Land Use

R. Todd Hunt

This was presented on July 24, at the 2014 OMAA LAW INSTITUTE

I. CONSTITUTIONAL ISSUES IN LAND USE LAW: DUE PROCESS CHALLENGES, INVERSE CONDEMNATION AND TAKINGS

A. Overview of constitutional attacks on zoning.

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.

Constitutional attacks can be brought under both the federal and Ohio constitutions in either federal or state courts. (Caveat: takings claims.)

1. Types of Constitutional Claims in the Land Use Context are:

a. Due process claims (U.S. Const., 14th Amendment; Ohio Const., Article I, Sections 1, 16 and 19) are of two types: procedural due process and substantive due process.

b. Equal protection claims (U.S. Const., 14th Amendment).

c. Takings claims (U.S. Const., 5th Amendment, via the 14th Amendment; Ohio Const., Section 19 of Article I, via mandamus action).

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.

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.

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.

B. Substantive Due Process challenges to zoning — Ohio cases.

1. Goldberg Co., Inc. v. City of Richmond Heights (1998), 81 Ohio St.3d 207.

Prior to *Goldberg,* the Ohio Supreme Court had adopted a conjunctive test for a property owner to challenge a zoning ordinance, whether or not a takings claim was asserted. *Gerijo, Inc. v. Fairfield* (1994), 70 Ohio St.3d 223, which was modified by *Goldberg.*

Goldberg Co., Inc. v. Richmond Heights (1998), 81 Ohio St.3d 207. In *Goldberg*, the Court modified the conjunctive test set forth in *Gerijo* and appeared to have aligned the Ohio Supreme Court with the United States Supreme Court in applying a single-prong test for a *substantive due process challenge* to the constitutionality of a zoning or land use regulation "on its face" or "as applied" to the property. *Goldberg* was *not* a takings case.

Goldberg's new substantive due process test: Whether the governmental action/regulation is "clearly arbitrary and unreasonable and has no substantial relation to the public health, safety, morals and general welfare" and is demonstrated "beyond fair debate". Nevertheless, the Court in *dicta* stated that the two-pronged, disjunctive test set forth in *Agins, supra*, applies to takings claims – i.e., the property owner may prove either the regulation: (i) fails to substantially advance legitimate state interests (i.e., the protection of the health, safety, general welfare) or (ii) the ordinance denies the landowner economically viable use of the property.

2. Jaylin Investments, Inc. v. Moreland Hills (2006), 107 Ohio St.3d 339.

This most recent pronouncement of the Ohio Supreme Court with respect to the test for challenging the constitutionality of a zoning regulation holds true to the Court's prior precedent in *Goldberg, supra.* The Court further held that the challenge to the zoning regulation must focus on the constitutionality of the ordinance as applied to prohibit the proposed use, not the reason-

ableness of the proposed use. Jaylin had focused its case upon facts showing that the proposed residential subdivision consisting of twenty-nine homes on one-half acre lots, as opposed to the unconstitutionality of the permitted zoning of single-family homes on two-acre minimum lots. The Court stated: "If we were to modify this rule as Jaylin advocates, we would effectively eliminate the initial presumption that the zoning is constitutional. Opposing parties would merely argue over who presents the better use of the property."

C. Inverse Condemnation and Regulatory Takings.

If a state, such as Ohio, provides an adequate procedure for seeking just compensation, a property owner must have used the state procedure and been denied compensation before he can claim a taking without just compensation under federal law. *Williamson County v. Hamilton Bank* (1985), 437 U.S. 172. See, *Village of Maineville v. Hamilton Twp. Bd. of Trustees,* 726 F.3d 762 (6th Cir. 2013), where developer was required to first seek compensation from the township for unlawful imposition of development impact fee through state remedies before bringing a federal court takings claim. See, also, *Stanislaw v. Thetford Twp.*, 515 Fed. Appx. 501 (6th Cir. 2013), wherein a car dealership claimed a taking of its property in federal court where township official refused to sign a certificate that dealership complied with zoning laws required under state law for renewal of its dealership license. The Court upheld summary judgment for township and its officials because dealership was required to first exhaust available state remedies and not ripe for review.

1. Federal cases.

Prior to the United States Supreme Court's May 2005 opinion in *Lingle v. Chevron U.S.A., Inc.* (2005), 544 U.S. 528, 2005 U.S. LEXIS 4342, the Supreme Court for many years had applied a disjunctive test when analyzing the takings clause in a zoning context. Previously, land use regulations constituted a taking if the land use regulation either (i) failed to substantially advance legitimate state interests; or (ii) denied the economically viable use of the land.

The sequence of Supreme Court cases on this issue are:

a. Penn Central Transportation Co. v. City of New York (1978), 438 U.S. 104. Application of City's "landmark" law does not affect a "taking" of private property by the government without just compensation where (i) the law does not interfere with the owner's present uses of the building; (ii) the law does not necessarily prohibit occupancy of any of the air space above the landmark building and (iii) the law does not deny all use of the air rights above the landmark.

b. Agins v. City of Tiburon (1980), 447 U.S. 255, 260. Owners of a five acre parcel of unimproved land brought an action against the City after the City adopted zoning ordinances placing the land in a residentially planned development and open space zone which would permit the owners to build between one and five single-family residences on the tract. Without exhausting administrative remedies, the property owners brought a facial challenge against the zoning ordinance alleging taking of property without just compensation in violation of the Fifth and Fourteenth Amendments. The court held that the ordinance substantially advanced a legitimate governmental goal; that the property owner will share the benefits and burdens of the City's exercise of such police power; and, although the ordinance limited development, the City neither prevented the best use of appellants' land nor extinguished a fundamental attribute of ownership. The application of a general zoning law to a particular property effects a taking only if the ordinance does not substantially advance legitimate state interests or denies an owner economically viable use of his land.

c. Palazzolo v. Rhode Island (2001), 533 U.S. 606. The owner of waterfront property claimed that state wetlands regulations deprived him of all economically beneficial use of the property. The state supreme court decided that claim was invalid based upon the undisputed fact that a non-wetlands portion of the property had development value, and further ruled that the property owner's post-regulation acquisition of the property prevented him from recovering under the multi-factor *Penn Central* test for an incomplete regulatory taking. The U.S. Supreme Court affirmed the state court's conclusion that the owner had not been deprived of all economic use, based upon the evidence of the property's residual development value. However, a fractured majority of the Court rejected the state court's ruling that post-regulation acquisition of title was fatal to a *Penn Central* claim. The lead opinion, which expressed three of the Justices' views, reasoned that the date of a takings claimant's acquisition of property rights in relation to the date of a regulation's enactment should not be determinative of whether unreasonable governmental limitations on the use and value of land can be challenged. Such a rule would effectively limit the state's obligation to exercise reasonably its authority to regulate property through enforcement of valid zoning and land-use restrictions, and would alter the nature of property, since the prior owner

could not transfer to a successor the interest that he possessed prior to the regulation. Furthermore, the opinion noted, a regulatory takings challenge does not necessarily ripen at the time of enactment of the regulation, so it would be illogical and unfair to bar such a claim simply because of the post-enactment transfer of ownership. On remand, the state court was to apply the *Penn Central* factors to the claim.

d. Lingle v. Chevron U.S.A. Inc. (decided 5/23/05), 544 U.S. 528.

Lingle held: The test for determining whether a regulation affects a Fifth Amendment Taking is not the test under the Agins case to the effect that the regulation does not substantially advance legitimate state interests. This necessarily leaves three formulas under U.S. Supreme Court precedents for determining regulatory takings.

First: The regulation deprives an owner of "all economically beneficial use" of the owner's property.

Second: Where the government's action requires the owner to suffer a permanent physical invasion of the owner's property, however minor, compensation must be paid.

Third: The *Penn Central, supra*, regulatory taking challenge is where the Court identified several factors that have particular significance, but most importantly: (1) the economic impact of the regulation on the claimant and particularly the extent to which the regulation has interfered with distinct investment-backed expectations; and (2) the character of the government action — i.e., whether it amounts to a physical invasion or affects property interest through an adjustment of the benefits and burdens of economic life to promote common good.

e. Koontz v. St. Johns River Water Management District, 568 U.S. ____, 133 S. Ct. 2586 (2013). Landowner sued water management district for a taking alleging that the denial of a land use permit unless he funded offsite mitigation projects on public lands violates the 5th Amendment. Owner offered district nearly ¾ of his property in a conservation easement in exchange for a permit to build in environmentally sensitive wetland area. District demanded either a reduction in area of owner's development proposal and more area in the conservation easement or for owner to hire contractors

to make improvements to district-owned wetlands several miles away.

The Court relied on its precedents in *Nollan v. California Costal Comm'n,* 483 U.S. 825 (1987) and *Dolan v. City of Tigard*, 512 U.S. 374 (1994). In *Nollan*, the Court held that the state must pay just compensation to landowners obtaining building permits along the Pacific coast of California where the state conditioned the permit on requiring the owner to grant an access easement for the public along the beach. In *Dolan*, the Court held that the government could not require an easement for a hike/bike trail along a creek on the plumbing supply store's property as a condition of the expansion of the store unless there is a nexus and rough proportionality between the city's demand and the effects of the proposed store expansion (-i.e., land use).

In *Koontz*, the Florida Supreme Court held the owner's takings claim failed because, unlike *Nollan* or *Dolan*, the water management district denied the permit application and second, a demand for money cannot give rise to a claim under *Nollan* and *Dolan*.

The U.S. Supreme Court reversed holding the *Nollan/Dolan* requirements must be satisfied where the government demands property from a land use permit applicant even when it denies the permit – i.e., the government cannot coerce people into giving up their constitutional rights. Otherwise, the government could "evade the *Nollan/Dolan* limitations simply by phrasing its demands for property as conditions precedent to permit approval. The "unconstitutional conditions doctrine" applied here "applies even when the government threatens to withhold a gratuitous benefit". "It makes no difference that no property was actually taken in this case."

Second, the Supreme Court held that monetary exactions such as demanded by the district, are subject to scrutiny under *Nollan* and *Dolan.* The district argued that there is no practical way to distinguish between impermissible land use exactions and property taxes that could accomplish the same result but the Court held there is a difference and a taking results for such exactions.

f. San Remo Hotel, L.P. v. City and County of San Francisco, 545 U.S. 323 (2005).

Holding: The U.S. Supreme Court held that it will not create an exception to the full faith and credit statute in order to provide a federal forum for litigants seeking to advance federal takings claims.

g. The federal Sixth Circuit Court of Appeals has continued to uphold the dismissal of property owners' "takings" claims based *on Williamson County's* requirement of exhaustion of state remedies. See, *Braun v. Ann Arbor Charter Twp.* (6th Cir. 2008), 519 F.3d 564.

2. Ohio cases.

a. State, ex rel. R.T.G., Inc. v. State of Ohio (2002), 98 Ohio St.3d 1. The Court held:

i. The appropriate statute of limitations on a takings claim should be six years, pursuant to Ohio Revised Code 2305.07, because when the state takes one's property, it is impliedly contracting with the owner that it will pay "just compensation". Note: As a result of this holding, the Ohio legislature adopted a specific statute of limitations for both physical and regulatory "takings" claims in Ohio of four years. Rev. Code §2305.09. (H.B. 161, effective 6/2/04).

ii. The Court held that the UFM constituted a regulatory taking under the *Lucas, supra*, holding since 100% of the economic value of the "relevant parcel" had been taken. The "relevant parcel" is the "vertical" parcel of all of the coal rights, whether owned in fee simple, leased or as mineral rights, if those rights have been taken, and compensation is due.

b. State, ex rel. Preschool Dev., Ltd. v. Springboro (2003), 99 Ohio St.3d 347. The Court stated in its opinion that the elimination of a direct curb cut from the property to the abutting state highway "...did not substantially or unreasonably interfere with its access." (Access to ones property is a property right in and of itself.)

c. McNamara v. Rittman (December 21, 2005), 107 Ohio St.3d 243. The U.S. Court of Appeals certified the following question to the Ohio Supreme Court: "Does an Ohio homeowner have a property interest in so much of the ground water located beneath the land owner's property as is necessary to the use and enjoyment of the owner's home?" The Ohio Supreme Court accepted certification of the question and held: "Ohio does recognize that landowners have a property interest in the ground water underlying their land and that governmental interference with that right can constitute an unconstitutional taking."

d. State, ex rel. Shelly Materials, Inc. v. Clark Cty. Bd. of Commrs. (2007), 115 Ohio St.3d 337. The court held the denial by the BZA of a conditional use permit to mine sand and gravel did not constitute a compensable

categorical taking of property — here the mineral rights to the property.

e. State, ex rel. Hilltop Basic Resources, Inc. v. Cincinnati (2008), 118 Ohio St.3d 131. The City denied an access permit based on its plans to build a retaining wall for a bridge that eliminated public road access to the property but not access by water from the Ohio River. (IV) the case involves a denial of right of access and not a regulatory taking so there is not a requirement that a denial of all economically viable use of the property be shown.

f. State, ex rel. Thieken v. Proctor (Franklin Cty. 2008), 180 Ohio App.3d 154. ODOT elimination of one curb cut to public road and limiting another curb cut to gas station causing "circuitry" of travel within property of tanker trucks is a "taking".

g. State, ex rel. Gilbert v. Cincinnati (2010), 125 Ohio St.3d 385. Deficient capacity in municipal sewer system not a "taking" of adjacent land to be developed. Repeated sewage overflows from municipal pump station into creek through private property with danger signage posted by government is a "taking".

h. Statute of Limitations Issues:
State, ex rel. Nickoli v. Erie Metroparks (2010), 124 Ohio St.3d 449. Four year statute of limitations [R.C. 2305.09(E)] requires accrued at latest when an encroaching recreation trail of metroparks first opened to public. Not a continuing violation.

i. Painesville Mini Storage, Inc. v. Painesville (2010), 124 Ohio St.3d 504. "Takings" claim accrued when City issued building permit for structure over an easement held by abutting property owner.

j. State, ex rel. Doner v. Zody (2011), 130 Ohio St.3d 446. If continuing damage to another's property is caused by act carried out on actor's land *and* actor's conduct or retention of control is of continuing nature, statute of limitations tolled. Damage to another's property caused by government-induced flooding that is either intended or the direct, natural or probable result of government-authorized activity and flooding is either permanent invasion or intermittent = takings. (ODNR dam case.)

D. Temporary Regulatory Takings.

1. Federal case law.

a. Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency (2002), 122 S. Ct. 1465. Lake Tahoe Regional Planning Agency had instituted two moratoria totaling 32 months on development around Lake Tahoe to study the impacts of development on the lake and to develop regulations going forward for environmentally sound growth. A group of 449 landowners alleged that they should be compensated under the "takings" clause of the Fifth Amendment for the period of time they were deprived of all economic use of the property — i.e., the moratorium period.

The question was not whether moratoria are *per* se legal but whether the government imposing the moratorium owes compensation to landowner. Court held that in this case it did not, but a case-by-case analysis of the facts of each case must be performed to answer such a question.

b. Moratoria recently used in Ohio for establishing zoning regulations for cell towers and internet sweepstakes cafes and for rezoning of land.

2. Ohio cases.

a. State, ex rel. Shemo v. Mayfield Hts. (2002), 96 Ohio St.3d 379 (decided October 2, 2002).

i. Shemo I. (*Shemo v. Mayfield Hts.* (2000), 88 Ohio St.3d 7.) This was a substantive due process "as applied" challenge to the zoning of property.

ii. Shemo II. (*State, ex rel. Shemo v. Mayfield Hts.* (2001), 92 Ohio St.3d 324.) Petition for a writ of mandamus to compel the City to grant final approval of the road improvements and to compel the City to commence state court appropriation proceedings to determine the value of the taking of property.

iii. Shemo III. (*State, ex rel. Shemo v. Mayfield Hts.* (2001), 93 Ohio St.3d 1.) Property owners refiled the mandamus action asking the Court to compel the City to commence state court appropriation proceedings, to grant final approval of the road improvements, including access and to grant all other approvals and permits.

The Court granted the writ of mandamus to compel the City to approve all plans, but it did not rule on the request to compel state appropriation proceedings.

iv. Shemo IV. (*State, ex rel. Shemo v. Mayfield Hts.* (2002), 95 Ohio St.3d 59.) Mandamus action to compel City to commence appropriation action for temporary taking. Time period of temporary taking at issue. Taking issue satisfied under *Gerijo/Agins* tests. Knowledge of zoning at time of property's purchase not dispositive.

v. Shemo V. (*State, ex rel. Shemo v. Mayfield Hts.* (2002), 96 Ohio St.3d 379). City's motion for reconsideration on several grounds denies on all grounds, except to shorten period of temporary taking.

vi. Cuyahoga County Probate Court Case multi-million dollar settlement before trial.

b. State ex rel Gilbert v. Cincinnati (2010), 125 Ohio St. 3rd 385. Deficient capacity in a municipal sewer system is not a "taking" of adjacent land to be developed. Repeated sewage overflows from a municipal pump station into a creek through private property with danger signage posted by the government is a "taking".

c. State ex rel. Gilmour Realty, Inc. v. City of Mayfield Hts. (2008), 119 Ohio St.3d 11. Held mandamus is proper remedy when an involuntary taking is alleged, either physical or regulatory taking, not a declaratory judgment action because it cannot compel public entity to commence appropriation or determine damages. On remand, Court of appeals granted summary judgment to City holding there was insufficient evidence that rezoning of land was a regulatory taking.

d. Clifton v. Village of Blanchester , 131 Ohio St.3d 287 (2012) (decided 3/1/12). Nonresident contiguous property owner no standing to bring action for an unconstitutional partial taking of his property against village, a neighboring political subdivision, seeking compensation for the rezoning of property located solely within the village's boundaries.

Supreme Court found no authority to support a finding that zoning of an adjacent property is so burdensome on another's property that it results in a taking of the complainant's property. The Court, however, avoided deciding the underlying takings claim.

e. Moore v. Middletown, 133 Ohio St.3d 55 (2012). City rezoned property which permitted a coke plant for a steel mill. Neighboring owner in adjacent city filed suit alleging a regulatory taking. In reversing, court of appeals finding of no standing by neighbor, Supreme Court deviated from *Clifton v. Blanchester* by holding: "Property owners whose property is adjacent to property rezoned by a foreign jurisdiction may use a declaratory-judgment action to challenge the constitutionality of the zoning action if the owner pleads that he has suffered an injury caused by the rezoning that is likely to be redressed." Court held, however, that the neighbors did not have standing to bring a takings claim by pursuing mandamus against a

neighboring jurisdiction to appropriate property outside its jurisdiction.

f. State, ex rel. Duncan v. Middlefield (2008), 120 Ohio St.3d 313. Owner alleged several claims including a "taking" for delay by village in issuing a permit for a tavern/pool hall. Court found delays were attributable mostly to owner and since the value of land increased over time, no adverse economic effect in spite of alleged lost profits.

g. Most recent Ohio appellate cases are:

i. First North Corporation v. Bd. of Zoning App. Olmsted Falls, 2014 WL 839174 (Ohio App. 8 Dist.). The Court found that owner's application for a use variance should have been granted to use land for residential rather than as zoned for industrial use as unnecessary hardship was shown and BZA's decision to deny variance was arbitrary and unreasonable *but* it held that the industrial zoning classification did not rise to the level of a taking of the land without compensation based on a finding of unnecessary hardship or because of a regional economic downturn.

ii. Cincinnati v. Gilbert, 2013 WL 5432093 (Ohio App. 1 Dist.). This case is the appropriation action filed by the city after it lost on the takings issue in the Ohio Supreme Court, 125 Ohio St.3d 385. The appellate court held that the city's sewage being dumped into the stream on the owner's property is a recoverable taking claim. However, absent an appraiser or some evidence under oath regarding the value of the property actually taken, the trial court was not required to award costs and attorney fees.

iii. Jochum v. Jackson Twp., 2013 WL 4471092 (Ohio App. 5 Dist.). The flooding of owner's property, allegedly caused by the township's failure to upgrade its storm water piping system, was not a taking of the property because the flooding was not intentional or foreseeable.

iv. State, ex rel. Wasserman v. City of Fremont, 2013 WL 817246 (Ohio App. 6 Dist.). Found partial taking of drainage easement when city built reservoir over old easement and farmer's field flooded.

v. City of Girard v. Youngstown Belt Railway Co. (2012), 134 Ohio St.3d 79. Federal Interstate Commerce Commission Termination Act did not preempt city's eminent domain authority to take property for recreation purposes since owner's plan for future use was too vague and speculative.

vi. State, ex rel. Ribo v. City of Uhrichsville, 2012 WL 3679574 (Ohio App. 5 Dist.). Erosion damage to owners' property allegedly as result of city's road repair project did not constitute a "taking". Four year statute of limitations also an issue.

vii. State, ex rel. Nicholson v. City of Toledo, 2012 WL 4338489 (Ohio App. 6 Dist.). Owner failed to exhaust his administrative remedies where property was condemned and demolished as a nuisance so could not seek mandamus relief to a "taking".

viii. State, ex rel. Fair v. City of Canton, 2012 WL 626273 (Ohio App. 5 Dist.). City's adoption of planned zoning district on owner's property did not take her business property where certain business uses were no longer permitted but others were permitted with less economic advantages.

ix. State, ex rel. East Ohio Gas Co. v. Bd. of Commr's of Stark Cty., 980 N.E. 2d 1056 (Ohio App. 5 Dist.). Placing cost of relocation of pipelines necessitated by county road widening project upon company is not a "taking" as easement for public highway purposes creates both surface and subsurface property rights and utility's easement in subservient.

II. TYPICAL ZONING CODE/RESOLUTION PITFALLS & WEAKNESSES

A. Substantive Problems.

1. Sign regulations (First Amendment implications). *See*, *Reed v. Toron of Gilbert* (9th Cir. 2013), 707 F. 3d 1057; cert. granted, 2014 WL 2931844.

a. Not Content Neutral.

i. Heightened scrutiny by courts.

b. Preferences given to commercial signs over political/opinion-related signs.

c. Durational limits on posting of political/opinion-related signs.

d. Inadequate levels of political/opinion-related signage not permitted on private properties.

e. Requiring a permit and/or fee for non-commercial, political/opinion-related signs.

f. Preferences given to local government signage over

private party signage.

g. Factual basis for sign regulations - size, height, number, setbacks, and other locational requirements.

h. Regulating "lawn art" – First Amendment issues.

2. Variance Standards/Factors.

Many codes/resolutions fail to make the distinction between "use" variances and variances for area and size regulations. Boards must deal with the issue of economic viability of property.

3. Zoning codes/resolutions that are in conflict with the Comprehensive/Master Plan.

4. Not treating religious land uses the same as other types of Places of Assembly (such as schools, theatres, party centers, etc.).

5. Requirements that nonconforming use structures destroyed to 50% of greater of value not be rebuilt or reinstituted. Such regulation often cause both inability to finance and to insure nonconforming use structures.

6. Subjecting municipal property and uses to zoning regulations. (See, e.g., Frantz v. City of Wooster, 2013 WL 601423 (Wayne Cty. App.), where city fire station denied as a conditional use.)

B. Procedural Problems.

1. Failure of a code/resolution to specify what constitutes a final decision of a local board or commission in an administrative hearing matter.

2. Failure of the board or commission to support its decision with conclusions of fact.

3. Failure to define who has standing to oppose the granting of a variance or other land use application for purposes of internal appeals to a higher board or entity within the local government or for standing to appeal or to be a party in Court.

4. Failure to set forth in your code/resolution a process for remedying possible "takings" claims.

5. Time limitations on conditional uses.

III. REHEARINGS BY BZA & JUDICIAL REVIEW OF DECISION OF BZA

A. Thirty days to appeal final decision to court.

B. Notice of appeal and praecipe must be filed with the local administrative board within thirty days of the final decision.

C. No jurisdiction for board to rehear decision after thirty day appeal time or appeal to court.

D. The former supersedes bond requirement of Ohio Rev. Code § 2505.06 in appeals upon questions of law and fact has been eliminated by amendment to that Section.

E. If a stay of construction pursuant to a variance is not obtained from the court, and construction commences, the appeal of any grant of a variance may be rendered moot.

F. Appellant's right to present additional evidence to the court beyond evidence in the administrative board's record is governed by the strict application of standards in Ohio Rev. Code §2506.03 — i.e., one of the following applies:

1. the transcript does not contain a report of all evidence admitted or proffered by the appellant;

2. the appellant was not permitted to appear and be heard in person, or by his attorney, in opposition to the final order, adjudication, or decision appealed from, and to do any of the following:

a. present his position, arguments, and contentions;

b. offer and examine witnesses and present evidence in support;

c. cross-examine witnesses purporting to refute his position, arguments, and contentions;

d. offer evidence to refute evidence and testimony offered in opposition to his position, arguments, and contentions;

e. proffer any such evidence into the record, if the admission of it is denied by the officer or body appealed from.

3. the testimony adduced was not given under oath;

4, the appellant was unable to present evidence by

reason of a lack of the power of subpoena by the officer or body appealed from or the refusal, after request, of such officer or body to afford the appellant opportunity to use the power of subpoena when possessed by the officer or body;

5. the officer or body failed to file with the transcript, conclusions of fact supporting the final order, adjudication, or decision appealed from. (A failure of the board to make conclusions of fact or findings to support its decision may lead the court to reverse the decision remand the case to the board for findings.

G. Neighboring property owners have standing as parties in Ohio Rev. Code § 2506 appeals if they appeared at the administrative hearing and testified in opposition to an application.

1. The issue is whether the neighbor's property directly affected by the variance or adjoining property only?

2. Also, did the third party "appear" at the board hearing?

3. Did the third party receive notice of board hearing, if required?

H. Nonprofit corporation and unincorporated associations lack standing to appeal.

I. A charter municipality can have standing to appeal its own board's decisions if explicit charter provision or duly passed ordinance provides for an appeal.

J. Common Pleas Court standard of review: "preponderance of substantial reliable and probative evidence on the whole record".

K. Constitutional claims raised by property owner requires a court trial.

L. Court has authority to remand a variance case back to local board based on procedural irregularities or lack of transcript.

IV. OHIO SUNSHINE LAWS APPLICABILITY

Sunshine Law may not be applicable to quasi-judicial deliberations of BZA. See, *TBC Westlake, Inc. v. Hamilton Cty. Bd. of Revision* (1998), 81 Ohio St.3d 58; *Application for Additional Use of Property v. Allen Twp. ZBA*, 2013 WL 785060 (Ohio App. 6 Dist.); 2000 Ohio Op. Atty. Gen. 35; and *Groff-Knight v. BZA* (Delaware Cty.), 2004 Ohio App. LEXIS 2856.

R. Todd Hunt is an attorney with Walter & Haverfield LLP, The Tower at Erieview, 1301 East Ninth Street, Suite 3500, Cleveland, Ohio 44114-1821 (216-928-2935) rthunt@walterhav.com