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A Busy Summer for Environmental and Land Use Law

In the past three months, we have witnessed a breathtaking series of decisions from the U.S. Supreme Court, the Connecticut Supreme Court, and the California Supreme Court that have provided important rulings and clarifications affecting real estate ownership and development in Connecticut and nationally. In summary:

- in Connecticut, our Supreme Court ruled that the Department of Energy and Environmental Protection, in reviewing permit applications, may review only the impacts of the activity that requires the permit, and may not inquire about or regulate other activities that may be "facilitated" by the regulated activity;
- the U.S. Supreme Court clarified, once and for all, that government regulation that confiscates personal property is a "taking," for which the federal Fifth Amendment requires the government to pay compensation;
- the U.S. Environmental Protection Agency and the U.S. Army Corps of Engineers proposed a new definition of "waters of the United States" − already challenged in the courts and (as of this writing) enjoined by one federal judge; the rule has the potential to greatly expand when a federal permit will be needed, in addition to local and state permits, to develop land;
- the U.S. Supreme Court confirmed that local governments can be sued for discrimination under the federal Fair Housing Act if they adopt ordinances or policies that have a "disparate" (disproportionate) impact on minorities, in addition to being liable for actions that constitute intentional discrimination;
- the California Supreme Court became the highest court of the largest state to affirm the right of municipalities to enact "inclusionary zoning" ordinances, which require builders to include in their developments a percentage of units for low and moderate income households; and
- the U.S. Supreme Court clarified federal constitutional rules for sign regulation.

This Client Alert also reports on amendments, proposed in the 2015 General Assembly, to Connecticut's affordable housing statute, which changes were not adopted but garnered support, and are likely to return in 2016.

Environmental Regulation In Connecticut: *Tilcon v. DEEP*

Tilcon Connecticut, Inc. operates quarries in North Branford, Wallingford, Montville, Plainfield, and Griswold. At each facility, it draws water from wells or ponds on its property in quantities requiring a "water diversion permit" from the DEEP. The water is used only to wash excavated materials, to control dust on haul roads, and for machinery cooling. Nonetheless, the DEEP, in processing Tilcon's water diversion permit applications (filed in 2003 originally), took the position that because the water withdrawals "facilitate and enable" Tilcon's earth excavation activities, the DEEP was authorized by the state's Water Diversion Policy Act to regulate Tilcon's earth excavation activities through the water diversion permit process. Such excavations are currently handled by municipal zoning and wetlands commissions. DEEP demanded from Tilcon for each facility, before it would process the five applications, a 25-year earth materials excavation plan and extensive analyses of any and all environmental impacts that might result from the earth excavations, as opposed to from the regulated water diversions. In other words, Tilcon was facing a potential state takeover of regulation of its earth excavation activities, which potentially put decades of extractable earth materials at risk for the company.

Shipman & Goodwin represented Tilcon. Our team filed a declaratory ruling petition with the DEEP Commissioner, challenging the department's interpretation of the water diversion act, as well as two ancillary DEEP efforts to use the diversion act to reopen duly-issued inland wetlands permits, and its refusal to process Tilcon's application for renewal of a federal water discharge permit until such time as Tilcon complied with all of DEEP's water diversion permit demands.

Tilcon was supported at the Supreme Court in *amicus curiae* briefs by the Connecticut Business & Industry Association, the Home Builders & Remodelers Association of Connecticut, and the Connecticut Water Works Association.

The Supreme Court, reversing the DEEP Commissioner and the trial court, accepted all three of Tilcon's arguments: the water diversion act cannot be used to regulate earth materials activities; the act is not authority to reopen a duly issued wetlands permit; and the DEEP cannot delay the processing of other permits as a way to leverage its water diversion act demands.

More than clearing the way for Tilcon to get its permits, this ruling should have beneficial implications for every business that is regulated by the DEEP. The Court in its opinion has essentially struck down a common DEEP position that any applicant for any permit subjects itself to DEEP's review of all potential environmental impacts, as opposed to the impacts of the permit applied for.

Federal Fair Housing Act – Disparate Impact Claims

"But I didn't mean to!" Every parent has heard that one. Regarding housing discrimination claims, the U.S. Supreme Court ruled in June 2015 that local governments cannot avoid federal Fair Housing Act (FHA) claims on the ground that they did not intend to discriminate against minorities; if their action results in discrimination, it's illegal. The case is *Texas Department of Housing and Community Affairs v. The Inclusive Communities Project, Inc.*

Proving intentional discrimination in official housing policies and actions (such as financing) can be a daunting task. By contrast, "a plaintiff bringing a disparate-impact claim challenges practices that have a 'disproportionately adverse effect on minorities' and are otherwise unjustified by a legitimate rationale." In other words, in disparate *impact* claims, whether the defendant *meant* to discriminate is irrelevant.

The underlying dispute in Texas concerned whether low income housing should be built in the inner city or the suburbs. The Inclusive Communities Project alleged that the Texas Department of Housing and Community Affairs had perpetuated segregated housing patterns by disproportionately allocating federal Low Income Housing Tax Credits for housing in predominantly black, inner city areas. In a 5-4 decision, the Court held that disparate impact claims can be brought under the FHA.

The Court noted the backdrop to the 1968 adoption of the FHA, which followed the assassination of Dr. Martin Luther King, Jr. and the racial unrest that followed. It then focused on the language in the FHA making it unlawful: "To refuse to sell or rent . . . or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin." 42 U.S.C. § 3604(a). The key phrase, the Court found, is "otherwise make unavailable," which is results-oriented language that refers to the *consequences* of an action, rather than the actor's intent. This critical phrase is similar to language in other anti-discrimination statutes that the Court had previously ruled permit disparate impact claims. Disparate impact liability is also supported by the 1988 amendments to the FHA, and the fact that nine federal appeals courts had already ruled that such claims were permitted.

The Court held that allowing disparate impact claims is consistent with the FHA's central purpose – to eradicate discriminatory practices. These practices include zoning laws, and the Court said that suits challenging discriminatory zoning decisions "reside at the heartland of disparate-impact liability." The availability of such liability "has allowed private developers to vindicate the FHA's objectives and to protect their property rights by stopping municipalities from enforcing arbitrary and, in practice, discriminatory ordinances barring the construction of certain types of housing units."

The Court stressed the importance of placing appropriate limits on disparate impact liability: requiring the plaintiff to point to a policy of the defendant causing the statistical disparity; allowing the defendant to explain the valid interest served by its policy; and directing lower courts to tailor their remedial orders to eliminating the offending practice by race-neutral means. Though a defendant can be held liable for causing a discriminatory effect in housing even if it didn't mean to cause it, a policy serving a valid interest is still a good defense to such claims.

Government Takings of Personal Property

Does government's obligation under the Fifth Amendment to pay just compensation when physically taking possession of one's property apply only to real property and not to personal property? In *Horne v. Department of Agriculture*, the U.S. Supreme Court said: "No." The Court stated: "The Government has a categorical duty to pay just compensation when it takes your car, just as when it takes your home."

This matter involved a challenge to the compensation procedure of the Agricultural Marketing Agreement Act of 1937 (Act), by which the U.S. Government physically confiscates raisins from farmers, markets and sells them at reduced prices, and then provides the farmer with any leftover profit; the purpose of the Act is to maintain a stable raisin market.

The plaintiff farmer challenged this law claiming that the taking of his raisins required compensation; in other words, fair market value, not what, if any, monies remain after the government's taking and subsequent sale. The Court held that holding a contingent interest (something less than fair market value) in the confiscated raisins wasn't sufficient compensation. The Court also held that this program can't be justified as a "condition" or "tax" to engage in farming – what it called the "let the farmer sell wine instead of raisins" option.

Inclusionary Zoning

Inclusionary zoning is municipal land use regulation that requires a residential developer to sell or rent a specified percentage of residential units at below-market rents or prices. The City of San Jose, California adopted an inclusionary housing ordinance that required all new, for sale residential developments with more than 20 dwelling units to set aside 15 percent of the units as affordable housing. The California Business and Industry Association (CBIA) challenged the ordinance as invalid because the City "failed to provide a sufficient evidentiary basis 'to demonstrate a reasonable relationship between any adverse public impacts or needs for additional subsidized units in the City ostensibly caused by . . . the development . . . and the new affordable housing exactions and conditions imposed on residential developments by the Ordinance.'"

In *CBIA v. City of San Jose*, the California Supreme Court upheld the ordinance. The Supreme Court found that the conditions the ordinance imposed on future developments were not "exactions," so as to require a *Nollan / Dolan* nexus and rough proportionality analysis under the takings clause of the U.S. and California Constitutions. Nor was the

ordinance illegal because it conditioned permit approval on the property owner's payment of money and provided no alternative means of satisfying the condition (the San Jose ordinance did provide alternatives such as building off-site affordable housing and paying an in-lieu fee). The Court reasoned:

> [W]hen a municipality enacts a broad inclusionary housing ordinance to increase the amount of affordable housing in the community and to disperse new affordable housing in economically diverse projects throughout the community, the validity of the ordinance does not depend upon a showing that the restrictions are reasonably related to the impact of a particular development to which the ordinance applies. Rather, the restrictions must be reasonably related to the broad general welfare purposes for which the ordinance was enacted.

The decision is significant not only because it gives California municipalities greater leeway to adopt inclusionary zoning ordinances but also because, as the American Planning Association noted in an e-mail sent on June 25, 2015: "The California Supreme Court is now the highest court in the country to hold that inclusionary zoning is legal, not a takings issue, and falls under the ambit of government police power."

"Waters Of The United States"

Developers need a permit from the U.S. Army Corps of Engineers, called a "404" permit, if they will discharge pollutants into "waters of the United States," so this definition is a very important factor in real estate development. On May 27, 2015, the U.S. Environmental Protection Agency and the U.S. Army Corps of Engineers issued a final Rule, effective on August 28, 2015, expanding the scope of "waters of the United States."

Technically, "waters of the United States" are waters that can be navigated with a boat − specifically, under the old rule, the agencies had jurisdiction generally over traditional navigable waters, interstate waters, territorial seas, and impoundments. For years, however, the federal government, in the name of environmental protection, has tried to extend this definition. The new Rule encompasses: (1) tributaries of navigable waters, interstate waters, and territorial seas; (2) waters adjacent to navigable waters, interstate waters, territorial seas, tributaries, and impoundments; (3) regional types of wetlands if they have a significant nexus to navigable waters, interstate waters, or territorial seas; and (4) waters in the 100-year floodplain or within 4,000 feet of impoundments, navigable waters, interstate waters, territorial seas, and tributaries, if they have a "significant nexus" to navigable waters, interstate waters, or territorial seas. The following are excluded: artificial lakes, ponds, and pools created in dry land; water-filled depressions related to construction activity; stormwater control features created in dry land; and wastewater recycling structures constructed on dry land.

The new Rule is important because real estate development necessarily involves earth-moving. If material is discharged to a water of the United States, a federal permit is needed. As noted earlier, one federal judge has issued an injunction against the new rule, halting the fule in 13 midwest states. Twenty-eight states, the U.S. Chamber of Commerce, and the National Association of Home Builders are continuing their challenge to the Rule. Stay tuned.

Sign Regulation

In *Reed v. Gilbert* (June 2015), the U.S. Supreme Court held that governments, including municipalities, cannot impose sign regulations that differentiate between: (1) "ideological signs" communicating a message or idea not for commercial purposes; (2) "political signs" promoting a candidate or proposition; and (3) "temporary signs" providing direction to a non-profit's event. The Court held that having different height, size, times for display and location requirements for signs based upon types of signs violates the First Amendment right to free speech.

The Court noted that these regulatory restrictions "depend entirely on the communicative content of the sign." Since this format is "content based" the regulations are subject to strict scrutiny, whereby government must demonstrate a compelling state interest to justify the law. The municipality's claim that differentiating between these types of signs, especially requiring stricter limitations for temporary signs, is necessary to "preserve aesthetics" fell on deaf ears. The Court noted that "directional signs are 'no greater an eyesore' . . . . than ideological or political ones." Similarly, the Court

rejected the municipality's argument that the regulatory scheme is required for traffic safety stating "[i]f anything, a sharply worded ideological sign seems more likely to distract a driver than a sign directing the public to a nearby church meeting." The Court indicated that government can still ban all signage on public land. However, when regulating signs on private land, government must apply "content-neutral options."

Connecticut Affordable Housing Act: Proposed Amendments That Did Not Pass . . .Yet

In a typical legislative session, there are dozens of bills seeking to amend or repeal the State of Connecticut's Affordable Housing Land Use Appeals Act, known as § 8-30g. The 2015 session was no exception. However, one bill took a more constructive approach of trying to fine tune the incentives that are intended to encourage towns to approve the development of much-needed affordable housing. Senate Bill 407 focused on making it easier for towns to achieve a moratorium on § 8-30g applications and adding extra incentives for approving certain types of affordable homes, such as homes with three or more bedrooms. The bill was favorably reported out of the Housing Committee but died in the Senate without a vote. It will likely be revived in the 2016 legislative session.

Senate Bill 407 would have (1) established a minimum size requirement (i.e., four affordable units) to qualify for the affordable housing appeals procedure under § 8-30g; (2) reduced from 75 to 50 the minimum number of housing unit equivalent points a town needs for a moratorium from the affordable housing appeals procedure; (3) encouraged towns to approve certain three bedroom affordable units by awarding bonus points for such units to towns seeking a moratorium; and (4) standardized the definition of "median income" for the Incentive Housing Zones (IHZ) so that it matched the definition of the same term as it applies to § 8-30g by requiring income eligibility for affordable homes to be calculated based on the lower of statewide or area wide median income (effectively lowering the maximum income eligible for affordable housing in some areas of the state).

Towns that have made recent progress in approving affordable housing can apply to the Department of Housing for a statutorily-authorized moratorium that largely exempts the town from § 8-30g applications for four years. Under existing law, towns are eligible for such a moratorium if they can demonstrate that they have added affordable housing homes equal to the greater of (1) two percent of their housing stock or (2) the equivalent of 75 housing unit equivalent points. The existing law and regulations contain a housing equivalent point system that designates a point value to qualified affordable homes based on several characteristics such as rental, owner occupied, age-restricted, and income eligibility level. However, the current point system does not offer points or additional points based on the number of bedrooms in an affordable home or for affordable homes that are constructed in an Incentive Housing Zone rather than under § 8-30g.

The proposed bill would have made it easier for towns to achieve a moratorium and offered an accelerated path if they approved the specific types of affordable homes that the legislature desires the most. Under the bill, non age-restricted affordable homes with three or more bedrooms would have received an extra or bonus housing equivalence point of 0.25 and non age-restricted affordable homes in an IHZ also receive an additional 0.25 point. In addition, a town would receive an extra 0.50 point for every age-restricted unit when it applied for a moratorium if, in total, at least 60 percent of its affordable homes included in the application were family homes (i.e., not age-restricted). While it may seem counter intuitive that the best way to increase affordable housing stock in some towns is to make it easier for them to achieve a moratorium on affordable housing applications, such is the state of progress on meeting the need for affordable housing in many Connecticut towns.

We expect to see this bill return in 2016. The debate in 2016 will likely center on the appropriate balance between incentivizing the approval and construction of much needed affordable housing and the towns' desires for an easier path to a moratorium.

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