

# ABA Government Law News

## State and Local

### A 60-Second Update on What's Happening

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**States Rush to Limit Eminent Domain:** The National Conference of State Legislatures lists the status of new state bills and laws limiting eminent domain in the wake of *Kelo*. For the current list see <http://www.ncsl.org/programs/natres/emindomainleg06.htm>

**Too Much Parking Space:** Does it seem that your city or the cities with whom you deal in seeking development approval require too much parking? If so, see the U.S. E.P.A. February 7 study finding that cities often require too much parking, resulting in sprawl as well as excessive impervious surface, damaging to water quality. [Parking Spaces, Community Places: Finding Balance through Smart Growth Solutions \(PDF, 300KB\)](#)  
<http://www.epa.gov/smartgrowth/pdf/EPAParkingSpaces06.pdf>  
Thanks to Planetizen for this story. <http://www.planetizen.com/node/newsitem>

**More Serious Sex and the City?:** Zoning restrictions on sexually oriented businesses rationalized on alleged secondary effects now are facing greater scrutiny. Applying the 2002 decision in *City of Los Angeles v. Alameda Books*, 535 U.S. 425, a federal trial court in [Daytona Grand, Inc. v. City of Daytona Beach](#), 2006 WL 158636, finds that the City did not meet its burden of proving a causal connection between plaintiff's entertainment venue and neighborhood crime and offered no substantial evidence to rebut plaintiff's expert evidence to the contrary.  
<http://www.courthousenews.com/lollipop.pdf>

**Property Rights Initiative Intact in Oregon; Compensation for Diminishing Property Value:** After failing previously in Oregon and a few other states, property rights activists have finally succeeded. Oregon's highest court upheld "Measure 37," a citizen initiative that allows a limited class of property owners to demand waiver of land use regulations enacted during ownership that reduce property value. The government can opt to pay compensation. (Thanks!) The court held, among other things, that requiring government to pay to enforce its land use regulations does not limit the legislature's plenary power. There is a rational basis to require payment for lost property value, thus there is no substantive due process violation. Limiting the claims to those who acquire their property prior to enactment of the offending regulations does not violate equal protection. The measure allows for implementing laws, thus plaintiffs (in this facial challenge) can not show that granting a waiver to the detriment of plaintiffs' own interests denies them due process in the form of a pre-deprivation remedy.  
<http://www.publications.ojd.state.or.us/S52875.htm>

Government lawyers in Oregon must now turn to assorted practical and process issues. Is land division a land use regulation? Does the measure's exception for federal law include zoning restrictions that implement NPDES permits? Is a waiver assignable to other owners (developers)? Is a use allowed under a waiver a non-conforming use, thus limiting the prospects for development financing? The measure allows claimants to file a trial court action and seek

attorney fees if the claim is not paid or the regulation waived within 180 days: Does failure to comply with an implementing ordinance (which has been the rule to date, not the exception) make for a defense of failure to exhaust administrative remedies? More to follow.

**Jefferson Fordham Award:** The Section seeks nominations for the Jefferson Fordham awards. Four awards are available to lawyers or law departments: (1) Law Office Accomplishment, (2) Lifetime Achievement, (3) Advocacy, and (4) Up & Comers. Please refer to our home page and scroll to bottom for details. <http://www.abanet.org/statelocal/home.html>

**State Free Speech Protection v. HOAs:** More persons living in places governed by homeowners' associations means more complaints over allegedly unduly restrictive covenants. No state action (except when *Shelley v. Kramer* applies as to race) means no federal constitutional protection, but state constitutions are another matter. In *Committee for a Better Twin Rivers v. Twin River Homeowners' Association*, a New Jersey court finds free speech protection against HOA actions that are "quasi-municipal" government actions. An article by prevailing counsel, the opinion, complaint and briefs are available: <http://www.aclu-nj.org/legal/legaldocket/committeeforabettertwinriv.htm>

**Is Eminent Domain a RLUIPA "Land Use Regulation"?** Two federal trial courts say no. RLUIPA defines "land use regulation" as "a zoning or landmarking law." Eminent domain, say the courts, is neither. As the court said in *Faith Temple Church v. Town of Brighton*, 405 F.Supp.2d 250 (W.D.N.Y.2005), where the town's decision to condemn land shown on its comprehensive plan as park space frustrated the church's purchase of the same land, the "statute says what it says." <http://www.nywd.uscourts.gov/decision/image.php?id=870> To the same effect, see *St. John's United Church of Christ v. City of Chicago*, 401 F.Supp.2d 887 (N.D.Ill.2005). Both courts reject dicta in *Cottonwood Christian Center v. Cypress Redevelopment Agency*, 218 F.Supp.2d 1203 (C.D.Cal.2002) suggesting the contrary.

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