact fees. The Court made a distinction between impact fees imposed due to a general legislative act and those imposed on individual developers negotiating development approval. Because the latter is discretionary, the potential for abuse by the local government is increased and courts will give them heightened scrutiny. Other courts have also made the distinction between impact fees legislatively imposed and those individually negotiated. On the other hand, the Court of Appeals of Maryland declined in *Waters Landing Limited Partnership v. Montgomery County*,[19] to apply the *Dolan* "rough proportionality" test to legislatively imposed impact fees.

While the stricter, two-part *Dolan* analysis may apply only to exactions in the form of land dedications and other non-monetary payments, municipalities imposing impact fees must still be able to demonstrate a relationship between the purpose for the fee and the development project. The impact fees used to fund improvements, which benefit and serve the residents of the new development, not the general public, are most likely to meet the connection requirement needed to overcome a takings challenge. Furthermore, the fees should be imposed by legislation on all development, not imposed on an individual developer through the development negotiations process.

Inclusionary Zoning

In response to concerns that smart growth measures can lead to increased housing costs, a municipality may consider creating an inclusionary zoning program. Such programs require a developer to build a certain percentage of the units in the new development as housing affordable to low-to-moderate income persons. Under some programs, the set-aside applies only if federal or state subsidies are available; in other programs, developers are awarded a density bonus for providing affordable housing. Other provisions may include the alternatives of dedicating land for affordable housing, allowing it to be built off-site, or making cash payment in lieu of providing the housing. To maintain affordable housing units, inclusionary zoning programs may place controls on the resale price or may give the local government an option to purchase when the affordable housing unit is offered for sale.

Developers may challenge an inclusionary housing program as a regulatory taking, arguing that they are unable to receive a reasonable return on their investment since a certain percentage of units are sold at prices not fixed by the market. The diminished return, however, is not likely to be substantial enough to constitute a taking, as was demonstrated in the previous discussion of

17 526 US 68 (1999)

18 12 Ca. 4th 854 (1996)

19 650 A.2d. 712 (1994)

the *Penn Central* case. A community can establish other incentives such as density bonuses or development subsidies that can further offset any potential loss, establishing an even more appropriate balance of economic equity as outlined in the *Penn Central* case.

CRAFTING SOUND SMART GROWTH POLICIES

These key takings decisions offer good guidance for local governments, reinforcing elements that help craft sound smart growth policies. As demonstrated by the discussion of takings case law, local governments continue to possess the authority to assist communities in managing growth. Local government rules and regulations continue to receive considerable respect from the courts. As long as regulations are fair in both process and substance and reasonably connected to a legitimate public purpose, takings-based challenges are unlikely to be successful. Challenges to well designed, fair, and justified land use regulations are unlikely to meet with success. Also, when regulations have the effect of removing all use and economic benefit from a piece of private property, they may or may not be found to be regulatory takings. Additional considerations include whether or not the current property holder is the person from whom the rights of use were taken. The courts have been more reluctant, though, to protect local governments from takings claims when it has been determined that the challenged regulation provides a public benefit at an uneven private cost.

The Planning Process

The key to developing sound smart growth policies rests in the local planning process. Communities looking to proactively address growth concerns with an eye toward the future should focus on the following three planning elements:

1. Substantial Citizen Participation – If a community is to develop regulations that have the support of the people, they must include the people throughout the planning process. If a community can incorporate a wide range of citizen input, then those who might challenge a land use ordinance will find little basis for their takings claim as the regulation came about after careful and collective consideration of private costs.

2. A Comprehensive Plan – The comprehensive plan serves as a community's blueprint for the future. Should a regulation be challenged, the community can point to the comprehensive plan for justification for the regulation, as outlined by the plan.

3. A Standardized Development Review Process – As takings are likely to occur if a parcel is entirely undevelopable, the development review process should include ensuring that no parcels are created that cannot be developed under existing or likely regulations. A sound development review process will provide on-going examination of the impact that development will have on a community.

Managing Growth with Fairness
The Regulatory Takings Test

Regulations that result from a community-inclusive planning process, where a community has set out a clear direction for where it would like to grow, stand a far better chance of withstanding any takings challenges that might be brought.

Developing Sound Land Use Regulations

There are substantive and procedural elements that need to be considered when crafting smart growth regulations. A fair and just land use regulation must adhere to good practice for procedural due process. This means that regulation must include an opportunity for the appeal of particular situations. Thus, from a procedural standpoint, any smart growth regulation needs to incorporate the following elements:

1. The regulation must allow for review of individual cases. All local governments and agencies should include procedures for fast, inexpensive and effective review of individual cases where hardship exists.

2. The regulation must allow for state review and oversight. Certain agencies should have responsibility to review and grant relief for property owners subject to particular hardship through conflicting or compounding effects of the regulations of different agencies and governments.

3. The regulation must demonstrate its mandate. A regulation should make explicit reference to the law or statute from which the referenced authority was derived. Thus, the regulation should be applied in accordance with that law.

Further, a sound land use regulation needs several substantive elements in order to demonstrate that the public benefit exceeds the private costs and thus will not be applied in a manner inconsistent with individual property rights as they are protected under the US Constitution. Some specific substantive elements include the following:

1. It must be demonstrated that the regulation aligns with a public purpose. This can be accomplished and is best supported by a sound and community-inclusive comprehensive planning process that results in regular renewal of the comprehensive plan.

2. The regulation should outline anticipated outcomes. Where possible, regulations should allow for flexibility in achieving regulatory goals. This may allow individuals to meet the intent of the regulations at lower cost than more specific and process based regulations.

Further, a community needs to demonstrate the potential outcomes of a regulation in a manner that can be applied to the individual, as well as the community. Thus, economic analyses of regulations should articulate and include both the potential costs of regulations and their potential benefits to all parties involved. In addition to an overall assessment of benefits and costs to the community as a whole and landowners in aggregate, this analysis should include an assessment of the burdens on the landowners most heavily affected, where appropriate. There is an educational need to demonstrate fairness in growth management–thus–land use regulations can be seen as both *givings* and takings. If the regulation in question is designed to create a public benefit, then, perhaps, it could fund any costs borne unevenly through its financing provisions based on benefits that accrue unevenly. Such policy responses can go far in helping a community avoid takings challenges to their land use regulations.

Communities should keep the following guidelines in mind when crafting growth management and smart growth policies:

1. Communities have many growth management tools available to address the potential for sprawling development. Despite the fact that few takings claims result in successful awards, these tools must be used carefully and fairly. Regulations must be justified.

2. While the courts have been reluctant to fault land use regulations in most takings claims, communities must still address the problems of who is responsible, who is qualified to make a takings claim or enforce a regulation, and how difficult the regulation is to interpret and implement.

3. Communities need to demonstrate fairness in their growth management and smart growth policies – both takings and *givings* -- and should incorporate citizen input from the beginning of policy development.

This last aspect of takings law can be seen, in some contexts, as an opportunity to educate a cynical public about the dollar value of local regulations to their personal financial situation. It also provides a mechanism for financing any payments mandated by specific takings law in specific local situations.

Ultimately, the success or failure of any smart growth measure relies on the extent to which the local community is involved in the planning process. Community fears of government over-regulation of land become amplified when the public is not involved early on in the planning process. Ultimately, policy outcomes that result from active community input typically result in few takings challenges *and* the regulations serve the needs of the community.

APPENDIX – A State-by-State Review of Zoning and Takings Challenges

What follows is a state-by-state review of recent takings challenges and legislation for the eight states with the U.S. EPA Region IV. These state profiles will provide communities in USEPA's Region IV with legal interpretations of many different aspects of takings claims and should offer some foundation for the development of sound smart growth policies.

Alabama

The state of Alabama has a fairly well-defined statutory framework for establishing zoning agencies, enabling them to pass various ordinances, and creating the procedures for reviewing rezoning requests. The lack of challenges and appeals reaching beyond the trial court level underscores the effectiveness of this framework. There are, however, a few actions that require the attention of the appellate courts. Occasionally, these actions arise out of failures of zoning authorities to comply with the statutes. Others relate to non-conforming uses and the treatment of those uses by the zoning enforcement authorities. And finally, there are challenges to specific ordinances as being beyond the limits of the police power.

The most recent appeal to reach the Court of Civil Appeals of Alabama–*Speakman v. City of Cullman*[20]–involved an improper grant of a rezoning request. In *Speakman*, the city granted a rezoning request to change the use of property from residential to business, in order for the landowners to build a Wal-Mart. Adjoining property owners brought suit alleging that the city's grant of the request was fatally defective for two primary reasons. First, the plaintiffs argued that under the City of Cullman's zoning ordinance, a number of procedural requirements needed to be met. One such requirement called for the inclusion of a description of the use of each adjacent property, which the Wal-Mart developers admitted they failed to provide. The Alabama Supreme Court had previously addressed this issue in *Kennon & Assoc., Inc. v. Gentry*,[21] stating that, "…in this jurisdiction, we have insisted on strict compliance with procedural requirements contained in statutes and regulations adopted pursuant to the enabling statutes." The Court, in that decision, went so far as to rule that even absent any prejudicial effect on any person, failure to strictly comply with a procedural requirement was grounds to invalidate the ordinance.[22]

Second, the *Speakman* plaintiffs further argued that the Cullman Zoning Ordinance also required that, "…before taking such action as it may deem advisable, the City Council shall consider the Planning Commission's written recommendation on each proposed zoning amendment."[23] The planning commission was required to create and adopt a master development plan for the community and prior to the plan's adoption they "…shall make careful and comprehensive surveys and studies of present conditions and future growth of the municipality."[24] Due to the planning commission's failure to make a recommendation (in addition to the description in the

20 2002 WL 363589 (Ala.Civ.App. 2002)

21 492 So.2d 312, 317 (Ala. 1986)

22 *Id*. at 318

23 *Speakman* v. *City of Cullman*, 2002 WL 363589 at *2

24 *Id*

application and failure to publish the rezoning ordinance in its final form before it was adopted) the zoning amendment was invalid.[25]

A 1997 appeal, *City of Birmingham Planning Commission v. Johnson Realty Co.,*[26] also resulted in a reversal of a planning commission's decision on rezoning. In that appeal, the planning commission had denied the developer's request for rezoning but the decision was reversed when challenged in court, resulting in an approval of the plan, due to the Board's failure to comply strictly with the statutory requirements.[27] Alabama Code allows the formation of a subdivision committee, comprised of three to five members of the planning commission, to review and either approve or deny any subdivision plan submitted to the committee.[28] The statute further provides that if the developer is dissatisfied with the decision of the committee, the aggrieved party may appeal to the full planning commission. The planning commission will then review the decision of the committee and either affirm or render such judgment that, "…should have been rendered by such committee" within 45 days.[29] However, the Birmingham planning commission failed to comply with the 45-day requirement, and, according to the Court, Johnson was entitled to the relief being sought, a *writ of mandamus* ordering the Planning Commission to issue a certificate of approval of Johnson's subdivision request and plat.[30]

Nonconforming uses have created legal problems for Alabama planning commissions on a number of occasions. The Alabama Supreme Court has recognized a general disfavor toward nonconforming uses.[31] The court stated:

> "…The intention of zoning laws as regards a use of nonconforming property is to restrict rather than extend it...The whole purpose and spirit of the zoning ordinance would be defeated if an owner is permitted to substitute permanent brick walls for rotted exterior wall, put in new flooring in place of rotted flooring, put on a new roof and build a new addition, as this would extend or prolong indefinitely the life of the nonconforming building."[32]

Two fairly recent cases demonstrate how the Alabama courts view the role that zoning plays in ordering land uses.[33] In one of the cases, *City of Foley v. McCleod*, the nonconforming use was a mobile home park.[34] The court found that by removing old mobile homes only to be replaced by new, the McCleods had "…gone far beyond merely remodeling or repairing a nonconforming structure."[35] By completely replacing the existing units, the McCleods had effectively prolonged or expanded the useful life of the mobile home park. This expansion violated Section 6.2 of the

25 *Id*. at *4-5

26 688 So.2d 871 (Ala.Civ.App. 1997)

27 *Id*

28 Ala. Code § 11-52-32(d) (1975)

29 *Id*

30 *City of Birmingham Planning Commission v. Johnson Realty*, 688 So.2d at 872-873

31 *Board of Zoning Adjustment v. Boykin*, 92 So.2d 906 (Ala. 1957)

32 *Id*. at 909

33 See *City of Foley v. McCleod*, 709 So.2d 471 (Ala. 1998); *White's Excavation and Construction Co. v. Board of Zoning Adjustments of the City of Daphne, Ala*., 636 So.2d 422 (Ala.Civ.App. 1994)

34 709 So.2d 471

35 *Id*. at 473

City's zoning ordinance, which states that,"…non-conformities shall not be enlarged upon, expanded, nor be used as grounds for adding other structures or uses prohibited elsewhere in the same district."[36] The Court then held that the City may generally enforce the zoning ordinance to prevent the replacement of mobile homes.[37] However, the Court held that the City could not require the McCleods to remove the six new mobile homes just placed. The City had said nothing on previous occasions when mobile homes were removed and replaced. Additionally, the City's building inspector had been informed of their plan and had offered no objection. And finally, the City had failed to present the issue until the new mobile homes were fully installed and ready to rent. "The City's continued acquiescence amounted to a misrepresentation of a material fact, namely that it would not enforce the zoning ordinance to prevent the McLeods from replacing mobile homes at Green Acres."[38] Therefore, the six new mobile homes were allowed to stay. However, the Court stated that the McCleods were officially on notice that the ordinance would be enforced in the future.[39]

The second case, *White's Excavation and Construction v. Board of Zoning Adjustments of the City of Daphne, Ala.*,[40] addressed a non-conforming use and the application of the states grandfathering clause. The landowner was operating a heavy equipment business on property in a residentially zoned area. After a neighbor complained, the code enforcement officer informed White that the operation of his business was in violation of the zoning ordinance. However, White provided evidence that he had operated the business continuously before the adoption of the current zoning ordinance. Thus, the officer concluded that the business was covered by the state's grandfather clause. The Board of Zoning Appeals overrode the code officer's decision, ordering White to cease operation of his heavy equipment company in a residential area.[41] White appealed to the circuit court, but was granted summary judgment in favor of the city, prompting a second appeal.

On second appeal, the Court of Civil Appeals first looked to Section 7.9 of the ordinance, which established the grandfather clause. It states,

> "…any use of buildings or land existing on the date of adoption of this Ordinance and not in compliance with its provisions shall be allowed to continue as a non-conforming use." The ordinance further defines non-conforming use as "…a use of land existing lawfully at the time of the enactment of this Ordinance..."[42]

The Court focused its inquiry on whether White was lawfully operating a business prior to the passage of the current zoning ordinance. Though the business had been operating at the time the current ordinance was passed, the district had also been zoned residential under the previous

36 *McCleod*, 709 So.2d at 474

37 *Id*

38 *Id*. at 474-475

39 *Id*. at 475

40 636 So.2d 422

41 *Id*. at 422-423

42 *White's Excavation and Construction v. Board of Zoning Adjustments of the City of Daphne, Ala*., 636 So.2d at 423

ordinance and White failed to show that any special permission had been granted for operation of his business. Therefore, White's business was not "lawfully" operating at the time the ordinance was passed and the grandfather clause was not applicable.

One final case worth mentioning involved a takings challenge over a noxious weeds ordinance, *City of Montgomery v. Norman*.[43] The defendant, Ms. Norman, was convicted in the Montgomery Municipal Court of creating a public nuisance by having weeds over 12 inches high in her yard. She appealed on several issues, including a claim that the ordinance violated the due process clause and that enforcement of the ordinance amounted to a taking.[44] The Court stated that, "…An ordinance that declares as a nuisance and requires the abatement of weeds above a height certain is a reasonable exercise of the police power."[45] This follows a US Supreme Court decision that held, "…It is well settled that the state may legitimately exercise its police powers to advance aesthetic values."[46] Therefore, the City's weed ordinance, enacted in part for aesthetic purposes, was a valid exercise of its police powers.

Norman had further alleged that the enforcement of the weed ordinance resulted in an unconstitutional taking of her property. The Court held that because Norman had failed to make a showing of diminished economic viability of her property, no taking had occurred.[47] Additionally, even if a taking had been affected, the City was not required to pay compensation because the property taken was a nuisance. Eradicating a nuisance is a proper exercise of the police powers and compensation is not required.[48]

The *Norman* case provides a good illustration of the Alabama judiciary's views of the application of zoning regulations. Zoning enforcements must strictly comply with the statute requirements, not be applied in an arbitrary or capricious manner, and stay within the broad framework of police powers. The Alabama courts will support zoning board decisions made under these guidelines, thus it appears as though the state of Alabama provides a safe and predictable environment within which zoning authorities can work.

Georgia

Georgia courts, especially those sitting in and around the Atlanta metropolitan region, have had numerous opportunities to address zoning issues. Recent Georgia Supreme Court activity, however, have seen some of most of the predominant challenges to various zoning regulations to date. In the most recent of these, *Town of Tyrone v. Tyrone, LLC,*[49] a developer sued the town of Tyrone for refusing to rezone property. The property in question was given a conservation-

43 *City of Montgomery v. Norman*, 816 So.2d 72 (Ala.Crim.App. 1999)

44 *Id*

45 *Id*. at 79

46 *Members of the City Council of the City Los Angeles v. Taxpayers for Vincent*, 466 US789, 805 (1984)

47 *Norman*, 816 So.2d at 80

48 *Id*

49 565 S.E.2d 806 (Ga. 2002)

residential designation under the1992 comprehensive plan and zoned agricultural-residential. The developer requested the property be redesignated highway-commercial and rezoned commercial in order for the developer to continue with an option to purchase and develop the property into a multi purpose town square, offering to donate land to the city for the development of a set of new municipal buildings. The existing buildings were located in the historic section of the town. The town council denied the developer's request.

In the initial suit, the Fayette County Superior Court had declared the zoning unconstitutional and ordered the town to rezone the property. Upon appeal, the Georgia Supreme Court went straight to the point and declared that this was an improper use of judicial power stating,

> "…Courts have no power to zone or rezone property. Rather, the power to zone and rezone is vested in the county and city governing authorities."[50]

The Court further addressed the constitutional argument granting zoning powers to local governments. The Court stated,

> "…Local governments' zoning classifications of property are presumptively valid because the local governing body is the more appropriate one to shape and control the local environment according to the best interests of the locality and its citizens."[51]

The challenger to a zoning regulation has the burden of rebutting this presumption. The landowner must prove, by clear and convincing evidence, that the zoning regulation (1) causes the landowner a significant detriment, and (2) is not substantially related to the public health, safety, morality, and welfare.[52] The Georgia Supreme Court has described a balancing test between these two aspects in which the benefit to the public is weighed against the detriment to the individual.[53]

"Significant detriment" is shown through a valuation process such as a real estate market appraisal. However, the Court has almost completely excluded testimony regarding an *increase* in value, if the zoning were changed, as irrelevant arguing that the true question is not the increase in value under the desired zoning, but "whether the existing zoning classification is depriving the landowner of property without due process of law."[54] Although the zoning classification does not need to render the property worthless to meet the burden of the constitutional challenge, a mere showing that it will be difficult to develop under existing zoning or that an economic harm will occur without the property being rezoned will not suffice.[55]

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50 *Id*. at 808

51 *Tyrone*, 565 S.E.2d at 809

52 *Tyrone*, 565 S.E.2d at 809; *City of Atlanta v. Tap Associates*, 544 S.E.2d 433, 435 (Ga. 2001)

53 *Jervey v. City of Marietta*, 559 S.E.2d 457, 459 (Ga. 2002)

54 *Tyrone*, 565 S.E.2d at 809

55 *Id*. at 810

Other cases have looked more closely at the actual valuation process and the effects of proposed and likely zoning changes on property values for compensation where property has been subjected to a taking under the Constitution.[56] These cases have been very case and fact specific and have required the extensive use of expert testimony.

The Court addressed the public benefit aspect in an earlier case, *City of Atlanta v. Tap Associates*, also involving a landowner/developer who had submitted a request for rezoning that had been denied.[57] In the case the Court stated that, in all rezoning cases, the question is "whether the city's choice of a zoning classification bears a substantial relationship to the public interest."[58] In *Atlanta*, the developer requested a change from residential to mixed-use zoning. The Court found that the city's goal of preserving single-family homes in the city was in the public interest.

Ordinances requiring removal of billboards have generated a significant number of unconstitutional challenges throughout the state.[59] A number of local governments have enacted zoning ordinance placing strict conditions on billboard locations, appearance, and size. Additionally, many of these ordinances require removal of existing billboards, without a built-in compensation provision. The Courts have consistently struck down these ordinances as unconstitutional because they fail to contemplate compensation for this *per se* taking.

Georgia also has a well-defined procedure for bringing constitutional challenges. A challenger must give notice to the local zoning authority before a challenge may be brought in Superior Court. While a relaxed standard of notice applies when raising the initial inquiry before the zoning board, the requirement may not be bypassed. Following adjudication by the superior court, an application to appeal must be filed. A direct appeal is improper and only a discretionary grant of the application will allow the challenger to appeal to the highest court. The Court has twice reiterated this procedure in recent challenges before it.[60]

While the Georgia courts seem rife with challenges to local zoning ordinances and zoning authority decisions, the courts are generally pro-zoning. The zoning board always begins with a presumptively valid ordinance. The challenger must overcome this presumption by clear and convincing evidence. The courts are strict in their valuations of property and do not allow any speculative factors that affect the property value. Additionally, the Court appears simply to defer to the governments' explanations of public benefit if even possibly related to the police powers. The few disputes that fall to the challenger are the result of poorly drafted regulations that need amending.

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56 See generally *Georgia Transmission Corporation v. Barron*, 566 S.E.2d 363 (Ga. App. 2002); *Unified Government of Athens-Clark County v. Watson*, 564 S.E.2d 453 (Ga. App. 2002)

57 *Atlanta*, 544 S.E.2d 433

58 *Id.* at 436

59 See *Outdoor Systems, Inc. v. Cobb County*, 555 S.E.2d 689 (Ga. 2001*); City of Roswell v. Outdoor Systems, Inc.*, 549 S.E.2d 90 (Ga. 2001); *State v. Hartrampf*, 544 S.E.2d 130 (Ga. 2001)

60 *Powell v. City of Snellville*, 563 S.E.2d 860 (Ga. 2002); *Outdoor Systems*, 555 S.E.2d 689

Florida

To the benefit of planners, the Florida Courts have ruled on a large number of takings challenges. This is advantageous to future planning strategies as well as future challenges because the law is now well-established and outcomes are highly predictable. Predictability is one of the greatest tools for a litigator or planning agency when confronted with a challenge, or with actions that may provoke a challenge. Most potential arguments and situations that have come before the Florida courts have been subjected to considerable analysis, and decisions rendered have built upon these and US Supreme Court precedents.

The majority of disputes are "regulatory takings" claims stemming from either denial of zoning changes and permits or delays in granting of permits. The most recent of these arose from a temporary moratorium on development in a portion of Leon County, in which the Court drew approvingly from the Ninth Circuit's decision in *Tahoe-Sierra Preservation Counsel v. Tahoe Regional Planning Agency*[61] that was subsequently affirmed by the US Supreme Court. In the state of Florida, the recent court case, *Bradford Phipps Ltd. Partnership v. Leon County*, Bradford challenged an court injunction prohibiting the County "from issuing any future building permits or other development permits until such time as the County comes into compliance with...the land use element of the Tallahassee/Leon County Comprehensive Plan.[62]" The sections at issue dealt with the development and implementation of a storm water plan for the Bradford Study Area (BSA). The moratorium was originally slated for seven months, but eventually lasted twenty-two months.

The Circuit Court found that the landowners purchased the property with knowledge of the "highly restrictive land use" regulations that existed in Leon County and that the interim ordinance was not reasonably unexpected.[63] The Court also found that the ordinance was temporary in nature, that Bradford Phipps had failed to obtain a final authoritative determination, and that it would have made the most economic sense to wait out the injunction and then proceed with its development plans.[64] The Florida Appellate Court then analyzed the challenge under the factors set out in *Lucas v. South Carolina Coastal Commission*.[65] In *Lucas*, the Supreme Court stated that, "...when the owner of real property has been called upon to sacrifice all economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking."[66] Thus, the Florida Court determined that a taking had not occurred since Bradford Phipps had failed to demonstrate that he was deprived of all economically beneficial use of the property.

The Florida Supreme Court previously acknowledged in *Tampa-Hillsborough County Expressway Auth. v. A.G.W.S. Corp*. that a temporary deprivation may constitute a taking.[67]

61 216 F.3d 764 (9th Cir. 2000)

62 *Bradford Phipps Limited Partnership v. Leon County*, 804 So.2d 464 (Fla.App. 2001), r'hrg denied 2002 at 465-466.

63 *Bradford Phipps*, 804 So.2d at 468

64 *Id*.

65 505 US1003 (1992)

66 *Id*. at 1019

67 *Tampa-Hillsborough County Expressway Auth. v. A.G.W.S. Corp.*, 640 So.2d 54 (Fla. 1994)

However, the *Lucas* Court went on to state that the situations where the government deprives an owner of all economically beneficial use are relatively rare.[68]

The Florida Supreme Court further quoted approvingly from the *Tahoe-Sierra* decision regarding temporary moratoria in a previous case, *Bradford. Keshbro, Inc. v. City of Miami,* relied upon by the Court of Appeals.[69] The relevant section states:

> "In several ways, temporary development moratoria promote effective planning. First, by preserving the status quo during the planning process, temporary moratoria ensure that a community's problems are not exacerbated during the time it takes to formulate a regulatory scheme. Relatedly, temporary moratoria prevent developers and landowners from racing to carry out development that is destructive of the community's interests before a new plan goes into effect...Finally, the breathing room provided by a temporary moratoria helps to ensure that the planning process is responsive to the property owners and citizens who will be affected by the resulting land-use regulations."[70]

Like the situation in *Tahoe-Sierra*, the injunction in *Bradford Keshbro* was designed to suspend development only until a storm water plan could be developed. The Court noted, "...it can hardly be said that a moratorium that was temporary from the outset destroys the economic value of the property."[71] It then went on the state that, "...a truly temporary land use injunction or moratorium looks more like a permitting delay than a compensable regulatory taking."[72]

Many of the factors relied upon in *Bradford Keshbro*, had also been explored in prior regulatory takings challenges in Florida. The most commonly used, and most difficult for property owners to prove, is the "deprivation of all economically beneficial use" from the *Lucas* decision in South Carolina. One reason for this difficulty is that not only must the landowner demonstrate that all economically beneficial use has been removed; the landowner must also show a reasonable investment-backed interest in the property.

In the case *State of Florida, Department of Environmental Protection v. Burgess*, the landowner had purchased 160 acres of undeveloped wetlands on the Choctawhatchee River in 1956, for $500. In 1992, he applied for a dredge and fill permit in order to build a 1000 square foot wooden dock, boardwalk, and A-frame camping shelter. The permit was denied and Burgess brought an inverse condemnation claim.[73] The Court reiterated the US Supreme Court's statements in *Lucas* that a regulatory taking occurs only in those rare situations where a regulation causes an owner "to sacrifice all economically beneficial uses" or "productive options" for the land's use.[74] Referencing a previous case, *McNulty v. Town of Indialantic*, the

68 *Lucas*, 505 USat 1018

69 801 So.2d 864 (Fla. 2001)

70 *Id*. (quoting *Tahoe-Sierra*, 216 F.3d at 777)

71 *Bradford Phipps*, 804 So.2d at 471.

72 *Id*.

73 See *State of Florida, Department of Environmental Protection v. Burgess*, 772 So.2d 540 (Fla.App. 2000) at 541.

74 *Id*. at 542.

Florida court stated, "economically viable use should not be read to assure an owner will be able to use the property to earn a profit to produce income. Rather, it assures an owner will be able to make some use of property that economically can be executed."[75]

Burgess alleged that he bought the land as an investment and for recreational use. The Court found that because the land remains "eminently suitable" for the stated purpose to which use the land has been put for over 30 years, the landowner has in no respect been deprived of "all economically beneficial use."[76]

The reasoning behind this finding suggests that to establish a compensable regulatory taking, the landowner is required to show that the "permit denial interfered with his reasonable, distinct, investment-backed expectations, held at the time he purchased the property."[77] Thus, a regulatory taking occurs only when there is a near-total elimination of an owner's property rights. Not included in these rights is a landowner's ability to gain a profit from an investment in land.[78] Burgess' expectation at the time of purchase was to use the land for recreational purposes, for which the land has been used and could still be used. This expectation had not been thwarted in any way by the denial of the dredge and fill permit. Consequently, no taking had occurred.

Another key element to the "total deprivation of all economically beneficial use" inquiry is the "whole parcel" approach. This was addressed in an inverse condemnation claim involving restrictive land use ordinances on an island and whether the land uses could be severed, for takings purposes, from a supportive mainland parcel. In *Town of Jupiter v. Alexander*, the property owner purchased, in a single transaction, a section of land on the mainland and an island adjacent to that parcel. Takings jurisprudence indicates that the "whole parcel" should be considered. In this case, the property consisted of two parcels separated by a body of water. Regardless, the court held that the "two parcels should be considered part of a single tract for purposes of a takings analysis."[79] The claim for inverse condemnation was brought after two years of applications and denials for development of the island parcel before a plan was approved. While the court held that this was a "normal delay" in land use planning, it proceeded to evaluate the claim under the deprivation of all economic benefit analysis through application of the "whole parcel" approach.[80]
The focus of the Court's inquiry was on whether the island and mainland parcels should be considered as one for purposes of a takings analysis. If the two parcels were considered as one whole, then no taking had occurred because Alexander could have developed the mainland parcel at any time.[81] A number of predominant factors were used to determine the treatment.

75 *McNulty v. Town of Indialantic*, 727 F.Supp. 604 (M.D.Fla. 1989)

76 *Burgess*, 772 So.2d at 543.

77 *Burgess*, 772 So.2d at 543.

78 *Id*. at 544.

79 *Town of Jupiter v. Alexander*, 747 So.2d 395 (Fla.App. 1998) at 397.

80 *Id*. at 399.

81 *Alexander*, 747 So.2d at 399

First, while the tracts were separated by a body of water, they could constitute a single tract if put to a single, integrated use.[82] Here, the mainland development would provide support to the island development. Second, the court had to consider unity of ownership.[83] Again, a single owner purchased the two parcels under a single contract. Finally, the unity of use, which is often gleaned from the intent of the owner, had to be evaluated.[84] The Court found that there was not only integrated use, but the island development also required mainland support. It stated, "Although the zoning differed on the two parcels, the highest and best use of the island parcel could be achieved only through use of the mainland parcel as support."[85] Accordingly, the Court held that the two parcels constituted a single tract for the takings analysis and, under the "whole parcel" theory, the landowner had not been deprived of "all economically beneficial use." Thus, no taking had occurred.

A useful tool, but one that requires careful use, is the designation of blighted property and subsequent use of a government's powers of eminent domain. This is a tool where sections of a city that have fallen into disrepair are purchased by the municipality and redeveloped. Florida Courts recently addressed the use of this planning option when a property owner whose land was within a designated "blighted" area challenged the taking of his property.

In *Rukab v. City of Jacksonville Beach*,[86] the Court addressed the requirements for a blight designation and the subsequent imposition of the powers of eminent domain. Eminent domain, as outlined in the Constitution, cannot be employed to take private property for a predominantly private purpose; it is a mechanism with which to take private property for a necessary public use.[87] Under the Community Redevelopment Act, the Florida Legislature had authorized counties and municipalities to "exercise broad powers to rehabilitate, clear, and redevelop slum and blighted areas."[88] The Florida Supreme Court has held that a strict construction must be given against the agency asserting the powers of eminent domain and that "the burden is on the condemning authority to establish a public purpose and reasonable necessity for the taking."[89] Once a reasonable necessity is shown, "the exercise of the condemning authority's discretion should not be disturbed in the absence of illegality, bad faith or gross abuse of discretion."[90] The *Rukab* Court found that the only public purpose supporting the taking was the designation of blight over the entire area, citing from an earlier case, that although a city "may designate an area as a slum...such a designation does not make it a slum."[91] Therefore, a property owner wishing to challenge the designation must be afforded the opportunity for a full hearing in the eminent

82 *Id*. at 401.

83 *Id*

84 *Id*.

85 *Id*.

86 *Rukab*, 811 So.2d 727 (Fla.App. 2002)

87 USConst. Art. 10, § 6.

88 *Rukab*, 811 So.2d at 729.

89 See *Baycol, Inc. v. Downtown Dev. Auth. of the City of Fort Lauderdale*, 315 So.2d 451, 455 (Fla. 1975) for further legal reasoning.

90 See *City of Jacksonville v. Griffin*, 346 So.2d 988, 990 (Fla. 1977) for further legal reasoning.

91 *Id*. (quoting *City of Jacksonville v. Moman*, 290 So.2d 105, 107 (Fla.App. 1974)).

domain action, in which the condemning agency must meet the burden of showing public purpose and necessity.[92]

A final item of which to be aware when rendering planning and zoning decisions is Florida's "Sunshine Law."[93] The Sunshine Law was enacted to "protect the public from 'closed door' politics and, as such, the law must be broadly construed to affect its remedial and protective purpose."[94] When a citizens group objected to a proposed plan at a community zoning commission hearing, they were informed that the meeting was not a "public hearing" subject to Florida's Sunshine Law. The Board reasoned that they were merely carrying out normal staff functions and so were not subject to the law. The Court countered, "…when public officials delegate their fact-finding duties and decision-making authority to a committee of staff members, those individuals no longer function as staff members but stand in the shoes of such public officials insofar as application of Government in Sunshine Law is concerned." Because the authority of final project approval had been delegated to the commission by county ordinance, committee members function as public officials.[95] Therefore, municipal and county planning and zoning committees are subject to Florida's Sunshine Law and so must be open to the public.

As stated at the outset, relatively accurate predictions are possible when takings challenges are brought before the Florida Courts. This not only gives planners an advantage when addressing a challenge, but also should aid them in avoiding the challenge in the first place. Regulatory takings have been fully explored and the established precedent should discourage the majority of claims under this theory. However, as evidenced by the blight designations, thorough fact-finding, analysis, and subsequent conclusions based upon them are key to prevailing in, and potentially avoiding, any takings claim. Additionally, full and strict compliance with ordinances and public notice and hearing requirements is essential. Planning agencies in Florida have a distinct advantage, and should utilize this advantage to its fullest potential.

92 *Id*. at 733.

93 Fla. Stat. §§ 286.001-.30 (2000).

94 See *Wood v. Marston*, 442 So.2d 934, 938 (Fla. 1983) for further legal interpretation of the Sunshine law.

95 *Evergreen the Tree Treasurers of Charlotte County, Inc. v. Charlotte County Board of County Commissioners*, 810 So.2d 526, 528, 531-532 (Fla.App. 2002).

Kentucky

As in many areas of the law in the Commonwealth of Kentucky, very little common law exists regarding zoning and takings challenges. Those recent published cases that do exist have on been heard at the Court of Appeals level, and older cases offer little to predict outcomes of current and future takings challenges. This complicates the land use decision-making process by injecting a degree of uncertainty, yet the cases that do exist offer hints of trends in future court decisions. The four cases that follow highlight these possibilities and should aid in local comprehensive planning efforts and rezoning decisions.

Chapter 100 of the Kentucky Revised Statutes (KRS) outlines the procedures and guidelines for planning agencies and zoning authorities. One requirement of the statue is that a planning commission must prepare a comprehensive plan intended to guide future public and private development.[96] The statutes set out a number of elements to be considered by the planning commission when formulating and adopting the plan.[97] And, all zoning and rezoning should follow that comprehensive plan.[98] KRS 100.213 requires that for a rezoning request to be granted, the planning commission must find that "…the request is either in agreement with the comprehensive plan or that the existing zoning classification is inappropriate and that the proposed zoning classification is appropriate; or that there have been major changes of an economic, physical, or social nature in the area which were not anticipated in the current comprehensive plan and which substantially alter the character of the area."[99]

In *Fritz v. Lexington-Fayette Urban County Government*, the Court reviewed a denial of a property owners' and developer's request for rezoning of land from R-1C (single family residential) to B-6P (planned shopping center). The Planning Commission, following a public hearing, denied the rezoning request because it did not comply with the comprehensive plan of the Lexington-Fayette Urban County Government.[100] The landowners appealed but the Lexington-Fayette Urban County Government, in a *de novo* review, also unanimously denied the request.

The Kentucky Supreme Court has held that when a planning commission denies a zoning request, it is the burden of the proponent of the change to show that the decision was arbitrary. A decision is arbitrary if "…no rational connection exists between that action and the purpose for which the [legislative] body's power to act exists."[101] In addition, the proponent must show that the requested zoning classification is appropriate.[102] When reviewing zoning decisions, the court is limited in its review to whether the decision was arbitrary; and by "…arbitrary we mean

96 Kentucky Revised Statute 100.193.

97 Kentucky Revised Statute 100.187.

98 Kentucky Revised Statute 100.201 and Kentucky Revised Statute 100.213(1)(a) and (b)

99 See *Fritz v. Lexington-Fayette Urban County Government*, 986 S.W.2d 456, 458 (Ky.App. 1998) for more legal interpretation of the statute.

100 986 S.W.2d 456 - 457.

101 *City of Louisville v. McDonald*, 470 S.W.2d 173 (Ky. 1971).

102 Kentucky Revised Statute 100.213.

clearly erroneous and by clearly erroneous we mean unsupported by substantial evidence."[103] In following these guidelines, the *Fritz* court found that even though the existing R-1C zoning classification may have been inappropriate, there was no finding that the comprehensive plan's recommended high-density residential zoning classification was also inappropriate and so it upheld that the denial was not arbitrary.[104]

A comprehensive plan looks beyond current land uses to future land uses and is constantly undergoing review and modification. Zoning changes are proper if they are either in accord with the plan or "…if the plan is out of touch with reality and there is a compelling need for the proposed change."[105] The KRS 100 planning statute thus requires timely updates to the comprehensive plan. It specifically requires review and updates at least every five years for "social, economic, technical, and physical advancements or changes."[106] The landowners in *Fritz* cited this section and strict compliance as grounds for overruling the denial of their request, because the required update had not been performed.[107] However, the statute addresses this situation, stating:

> "...If the review is not performed, any property owner in the planning unit may file suit in the Circuit Court. If the Circuit Court finds that the review has not been performed, it shall order the planning commission, or the legislative body in the case of the statement of goals and objectives element, to perform the review, and it may set a schedule or deadline of not less than nine (9) months for the completion of the review. No comprehensive plan shall be declared invalid by the Circuit Court unless the planning commission fails to perform the review according to the court's schedule or deadline. The procedure set forth in this section shall be the exclusive remedy for failure to perform the review."[108]

Therefore the planning commission was required to update the comprehensive plan, but the denial was upheld.[109]

Standing in stark contrast to the Court's ruling in *Fritz* is a previous Court decision just nine months prior, *21st Century Development Co. v. Watts*. In that case the planning commission granted a zoning request from low density rural residential (RR) to a much higher density single family residential (RS). Watts, a neighboring landowner, appealed the decision of the planning commission. At the public hearing, the planning commission staff, Mr. Watts, and other interested parties had testified as to the negative impacts of the proposed zoning change. Regardless, the chair of the planning commission ruled "…that these factors could not be

103 *Danville-Boyle County Planning and Zoning Commission v. Prall*, 840 S.W.2d 205, 208 (Ky. 1992).

104 986 S.W.2d at 459.

105 See *Fritz*, 986 S.W.2d at 459 for legal reasoning on this point.

106 Kentucky Revised Statute 100.197.

107 *Fritz*, 986 S.W.2d at 459.

108 Kentucky Revised Statute 100.197(2).

109 *Fritz*, 986 S.W.2d at 460.

considered in the planning commission's deliberations and that the commission was limited to considering solely whether or not the proposal was in conformance with the comprehensive plan, which it was." Therefore, the request was granted.[110]

The Court held that, as a matter of law, the rezoning request amending the plan was invalid because the planning commission erred in excluding relevant evidence, specifically testimony from qualified individuals -- "…when it narrowed its decision to depending solely on whether or not the requested zoning map amendment was in accordance with the recommended land use element of the comprehensive plan."[111] The Kentucky Supreme Court has compared a zoning request hearing to a trial "for the purpose of determining the adjudicative facts necessary to decide whether or not to grant the zone change."[112] Given that recognition, the evidence should have been considered. Additionally, the Circuit Court and the Court of Appeals concurred that the planning commission is not bound to rezone "…solely because a request is in accordance with a comprehensive plan or its recommended land use element."[113] When viewed together, the holdings of *Fritz* and *21st Century Development* appear to say that the lack of conformity with the comprehensive plan is appropriate grounds for a denial, but accordance with the plan in itself is not adequate for an automatic grant of a rezoning request. A prudent planning commission would, therefore, allow and consider all relevant evidence in every case and render a decision based on all facts before it.

The most recent dispute to come before the Court of Appeals involves an often-used practice of zoning authorities to restrict, to some degree, the location of certain types of businesses.[114] In the case, *Peter Garrett Gunsmith, Inc. v. City of Dayton*, city ordinances in both the City of Dayton and the City of Bellevue prohibited the location of gun shops within specific zoning districts where the business owner proposed to locate, but did not prohibit their operation in other districts. Peter Garrett Gunsmith, Inc., alleged that a taking had occurred and that the zoning ordinance was invalid because the ordinance was in contravention of a state statute. Since both challenges hinged on whether the ordinance directly conflicted with KRS 65.870, the Court heard both cases simultaneously.[115]

The state statute that was the basis of Peter Garrett's appeal addresses firearms regulation. It specifically states "…no city, county or urban-county government may occupy any part of the field of regulation of the transfer, ownership, possession, carrying or transportation of firearms, ammunition, or components of firearms or combination thereof."[116] The Court held that "…the plain meaning of the language of KRS 65.870 does not restrict a municipality's ability to enact

110 958 S.W.2d 25 (Ky.App. 1997) at 26.

111 *21st Century Development*, 958 S.W.2d at 27.

112 *Id.* (citing *Kaelin v. City of Louisville*, 643 S.W.2d 590 (Ky. 1982)).

113 *Id.*

114 *Peter Garrett Gunsmith, Inc. v. City of Dayton*, 2002 WL 1728621 (Ky.App. 2002) (This case has not yet been released for citation as authority.).

115 *Id.*

116 Kentucky Revised Statute 65.870.

zoning ordinances which affect the location of a business engaging in these activities…one still has the right to convey firearms, own firearms, possess firearms, carry firearms and transport firearms in the Cities of Bellevue and Dayton."[117] The court noted that the statute was very specific on what could not be regulated and regulation of business locations was conspicuously absent from the list.

Drawing from KRS 82.082(2), the Court stated that "…a city's power to enact zoning regulations is only limited to the extent legislation specifically prohibits it, to the extent that it will conflict with a statute or constitutional provision, to the extent a comprehensive scheme of legislation on the same subject matter exists, or to the extent it is unreasonable, arbitrary, or oppressive."[118] Because the provisions of KRS 65.870 do not specifically limit the powers of the city to enact zoning regulations, the ordinances are valid. The ordinances being appealed do not represent a municipality's attempt to regulate firearms. They represent regulations in the field of land use, a field specifically authorized to the cities under KRS 100.201-.214.[119] The Court also remarked that, without the power to control the location of certain businesses, cities would be "…at the mercy of the firearms businesses" that would be entitled to operated wherever they chose, even in the middle of a residential area.[120] Therefore the denial of Peter Garrett's request was proper and did not contravene state statutes concerning the regulation of firearms.

A final action worth addressing involves the placement of cellular telephone towers. In *Oldham County Planning and Zoning Commission v. Courier Communications Corp.*, the Court essentially removed any control over tower locations from the planning agencies and zoning authorities. In an unusual reversal of roles, the Oldham County Planning and Zoning Commission alleged that the removal of local control over tower locations was a taking of private property without consent or compensation in violation of the Kentucky and United States Constitutions.[121] Cellular One, the owner of the tower in question, was classified as a public utility under KRS 278.010(3). Under state statute, entities falling under the jurisdiction of the public service commission "shall not be required to receive the approval of the planning unit for the location or relocation of any of their service facilities."[122] Therefore, the Court concluded that Cellular One was "…not subject to the conditional use and dimensional variance ordinances of the [planning commission] in locating its service facilities."[123]

Certain aspects of planning and zoning appear to be well settled in the Kentucky courts. First, any entity that falls within the definition of a "public utility" is beyond the reach of local planning agencies and exempt from zoning ordinances. Second, state statutes will be read narrowly and, where restrictions on the location of particular business types are not specifically

117 *Peter Garrett Gunsmith*, 2002 WL 1728621 at *2.

118 *Peter Garrett Gunsmith*, 2002 WL 1728621 at *2.

119 *Id.* at *3.

120 *Id.*

121 722 S.W.2d 904 (Ky.App. 1987) at 905.

122 Kentucky Revised Statute 100.324(1).

123 *Oldham County Planning and Zoning Commission*, 722 S.W.2d at 906.

forbidden, the ordinances will stand. Third, statutes providing the guidelines and procedures for planning commissions should be met with strict compliance. However, failure to comply will not necessarily invalidate an ordinance, at least with regard to the prescribed review and update of the comprehensive plan. Finally, planning commissions should hear and consider all evidence when making a decision. Failure to do so opens an ordinance to invalidation by a court. The Kentucky Supreme Court has held that "…zoning lines must be drawn somewhere and this duty is properly assigned to the [local planning commission]."[124] Regardless, that duty does have boundaries or rules.

124*City of Bowling Green v. Hunt*, 516 S.W.2d 647, 648 (Ky. 1974).

Mississippi

Consistent with many of the states in Region IV, Mississippi courts are faced with some common situations. The most prevalent cases to enter the courtroom concern the valuation of property following condemnation proceedings through powers of eminent domain. Over the years, though, it seems as though Mississippi courts have addressed most foreseeable issues, and even a few not so foreseeable. Second in number are the challenges to zoning amendments and rezoning of lands. Third are appeals from denials of rezoning or variance requests. Finally, billboards seem to appear in many reviews of zoning cases within the judicial system.

Valuation of property is a common takings dispute within the application of eminent domain powers in Mississippi. Typically, the condemning agency first makes an attempt to negotiate with a landowner. When negotiations fail, or more likely when the landowner refuses the offer, condemnation proceedings are initiated in the Special Court of Eminent Domain. At this point both parties offer evidence, often in the form of expert testimony from land appraisers, as to the "before and after" value of the land. The "before and after rule" considers the value of the whole parcel (assuming that only a portion is to be taken) before the taking, and the value of the remaining parcel after the taking; compensation is based upon the difference. If the entire parcel is taken, the valuation simply considers the "before" figure. Obviously a landowner wants to maximize the "before" value of the property, but several limitations apply.

When valuing land, it is appropriate to appraise the property under the highest and best use within the zoned parameters. In other words, it is not the current use of the property, but the most valuable use contemplated under the current zoning ordinance. However, many landowners attempt to increase the appraised value by basing their speculation on a higher zoning classification. The Mississippi Courts have consistently held (as have the majority of other state courts) that mere speculation will not suffice. There must be a considerable probability, not simply a possibility, that the land will be rezoned immediately or within a reasonable time.[125]

In *Scribner Equipment Co. v. Mississippi Transportation Commission*, the landowner alleged that he was entitled to compensation for gravel deposits under the condemned property. The Court of Appeals held that he was not entitled to the additional compensation because current zoning laws prohibited surface mining, but there was no indication that the landowner had appealed that zoning ordinance or had any plans to pursue the gravel deposits in the immediate future.[126] In *Mississippi Transportation Commission v. National Bank of Commerce*,[127] the Mississippi Supreme Court held that the trial court had erred in allowing the landowners' expert to give his opinion on the value of the condemned property as if the rezoning had already occurred. The Mississippi Supreme Court has even gone so far as to state that where land is

125 *Mississippi Transportation Commission v. National Bank of Commerce*, 708 So.2d 1 (Miss. 1997); *Dennis v. City Council of Greenville*, 646 So.2d 1290 (Miss. 1994); *Scribner Equipment Co. v. Mississippi Transportation Commission*, 767 So.2d 225 (Miss. App. 2000).

126 767 So.2d 225.

127 708 So.2d 1.

reasonably expected to be rezoned, the fair market value of land is based on its current zoning, with a possibility of rezoning, *not* as if it had already been rezoned.

Ultimately, when condemnation proceedings are brought before the Court, the jury places a value upon the land. As in all jury verdicts, absent a clearly erroneous result, the verdict will be upheld. Even if the Court would find a different result, if the evidence supports the jury's verdict, it will stand. This concept is illustrated in a case where land was condemned for the widening of a roadway. In the case, *Mississippi Transportation Commission v. Bridgeforth*, a number of graves were discovered subsequent to the "quick take" of the land, but prior to resolving the issue of just compensation. The land was to be valued at the time of the taking based on the knowledge of the buyer and seller. Therefore, evidence that graves were located within the right-of-way was irrelevant to the valuation and was properly excluded by the trial court. Because the trial court had not erred in excluding evidence of the gravesites, the jury verdict was upheld.[128]

Three sub-issues have been addressed pertaining to rezoning and zoning amendments. The first involves "down zoning" to a less intensive use. A landowner recently challenged the rezoning of a property from R-4 multifamily residential to R-2 single and two-family residential. A number of residents requested the change, and following a public hearing, the remaining undeveloped area was rezoned R-2. In reaching this decision, the City of Clarksdale issued a thirty-three page document which (1) set forth the history and development of this tract, (2) the testimony received, (3) the personal familiarity of the Board of Mayor and Commissioners with the area, and (4) the basis for the City's decision.[129] The document contained specific findings on fire protection, drainage, streets and traffic, and the impact of the proposed construction (of additional multifamily units) on the Voting Rights Act.[130] The Court then looked to the standard of review.

The courts are quite limited in reviewing decisions of local zoning boards. "The zoning decision of a local governing body which appears to be fairly debatable will not be disturbed on appeal, and will be set aside only if it clearly appears the decision is arbitrary, capricious, discriminatory, illegal or is not supported by substantial evidence."[131] In *Briarwood, Inc. v. City of Clarksdale*, the extensive findings of fact and conclusions were clearly not arbitrary or capricious. The party seeking rezoning bears the burden of proving that "(1) there was a mistake in the original zoning, or (2) the character of the neighborhood has so changed to justify reclassification, and that there is a public need for rezoning."[132] Evidence was presented and considered as to the current character of the neighborhood, that additional multifamily units would exacerbate criminal and gang activities, and the additional multifamily units could be characterized as a violation of the

128 *Mississippi Transportation Commission v. Bridgforth*, 709 So.2d 430 (Miss. 1998).

129 *Briarwood, Inc. v. City of Clarksdale*, 766 So.2d 73 (Miss. App. 2000) at 76.

130 *Id*. at 77-79.

131 *City of Biloxi v. M.C. Hilbert*, 597 So.2d 1276, 1280 (Miss. 1992).

132 *Briarwood*, 766 So.2d at 80.

Voting Rights Act due to a concentration of minority votes in a single district dominated by public housing.[133]

The landowner/developer brought an additional taking claim alleging that the rezoning was, in effect, a taking, as it precluded him from putting his property to what he claimed was its highest and best use. [134] "A taking is affected if the application of a zoning law denies a property owner of economically viable use of his land."[135] However, the City's zoning ordinance does not prohibit the use of the tract for residential purposes. It simply limits the number of units to be built on that particular tract. Therefore, there was no impairment of an economically viable use by Briarwood[136].

An amendment to a zoning ordinance in Greenville, MS, changing a property owner's use from permitted to conditional, gave rise to another challenge. In *Walters v. City of Greenville*,[137] the City wished to curb various criminal and nuisance problems associated with certain types of businesses such as taverns, bars and nightclubs by changing the property at issue from a permitted use to a conditional use. The Court distinguished the two types of ordinances as follows:

> On permitted uses: "…Some zoning ordinances contain a general provision or cumulative provisions permitting kinds of buildings and uses thereof in less restricted zones that are expressly permitted in the more restricted zones…"[138]
>
> On conditional uses: "…conditional zoning is a device employed to bring some flexibility of use to an otherwise rigid system of control...'Conditional zoning' involves ordinances which provide either that rezoning becomes effective immediately with an automatic repealer if the specific conditions are not met, or that the zoning becomes effective only upon conditions' being met within a certain time."[139]

The Court's legal reasoning was based on an earlier case, *Board of Alderman of Town of Bay Springs v. Jenkins*, where the Mississippi Supreme Court stated that "…before property is reclassified from one zone to another, there must be proof either (1) that there was a mistake in the original zoning, or (2) the character of the neighborhood has changed to such an extent as to justify rezoning and that public need exists for rezoning."[140] In considering the second criterion, the *Walters* finding broke it down further into two separate tests, (1) distinguishing between

133 *Briarwood*, 766 So.2d 73.

134 *Briarwood*, 766 So.2d at 82.

135 *Id*. (quoting *Vari-Build, Inc. v. City of Reno*, 596 F.Supp. 673, 679 (D.Nev. 1984)).

136 *Id*.

137 751 So.2d 1206 (Miss. App. 1999).

138 *Id*. at 1209.

139 *Id.*

140 423 So.2d 1323, 1328 (Miss. 1982).

permitted use and conditional use (as described previously) and (2) weighing Walters' individual interests against the greater public good.[141]

In considering the first element of the *Walters* decision, the Mississippi courts have looked briefly at the issue of a change in the character of the neighborhood, focusing primarily on the public need aspect. The Court took notice that the justification for the proposed amendment was that the zoning change would curb crime and trouble by allowing the planning commission to evaluate future renters or buyers of these businesses prior to their lease or purchase. Zoning ordinances and amendments are presumptively valid, and can only be proven invalid by a show of arbitrariness or capriciousness in the zoning boards' decision. If a decision by the board is "fairly debatable", it cannot be arbitrary or capricious, and is therefore valid.[142] Because the zoning board made specific findings regarding the character of the neighborhood, the presence of crime in the area, and the apparent connection between the criminal activity and the types of businesses at issue, the amendment was at least "fairly debatable" and therefore the court could not disturb the zoning board's decision.[143] From the facts presented to the board, the first element from *Jenkins*, the demonstration of public need, was satisfied.

The second element of the *Walters* inquiry is a balancing test weighing the public interest against the interest of the effected individual.[144] The Mississippi Supreme Court, in *City of Jackson v. Bridges*,[145] had previously stated that while land values are not controlling, "…it is a proper element to be considered, since no basis for exercise of the zoning power exists if the public gain is small compared with the individual hardships or loss."[146] Walters claimed that a taking had occurred because the value of his property had been diminished since the restriction would make it more difficult for him to sell or lease the land. However, the court clearly held that "…a mere speculation as to difficulty in selling or renting the property in the future in no way amounts to a taking."[147] Additionally, the public interest served by the amendment far outweighed the harm that might possibly fall upon Mr. Walters or the other effected business owners.[148] Therefore, the amendment was valid and no taking requiring compensation had occurred.

One specific statutory issue, which arose in a challenge over zoning ordinances prohibiting various airport hazards, concerns the proper entity responsible for answering to the inquiry of whether a taking has occurred. When a takings challenge is brought, the circuit court has two tasks. First, it must evaluate the validity of the zoning ordinance giving rise to the challenge. Second, provided that the ordinance is valid, the court must evaluate each property to determine whether a taking has actually occurred.[149] In *CEPR v. Board of Supervisors of Lowndes County*, the Mississippi Supreme Court held that Section 61-7-25 of the Mississippi Code required the

141 *Walters*, 751 So.2d 1206 (Miss. App. 1999).

142 See *Burdine v. City of Greenville*, 755 So.2d 1154 (Miss. App. 1999).

143 *Walters*, 751 So.2d 1206.

144 *Walters*, 751 So.2d at 1211.

145 139 So.2d 660, (Miss. 1962).

146 *Id*, at 663-64.

147 *Walters*, 751 So.2d at 1210.

148 *Id*. at 1211.

149 *Citizens For Equal Property Rights (CEPR) v. Board of Supervisors of Lowndes County*, 730 So.2d 1141, 1145-46 (Miss. 1999).

decision on takings to be made by a court. Therefore, the case was remanded to the circuit court for this determination.[150] If a taking is found on any of the effected properties, then Lowndes County may invoke its acquisition powers to take the land for just compensation.[151]

While is seems that highway billboards are sprouting up faster than ever, many municipalities are attempting to not only curb their spread but even reduce the existing number. In order to accomplish this reduction, the City of Ridgeland implemented a fairly well established method of amortization. Ridgeland passed an ordinance requiring removal of certain on-premises signs. However, to avoid paying compensation for a "taking", the city developed a system of amortization based on the cost of the sign and the length of time the sign had been in place, giving owners up to five years to comply with the sign ordinance. While all but six of the effected businesses complied, the remaining six brought suit alleging that the removal requirement amounted to a taking requiring just compensation under both the Mississippi and US Constitutions.[152] The Mississippi Supreme Court again utilized its balancing test of public gain against private loss. The Court looked to a number of other decisions, including a finding by the Fifth Circuit that "an ordinance providing for the discontinuance of non-conforming use after a five year amortization period for non-conforming signs did not constitute a deprivation of property without due process of law."[153] The Court followed the Fifth Circuit ruling that the ordinance applying this amortization period was a valid exercise of police power, and the ordinance did not constitute a taking.[154]

However, a prior case addressed the removal of "off-premises" billboards and the Relocation Assistance Act. The Relocation Assistance Act allocates money for the removal and relocation of signs within rights-of-way.[155] The Act is designed to compensate sign owners when the Mississippi Department of Transportation (MDOT) widens roadways, by removing and installing the effected billboards through use of funds provided by the Act. In the case, *Mississippi Dept. of Transportation v. B & G Outdoor*,[156] the effected billboard had two poles, which did not comply with zoning requirements of the property in which it was to be reinstalled; only mono-pole billboards were permitted. MDOT refused to pay for a new sign. B & G argued that simply paying for removal and reinstallation was a taking because the existing billboard was useless in the new location as it was an illegal design. The Court ultimately held that this was a taking and that the spirit of the Relocation Act required not only reinstallation of the sign, but reinstallation of a conforming sign.[157]

Mississippi Courts are likely to find for zoning boards. However, the zoning boards are responsible for following correct procedures as outlined by statute. Provided that procedures are followed and valid reasons are given, based upon specific facts, zoning ordinances will be upheld. Courts are also reluctant to find a taking on mere speculation or because a property

150 *Id.*

151 See Miss. Code Ann. § 61-7-29 (1996).

152 *Red Roof Inns, Inc. v. City of Ridgeland*, 797 So.2d 898 (Miss. 2001).

153 *Id.* at 902 (citing *E.B. Elliott Adver. Co. v. Metropolitan Dade County*, 425 F.2d 1141, 1155 (5th Cir. 1970).

154 *Id.* at 903

155 Miss. Code Ann. § 43-39-7 (Rev. 1993).

156 722 So.2d 1273 (Miss. App. 1998).

157 *Id.*

owner suffers some hardship, as long as that hardship is outweighed by the public interest. However, statutes providing compensation for specific takings will likely be construed in favor of the landowner, if a more narrow reading violates the spirit of the statute. The bottom line is that the Mississippi Courts are favorable to zoning entities and will often follow the majority rule on issues of first impression.

North Carolina

The state of North Carolina is generally regarded as very pro-zoning. The legislature has given broad powers to municipalities to institute numerous zoning regulations, procedures, and permitting. The most recent challenges to zoning issues in North Carolina fall into two primary categories, the use of creative zoning techniques and the placement of manufactured housing. In the first category, one of the more interesting and streamlined approaches to rezoning is a system of conditional use zoning through a purely legislative, one-step process called high-speed zoning. This type of conditional use zoning has generated considerable interest as a flexible zoning tool that can be used to quickly address growth in urban areas. While this technique has its predominant following in Mecklenburg County (City of Charlotte and surrounding cities), a recent appellate court decision could expand its use. In the second category, the cases involving manufactured housing are fairly straightforward. The state is attempting to promote affordable housing options through statutory authority to which communities have protested along the typical Not-in-My-Backyard lines. What follows is a review of North Carolina case law from these two major areas that will demonstrate the current climate for zoning and land use regulation in the state.

In *Massey v. City of Charlotte*[158] a group of neighboring landowners petitioned for a *writ of certiorari* and brought a complaint for declaratory judgment regarding the city's use of conditional use zoning. The city had granted a conditional use district permit to the Albemarle Land Company for the construction of a retail shopping center. The city had fine-tuned this rezoning into a single zoning ordinance, which gave rise to the suit before the Court. The district court held that the rezoning procedure requires a two-step process wherein a legislative zoning decision is made and followed by a quasi-judicial hearing to determine whether the issuance of a conditional use permit is proper.[159] Because the city issued a conditional use district permit to rezone from R-3 to commercial center, in a single, purely legislative process, the district court invalidated the permit. The appellate court, however, held that this process was well within the bounds of state law and zoning jurisprudence in North Carolina. In reversing the district court, the Court relied upon the N.C. Supreme Court's prior holding in *Chrismon v. Guilford County*[160] and the language of the North Carolina General Statutes.[161] The "Supreme Court expressly approved conditional use zoning in this State as 'one of several vehicles by which greater zoning flexibility can be and has been acquired by zoning authorities."[162]

Conditional use zoning was defined by the N.C. Supreme Court as occurring "…when a government body, without committing its own authority, secures a given property owner's agreement to limit the use of his property to a particular use or to a subject his tract to certain restrictions as a precondition to any rezoning."[163] This is distinguished from "contract zoning"

158 *Massey v. City of Charlotte*, 550 S.E.2d 838 (N.C. App. 2001).

159 *Id*. at 841.

160 *Chrismon v. Guilford County*, 370 S.E.2d 579 (N.C. 1988).

161 *Massey*, 550 S.E.2d 838.

162 *Id*. at 841 (quoting *Chrismon*, 370 S.E.2d at 583).

163 *Chrismon*, 370 S.E.2d at 583.

which was held to be illegal.[164] Contract zoning occurs where the landowner and the zoning authority enter into a bilateral contract, each undertaking reciprocal obligations.[165] Conditional use zoning, on the other hand, involves a unilateral contract where the landowner seeking the zoning change is bound to a specific intended use, while the zoning authority "maintains its independent decision-making authority."[166]

According to the N.C. Supreme Court in *Chrismon* and the 2001 Appellate Court decision in *Massey*, conditional use zoning is valid as long as it is "…reasonable, neither arbitrary nor unduly discriminatory, and in the public interest."[167] The Court then bluntly stated that, "…nowhere in the *Chrismon* decision does our Supreme Court hold that a quasi-judicial process is required in order for conditional use zoning to be valid."[168] In both *Chrismon* and *Massey*, the city used a single proceeding to determine both the rezoning decision and the approved conditional uses. Therefore, provided that the relevant guidelines are followed, a single, purely legislative procedure is quite appropriate for rezoning of lands in North Carolina. The relevant guidelines that must be followed are found in the N.C. General Statutes.[169]

Turning to zoning issues involving manufactured housing, the existence and location of manufacturing housing has elicited contentious debate nationwide and the response in North Carolina is no exception. The power to zone for manufactured housing was granted to municipalities by the North Carolina General Assembly in 1987, adopting section 160A-383.1 to the General Statutes. While the purpose of this legislation was to provide more affordable housing opportunities for low and moderate-income residents,[170] it has created a considerable amount of litigation. Subsection (a) also states that it is the intent of the General Assembly to prompt cities to reexamine their land use practices "and *consider* allocating more residential area for manufactured homes based upon local housing needs" (emphasis added). Subsection (c) then plainly states, "A city *may not* adopt or enforce zoning regulations or other provisions which have the effect of excluding manufactured homes from the entire zoning jurisdiction."[171] (emphasis added). The apparent contradiction is obvious, giving firepower to both pro-manufactured housing litigants and their opponents. Most complaints, however, are brought as a violation of subsection (e), using the above language to bolster the arguments.

Subsection (e) provides that "a city *may* designate a manufactured home overlay district ("MHOD") within a residential district," and defers to the city's comprehensive plan for appropriate zones.[172] (emphasis added). Essentially, a municipality may, if it so chooses, draft municipal codes that allow for a MHOD within an R-7, or R-9 district. Again, the legislature is setting up a situation for the courts to interpret the statute. Two recent cases arising from MHOD

164 *Allred v. City of Raleigh*, 178 S.E.2d 432 (N.C. 1971).

165 *Chrismon*, 370 S.E.2d at 593.

166 *Id*.

167 *Massey*, 550 S.E.2d at 842 (quoting *Chrismon*, 370 S.E.2d at 586).

168 *Id*. at 842.

169 See generally Art. 19, Part 3, Ch. 160A.

170 See § 383.1(a).

171 See § 383.1(c).

172 See § 383.1(e).

permit denials in the City of Burlington have given the courts this opportunity. The two suits were brought under section 383.1 by landowners, against the City of Burlington, whose MHOD permits were denied.

In the first case, *Northfield Development Co., Inc. v. City of Burlington,*[173] the plaintiff made two separate requests for MHOD designation and both were denied. In the first request, the plaintiff had entered into an agreement to sell the subject property, provided the city of Burlington rezoned the property MHOD. The planning board denied the request and while the sale of the property continued, the price per acre was reduced by $2000. The plaintiff complained that the failure to rezone the property directly and adversely affected the plaintiff and that the refusal was unreasonable, arbitrary, and capricious. In the second request, the same plaintiff requested that another property be rezoned MHOD, which was summarily denied by the planning board. The plaintiff, again, alleged that the denial was "…unreasonable, arbitrary, and capricious, thus violating Article I, Section 19 of the North Carolina Constitution." [174] The North Carolina Court of Appeals held that the city of Burlington was within its legal right to deny the rezoning request and that the fact that North Carolina state law provides local governments with the ability to create these zoning overlays, the law does not compel the local planning agency to do so. [175]

In the second case, *Devaney v. City of Burlington,*[176] the North Carolina Court of Appeals reprimanded the city of Burlington for denying a MHOD application suggesting that the city used the rezoning hearing to gauge resident opinion on the matter rather than applying zoning ordinance criteria to the request. The plaintiffs in the case were "…requesting that the City be ordered to approve their application, as the Burlington City Code provides that MHODs are 'permitted by right' in R-9 districts. Plaintiffs also alleged the city 'has violated the terms and spirit of its own Ordinance and N.C.G.S. § 160A-383.1 by consistently denying applications for [MHODs].'"[177] While the Court did not find in favor of the city of Burlington, it did not force the city to approve the plaintiffs' request. Rather, it found that the City Council used an incorrect standard in reviewing the application. The Court vacated the trial court ruling in favor of the city and remand to the Superior Court to remand to the city a proper rezoning hearing where findings of fact and not the opinions of residents guide the decision. [178]

As evidenced by these court rulings, the North Carolina courts support efforts to manage land use through zoning legislation. When fairly applied, proper planning tools appear to be generally supported in North Carolina. Creative methods to streamline the planning process will serve the state well as communities look for ways to address growth while not standing in the way of development. Further, the state is supported in its efforts to provide access to decent and affordable housing for North Carolina residents.

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173 *Northfield Development Co. v. City of Burlington*, 523 S.E. 2d 743 (N.C. App. 2000).

174 *Id.* at 275.

175 *Northfield Development Co. v. City of Burlington*, 523 S.E. 2d 743 (N.C. App. 2000)..

176 *Devaney v. City of Burlington*, 545 S.E.2d 763 (N.C. App. 2001).

177 *Id* at 335-336.

South Carolina

Unlike other jurisdictions, South Carolina has seen few takings challenges go beyond the trial level. The major reason for this is that the applicable law was well established by the US Supreme Court in its 1992 landmark *Lucas* decision.[179] A considerable number of the court challenges have arisen out of federal efforts to manage coastal land uses, specifically the Coastal Management Zone Act of 1977. This Act has sparked controversy all along the eastern seaboard. While the South Carolina Department of Health and Environmental Control, Office of Ocean and Coastal Resource Management is the responsible agency, the fact that state zoning laws are mandated to some degree by federal statute has prompted many challengers to seek remedies in the federal courts. Once the US Supreme Court has spoken on an issue, all other courts are bound. For this reason, the South Carolina courts have become accustomed to reiterating the decisions of the US Supreme Court on *Lucas* and ruling appropriately.

South Carolina courts also see appeals from zoning board decisions denying rezoning permits or rezoning areas that have already been developed to some degree, but far fewer than other states in Region IV. The most recent challenge arose from a decision to rezone from multi-family to single family development in Charleston. In *Lake Frances Properties v. City of Charleston*,[180] A landowner made a number of improvements to property in the form of roads, sewers, and water, prior to the change in zoning. Once the city rezoned the property he brought suit against the city for damages, alleging that the rezoning had caused the property to sell for a discount of at least $1 million. The owner attempted to prove a nonconforming use, which would be a basis for a vested right to continue. The court, however, held that since the property sat dormant for over 13 years, no buildings had been constructed, and no permits had been obtained, no vested right existed. For a nonconforming use to continue, it must exist at the time of rezoning. Additionally, the infrastructure improvements were not limited to multi-family development. Therefore, all economically viable use was not lost and the takings challenge failed.[181]

Recent challenges pursuant to the Coastal Management Zone Act arose out of damage caused by Hurricane Hugo. One of the ordinances flowing from the Act involved the repair and rebuilding of piers following their destruction. The goal was apparently to reduce the overall number of piers by allowing only public piers to be repaired or rebuilt, if they were greater than 75% destroyed. In *Sea Cabins on the Ocean IV Homeowners Association, Inc. v. City of North Myrtle Beach*,[182] a homeowners association that owned a private fishing pier brought a takings challenge because the zoning board would only approve repair of the pier if it were opened to the public. The South Carolina Supreme Court addressed both the issue of a physical taking based on the City's Beach Franchise Ordinance (public access condition) and allegations of a temporary taking due to the delays in issuing a building permit.[183] The Court found that the denial was based on the Board's zoning ordinance and not on the condition of a pier franchise agreement, so

178 *Id* at 339.

179 This decision has served as the basis for most regulatory takings challenges around the country. See *Lucas v. South Carolina Coastal Council*, 505 US1003 (1992) for more on the legal reasoning.

180 561 S.E.2d 627 (S.C. 2002).

181 *Id.*

182 548 S.E.2d 595 (S.C. 2001).

183 The trial court upheld the denial, but the appellate court found that the pier was less than 75% destroyed and reversed the zoning board's denial, giving rise to the temporary taking argument.

no physical taking had occurred. Second, the temporary taking challenge failed because the zoning ordinance itself was not invalidated, delays due to issuance of building permits cannot give rise to a temporary taking, and not all economic benefit had been lost.[184]

The Court of Appeals in South Carolina as also sent the message that judicial appeals of zoning board decisions must follow specific criteria. In *Massey v. City of Greenville Board of Zoning Adjustments* the Court stated, "a reviewing court should not disturb the findings of a zoning board of adjustment unless the board has acted arbitrarily or in an obvious abuse of discretion, or unless the board has acted illegally or in excess of its lawfully delegated authority."[185] In that case, Massey was challenging the board's denial of her application for a conditional use permit. At trial Massey as permitted to introduce additional testimony for her application. That court held that the zoning board acted arbitrarily and unreasonably in denying Massey's applications, reversing the board's decision. The first error found by the South Caroline Court of Appeals involved the trial court's admission of the additional testimony.[186]

The city, in *Massey,* was not without fault. The Court found a second error involving the city's use of a document entitled "Findings of Fact and Conclusions by the Greenville Board of Zoning Adjustments. Per recent Court actions, the universal rule of "final decision" applies equally in South Carolina challenges. The Court set out exactly what constitutes, or rather what does not constitute, a final decision in *Massey.* The Court found that a letter sent by the zoning administrator, advising the applicant of a denial, did not constitute a final decision by the board. Findings of fact and conclusions prepared by the zoning administrator did not constitute a final decision by the board. Even a transcript of hearings held by the board regarding the application did not constitute a final decision by the board.[187] Under South Carolina Code, "All final decisions...of the board [of zoning appeals] shall be in writing and be permanently filed in the office of the board as a proper record."[188] The final decision must contain separately stated "findings of fact and conclusions of law."[189] None of the above items met these requirements, so no final decision had been made and judicial review was improper.

As stated above, the South Carolina Courts follow Supreme Court decisions to the letter. The occasional regulatory takings claim is reviewed against the fiats set out in *Lucas* and its progeny. The South Carolina Courts generally appear to be pro-zoning and rarely if ever find a regulatory taking.[190] For these reasons, few challenges are addressed by the higher courts, and even fewer succeed.

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184 *Sea Cabins on the Ocean IV Homeowners Association, Inc. v. City of North Myrtle Beach*, 548 S.E.2d 595 (S.C. 2001).

185 532 S.E.2d 885 (S.C. App. 2000) at 197.

186 *Id.*

187 *Id.*

188 S.C. Code Ann. § 6-7-740 (Supp. 1999).

189 *Id.*

190 See generally *Worsley Companies v. Town of Mt. Pleasant*, 528 S.E.2d 657 (S.C. 2000).

Tennessee

While the State of Tennessee appears to be fairly litigious with regard to zoning and takings issues, the state's highest court has not entertained a case relating to either in the past decade. Presumably, this is the Court's show of approval of the appellate divisions' rulings. During the past several years, a number of cases have been presented at the appellate level that allege various points, but which all essentially argue procedure, which can be as simple as complying with state legislative notice requirements, or as complex as the role of courts in reviewing zoning board decisions. While the Tennessee Courts generally seek to avoid interfering with zoning board decisions, private property rights advocates appear to have a growing voice in the Tennessee courts.

In the most recent challenge brought before the Tennessee Court of Appeals, *County Residents Against Speedway Havoc v. Wilson County Commission*,[191] a citizens group known as C.R.A.S.H. (County Residents Against Speedway Havoc) challenged the rezoning of agricultural land to allow erection of a racetrack. The crux of the challenge was a change in the zoning ordinance that reduced the public notice period for a change in zoning from 30 days to 15 days. The group claimed that the zoning amendment was invalid for lack of adequate notice.[192] The state of Tennessee's zoning enabling legislation sets out the notice requirements that county legislative bodies must adhere to when proposing amendments to zoning ordinances. It states, "...the county legislative body shall hold a public hearing thereon, at least fifteen (15) days' prior notice of the time and place of which shall be given by at least one (1) publication in a newspaper of general circulation in the county."[193] The Tennessee Courts have not hesitated to invalidate ordinances that fail to follow the mandates of the state's enabling acts. The Tennessee Supreme Court addressed the notice issue in *Clapp v. Knox County*,[194] acknowledging the necessity of proper notice under zoning ordinances. The *Clapp* Court held that for notice to meet the legal requirements it must comply with the applicable ordinances, it must not be misleading, and it must convey the necessary information to interested parties. Thus, the notice given in *C.R.A.S.H*. "substantially complied" with these requirements and therefore was valid.

Two other recent cases before the Court of Appeals addressed the role of the Courts in reviewing decisions of zoning boards; *Brunetti v. Board of Zoning Appeals of Williamson County*[195] and *MC Properties, Inc. v. City of Chattanooga.*[196] In the *Brunetti* case, the complaint dealt with the Board of Zoning Appeals' interpretation of allowable uses of land zoned "estate." The plaintiff was seeking a clarification on the zoning classification, claiming that the agricultural activities on a neighboring property violated the zoning ordinance. The zoning board did not agree stating that the agricultural use was within the allowable uses under the classification. The plaintiff then sought court review of the ruling. In the *MC Properties* case, the plaintiff had challenged the city's denial of a rezoning request. The City Counsel had refused to rezone the plaintiff's

191 2001 WL 839917 (Tenn. Ct. App.),

192 The enabling acts are found at Tenn. Code Ann. § 13-7-101 et. seq.

193 Tenn. Code Ann. § 13-7-105.

194 273 S.W.2d 694 (Tenn. 1954)

195 1999 WL 802725 (Tenn. Ct. App. 1999)

196 994 S.W.2d 132 (Tenn. Ct. App. 1999).

property from residential and church use to commercial use due to insufficient traffic infrastructure. The trial court agreed with the plaintiff and ordered the city to grant the request. The city appealed the decision, asking for court review. "Local zoning decisions regarding the interpretation of application of existing zoning ordinances to a specific set of facts are reviewable by the courts under Tenn. Code Ann. § 27-9-101 et. seq."[197] The Code "gives county zoning appeals boards the authority to hear and decide appeals where it is alleged there is error in any order, requirement, decision, or refusal by any administrative official in the enforcement of any zoning ordinance."[198] The Board is also authorized to make special exceptions to zoning regulations where it sees fit.[199] The ruling did acknowledge that the role of the courts is limited, however, in reviewing zoning decisions stating that, the court's inquiry, pursuant to common law *writ of certiorari*, is limited to "whether the board (1) exceeded its jurisdiction, (2) acted illegally, arbitrarily, or fraudulently, or (3) acted without material evidence in the record to support its decision."[200]

The overriding rule of all Tennessee Courts' decisions is that courts should be hesitant to interfere with decisions by local zoning officials unless interference is clearly necessary. Even then, a court should not substitute its own judgment for that of the local zoning officials. In *Fallin v. Knox County Board Of Commissioners*, the Tennessee Supreme Court stated that "…the courts should not interfere with the exercise of zoning power and hold a zoning enactment invalid, unless the enactment, in whole or in relation to any particular property, is shown to be clearly arbitrary, capricious, or unreasonable, having no substantial relation to the public health, safety, or welfare, or is plainly contrary to the zoning laws."[201] The Supreme Court later stated in *McCallen v. City of Memphis* that if any possible reason exists for justifying the action of the zoning board, the action would be upheld.[202] For that reason, the zoning board decisions in both *Brunetti* and *MC Properties* were upheld.

A 1996 case did present a situation where a board of zoning appeals was found to have acted arbitrarily, requiring a remand. In *Hoover, Inc. v. Metro Board of Zoning Appeals*, [203] the court was presented with an unusual situation where the president of Hoover, Inc. was a member of the zoning board. Hoover was requesting a zoning change to allow it to operate a quarry. The board member with the conflicting interest took no part in the hearings, as required by statute. Hoover fulfilled all requirements necessary to acquire the variance, as was conceded by the board members. However, the application was denied. On appeal, the *Hoover* court concluded that the board members had acted illegally, arbitrarily, and fraudulently, stating, "…if a reviewing court finds that there was no material evidence to support an administrative body's decision, the reviewing court must conclude that the administrative body acted illegally."[204] The Court also noted, "…where a petitioner for a zoning permit has met all of the requirements of the

197 *Brunetti*, 1999 WL 802725 at *2.

198 Id.; Tenn. Code Ann. § 13-7-109.

199 Tenn. Code Ann. §§ 13-7-107 and 109.

200 *Brunetti*, 1999 WL 802725 at *2.

201 *Fallin v. Knox County Bd. of Commissioners*, 656 S.W.2d 338, 342 (Tenn. 1983).

202 *McCallen v. City of Memphis*, 786 S.W.2d 633, 641 (Tenn. 1990).

203 924 S.W.2d 900 (Tenn. Ct. App. 1996) at 904-905.

204 *Id.*

applicable zoning resolution, and where the zoning authority denies the permit based on reasons other than the petitioners compliance with the resolution, the [zoning authority's] action in denying the permit is arbitrary and unreasonable."[205] The *Hoover* Court concluded that the board members had acted illegally, arbitrarily and fraudulently because they constructively denied the permit–the denial was "constructive" because two board members abstained from voting, while knowing that abstention would legally cast their votes for the prevailing party–despite acknowledging the fact that Hoover had fulfilled the zoning requirement.[206]

An additional challenge drawing on these principles involved a permit to erect a communications tower. In *Domincovitch v. Wilson County Board of Zoning Appeals*[207] the case considered the limit of the zoning board's jurisdiction in placing communications towers and the board's ability to deny an application. The dispute arose when the plaintiff requested a permit to erect a communications tower on a 29-acre parcel zoned A1 (agricultural). Utility use, such as the communications tower, is a "use permissible on appeal" under the Wilson County zoning laws. After hearing all the evidence, the board found no violation of any zoning ordinances upon which denial could be based, therefore should have granted the petitioner's permit. The board, however, denied the permit based on airport safety. Even though the reason was not valid, it had been addressed by Petitioner and shown to be irrelevant. Therefore, the court found that the Board had exceeded its jurisdiction and had acted arbitrarily in denying the petitioner's permit.[208]

A recent takings challenge was brought due to an agreement to include hiking and biking trails within a new development. In *Knox Loudon Corp. v. Town of Farragut,* Knox Loudon alleged that the requirement of hiking and biking trails in the development permit constituted a taking, requiring compensation. The permit, however, was not granted in return for inclusion of the trails. The previous owner of the Knox Loudon property had acquired the permit pursuant to an earlier plan presented to the board. The board granted the permit on the condition that the trails included in the development plan would actually be built, to which the developer agreed.[209] The Court held that since Knox Loudon voluntarily agreed to purchase the land and the attached permit (including the challenged agreement). Therefore, there was no taking requiring compensation.

As a final point on the State of Tennessee's response to land use challenges, two issues have arisen regarding eminent domain proceedings. The first involves the authority of the entity exercising its eminent domain rights and the second looks at time of valuation for compensation purposes. In *City of Johnson City v. Campbell*,[210] Johnson City filed a petition for condemnation to take a portion of land owned by the Campbells. Johnson City's charter states that the city "shall have the power of eminent domain by ordinance" but does not specifically provide for this

205 *Id.* at 905 (quoting *Roger's Group, Inc. v. County of Franklin*, 1992 WL 85805 at *5 (Tenn. App. 1988)).

206 *Id.* at 906.

207 2000 WL 1657843 (Tenn. Ct. App. 2000).

208 *Id.*

209 *Knox Loudon Corp. v. Town of Farragut*, 2000 WL 775077 (Tenn. Ct. App. 2000).

210 2001 WL 112311 (Tenn. Ct. App.).

power by resolution.[211] The issue was whether the City had the power of eminent domain to condemn the Campbells' land without first passing an ordinance granting the power to the city.

The court looked at the language of the specific statute upon which the City brought the action and concluded that it must, in fact, pass an ordinance granting the power prior to undertaking condemnation proceedings.[212] The Court declined to look further into the statutes to see if another statute would grant the power, but stated that it was bound to decide the case on the facts and issues pled by the parties.[213] Therefore, the Court held only that the City "…must proceed by ordinance if it relies upon section 7.10 of its charter as the basis for its power of eminent domain."[214]

The second eminent domain issue relates to lands that are not initially condemned for purposes of a project, but for which condemnation is later found to be necessary. This involves a concept known as "scope of project." In *Metropolitan Government of Nashville v. Overnite Transportation Co*., the case considered the issue of when property valuation is calculated for the purposes of additional property acquisitions to be added on to an existing project. In that case the courts found that when property is not included in the initial condemnation action and the value increases due to the project, such as the construction of a new airport terminal, and that land is later condemned because it has been deemed necessary to the project, the time of valuation depends upon whether it can be characterized as within the "scope of project." In other words, if it can reasonably be assumed that the land will be necessary to the project despite not being included in the initial zone of condemnation, it is properly within the "scope of project." If this is the case, the value of the land for purposes of compensation should be at the time of the original condemnation action. However, if the land is outside of the "scope of project," then the value should reflect its current fair market value.[215]

Most remaining challenges have simply resulted in the Courts' reiteration of acceptance of zoning ordinances as a proper use of the police power. They have consistently held that zoning regulations are not takings, and that regulatory delays cannot be temporary takings. State and local statutes and regulations set out the extent of jurisdiction and authority of the various zoning boards. Provided that these statutes are followed, the wisdom and decisions of zoning boards are rarely disturbed.

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211 *Id.*

212 *Id.*

213 *Id*

214 *Id*. at *7.

215 *Metropolitan Government of Nashville v. Overnite Transportation Co.*, 919 S.W.2d 598 (Tenn. Ct. App. 1995).