

Presented at the North Carolina Bar Association  
Land Use Regulation and Planning Seminar  
Grandover Resort & Conference Center, Greensboro, NC  
October 13, 2000

**LAND USE LITIGATION CASES:**  
**THE THIN LINE BETWEEN WINNING AND LOSING**

*By: David S. Pokela<sup>1</sup>*  
*Adams Kleemeier Hagan Hannah & Fouts*  
*Greensboro, North Carolina*

In the land use litigation context, this paper explores the factual scenarios that lead to winning cases from the landowner/developer perspective. By doing so and also by showing what does not lead to a winning case for a landowner/developer, this paper necessarily also gives equal time to the governmental entity by exploring the factual scenarios that lead to winning cases from the government perspective. The subject matter covered herein is a mix of land use topics that have been highlighted, some recently, by the U.S. Supreme Court (total economic takings, partial economic takings, temporary takings, possessory exactions, non-possessory exactions, equal protection) and the North Carolina Supreme Court (governmental negligence in permitting).

The perception, and maybe the reality, is that the governmental entity almost always prevails in land use cases due to presumptions of validity, minimal scrutiny and deferential review. Nevertheless, landowners/developers can and do prevail in land use litigation cases. The difficulty is in determining what makes a winning set of facts. This paper endeavors to assist in that determination by identifying the thin line between winning and losing. However, sometimes finding

---

<sup>1</sup>The help of Thomas G. Hooper and Gregory T. Higgins is acknowledged with thanks.

that fine line is not even enough. It may be more important to know how high one has to jump to get over that fine line once it is found.

## TOTAL ECONOMIC TAKINGS

### Discussion of the Issue:

Aside from physical and title takings, economic takings have been a hot topic in land use law. The basic two prong test for when land use regulations can effect an economic impact taking is: (1) whether the regulation does not substantially advance legitimate state interests, or (2) if the regulation denies an owner economically viable use of his land. See Agins v. Tiburon, 447 U.S. 255 (1980). When a landowner asserts a "total" takings claim and proves that he has been deprived of *all* economically viable use of his land, the Supreme Court considers it a *per se* taking and does not address the governmental interest. See Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992). However, the Lucas Court noted a limitation to the *per se* taking rule: the government "may resist compensation if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with." Id. In other words, the limitation "must inhere in the title itself, in the restrictions that background principles of the state's law of property and nuisance already place upon land ownership." Id.

The North Carolina standard is set forth in Finch v. City of Durham, 325 N.C. 352, 384 S.E.2d 8 (1989): "the test for determining whether a taking has occurred . . . is whether the property . . . has a practical use and a reasonable value." The North Carolina Court of Appeals has stated that the Lucas and Finch tests are consistent. Guilford Co. Dept. of Emergency Services v. Seaboard Chemical Corp., 114 N.C. App. 1, 441 S.E.2d 177 (1994).

### Winning Cases:

Besides Lucas (the landowner purchased beachfront lots with the intention to build single-family houses on the property, and a subsequently enacted regulation prevented development of the land in any way and left the property economically idle), other examples do exist where landowners successfully argued that a *per se* taking occurred. See e.g. Bowles v. U.S., 31 Fed. Cl. 37 (1994) (refusal of Corps of Engineers to issue a Section 404 permit was a taking because no economic use remained; 91.8% reduction in property value claimed by government; based on investment-backed expectations, the court said a taking occurred even if it was not a *per se* taking); Palm Beach Isles Assocs. v. United States, 208 F.3d 1374 (Fed. Cir. 2000) (Permit to dredge and fill was denied as to a 50.7 acre portion of a 311 acre tract; the court determined that the 50.7 acre parcel was the economically relevant parcel).

On the issue of whether a prohibition inhered in the title itself (thereby barring a claim of a compensable taking), an example of a case won by a landowner is: K&K Construction v. Department of Natural Resources, 551 N.W.2d 413 (Mich. App. 1996), rev'd on other grounds, 575 N.W.2d 531 (Mich. 1998). In K&K Construction, where the landowner desires to fill-in a wetland to build a restaurant, the court stated that a generalized invocation of public interest in the state constitution is not a background principle of nuisance and property law. The Michigan Supreme Court determined that it was not a total taking and, therefore, did not review the ruling pertaining to whether the prohibition inhered in the title itself.

### Losing Cases:

Because of the categorical or *per se* taking rule, many landowners strive to paint their cases as total takings. However, there are numerous examples of cases where landowners have failed in

this regard despite significant losses in value. See William C. Haas & Co. v. City of San Francisco, 605 F.2d 1117 (9<sup>th</sup> Cir. 1979) (a 95 percent reduction in value is not a taking), Pace Resources, Inc. v. Shrewsbury Township, 808 F.2d 1023 (3d Cir. 1987) (90 percent reduction from \$495,000 to \$52,000 is not a taking); Hadacheck v. Sebastian, 239 U.S. 394 (1915) (an 85 percent reduction \$800,000 to \$60,000 is not a taking). The alleged taking in the North Carolina case of Finch v. City of Durham was partial and is discussed further in the partial economic takings section of this paper.

The other battleground in Lucas-type cases is whether a takings claim is defeated due to a prohibition inhering in the title itself or where the proscribed use interests were not part of the title to begin with. Examples of cases where the landowner lost this battle are: Department of Health v. The Mill, 887 P.2d 993 (Colo. 1994) (“under principles of Colorado nuisance law, the right to make any use of the property that would create a hazard to public health by spreading radioactive contamination was excluded from [the landowner’s] title at the onset.”); Shell Island Homeowners Ass’n v. Tomlinson, 134 N.C. App. 217, 517 S.E.2d 406 (1999) (plaintiff’s tract was subject to the challenged restrictions at the time the original permit was issued); see also, Just v. Marinette County, 201 N.W.2d 761 (Wisc. 1972) (in a case decided much earlier than Lucas, the court held that a rule against filling a wetland did not constitute a taking because the landowner did not have an absolute right to use his land for a purpose which the land was unsuited for in its natural state).

**The Thin Line Between Winning and Losing:**

A. **Issue: Is It A Per Se Lucas-Type Total Taking?**

Generally, if the landowners cannot show 100% total deprivation of economic use, the landowner is going to lose this issue. However, examples of something less than 100% exist, and the issue of defining the relevant economic parcel is paramount.

B. Issue: Does The Prohibition Inhere In The Title Itself?

To the extent that the government can rely upon nuisance law and necessity to prevent uses that threaten the lives and property of others, the government should be able to avoid compensation. Prevention of flooding is given as an example in Lucas.

## PARTIAL ECONOMIC TAKINGS

### Discussion of the Issue:

When a landowner has not been deprived of all economically beneficial use of his land, it is generally held that "partial" economic deprivations are analyzed under the Penn Central multi-factor test. See Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992); Penn Central Transp. Co. v. New York City, 438 U.S. 104 (1978). Although a partial deprivation does not activate the *per se* taking rule of Lucas, compensation may be due for a taking after an *ad hoc* analysis of : (1) the character of the government action; (2) the economic impact of the regulation on the claimant; (3) the extent to which the regulation interfered with investment-backed expectations. See *id.*

Several North Carolina decisions have acknowledged the Penn Central analysis and, therefore, provide some basis for a partial economic taking claim. Finch v. City of Durham, 325 N.C. 352, 384 S.E.2d 8 (1989) (although the landowner lost; the court cited Penn Central and considered investment-backed expectations); Sherrill v. Town of Wrightsville Beach, 81 N.C. App. 369, 344 S.E.2d 357 (1986) (court cited Penn Central and considered investment-backed expectations; court stated that taking occurs when the landowner is deprived of *virtually* all the beneficial uses of the land). However, numerous North Carolina decisions refer to the need to show a deprivation of "all" value and use.

### Winning Cases:

Bowles v. U.S., 31 Fed. Cl. 37 (1994) (Lucas - type total taking found but, in the alternative, a partial taking of 91.8% of the value existed as well when plaintiff could not construct a septic system and plaintiff's investment backed expectations were to build a permanent retirement residence); Golden Gate Hotel Ass'n v. City and County of San Francisco, 836 F.Supp. 707 (N.D.Ca.

1993) (partial taking due to interference of investment backed expectations), vacated on other grounds, 18 F. 3d. 1482 (9<sup>th</sup> Cir. 1994); see also Loveladies Harbor v. United States, 28 F.3d 1171 (Fed. Cir. 1994) (illustrating that the way the denominator rule is applied can be all important – court found a taking after it analyzed taking of 12.5 acres when there was an original parcel of 250 acres and 51 acres after a sale of some property).

### *Losing Cases:*

Some of the cases discussed in the total economics taking section are examples of cases with partial economic deprivations that the landowner did not win. In addition, see Finch v. City of Durham, 325 N.C. 352, 384 S.E.2d 8 (1989) (although court concludes plaintiff was not deprived of practical use and reasonable value, the court essentially applied all of the Penn Central factors; investment backed expectations element was not satisfied by plaintiff due to notice); Messer v. Town of Chapel Hill, 346 N.C. 259, 485 S.E.2d 269, (1997) (severe diminution in value is not compensable); Guilford Co. Dept. of Emergency Services v. Seaboard Chemical Corp., 114 N.C. App. 1, 441 S.E.2d 177 (1994) (must show deprivation of “all” economically beneficial or productive use); Dodd v. Hood River County, 855 P.2d 608 (Or. 1993) (placement of land in forest zone did not frustrate investment backed expectations; landowner could still enjoy forest and agricultural uses); Orange Lake Assoc. v. Kirkpatrick, 21 F.3d 1214 (2d Cir. 1994) (reduction from twelve dwelling units per acre to two dwelling units per acre was not a compensable partial taking – notice of regulation); Wyer v. Board of Env'tl. Protection, 747 A.2d 192 (Me. 2000) (court stated we decline to adopt Wyer’s partial taking theory; reduction in value of \$100,000 to \$50,000 due to State’s Sand Dune laws did not constitute a taking because property could still be used for “parking, picnics, barbecues and other recreational uses”).

**The Thin Line Between Winning and Losing:**

Although it is often unclear where the “thin line” is in partial economic takings cases, it is relatively clear that it is a line that is often too high for landowners to get over. In what is essentially a balancing of public and private interests, the landowner can always expect to have to overcome strong public interests. The landowner may have a better chance if the regulation is historical, coastal or environmental as opposed to a regulation protecting public health and safety. The economic impact on the claimant will have to be extreme and even that may not be enough. With respect to investment backed expectations, the best landowner case will involve a scenario where the regulation was enacted after the purchase of the property and the landowner had no actual or constructive notice of the regulation.

The bottom line is that the Penn Central multi-factor test is a low level of scrutiny with consideration of (or deference to) public interests. Landowners do not win these cases very often. North Carolina courts often give little regard to the Penn Central multi-factor test and simply determine whether there has been a deprivation of “all” use and value.

## TEMPORARY TAKINGS (i.e., Moratoria)

### Discussion of the Issue:

When local governments desire to preserve the status quo while longer term land use solutions are considered, local governments often employ measures such as moratoria or interim zoning ordinances (stop-gap ordinances). During the implementation of such measures, landowners usually are prevented from pursuing their intended uses. At such times, it is common to hear a landowner complain that he is due just compensation for a temporary taking.

Temporary takings claims often focus on the U.S. Supreme Court decision of First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304 (1987). Without defining what constitutes a temporary taking, the Court in First English held that when a landowner is denied all use of his property for a temporary period, under circumstances that amount to a taking, the appropriate remedy is the payment of just compensation. The court also suggested that there is no claim for a temporary taking in connection with the normal land use delays in obtaining building permits, changes in zoning ordinances, variances and the like. See Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922) (“Government could hardly go on if to some extent values incident to property could not be diminished without paying for every such change in the general law.”).

A number of cases have considered the issue of whether interim development controls that deny all use are takings. As illustrated by the cases cited below, the general rule that has developed is that interim development controls do not constitute a taking if they are reasonable in duration, scope and extent. See generally, Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992) (citing Pennsylvania Coal) (a taking by regulatory action is recognized only if such action goes “too far”).

**Winning Cases:**

An example of a case where a landowner might prevail is when there was a four-year delay and the governmental entity failed to take reasonable actions during the delay towards enacting permanent regulations. See Lake Illyria Corp. v. Gardiner, 43 A.D.2d 386 (N.Y. App. Div. 1974) (interim zoning held to be "void" – not a takings case); see also Deal Gardens, Inc. v. Board of Trustees, 226 A.2d 608 (N.J. 1967) (interim zoning ruled "void" because it lasted longer than time that was needed to substitute a complete ordinance; excuse of lack of federal funds for planning and zoning survey was considered unacceptable by the Court); Peacock v. County of Sacramento, 77 Cal. Rptr. 391 (Cal. App. 3d Dist. 1969) (approximate three-year period from enactment of interim study ordinance to adoption of general plan was held to be reasonable, but a taking resulted from extension of the restrictive measures beyond that time).

**Losing Cases:**

Governmental entities have prevailed where interim development controls lasted as long as 3 years. See Williams v. City of Central, 907 P.2d 701 (Colo. App. 1995) (ten-month delay not extraordinary as matter of law); McCutchan Estates Corp. v. Evansville-Vanderburgh County Airport Authority Dist., 580 N.E.2d 339 (Ind. App. 1991) (nine-month delay not extraordinary as a matter of law); see also, Dufau v. United States, 22 Cl.Ct. 156 (1990) aff'd sub nom. In re Seward, 940 F.2d 677 (Fed. Cir. 1991) (sixteen-month delay not extraordinary as a matter of law); First English Evangelical Lutheran Church v. County of Los Angeles, 258 Cal. Rpt. 893 (Cal. App. 2d Dist. 1989) (delay of more than two years not unreasonable); Guinnane v. City & County of San Francisco, 241 Cal. Rptr. 787 (Cal. App. 1987) (delay of more than one year not unreasonable as a matter of law); Woodbury Place Partners v. City of Woodbury, 492 N.W.2d 258 (Minn. App. 1992) (delay of two

years not extraordinary considering state statute permitted interim zoning ordinances for periods of up to thirty months); Campana v. Clark, 197 A.2d 711 (N.J. Super. Ct. 1964) (31 months deemed valid); Tabb Lakes, Ltd. v. United States, 10 F.3d 796 (Fed. Cir. 1993) (three year delay not extraordinary).

**The Thin Line Between Winning and Losing:**

The thin line between winning and losing on this claim is not so much the length of time (although longer periods are better for the landowner) – but the fact that nothing or very little was done by the government during the interim. Still, if you are a landowner, you cannot beat unreasonable government conduct. City of Monterey v. Del Monte Dunes Ltd., 526 U.S. 687 (1999) is analyzed conceptually as a takings case (five formal denials over five years). Although it is not a moratorium case, it illustrates that takings cases, including temporary takings, can be won when the delays are extraordinary and are tainted by unreasonable governmental conduct.

## **POSSESSORY EXACTIONS (i.e. Dedications)**

### **Discussion of the Issue:**

Property development often involves governmental requests for land for a variety of public purposes such as: roads, utilities, schools, parks, public safety and storm water management. Dedications of land for such purposes are referred to as possessory exactions.

While acknowledging that exactions can be a legitimate means of exercising growth control, the U.S. Supreme Court has set forth the following two-part test for determining whether an exaction rises to the level of a taking under the 5<sup>th</sup> Amendment:

- (1) There must be an “essential nexus” between the regulation and a legitimate state interest, and
- (2) There must be “rough proportionality” between the regulation and the projected impact of the proposed development.

See Nollan v. California Coastal Com., 483 U.S. 825 (1987) (as a condition for permit approval to enlarge a home, the government required the landowner to grant an easement along the beachfront of their property in order to provide lateral public access to beach; the Court held that the government is required to pay for the easement because there is not a sufficient relationship between the regulation and asserted public purpose); Dolan v. City of Tigard, 512 U.S. 374 (1994) (as a condition of approval to enlarge a store and parking lot, the government required the dedication of land for a pedestrian and bicycle pathway easement for public use and required the dedication of land for a public greenway for flood control; the government could not show that the traffic generated from the development reasonably related to the required easement). The “rough proportionality” test is a form of heightened scrutiny that requires more judicial review than is found in traditional rational basis cases.

As far as I can determine, the North Carolina appellate courts have not utilized Nollan and Dolan together. In fact, there are not any reported decisions citing Dolan. In pre-Dolan decisions, North Carolina courts have used minimal scrutiny to analyze possessory exactions. Batch v. Town of Chapel Hill, 326 N.C. 1, 387 S.E.2d 655 (1990); Franklin Road Properties v. City of Raleigh, 94 N.C. App. 731, 381 S.E.2d 487 (1989).

There are several known limitations to the “rough proportionality” test. First, the test does not apply in permit denial cases which require the Lucas test instead. City of Monterey v. Del Monte Dunes Ltd., 526 U.S. 687 (1999). Second, according to the highest court of Maryland, the “rough proportionality” test does not apply to a subdivision “condition.” City of Annapolis v. Waterman, 745 A.2d 1000 (Md. 2000) (dedications give the public a right to use the property and conditions simply limit how the landowner may use his property; conditions are subject to the total take standards set forth in Lucas); see River Birch Associates v. City of Raleigh, 326 N.C. 100, 388 S.E.2d 538 (1990) (the North Carolina Supreme Court recognized that dedications are conveyances to the public at large; subdivision requirement of conveyance to homeowners association was analyzed under Finch standard).

**Winning Cases:**

Nollan v. California Coastal Com., 483 U.S. 825 (1987) (landowner prevailed on the first prong concerning an essential nexus to a legitimate state interest); Dolan v. City of Tigard, 512 U.S. 374 (1994) (landowner prevailed on the second prong relating to rough proportionality); Lance Burton v. Clark Co. Comm’s., 958 P.2d 232 (Wash. App. 1998) (government failed to bear its burden of showing that the exacted road will alleviate the problems identified by the county); Shultz v. City of Grant Pass, 884 P.2d 569 (Or. Ct. App. 1994) (dedication of 10-foot right-of-way was not

roughly proportional to impact of proposed subdivision); Luxembourg Group v. Snohomish County, 887 P.2d 446 (Wash. App. 1995) (dedication of right-of-way for access of neighboring property is improper because the proposed subdivision did not create the neighbor's access problem). In Franklin Road Properties, *supra*, the North Carolina Court of Appeals ruled in favor of a landowner in holding that summary judgment was improper and that an issue of fact existed as to whether an exaction was an "unconstitutional taking" under a "rational nexus text."

### **Losing Cases:**

Batch v. City of Chapel Hill, 326 N.C. 1, 387 S.E.2d 655 (1990) (denial of application was proper because landowner failed to dedicate as required by ordinance); City of Annapolis v. Waterman, 745 A.2d 1000 (Md. 2000) (subdivision "conditions" do not get the benefit of heightened scrutiny); Curtis v. Town of S. Thomaston, 708 A.2d 657 (Me. 1998) (where town lacked adequate water supply, condition of creation of water retention pond and easement to pond for town was proportional to demands created by proposed subdivision).

### **The Thin Line Between Winning and Losing:**

From the perspective of a developer or landowner, the possessory exaction case is one of the few types of cases that receives any form of heightened scrutiny. Furthermore, the burden of proof is on the government to show "rough proportionality." Consequently, to the extent that the thin line between winning and losing is a hurdle to be jumped, it is a lower hurdle to jump over than that imposed by the Lucas test. However, if the case is really a permit denial or a subdivision condition, it is tougher case to win because the Lucas test applies. Under North Carolina law, it remains to be seen whether heightened scrutiny will be applied in possessory exaction cases.

Assuming the Nollan-Dolan test applies, cases are not generally won on the first prong (Nollan is an example of a rare win on the first prong). The majority of landowner victories are based on the second prong where the government cannot meet its burden of proof of showing “rough proportionality” between the regulation and the proposed impact. Dedications of land for road widenings will be deemed takings where the subdivision will not create a need for wider roads. Takings will be found where the landowner is providing public benefits beyond the impact of the development. On the other hand, the government will prevail where the dedications address problems created by the development.

## **NON-POSSESSORY EXACTIONS (i.e., impact fees, fees-in-lieu)**

### **Discussion of the Issue:**

When the subject is non-possessory exactions such as impact fees and fees-in-lieu, the big unresolved issue is whether the Nollan-Dolan two-part test applies. Nollan and Dolan both involved possessory exactions. The Supreme Court has not addressed this specific issue with a definitive statement. The Court in Del Monte Dunes confused some on this issue because it mentioned Dolan “rough proportionality” in reference to possessory exactions and then later used the word dedication as if it were different than an exaction (implying that an exaction can be something other than a dedication). City of Monterey v. Del Monte Dunes Ltd., 526 U.S. 683 (1999). The case of Ehrlich v. City of Culver City, 512 U.S. 1231 (1994) has been construed to suggest that Nollan and Dolan apply to non-possessory exactions. Ehrlich was a case involving a development fee that the Supreme Court remanded “for further consideration in light of Dolan.” See id.

Essentially, there is a split of opinions on whether “rough proportionality” applies to non-possessory exactions (including those legislatively imposed). Cases that hold that “rough proportionality” is not applicable are as follows: Clajon Prod. Corp. v. Petera, 70 F.3d 1566 (10<sup>th</sup> Cir. 1995); New Port Largo v. Monroe Co., 95 F.3d 1084 (11<sup>th</sup> Cir. 1996); McCarthy v. City of Leawood, 894 P.2d 836 (Kan. 1995); Home Builders Ass’n v. City of Scottsdale, 930 P.2d 993 (Ariz. 1997); Parking Ass’n v. City of Atlanta, 450 S.E.2d 200 (Ga. 1994); Southeast Cass Water Resource Dist. v. Burlington N. R.R., 527 N.W.2d 884 (N.D. 1995).

Cases that hold that “rough proportionality” does apply to non-possessory exactions are as follows: Homebuilders Ass’n v. City of Beavercreek, 729 N.E.2d 349 (Ohio 2000); Ehrlich v. City of Culver City, 911 P.2d 429 (Ca. 1996); Peterman v. Department of Natural Resources, 521 N.W.2d

499 (Mich. 1994); Christopher Lake Dev. Co. v. St. Louis County, 35 F.3d 1269 (8<sup>th</sup> Cir. 1994); Northern State Home Builders Ass'n. v. County of DuPage, 649 N.E.2d 384 (Ill. 1995); Manocherian v. Lenox Hill Hosp., 643 N.E.2d 479 (N.Y. 1994); Isla Verde Int'l Holdings, Inc. v. City of Camas, 990 P.2d 428 (Wash. App. 1999) clarified by, reconsideration denied by 2000 Wash. App. Lexis 268 (Feb. 11, 2000) rehearing and reconsideration granted by 2000 Wash. Lexis 523 (Sept. 5, 2000) 990 P.2d 429 (Wash. App. 1999); Steel v. Cape Corp., 677 A.2d 634 (Md. App. 1996); see also Trimen Dev. Co. v. King County, 877 P.2d 187 (Wash. 1994).

**Winning Cases:**

Christopher Lake Dev. v. St. Louis County, 35 F.3d 1269 (8<sup>th</sup> Cir. 1994) (Dolan used to strike down off-site drainage system for use by the entire watershed); Northern State Home Builders v. County of DuPage, 649 N.E. 2d 384 (Ill. 1995) (Dolan used to invalidate transportation impact fee); Isla Verde Int'l Holdings, Inc. v. City of Camas, *supra* (Dolan used to invalidate open space set aside ordinance); Southern Nev. Homebuilders Ass'n. v. City of N. Las Vegas, 913 P.2d 1276 (Nev. 1996) (lack of state law authorization for imposition of permit fee to fund fire protection and medical services); Board of Co. Commiss'rs v. Bainbridge, Inc., 929 P.2d 691 (Colo. 1996) (no authority to impose school impact fee at building permit stage when it was already required to be assessed at subdivision stage); see also Country Joe, Inc. v. City of Eagan, 560 N.W.2d 681 (Minn. 1997) (no authority to impose road connection charge because it really was a tax); Vintage Constr. Co. v. City of Bothell, 922 P.2d 828 (Wash. App. 1996), *aff'd* 959 P.2d 1090 (Wash. 1998) (fee-in-lieu of dedication was improper).

**Losing Cases:**

Homebuilders Ass'n v. City of Beavercreek, 729 N.E.2d 349 (Ohio 2000) (impact fee ordinance upheld); Steel v. Cape Corp., 677 A.2d 634 (Md. App. 1996) (adequate public facility ordinance upheld); Trimen, supra (comprehensive assessment of park needs conducted and fee-in-lieu was upheld as reasonably necessary); F&W Assocs. v. County of Somerset, 648 A.2d 482 (N.J. Super. Ct. App. Div. 1994) (traffic impact fees upheld where a comprehensive study had been conducted).

**The Thin Line Between Winning and Losing:**

The thin line between winning and losing is obscured by whether the Nollan-Dolan "rough proportionality" is applied to non-possessory exactions. If it is, then the chances of winning are enhanced by the heightened scrutiny. If Nollan and Dolan do not apply, then the landowner must overcome the minimal scrutiny found under Lucas.

If the Nollan-Dolan "rough proportionality" is applied, then the whereabouts of the thin line between winning and losing is the same as in possessory exactions. Courts are impressed by the government when it can show detailed studies that were done prior to legislative non-possessory exactions. Successful attacks on legislative exactions tend to focus on the authority to impose them.

## VESTED RIGHTS

### Discussion of the Issue:

The concept of vested rights is "rooted in the 'due process of law' and the 'law of the land' clauses of the federal and state constitutions" and "has evolved as a constitutional limitation on the state's exercise of its police power[s]." Godfrey v. Zoning Bd. of Adjustment, 317 N.C. 51, 344 S.E.2d 272 (1986). The intent through vested rights is to establish certain rights at different times in the land development permitting and review process.

There are two methods for a landowner to secure a vested right. The landowner's right is vested if he meets either (1) the requirements of N.C. Gen. Stat. § 153A-344.1 (counties) or § 160A-385.1 (municipalities) or (2) the requirements of North Carolina's common law doctrine of vested rights. Browning-Ferris Indus. v. Guilford County Bd. of Adjustment, 126 N.C. App. 168, 484 S.E.2d 411 (1997).

North Carolina's vested rights statutes for counties and municipalities are nearly identical. One key component of the statutes is to create a vested right earlier than the issuance of a building permit. Under the statutes, the vested right is the right to undertake and complete the development and use of property under the terms and conditions of "an approved site-specific development plan" or "an approved phased development plan." A site-specific development plan is one that describes "with reasonable certainty the type and intensity of use for specific parcels of property." It is up to the local government to define by ordinance what constitutes a site-specific development plan. A phased-development plan is not as specific as a site-specific development plan. If a site-specific development plan or phased-development is approved after notice and hearing, a vested right to develop pursuant to the plan is created. There are several express exceptions to the statutory vested

right. Two exceptions worth noting are that a vested right would not be created if: (1) the development would be in violation of a state or federal law if such state or federal law has a fundamental effect on the plan, or (2) natural or man-made hazards on or in the immediate vicinity of the property are a threat to the general welfare if the project were to proceed.

The Supreme Court of North Carolina explained the doctrine of common law vested rights as follows:

one who, in good faith and in reliance upon a permit lawfully issued to him, makes expenditures or incurs contractual obligations, substantial in amount, incidental to or as part of the acquisition of the building site or the construction or equipment of the proposed building for the proposed use authorized by the permit, may not be deprived of his right to continue such construction and use by the revocation of such permit, whether the revocation be by the enactment of an otherwise valid zoning ordinance or by other means, and this is true irrespective of the fact that such expenditures and actions by the holder of the permit do not result in any visible change in the condition of the land.

Town of Hillsborough v. Smith, 276 N.C. 48, 55, 170 S.E.2d 904, 909 (1969). Recently, the Court of Appeals reduced the common law concept of vested rights into a four part test requiring the party claiming a vested right to show:

- (1) substantial expenditures;
- (2) in good faith reliance;
- (3) on valid governmental approval;
- (4) resulting in the party's detriment.

Kirkpatrick v. Village Council for Village of Pinehurst, 2000 WL 621089 (N.C. App. 2000). It should be noted that the third element is often expressed as "the issuance of a valid building permit, if such permit is required . . . ." Koontz v. Davidson Co. Bd. of Adjustment, 130 N.C. App. 479, 503

S.E.2d 108 (1998); Browning-Ferris Indus. v. Guilford County Bd. of Adjustment, 126 N.C. App. 168, 484 S.E. 2d 411, (1997)

**Winning Cases:**

*Concerning the element of "substantial expenditure":*

In re Application of Campsites Unlimited, Inc., 287 N.C. 493, 215 S.E.2d 73 (1975) (substantial expenditures included purchase of property, engineering and legal work, and engineering and staking of roads and lots, cutting and clearing of tress and grading and opening of roads); Hillsborough v. Smith, 276 N.C. 48, 170 S.E.2d 904 (1969) (substantial expenditures included exercising option to purchase the land, paying contract price and taking title, entering into construction contracts and agreements to purchase certain equipment); Cardwell v. Smith, 106 N.C. App. 187, 415 S.E.2d 770 (1992) (substantial expenditures made in reliance on special use permit issued for quarry); Randolph County v. Coen, 99 N.C. App. 746, 394 S.E.2d 256 (1990) (substantial expenditures found where automobile dealer had finished preparing dealership site for operations, met the requirements for and obtained the requisite licenses to operate, and had vehicles available for sale); Transland Properties, Inc. v. Board of Adjustment, 18 N.C. App. 712, 198 S.E.2d 1 (1973) (substantial expenditures included clearing and grading and installation of streets, construction of curb, gutters, sidewalks, and water and sewage system).

*Concerning the element of "good faith":*

In re Application of Campsites Unlimited, Inc., 287 N.C. 493, 215 S.E.2d 73 (1975) (landowner acted in good faith where its "proceeding 'speedily' with its development was not to win

a race with the proponents of zoning but to get its property in condition to take advantage of the spring and summer market for the sale of camp sites”).

**Losing Cases:**

*Concerning the issue of "substantial expenditure":*

Russell v. Guilford County, 100 N.C. App. 541, 397 S.E.2d 335 (1990) (expenditures were not substantial where evidence demonstrated that plaintiff did nothing more than hire an engineer to draw up plans for development and submit the plans to county's technical review committee).

*Concerning the issue of "good faith":*

Warner v. W&O, Inc., 263 N.C. 37, 138 S.E.2d 782 (1964) (no good faith where evidence disclosed that expenditures were made after the zoning ordinance changed); Stowe v. Burke, 255 N.C. 527, 122 S.E.2d 374 (1961) (no good faith where developer knew of community opposition to his intended construction of apartments, assured community he would not build apartments, knew of petition to re-zone prior to any construction, but poured foundations between time petition was filed and hearing was scheduled and when ordinance was changed); Koontz v. Davidson County Bd. of Adjustment, 130 N.C. App. 479, 503 S.E.2d 108 (1998) (no good faith where developers knew that petition to re-zone was pending at the time they applied for and received zoning compliance permits and then installed street, obtained concrete, and performed landscaping).

**The Thin Line Between Winning and Losing:**

With respect to statutory vested rights claims, there is minimal case law that illustrates the subtle area between a winning and losing case. Potential "gray" areas in statutory vested rights disputes may arise in the exceptions such as threats to the general welfare and changes in state or federal law that have a fundamental effect on the plan.

With respect to common law vested rights, one cannot even begin to think about winning one of these cases unless there is a valid and lawful approval that has been relied upon. If this key

element is missing, the following section in this paper on governmental negligence in permitting may provide the landowner with another avenue. On the issue of "substantial expenditures," developers tend to win cases in which they have made many expenditures in the form of money, labor and energy (it helps to have a *list* of these). The good faith element is often lost when expenditures are made with knowledge of the ordinance change or knowledge of a pending petition to rezone. However, knowledge of a general study of zoning that may or may not lead to a zoning change will not likely be deemed to be bad faith.

In sum, it seems that vested rights cases have a *relatively* high winning percentage for landowners.

## GOVERNMENTAL NEGLIGENCE IN PERMITTING

### Discussion of the Issue:

For years, governmental entities in North Carolina avoided liability for governmental negligence in activities such as building inspections and zoning enforcement by relying upon the "public duty doctrine." The "public duty doctrine," as traditionally applied and judicially accepted in police protection cases, essentially provides that when a governmental entity exercises its police powers, it is acting for the benefit of the general public as opposed to any specific individual. Consequently, the governmental entity owes a duty to the general public, but not to the individual. Without being owed a duty, the individual cannot assert a claim of negligence.

Although the North Carolina Court of Appeals broadly applied the "public duty doctrine" to building inspectors and zoning officers in published and unpublished opinions, the Supreme Court had not applied it to anyone except police officers, Braswell v. Braswell, 330 N.C. 363, 410 S.E.2d 897 (1991), and state agencies, Stone v. North Carolina DOL, 347 N.C. 473, 495 S.E.2d 711 (1998). On April 7, 2000, the North Carolina Supreme Court recognized the limited application of the "public duty doctrine" to police officers and state agencies and refused to apply it to building inspectors. Thompson v. Waters, 526 S.E.2d 650 (N.C. 2000).

### Winning Cases:

Other than Thompson, there have not been any subsequent land use opinions pertaining to the "public duty doctrine."

### Losing Cases:

Although there are numerous building inspection cases where the landowner lost, those presumably are overruled by Thompson. It is an open issue whether Derwort v. Polk County is still

good law. 129 N.C. App. 789, 501 S.E.2d 379 (1998) ("Public duty doctrine" barred negligence claim against board of commissioners and planning board where the claim was based on the denial of septic tank permits *after* planning board certification of development plan).

**The Thin Line Between Winning and Losing:**

It is clear that negligence claims can be brought against building inspectors. Further, the Court showed a strong movement away from broad use of the "public duty doctrine." It would appear that negligent land use decisions/actions are not barred by the "public duty doctrine." However, as the floodgates of litigation open, it will be interesting to see future court reaction.

## EQUAL PROTECTION

### Discussion of the Issue:

As a general rule, a land use regulation that treats similarly situated people differently will be upheld under the equal protection clause if it is rationally related to a legitimate government interest. In fact, the regulation will be upheld if the court can *conceive* of any rational basis. This is known as minimal scrutiny or rational basis review. In the rare circumstance where a classification involves a suspect class or fundamental right, then heightened scrutiny is used.

Equal protection challenges to land use regulations are not uncommon since land use regulations often necessarily classify people and property. Land use equal protection claims have been in the spotlight recently due to the U.S. Supreme Court decision of Village of Willowbrook v. Olech, 528 U.S. 562, (2000). In Olech, the plaintiff sought to be connected to the municipal water supply and the municipality demanded a 33-foot easement as a condition. However, other local property owners were only required to grant a 15-foot easement. After a 3 month delay, the municipality agreed to reduce its demand to a 15-foot easement. Consequently, the plaintiff, *on behalf of herself rather than a class of people*, claimed that she was treated differently than similarly situated property owners, and that the different treatment was irrational, arbitrary and motivated by *ill will*. On a 12(b)(6) motion to dismiss, the trial court dismissed the equal protection claim.

In a *per curiam* opinion, the U.S. Supreme Court held that an equal protection claim can be brought by a "class of one" and that equal protection challenges that claim irrational distinctions do not also need to allege governmental ill will, maliciousness or vindictiveness. See Esmail v. Macrane, 53 F.3d 179 (7<sup>th</sup> Cir. 1995) (Pre-Olech decision that recognized claims of official malicious

harassment as a third type of equal protection claim – the first two types are unequal treatment of a suspect class and regulations that make irrational distinctions).

**Winning Cases:**

Esmail v. Macrane 53 F.3d 179 (7<sup>th</sup> Cir. 1995) (reversal of 12(b)(6) dismissal because complaint that alleged malicious vindictiveness by government entity was sufficient to state a claim upon which relief could be granted under the equal protection clause). Olech as described earlier, can be viewed as a win – maybe – but plaintiff still has a long way until ultimate victory. Remember, any conceivable basis can support the governmental action.

**Losing Cases:**

Bryan v. City of Madison 213 F.3d 267 (5<sup>th</sup> Cir. 2000) (dismissal of selective enforcement of zoning laws upheld); Alsenas v. City of Brecksville, 2000 U.S. App. Lexis 14520 (6<sup>th</sup> Cir. June 19, 2000) (dismissal of equal protection claim relating to denial of building permit upheld); Hilton v. City of Wheeling, 209 F.3d 1005 (7<sup>th</sup> Cir. 2000) (in another Judge Posner opinion – like Esmail and Olech – the court found that the plaintiff failed to present evidence of improper motive or illegitimate animus); Responsible Citizens in Opposition to Flood Plan Ordinance v. City of Asheville, 308 N.C. 255, 302 S.E.2d 204 (1983) (classification created by ordinance is reasonable); Shell Island Homeowners Ass'n v. Tomlinson, 134 N.C. App. 217, 517 E.E.2d 406 (1999) (rational relationship existed).

**The Thin Line Between Winning and Losing:**

To the extent there was a question as to whether an individual (without claiming to be a member of a class) could bring an equal protection claim, Olech clarifies that issue in the affirmative. That is a good thing for land use plaintiffs who often would find themselves as a “class of one.”

However, the land use equal protection claim really is not any easier to win if you are a landowner. Equal protection claims remain subject to an extremely deferential level of scrutiny unless the claim involves suspect classes or fundamental rights. As Esmail and Hilton might imply, a successful equal protection claim may almost necessarily need to have an element of governmental malice or vindictiveness despite the ruling of Olech (properly pled equal protection claim does not need “ill will”). Without evidence of vindictiveness or malice, it will be too easy for courts to “conceive” of a rational basis.

## SOURCES

I would like to acknowledge the following sources that contain valuable analysis and collections of cases:

J. Juergensmeyer & T. Roberts, *Land Use Planning and Control Law* (1998)

R. Freilich, *From Sprawl to Smart Growth* (1999)

Land Use Institute Ali-Aba Course of Study Materials for August, 2000 Seminar and the following articles contained therein:

*Selected Recent Cases of Significance to Landowners*  
By John J. Delaney and Emily J. Vaias

*Update on Planning and Land Use Regulatory Decisions*  
By Robert H. Freilich

*Vested Rights and the Development Chronology – 2000 Update*  
By John J. Delaney

*Update: The Takings Issue and Equal Protection*  
By Robert H. Freilich

*Investment-Backed Expectations in Takings Law*  
By Daniel R. Mandelker

*Good and Evil in the Village of Willowbrook: the Story of the Olech Case*  
By Dwight H. Merriam

*Practical Considerations: Dedications, Fees, and Other Exactions*  
By Stanley D. Abrams

*Applicability of Nollan-Dolan Rough Proportionality Requirements to Non-Possessory Exactions and Exactions Imposed by Legislative Enactment*  
By John J. Delaney

*Update: The Takings Issue*  
By Michael M. Berger

D. Callies, *Takings: Land-Development Conditions and Regulatory Takings after Dolan and Lucas* (1996) and the following articles contained therein:

*After Lucas and Dolan: An Introductory Essay*  
By David L. Callies

*Takings in the Land-Use Arena after Lucas and Dolan: How Far Is Too Far in Imposing Exactions?*  
By Daniel J. Curtin, Jr.

*At Last, the Supreme Court Solves the Takings Puzzle*  
By Douglas W. Kmiec

*Investment-Backed Expectations in Takings Law*  
By Daniel R. Mandelker

*Lucas v. South Carolina Coastal Council: Yes, Virginia, There Can Be Partial Takings*  
By Michael M. Berger

*Regulatory Takings: Factoring Partial Deprivations into the Taking Equation*  
By Robert H. Freilich, Elizabeth A. Garvin, and Duane A. Martin

*Partial Takings after Dolan*  
By G. Richard Hill

*Assessing the Impact of Dolan v. City of Tigard on Local Governments' Land-Use Powers*  
By Otto J. Hetzel and Kimberly A. Gough

P. Salkin and R. Freilich, *Hot Topics in Land Use Law* (2000) and the following articles contained therein:

*Municipal Myopia Run Rampant: City of Monterey v. Del Monte Dunes*  
By Michael M. Berger

*The Public Interest Is Vindicated: City of Monterey v. Del Monte Dunes*  
By Robert H. Freilich and Jason M. Divilbiss

*Recent Developments in Land Use, Planning, and Zoning Law: The Evolving Role of the Comprehensive Plan*  
By Edward J. Sullivan

*"Where's Dolan?" Exactions Law in 1998*  
By Jonathan M. Davidson, Ronald Rosenberg, and Michael C. Spata