

## **LAND USE LITIGATION**

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### **II. LAND USE LITIGATION**

#### **A. THE POWER TO ZONE: WHO HAS IT AND WHERE DOES IT COME FROM?**

##### **1. The Police Power**

A charter municipality's power to enact zoning regulations derives directly from the Ohio Constitution, Article XVIII, Section 3. *Gerijo, Inc. v. Fairfield* (1994), 70 Ohio St.3d 223, 225; *Hudson v. Albrecht, Inc.* (1984), 9 Ohio St.3d 69, 71; and *Pritz v. Messer* (1925), 112 Ohio St. 628, 637. Section 3 of Article XVIII reads as follows: "Municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws." Thus, zoning ordinances are an exercise of the police power granted municipalities by the Ohio Constitution. *Garcia v. Siffrin* (1980), 63 Ohio St.2d 259, syl. 2.

Municipal (city and village) zoning ordinances may deviate from state statutory provisions and requirements provided the municipal regulations are not less stringent than state law or the particular state statute prescribes a rule

of conduct upon citizens of the state generally and there is a direct conflict between the municipal law and the state statute. *Garcia, supra, see also, City of Avon v. Samanich* (Lorain Cty. App. 1995), 1995 WL 500141 (home day care).

The zoning powers of counties and townships in Ohio are not derived from the constitution, but from specific state statutes. Therefore, the zoning authority of counties and townships is much narrower than municipal corporations and must not deviate from state statute. *Bainbridge Twp. v. Funtime, Inc.* (1990), 55 Ohio St.3d 106.

## 2. Overview of State Planning Law

### a. Statutes Governing Cities and Villages

- i. R.C. Chapter 711 -- Subdivision of real property.  
(Most municipal subdivisions of land is accomplished pursuant to local ordinances.) County commissioners, county planning commissions or regional planning commissions approve subdivisions outside of municipal boundaries under varying circumstances. Under recent revisions to Rev. Code Section 711.09, city and village planning commissions no longer have review authority over subdivision plats within 3 miles

and 1.5 miles of their borders under most circumstances.

- ii. R.C. Chapter 713 -- Planning and zoning powers of municipalities. R.C. 713.13 -- Power of city or abutting and neighboring property owners to seek injunction to stop violation of zoning regulations. R.C. 713.15 -- Prohibition against retroactive zoning laws (i.e., allowance of prior nonconforming uses). R.C. 715.41 -- Drainage of private lands.
- iii. R.C. 715.44 -- Municipal power to abate nuisances. Definition of "*nuisance*": "What amount of annoyance or inconvenience will constitute a nuisance, being a question of degree dependent on varying circumstances, cannot be precisely defined." *Columbia Gas & Light Company v. Freedland* (1861), 12 Ohio St. 392. (See *Lucas v. South Carolina Coastal Council* (1992), 505 U.S. 1003, 112 S.Ct. 2886, 120 L.Ed.2d 798).

b. Counties -- R.C. Chapter 303

i. County rural zoning -- R.C. §§303.01- 303.25.

Power to zone unincorporated areas of county in accordance with comprehensive plan -- R.C. 303.02. Township zoning regulations take precedence over county regulations if adopted prior to the county regulations or the county regulations are repealed by vote of township -- R.C. 303.22 and 303.25.

c. Township Statutes

i. R.C. Chapter 519. Townships are statutory creatures without powers conferred by the Ohio Constitution, as are cities and villages. Township has only those zoning powers conferred by R.C. 519.02.

ii. Significant limits on township zoning powers: R.C. 519.19 (nonconforming uses) and R.C. 519.21 (agricultural uses), and R.C. 519.211 (utilities, railroads, cellular telephone towers, sale of alcohol).

iii. Optional Limited Self Government -- R.C. Chapter 504 (limited statutory "home rule"). R.C. 504.04 limited "home rule" does not grant townships the

power to adopt land subdivision regulations, road construction standards, water and sewer regulations, urban sediment rules, storm water and drainage regulations, or to interfere with agricultural uses, adopt building standards (other than standard building codes), or regulate the conservation or development of natural resources.

A major issue is the effect of R.C. Chapter 504 upon a township's zoning powers in R.C. Chapter 519? This may be a fertile ground of future litigation.

**B. PROPERTY RIGHTS vs. POLICE POWER: GENERAL ZONING PRINCIPLES**

In addition to the police power provided to municipal corporations, the Ohio Constitution has always provided that the use of private property is subservient to the public welfare. *Northern Ohio Sign Contractors v. Lakewood* (1987), 32 Ohio St.3d 316, 318. Article I, Section 19 of the Ohio Constitution provides, in pertinent part:

Private property shall ever be held inviolate, but subservient to the public welfare. . . . [W]here private property shall be taken for public use, a compensation

therefor shall first be made in money, or first secured  
by a deposit of money . . . . (emphasis added).

Coupled with these constitutional provisions is the Ohio Supreme Court's recognition that local authorities are presumed to be familiar with local conditions and the needs of their respective communities. *Allion v. City of Toledo* (1919), 99 Ohio St. 416, at ¶1 of the syllabus; *Porter v. City of Oberlin* (1965), 1 Ohio St.2d 143, 149; and, *Wilson v. Cincinnati* (1976), 40 Ohio St.2d 138, 142. Municipal zoning ordinances are a matter of particular local concern. It has long been recognized in Ohio that municipal governing bodies are better qualified, because of their experience and knowledge of local situations and local needs, to enact responsible zoning ordinances. *Willott v. Village of Beachwood* (1964), 175 Ohio St. 557, 560; *Hudson v. Albrecht, Inc., supra*, at 71; and, *Gerijo, Inc. v. Fairfield, supra*, at 226.

The above principles have been applied by the Ohio Supreme Court in the context of the evolution of zoning laws in Ohio. As the United States Supreme Court held in *Euclid v. Ambler Realty Co.* (1926), 272 U.S. 365, 386, zoning ordinances are of relatively "modern origin". Thus, what may have been thought of as an unconstitutional derogation of property rights fifty years ago is now adjudged constitutional. The evolution of zoning law has been accelerated by the increasing complexities of modern society and the

problems caused by continuing land development. Although written almost seventy years ago, the Supreme Court's opinion in *Euclid v. Ambler* is as relevant as tomorrow's headlines:

Building zone laws are of modern origin. They began in this country about twenty-five years ago. Until recent years, urban life was comparatively simple; but with the great increase and concentration of population, problems have developed, and constantly are developing, which require, and will continue to require, additional restrictions in respect to the use and occupation of private lands in urban communities. Regulations, the wisdom, necessity and validity of which, as applied to existing conditions, are so apparent that they are now uniformly sustained, a century ago, or even half a century ago, probably would have been rejected as arbitrary and oppressive. Such regulations are sustained, under the complex conditions of our day, for reasons analogous to those which justify traffic regulations, which, before the advent of automobiles and rapid transit street railways, would have been condemned as fatally

arbitrary and unreasonable. And in this there is no inconsistency, for while the meaning of constitutional guarantees never varies, the scope of their application must expand or contract to meet the new and different conditions which are constantly coming within the field of their operation. In a changing world, it is impossible that it should be otherwise. But although a degree of elasticity is thus imparted, not to the *meaning*, but to the *application* of constitutional principles, statutes and ordinances, which, after giving due weight to the new conditions, are found clearly not to conform to the constitution, of course, must fall. (emphasis added and emphasis in original).

*Id.* at 386-387. The Ohio Supreme Court, through the years, has attempted to follow the dictates of both the United States Supreme Court and the Ohio Constitution, while continuing to recognize that local governing bodies are best suited to determine local zoning needs.

Ohio zoning law, as enunciated by the Ohio Supreme Court, has evolved by clarifying the law in its *application*, while attempting to remain true to the *meaning* of constitutional guarantees. In a series of decisions, culminating in *Goldberg Cos., Inc. v. Richmond Hts. City Council* (1998), 81

Ohio St.3d 207, the Court set forth the context in which courts are to judge the constitutionality of local zoning ordinances and then enunciated the proper standard by which to judge such ordinances. In its earlier *Gerijo, Inc. v. Fairfield* (1994), 70 Ohio St.3d 223 decision, the Court began its analysis by delineating the inherent tension between local zoning ordinances and an owner's use of private property:

[T]he Ohio Constitution explicitly subjects the right of an individual to use and enjoy his or her property to the legitimate exercise of local police power. See Section 3, Article XVIII. Inasmuch as the exercise of police power interferes with individual rights, the use of such power must bear a substantial relationship to a legitimate government interest and must not be unreasonable or arbitrary. *Hudson v. Albrecht, Inc.* (1984), 9 Ohio St.3d 69, 9 OBR 273, 458 N.E.2d 852; *Cincinnati v. Correll* (1943), 141 Ohio St. 535, 539, 26 O.O. 116, 118, 49 N.E.2d 412, 414. (emphasis added).

*Id.* at 225. Next, the Court set forth the proper legal context for determining the constitutionality of zoning ordinances:

When reviewing the legitimacy of zoning ordinances, this court has repeatedly recognized a strong presumption in favor

of the validity of an enactment. *Hudson, supra*, 9 Ohio St.3d at 71, 9 OBR at 275, 458 N.E.2d at 855; *Downing v. Cook* (1982), 69 Ohio St.2d 149, 151, 23 O.O.3d 186, 187, 431 N.E.2d 995, 997; *Brown v. Cleveland* (1981), 66 Ohio St.2d 93, 95, 20 O.O.3d 88, 89, 420 N.E.2d 103, 105. The party challenging an ordinance bears, at all stages of the proceedings, the burden of demonstrating that the provision is unconstitutional. *Ketchel v. Bainbridge Twp.* (1990), 52 Ohio St.3d 239, 557 N.E.2d 779; *Mayfield-Dorsh, Inc. v. S. Euclid* (1981), 68 Ohio St.2d 156, 157, 22 O.O.3d 388, 388 [sic], 429 N.E.2d 159, 160; *Hilton v. Toledo* (1980), 62 Ohio St.2d 394, 396, 16 O.O.3d 430, 431, 405 N.E.2d 1047, 1049. As this court discussed in *Willott v. Beachwood* (1964), 175 Ohio St. 557, 560, 26 O.O.2d 249, 251, 197 N.E.2d 201, 204, a court's authority in determining the validity of zoning regulations is limited in that "the court can not usurp the legislative function by substituting its judgment for that of the council. Municipal governing bodies are better qualified, because of their knowledge of the situation, to act upon these matters than are the courts." See, also, *Wilson v. Cincinnati* (1976), 46 Ohio St.2d 138, 142, 75 O.O.2d 190, 193, 346

N.E.2d 666, 669; *Allion v. Toledo* (1919), 99 Ohio St. 416, 420, 124 N.E. 237, 238. A court may substitute its judgment for that of the local governing body only when a municipality exercises its zoning power in an arbitrary, confiscatory or unreasonable manner which violates constitutional guaranties.

*Willott, supra*, at paragraph three of the syllabus.

In *Goldberg, supra*, the Supreme Court reaffirmed these same basic principles. 81 Ohio St.3d 209-210.

It is, however, axiomatic in Ohio that "[z]oning resolutions are in derogation of the common law and deprive a property owner of certain uses of his land to which he would otherwise be lawfully entitled" and, therefore, "such resolutions are ordinarily construed in favor of the property owner." *Saunders v. Clark Cty. Zoning Dept.* (1981), 66 Ohio St.2d 259, 261, citing *In re University Circle, Inc.* (1978), 56 Ohio St.2d 180, 184; *Pepper Pike v. Landskroner* (Cuyahoga Cty. 1977), 53 Ohio App.2d 63, 76; 3 Anderson, American Law of Zoning (2nd Ed.) 4, §16.02.

### **C. TYPES OF LAND USE DISPUTES**

Land use disputes generally center around two issues: the legality of land use regulations on their face or the application of such regulations to specific properties. Land use disputes usually are, and generally must be, initiated at the local government level -- first with the local code enforcement

officer or township zoning inspector and second, upon appeal of the administrative official's decision or interpretation to the local zoning board of appeals.

Appeals of local boards' or councils' final decisions on code interpretations, conditional use permits, nonconforming uses, and variance requests can then be made to the common pleas court of that county within 30 days. This appeal to court involves a judge as the decision maker, rather than a jury, unless there is a legitimate claim for damages due to an unconstitutional taking of the property.

The constitutionality of a zoning ordinance may be challenged either by an administrative appeal under Revised Code Chapter 2506 when a final decision has been made by local government on a land use application, or by declaratory judgment action pursuant to Revised Code Chapter 2721. *Karches v. Cincinnati* (1998), 38 Ohio St.3d 12, 15; *Driscoll v. Austintown Associates* (1975), 42 Ohio St.2d 263. Constitutional challenges to land use regulations will be discussed below and may, depending upon the facts, be brought either in state court or in federal court pursuant to 42 U.S.C. §1983.

Most court cases involving land use do not involve constitutional issues and are generally confined to whether the local administrative body followed the standards in local regulations in denying applications for land use permits or variances from such local regulations.

Neighboring property owners have standing as parties in R.C. 2506 appeals if they appeared at the administrative hearing and testified in opposition to an application. *Roper v. Bd. of Zoning Apps. of Richfield Twp.* (1962), 173 Ohio St. 168. Injunctive relief is available through R.C. 713.13.

A charter municipality may have standing to contest the decision of its own BZA only where its charter provides for such an appeal. *Willoughby Hills v. C.C. Bar's Sahara, Inc.* (1992), 64 Ohio St.3d 24.

If the local board's decision precludes any development of the property, constitutional claims may be raised by the property owner in a R.C. §2506 appeal which must be tried de novo by the court. *SMC, Inc. v. Laudi* (Cuyahoga 1975), 44 Ohio App.2d 325.

The remedy for the failure of a proposed legislative zoning change is a declaratory judgment action in court to declare the current zoning unconstitutional. Any procedural challenges to the enactment of zoning ordinances must be brought within two years. Ohio Rev. Code §713.121 (Municipalities); Ohio Rev. Code §303.122 (Counties); Ohio Rev. Code §519.122 (Townships).

If the defendant-government authority raises it as an affirmative defense, plaintiff-property owner may need to exhaust administrative remedies -- e.g., a variance request -- prior to bringing a declaratory judgment action, *except* where: 1) the administrative remedy is not equally as

serviceable as a declaratory judgment action or is unusually expensive or onerous; 2) seeking the remedy would constitute a vain act; or 3) if the administrative body does not have the authority to grant the relief requested.

*Jones v. Chagrin Falls* (1997), 77 Ohio St.3d 456; *Karches v. Cincinnati* (1988), 38 Ohio St.3d 12; *Driscoll v. Austintown Associates* (1975), 42 Ohio St.2d 263; *Gates Mills Investment Co. v. Pepper Pike* (1975), 44 Ohio St.2d 73; *Standard Oil Co. v. Warrensville Heights* (1976), 48 Ohio App.2d 1.

#### **D. CHALLENGES TO CONSTITUTIONAL VALIDITY**

The constitutionality of a zoning ordinance may be challenged either by an administrative appeal under Revised Code Chapter 2506 or by a declaratory judgment action pursuant to Revised Code Chapter 2721. *Karches v. Cincinnati* (1988), 38 Ohio St.3d 12, 15; *Driscoll v. Austintown Associates* (1975), 42 Ohio St.2d 263.

Prior to instituting a declaratory judgment action to determine the validity of a zoning ordinance as applied to a specific parcel of property, a party ordinarily must exhaust administrative remedies. (See discussion in part III.C.1. above.)

In *Karches, supra*, the Ohio Supreme Court adopted the holdings in *Williams County Regional Planning Comm. v. Hamilton Bank of Johnson City*, 473 U.S. 172, 87 L.Ed.2d 126 (1985), and *MacDonald, Sommers & Frates v. County of Yolo*, 477 U.S. 340, 91 L.Ed. 285 (1986), and held that

a case involving an attack on the constitutionality of a zoning ordinance is not ripe for adjudication until the decision maker has reached a final decision. *Karches*, 38 Ohio St.3d at 14-15. This, once again, requires an exhaustion of administrative remedies.

Constitutional attacks can be brought under both the federal and Ohio constitutions in either federal or state courts. Obviously, at least one federal claim is required for a federal court to have jurisdiction over the case. Challenges to local government action or land use laws under the federal constitution must be brought through 42 U.S.C. §1983. State constitutional claims are often added by property owners to their federal claims in federal court cases.

1. Types of Constitutional Claims.

- a. Due process claims (U.S. Const., 14th Amendment; Ohio Const., Article I, Sections 1, 16 and 19)

Procedural due process

Substantive due process

- b. Equal protection claims (U.S. Const., 14th Amendment)
- c. Takings claims (U.S. Const., 5th Amendment, via the 14th Amendment)
- d. Privacy/familial rights claims (U.S. Const., 14th Amendment)

- e. First Amendment claims (U.S. Const., 1st Amendment, via the 14th Amendment; Ohio Const., Article I, Section 11)

2. Due Process Claims.

a. Procedural Due Process

What is at issue is not whether government action has deprived the plaintiff of a constitutionally protected property interest, but whether the deprivation of such an interest is without the procedural protections required by the constitution -- i.e., "due process of law". *Shirokey v. Marth* (1992), 63 Ohio St.3d 113, 119, citing *Zinerman v. Burch* (1990), 494 U.S. 113.

- (i) Threshold issue: A Property Right must be involved.
- (ii) Applies only to administrative (adjudicative) action, not legislative.
- (iii) Right to notice and fair hearing.
- (iv) Applicant's procedural rights:
  - timely notice
  - presentation of evidence
  - cross-examination
  - decision on record
  - written findings

- unbiased decisionmaker

(b) Substantive Due Process

The Due Process Clause of the 14th Amendment contains a substantive component that bars certain arbitrary, capricious, and unreasonable government action depriving a person of a property right.

- (i) The requirement of substantive due process is that there must be some reasonable basis to believe that a regulation will promote the public health, safety or general welfare (some legitimate public purpose)
- (ii) Minimum Rationality Test: A plaintiff must show that the land use regulation is not rationally related to a legitimate public purpose (land use concern). The local government need not select the best or least restrictive method of obtaining its goals. *Schenck v. City of Hudson* (6th Cir. 1997), 114 F.3d 590, 593-94.
- (iii) A regulation may be arbitrary and unreasonable "on its face".
- (iv) A regulation may be arbitrary and unreasonable "as applied" under the facts and circumstances of a particular case.

3. Equal Protection Claims

Absent some fact that the local land use law or the actions of government officials discriminated against the plaintiff on the basis of the plaintiff's membership in a protected class (e.g., race, age, gender), plaintiff must prove that he/she was treated differently from similarly situated individuals. Additionally, a plaintiff must then prove that there was no "rational basis" for the government regulation or decision which adversely affected the plaintiff. Such claims arise where there is different treatment of similar lands, different treatment of similar uses, and different treatment of similarly-situated persons. The courts are required to give deference to the legislative judgment supporting the land use regulation. The federal appellate court encompassing Ohio has adopted a very deferential view toward the actions of local officials with respect to zoning matters and equal protection claims, requiring more than a single unjustified action against a plaintiff and a preferred classification of which the plaintiff did not belong. *Booher v. U.S. Postal Service*, 843 F.2d 943.

4. Takings Claims

Under the 5th Amendment to the U.S. Constitution and Section 19 of Article I of the Ohio Constitution, a land use regulation may go too far and constitute a regulatory taking of private property

requiring the payment of just compensation to the aggrieved private property owner. All property, however, is owned subject to the exercise of the police power by the government for the purposes of protecting and promoting the public welfare. Almost all land use regulations, to some extent, adversely affect or reduce part of the use, value or potential development of private property. It is not, however, a "taking" simply because a regulation may have substantially reduced the market value of land or does not allow a property owner to use his/her land to its highest and best use.

The standards for determining whether or not there has been a "taking" of private property by government regulation, is set forth in the summary of recent case law below.

5. Privacy/Familial Rights Claims

The United States Supreme Court first began recognizing a right to privacy or familial association as related to land use regulations as one of the penumbra of rights found within the liberties protected by the due process clause of the 14th Amendment. See *Moore v. City of East Cleveland* (1977), 431 U.S. 494, 499.

6. First Amendment Claims

The First Amendment to the U.S. Constitution and Section 11 of Article I of the Ohio Constitution bring into play constitutional

rights that may be affected by local land use regulations. These rights have generally centered around the right to free speech impinged upon by the regulation of signs, the accessibility of news racks and stands, the regulation of sexually oriented businesses, and the "free exercise" of religion clause of the First Amendment with respect to regulation of churches and religious uses.

Leading cases related to regulation of signs and billboards are: *City of LaDue v. Gilleo* (1994), 114 S.Ct. 2038 (some type of political signage is required to be permitted on residentially-zoned properties); *Members of City Council of Los Angeles v. Taxpayers for Vincent* (1984), 466 U.S. 789 (a content neutral prohibition of signage in public rights-of-way is permissible); *Metromedia, Inc. v. City of San Diego* (1981), 453 U.S. 490 (aesthetics and traffic safety are legitimate public purposes to support regulation of signs, including off site commercial signs, but the regulation must not treat commercial signs more favorably than noncommercial signs).

The leading case related to sexually oriented businesses is *City of Renton v. Playtime Theaters, Inc.* (1986), 475 U.S. 41, which upholds a city's right to regulate sexually oriented businesses with uses deemed to be protected by the First Amendment by specifying locational criteria as to where such uses would be permitted within

the City as long as the regulations were related to controlling the adverse secondary effects of such uses (e.g., crime, reduced property values, etc.) rather than the improper intent to suppress the speech or activity itself.

Courts have regularly upheld prohibitions on religious activities and uses in single-family residential zoning districts. See, e.g., *Lakewood Congregation of Jehovahs Witnesses v. City of Lakewood* (6th Cir. 1983), 699 F.2d 303.

7. Recent Case Law

a. *Dolan v. City of Tigard*, 129 L.Ed.2d 304, 1994 U.S. LEXIS 4826 (1994).

(i) Facts: Florence Dolan owns a chain of plumbing and hardware stores in Oregon. Her store in the City of Tigard abutted a creek which was a main watershed through the downtown area. She applied for a permit to build a larger store and to blacktop her gravel parking lot. The City agreed to allow the plan but required her to: (1) dedicate the land on her site lying within the 100 year flood plain to the City as a “greenway”; and (2) install a pedestrian/bicycle path along her property. The City had in place fairly detailed plans for establishment of both a greenway system along the creek to

control flooding and encourage pedestrian traffic for recreational purposes and to construct a pedestrian/bike way through the downtown area to help alleviate traffic congestion.

Mrs. Dolan challenged the City's decision as a taking of property in violation of the taking's clause of the Fifth Amendment of the Constitution. The Oregon Supreme Court upheld the City's position on the basis that both of the permit conditions: (1) had an essential nexus to the development of the proposed site; and (2) were reasonably related to the impact of the expansion of the owner's business.

(ii) In a 5 to 4 decision, the U.S. Supreme Court reversed and remanded the case holding that:

(1) the court must determine two issues to determine whether exactions imposed by a City on approval of a landowner's building permit violate the Fifth Amendment's takings clause:

(a) whether an essential nexus exists between legitimate state interests and the permit conditions, and

- (b) if the nexus exists, whether the City has shown a rough proportionality between the exactions and the projected impact of the proposed development; and
- (2) the City of Tigard established the first requirement of an essential nexus but did not satisfy the requirement of showing rough proportionality because:
  - (a) the City never explained why a public greenway, as opposed to a private one, was necessary in the interest of flood control, and
  - (b) The City had the burden to demonstrate that the additional number of vehicle and bicycle trips generated by the development reasonably related to the condition requiring a pedestrian/bicycle pathway.
- (iii) Two important points to remember from this case are:

- (1) To determine the element of “rough proportionality”: “no precise mathematical calculation is required, but the City must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development”; and
- (2) The local government has the burden of proof to make findings of fact to support the “rough proportionality” between the proposed exaction and the harm to be prevented. (This is in sharp contrast to the normal zoning challenge in which the property owner has the burden of proving that the regulation hinges upon property rights. However, this applies only to administrative decisions involving one property owner rather than legislative zoning decisions.)

b. *Lucas v. South Carolina Coastal Council* (1992), 505 U.S. 1003, 112 S. Ct. 2886, 120 L. Ed.2d 798.

- (i) Facts.

(ii) Compensable regulatory taking occurs when governmental action denies all economically beneficial use of real property unless:

Government is preventing a nuisance as determined by "background principles" of state property and nuisance law -- i.e., the use of land for what are presently expressly prohibited purposes was always implicitly illegal (e.g., constructing a nuclear plant on top of an earthquake fault).

(iii) Preventing a harmful or noxious use (nuisance) cannot be justified simply by referring to legislative findings but through objective evidence in a "total taking inquiry". If less than a total taking of all economically beneficial use of the property is present, then an ad hoc economic impact versus governmental purpose analysis under prior court cases is used to determine whether there is a "taking". However, when looking at the property interest at stake, a court must look at the parcel as a whole rather than individual portions of it as set forth in U.S. Supreme Court holdings in *Penn Central* and *Keystone*.

- (iv) Government regulators and attorneys should:
- Assert the ripeness of the landowner's claim as its first line of defense.
  - Avoid regulation that denies all economically beneficial use of the land.
  - Find and state in your eligibility legislation a public health or safety reason, as opposed to a general welfare or aesthetic reason.
  - Avoid total or substantial taking by offering landowner techniques such as density transfers, clustering, and hardship variances.
  - Enact grandfather clauses for projects where applications for construction have been submitted.
- (v) South Carolina Supreme Court order on remand (11/20/92).

State Coastal Council did not show any common law basis to restrain Lucas' proposed use of his land. The sole issue for determination at trial would be actual damages to Lucas for temporary taking commencing with the enactment of the 1988 Beachfront

Management Act to the date of the state supreme court's order.

(vi) Ohio Supreme Court's response to *Lucas*:

*Community Concerned Citizens, Inc. v. Union Township Board of Zoning Appeals* (1993), 66 Ohio St.3d 452. "[C]itizens acquire a 'bundle of rights' when they take title to property. In accordance with the Takings Clause, that 'bundle' cannot be held subject to the state's subsequent decision to eliminate all economically beneficial uses and a regulation having such effect cannot be enacted or sustained without compensation being paid to the owner. However, if the new restrictions simply clarifies an existing regulation, no compensation is owed." The denial of a conditional use permit to use property for a daycare center does not deny applicant all economically beneficial uses of the property and therefore is not a taking.

c. U.S. Supreme Court's "Takings Trilogy"

(i) *First English Evangelical Lutheran Church of Glendale v. Los Angeles County* (1987), 482 U.S. 304.

Land regulation can be a "taking" even for a temporary period of time for which just compensation is due directly under the Fifth and Fourteenth Amendments. On remand, the state appellate court found no taking because ordinance substantially advanced legitimate public safety interest (the property was located in a flood plane), did not deny landowner all use of property, and only imposed reasonable limitations on use of land for a reasonable period during which state could study any possible uses for land which would be compatible with public safety.

- (ii) *Nollan v. California Coastal Commission* (1987), 483 U.S. 825.

Development exaction for public easement along backfront residential property held to be a taking, both regulatory and physical. Condition attached to building permit was a taking because the condition was not directly connected to a substantial advancement of a legitimate governmental interest. Heightened scrutiny of governmental action required

under takings clause, as opposed to mere "rational" standard use in due process or equal protection challenges.

- (iii) *Keystone Bituminous Coal Association v. DeBenedictis* (1987), 480 U.S. 470.

Pennsylvania Coal Subsidence Act not a taking. A facial challenge to a law regulating activity akin to a public nuisance, where property can still be profitably used, will likely result in no taking.

- d. *Goldberg Cos., Inc. v. Richmond Heights City Council* (1998), 81 Ohio St.3d 207.

- (i) Syllabus: "A zoning regulation is presumed to be constitutional unless determined by a court to be clearly arbitrary and unreasonable and without substantial relation to the public health, safety, morals or general welfare of the community. (*Gerijo, Inc. v. Fairfield* (1994), 70 Ohio St.3d 223, 638 N.E.2d 533, modified in part.)."

- (ii) Facts: Plaintiff-property owner requested approval of a site plan and a parking variance in connection with its plan to construct a 62,000 square foot retail

building in the City of Richmond Heights. The City Zoning Code required retail stores to provide one parking space per 100 square feet of usable floor area. The parking variance sought by Plaintiff was to provide 372 parking spaces instead of the required 554 spaces. Plaintiff argued that the 372 spaces were all that were necessary for the development based on national planning standards and would enable Plaintiff to preserve a mature stand of trees at one end of the property. The City denied the requested variance.

Based upon the two-part test for judging the constitutionality of zoning regulations established in *Gerijo, Inc. v. Fairfield, supra*, both the trial court and the court of appeals upheld the City's denial of the variance since Plaintiff admitted it was economically feasible to develop the property with the required parking and even submitted an alternative site plan showing the required parking.

The Ohio Supreme Court initially declined to accept jurisdiction of the case on a 4-3 vote; upon a motion for reconsideration, the court accepted the

case by a 4-3 vote and required briefing and oral arguments. On a 4-3 vote immediately following oral arguments, the court dismissed the case for the reason that jurisdiction was improvidently granted. On a second motion for reconsideration, the court granted the motion by a 4-3 vote, reversed the lower courts and remanded the case to the trial court to determine whether the Plaintiff established the new standards set forth by the court for challenging the constitutionality of a zoning ordinance. (The case is now moot since the Plaintiff sold the property and a Code-conforming assisted living facility is being built on the property.)

- (iii) In the Ohio Supreme Court's final 7-0 decision in the case, the court modified its previous test for establishing the constitutionality of a zoning ordinance enunciated in *Gerijo, Inc. v. Fairfield, supra*. *Gerijo* had held that "A party who attacks a municipal zoning ordinance on constitutional grounds must prove, beyond fair debate, both that the enactment deprives him or her of an economically viable use and that it fails to advance a legitimate

governmental interest." (Emphasis added.) The court in *Goldberg* clarified that the property owner in *Gerijo* challenged the constitutionality of a zoning scheme but did not allege that the zoning constituted a "taking" of its property. The court also clearly squared its test for the constitutionality of zoning regulations, absent a takings claim, with the federal constitutional test established in *Euclid v. Ambler* (1926), 272 U.S. 365. The court held: "A zoning regulation may be either constitutional or unconstitutional based upon whether it is 'clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare' regardless of whether it has deprived the landowner of all economically viable uses of the land."

Although the property owner attempted to make a distinction between area and use zoning regulations in terms of setting a standard for constitutional challenge, the court rejected such a distinction by stating that: "Both types of regulations

have the potential to prevent a landowner's practical use of the property." Perhaps the most significant statement in the court's opinion is that "the powers, not unlimited, need only bear a rational relation to the health, safety, morals or general welfare. *Id.* at 213-214.

Citing a laundry list of precedent at the beginning of its opinion, the court was very deliberate in pointing out at least two "unassailable propositions" with respect to a court's determination of whether a zoning ordinance is constitutional, as follows: (1) zoning ordinances are presumed constitutional, and (2) the party challenging the constitutionality of a zoning ordinance bears the burden of proof, it must prove unconstitutionality beyond fair debate.

There are, however, portions of the opinion which may cause confusion in the future. For example, the opinion indicates that if the landowner has both challenged the constitutionality of the zoning and also alleged that it constitutes a taking of the property, the case is "terminated" if the zoning is

found to be unconstitutional, because the property owner is free of the zoning that restricted the use of the land. This begs the question of whether the restriction deprived the landowner of a "bundle of rights" and whether damages should be awarded for a temporary taking. Also, the case does not "terminate" since the local government has the opportunity to rezone the property in a constitutional manner as prescribed by *Union Oil Co. v. Worthington* (1980), 62 Ohio St.2d 263, and will usually be given a finite period of time by the court to do so. The opinion may also create confusion regarding zoning challenges *on their face* versus challenges *as applied*.

- e. At least five courts of appeals in Ohio have already applied the *Goldberg, supra*, decision. In *Henry Meyer Associates, Inc. v. Village of Moreland Hills* (Cuyahoga App.), 1998 WL 518164, the court concluded that the term "substantial relation" in the *Goldberg* holding "is synonymous with rational relation, which the U.S. Supreme Court has defined as the minimal scrutiny standard," citing *Duke Power Co. v. Carolina Environmental Study Group, Inc.* (1978), 438 U.S.

59. The court further stated, "If a minimal rational-reasonable relationship exists between the regulation and the goal of health, safety, or general welfare, then the presumption of validity stands against challenge." The court reversed the trial court's ruling that the village's zoning was unconstitutional where the property was zoned for single-family homes and the Plaintiff desired a multi-family use. The case was remanded to the trial court for a determination of the case consistent with *Goldberg*. (The Ohio Supreme Court recently declined to exercise jurisdiction over the case.)

In *Helt Enterprises, Inc. v. City of Willoughby* (Lake Cty.) 1998 WL 637601, the court applied *Goldberg* to uphold a city health and safety regulation which prohibited the storage of bulk propane in areas which were not zoned as general industrial districts. See also *Reese v. Bd. of Trustees of Copley Twp.* (Summit App.), 1998 WL 405027 (*Goldberg's* standard applied to a request for rezoning from open space and conservation zoning district to intensive automotive oriented commercial zoning district where the court upheld the original zoning.)

In *Klein v. Hamilton Cty. Bd. of Zoning* (Hamilton App.), 1998 WL 337047, the court applied *Goldberg* in upholding the local zoning regulation prohibiting an insurance office in a condominium complex. Finally, in *Leuchtag v. City of Akron* (Summit App.), 1998 WL 193483, the court upheld two-family residential zoning against an attack by the property owner of an unconstitutional application of the zoning to her property where she desired to have a conditional use permit granted for a medical office in a residential unit.

f. *Gerijo, Inc. v. Fairfield* (1994), 70 Ohio St.3d 223 (*cert. denied*). Modified by *Goldberg, supra*.

(i) Syllabus: "A party who attacks a municipal zoning ordinance on constitutional grounds must prove, beyond fair debate, both that the enactment deprives him or her of an economically viable use and that it fails to advance a legitimate governmental interest." (Emphasis added).

(ii) Facts: Plaintiff owned approximately 37 acres in the City of Fairfield which was surrounded on three sides by multi-family residential development. The fourth side abutting the property is zoned for commercial

uses. The Gerijo property had itself been zoned as multi-family residential when in 1989 the City rezoned it to an industrial park district. The rezoning was pursuant to the comprehensive land use plan adopted in 1989. The property owner petitioned the City Council to rezone the property from industrial to multi-family residential to pursue a purchase offer to developments 532 multi-family units on the property at a price of \$65,000 per acre. The City had an adopted policy of improving its ratio of owner-occupied housing versus rental-occupied dwellings to 70/30 from its present 50/50 ratio. The trial court found that plaintiff failed to prove the industrial zoning was confiscatory and invalidated the zoning on the grounds that it failed to substantially advance a legitimate governmental interest. The Court of Appeals affirmed.

- g. *Central Motors, Inc. v. Pepper Pike* (1995), 73 Ohio St.3d 581.

This case was decided after *Gerijo* and relies on the now modified two-pronged conjunctive test of *Gerijo* in its

holding. The Ohio Supreme Court’s decision marked an end to 21 years of litigation in this case involving a challenge to the constitutionality of the City’s single-family townhouse zoning of the property sought to be developed by the land owner for a mix of office, commercial, high-rise apartment and town-house uses.

The Supreme Court held that both the trial court and the court of appeals inappropriately second-guessed the City Council in determining whether the zoning substantially advanced a legitimate government interest and should not have determined whether the landowner’s proposed zoning “better” advanced the stated governmental interest. (The City would likely have also won under the *Goldberg* test.) Also, the Supreme Court held that a substantial diminution in value of the property from \$34,210 per acre to \$14,900 per acre, assuming plaintiff’s expert appraisal was accurate, did not establish beyond fair debate the lack of an economically viable use of the property.

- h. *Columbia Oldsmobile, Inc. v. City of Montgomery* (1990), 56 Ohio St.3d 60.

After *Goldberg*, the importance of *Columbia Oldsmobile* is its holding that there is no statutory requirement that municipalities enact a comprehensive community plan pursuant to their powers to zone under R.C. 713.06 et seq., in order for zoning regulations to be valid. *Id.* at 66.

i. *Schenck v. City of Hudson* (6th Cir. 1997), 114 F.3d 590.

(i) Facts.

The federal district court had granted a preliminary injunction to plaintiff-developers which prohibited the city from enforcing its residential growth management system. On an annual basis, the City's system restricted the number of residential building permits within that particular year based upon the amount of municipal infrastructure needed to service such developments and the availability of other city services. The city had made specific findings when it passed the ordinance setting forth its intent to manage the city's residential growth so that it did not exceed the capability of its infrastructure to avoid the need for new infrastructure so the current city needs could be met, to protect the city's unique character and to encourage nonresidential development to increase the city's tax base. A preference was given in the

ordinance to developments proposing affordable housing, housing for the disabled and elderly, and to lots receiving preliminary or final plat approval prior to the effective date of the ordinance.

(ii) Holding.

In a two-to-one decision, the 6th Circuit overturned the lower court's grant of a preliminary injunction in the face of a substantive due process claim that the ordinance was arbitrary and unreasonable. The court held that a cap on the number of permits for homes to be built in the city unquestionably bears a rational relationship to the city's legitimate concern of controlling growth in residential areas until such time as its infrastructure is able to meet the current and future needs -- i.e., the ordinance was "rationally related to its purpose". The court gave substantial deference to the legislative judgment of the city council. (The case is now on appeal before the 6th Circuit for a second time after the City was granted summary judgment on Plaintiffs' claims.)

j. *Kruse v. Village of Chagrin Falls* (1996 6th Cir.), 74 F.3d 694.

(i) Facts.

The Village performed certain road work across a street that had been vacated some 130 years earlier. The vacated right-of-way crossed the property owners backyard. Plaintiffs had filed a trespass action and a quiet title action in state court to stop the Village's destruction of the property and to obtain monetary damages. The Village filed a counter-claim alleging an encroachment by the Kruses and seeking removal of the family's home. The state appellate court eventually upheld the grant of summary judgment to the landowners but held that the Village was immune from damages involved in the trespass and excavation of the property. The Ohio Supreme Court declined to accept the case for review.

The Kruses then filed a 42 U.S. C. Section 1983 action in federal court under the Fifth and Fourteenth Amendments to the U.S. Constitution seeking monetary damages for a taking without compensation and violation of procedural due process. The trial court granted the Village's motion to dismiss based on the fact that the landowners had an adequate state remedy through the state's inverse condemnation proceedings.

(ii) Holding.

The 6th Circuit, reviewing the case de novo because of the dismissal of the claims for lack of subject matter jurisdiction, held that this was not a regulatory taking case and not a case in which the property owner had the opportunity to resort to administrative procedures which might alleviate the need to address the Constitutional question. Most importantly, the Court held that Ohio does not have explicit statutory procedures governing inverse condemnation to compensate landowners whose property has been taken in violation of the Constitution and the state's eminent domain statutes. The court further stated that in Ohio "the availability of remedies and the procedure to obtain compensation for property taken without regard to the state's appropriation statutes are confusing and uncertain at best." Specifically, Ohio Revised Code §§163.01-163.62 provide eminent domain procedures for the government prior to taking property, but not for the landowner to obtain compensation. The 6th Circuit acknowledged that the Ohio Supreme Court has held that a mandamus action can be sought to require the government to institute appropriation

proceedings pursuant to Ohio statute, but the 6th Circuit also reiterated the difficulty to a property owner in meeting the stringent requirements for issuance of a writ of mandamus. Therefore, the court held that the distinctions between regulatory takings and takings by physical occupation or invasion support the conclusion that the landowners in the case were not required to pursue any further attempts in state court to obtain the compensation which the Constitution mandates they be paid. The trial court's decision was reversed and the case was remanded for a trial to award the land-owners damages.

- k. *LRL Properties v. Portage Metro Housing Authority* (6th Cir. 1995), 55 F.3d 1097.

Apartment owners sued the local housing authority, its board members and employees, under Section 1983 alleging defendants violated the owner's procedural and substantive due process rights and equal protection rights, as well as defaming and tortiously injuring the property owners by arbitrary and capricious enforcement of Federal Section 8 housing quality standards and by denying the property owners proposal for Section 8 financial assistance. The case was

dismissed on a Civil Rule 12(b)(6) motion in the trial court. The court of appeals held that in Ohio, 42 U.S.C. Section 1983 actions are governed by the state's 2-year statute of limitations for personal injury rather than the 4-year "residual" statute of limitations, in spite of two court of appeals opinions from state appellate courts to the contrary. The second significant part of the holding is that where the government's discretion is not limited by existing regulations in awarding government benefits, no cognizable property interest has been established which is protected by due process, either procedural or substantive due process.