

STATE & LOCAL LAW NEWS

The Section serves as a collegial forum for its members, the profession and the public to provide leadership and educational resources in urban, state and local government law and policy.



As part of its Annual Meeting activities, the ABA planned a Public Service Project to give something back to the city where the meeting is held. Here Section members get ready to plant flowers and spruce up around Lafayette Park in New Orleans. For more photos of Section activities at the Annual Meeting, see page 4.

Get Active! Join a Section Committee

All Section members should have received, or will soon receive, a Committee Preference questionnaire. If you are now a committee member, or you would like to join a committee, you should complete this self-mailing form and return it to Jackie Baker at ABA headquarters.

All Section members are invited to make the best use of their Section membership by joining a committee! Call a committee chair today and volunteer.

For a complete list of Section committees, descriptions of activities planned for the 1994-95 Association year, and names and addresses of who to call to volunteer, see pages 12-15 of "Section News."

MARK YOUR CALENDAR

Legal and Public Policy Issues in Historic Preservation
Oct. 26-30, 1994, Boston Park Plaza, Boston, MA, in cooperation with the National Trust for Historic Preservation

NOLPE Seminar
Nov. 17, 1994, Hiatt Islandia, San Diego's Mission Bay

Spring Council Meeting
Apr. 27-30, 1994, Marriott Reach, Key West, FL

Beyond Nollan: The Constitutionality of Land Development Conditions After Dolan

By David L. Callies

In *Dolan v. City of Tigard*, ___U.S.___, 114 S. Ct. 2309 (1994), the U.S. Supreme Court struck down a municipal building permit condition that the landowner dedicate bike path and greenway/floodplain easements to the city. As the Court pointed out, had Tigard simply required such dedications, it would be required to pay compensation under the Fifth Amendment. Attaching them as building permit conditions required a more sophisticated analysis closely following *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), since the police power is implicated rather than the power of eminent domain. In the process, the Court signalled how far local government may go in passing on the cost of public facilities to landowners. The answer: only to the extent that the required dedication is related both in nature and



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extent to the impact of the proposed development.

The Dolans own and operate a 9,700 square foot plumbing and electrical supply store on main street in Tigard's central business district. Seeking to double the size of the store and pave a thirty-nine-space parking lot, the Dolans applied for a building permit from the City Planning Commission. Tigard had previously adopted a comprehensive land-use plan required by state comprehensive land-use management statutes, in accordance with statewide goals. (See, for discussion, Sullivan, *Oregon Blazes a Trail in STATE & REGIONAL COMPREHENSIVE PLANNING: IMPLEMENTING NEW METHODS FOR GROWTH MANAGEMENT* (Buchsbbaum & Smith, eds. 1993.)) Many of the plan's features are codified in Tigard's Community Development Code (CDC). Among the plan's requirements:

1. In accordance with a pedestrian/bicycle pathway plan, new development must dedicate land for pathways where shown on the plan.
2. In accordance with a master drainage plan, to combat the risks of flooding in 100-year floodplains, especially as exacerbated by increased impervious surface through development, developers along waterways such as Fanno Creek (which borders the Dolan parcel to the west) must guarantee the floodway and floodplain are free of structures and able to contain floodwaters by preserving the land alongside as greenway.

As a result of the plan and its codification in the CDC, the Commission granted the Dolans their permit upon condition that they dedicate the portion of their property in the floodplain as a greenway and that an additional 15-foot strip be dedicated adjacent to the greenway as a pedestrian bicycle path. The basis of these requirements is a series of Commission findings.

With respect to the bikeway, the Commission found that the pathway system as an alternative means of transportation "could" offset some of the traffic demand on nearby streets and lessen the increase in traffic congestion. The Commission also found it was reasonable to assume that some of the Dolans' customers and staff could use the pathway for transportation and recreation.

With respect to the floodplain greenway dedication, the Commission found it was reasonably related to the Dolans' application since the site would have a more impervious surface. This would result in increased stormwater drainage. Therefore the dedication requirement was related to the applicants' plans for more intensive development of their land.

After appealing to various local and state administrative agencies and to the Oregon courts without success, the Dolans challenged the holding of the Oregon Supreme Court that the City of Tigard could condition the approval of their building permit on the dedication of property for flood control and traffic improvement. The U.S. Supreme Court granted certiorari to set out

the "required degree of connection between the exactions imposed by the city and the projected impacts of the proposed development." 114 S. Ct. at 2312.

In a concise and well-organized opinion, the Court essentially adopted a three-part test:

1. Does the permit condition seek to promote a legitimate state interest?
2. Is there an essential nexus between the legitimate state interest and the permit condition?
3. Is there a required degree of connection between the exactions and the projected impact of the development?

The Court disposed of the first two quickly and affirmatively. Certainly the prevention of flooding along the creek and the reduction of traffic in the business district "... qualify as the type of legitimate public purposes we have upheld." *Id.* at 2318 (citing *Agins v. City of Tiburon*, 447 U.S. 255, 260-62 (1980)). Moreover, the court held it was "equally obvious" that a nexus exists between preventing flooding and limiting development within the creek's floodplain, and that "the same may be said for the city's attempt to reduce traffic congestion by providing for alternative means of transportation" like a "pedestrian/bicycle pathway." 114 S. Ct. at 2318. So far, so good: we have public purpose (which the Court assumed without deciding in *Nollan*) and essential nexus (which the Court decided was lacking in *Nollan*). The question remained, with respect to the third test: "Whether the degree of the exactions demanded by the city's permit conditions bear the required relationship to the projected impact of petitioner's proposed development." *Id.*

The Court said no: the city's "tentative findings" concerning increased stormwater flow from the more intensively developed property, together with its statement that such development was "anticipated to generate additional vehicular traffic thereby increasing congestion" on nearby streets, were simply not "constitutionally sufficient to justify the conditions imposed by the city on petitioner's building permit." *Id.* To find out why, the Court looked to state court decisions for guidance.

In formulating this third part of the test, the Court reviewed and rejected the two extremes in the range of state exactions law: the specifically and uniquely attributable test from Illinois (*Pioneer Trust & Savings Bank v. Village of Mt. Prospect*, 176 N.E.2d 799 (Ill. 1961), which requires a mathematical precision expressly rejected by the Court) and "very generalized statements as to the necessary connection between required dedication and the proposed development" (from such as *Jenad, Inc. v. Scarsdale*, 218 N.E.2d 673 (N.Y. 1966) which this author and others have characterized as a corruption of the reasonable relationship test). Instead, the Court adopted as an "intermediate
(continued on page 18)

1995 Spring Section Meeting

Marriott Reach Hotel, Key West, Florida April 26-30, 1995

Wednesday, April 26, 1995

Arrival

Thursday, April 27, 1995

7:30 a.m.-12:00 noon

Executive Committee Meeting

2:00 p.m.-5:00 p.m.

"How to Try a Land Use Case—Learn from the Masters"

The basis of the panel discussion will be a land-use amendment fact pattern which includes water, wetlands, school overcrowding, traffic, and affordable housing issues. Panel members will discuss how the case should be presented and what facts are important to include in the record if they were presenting the local government, the developer, and environmental group and the state agency.

2 p.m.-5 p.m.

Public Education Committee Round Table Discussion on the impact of federal mandates with respect to students with disabilities on providing public education.

6:00 p.m.-7:30 p.m.

Welcome Reception

Friday, April 28, 1995

7:30 a.m.-9:00 a.m.

Committee Chairs Breakfast Meeting

9:00 a.m.-12 noon

Land Use Program:

Hot Topics In Land Use . . .

Roundtable Discussion Including the Florida Perspective . .

Q & A Session

9:00 a.m.-12 Noon

General Municipal Law Program:

Privacy Rights of Public Employees and Section 1983 Litigation

Numerous workplace privacy issues will be discussed including: employee application forms and medical records to workplace searches, E-mail, and drug and alcohol testing concerns, and the regulation of off-duty employee conduct. In addition, recent developments in 42 U.S.C. § 1983 litigation will be discussed and reviewed with a special emphasis placed on liability trends impacting governmental entities, elected officials, and their employees and/or representatives.

6:00 p.m.-7:00 p.m.

Sunset Welcome Reception

10:00 p.m.-12 midnight

Evening at Margaritaville Cafe

No Host Blast at Jimmy Buffet's

Saturday, April 29, 1995

7:30 a.m.-9:00 a.m.

Media Board

9:00 a.m.-12:00 noon

Council Business Meeting

7:00 p.m.-8:00 p.m.

Council Dinner (Ticketed)

Sunday, April 30, 1995

7:30 a.m.-9:00 a.m.

Committee Meetings

9:00 a.m.-11:00 a.m.

Council Meeting

11:00 a.m.-12 noon

Professional Services Meeting

Learn from the Masters . . .

David Callies, Professor of Law, University of Hawaii

Thomas Cloud, Gray, Harris & Robinson

Susan Delegal, Holland & Knight

Harry Stewart, Akerman, Senterfitt & Edson

Thomas Pelham, Apgar, Pelham, Pfeiffer & Theriaque

Robert Freilich, Freilich, Leitner & Carlisle

Larry Smith, Graham & Dunn

Representatives from the Florida Bar's Local Government Section, the Florida Association of County Attorneys, the Florida Municipal Attorneys Association, and the Florida Institute of Government will also participate.

Get Involved . . .

Section meetings are open to every registrant, affording you a chance to hear and participate in the formation of ABA policy on state and local government law.

Socialize . . .

The days don't end with the meetings! Each evening will feature a social event for you and your guest to enjoy.

Accommodations . . .

We have negotiated a special rate of \$129 per night, single or double occupancy, for our meeting. The hotel is only a five minute walk from Old Town Key West with all its attractions, shops, restaurants, and clubs.

Key West is easy to get to, with over sixty-six daily. Nonstop flights are available from Miami, Ft. Lauderdale, Tampa, and Orlando.

There is complimentary shuttle service to and from the airport.

Recreation . . .

The hotel has added a second pool. The addition encompasses a water playground, with decks and patios for the true island feeling.

Enjoy a full service health club, play tennis, or take advantage of the hotel's watersports department, which will arrange snorkeling trips, deep-sea fishing, parasailing, and equipment rental including bicycles and mopeds. Golf can be arranged at the nearby Key West Golf resort.

Scenes from the New Orleans Annual Meeting



1994-95 Chair Jim Baird presents outgoing Chair Anita Miller with a memento commemorating her outstanding contributions as the founder of the Section's book program.

Steve Conlon, author of the Section's best-seller *Tax-Exempt Derivatives* accepts the appreciation of the Section from Chair Jim Baird.



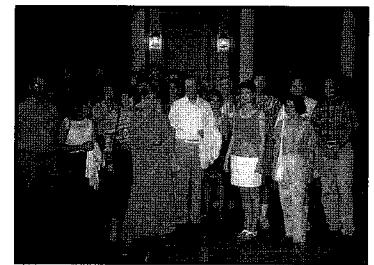
Joseph Z. Fleming of Miami, chair of the Section's Task Force on Emerging Issues, leads the discussion on "Coping with Chaos: Disaster Planning."



Section members pitch in to make the ABA's visit to New Orleans an all around worthwhile effort.



Board of Governors members David Cardwell of Orlando and Jack Brown of Tulsa report on the deliberations of the Association's governing body at the Section Council Meeting in New Orleans.



A walking tour of the Garden District included a stop at vampire author Ann Rice's home.

Law Student Liaison Notes

By Duane A. Martin

The Section of State and Local Government Law is one of the most dynamic sections of the ABA—and this is an exciting time to be a law student member. The relationship between the Law Student Division (LSD) and the Section seems to grow stronger each year. This is due in no small part to the commitment of the Section leadership, and to the accomplishments of Tracie Nelson, the Law Student Liaison for the past two years. My goal as the new Law Student Liaison is to build upon Tracie's efforts and attempt to facilitate a stronger relationship between the two entities.

One significant way to improve the relationship



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between the two organizations is to encourage more student involvement in the Section. Perhaps the Section's most notable opportunity for student involvement centers on the committees of the Section. Most of the substantive work of the Section is accomplished through the committees. The Section is composed of scholars and practitioners who are on the cutting edge of their fields including Land Use, Public Finance, Environmental, Public Transportation, Government Operations, Human Resources, Public Education, International Law, and Crisis Management. I will be contacting each student member of the Section to explain how to become involved in one of these committees.

As a law student, you should begin to recognize the value of interacting with attorneys who specialize in the areas of law that interest you. The Section offers you the opportunity to socialize and work with practitioners and scholars who are the best in their respective fields. Moreover, the Section offers you the opportunity to become actively involved in the work of the Section and ABA, and to have fun doing it.

For more information about ways to become involved as a law student member of the Section, please contact Duane Martin at 816/235-1661.

School District Based on Religious Boundaries Held Unconstitutional

By Fay Hartog-Rapp

On March 30, 1994, the U.S. Supreme Court issued its decision in *Board of Education of Kiryas Joel Village School District v. Grumet*, __ S. Ct. __, 1994 WL 279673. In this case, the Court was asked to determine the constitutionality of a New York special statute that created a separate school district that followed village lines. The Village of Kiryas Joel had been described as a religious enclave of Satmar Hasidim, practitioners of a strict form of Judaism. The Satmar created the settlement within the town of Monroe and ultimately formed a village within the Town of Monroe.

The village's boundaries were drawn to include the territory owned and inhabited entirely by the Satmars. The residents of Kiryas Joel are vigorously religious people, make few concessions to the modern world, and go to great lengths to avoid assimilation into it. They interpret the Torah strictly; segregate the sexes outside the home; speak Yiddish as their primary language; eschew television, radio, and any English language publication; and dress in distinctive ways that include headcoverings and special garments for boys, and modest dresses for girls. Their parochial education differs for boys and girls, and requires that boys and girls attend different schools.

Within the Village of Kiryas Joel, there are disabled children who are entitled under state and federal law to special education services. Originally, the Board of Education of Monroe-Woodbury Central School District provided such services for the children of Kiryas Joel at an annex to their religious school. However, after the Supreme Court issued its decisions in *Aguillar v. Felton*, 473 U.S. 402 (1985), and *School District of Grand Rapids v. Ball*, 473 U.S. 373 (1985), the Board of Education of Monroe-Woodbury Central School District was unable to continue the practice. The children of Kiryas Joel who needed special education, for mental retardation and other disabilities, were required to attend public schools outside their village which their families found unsatisfactory. Parents of the children believed that the children suffered panic, fear, and trauma

because they were required to leave their own community and be with people whose ways were so different.

In response to the problem, the New York State legislature created a special school district drawn along the village boundaries. The only students attending the public schools of Kiryas Joel were those in need of special education. Disabled students from Kiryas Joel and other neighboring districts were educated in the Kiryas Joel schools. The other village children stayed in their parochial schools relying on the new school district only for transportation, remedial education, and health and welfare services. If a nondisabled student in Kiryas Joel were to seek a public school education, the district would have to pay tuition to send the child into the Monroe-Woodbury schools or to another school district nearby.

Several months before the new school district was to begin operation, the New York State School Board Association brought an action against the State Department of Education challenging the statute as an unconstitutional establishment of religion. The lower court found that the statute failed all three prongs of the test in *Lemon v. Kurtzman* and was thus unconstitutional under both the national and state constitutions. The appellate court affirmed the decision concluding that because both the District's public school population and its school board would be exclusively Hasidic, the statute created a "symbolic union of church and state that was likely to be perceived by the Satmar Hasidim as an endorsement of their religious choices, or by non-adherence as a disapproval of their own." 1994 WL 279673, at 4. As a result, the Court concluded that the statute's primary effect was an impermissible advancement of religious belief.

The Supreme Court affirmed, relying less on the *Lemon v. Kurtzman* test than on other of its decisions. It stated, "A proper respect for both the Free Exercise and the Establishment Clauses compels the State to pursue a course of 'neutrality' towards religion, favoring neither one religion over others nor religious adherence collectively over non-adherence," citing *Committee for Public Education & Religious Liberty v. Nyquist*, 1994 WL 279673, at 5. The Court, in its majority opinion, relied heavily on *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116 (1982), in which the Court struck down a Massachusetts statute granting religious bodies, such as churches, veto power over appli-



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cations for liquor licenses. In *Larkin*, the Court found that in spite of the state's valid interest in protecting churches, schools, and like institutions from the "hurley burley associated with liquor outlets," the Act brought about a "fusion of governmental and religious functions by delegating important discretionary and governmental powers to religious bodies thus impermissible entangling of government and religion." 459 U.S. 126, 127.

In *Kiryas Joel*, the Court found that the Establishment Clause prevents delegating governmental power to any religious group and that the problem presented by the New York statute resembled the issue raised in *Larkin*. To the extent that *Larkin* teaches that a state may not delegate its civic authority to a group chosen according to religious criterion, authority over public schools cannot be delegated to a local school district defined by the state in order to grant political control to a religious group. 1994 WL 279673, at 6. While acknowledging that religious people or groups of religious people cannot be denied the opportunity to exercise the right of citizens simply because of their religious affiliations or commitments and that individuals who happen to be religious may hold public office, does not mean that a state may deliberately delegate discretionary power to an individual, institution, or community on the grounds of religious identity.

The Court noted that of the special school districts previously created by the New York State legislature, all such school districts had been designed to be run by private organizations serving institutionalized children. The Kiryas Joel District ran uniquely counter to state practice of consolidation of districts, following the lines of a religious community where the customary neutral principles would not have dictated the same results. Thus, the Court felt there was good reason to treat this district as the reflection of a religious criterion for identifying the recipients of civil authority. 1994 WL 279673, at 6.

The Court further stated that the New York law was not rendered unconstitutional by the fact that it facilitated the practice of religion. However, Justice Souter, in his majority opinion, clarified that accommodation of religious practices is not a principle without limits, and what the Village of Kiryas Joel sought was an adjustment to the Satmars' religiously grounded preferences that could not be accepted. While prior decisions have allowed religious communities and institutions to pursue their own interests free of governmental interference, an otherwise unconstitutional delegation of political power to a religious group cannot be saved as a religious accommodation (at 9).

Ultimately, the statute failed the test of neutrality by delegating a power that ranks at the very apex of the function of a state to an electorate defined by common religious belief and practice in a manner that

fails to foreclose religious favoritism (at 11). The Court noted (in footnote 6) that the conclusion does not imply that any political subdivision that is coterminous with the boundaries of a religiously homogeneous community, suffers the same constitutional infirmity. The Kiryas Joel school district was distinguishable from one whose boundaries are derived according to neutral, historical, and geographic criteria, but whose population happens to comprise co-religionists.

In a concurring opinion, Justice O'Connor suggested that the Religion Clauses prohibit the government from favoring religion, but they provide no warrant for discriminating against religion. She urged that the Court's decisions in *Aguilar v. Felton* and *Grand Rapids v. Ball* be reconsidered in order to bring Establishment Clause jurisprudence back to what she suggested was proper—government impartiality toward religion (at 16). Justice Kennedy also suggested, in a concurring opinion, that the decisions in *Grand Rapids* and *Aguilar* "may have been erroneous."

The Dissent

Justice Scalia, joined by Chief Justice Rehnquist and Justice Thomas, dissented vigorously. The dissent found it ridiculous that the Satmar Hasidim could have become "an establishment of the Empire State." Justice Scalia made reference to the history of our country in which many political subdivisions had been established by a religious minority and cited the examples of the states of Utah and New Mexico. In a vituperative dissent, he stated:

Justice Souter's position boils down to the quite novel proposition that any group of citizens (say, the residents of Kiryas Joel), can be invested with political power, but not if they all belong to the same religion. Of course, such disfavoring of religion is positively antagonistic to the purpose of the Religion Clauses and we have rejected it before. [at 25].

Clearly, Scalia's dissent will be revisited in future cases involving public education. Justices O'Connor and Kennedy's suggestion that the Supreme Court's decisions in *Aguilar v. Felton* and *Grand Rapids v. Ball* had been erroneous portends revisiting those decisions as well. Finally, the Court's failure to rely more heavily on the *Lemon v. Kurtzman* "three-prong test" suggests an unspoken although clear suggestion that the Court is moving away from the traditional analysis of unconstitutionality when it comes to religion cases. While making reference to *Lemon v. Kurtzman*, the statute held unconstitutional was not analyzed on the traditional basis.

Conclusion

The conclusion of the Court was that the government had delegated a fundamental governmental

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SUPREME COURT WATCH

By Beate Bloch

In the last few weeks of the October 1993 Term, the Court decided too many cases of importance to state and local governments to report in one column. This issue will deal with cases involving federal-state relations; the next, with First Amendment, taking, and taxation.

Commerce Clause

In *C & A Carbone, Inc. v. Town of Clarkstown, New York*, 114 S. Ct. 1677 (decided May 16), the Court dealt another blow to state and local waste control efforts. The town had contracted for the construction of a solid waste transfer station to separate recyclable items from other waste, to be turned over to the town for a nominal payment after five years. The private contractor was permitted to charge a tipping fee higher than charged by the private market. A town ordinance required that all nonrecyclable nonhazardous solid waste in the town, even if it were sorted elsewhere, be brought to the transfer station. The Supreme Court, 6-3, invoked the "dormant" Commerce Clause to hold the ordinance invalid.

Justice Kennedy, writing for the Court, noted that the flow control ordinance regulates interstate commerce. It discriminates against interstate commerce because only the favored operator may process waste. Justice O'Connor, concurring, thought the ordinance was invalid "because it imposes an excessive burden on interstate commerce."

Justice Souter, joined by the Chief Justice and Justice Blackmun in dissent, noted that the law did not directly benefit any "class of local private actors," but "directly aids" in the fulfillment of "a traditional governmental responsibility."

In *West Lynn Creamery, Inc. v. Healy*, 114 S. Ct. 2205 (decided June 17), the Court, 7-2, struck down a Massachusetts assessment imposed on fluid



milk sold by dealers to Massachusetts retailers. About two-thirds of that milk is produced out of state. The proceeds from the assessment—one-third of the difference between 15 percent per hundredweight and the actual price—are distributed to Massachusetts dairy farmers.

Justice Stevens, writing for the Court, explained that the purpose and effect of the law "are to enable higher cost Massachusetts dairy farmers to compete with lower cost farmers in other states. The 'premium payments' are effectively a tax which makes milk produced out of state more expensive." Because the effect of the assessment on Massachusetts producers is offset by the subsidy they receive, "the tax is thus effectively imposed only on out-of-state products." Domestic milk producers receive not only "the tax paid on the sale of Massachusetts milk, but also the tax paid on the sale of the milk produced elsewhere." He compared the case to *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984), where the court struck down a Hawaiian liquor tax because it exempted certain locally produced liquors. Justice Scalia was joined by Justice Thomas in a concurring opinion.

Chief Justice Rehnquist, joined by Justice Blackmun, dissented, because subsidies to local industries are generally upheld, and the tax is even-handed on its face.

In *Associated Industries of Missouri v. Lohman*, 114 S. Ct. 1815 (decided May 23), the Court, without dissent, invalidated in part a use tax of 1.5 percent imposed by Missouri on articles produced outside the state, in addition to sales taxes and corresponding use taxes totaling 4.225 percent. The state's political subdivisions are authorized to impose local sales taxes; more than 1,000 local jurisdictions have sales taxes ranging from .5 percent to 3.5 percent.

Justice Thomas, writing for the Court, held that the tax, while not invalid in its entirety, discriminates against interstate commerce wherever it exceeds the local sales tax. Although more than 93 percent of the affected sales were made in jurisdictions where the local tax exceeded 2.5 percent, averaging could not be used to overcome that discriminatory effect.

On the plus side, the Court held that a state can delegate taxing power to localities so long as no discrimination results. The case was remanded for consideration of the appropriate remedy.

There was one favorable decision, *Barclays Bank v. Franchise Tax Bd. of California*, 114 S. Ct. 2268 (decided June 20). The Court upheld a California income tax (which has since been modified) on multinational corporations, based on "worldwide combined reporting." The proportions of payroll, property, and sales located in California were averaged to determine income allocable to California and subject to the tax.



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Justice Ginsburg wrote the Court's opinion, noting that *Container Corp. of America v. Franchise Tax Bd.*, 463 U.S. 159 (1983), had decided this question for domestic taxpayers, and holding that the tax could be applied to foreign corporations as well. The bank had not substantiated its argument that the reporting requirements were unduly difficult for foreign corporations.

The argument that the tax impaired the ability of the government to speak with "one voice" in foreign affairs had been rejected in *Wardair Canada, Inc. v. Florida Dep't of Revenue*, 477 U.S. 1 (1986). It is Congress, and not the executive, that has the power to regulate foreign commerce, and Congress has not prohibited state-mandated worldwide combined reporting. Justices Blackmun and Scalia wrote concurring opinions.

Justice O'Connor, joined by Justice Thomas, concurred with respect to domestic corporations but not as to foreign corporations.

Preemption

In two cases, the Court upheld state law claims against asserted preemption under federal labor law, citing *Lingle v. Norge Division of Magic Chef, Inc.*, 486 U.S. 399 (1988), which held that a state law claim for retaliatory discharge was not barred by federal law even though the collective bargaining agreement provided an arbitration remedy for unjustified discharge.

Livadas v. Bradshaw, 114 S. Ct. 2068 (decided June 13), was filed under a California law that requires an employer to pay all wages due an employee immediately upon discharge. The employee demanded her wages, but the employer sent a check which she received three days later. She filed a claim with the California Division of Labor Standards Enforcement, seeking three days' wages, as provided by the law. The commissioner adopted a non-enforcement policy because the law precluded her from "interpretation or application of any collective bargaining agreement containing an arbitration clause," and that the agreement established the rate of wages to be paid. There was no dispute about the amount owed, and no grievance procedure had been initiated. Livadas filed suit under 42 U.S.C. § 1983, alleging that the non-enforcement policy was preempted as conflicting with her rights under the National Labor Relations Act (NLRA). The Supreme Court held that her claim was viable.

Justice Souter's opinion for the unanimous Court explained: "A state rule predicting benefits on refraining from conduct protected by federal law poses special dangers of interference with congressional purpose." Section 301 of the NLRA "cannot be read broadly to preempt nonnegotiable rights conferred on individual employees as a matter of state law." Here, there was no dispute concerning the meaning of contract terms, but a question only of state law.

In *Hawaiian Airlines, Inc. v. Norris*, 114 S. Ct.

2239 (decided June 20), Norris, a mechanic, was suspended for refusing to certify that satisfactory repair work had been performed on a plane and that it was fit to fly, and called the Federal Aviation Authority to report the problem. He then invoked the grievance procedure of the collective bargaining agreement and, at a hearing, was terminated for insubordination. The Supreme Court held that Norris' suit against the airline under the Hawaii Whistleblowers Protection Act was not preempted by the NLRA. Justice Blackmun wrote the opinion for a unanimous Court.

The state also emerges victorious against a preemption claim in *PUD No. 1 v. Washington Dep't of Ecology*, 114 S. Ct. 1900 (decided May 31), involving the proposed Elkhorn Hydroelectric Project on the Dosewallips River, which would divert water from part of the river, run it through turbines, and then return it to the river below the bypass. The project required a license from the Federal Energy Regulatory Commission (FERC). In addition, because the project may result in discharges into the river, state certification was required under section 401 of the Clean Water Act, 33 U.S.C. § 1341. The Washington Supreme Court upheld the state's right to condition certification on a minimum stream flow requirement, and the Supreme Court affirmed, 7-2, in an opinion by Justice O'Connor. Justice Stevens wrote a concurring opinion. Justice Thomas, joined by Justice Scalia, dissented.

Voting Rights

States successfully resisted two suits brought under section 2 of the Voting Rights Act of 1965. In *Holder v. Hall*, 114 S. Ct. 2581 (decided June 30), a sharply divided Court held that a governing body's size is not subject to a vote dilution challenge under section 2. Bleckley County, Georgia, has a single-commissioner form of government, as have twenty other Georgia counties. About 20 percent of the voting population is black. In 1985, the state legislature authorized Bleckley County to adopt a multi-member commission of five, elected from single-member districts, and a chair, elected at large, but the plan was turned down in referendum.

Justice Kennedy, for the Court, explained that there was "no objective and workable standard for choosing a reasonable benchmark by which to evaluate a challenged voting practice." The fact that most Georgia counties have five-member commissions was not dispositive concerning the proper size of the governing body. The "fact that a change in voting practice must be precleared under § 5" does not "necessarily mean(s) that the voting practice is subject to challenge in a dilution suit under § 2." Justice O'Connor wrote a concurring opinion. Justice Thomas, joined by Justice Scalia, concurred separately on the ground that voting dilution cannot be challenged under section 2, which covers only restrictions that limit citizens' access to the ballot.

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Past Section Chair Jefferson Fordham Memorialized

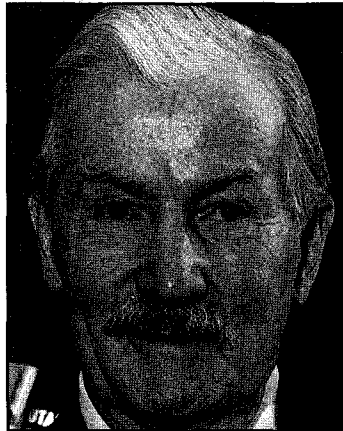
By Jerome J. Shestack

Jefferson B. Fordham died in June of this year at the age of ninety-two. He was, in Rufus Choate's felicitous words, a man "who magnified the profession."

This brief tribute cannot do full justice to the manifold contributions Jeff Fordham made to our profession and to our nation. His memorial is writ large in our profession's achievements for human worth and dignity, in the annals of legal education, and in the local and state government institutions of our nation. Even more, his true memorial is best preserved in the minds and hearts of the many men and women, colleagues and students, whom he challenged and counseled and inspired to strive for the pinnacles of our profession.

He was born in North Carolina, educated at Yale, taught at LSU, and was Dean of the law schools at Ohio State and then the University of Pennsylvania. He was an inspired teacher, but even more, a remarkable doer. When he entered the field of municipal law, it was a jumble of arcane codes, of law without vision, and parochial practitioners. Jeff was a pioneer in teaching that the tough problems of local government did not lend themselves to simplistic solutions. What was needed was the fusion of effort of many disciplines and a larger vision of the community. When he became Chair of the ABA Section of Municipal Law between 1949 and 1951, he was the first to organize inter-disciplinary studies under bar sponsorship. His Section projects included lawyers, engineers, planners, and administrators. His studies served as models for future cooperative undertakings between disciplines. For seventeen years, he edited this Section's monthly newsletter and guided lawyers in new modes of thought. Because of his concepts, the Section was renamed the Section of Local Government as prelude to its present name. He loved this Section.

In his time, casebooks in this field were called Casebooks on Municipal Corporations. In 1949, his



casebook on *Local Government Law* revolutionized the teaching of this field. Here for the first time, he addressed planning and finance, housing and blight, transportation and congestion, in short, the whole range of urban problems whose solutions required a larger concept of community. He pioneered the concepts of home rule, and the landmark decisions sustaining home rule owe a large debt to his analysis and writing.

Other times involved other struggles. Look back to the summer of 1963. In Alabama, civil rights workers were met by bullwhips and cattle prods. In Mississippi, Negro churches were being bombed. Throughout the South, the strains of "We shall overcome" pierced the stillness of the summer nights as the civil rights movement began to organize and awake the nations's sleeping conscience.

It was not easy to get a new section started in this area at that time. The point that Dean Fordham kept making over and over was a simple one. The highest values in our society, he said, are associated with the integrity and the fulfillment of the individual human personality. "We must not let great problems of our times concerned with the first order of human values pass us by."

His message came through and the Section of Individual Rights was finally created in 1966. He became its first Chair and in an unprecedented move was re-elected Chair for a second year. He led that Section to bring to the fore the pressing issues of his time—civil rights, rights to legal services, campus unrest, human rights treaties, and rights of minorities and women. These are now mainstream activities in our profession. But not then. Jefferson Fordham was pioneer, concept builder, a man ahead of his times, but with an unswerving faith in the capacity of our bar and in our profession to advance society.

Judge Clark of the Second Circuit called Jeff Fordham "a mixture of Southern charm and Northern granite." He was that. Chief Justice Earl Warren said he was courageous and forward looking and one of the bar's "most effective forces for justice." He was that. For me, he was a mentor, model, friend, and ally. In Jefferson Fordham there was a lovely blending of love of profession, devotion to individual human beings, and responsibility to the community.

May his memory be always green.

Jerome J. Shestack is a member of the ABA Board of Governors and a candidate for President-Elect of the Association. He practices law with Wolf, Block, Schorr, and Solis-Cohen, Philadelphia, PA. These remarks were delivered to the Section Council at its August 7 meeting in New Orleans.

CHAIR'S MESSAGE

Our Section Is "On a Roll"

By James Baird

As we begin a new year, our Section continues to move forward on many different fronts. It's an exciting time for me, because this Section is definitely "on a roll."

New Committees:

Municipal Liability and Crisis Management

We have created two new committees to help serve Section members in the year ahead.

The Municipal Liability Committee, chaired by Terry Welsh of Dallas, Texas, will coordinate Section reports, activities, and CLE projects in the exceedingly important and ever-growing area of municipal liability.

Joe Fleming, Miami, Florida, will chair our new "Crisis Management" Committee. This committee is an outgrowth of Joe's work on our earlier task force and will coordinate Section reports and activities in the critical area of state and local government response to crises of all kinds, such as hurricanes, tornadoes, floods, or events such as the Branch Davidian standoff.

Anyone interested in joining one of these two new committees, please contact the appropriate committee chair or one of our Section's excellent staff, Jackie Baker or Sharon Tindall, and they will see that you are immediately placed on the appropriate committee mailing list.

Anita Miller: New Section Officers Chair

Our Section is rolling within the ABA, the most recent example being Anita Miller's election (in the first contested election ever) to the position of Chair of the Section Officers' Conference. For the uninitiated, the Section Officers' Conference is a conference of all of the ABA's sections working together to coordinate their activities and maximize their impact within the ABA. We are very proud of Anita, and proud to be the Section providing this important ABA leadership function to the bar.



James Baird is Chair of the Section and practices law with Seyfarth, Shaw, Fairweather & Geraldson in Chicago, IL.

Key West Section Meeting: April 26 through 30, 1995

A section on a roll has to have a great place to meet and we have ours—in Key West, Florida. All Section members are invited to attend this meeting on April 26 through April 30, 1995. We will have CLE programs Thursday afternoon, April 27, and Friday morning, April 28. Then it's on to Jimmy Buffett's Margaritaville for a late Friday evening "seminar," with various committee and Council meetings scheduled for Saturday and Sunday morning. This is a great opportunity to make new friends and professional contacts, and to reestablish old ties with experts in the field. We have obtained very favorable room rates, so you have no excuse. Feel free to bring your spouse, friend, or family, but be sure to make your reservations early, because plane transportation may be a problem if you wait until the last moment (it's the back end of spring vacation).

Crisis Video in the Works

A section on a roll certainly has to have its own video program. No, ours isn't MTV, but it is an excellent video for use by state and local government attorneys, elected officials, and others on the critical sub-

STATE & LOCAL LAW NEWS

State & Local Law News (ISSN: 0195-7686) is published quarterly, as a service to its members, by the Section of State and Local Government Law of the American Bar Association, 750 North Lake Shore Drive, Chicago, IL 60611-4497.

State & Local Law News provides information concerning current developments in the law of interest to state and local government lawyers, news about the activities of the Section, and other information of professional interest to Section members.

Any member of the ABA may join the Section by paying its annual dues of \$35. Subscriptions to *State & Local Law News* are available to nonlawyers for \$39.95 a year (\$44.95 for foreign subscribers).

The views expressed herein are not necessarily those of the American Bar Association or its Section of State and Local Government Law.

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ject of coping with unexpected community crises. The video is approximately forty-five minutes long and is now in the editing stage. It contains numerous helpful tips, both legal and practical, for state and local governments in responding to crisis situations and should be an exceedingly important contribution from our Section to the bar and the entire country.

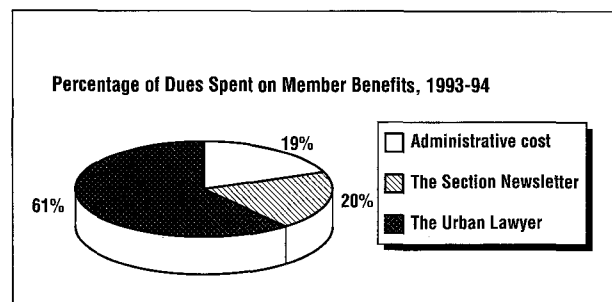
New Section Books Available

As befitting a section on a roll, we have recently published exciting new books of assistance to our Section's members. These include our highly acclaimed *Tax-Exempt Derivatives* and an update to one of our previous bestsellers, *The ABCs of Arbitrage*. In addition, our new book on *Privacy Rights of Public Employees* should be available soon. Larry Ethridge, Louisville, Kentucky, our Section's outstanding Communications Director, who is ably assisted by Publications Director Tom Roberts of Wake Forest University, reports that an additional four books are now in the drafting and/or production stages. If you have an idea for a book which you would like to have the Section consider, please don't hesitate to contact Larry directly.

Your Section on a Roll: More Bang for the Buck

All of us are concerned when we pay money for any activity or item that we receive full value for our investment. This obviously applies to our Section dues. I am happy to report that over 81 percent of all Section dues money this past year was returned to Section members in the form of direct Section membership services. These member services include this newsletter and *The Urban Lawyer*, plus the Section's CLE programs and publications. However, if our Section expects to stay on a roll, we will have to do an even better job to expand our membership services and help our Section grow. For this next year, we intend to further expand our services to Section members in the areas of CLE, new publications, our Section video, CEELI activities, liaison activities to other sections, and through the Section's Spring Meeting in Key West, Florida.

If you have any ideas or suggestions as to how the Section can better serve you, please do not hesitate to contact me directly. If I don't hear from you beforehand, I certainly will expect to see you in Key West, when our Section rolls on to Margaritaville.



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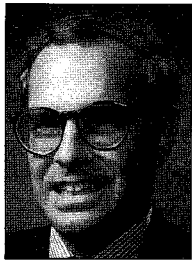
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SECTION NEWS

Section Committees Gear Up for an Exciting Year

It has been said that its committees are the lifeblood of the Section. We hope *all* Section members have joined one of the following committees and will become actively involved in your committee's numerous activities. If you haven't yet, call a committee chair today and volunteer.



Crisis Management

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The Crisis Management Committee emerges so-to-speak from the Emerging Crisis Task Force begun in 1994. The Task Force was responsible for "Coping with Chaos: Disaster Planning" at the ABA Annual Meeting, which was taped and supplemented with written materials to enable planning for coping with disasters. Among the disasters discussed at the program were natural (such as Hurricane Andrew and flooding), human (such as the bombing of the World Trade Center), and other problems that must be dealt with under emergency situations.

While the success of the Task Force resulted in formation of the Crisis Management Committee, the Committee plans to focus on more than emerging crises. It will consider as its scope of work under the heading of Crisis Management not only "emerging crises" but the evaluation of continuing and long-standing problems that face state, local, and urban governments. These include, but are not necessarily limited to, the following types of issues:

1. *Environmental and Land-Use Issues*—These include coping with emerging and long-standing traffic problems and resolving natural resources issues, such as those that confront many areas of the country

with either too much or too little water.

2. *Urban Problems and Issues*—These include emerging crime problems and the underlying causes that may be responsible for escalating crime throughout our country.

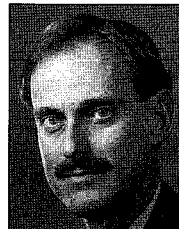
3. *Civil Rights Issues*—Including those which relate to environmental justice.

4. *The Mixed Effects of Efforts to Improve Communities*—These include, for example, blockades established in many communities throughout the nation to provide for public safety, police protection, and environmental quality, which simultaneously create physical barriers that have long-term implications for the areas and people excluded because of such barriers.

5. *Promoting Interest Groups Activities That Create Conflicts with Other Interest Groups*—These include special schools and facilities and also monuments that become desirable symbols for some groups, but that focus the attention of other groups and become symbols for protests.

The Committee is planning activities that will include programs at future meetings and publications. In the next year we plan to catalog cases that have resolved issues in these areas and make this information available. It is hoped that when governmental issues arise, the Committee will have provided sources of information to evaluate, which include not only compromises that may be possible but analogies as well.

The Committee is open to any interested Section member and ideas for projects, or areas of consideration, would be greatly appreciated. If there are other areas that should be explored, similar to those listed above or entirely different areas, we would welcome your comments, your suggestions, and also your membership on the Committee.



Government Liability

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The Government Liability Committee focuses on the various bases upon which state and local governmental liability is predicated, including liability premised upon 42 U.S.C. § 1983, Title VII, tort, and "special duty" relationships between individuals and governmental entities. Since this is an emerging area of the law, the Committee's goal is to provide updates on new cases and educational outreach for Section members and local government law practitioners. Subcommittees are in the process of being formed and your involvement will be invaluable in assisting local government lawyers address the myriad of issues they confront on a daily basis.

At present, the Government Liability Committee

has two seminars planned. The first will be a one-day seminar in Dallas on March 10, 1995, and is entitled "The Challenges Facing Local Governments—Putting the Pieces Together." The cost for this seminar will be approximately \$100 and CLE credit will be given to those attending. The second seminar, scheduled for April 28, will be held in conjunction with the Section's 1995 Spring Meeting in Key West and will address local governments and § 1983 liability. The Committee will provide an analysis of recent government liability cases and new theories of recovery against local governments.



Government Operations

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Detroit, MI 48226
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The Government Operations Committee is charged with addressing a variety of issues including local government organization and management, ordinances and administrative regulations, and public election law. The Committee has established subcommittees to focus on these areas. Other areas for which subcommittees have been suggested include federal mandates and ethics. Subcommittees are requested to prepare a report addressing aspects of their subject area for inclusion in *The Urban Lawyer*. Past reports have addressed public election law, ordinances, and housing.

The Government Operations Committee is planning a program for the ABA's 1995 Annual Meeting in Chicago, Illinois. The Committee intends to focus on drafting defensible ordinances and public policies relating to sign ordinances and/or public forum access in light of recent First Amendment challenges to government action in this area. We are looking for case studies from Section member's personal experiences and sample ordinances or policies.

The Government Operations Committee held a business meeting in New Orleans to discuss 1995 organization and program issues and will be meeting at intervals throughout the new year.



Human Resources

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FAX 312/474-7898

New Orleans was hot, but great, and while we were there the Human Resources Committee planned a number of exciting activities for 1994-95.

In 1995, we will be presenting a CLE program at the Section's Key West Spring Meeting at the end of April. The major human resources presentation at the meeting will cover privacy rights of public sector employees, including cutting-edge issues regarding computer confidentiality.

For next summer's ABA Annual Meeting we have lined up David Fram, chief ADA policy attorney at the Equal Employment Opportunity Commission. We plan to have a symposium with Mr. Fram and local government law attorneys addressing the particular disability compliance problems faced by the public sector. We think our members will find Mr. Fram both knowledgeable and frank about the government's thinking on ADA compliance. We plan to have a lengthy question and answer session, so save those tough questions.

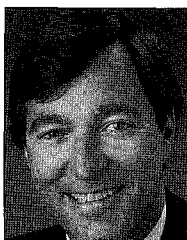


International Law

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FAX 044-71-404-0087

Following the success of the Committee's program on the utilization of land-use controls to achieve environmental objectives and the impact of environmental standards on free trade at the ABA Annual Meeting in New Orleans, the International Law Committee is now actively preparing a program on "Economic Instruments as a Vehicle for Environmental Policy" for discussion at the 1995 Annual Meeting in Chicago. The topic was discussed and cleared by the ABA's Standing Committee on Environmental Law meeting in New Orleans.

Anyone who would like to make a contribution to the program, either in written form, or by presenting a paper in Chicago, or by joining a discussion panel is invited to contact Committee Chair John Salter or Sharon Tindall at 312/988-5649. Contributions dealing with actual experience in the use of economic or fiscal instruments would be extremely valuable and much welcomed.



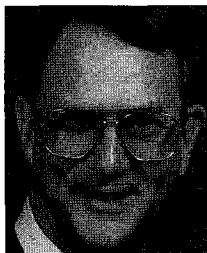
Land Use, Planning and Zoning

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206/624-8300
FAX 206/340-9599

The Land Use Committee will make a conscious attempt this year to solidify its external connections in several ways. First, the Committee has a new Vice-

Chair for Membership, Mary Massaron Ross. Unlike most membership positions, Mary will not focus solely on seeking new members, but rather will help the Committee to better serve existing members. We will reach out to our "alumni" and to members whose activity has been sporadic and encourage them to remain in communication with the Committee and take advantage of the knowledge and networking that the Committee offers. Second, the Committee's outreach will include solidifying our relationship with "sister" committees in the ABA and with similar committees in other organizations such as the APA and NIMLO. Third, we will resume our prior success in co-sponsoring our spring programs with local bar associations. At the Key West program in April, for example, we will put on two programs designed not only to serve our Committee members, but to be useful to local Florida Bar members as well. One program will feature national and Florida litigators sharing their thoughts on "How to Try a Land Use Case." The second program will feature the chairs of our subcommittees presenting "Focus on Land Use," our annual in-depth look into eleven specific areas of land-use law. The first program will feature practical tips and demonstrations, while the second will include the roundtable discussions that are the Land Use Committee's trademark. Finally, we will continue our tradition of guided historic "land use" walks in the city where our meetings are held. The New Orleans walk was a true highlight and we look forward to new insights about the development history of Key West.

The summer meeting will return to Chicago in 1995 and we have several programs on the drawing board. Our feature program will continue our "outreach" theme, in that we will seek to involve several other committees from State and Local Government to make the program a comprehensive Section-wide effort. The wide range of issues including technical innovations and the types of transit options in use today, financing issues, planning and social issues, as well as governance and legal questions. The Committee will have its annual "Know the City" program, this time featuring special insights about Chicago. Finally, we are considering a program focusing on "Environmental Equity" issues.



Public Education

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FAX 515/243-2149

The Public Education Committee has been reorganized to provide programs and publications that will be useful to members of the Section and their

clients. Jane Little Horton of Bracewell and Patter-son, Houston, Texas, will serve as Vice-Chair/Programs for the 1994-95 year. James Hanks of Klass, Hanks, Stoos, Carter, & Villone, Sioux City, Iowa, past chair of the NSBA National Council of School Attorneys will serve as Vice-Chair/Planning. Lelia B. Helms, professor at the University of Iowa, will serve as Vice-Chair/Reports and Publications.

The Committee will co-sponsor a seminar with the National Organization on Legal Problems of Education (NOLPE) on November 17, 1994, from 1:00 to 4:00 p.m., at the Hyatt Islandia Hotel, San Diego, California, in conjunction with the NOLPE Annual Meeting. The topic will be "Planning and Doing Building and Procurement Projects—An Overview of Legal Issues: Competitive Bidding, Contracting ADA Compliance, Taxation of Bonds, and Security Law Issues." Presenters at this seminar will include Committee Chair Edgar H. Bittle, Janet Horton, and Michael Reppe and Dennis Holsapple of the Kutak Rock firm.

The Committee is also planning a seminar to be co-sponsored with NOLPE in November 1995 in Kansas City. The topic for that seminar will be "Legal Procedures Governing Local Government Administrative and Grievance Hearings: Employee Hearings, Student Hearings, and Other Administrative Hearings."

All Section members are invited to participate in the activities of the Committee. Those with involvement in elementary/secondary or higher education law are invited to contact the chair or co-chairs. Members of the Committee are invited to submit synopses of cases of interest to be included in the Committee's annual report, or to participate in the work of the subcommittees. The Committee will meet at the time of the Section's Spring Meeting, April 26-30, at the Marriott Reach Hotel, Key West, Florida.



Public Finance

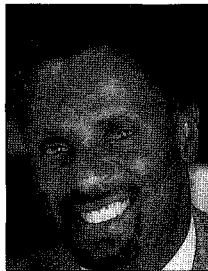
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The activities of the Public Finance Committee are focused on financing activities of state and local governments. Committee members in private practice represent public issuers, underwriters, credit providers, trustees, and other participants in the public debt market while other members are employed by government agencies. Issues relating to regulation of the tax-exempt debt market and securities by the Securities and Exchange Commission and the Inter-

nal Revenue Service, the financing needs of state and local government, and professional education in the area receive attention by separate subcommittees.

Last year the Committee conducted a program at the Midyear Meeting with the staff of the SEC discussing the SEC's project to further regulate disclosure by state and local governments in the securities markets. Following the SEC's subsequent issuance of releases concerning disclosure obligations, the Committee prepared a Comment Letter to the SEC for the Section. During the year, the Second Edition of *Disclosure Roles of Counsel* was published, a project in which the Section was both a participant and the publisher. The Section also published the very successful book, *Tax-Exempt Derivatives*, which was written by Committee members.

This year the Committee will continue to be involved with issues relating to disclosure by public issuers and the related duties of lawyers. Work is under way to present a program either to the Section or another group about required disclosure at the time of the original offering as well as throughout the term of the securities. The Committee is also considering writing a book on disclosure practices to be published by the Section.



Public Transportation

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College of Law
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FAX 503/370-6375

The Public Transportation Committee will be involved in several important national public transportation issues during the year. I propose that the Committee devote its attention to the following areas, which are not necessarily listed in order of importance: (1) the level of federal assistance for local public transportation; (2) the implementation of ISTEA, particularly with respect to Joint Planning Regulations and Flexible Funding; (3) revision of Minority Business Enterprise regulations as applied to public transit grants; (4) compliance with the Americans with Disabilities Act; (5) the status of the development of a national transportation system by the Department of Transportation and its relationship to the national highway system called for under ISTEA; and (6) implementation of section 13(c) of the Federal Transit Act, particularly the labor protection provisions.

These are only suggested topics. You will be receiving a questionnaire requesting that you specify certain areas of interest. If you are interested in serving as a vice chair or as a chair of a subcommittee, please write Sharon Tindall at the Section office.



Task Force on Emerging Issues

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Manchester, NH 03104-2641
603/666-7546
FAX 603/623-4050

The Task Force on Emerging Issues is charged with identifying and developing new issues that can be expected to confront the practicing attorney with important demands for expertise and action. The Task Force serves as an incubator for such issues by facilitating and documenting their emergence and import, and by encouraging the dissemination of knowledge about them. As Task Force chair, I welcome participation by Section members as we begin to think about implications for practice in the new millennium. If this gets you thinking about cyberspace, good—we need to be able to harness the new technology to benefit the range of attorneys and clients involved in public sector law.

Supreme Court Watch

(continued from page 8)

Justice Blackmun was joined in dissent by Justices Stevens, Souter, and Ginsburg. Justice Stevens, joined by the other three dissenters, wrote a separate opinion in reply to Justice Thomas.

In *Johnson v. De Grandy*, 114 S. Ct. 2647 (decided June 30), the Court upheld Florida's redistricting plan. This district court had upheld the Senate plan, but struck down the House plan, ruling that the state could create more Hispanic districts without a regressive effect on blacks. The Supreme Court affirmed as to the Senate plan, but reversed as to the House

Justice Souter wrote the Court's opinion, holding the plan did not on its face violate section 2 because, "in spite of continuing discrimination and racial bloc voting, minority voters form effective voting majorities in a number of districts roughly proportional to the minority voters' respective shares in the voting age population." Although proportionality is not a "safe harbor," the district court failed to "address the statutory standards or unequal political and electoral opportunity," but instead mistakenly equated dilution under section 2 with failure to "maximize the number of reasonably compact majority-minority districts." Justices O'Connor and Kennedy wrote concurring opinions.

Justice Thomas, joined by Justice Scalia, thought that an apportionment plan is not a "standard, practice, or procedure" subject to challenge under section 2.

Endnotes

1. See discussion of *Oregon Waste Systems, Inc. v. Department of Environmental Quality of State of Oregon*, 62 U.S.L.W. 4209 (decided Apr. 4, 1994), in *Supreme Court Watch*, 17 St. & Loc. L. News No. 4, at 7 (Summer 1994).

WASHINGTON'S LABYRINTHINE WAYS



By *Otto J. Hetzel*

A Most Acrimonious Close for the 103rd Congress. Bodies of unenacted legislation lay strewn around on Capitol Hill in various stages of the enactment process. They were the victims of filibusters and delaying tactics by Republicans who saw an opportunity to trash Clinton's reform agenda and help themselves by directing voter ire at incumbents, more of whom are Democrats. Perhaps it was the real potential of a Republican takeover of the next Senate that emboldened their actions, or just the opportunity to attack the President. Whatever the rationale, Senator Dole and his colleagues in the Senate provided a textbook demonstration of the effectiveness of filibusters in the closing days of Congress to limit that body's output. Almost indifferent to voters' reactions to its use, the Senate GOP mounted twenty-six filibusters in this Congress, roughly one quarter of them in the last weeks.

Coming at the end of the session, their tactics were particularly effective, not only preventing the bill under discussion from proceeding, but with a limited number of days before adjournment for the upcoming elections, the filibusters prevented many other items from even being brought up for final consideration. The result was that many worthwhile bills, which earlier had substantial bipartisan support, were never enacted.

Dole's tactics, labelled a "scorched earth policy" by one Democratic senator and termed "unprecedented obstructionist actions" by Majority Leader Mitchell, combined five major filibusters along with procedurally authorized thirty-hour debate periods, not normally utilized, to hold up most action. The additional time for debate is permitted following cloture before a vote or before bills approved by both Houses could even be sent to conference committees to resolve differences.

Thus, few bills got acted upon during the closing

weeks before adjournment on October 8. The only major area of agreement for most members was to scold the President for his unilateral action of going into Haiti. Even the General Agreement on Tariffs and Trade (GATT), initiated and supported by Republicans, was delayed for consideration until a "lame duck" session after the November elections. The President, of course, took several swings at the obstructionist actions. Whether their tactics were successful will have to await November's elections.

With the anticipated change in membership of both Houses of Congress that is expected to accord more power to Republicans, versions of legislation that will be renewed in the next session are unlikely to achieve the same policy goals that would have been acceptable to current members of both Houses. In the House, visions of a speakership dangled before Republican leader Newt Gingrich. While it is a long-shot, there is a tangible possibility that the Republicans could achieve enough gains in conjunction with retirements from the House to take over effective control of that body. The temptation, therefore, to delay matters until then was too much for Republicans in both Houses.

Not many pending measures survived. At the close of the session, unrelated subjects were tacked on bills treated as the last train leaving the station in order to provide a vehicle for passage. For instance, funding for operations of the Securities and Exchange Commission was endangered because many nongermane amendments on other matters were incorporated in it when it became the last appropriation bill under consideration, meaning that it would ultimately be enacted before Congress adjourned.

Democrats also bear some responsibility for what occurred. Too many bills were stacked up awaiting consideration once health-care legislation died late in the session. The weakness of the President became apparent when a procedural vote on the crime bill was lost and only last-minute scrambling rescued what otherwise seemed a sure thing. The circumstances invited Republican delaying tactics that allowed only a few senators to hold up a bill's consideration.

States and local governments had significant interest in a few measures salvaged in the remaining time, as well as in many of those which were abandoned. Among those enacted, the crime bill, preservation of California desert land, and a new approach to educational funding had the most importance. The latter only made it when a 75-24 cloture vote cut off debate on one of the Republican filibusters.

Congress was unable to act on a number of measures affecting itself that may come back to "bite"



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those who prevented enactment. These included eliminating congressional exemptions from many worker protection measures, reform of lobbying and gift restrictions, new procedures for streamlining congressional action, and campaign finance reform. Among those prominent measures lost that had potential impact on state and local governments were: housing and community development reauthorization; revisions in the Superfund hazardous waste cleanup; new Clean Water Act standards for municipalities; relief from unfunded federal mandates; and, authorization of the telecommunications highway.

Mixed Reactions to the Crime Bill Ultimately Enacted. The Crime Bill became law but only after a hard battle and procedural setbacks demonstrating great concern by many in Congress about its specific provisions. Disproportionate impact on minorities influenced many black legislators to oppose initiating fifty-eight new crimes for which the death penalty could be imposed. Even greater resistance came from those opposing assault weapon restrictions covered in the bill. The NRA lost another battle to a determined Administration that made enactment of the bill its primary objective.

The bill was seen as essential for the Administration's survival, so many members who might have objected to specific provisions in it rallied around the President, whose remaining prestige was on the line after the procedural rule vote went down to defeat. It was also important to many representatives running for re-election and wanting to demonstrate a tough posture addressing the top issue on the minds of their constituents. Only after some \$4 billion in "preventative programs" were dropped from the measure could a majority be found to support it. At the end, support from moderate Republicans became critical and the reduction was their price for support.

As enacted, the bill creates a \$30.2 billion trust fund (funded from the anticipated savings of severing 252,000 federal workers from the payroll) that would provide: (1) \$13.4 billion for grants, from which \$8.8 billion will go to localities to hire police officers to perform community policing, with the remainder for more border patrol officers to limit illegal alien immigration that sorely burdens border states, and for other federal agents; (2) \$9.9 billion for grants to states for prisons and boot camps to encourage tougher sentencing that will increase prison populations; (3) \$5.5 billion in grants for recreation such as "midnight basketball" to distract potential offenders, for education and anti-gang programs, along with shelters for women subjected to violence; and, (4) \$1.4 billion for anti-drug efforts including special courts to provide treatment and close monitoring of first-time, nonviolent drug offenders.

The Act is to fund 100,000 new police officers for local jurisdictions, assist states in building new prisons, and launch a variety of crime prevention programs. The "three strikes and you're out" provision imposing life imprisonment on repeat violent offenders was the most popular provision for many legislators. Other significant provisions relate to allowing notification of residents when violent sexual offenders are released into a community, and requiring a life-time, quarterly-updated registration by the offenders. Sex-based violence was also made a civil rights violation and grants are provided to encourage domestic violence arrests without consent of abuse victims. Federal penalties are now created for interstate stalking or spouse abuse. Of the amounts to be provided, \$170 million is for technical improvements including DNA testing research. Has O.J.'s defense team checked this out?

Education Act Refocus Survives Logjam. Funding for elementary and secondary education was only shaken loose from a Republican filibuster by Senator Helms, arguing over school prayer, by a cloture vote. The compromise on this issue in the conference report was upheld. It would bar funds to districts that violated federal court orders upholding student rights to unsupervised prayer in school.

The Act authorizes \$7.4 billion in formula grants to local school districts to educate low-income students. Aid to poorer districts will increase starting in 1996. Compensating for costs of educating children living on federal enclaves, another \$866 million will go to school districts responsible for educating children of federal workers on such sites. Leadership grants under the Eisenhower Professional Development Program will get another \$800 million.

Special grants are also authorized for: combating violence and drugs in schools (\$630 million); improving teaching of disadvantaged and handicapped children (\$370 million); for migrant workers (\$310 million); for technology instruction and equipment (\$215 million); for immigrant children (\$215 million); construction of facilities in poor districts (\$200 million); improvement of teaching and curriculum in tax-poor urban and rural districts (\$150 million); for magnet schools (\$120 million); for the "Even Start" Family Literacy Program (\$118 million); to encourage experimental teaching techniques (\$59 million); for equipment for private school pupils (\$41 million); and, for education of dropouts and delinquents (\$40 million). Of course, the next question is what funds will actually be made available for these programs by the next Congress since the appropriation bill enacted earlier was several billion dollars short of these totals. The fight was over re-directing more aid to districts with poorer students starting in 1996, which finally prevailed, but barely.

Beyond *Nollan*

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position” a “reasonable relationship” test, which the majority of the states addressing this issue appear to have adopted. See, e.g., *Jordan v. Menomonee Falls*, 137 N.W.2d 442 (Wis. 1965); *Call v. West Jordan*, 606 P.2d 217 (Utah 1979); and *College Station v. Turtle Rock Corp.*, 680 S.W.2d 802 (Tex. 1984). However, the Court terms it instead a “rough proportionality” test to avoid (according to the Court) confusion with “rational basis” (which describes the minimum level of scrutiny under the Fourteenth Amendment’s Equal Protection Clause): “[T]he city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development.” 114 S. Ct. at 2319-20.

What does this mean? First, the Court cites and quotes as its principal source a case which equates reasonable relationship with nexus. (*Simpson v. North Platte*, 292 N.W.2d 297, 301 (Neb. 1980).) Second, many of the state courts use “rational nexus” as the usual term applied to the “middle ground” test adopted by the *Dolan* court. The tests—rational nexus and reasonable relationship—are therefore arguably the same for this third part, and represent an affirmation of what most state courts have been doing with exactions law for the past twenty years (see especially *Contractors & Builders Association v. City of Dunedin*, 329 So. 2d 314 (Fla. 1976), and commentary in NICHOLAS, NELSON AND JUERGENSMEYER, A PRACTITIONER’S GUIDE TO DEVELOPMENT IMPACT FEES (1991), and CALLIES, PRESERVING PARADISE: WHY REGULATION WON’T WORK (1994), at ch. 4).

In sum, the Court has adopted what most recent cases and commentary had hitherto called the “rational nexus” test, after first describing it as the (more general) “reasonable relationship” test, and finally settling on a brand-new term, “rough proportionality”—which it never uses for the rest of the opinion.

Applying the test to the *Dolan* hardware store property, the Court concludes that the City of Tigard demanded too much to pass this third nexus/rough proportionality test. Simply concluding that a bikeway easement could offset some of the traffic demand which the new hardware store would generate did not constitute sufficiently quantified findings for the taking of an easement. While the Court

[has] no doubt that the city was correct in finding that the larger retail sales facility proposed by petitioner will increase traffic on the streets . . . the city has not met its burden of demonstrating that the additional number of vehicle and bicycle trips generated by petitioner’s development reasonably relate to the city’s requirement for a dedication of the pedestrian/bicycle

pathway easement. The city simply found that the creation of the pathway “could offset some of the traffic demand . . . and lessen the increase in traffic congestion . . .” The city must make some effort to quantify its findings . . . beyond the conclusory statement [quoted above].

114 S. Ct. at 2322.

As to the greenway easement, while the Court said,

It is axiomatic that increasing the amount of impervious surface will increase the quantity and rate of stormwater flow from petitioner’s property . . . the city demanded more—it not only wanted petitioner not to build in the floodplain, but it also wanted petitioner’s property along Fanno Creek for its greenway system. The city has never said why a *public* greenway, as opposed to a *private* one, was required in the interests of flood control.

Id. at 2320 (emphasis added).

The constitutional problem in both instances is “the loss of [their] ability to exclude” which the Court reminds us is one of the most essential sticks in the bundle of rights that are characterized as property. Indeed, Chief Justice Rehnquist has previously and frequently written about the fundamental nature of property rights: “[We] hold that the ‘right to exclude’ so universally held to be a fundamental element of the property right, falls within the category of interests that the Government cannot take without compensation.” *Kaiser Aetna v. United States*, 444 U.S. 164, 179-80 (1979). The Court generally has said much the same thing in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). This is a critical point, to which the Court returns several times. Property rights matter mightily to this Court:

We see no reason why the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First Amendment [free speech, press, religion, association, assembly] or the Fourth Amendment [search and seizure] should be relegated to the status of a poor relation in these comparable circumstances.

114 S. Ct. at 2320.

This “right to exclude” language may persuade some that the decision should be restricted in its application to land dedication exactions. There is much in the opinion which would bear such an interpretation. Most of the state cases cited by the court are land dedication cases (as was the *Nollan* case), and except in rare instances, the Court consistently refers to the proposed “dedication” (not condition or exaction) throughout the opinion. Based on the philosophy behind the Court’s other recent land-use decisions—particularly after *Nollan*—a broader interpretation makes more sense.

This is particularly true following the Supreme

Court's vacating and remanding the impact fees case of *Ehrlich v. City of Culver City*, 19 Cal. Rptr. 2d 468 (Cal. Ct. App. 1993), *vacated*, 114 S. Ct. 2731 (1994), to the court of appeals in California only days after its decision in *Dolan*. Culver City had imposed a \$280,000 fee to "mitigate" the loss of "community" facilities as a condition of Ehrlich's tearing down his private—and unprofitable—tennis and recreation club and building something of a residential nature. Also a condition of the same city zoning and map amendment approval: an "in lieu" art fee of \$33,220. No property dedication case, this. Both fees were levied only after the city found that providing recreational facilities and art work were public benefits and the fees were appropriate methods to obtain those benefits. Observing that monetary exactions compelled as a condition of approval required only a rational relationship to a governmental purpose, as compared to the heightened scrutiny required where the condition on approval constitutes a physical taking, the California Court of Appeals upheld both fees, citing not only *Nollan* but also the California cases of *Blue Jeans Equities West v. City and County of San Francisco*, 4 Cal. Rptr. 2d 114 (Cal. Ct. App. 1992), *cert. denied*, 113 S. Ct. 191 (1992), and *Commercial Builders of Northern California v. City of Sacramento*, 941 F.2d 872 (9th Cir. 1991), *cert. denied*, 112 S. Ct. 1997 (1992). It remains to be seen whether either the difference in tests applied or the fees themselves survive the *Dolan* rough proportionality test.

Procedurally, the Court also changed the way the burden of proof is allocated in land-use litigation. Typically, it is the landowner which carries the substantial burden of proving that the challenged regulation represents an arbitrary regulation of property rights (for which proposition the Court cites no less an authority than *Euclid v. Ambler Realty Co.*, 304 U.S. 365 (1926)). Noting that Tigard made an "adjudicative decision" to condition the Dolans' application for a building permit, the Court held that "[i]n this situation, the burden properly rests on the city," citing the *Nollan* case. 114 S. Ct. at 2320.

Dolan is quickly making its mark in state courts. In *Homebuilders Association of Central Arizona v. City of Scottsdale*, 875 P.2d 1310 (Ariz. Ct. App. 1993), an Arizona court of appeals decision upholding a water resources development fee on new developments was remanded for reconsideration in light of *Dolan* on July 6 after review had been previously granted. In *Trimen Development Company v. King County*, 877 P.2d 187 (Wash. 1994), the Supreme Court of Washington upheld a park development fee only after finding that "the fees imposed in lieu of dedication were reasonably necessary as a direct result of Trimen's proposed development," specifically citing *Dolan* and its rough proportionality requirement between dedication and impact of proposed development. *See also Third & Catalina Associates v. City of Phoenix*, No. 1 CA-CV 93-

0337 (Ariz. Ct. App. Aug. 18, 1994), upholding a sprinkler retrofit ordinance on the questionable ground that "[h]ere we do not have a situation of private property being pressed into public service as in *Dolan v. City of Tigard*." *Id.*, slip op. at 5.

In a recent Florida inverse condemnation case, *State Department of Transportation v. Heckman*, No. 93-0978 (Fla. Ct. App. Sept. 14, 1994), the City of Oakland Park waived a platting requirement needed for a building permit in return for a seven foot right-of-way and subsequently gave it to the state Department of Transportation for highway-widening. The court cited *Dolan*'s "rough proportionality" test and "assum[ed] [the city] was not entitled to require the dedication;" however the court held that the inverse condemnation claim against the state transportation department (rather than the city) could not be supported by a principle of agency by estoppel. *Id.*, slip op. at 3.

For local government, the message is clear: exactions—particularly those of the land dedication variety—must clearly and unequivocally solve problems generated by the landowner upon whom they are levied, and in proportion to the impact the proposed development is likely to have. For example, the need for parks (indeed public spaces generally) and schools are generated by residential developments, not commercial and industrial developments. Golf courses don't generate a need for so-called affordable housing. For that matter, neither does a market-rate housing development. On the other hand, state and local government has a responsibility to provide needed public facilities, and the development community can be constitutionally required to bear its proportionate share of the costs of those facilities, the need for which its development generates. After all, the Court said in closing:

Cities have long engaged in the commendable task of land use planning, made necessary by increasing urbanization particularly in the metropolitan areas. . . . The city's goals of reducing flooding hazards and traffic congestion, and providing for public greenways are laudable, but there are outer limits to how this may be done.

114 S. Ct. at 2322.

Religious School District

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responsibility for the provision of public education to a single religious group, and as such, violated the Establishment Clause. While the conclusions of the Court were not unforeseeable, the rationale and the reaction may well signal a different future for free exercise and establishment cases.