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REAL ESTATE AND LAND USE

A SHIPMAN & GOODWIN® LEGISLATIVE UPDATE

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Recent Legal Developments

New Life for Takings Claims

By far, the most important recent development in land use law is the U.S. Supreme Court's June 2019 decision in *Knick v. Township of Scott*, in which the Court held, essentially, that if government imposes a regulation that renders land totally or nearly economically undevelopable, the property owner can proceed directly in federal court for a violation of the Takings Clause. The *Knick* decision erased a 1985 ruling that property owners must first go to state court with their taking claims, and lose, before their federal taking claim was "ripe for adjudication." The unintended consequence of the 1985 ruling was that after owners went to state court and lost, the federal courts turned away their federal claim, holding that the property owners had "had their day in court." Put another way, the *Knick* decision restores the Takings Clause as a federal civil right, on par with the rest of the Bill of Rights. Equally important, this change allows the property owner, if successful, to recover attorneys' fees.

We have been working on this issue for 20 years; in *Knick*, we filed a friend-of-the-court brief on behalf of two members of Congress, and our brief was cited in one of the Court's opinions.

We expect this newly restored federal right to be used, among other ways, to challenge climate change regulation, denials of as-of-right infrastructure such as sewer connections, and excessive open space dedication requirements.

Takings claims have always been challenging to pursue, but the U.S. Supreme Court has now at least restored a property owner's right to a prompt day in federal court, to pursue a guarantee contained in the federal Bill of Rights.

Climate Change and Sustainability

There was a time in Connecticut when zoning hearings about development proposals invariably were dominated by discussions of property tax revenue and school funding; low impact commercial development was good (providing revenue, but needing few municipal services), and most residential development (viewed as not paying for itself) was bad. Today at hearings, very little is said about taxes and schools, and more and more the topics are climate change, resiliency planning, and sustainability. Especially when the proposal is in or near a coastal zone, river, or other water body, these concerns are starting to predominate. While these are important and worthy issues, the difficulty is that regulatory responses to climate change and global warming are still in the formative stage; how they

should affect land development is far from clear. In short, over the next few years, we foresee land use hearings focusing on whether and how land development should be regulated to counteract the effects of more variable and extreme temperatures, more intense rainfalls, and other changes in weather patterns.

Opportunity Zones: Treasury Department Final Regulation

Our real estate and tax attorneys have already produced materials explaining Opportunity Zones [https://www.shipmangoodwin.com/qualified-opportunity-zones], but tax and real estate experts have been awaiting the all-important final regulations from the U.S. Treasury Department, spelling out the tax implications of Opportunity Zone projects. The final regulations were released on December 19, 2019. The regulations are over 500 pages and answer many of the questions that were left unanswered by the two sets of proposed regulations that had been released in late 2018 and early 2019. From the perspective of an investor in a qualified opportunity fund, many of the unanswered questions have been resolved in a favorable manner.

Affordable Housing and Section 8-30g

In the past year, much has been written about barriers to affordable housing. In particular, General Statutes § 8-30g has been characterized as slow, expensive, and having produced less than 5,000 affordable units statewide since its inception in 1990. While some § 8-30g applications have required litigation, during the past ten years, about half of § 8-30g applications have either been approved without court action, or settled promptly after an initial trial court decision. A good example is *Dakota Partners, Inc. v. Newington Town Planning and Zoning Commission*, an August 2019 court decision. The proposal is to redevelop a former car dealership location into a 108 unit, Low Income Housing Tax Credit-financed development, within walking distance of a CTfastrak commuter station. From the start of the public hearings (application denied) to the trial court decision ordering approval (not appealed), took 12 months. This example shows that with the right site and the right plan (good sewer, water, traffic, and emergency access), and attention to architecture and landscaping, § 8-30g remains a tool to overcome opposition to higher density development. Meanwhile, Department of Housing data indicate that since 1990, the number of affordable (§ 8-30g compliant) and lower-cost residential units built and occupied attributable to § 8-30g is closer to 15,000 units, not 5,000.

The Future of Single-Family Zoning?

The City of Minneapolis has essentially banned zoning districts in which lots with infrastructure that will accommodate more than one residential unit may be developed only with one single-family home. A few other cities have done the same, and more are considering it. The issue is: Where housing availability and affordability are constrained by limited supply, can a municipality afford to limit the resource of "buildable lots" to a number of units that is *less* than the lot's infrastructure and good planning can accommodate? What does a city preserve and promote, other than a long-embedded tradition, when it allows only a single-family home on a large lot? We expect more housing advocates to ask this question in towns and cities where a limited supply of multi-unit housing drives up housing costs and has an exclusionary impact.

Tax Exemptions For Group Homes Challenged

Across Connecticut, we are seeing more municipal tax assessors challenging property tax exemptions of non-profit organizations that provide treatment for people with disabilities. Assessors have noted that the state statute that grants such exemptions does not apply to "subsidized housing." This term is generally understood as applying to permanent housing in which the developer receives a government subsidy that allows it to charge a lower rent, or tenants receive a direct government payment to help pay the rent (or both). Conversely, a building within which treatment is provided for mental health disabilities, paid for with state money, is not "subsidized housing." Nonetheless, several assessors are challenging the tax exemption of non-profit mental health service providers, asserting that state money for treatment makes the housing "subsidized." One such case being handled in the Connecticut Appellate Court by our Practice Group for the non-profit provider is *Rainbow Housing Corp. v. Town of Cromwell* (AC 43094).

Controlling Peer Review Fees

It has become common in recent years for municipal land use commissions to charge applicants a fee to pay for one or more consultants to conduct a "peer review" of the application. Unfortunately, we have seen several abuses in the charging and spending of these fees. To avoid possible overreaching, we advise our clients to request these agreements when a commission demands a fee: (1) no fee if the commission has paid staff who are capable of conducting the review; (2) the consultant hired must be disclosed in advance to make sure he / she is qualified and does not have any conflict of interest, or bias; (3) the consultant should provide a scope of work before starting; (4) the consultant should charge its municipal or public sector rate; (5) the consultant should be directed to contact the applicant's team directly to get questions answered before issuing a report, instead of issuing a report that merely contains questions; and (6) all communications and reports should be provided simultaneously to the applicant when provided to the commission or its staff. While peer review fees are permissible, they can and should be controlled to ensure fairness.

Fair Housing Act Obligations of Landlords

In December 2019, the U.S. Court of Appeals for the Second Circuit issued a decision (*Francis v. Kings Park Manor, Inc.*) that could signal increased obligations for landlords under the Fair Housing Act ("FHA"). The appeals court held that the FHA, "which forbids 'interference' with a person's 'exercise or enjoyment of' his or her rights under the FHA, clearly encompasses landlord liability for a tenant's racially hostile conduct in at least some circumstances." Thus, the court held that a landlord could be liable for failing to intervene when one tenant takes racially-based action against another. In a dissent, Judge Livingston warned that the majority opinion could create "potentially traumatic consequences" for the housing market, as it threatens to "expose all landlords to suit for purposeful discrimination based on the wrongful conduct of one tenant vis-à-vis another so long as such landlords have ever responded to a lease violation." The landlord's petition for rehearing is pending.

News From Our Practice Group:

New Team Members

We have three new members of our Real Estate, Environmental, Land Use, and Construction team:

Pat Naples is a 2014 graduate of Wake Forest Law School. He clerked for the federal Fourth Circuit Court of Appeals in Richmond, Virginia, and was then in private practice in Washington, DC. Pat will handle land use, real property, environmental, and commercial litigation.

Lilia Hrekul has been practicing law since 2011, and but most recently obtained her Masters degree in Environmental and Energy Law from the University of Connecticut. Lilia has been in private practice, and recently spent three years at Pratt & Whitney. She will handle land use and environmental counseling and litigation. She is originally from the Ukraine.

Tyler Archer joins us after graduating from Boston College Law School and a one-year Connecticut Superior Court clerkship. He will be involved in all aspects of our land use and environmental work. He is an accomplished woodworker, and was an All-State receiver for Brookfield High School.

Questions or Information:

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