LAND USE LAWS IN NEVADA

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1. **Introduction**.

The purpose of this seminar is to provide an overview of the principal land use and environmental regulations affecting the development of real property in Nevada. With Nevada's rapid growth, limited natural resources, growing environmental and quality of life concerns and the lack of financial resources at the state and local levels, land use law in Nevada is rapidly changing and increasing in importance.

This paper will address the administrative process of obtaining approvals for the development of residential and commercial projects and permits, judicial review of the decisions made by local planning and governmental entities, as well as some specific environmental regulations that affect the feasibility of development of certain real property in Nevada. Any lawyer involved in the purchase or sale of real estate in Nevada should have some familiarity with land use law and the administrative process associated therewith in order to properly structure transactions for the acquisition of real property intended for development.

2. **Historical Background**.

In the history of American jurisprudence, land use regulation is a relatively new and judicial intervention into that process is an even more recent phenomenon. While the United States Supreme Court indicated as early as 1887 that "all property in this country is held under the implied obligation that the owner's use of it shall not be injurious to the community," (see, Mugler v. Kansas, 123 U.S. 623 (1887)), until about seventy years ago, both local governments and the judiciary expressed strong reluctance to interfere with the use and development of privately-owned property. The first zoning regulations were enacted in New York City in 1916. Zoning and land use regulations, in general, were upheld by the United States Supreme Court in two landmark cases. Euclid v. Amber Realty Co., 272 U.S. 365 (1926) and Nectow v. City of Cambridge, 277 U.S. 183 (1928). Authority for zoning regulations were found in the states' "police power" which is deemed necessary for the protection of the public health, morals, safety and welfare. The police power is still the recognized basis of governmental regulation of land use.

Virtually every state, county, city and community now has some sort of land use regulation. With the passage of time and the growing concerns about resource availability, air

pollution, traffic congestion and other growth and development related concerns, governmental regulation of land use has become more extensive and complex. This trend will inevitably lead to greater restraints on and even the denial of an individual's right to develop his property which will no doubt result in an increased resort to the courts for ultimate relief.

Litigation involving governmental restraints on the development of private property has significantly increased over the last two decades and that trend is expected to continue. For a significant period of time after the United States Supreme Court upheld land use regulations, there was very little judicial involvement in the process. The administration and interpretation of local land use regulations were left to the local elected and appointed administrative agencies and municipalities. The local authorities are given broad discretion to administer the land use regulations. The courts were very reluctant to intervene in that process. However, the relatively unfettered discretion of the elected representatives has been significantly limited over the last two decades by both the state and federal courts. This pattern is demonstrated in Nevada by the cases of City of Reno v. Travelers Hotel, 100 Nev. 436, 683 P. 2d 960 (1984) and Nova Horizon v. City of Reno, 105 Nev. 92, 769 P. 2d 721 (1989). Similarly, the United States Supreme Court cases of First English Evangelical Lutheran Church v. County of Los Angeles, 472 U.S. 304, 107 S. Ct. 2378 (1987); and Nollan v. California Coastal Commission, 483 U.S. 825, 107 S. Ct. 3141 (1987), represent a significant change in judicial attitude toward restraints on land use imposed by local agencies. These cases impose important limitations on the exercise of the police power in land use cases and clearly put the risk of mistakes in the planning process on the governmental entity. Currently, under both state and federal law, a mistake in the planning process may subject the local governmental authority to monetary damages.

The planning process often develops into a dispute between an individual's private property rights and the perceived best interests of the local community. However, there is significant mutuality of interest between the local community and the developer which, if recognized, can greatly facilitate the planning and development process. The relationship between the developer and the local permitting authority is well stated by Deems and Jenette in their excellent treatise entitled A Practical Guide to Winning Land Use Approvals and Permits.

"The relationship between the developer and the local permitting authorities sometimes reflects the adage that opposites attract, primarily because of these participants mutual, but disparate, concerns with the proposed development. Local governments usually hold out the

welcome mat for new development because of the increased tax base. Still, regardless of the experience of a developer or obvious desirability of a project, governmental officials generally believe that as representatives of the community, they are best qualified to rule upon the development proposal. Moreover, local governments are increasingly seeking extractions from the developer as a means of funding most (if not all) of the added community services which will be needed for the new development. This technique allows the political officials to avoid the unpopular task of seeking to impose a heavier tax burden upon the community as the result of a new project."

"In contrast to the governmental representative, the developer is usually confident that the project has been skillfully planned and sees little need for the many suggestions offered or requirements created by the permitting officials. Further, the wide array of governmental entities, which must be satisfied, seems a continual nuisance and bureaucratic morass. Finally, many developers believe that the local government is unfairly attempting to add costs to the project to avoid expenses which should be borne by government. After all, the argument goes, the developer is also a taxpayer, the development project will add to the tax base of the community and the many fees and assessments are an unfair extraction." Id at 1-5, Sec. 1.01[2].

Given the fiscal restraints on local governments and the continuing pressures from growth, the above quotation is particularly applicable in Nevada. It is one of the principal functions of the land use lawyer to insure these competing interests work together for their mutual benefit. It is important to resolve such disputes during the administrative process. Few, if any, developers wish to obtain their ultimate approvals through judicial relief, which is both time-consuming and costly. Thus, it is an essential function of the land use lawyer to insure that his client and the local authorities communicate and work together in the approval process.

A. THE POWER TO ZONE: WHO HAS IT, WHAT DOES IT COVER, WHERE DOES IT STOP?

In Nevada, the power to make zoning decisions is basically granted in County Commissions, City Councils, Planning Commissions, Boards of Zoning Adjustment and special Hearing Examiners. The relevant statutory references providing the express authority for these entities are found in the Nevada Revised Statutes (NRS) Chapter 278. The general power of Planning Commissions is found in NRS 278.030 to 278.265. The general power of Boards of

Zoning Adjustment is found in NRS 278.270 to 278.310. And the general power of Special Hearing Examiners is found in RNS 278.262 to 278.265 and 278.315.

1. <u>The Board of Zoning Appeals – Powers, Process, Standards, Findings of Fact!</u>

<u>Statutory Regulations:</u>

a. **NRS 278.270** provides that the governing body of any county or of any city which enacts zoning regulations under the authority of NRS 278.010 to 278.630, inclusive, may provide by ordinance for a board of zoning adjustment.

b. **NRS 278.300** provides that a board of zoning adjustment shall have the following general powers:

(1) The power toe hear and decide appeals;

(2) The power to decide a request for a zoning variance.

(3) The power to interpret zoning maps; and

(4) The power to decide a request for a special use permit or special exception.

c. **NRS 278.280** provides that the board may be comprised of the following:

(1) Members of the governing body; or

(2) Not more than seven appointed members.

This statute also provides that one member of the board may be a member of the planning commission.

d. **NRS 278.310** provides who may appeal a decision to the board:

(1) Appeal to the board of zoning adjustment may be made by:

(a) Any person aggrieved by his inability to obtain a building permit or by the decision of any administrative officer or agency or enforcement of the provisions of any zoning regulation of any regulation relating to the location or soundness of structures.

(b) Any officer, department, board or bureau of the city or county affected by the grant or refusal of a building permit or by other decision of an administrative officer or agency based on or made in the course of the administration or enforcement of the provisions of any zoning regulations.

(2) The time within which an appeal must be made and the form of other procedure relating thereto, shall be as specific in the general rules provided by the

governing body to govern the procedure of the board of zoning adjustment and in the supplemental rules of procedure adopted by the board of zoning adjustment.

e. **NRS 278.315** gives the board of zoning adjustment the authority to hear and decide a request for a variance, special use permit, conditional use permit or other special exception.

f. **NRS 278.317** provides that the governing body may reserve to itself the power to review the board's decision regarding a variance, special use permit or other special exception.

Standard of Review

The standard of review of findings of fact required of a board in making a decision is the same standard that applies to most zoning decisions. The standard is "substantial evidence," and the Nevada Supreme Court has defined substantial evidence as "that which a reasonable mind might accept as adequate to support a conclusion." Enterprise Citizens Action Committee v. Clark County Bd. Of Commissions, 112 Nev. 649, 918 P. 2d 305 (1996); City of Las Vegas v. Laughlin, 111 Nev. 557, 893 P. 2d 383 (1995).

In addition, if the board is empowered to decide zoning variances, NRS 278.300(c) provides a general definition of a variance which many jurisdictions use. This definition suggests that some type of hardship must exist in order to approve a zoning variance. In Enterprise Citizens Action Committee, supra, the Nevada Supreme Court addressed this issue but did not adopt a definition for a hardship. The Court simply reviewed definition of hardships from other jurisdictions and determined that a hardship did not exist to warrant approval of the subject variance. This suggests that the Nevada Supreme Court will analyze these matters in the future on a case by case basis and leave the interpretation of a variance up to the local governing body.

2. Ubiquitous Manufactured Housing and Its Implications for Your Town.

The relevant statute providing a local governing body's authority to review issues related to manufactured housing is contained in NRS 461.260, which provides:

461.260 Enforcement, inspection and approval by local authority; zoning and other restrictive powers of local authority reserved.

(1) Local enforcement agencies shall enforce and inspect the installation of factory-built housing and manufactured buildings.

(2) Local use zone requirements, local fire zones, building setback, side and rear yard requirements, site development and property line requirements, as well as the review and regulation of architectural and aesthetic requirements are hereby specifically and entirely reserved to local jurisdictions notwithstanding any other requirement of this chapter.

(3) Nothing in this chapter prohibits any appropriate local government authority from examining and approving all plans, applications or building sites.

(4) A local government authority may inspect Nevada manufacturers of factory-built housing or manufactured buildings to insure compliance with all provisions of NRS 461.170. Before conducting an initial inspection of any such manufacturer, a local government authority shall give 10 day's written notice to the administrator of the division. The local government authority need not give notice to the administrator before conducting subsequent inspections of the manufacturer.

This regulation gives the local governing body broad discretion in reviewing applications for manufactured housing. This discretion has mainly come in the form of an aesthetic review. The relevant Nevada Supreme Court case dealing with an aesthetic review or architectural review is Board of County Commissioners of the County of Clark v. CMC of Nevada, Inc., 99 Nev. 739, 670 P. 2d 102 (1983).

3. Recent Case Histories (excerpts from opinions):

a. County of Clark v. Doumani, 114 Nev. 46, 952 P. 2d 13 (1998). The master plan establishes a standard which is entitled to deference and carries a presumption of applicability. We, therefore, conclude that the limitation period does not begin to run when a final decision is rendered. Rather, the limitation period begins to run only when notice of the final decision is filed.

b. Carson City v. Lepire, 112 Nev. 363, 914 P. 2d 631 (1996). The Court has held that public opposition to a proposal is sufficient ground for denial. The United States Constitution simply does not forbid democratic government to succumb to individual and public pressure in reaching land use decisions that work to the detriment of an individual litigant.

c. Enterprise Citizens Action Committee v. Clark County, 112 Nev. 649, 918 P. 2d 305 (1996). While we are not compelled to employ any of these definitions, we conclude that respondents have failed to prove, pursuant to any of these definitions, that the strict application of the zoning regulations would result in a hardship or difficulty which merited the

granting of the variance…[I]t is incumbent upon the property owner to prove what the hardship or difficulty is, i.e., the owner of the property would be deprived of all beneficial uses of the land if the land was used solely for the purpose allowed in that zone, the value of the property would decrease significantly if the property was used solely for the purpose allowed in that zone, a reasonable return on the property would not be realized unless the variance was granted, the land is virtually useless as zoned or no feasible use could be made of the land as zone.

d. American West Development, Inc. v. City of Henderson, 111 Nev. 804, 898 P. 2d 110 (1995), footnote 3. Nevada's statutory scheme mandates that municipalities adopt zoning regulations that are in substantial agreement with approved master plan.

e. City of Reno v. Harris, 111 Nev. 672, 895 P. 2d 663 (1995). [W]e unequivocally held that the granting or denial of a use permit is generally within the prerogative of local governments. Finally, we not it is not the business of courts to decide zoning issues. Because of the Board's particular expertise in zoning, courts must defer to and not interfere with the Board's discretion if this discretion is not abused. …Once it is established that an area permits several uses, it is within the discretion and good judgment of the municipality to determine what specific use should be permitted.

f. City of Las Vegas v. Laughlin, 111 Nev. 557, 893 P. 2d 383 (1995). The grant or denial of a request for a special use permit is a discretionary act. If this discretionary act is supported by substantial evidence, there is no abuse of discretion. Substantial evidence is that which a reasonable mind might accept as adequate to support a conclusion. …We conclude that the concerns expressed by the public, specifically those over increased traffic where children walk to school and preserving the residential nature of the neighborhood, established a valid basis for the denial of Laughlin's request for a special use permit.

B. APPEAL PROCESS.

1. Making a Record: In making a record on zoning matters, it may be helpful to take specific consideration of the following issues, if applicable:

a. Changed conditions since the adoption of a master plan;

b. The particular sue was not contemplated when the master plan was adopted;

c. Change in growth patterns in the area and the potential impact the application will have on the existing neighborhood;

d. Whether the use is consistent or compatible with the users in the area or the development trends being established;

e. Traffic considerations;

f. Aesthetic considerations;

g. Crime factors to be considered;

h. Availability of resources and utilities to the service area;

i. Whether the development is commensurate with the character and the physical limitations of the land;

j. Specific and substantial comments made at the public hearing; and

k. Health, safety, morals and general welfare considerations.

This list provides a possible basis for making a record that may hold up on court. Our knowledge from case law suggests that one factor alone may not be enough to avoid the perils of judicial scrutiny; however, the totality of these factors combined will provide a very strong basis for any zoning decision.

The public hearing on a request for a land use permit is much like the “trial” in civil litigation. Regardless of the entity involved or the permit requested, the developer must be like the attorney at trial, prepared to make a persuasive case for his request. Proper preparation can lay the groundwork for a smooth and successful public hearing.

The developer and his attorney should attend and become familiar with other hearings conducted by the board that will consider the application. From this, you will learn the logistics and orientation of the hearing room, gain an understanding of the dynamics of the hearing process itself, idiosyncrasies of the board members and how planning staff’s input is utilized. Staff has a tremendous impact on any application and the attorney must know how best to use that input. A complete understanding of the process will allow the attorney to tailor his presentation in the most effective manner.

A developer’s attorney must consider how to persuade the board to grant the requested permit. This is typically done through documents, reports and studies prepared and/or presented by expert witnesses.

The permitting agency usually wants to meet the developer for the project and “view the premises.” He or his authorized representative must be available to answer questions from the board or agency.

Because nearly all projects engender some opposition, it makes sense to have as many supportive neighboring property owners available to speak favorably to the board as possible. The developer or attorney should be sure to meet with these people. These witnesses can give a very simple statement to the board, expressing their support for the project for a specified reason. A short, written statement read into the record is effective.

A developer and his attorney must also consider what witnesses will be presented in opposition. A staff report is typically done in advance of the meeting and a developer will know whether the staff supports or opposes the project. If staff opposes the project, the developer must be prepared to address this opposition at the public hearing. The best way to deal with staff opposition is to be prepared to compromise and meet before the public hearing with the staff in hopes of obtaining a favorable report.

A developer should know whether adjacent property owners and/or neighborhood organizations support or oppose a proposed project, should consider how persuasive the spokesperson for the organization will be and whether it makes sense to address the opposition of the neighborhood organization in the developer's initial presentation. Appearance at the local Citizen's Advisory Board (CAB) is recommended and comments made by the public should be considered.

A developer should prepare exhibits and summaries of the evidence supporting the project to present to the CAB and public agency.

The project renderings, plan, map or drawing should be large and presented in one place in the room so that the party making the presentation can direct everyone's attention to the points being made. Where only small pictures and maps are used, there is a loss of control over what people are looking at and when they are looking at them. A developer should also prepare individual exhibits to pass out to the board members for their review. This will allow them to easily follow the presentation.

In making the presentation of exhibits, the attorney should ensure that each exhibit is clearly received, identified and preserved for the record. In hotly contested hearings, a court reporter should be utilized. A bound volume of exhibits makes control of the physical record easier.

The following general outline should be followed in any presentation. Remember, however, the bulk of the presentation should be made by the expert and technical witnesses and not by the attorney or even the developer.

Staff usually goes first and presents its staff report and covers basic project information. It should not be repeated in the developer's presentation. The following is the suggested format:

1. Introduce the developer.
2. Outline the format of the presentation.
3. Address legal issues and present legal memoranda.
4. State what the evidence will be considered and presented as part of the record.
5. Outline the specific request in the application.
6. Present the evidence, using various experts and engineers.
   - Identify and describe the site.
   - Describe the project.
   - Describe surrounding land uses and compatibility.
   - Outline the zoning.
   - Economic impact.
   - Environmental impact.
   - Air quality impact.
   - Traffic impact.
   - Present technical reports with concise written summaries.
   - Address the findings required by statute and ordinance and present concise written summaries.
   - Utilize staff report.
7. Address opposition.
8. Present supportive neighborhood and citizen witnesses.
9. Summarize (have and distribute a summary sheet on main issues).
10. Reserve rebuttal time.

After the developer presents his case, opposition groups are allowed to present their testimony or evidence.

In general, the applicant is well-advised to ignore personal contact with any opposition groups at the meeting. Personalities sometimes clash, but always avoid ad hominem. The

applicant should focus on technical matters, the legal requirements for the permit or approval and emphasize that the application meets all those requirements. It is particularly helpful if the staff members can be used to remind the governing board what issues are before them and what technical facts are without dispute.

After the testimony is completed, the board will usually close the public hearing and discuss the project. During this phase, they will usually ask questions of staff, the applicant or the opposition. The attorney for the developer should field the questions and direct which expert, engineer or the developer is to answer the question. Legal issues would be answered by the attorney with some interaction with the board's staff attorney in attendance. It is always helpful to previously arrange with a sympathetic board member that he or she will also question you on the project if other board members will not allow the applicant to speak.

Once a developer has been successful in a request for a land use permit, the developer should take other steps to assure a strong working relationship with the board, governmental officials and the public at-large.

A developer should be prepared to make a statement to the media concerning the outcome of the hearing. If successful, the developer should express gratitude to the board and the people of the community for their support of the project. If unsuccessful, the developer should not appear bitter or otherwise cynical and should simply state to the local media that he is disappointed and is considering his options. In many situations, a written press release will be repeated almost verbatim in local newspapers and an oral presentation at a press conference will be quoted to the public in the local newspaper or other radio and television media. Thus, statements to the media are important and can either help assure continued support for the project or begin the groundwork for mounting an appeal of the zoning board's decision.

Governmental agencies should not be captured by citizen opposition that is not based upon the applicable statutes or ordinances. Nor should they become enamored with a development that is not in accordance with the locality's comprehensive plans or needs. Agencies need to be flexible without being swept up in the events of the moment. The government is expected to provide the long-term planning that creates a cohesive structure in the land development of an area.

The role of the agency is to provide coordination with other agencies in the review process, provide objective and factually supported date so as to allow the governing body to exercise its decision-making process objectively and without emotion.

2. **Burden of Proof:** The universal rule, and well-settled in Nevada, is that local zoning decisions are entitled to a presumption of validity. Coronet Homes, Inc. v. McKenzie, 84 Nev. 250, 439 P. 2d 219 (1968). The burden is on the party challenging such a decision to overcome that presumption in a particular case. City of Henderson v. Henderson Auto Wrecking, Inc., 77 Nev. 118, 359 P. 2d 743 (1961). The reason for the presumption and burden is simple. Zoning decisions are best made by zoning authorities that are best qualified to apply zoning principles to a set of facts. Zoning decisions are rarely right or wrong. Rather, they are either supported by substantial evidence or they are not. In many cases, an approval or a denial would have such a basis. Zoning ordinances providing that applicant seeking special use permit must present evidence that use is necessary to public health, convenience, safety and welfare and for promotion of general good of community is not unconstitutional on theory that is places an unreasonable burden on applicant for a special use permit. Coronet Homes, Inc. v. McKenzie, supra.

An interesting question arises in cases regarding a zone change request that conforms to a master plan. In Nova Horizon v. City of Reno, 105 Nev. At 96, 769 P. 2d at 723, the Nevada Supreme Court held, "We therefore choose to view a master plan as a standard that commands deference and a presumption of applicability, rather than a legislative straightjacket from which no leave may be taken."

3. **Statute of Limitation:** Nevada Revised Statute 278.0235 provides:

> No action or proceeding may be commended for the purpose of seeking judicial relief or review from or with respect to any final action, decision or order of any governing body, commission or board authorized by NRS 278.010 to 278.630, inclusive, unless the action or proceeding is commenced within 25 days after the date of filing of notice of the final action, decision or order with the clerk or secretary of the governing body, commission or board.

In County of Clark v. Doumani, 114 Nev. 46, 952 P. 2d 13 (1998), the Nevada Supreme Court stated:

> Giving the words of the statute their plain meaning, the mere presence of the Board's clerk at the hearing for the purpose of recording the Board's decision does not constitute filing of notice of the decision with the clerk. We conclude that "filing of notice of the

final action" under NRS 278.0235 is accomplished when someone or some entity provides separate, written notice of the final action to the secretary or clerk of the governing body, commission or board.

Further, although the statute does not expressly require that notice be given to the applicant to give effect to the statute of limitations, the applicant must be informed that notice of the final action was filed with the clerk or secretary. Thus, any notice filed with the clerk or secretary should also be forwarded to the applicant and should include the date on which the notice was filed with the clerk or secretary.

4. Procedural Requirements for Making an Appeal: NRS 34.160, NRS 278.0233 and NRS 278.0237 provide the standard procedure for filing an appeal of a land use decision. See form Petition for Writ of Certiorari and/or In The Alternative, Complaint for Declaratory Relief attached as Exhibit A.

5. Writ of Mandamus: Nevada Revised Statutes 34.160, 278.0233 and 278.0237 provide the statutory guidelines for judicial review.

a. Petition for Writ of Mandamus, Writ of Certiorari and/or In The Alternative, Complaint for Declaratory Relief

b. Stipulation and Order for Briefing Schedule (See EJDCR 2.15).

c. Memorandum of Points and Authorities in Support of Petition for Writ of Mandamus.

d. Memorandum of Points and Authorities in Opposition to Petitioner's Writ of Mandamus.

e. Memorandum of Points and Authorities in Reply to the Opposition to the Petition for Writ of Mandamus.

f. Stipulation and Order Setting Hearing.

6. Standard of Review:

a. City of Las Vegas v. Laughlin, 111 Nev. 557, 893 P. 2d 383 (1995). Review of a zoning decision by writ is made strictly upon the record.

b. Tighe v. Von Goerken, 108 Nev. 440, 833 P. 2d 1135 (1992). A governing board's decision should only be overturned when there is a manifest abuse of discretion.

c. An abuse of discretion may be found by showing that the governing body's decision was not based upon substantial evidence or that the

> governing body's decision was arbitrary and capricious. Substantial evidence has been defined as "that which a reasonable mind might accept as adequate to support a conclusion. City of Las Vegas v. Laughlin, 111 Nev. 557, 893 P. 2d 383 (1995). And, arbitrary and capricious has been defined as a baseless decision made for no apparent reason. City Council v. Irvine, 102 Nev. 277, 721 P. 2d 371 (1986).

7. Ex Parte Communications. It is interesting to note that the authority for establishment of the Board of County Commissioners comes from the Nevada Constitution, Article 4, Section 26, which provides that the Legislature shall provide by law for the election of a Board of County Commission and such County Commission shall jointly and individually perform such duties as may be prescribed by law.

NRS Chapter 278 and Washoe County Code 110 discuss the procedures to be followed by the County Commission. Under the Constitutional provision, one may argue that an individual commission cannot do what the commission as a whole cannot do, i.e. individually talk to a proponent or to an opponent.

A stronger argument against the individual communications is found in the Ethics in Government statutes, Chapter 281. These statutes, which apply to public officials, including Commissioners, include NRS 281.481(5) providing that a public officer who acquires information not available to other generally cannot use it to further the pecuniary interest of others. The Act provides for voidability of actions taken in certain circumstances where the Act is violated. While it does not specifically discuss voidability of an action taken when the public officers uses information not available to the general public, an argument could be made that the action is voidable or, at the very least, that the violating officer should not have taken part in the discussions or voted on the matter.

A request for notice under the Nevada open meeting law should be considered. See Exhibit B.

Finally, Nevada Contractors v. Washoe County, 106 Nev. 310, 796 P. 2d 31 (1990) states that a decision to issue a special use permit is discretionary. A good argument can be made that use of information gathered outside the public hearing, upon which the commissioner relies without allowing rebuttal from the public, violates fundamental fairness and due process and, therefore, constitutes and abuse of discretion.

In Jennings v. Dade County, 589 So. 2d 1337 (Fla.App.1991), the landowner petitioned for writ of certiorari to challenge trial court order which dismissed landowner's count alleging due process violation as a result of ex parte communication between adjacent landowner's lobbyist and the county commissioners before vote approving use variance for adjacent landowners, which gave to landowner leave to amend complaint only against county, and which denied motion to dismiss count alleging nuisance as result of permitted use. The Florida District Court of Appeal held on rehearing that: (1) landowner's timely petition activated common-law certiorari jurisdiction; (2) lobbyist's ex parte communication could violate due process despite landowner's actual and constructive knowledge of ex parte communication; and (3) landowner's prima facie case of ex parte contact would give rise to presumption of prejudice and shift burden to adjacent landowner and county to rebut the presumption.

The Florida court held that, "it is also fairly settled in this state that the granting of variances and special exceptions or permits are quasi-judicial actions." The Court went on to state (589 So. 2d at 1350-51):