LAND USE LAW UPDATE

MID-ATLANTIC PLANNING COLLABORATION

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November 5, 2020

WVULAW
LAND USE & SUSTAINABLE DEVELOPMENT LAW CLINIC

MID-ATLANTIC PLANNING COLLABORATION

November 10 - **Ethics Cases of the Year** (1 pm-2:30 pm ET) *Ethics CM
November 12 - **Sign Ordinances** (1 pm-2:30 pm ET) *Law CM
November 24 - **Better Public Engagement** (1 pm-2 pm ET)
December 1 - **The Planner's Tool Kit** (1 pm -2 pm ET)
December 3 - **Legal Issues with Green Energy** (1pm-2:30 pm ET) *Law CM
December 8 – **Broadband and Planning** (1 pm- 2 pm ET)
December 17- **Equity Planning** (1pm-2:30 pm ET)

To Register, go to:https://virginia.planning.org/conferences-and-meetings/mid-atlantic-planning-collaboration/.

ROADMAP

- Regulatory Takings
- Small Cells (5G)/Telecommunications
- FOIA, Open Meetings, and COVID
- Signs
- Religious Land Use and Institutional Persons Act (RLUIPA)
- Short-Term Rentals

MURR ET AL V. WISCONSIN (2017)

Supreme Court of the United States

Lot Merger Case

- Property owner argued that the merger requirement amounted to a regulatory taking

Lots E and F are contiguous and under common ownership

- Because the lots were substandard for development, the local ordinance required that the two lots be merged
- This also meant that lots E and F could not be sold separately.

SCOTUS announced a 3-part factor test for identifying proper unit of property:

1. Treatment under state and local law
2. Physical characteristics
3. Value

St. Croix River, Wisconsin

MURR ET AL V. WISCONSIN (CON'T)

Court, in a 5-3 decision, said Wisconsin was correct in viewing the two parcels as one, via the merger ordinance, as such there was no compensable taking.

- Court answered in the affirmative that merger provisions are generally a legitimate exercise of government power.

In response to *Murr,* the state of Wisconsin created legislation that limits the authority of local governments and state agencies to enact lot merger provisions.

KNICK V. TOWNSHIP OF SCOTT, PA (2019)

- Township enacted ordinance that required all cemeteries to be open and accessible to the public during daylight hours.
- Township officer would also be permitted to enter property to determine if there was a cemetery.
- Property owner in this case alleged an unconstitutional taking
  - The government violates the takings clause when it takes property without compensation

KNICK V. TOWNSHIP OF SCOTT, PA (2019)

In takings cases, must private landowners exhaust all state-offered venues for mediation before seeking action in the federal courts?

- The case specifically addresses the Court's prior decision from the 1985 case, Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City.
- Williamson made it very difficult for land use cases to be heard by federal courts, even though other constitutional challenges did not have the same requirement.

SCOTUS Case (5-4 Decision)

- Ruling overturned "exhaustion requirement" established in Williamson for takings (land use) cases.

FCC SMALL CELLS DECLARATORY RULING AND ORDER

In September 2018, the FCC issued an Order and Declaratory Ruling in part to ensure smooth deployment of 5G technology across the country.

The FCC explained, in reaching its decision, that 5G is expected to:

1. Provide much faster network speeds for broadband consumers
2. Employ life-saving automated car technology
3. Offer wider, deeper access to home automation, telemedicine and other essential technologies.

FCC SMALL CELL ORDER (CON'T)

The FCC's Report and Order sets new rules on local governments in three main areas:

1. **Fees:** The order identifies what the FCC considers reasonable costs that can be imposed on companies for small cell deployment.
2. **Restrictions:** The commission says it tried to rein in obstacles to deployment, while still allowing local governments to protect public safety and quality of life.
3. **Time:** The order establishes "shot clocks" that limit how much time a government can take to rule on small cell applications.
    1. 60 or 90 days
    2. No "deemed granted" language for small cells

(Source: https://info.aldensys.com/joint-use/fcc-small-cell-order-part-1)

CITY OF PORTLAND V. UNITED STATES (9TH CIRCUIT) 2020

- Consolidated Small Cell (5G) cases from cities across the country against the FCC in response to the 2018 Order on Small Cells.
- 9th Circuit (3-member panel) largely upheld the FCC order intended to facilitate the rapid deployment of 5G wireless facilities and limit local governments' ability to regulate telecommunications providers.
- Court upheld FCC's cap on what is "presumptively lawful" for local governments to charge for reviewing 5G applications. Court also upheld shorter time frame to review applications, AKA the "shot clock."

CITY OF PORTLAND (CON'T)

One point the court disagreed with FCC is that aesthetics requirements are not preempted if they are:

1. Reasonable,
2. No more burdensome than those applied to other types of infrastructure deployments, and
3. Objective and published in advance.

DAVISON V. RANDALL (FOURTH CIRCUIT) 2019

- Social Media Case
- Board of Supervisor member removed comment by citizen and banned him from her social media Page (temporarily).
- Citizen sued and claimed the board member violated his First Amendment and due process rights by blocking him from the Board of Supervisor's Facebook Page.
- The Circuit Court reviewed the legal question of "whether the board member's Facebook page constituted a public forum under traditional First Amendment law?"
  - The Court noted while there is no established case law on if and how a Facebook or other social media page might constitute a public forum, the Chair's page did "bear the hallmarks of a public forum."

DAVISON V. RANDALL (CON'T)

The 4th Circuit affirmed that the Board member "created and administered" the Facebook page "as a tool of governance." Moreover, on the page the board member states that she wants to ***"hear from ANY Loudo[u]n citizen on ANY issues, request, criticism, complement or just your thoughts."***

The Court found that by engaging in viewpoint discrimination on her Facebook page, the board member violated the Plaintiff's freedom of speech rights under the First Amendment and was not entitled to block the Plaintiff or any citizens from commenting on her Facebook page.

However, the County was not liable for the board member's "one-off," which was a unilateral decision.

OPEN MEETINGS AND COVID-19

- What are the primary concerns regarding open meetings, generally?
  - Transparency in state and local government
  - The ability for citizenry to actively participate in the meetings
  - Clear record of the meetings.
- What problems, if any, did you encounter as a planner with respect to meetings during the pandemic?
- How did some states deal with compliance of sunshine laws and pandemic?
- Can all the objectives of your state's open meetings laws be achieved if in person meeting wasn't required?

FREEDOM OF INFORMATION ACT AND COVID

Some states suggested invoking extensions (Virginia), some communities cited executive order to suspend response times under state's FOIA requirements (Maryland), and still others expanded exception to response deadline to include "days of COVID-19 closure."

FOIA strategies moving forward:

- Be very clear and proactive with requester
- Set EDCs (estimated dates of completion) with requester
- Explain any difficulties up front, don't wait until the very.
- Talk to legal counsel, work with them to figure out the best game plan!

SIGNS

Need to first answer the question. What is a sign? [May not be as easy as you think.]

"Any device with the essential purpose to communicate, designed to communicate, or where context results in communication, and such communication is aimed at persons in a public right-of-way."

- How about this definition?

Reed Case clarified that zoning must regulate signage strictly based on objective sign qualities, not content. Sign regulation based on the content of a sign, in most cases, is unconstitutional.

SIGNS FOR JESUS V. TOWN OF PEMBROKE (1ST CIR. 2020)

- 1st Amendment Sign and RLUIPA Case, New Hampshire
- The Town's Zoning Board of Adjustment denied the permit because it believed the sign would "detract from the rural character of the Route 3 corridor." Moreover, the town's electronic sign provision leaves open "alternative channels for communication."
- The Town's ordinance specifically lays out the criteria used to determine whether a sign is an electronic changing sign. These criteria are, as the District Court found, objective ones.
- "The First Amendment does not guarantee a right to the most cost-effective means of distribution."

SIGNS FOR JESUS

The Church brings two distinct claims under RLUIPA on appeal, the first under the "equal terms" provision, and the second under the "substantial burden" provision:

1. The Church points to Pembroke Academy and NHDOT as comparators. Both were allowed to erect electronic signs in the same area where the church is located. However, the court rejected Pembroke Academy and NHDOT as viable comparators as they are part of the state.

2. The Town contends that any "inconvenience" the electronic sign provision imposes on the Church cannot be "significant enough to rise to the level of a “substantial burden' as contemplated by RLUIPA." After all, requiring the Church to continue using a manually changeable, non-electronic sign is hardly an "oppressive" imposition on the Church's religious exercise.

REDEEMED CHRISTIAN CHURCH OF GOD V. PRINCE GEORGE'S COUNTY, MD (FOURTH CIRCUIT 2020)

- Church purchased property to accommodate larger congregation- zoning district allows churches and property is within "sewer envelope"
- County denied church's application to upgrade water and sewer to accommodate larger congregation
- Church files suit under RLUIPA, County moves to dismiss, claiming that water and sewer approval not a "land use regulation"

REDEEMED CHRISTIAN CHURCH OF GOD V. PRINCE GEORGE'S COUNTY, MD (FOURTH CIRCUIT 2020)

Holding:

- Water and sewer approval is land use regulation
- Church stated valid substantial burden claim under RLUIPA
- County's denial was intentionally "overcrowding" or providing "insufficient space" for the religious organization, a valid claim has been stated
- Upon purchase, Church had reasonable expectation that water and sewer application would be approved

CITY WALK-URBAN MISSION INC V. WAKULLA COUNTY, FLORIDA

"Lord, when did we see you hungry or thirsty or a stranger or needing clothes or sick or in prison and did not help you?" *Matthew* 25:44. To which the Lord replied, "Truly I tell you, whatever you did not do for one of the least of these, you did not do for me." *Id.* 25:45. Scripture teaches that by serving those in need, particularly those shunned by society, one serves the Lord. *See James* 2:14-16 ("What good is it, my brothers and sisters, if someone claims to have faith but has no deeds? Can such faith save them? Suppose a brother or a sister is without clothes and daily food. If one of you says to them, 'Go in peace; keep warm and well fed,' but does nothing about their physical needs, what good is it?")

CITY WALK-URBAN MISSION INC V. WAKULLA COUNTY, FLORIDA

- Religious group granted motion for preliminary injunction to operate a transition home for no more than 3 people at a time that included registered sex offenders
- Contacted county planning office and informed that use permitted as "family care home" with up to six unrelated people
- Operated without incident for a year and a half until neighbors found out that registered sex offenders lived there and complained
- County issues notice of violation, stating that property was being used as a "boarding house"

CITY WALK-URBAN MISSION INC V. WAKULLA COUNTY, FLORIDA

- Four months later, zoning ordinance amended to remove "family care home" and "shelter home" as permitted uses in the district
- County Director of Planning testified that there was NOWHERE in the county that the group could operate its transition home
- Substantial burden on religious exercise and County failed to show that the burden imposed is the least restrictive means of furthering a compelling interest

HUNT VALLEY BAPTIST CHURCH V. BALTIMORE COUNTY MD (2020)

- Public schools and other uses allowed of right in conservation district but churches require a special exception
- County: parking and gymnasium inconsistent with zoning provisions
- Motion for Summary Judgement denied by court
- Substantial burden and nondiscrimination claims stated- Board members made derogatory comments about "megachurch" and homeschooling

SHORT TERM RENTALS- HOMEAWAY, INC. V. CITY OF SANTA MONICA (9TH CIR. 2019).

Santa Monica ordinance prohibited all short-term rentals of 30 consecutive days or less, except for licensed home-sharing (where residents stay on-site with guests)

Platforms file suit, alleging that ordinance violates Community Decency Act and First Amendment

Other obligations imposed on Platforms (1) collecting and remitting "Transient Occupancy Taxes," (2) disclosing certain listing and booking information regularly, (3) refraining from completing any booking transaction for properties not licensed and listed on the City's registry, and (4) refraining from collecting or receiving a fee for "facilitating or providing services ancillary to a vacation rental or unregistered home-share."

SHORT TERM RENTALS- HOMEAWAY, INC. V. CITY OF SANTA MONICA (9TH CIR. 2019).

Content-based burden on commercial speech?

Held: ordinance does not target conduct with a significant expressive element (booking transactions)

Ordinance does not have the effect of singling out those engaged in expressive activity (advertising)

All claims dismissed

WALLACE V. TOWN OF GRAND ISLAND (NY 2020)

- Town of Grand Island passed an ordinance in 2015 prohibiting STRs in certain zoning districts, except when the owner also resides on the premises
- Plaintiff purchased a single-family home in the town for purpose of renting it out on a short-term basis in 2012
- Plaintiff applies for extension of nonconforming use amortization and use variance to allow continuing use of the home for STRs- both denied
- Plaintiff files regulatory takings claim
- Summary judgment for town- plaintiff showed only diminution in value, which is not sufficient to prove a regulatory taking

ZAATARI V. CITY OF AUSTIN (2020)

- Austin STR ordinance creates classes of STRs:

-owner-occupied or associated with owner-occupied (Type 1)

-Not owner-occupied or associated with owner-occupied (Type 2)

-Part of multi-family residential use (Type 3)

- Permits to for Type 2 ordered to immediately stop; all such rentals terminated as of April 1, 2022

ZAATARI V. CITY OF AUSTIN (2020)

- Ordinance also banned “broad swaths of assembly”

-Any assembly after 10 pm

-Outdoor assemblies of more than 6 adults at any time

-Use of property by more than six unrelated adults or ten related adults at any time

- Property owners filed suit, claiming violations of Texas constitution State of Texas intervened claiming ban on Type 2 was a taking and retroactive law

ZAATARI V. CITY OF AUSTIN (2020)

- Ban on Type 2 rentals unconstitutionally retroactive because it served minimal public interest, if any, and significantly impaired fundamental property rights

-City had never issued any citation

-Short-term rentals just residential as owner-occupied homes

-Results in a loss of income for owners relying on short term rentals

-“established practice” and “historically…allowable use”

- Restrictions on assembly, without regard for peacefulness or purpose, violate the Texas Constitutional rights of tenants and owners

DEFINING FAMILY TO REGULATE SHORT-TERM RENTALS

Kintner v. ZBA of Smithfield Township, 2019 WL 178486 (Commonwealth Ct. Pa. 2019).

As many as six (6) persons living together as a *single, permanent and stable nonprofit housekeeping unit*, using all rooms in the dwelling and housekeeping facilities in common and having such meals as they may eat at home generally prepared and eaten together with the sharing of food, rent, utilities or other household expenses. Households or groups of more than six (6) persons living together shall not be considered families for purposes of the Chapter unless affirmative evidence is presented to indicate to the satisfaction of the Zoning Officer that the household or group meets the other criteria contained herein.

DEFINING FAMILY TO REGULATE SHORT-TERM RENTALS

- *Slice of Life, LLC v. Hamilton Township Zoning Hearing Board*, J-97-2018 (Pa. Commw. Ct. Apr. 26, 2019)
  - Issue of whether a zoning ordinance that defines "family" as requiring "a single housekeeping unit" permits the purely transient use of a property located in a residential zoning district
  - Reinstated decision of Zoning Board, which found the property was "part of a transient lodging business enterprise"
  - Purely transient, short-term use of a house is NOT a permitted use in a residential district limiting use to single-family homes by "a single housekeeping unit" as it is contrary to the provisions of the zoning ordinance.

QUESTIONS/CONCLUSION

Thank you!!! And don't forget to register for the rest of the Mid-Atlantic Planning Collaboration Webinar Series!!!!

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