Update on Planning, Land Use, and Eminent Domain Decisions

Comprehensive Planning, Moratoria, Takings, and Vested Rights

February 1, 2017

2:00 -3:45 PM

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Takings

***Murr v. Wisconsin* (US 2016).**
http://www.scotusblog.com/case-files/cases/murr-v-wisconsin/
Petition for certiorari
http://www.scotusblog.com/wp-content/uploads/2015/11/Murr-petition-for-cert.pdf

QUESTION PRESENTED

In a regulatory taking case, does the "parcel as a whole" concept as described in Penn Central Transportation Company v. City of New York, 438 U.S. 104, 130-31 (1978), establish a rule that two legally distinct, but commonly owned contiguous parcels, must

Note: All cases can be found on Google Scholar by simply searching the case name.

be combined for takings analysis purposes?

Moratoria

***Fort Collins v. Colo. Oil And Gas Assn.*, 369 P.3d 586, 2016 C.O. 28 (Colo. 2016).**
https://scholar.google.com/scholar_case?case=14617160166041881631&q=moratorium&hl=en&as_sdt=8006&as_ylo=2016

> ¶ 1 This case comes to us on review of the Larimer County District Court's order invalidating the city of Fort Collins's five-year moratorium on fracking and the storage of fracking waste within the city. As in City of Longmont v. Colorado Oil and Gas Association, 2016 CO 29, 369 P.3d 573, which we also decide today and which invalidated the city of Longmont's bans on fracking and the storage and disposal of fracking waste, this case presents us with the narrow question of whether state law preempts Fort Collins's fracking moratorium.
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> ¶ 2 We conclude that because fracking is a matter of mixed state and local concern, Fort Collins's fracking moratorium is subject to preemption by state law. Applying well-established preemption principles, we further conclude that Fort Collins's five-year moratorium on fracking and the storage of fracking waste operationally conflicts with the effectuation of state law. Accordingly, we hold that the moratorium is preempted by state law and is, therefore, invalid and unenforceable. We thus affirm the district court's order and remand this case for further proceedings consistent with this opinion.

***TCEF, INC. v. County of Kern*, No. F070043 (Cal. Ct. App. Mar. 29, 2016).**
https://scholar.google.com/scholar?as_ylo=2016&q=moratorium&hl=en&as_sdt=8006

> In June 2012, the voters of Kern County approved Measure G, an ordinance that authorized medical marijuana dispensaries but restricted them to areas zoned for industrial use. Ironically, the validity of Measure G was challenged by a group of medical marijuana dispensaries that were operating in areas zoned for commercial use, an area approved for dispensaries under an earlier ordinance. The dispensaries alleged that County erroneously determined Measure G was exempt from environmental review and violated the California Environmental Quality Act (CEQA) (Pub. Resources Code, § 21000 et seq.) by failing to conduct an initial study of the measure's environmental impacts.
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> We conclude that there is a possibility that Measure G may have a significant effect on the environment and, therefore, the common sense exemption does not apply. Measure G itself states that "Medical Marijuana Dispensaries have serious secondary effects on the community," including increased traffic, noise and litter.
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> We therefore affirm the order invalidating Measure G.

***Allenmore Medical Investors, LLC v. City of Tacoma,* No. C14-5717-RBL (W.D. Wash. Aug. 8, 2016).**
https://scholar.google.com/scholar?start=10&q=moratorium&hl=en&as_sdt=8006&as_ylo=2016

> The case involves AMI's development of what used to be the Tacoma Elks Lodge property into what is now a Wal-Mart store and shopping center. In 2011, AMI had a contractual right to purchase the Elks property, which consisted of five lots. On August 30, 2011, the Tacoma City Council passed an emergency Ordinance imposing a six-month moratorium on "big box" retail development, allegedly because it was concerned about the possibility of a Wal-Mart-based shopping center on the Elks property. The Ordinance became effective September 1, 2011. In the interim—August 31, 2011—Wal-Mart (and its architect, BCRA) filed a building permit application for the development of a big box retail store and a host of related improvements. AMI paid the $44,000 permit review fee.
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> But it is clear that the development rights vested when the complete valid building permit application was filed, and AMI was entitled to have its proposal judged against the law as of that date:
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> > A valid and fully complete building permit application for a structure, that is permitted under the zoning or other land use control ordinances in effect on the date of the application shall be considered under the building permit ordinance in effect at the time of application, and the zoning or other land use control ordinances in effect on the date of application.
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> RCW 19.27.095(1)(emphasis added). The City admits the BLA was proper under the Tacoma Municipal Code. It refused to process the BLA application because, it claimed, the moratorium prohibited it from doing so. This is contrary to Washington law, and it was wrongful as a matter of law. AMI's Motion for partial summary judgment on that limited point is therefore GRANTED.

***Hughes Bros., Inc. v. Town of Eddington*, 130 A.3d 978, 2016 M.E. 13 (Me. 2016).**
https://scholar.google.com/scholar_case?case=18183794577742090417&q=moratorium&hl=en&as_sdt=8006&as_ylo=2016

> ¶ 23] The evidence presented regarding the purpose of the executive session supports the court's determination that the Town met its burden to show that the executive session was held for—and limited to—the authorized purpose of consulting with counsel to draft a legally sound ordinance amendment for proposal at a later public meeting. See id. § 405(4), (5), (6)(E); see also Blethen Me. Newspapers, Inc., 2008 ME 69, ¶¶ 15-18, 947 A.2d 479; 984*984 cf. Town of Burlington, 2001 ME 59, ¶ 22, 769 A.2d 857. The Town did not "finally approve[ ]" any ordinance or rule in executive session. 1 M.R.S. § 405(2). Rather, after consulting with counsel during the executive session, the Planning Board

publicly deliberated and voted to present a proposed moratorium to the Board of Selectmen. The Board of Selectmen then held a public hearing before submitting the proposed moratorium to the vote of the Town's residents at a special town meeting. It was not until the majority vote of the residents at the town meeting that the moratorium was actually adopted. See Vella v. Town of Camden, 677 A.2d 1051, 1055 (Me.1996).

[¶26] The FOAA contains no prohibition against municipal boards simultaneously entering into executive session to jointly consult with counsel about how to comply with the law in carrying out their respective duties. See id. § 405(6)(E). The court did not err in determining that each board took the steps necessary to enter into executive session. See id. § 405(3), (4), (5), (6)(E); Blethen Me. Newspapers, Inc., 2008 ME 69, ¶¶ 15-18, 947 A.2d 479. Although government actors must take care to prevent an executive session from illegally expanding into public matters that may be addressed only in an open public meeting, see 1 M.R.S. § 405(2), (4)-(6), the bare fact that boards share in the advice of counsel during a combined executive session does not offend the FOAA and demonstrates prudent fiscal management.

***Clayland Farm Enterprises, LLC. V. Talbot County, Maryland*, No. 15-1755 (4th Cir. Dec. 2, 2016).**
https://scholar.google.com/scholar_case?case=11126783220022043657&q=moratorium&hl=en&as_sdt=8006&as_ylo=2016

Clayland Farm suffered concrete and certain injury as soon as the moratoriums were enacted; the ordinances prohibit Clayland Farm from subdividing more than one additional lot from its property and from developing more than one dwelling unit on the lot, which had previously been allowed. The possibility that Talbot County may enact future zoning or planning ordinances that affect Clayland Farm's ability to develop its property does not call into question the finality of the three ordinances that currently restrict Clayland Farm. Thus, Count I's facial challenge is ripe.

***City of Longmont v. Colo. Oil and Gas Assn.*, 369 P.3d 573, 2016 C.O. 29 (Colo. 2016).**
https://scholar.google.com/scholar_case?case=4292539255803886313&q=moratorium&hl=en&as_sdt=8006&as_ylo=2016

¶ 1 Hydraulic fracturing, commonly known as fracking, is a process used to stimulate oil and gas production from an existing well. See Patrick H. Martin & Bruce M. Kramer, The Law of Oil and Gas 14-15 (9th ed.2011). Viscous fluid containing a proppant such as sand is injected into the well at high pressure, causing fractures that emanate from the well bore. Id. at 15. The pressure is then released, allowing the fluid to return to the well. Id. The proppant, however, remains in the fractures, preventing them from closing. Id. When the fluid is drained, the cracks allow oil and gas to flow to the wellbore. Coastal Oil & Gas Corp. v. Garza Energy Tr., 268 S.W.3d 1, 7 (Tex.2008). First used commercially in 1949, the process is now common worldwide. Id.

¶ 2 As the briefing in this case shows, the virtues and vices of fracking are hotly contested. Proponents tout the economic advantages of extracting previously inaccessible oil, gas, and other hydrocarbons, while opponents warn of health risks and damage to the environment. We fully respect these competing views and do not question the sincerity and good faith beliefs of any of the parties now before us. This case, however, does not require us to weigh in on these differences of opinion, much less to try to resolve them. Rather, we must confront a far narrower, albeit no less significant, legal question, namely, whether the City of Longmont's bans on fracking and the storage and disposal of fracking waste within its city limits are preempted by state law.

¶ 3 Applying well-established preemption principles, we conclude that an operational conflict exists between Longmont's fracking bans and applicable state law. Accordingly, we hold that Article XVI is preempted by state law and, therefore, is invalid and unenforceable. We thus affirm the district court's order enjoining Longmont from enforcing Article XVI and remand this case for further proceedings consistent with this opinion.

***Schnitzer West, LLC V. City of Puyallup*, No. 47900-1-II (Wash. Ct. App. Oct. 18, 2016).**
https://scholar.google.com/scholar_case?case=3648425341669454667&q=moratorium&hl=en&as_sdt=8006&as_ylo=2016

The City of Puyallup (City) appeals from a superior court order declaring its "Ordinance No. 3067" (the Ordinance) invalid under the Land Use Petition Act (LUPA), chapter 36.70C RCW. Schnitzer West LLC filed a LUPA petition challenging the Ordinance in superior court, claiming that the Ordinance was an invalid land use decision. The City argues that the superior court lacked subject matter jurisdiction because the Ordinance is a legislative action, not a land use decision subject to LUPA review.

We hold that the Ordinance was not a "site-specific" land use decision because it did not result from an application by a specific party, and therefore the superior court lacked subject matter jurisdiction under LUPA. Accordingly, we reverse the superior court order declaring the Ordinance invalid and dismiss Schnitzer's LUPA petition.

***Peterson v. Village of Downers Grove*, No. 14 C 09851 (N.D. Ill. Feb. 4, 2016).**
https://scholar.google.com/scholar_case?case=12262132810920675329&q=moratorium&hl=en&as_sdt=8006&as_ylo=2016

Leibundguth also asserts that because the Village "has permitted [it] to display its signs for a decade since amending the Sign Ordinance," the Village will not be injured by an injunction barring enforcement of the Sign Ordinance pending appeal. Pl.'s Stay Br. at 4. But this argument is unpersuasive because it really is premised on the Village's decision to give residents a long lead time to comply with the Ordinance. The Village's decision to implement a seven-year moratorium from enforcement in the Ordinance, and to later extend that moratorium period by two years, see R. 37-4, Exh. 1 at 349 (extending sign

compliance deadline from May 2012 to May 2014); Sign Ord. § 9.090(G), in order to give residents time to come into compliance with the new regulation does not support Leibundguth's proposition that the Village will suffer no injury if the Court were to now issue an injunction barring enforcement of the Ordinance. In fact, the Village's decision to grant such a long moratorium period actually cuts against Leibundguth's argument; it shows that the predicament Leibundguth currently finds itself in was avoidable. Leibundguth had plenty of time to bring suit during the years-long moratorium. As originally enacted, the Sign Ordinance gave residents seven years with which to bring any non-conforming signs into compliance. Leibundguth could have easily brought suit then, and likely had received a district court and appellate court decision by the moratorium period's end. Instead, Leibundguth chose to wait until December 2014 to file suit, after both the original and the extended moratorium periods had expired. Simply put, Leibundguth put itself in this position and now it must deal with the consequences of waiting to bring suit.

***G & G Fremont, LLC v. City of Las Vegas*, No. 2: 14-CV-1006 JCM (PAL) (D. Nev. Aug. 10, 2016).**
https://scholar.google.com/scholar_case?case=6933320653042862583&q=moratorium&hl=en&as_sdt=8006&as_ylo=2016

The present case involves the regulation of package liquor sales by the City along the Fremont Street Experience ("FSE"). (ECF No. 44 at 2). The property owners own shops that sell packaged liquor on the FSE. (ECF No. 45 at 3). At the Las Vegas Planning Commission's July 9, 2013 meeting, members of the public and a representative of the Las Vegas Metropolitan Police Department ("LVMPD") opposed the applications of four new package liquor stores and voiced their concerns about issues caused by these stores. (Id. at 3). The accounts from the individuals present described various issues with the package sales, including: (1) how the package stores routinely oversold alcoholic beverages to visibly intoxicated patrons; and (2) the availability of high-alcohol drinks in large quantities. (ECF No. 44 at 3). The planning commission also heard accounts of the effect of package liquor on underage drinking and crime. (Id. at 4-5). Furthermore, a retired LVMPD sergeant spoke about his experiences with crowd issues and underage drinking involving package liquors. (Id. at 5). Finally, the City received petitions opposing the applications for new package liquor purveyors with over 1,000 signatures. (ECF No. 45 at 7).

As a result of this meeting and further discussion, the City ultimately adopted Bill No. 2013-15 as Ordinance No. 6287 and imposed a 180-day moratorium on new land use entitlements and business licenses for package liquor on FSE. (Id. at 6). Subsequently, in May 2014, the City passed Ordinance No. 6320. (ECF No. 45 at 2). The ordinance, enacted as LVMC 6.50.475, applied only to souvenir stores along the FSE selling packaged liquor. (ECF No. 45 at 3). These new restrictions prohibited the sale of "single serving products containing alcohol for immediate consumption," such as Jell-O shots or candy; any malt or beer beverage greater than thirty-two liquid ounces in size or an alcohol content greater than eleven percent alcohol by volume. The ordinance further

prohibited the sale of alcohol (except beer or wine) in containers less than three hundred seventy-five milliliters. § 6.50.475(A), (C)-(E).

LVMC 6.50.475 also contained several advertising restrictions. (ECF No. 44 at 21). The ordinance required that the stores limit their alcohol advertising to only ten percent of their store windows, and it prohibited stores from posting alcohol price advertisements visible to individuals standing outside of the establishment. § 6.50.475(F)-(H). The ordinance also required that the stores post signs informing customers that it is prohibited to open or consume alcohol purchased at the store on the pedestrian mall. § 6.50.475(I). The property owners filed the instant complaint on June 20, 2014, alleging thirteen claims for relief. (ECF No. 1 at 26). On October 7, 2015, the city council repealed former LVMC 6.50.475(F)-(H). (ECF No. 44 at 21). Defendant now moves for summary judgment and plaintiffs move for partial summary judgment. The court will address each in turn.

IV. Conclusion
In sum, the court grants the City's motions for summary judgment on plaintiffs' claims with respect to substantive due process, void for vagueness, procedural due process, equal protection, the Sherman Act, bill of attainder, and the issue of inverse condemnation. Moreover, the court denies both the City's and plaintiffs' motion for summary judgment as they relate to the First Amendment claim.

Accordingly,
IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that defendant City of Las Vegas' motion for summary judgment (ECF No. 44) be, and the same hereby is, GRANTED consistent with the foregoing.
IT IS FURTHER ORDERED that plaintiffs G&G Fremont, LLC's and Crazy Ely Western Village, LLC's motion for partial summary judgment (ECF No. 45) be, and the same hereby is, DENIED consistent with the foregoing.

Vested Rights

***Snohomish Cnty. v. Pollution Control*, 368 P.3d 194, 192 Wash. App. 316 (Ct. App. 2016).**
https://scholar.google.com/scholar?as_ylo=2016&q=%22vested+rights%22+zoning&hl=en&as_sdt=8006

We hold that (1) the 2013-2018 Permit's required stormwater regulations are "land use control ordinances" under the vested rights statutes, (2) enforcement of condition S5.C.5.a.iii would violate the statutory vested rights of developers who submit applications before July 1, 2015 but do not begin construction until after June 30, 2020, and (3) federal law does not preempt Washington's vested rights statutes. Accordingly,

we reverse the Board's order and remand to the Board to direct Ecology to revise condition S5.C.5.a.iii to specify that the 2013-2018 Permit applies only to those completed applications submitted after July 1, 2015.

***Matter of Perlbinder Holdings, LLC v. Srinivasan*, 2016 N.Y. Slip Op 2122 (2016).**
https://scholar.google.com/scholar_case?case=34855300023071235 38&q=%22vested+rights%22+zoning&hl=en&as_sdt=8006&as_ylo=2016

When a permit is wrongfully issued in the first instance, the vested rights doctrine does not prevent the municipality from revoking the permit to correct its error. Because the 2008 permit was unlawfully issued, petitioner could not rely on it to acquire vested rights.

***Ferris Trust v. Planning Com'n*, 378 P.3d 1023, 138 Haw. 307 (Ct. App. 2016).**
https://scholar.google.com/scholar_case?case=7081531629258692561&q=%22vested+rights%22+zoning&hl=en&as_sdt=8006&as_ylo=2016

On appeal, the Ferris Trust contends the circuit court erred in upholding the interpretation, by Defendant-Appellee/Appellee County of Kaua`i Planning Department (Planning Department), of the Kaua`i County Comprehensive Zoning Ordinance (CZO) as requiring an applicant for a nonconforming use certificate to have authorization from at least a 75% interest of the equitable and legal title of the lot. …

Persons with less than a seventy-five percent ownership interest may be able to establish vested rights to prior lawful nonconforming uses. Therefore, precluding such persons from even applying for a nonconforming use certificate would be inconsistent with the purpose of the ordinance to identify those engaged in the prior lawful use of their property as a transient vacation rental and to allow them to apply to continue that use. In contrast, construing the ordinance to permit the "owner, operator, or proprietor of any single family transient vacation rental which operated outside of a Visitor Destination Area prior to [the effective date of the ordinance specifically banning such use]" to apply for a nonconforming use certificate would be consistent with and advance the express purpose of the ordinance. It would give all those who could potentially establish a vested right to continue using their property as a transient vacation rental the opportunity to apply for, and demonstrate their entitlement to, a nonconforming use certificate.

***Allenmore Medical Investors, LLC v. City of Tacoma*, No. C14-5717-RBL (W.D. Wash. Aug. 8, 2016).**
https://scholar.google.com/scholar_case?case=15191784904114719266&q=%22vested+rights%22+zoning&hl=en&as_sdt=8006&as_ylo=2016

It accurately points out that the vested rights doctrine "strongly protects the right to develop property" (Potala Village Kirkland LLC v. City of Kirkland, 183 Wn. App. 191 (2014)) and that the filing a complete building permit application (though not lesser

applications) triggers the vesting. Erickson v. Associates, Inc., 123 Wn.2d 864 (1994). The doctrine entitles developers to have land development proposals processed under the regulations in effect at the time a complete building permit application is filed, regardless of changes in zoning or other land use regulations. Abbey Road Group, LLC v. City of Bonney Lake, 167 Wn.2d 242 (2009).

Bridge Aina Le'a, LLC v. State of Hawaii Land Use Commission, **Civil No. 11-00414 SOM-BMK (D. Haw. Feb. 29, 2016).**
https://scholar.google.com/scholar_case?case=9452149389492288384&q=%22vested+rights%22+zoning&hl=en&as_sdt=8006&as_ylo=2016

Defendants argue that Bridge's vested-rights claim for money damages is precluded by Allen v. City & County of Honolulu, 58 Haw. 432, 571 P.2d 328 (1977). See ECF No. 116, PageID #s 3030-32. This court agrees.

In Allen, the plaintiffs purchased oceanfront property intending to build a highrise condominium. Plaintiffs spent substantial money on work necessary to obtain a building permit. 58 Haw. at 433-34, 571 P.2d at 328-29. However, the City Council, in response to political pressure from nearby residents to prevent the highrise construction, passed a zoning amendment, which reduced the maximum building height from 350 feet to 40 feet and effectively prohibited plaintiffs from developing the condominium. Id. at 434 n.1, 571 P.2d at 329 n.1.

The plaintiffs brought claims for damages claiming vested rights and zoning estoppel, and arguing that they had incurred substantial nonrecoverable costs in reliance on the existing zoning and the reasonable probability that they would be issued a building permit. Id. at 434, 571 P.2d at 329. The Hawaii Supreme Court held that an award of money damages was not the proper remedy for either theory. Id. at 437, 571 P.2d at 330 ("The remedy is to allow continued construction, not award damages."). Given Allen, Bridge may not maintain a vested-rights claim for damages.

Little Compton Resorts, Inc. v. Zoning Board for the Town Of Little Compton**, CA No. NC-2016-0262 (R.I. Super. Ct. Nov. 22, 2016).**
https://scholar.google.com/scholar_case?case=11630165471402771571&q=%22vested+rights%22+zoning&hl=en&as_sdt=8006&as_ylo=2016

Due to the intrinsically nonbinding nature of a zoning certificate, its issuance may not be appealed because neighboring property owners lack the requisite standing to bring such an appeal under the Enabling Act. This Court concludes a nonbinding zoning certificate does not give rise to a controversy because the advisory document creates no vested rights in the recipient. The purpose for this conclusion is two-fold: (1) the nonbinding nature of the certificate carries with it no injury because it merely provides the zoningenforcement officer's opinion in order to clarify the existing status of the

property; and (2) no provision of the Enabling Act requires that neighboring or abutting property owners be given notice upon the issuance of an advisory zoning certificate.

***In re B&M Realty, LLC*, 2016 V.T. 114 (Vt. 2016).**
https://scholar.google.com/scholar_case?case=9382093053817269404&q=%22vested+rights%22+zoning&hl=en&as_sdt=8006&as_ylo=2016

> As the trial court explained, Vermont follows the "minority rule" that a party obtains a vested right in existing regulations "as of the time when [a] proper [permit] application is filed." Smith v. Winhall Planning Comm'n, 140 Vt. 178, 181, 436 A.2d 760, 761 (1981). The majority rule holds, by contrast, that "rights vest only if an applicant has both received a permit and substantially relied on it in commencing work, or can show that an amendment was enacted to target its development." In re Keystone Dev. Corp., 2009 VT 13, ¶ 6, 186 Vt. 523, 973 A.2d 1179 (mem.) (citing Smith, 140 Vt. at 181, 436 A.2d at 761). Pursuant to the minority rule this Court adopted, a party's ability to rely on a particular zoning regime vests sooner than it would under the majority rule. We adopted this minority rule because we found it more practical to administer, it provided greater certainty, and it avoided extended litigation. Smith, 140 Vt. at 181-82, 436 A.2d at 761. We made clear that parties do not have an "open-ended right to `freeze' the applicable regulatory requirements by proposing a development with inadequate specificity." In re Ross, 151 Vt. 54, 56, 557 A.2d 490, 491 (1989). Instead, a party must file a complete permit application before any rights will vest. Id. (concluding that applicant had no vested right in town plan in existence at time it filed incomplete application for Act 250 permit)….
>
> Nor do the facts that prior to 2007 applicant was taking steps to advance the development project, and that municipal leaders were aware of these efforts, give rise to a vested right in application of the 2003 Regional Plan. A mere "suggestion" to a municipality "that a property owner would like to undertake ill-defined work at an unspecified time" is insufficient to vest in a developer a right to rely on the then-existing regional plan for purposes of an application for a future Act 250 permit. In re Keystone Dev. Corp., 2009 VT 13, ¶¶ 5-6 (holding that developer acquired no vested rights in zoning ordinance where it did not submit a "full and complete" application for a zoningpermit but merely alerted city officials that it intended to perform certain work on its property). As in Keystone, applicant's position here would create great uncertainty in the law and move us even further away from the majority rule. See id. ¶ 6 (explaining that without a proper application, one cannot know "what rights, exactly, had vested as to a particular party, or when"). It is clear that applicant acquired no vested right in use of the 2003 Regional Plan for Act 250 purposes prior to the TRO Regional Commission's adoption of the 2007 Regional Plan.