Fall 2015

CONNECTICUT PLANNING

American Planning Association
Connecticut Chapter
Making Great Communities Happen

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Sign Regulation Turned On Its Head

page 14

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MAKING GREAT COMMUNITIES HAPPEN

PRESIDENT'S MESSAGE

The past couple of months have brought several changes and additions to CCAPA Chapter leadership and I'd like to focus my message on two leaders going and another two leaders coming.

In early fall, the CCAPA Board thanked Linnea McCaffrey, AICP, Program Co-Chair for the past five years, for her excellent service to the Chapter. Linnea's thoughtful attention to current planning issues and the needs of Chapter members brought about a wide array of quality and timely programs and events. In the past few years, the Chapter has averaged two to four events per month under Linnea's leadership. Her participation will be missed on the Chapter Board.

The Chapter also thanks Jana Roberson, AICP who has been our Chapter Government Relations Chair for the past two years and who stepped down from that position in late November. In each of the two legislative sessions that Jana led our government relations work, CCAPA initiated or worked collaboratively on active bills. In the 2015, CCAPA collaborated on a successful bill which passed as new Connecticut Tax Increment Financing legislation. Jana's energy and thoughtful leadership has helped CCAPA's legislative activities become more proactive. During her time as Chair, the Chapter elected to increase our financial commitment to actively lobbying at the Capitol for issues that matter to planners.

At its October meeting, the CCAPA Board welcomed and appointed Jeanne Davies, AICP as its new Program Committee Co-Chair. Jeanne has been a member of CCAPA since 1988 and a member of the Program and former Legislative Committees. She has enjoyed working on Connecticut's SNEAPA Committee for several Connecticut sponsored conferences. Jeanne has worked as Deputy Director and Principal Planner for the Lower CT River Valley Council of Governments for fifteen years and has over 28 years of experience in community and regional land use, transportation, environmental and emergency management planning. The Board looks forward to her continued service to the Chapter and the energy, enthusiasm and creativity she brings to producing Chapter Programs.

October 1st saw the addition of CCAPA's new President Elect

(continued next page)

Cover photo courtesy of NNECAPA.

CONNECTICUT PLANNING

is published quarterly by the Connecticut Chapter of the American Planning Association. Contributions are encouraged. Submissions must include the name and contact information of the contributor. Material may be edited to conform to space or style requirements. Please address submissions to Executive Editor Rebecca Augur, AICP (contact information below).

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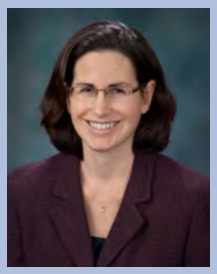
PRESIDENT'S MESSAGE, cont'd

Michael Piscitelli, AICP to the Chapter Board. Mike serves as the Deputy Economic Development Administrator for the City of New Haven. Economic Development coordinates the work of seven city departments. He previously served as the City's Comprehensive Planner in the City Plan Department. From there, he served as the first Director of a reorganized Transportation, Traffic and Parking Department with a mission to enhance the City's transportation assets into a sustainable and integrated system. Familiar with CCAPA, Mike also served in the past for several years as the Chapters Professional Development Officer. We look forward to the professionalism, intellect and warmth of spirit that Mike will bring to his position as President-Elect and to his term as President beginning in October 2016.

Please do not hesitate to be in touch with me should you have any thoughts, questions or suggestions for the Chapter! My inbox welcomes your emails, my voicemail welcomes your messages and my door welcomes your feet if you find yourself in Hartford! Happy Planning!

— Emily Hultquist, AICP

FROM THE EDITOR



I am pleased to present an issue that largely consists of unsolicited reader contributions. I appreciate suggestions for themes and articles, but I love when folks just send articles without any prodding from me! As it so happens, these also fit nicely into a legal update theme.

We have two different takes on the recent U.S. Supreme Court decision regarding signs. In addition, you will find a nice review of the role alternates play on land use commissions, which we think would be valuable to share with your commission chairs, especially in swearing-in season. We also have a new take on urban planning as seen through the eyes of someone spending a lot of time pounding the pavement.

Finally, you will find the usual updates on Chapter happenings, including an announcement of the newly appointed CCAPA Peer Support Agent. As always, I welcome your suggestions, comments and feedback. Wishing you a happy new year.

— Rebecca Augur

The Role of Alternative Members of Connecticut Land Use Boards

by Robert J. Reeve, Esq., Scully, Nicksa & Reeve, LLP

Much like alternate jurors in civil and criminal trials, alternate members of Connecticut land use boards are often seen and seldom heard. They provide a valuable service, but problems can arise if they speak out at the wrong time. In most cases they patiently sit through many hours or multiple evenings of public hearing testimony, only to be left out of the decision making process. Alternate members do, however, play an important role in the land use process, even in applications where they don't ultimately participate in the decision.

Agency members, professional staff, and parties interested in land use applications need to be aware of how and when alternates may legally participate in public hearings, deliberations and votes.

Alternate members of land use boards are creatures of statute. They may be either appointed by the town's legislative body or elected, as provided by town ordinance. *See, C.G.S. Sec. 8-1b (zoning commissions) and Sec. 8-5 (zoning boards of appeal)*. When "seated," i.e. designated to act on a particular application, alternates have all of the powers and duties of regular members.

While this article will focus on zoning commissions and zoning boards of appeal (ZBA), statutes governing other land use boards have similar provisions allowing alternate members to act when regular members are not available or eligible to render a decision. *See, C.G.S. Sec. 22a-42(c) (inland wetlands agencies); Sec. 7-147d(c) (historic district commissions)*.

Why are Alternates Important?

Alternates often supply critical votes at the ZBA, as no variance can be granted or decision of the zoning enforcement officer overruled without 4 out of 5 affirmative votes. *C.G.S. Sec. 8-7*. For this reason applicants often do not go forward with variance applications unless 5 members are available act, so alternates frequently decide ZBA matters. Some towns have created land use boards with an even number of members, which can lead to problems with tie votes which result in the denial of an application. Having alternates available to decide applications when regular members are absent from a 6 member zoning commission changes the applicant's task from persuading the majority of a quorum (4 out of 4, or 4 out of 5) to the less difficult burden of convincing a majority of the full board (4 out of 6). The same holds true when the zoning regulations require that a supermajority of the full board approve a request to relax the zoning standards or waive a subdivision regulation if certain conditions are met. In all of these cases, alternates who are well acquainted with the public hearing record may be the critical votes if one or more regular members are absent or ineligible to act when the vote is taken. Alternates have an important role to play, and those few who habitually miss meetings or fail to participate as though they may be called upon to vote do a disservice to the commission and the public.

Alternate members can and should fully participate in the public hearing process, even where all of the regular members are present. Especially in the case of a multiple meeting public hearing, it is difficult to predict when the vote will be taken or which regular members will be present at the time of the vote. It would be incongruous and prejudicial to the parties not to know what concerns alternates who are eventually seated may have with the proposal. For this reason our Appellate Court has held that there is no prohibition on full participation by all alternates during the public hearing. *Komondy v. Zoning Board of Appeals of the*

(continued on page 5)

Alternates often supply critical votes at the ZBA, as no variance can be granted or decision of the zoning enforcement officer overruled without 4 out of 5 affirmative votes.

Alternative Members cont'd

Town of Chester, 127 Conn. App. 669, 677-683 (2011).

Komondy also instructs that it is improper, for reasons to be discussed below, for unseated alternates to participate in the process once the public hearing is closed and the commission begins to deliberate on an application. Therefore, once it is determined that less than a full complement of regular members are present and eligible to deliberate and vote it is important to understand which alternates are being seated to consider and act on a particular application. Typically the chairperson, often with staff assistance, makes this designation. This is sometimes done at the beginning of the meeting after attendance is taken, with alternate "A" appointed to act on all matters for regular member "B" who is not present. A "full meeting" appointment can lead to questions later on in a long agenda about which applications the alternate is eligible to act on. In the author's view the preferred method, followed by many boards, is to appoint alternates on an item by item basis as matters are reached for deliberation, rather than at the commencement of a meeting or during the public hearing.

Both regular members and seated alternate members must be familiar with the application in order to be eligible to deliberate and vote, usually by being personally present throughout the public hearing or by listening to recordings and reviewing any written communications. While a full discussion of what constitutes adequate familiarity with the record is beyond the scope of this article, good practice is for any member who may have missed all or part of the public hearing to state on the record how he or she has attempted to fulfill that obligation.

The method for designating zoning commission alternates is set forth in the same town ordinance that provides for their election or appointment. Sec. 8-1b. As a practical matter many land use boards have adopted bylaws which govern the appointment of alternates, typically on a rotating basis. Commission staff should

(*continued on page 6)*

Alternate members can and should fully participate in the public hearing process, even where all of the regular members are present.

Alternative Members cont'd

be able to determine who is "up next" in the rotation.

Somewhat surprisingly, a regular member of a ZBA who is absent at the time of a vote has the power to appoint which alternate is to act in his or her place. *C.G.S. Sec. 8-5a*. The statute does not state how an absent member is to make this designation, but presumably it could be done in a writing delivered to the board at or before the meeting. The author has never witnessed this method of designating an alternate and suspects it is not well known and rarely used. If the member fails to make a designation or is disqualified from acting (as opposed to being absent), the ZBA chair designates alternates on a rotating basis.

When a member of either a zoning commission or ZBA is disqualified due to some personal or financial interest and no alternate is available to act, a town may provide by ordinance that any elector be appointed to act on that application. *C.G.S. Sec. 8-11*. Again, this is probably a rarely used procedure.

Once the alternates on a particular matter have been designated the commission and the board begins to deliberate on the application any alternates who have not been seated should refrain from any further participation. *Komondy at 686*. Analogizing to the situation of an alternate juror who has been dismissed after the evidence was concluded, the Court reasoned that participation in commission deliberations after the close of the public hearing by an unseated alternate member creates an improper outside influence by one not entitled to participate in the decision making process. *Id. at 685*.

Just because such improper participation took place by an alternate does not necessarily mean an appeal from the board's decision will be sustained. Rather, the court must determine whether the improper participation resulted in material prejudice to the appellant by impacting the board's decision making process. The inquiry includes the frequency and severity of the unseated alternate's participation in the deliberations and any attempts to

(*continued on page 7*)

sway the votes of properly seated members. *Id. at 689.* Ms. Komondy could not show the hardship required to obtain a variance from the zoning regulations, so the Court affirmed the dismissal of her appeal even though there was admittedly improper participation by an unseated alternate. *Id. at 690.* This is akin to a harmless error standard, and an appellant who seeks to overturn a decision on this basis should be prepared to demonstrate that the outspoken alternate was able to influence and perhaps ultimately change what would have otherwise have been the proper outcome.

However, the *Komondy* Court in footnote 10 of its opinion may have been signaling that it will be less tolerant of such breaches in the future: "…we emphasize that the participation of an unseated alternate in the board's deliberations is not to be condoned. Even if that participation ultimately is deemed harmless, it nevertheless raises the specter of impropriety. For that reason, the prudent course is to prohibit such participation in all instances."

Professional staff and agency members are encouraged to minimize their exposure to the delay, expense and uncertainty of litigation by clarifying the status of alternates during the application process. Prior to any deliberations the Chair should indicate which alternates are being seated to deliberate and vote, and have them describe how they have familiarized themselves with the record if not personally present during the entire public hearing. Alternates who are not being seated should be instructed not to participate in the deliberation or vote on that application.

Alternate members provide a valuable service to the commission and the public, and they often provide insight and suggest improvements to plans whether or not they ultimately deliberate and vote on an application. By following these simple guidelines commissions and their professional staff can ensure that well intentioned efforts do not result in unintended consequences.

Robert J. Reeve is an attorney at Scully, Nicksa & Reeve, LLP. His practice concentrates in land use matters, including planning, zoning and wetlands matters. He can be reached at rreeve@scullynicksa.com.

Appreciating Good Urban Planning, Mile by Mile

by Shawna Kitzman, AICP, Fitzgerald and Halliday

I recently trained for my first marathon. Even as a seasoned competitive runner, I feared the 26.2 mile endeavor. I enjoyed my sweet spot — the half marathon — along with local 5ks, 10ks, and even 15ks. But, a marathon? For many years, my gut reaction was "No, thank you!"

I gained entry into the NYC Marathon via lottery. Two months after putting my name in, my credit card was charged and there I was, both nauseated and elated about the prospect of running the streets (the many streets!) of New York City. More importantly, it was time to mentally prepare for four months of training.

By late June I laced up my running sneakers. Tackling the three- and six-mile easy runs required relatively minor planning or creativity. I simply went out the door of our West Hartford home and headed towards a few well-worn paths, residential streets, collector roads, and the fragrant sanctuary of Elizabeth Park.

Training soon required 15-mile runs. I had to put forethought into not only what I was eating and how much I was sleeping, but where I was going.

Before heading out, I mapped routes using the no-frills website, GMaps Pedometer. I often knit together residential street grids, opting for neighborhoods with interesting architecture. Dominated by 19th- and 20th-century Victorian homes, the West End of Hartford takes the cake. I nearly forgot I was running, pleasantly distracted by the historic paint palettes and intricate architectural details.

Hartford was once threaded with streetcars, originally pulled by horses on tracks, and eventually electrified. Hence, the pedestrian-friendly street grid.

The benefit of the street grid was never more apparent than when I ran to a friend's home. I had a rough idea of where she lived, but had yet to travel there on foot. Brilliantly, I decided to push my toddler in a jogging stroller that hot July day.

After encountering two places where the sidewalk ended, I zig-zagged a busy Trout Brook Drive and eventually crossed the pedestrian-unfriendly North Main Street into a neighborhood of cul-de-sacs. Despite my decent sense of direction, I took a wrong turn. My toddler got fussy. I got annoyed. I wiped sweat off my brow and pulled out my iPhone to figure out where we were. Not far, but we needed to backtrack to the main road.

(continued on page 9)

The author takes a break from an 18-mile run to enjoy the scenic beauty of Collinsville, CT.

Appreciating Urban Planning cont'd

Getting lost in a labyrinth of cul-de-sacs will quickly take the wind out of your sails.

The long runs got longer. I was at a loss for new journeys that didn't require running on arterial shoulders. It was time to broaden my range, so I ventured the Farmington River Trail for relatively uninterrupted mileage.

The multi-purpose trail is beautiful and well-maintained, but I was alone, and on high alert. A female jogger had recently been assaulted on an Avon trail in broad daylight. I wished for the security that's inherent with more fellow joggers, walkers, or bikers.

I was also afraid of bears. Being scared of creeps and wildlife drained my energy, and that run left me mentally and physically depleted. I went back again the following week, determined to conquer the trail.

This time I brought my sister. We ran through the incredibly quaint village of Collinsville in Canton, where people brunched, antiqued, and moseyed along the waterfront path. We navigated around the populated trail, and felt that we were dropped into the set of some lovely movie.

My family and I chose to live in West Hartford precisely because of its walkable, dense suburban development and quality of life. I often ran my favorite, shaded streets or neighborhoods lined by huge homes, curiously daydreaming how the 1% might use all that space. I opted for quiet, long hilly routes over pedestrian-unfriendly strip malls and industrial neighborhoods. Marathon training allowed me to witness my hometown with new eyes, as a pedestrian, not a driver.

Shawna Kitzman, AICP is a Senior Planner with Fitzgerald & Halliday, focused on community planning and public outreach. She is currently working with Eastern Health Highland District to fulfill a Plan4Health grant from APA and CDC, promoting active transportation and healthy food access.

Hartford was once threaded with streetcars, originally pulled by horses on tracks, and eventually electrified. Hence, the pedestrian-friendly street grid.

We are pleased to announce the appointment of Francis Armentano, AICP as the inaugural Peer Support Agent for the Chapter.

New CCAPA Peer Support Agent

by Rebecca Augur, AICP, CCAPA Communications Committee Chair

One of the changes implemented with the CCAPA By-Law revisions passed earlier this year was the creation of a Chapter Peer Support Agent to be appointed by the President. The Peer Support Agent is to "provide confidential peer assistance, mentoring and guidance when requested by a member. Such assistance shall be non-binding and shall incur no liability upon the Agent or Chapter." The By-Law also enables the appointment of assistants as necessary.

We are pleased to announce the appointment of Francis Armentano, AICP as the inaugural Peer Support Agent for the Chapter. Fran serves as the Director of Community Development for the Town of Granby, where he has worked since 1986. He is responsible for planning, implementing and supervising the Town's overall Community Preservation and Development program. In addition to the customary Town Planner functions, Fran assists the Town Manager, runs the Housing Rehabilitation Program and serves as grant writer/administrator, GIS coordinator and more. Fran started his career in Vernon, CT in 1980 as an Assistant Town Planner. He has been a member of the American Institute of Certified Planners since 1990 and has been active in CCAPA in a variety of capacities, most recently on the Awards Committee.

We are also pleased to announce Glenn Chalder, AICP will serve as Assistant Peer Support Agent. Glenn is President of Planimetrics, a planning consulting firm based in Avon. He has over 25 years of experience in planning, and has been active in the Chapter in a variety of roles.

Please join us in thanking both Fran and Glenn for agreeing to serve in this important new role for the Chapter. If you are currently struggling with a thorny issue in your role as a planner, looking for some feedback on the direction of your career or any other professional issue on which you could use some mentoring and guidance, please send a request for assistance to info@ccapa.org. Note that we will be working on establishing a more formal means of communication directly to the Peer Support Agent. For now, please just send a request, and Fran or Glenn will get back in touch with you.

New AICP Members

by Sue Westa, AICP, CCAPA Professional Development Officer/Program Committee Co-Chair

APA reported a national pass rate of 55% for the Fall 2015 AICP exam; however CT's pass rate was 78%!

Congratulations to the following CCAPA members who passed:

Jamie Bratt, Director of Economic and Community Development, Town of Trumbull
Meghan Sloan, Senior Transportation Planner, CT Metro COG
Phil Barlow, Principal, TO Design, LLC
Amanda Kennedy, Director of Special Programs, SECCOG
Tim Baird, Planner, Milone and MacBroom, Inc.
Herve Hamon, HOH Design
Catherine Johnson, Architect & Town Planner, City of Middletown

APA CT American Planning Association Connecticut Chapter
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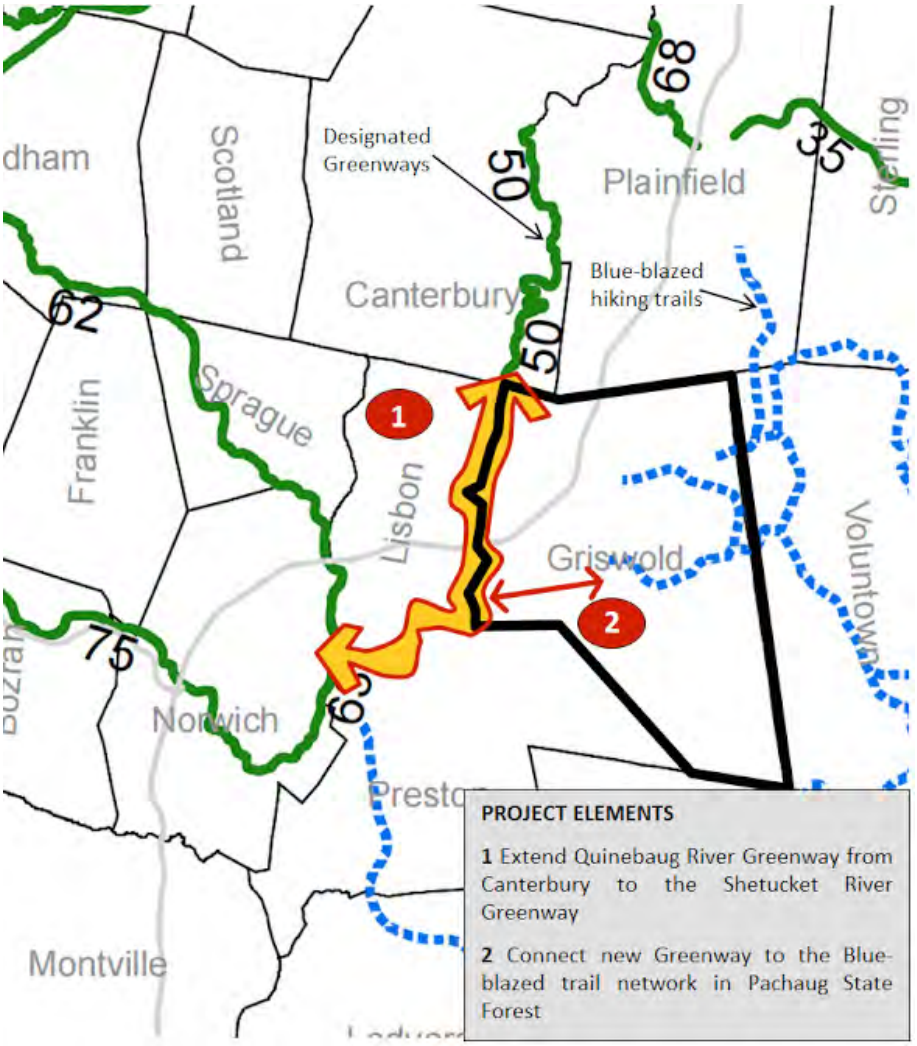
Stay current with CCAPA happenings! Bookmark our online events page at www.ccapa.org/events-calendar so you don't miss out!

CCAPA FY 2016 Budget — Approved September 2015

			Approved FY 16
Revenue			
4000	Dues Revenue (AICP & APA Rebate)	$	25,200.00
4100	Conference and Workshop Registration Revenue	$	20,000.00
4200	Grants Received and Contracts Revenue	$	50,817.00
4500	Advertising Revenue	$	9,000.00
4700	Investment Revenue--Interest	$	15.00
4900	Other Revenue (Transfer from Reserves)	$	9,447.00
	Total Revenue	**$**	**114,479.00**
Expenses			
7000	Professional Fees-Management (Website)	$	2,000.00
7010	Professional Fees-Management (Newsletter)	$	12,600.00
7020	Professional Fees-Consulting (Legisl Monitoring)	$	9,000.00
7030	Professional Fees--Consulting (Accountant)	$	2,500.00
7040	Professional Fees--Consulting (Other)	$	1,500.00
7211	Insurance--Other	$	1,500.00
7230	Supplies--Office Admin	$	75.00
7232	Supplies-Books & Resources (AICP Materials)	$	200.00
7233	Supplies-Other (Awards, Chap Promo Items)	$	800.00
7240	Telecommunications and E-cost	$	1,500.00
7250	Photocopying & Duplicating Cost	$	20.00
7251	Postage, Handling and Freight	$	150.00
7252	Printing Cost	$	250.00
7260	Travel--Lodging	$	4,200.00
7261	Travel--Food	$	1,400.00
7262	Travel--Transportation	$	2,500.00
7263	Travel--Other	$	2,200.00
7280	Admin-Bank Fees	$	50.00
7300	Advertising	$	500.00
7400	Sponsorships Paid	$	150.00
7410	Grants Paid (Scholarships)	$	3,500.00
7600	Mtgs Exp--Meal & Beverage Service	$	8,500.00
7610	Mtgs Exp--Equipment Rental	$	300.00
7620	Mtgs Exp--Facilities Rental	$	4,500.00
7630	Mtgs Exp--Transportation	$	500.00
7640	Mtgs Exp--Honorarium/Speaker Fees	$	3,500.00
7900	Other Expenses (CM fees)	$	2,600.00
7910	CDC/APA Grant Payment	$	47,984.00
	Total Expenses	**$**	**114,479.00**

The Diana Donald Scholarship — Building Professionals of Tomorrow

by Khara Dodds, AICP, CCAPA Secretary



The Connecticut Chapter of the American Planning Association would like to congratulate the Norwich Community Development Corporation (NCDC) for winning the Diana Donald Scholarship-Internship Award! Historically, CCAPA has offered the Diana Donald Scholarship to college and graduate students in planning, or a planning-related field, that have demonstrated strong academic performance. This year, the Chapter decided to take this program a step further. Birthed out of the tradition of the Scholarship fund, the Chapter offered a Scholarship-Internship program to give non-profits and governmental organizations the opportunity to hire an intern studying in a planning or planning-related field to work on an identifiable planning initiative within the organization. The scholarship funds, in the amount of $3,500, will be provided to pay the intern to work on a planning project that will develop their skills and expand their knowledge base in planning, while giving support to the awarding organization in advancing a planning project.

Diana Donald, who passed away in 1975, was a Connecticut-based planner who was recognized nationally for her contributions to the profession. At the time of her passing, at age 40, she was the First Vice President of the American Institute of Planners and was in line to become President. Her status in the association set an historical precedent for women in planning. To continue Diana Donald's legacy, this scholarship-internship program is not only intended to promote good planning and innovative planning initiatives, but it is also intended to provide an opportunity to students interested in pursuing careers in planning to gain credible work experience in the field to help prepare them for post-graduation. It is the hope that we can help build good professionals of tomorrow that can lead the way in planning in this state and beyond.

The Norwich Community Development Corporation will utilize the grant award to hire an intern to manage the Griswold Economic Development Commission's Greenway and Trails development program. This project will include the development of a Greenway Plan for the Quinebaug River, and the preparation of an application to the State of Connecticut Department of Energy and Environmental Protection's Greenway program. NCDC's hope is that this internship will provide the student with practical experience in determining how to develop a plan, earn community support, and create a project that can then be implemented by civic leaders. The project will also include learning about how to implement recommendations, which will provide the intern with grant application preparation skills. At the same time, Griswold, a small community of just around 12,000 people will receive planning resources, through the intern, that will support their efforts in advancing the role their natural resources play in the development of their community.

After *Reed*, viewpoint neutral regulation is no longer synonymous with content-neutral regulation.

Sign Regulation Turned On Its Head

by Evan Seeman, Esq., Robinson & Cole, LLP

Communities across the country must now scrutinize sign codes with even more care following the recent U.S. Supreme Court decision in *Reed v. Town of Gilbert*. Content-based sign laws — those targeting speech based on communicative content — have long been presumed to be unconstitutional violations of free speech unless they are narrowly tailored to serve compelling government interests (known as strict scrutiny judicial review). Many thought that sign codes were content-neutral if they could be "justified without reference to the content of the regulated speech" or not adopted by the government "because of disagreement with the message." But that may have all changed with *Reed*. Now, sign codes that regulate based on "topic" or "subject matter" alone (e.g., no temporary signs in a public right-of-way except those giving directions to an event at a nonprofit), even without distinguishing among different viewpoints within that topic or subject matter (e.g., no temporary signs in a public right-of-way giving directions to a neo-Nazi or any other "hate group"), will likely be put to strict scrutiny. After *Reed*, viewpoint neutral regulation is no longer synonymous with content-neutral regulation.

The Town of Gilbert's sign code prohibited outdoor signs without a permit, but exempted twenty-three categories from this requirement, including temporary directional, ideological, and political signs. Good News Community Church, described as a "small, cash-strapped entity that owns no building," used temporary directional signs to advertise the changing location of its services to the public. The

(continued on page 15)

Photo credits, above: Amir Syed, Kerry Lannert, Jason Tester, NNECAPA (Flickr)

Sign Regulation cont'd

Church, which holds religious worship services in elementary schools or other locations in and near the Town, placed about 15 to 20 temporary signs around Town. Among other restrictions, the sign code limited temporary directional signs to being placed on private property or a public right-of-way no more than twelve hours before the event being advertised and no more than one hour after the event. Signs conveying other messages, such as ideological and political signs, were subject to less stringent restrictions than the temporary directional signs used by the Church.

The Town's sign compliance manager twice cited the Church for violating the sign code — first for exceeding the time limits for signage and second for both exceeding the time limits and failing to include the date of the event on the signs. The Church claimed that the sign ordinance made impermissible content-based distinctions between the different categories of signs, but the U.S. Court of Appeals for the Ninth Circuit disagreed. Relying on established signage regulation law, the Ninth Circuit found that the sign code did not violate free speech doctrine because "the distinction between Temporary Directional Signs, Ideological Signs, and Political Signs…are based on objective factors relevant to Gilbert's creation of the specific exemption from the permit requirement and do not otherwise consider the substance of the sign."

The Supreme Court, in a majority opinion, authored by Justice Thomas, reversed and ruled the Town's sign code unconstitutional on its face, since the different signage restrictions "entirely depend on the communicative content of the sign." It reasoned that speech regulation aimed at specific "subject matter" or an "entire topic" is content-based even if it does not discriminate among viewpoints within the subject matter or topic. According to Justice Thomas, regulation of a temporary directional sign displaying "the time and location of a specific event" is impermissibly content-based.

(*continued on page 16*)

The Supreme Court, in a majority opinion, authored by Justice Thomas, reversed and ruled the Town's sign code unconstitutional on its face, since the different signage restrictions "entirely depend on the communicative content of the sign."

In the *Reed* aftermath, courts have been split about whether distinctions between on-premises and off-premises signs are content-based and subject to strict scrutiny.

Sign Regulation cont'd

The Court gave an example to illustrate its point: "If a sign informs its reader of the time and place a book club will discuss John Locke's *Two Treatises of Government*, that sign will be treated differently from a sign expressing the view that one should vote for one of Locke's followers in an upcoming election, and both signs will be treated differently from a sign expressing an ideological view rooted in Locke's theory of government." The compelling interests advanced by the Town to justify the different treatments (aesthetics and traffic safety) did not pass strict scrutiny, because the regulation was "hopelessly underinclusive" by failing to place the same restrictions on ideological and political signs.

Reed appears to have expanded the types of sign codes that will be deemed content-based and subject to strict scrutiny. This should be troubling for communities across the country, as many, if not most, sign codes regulate signs in a similar way to that found unconstitutional in *Reed*.

While the Supreme Court's decision was unanimous, the Justices wrote three separate concurring opinions. Perhaps encouraging is Justice Breyer's concurring opinion taking the position that content-based discrimination "cannot and should not always trigger strict scrutiny" because "virtually all government activities involve speech, many of which involve the regulation of speech." However, Justice Kagan, in her concurring opining joined by Justices Ginsburg and Breyer, prophesizes that courts will now be required to invalidate numerous "entirely reasonable" sign ordinances, making the Court "a veritable Supreme Board of Sign Review."

Justice Alito, joined by Justices Kennedy and Sotomayor, added "a few words of further explanation" to stress that local governments are not powerless to regulate signage. They provided a non-inclusive list of content neutral criteria to regulate signs: (a) the locations in which signs may be placed; (b) lighted and unlighted signs; (c) signs with fixed messages and electronic signs with messages that change; (d) the placement of signs on private and public property; (e) the placement of signs on commercial and residential property; (f) on-premises and off-premises signs; (g) restricting the total number of signs allowed per mile of roadway; and (h) imposing time restrictions on signs advertising a one-time event. It is not clear whether the authors of the majority opinion, or even some of the other concurring Justices, agree with this list. Justice Alito's list, which includes rules

(*continued on page 17*)

Sign Regulation cont'd

distinguishing between on-premises and off-premises signs and rules that restrict signs advertising a one-time event, appear to conflict to some extent with Justice Thomas' majority opinion.

In the *Reed* aftermath, courts have been split about whether distinctions between on-premises and off-premises signs are content-based and subject to strict scrutiny. In *Contest Promotions, LLC v. City and County of San Diego*, a federal court in California concluded that *Reed* does not apply to commercial speech and therefore the distinction between on- and off-premises signs in that case was subject only to intermediate scrutiny. The court in *Contest Promotions relied on Justice* Alito's explanatory list to reach this result. But a federal court in Tennessee reached the opposite conclusion in *Thomas v. Schroer* and expressly found that Justice Alito's concurrence was "not binding precedent" and noted that "[t]he concurrence's unsupported conclusions ring hollow in light of the majority opinion's clear instruction that a speech regulation targeted at specific subject matter is content based even if it does not discriminate among viewpoints within that subject matter." Therefore, the applicability of *Reed* to commercial speech appears to be an open question.

It is not just sign codes that will feel the effect of *Reed*. Recently, the U.S. Court of Appeals for the Seventh Circuit, in *Norton v. City of Springfield*, applied *Reed* to conclude that a panhandling ordinance was unconstitutional. The ordinance prohibited panhandling, defined as "an oral request for an immediate donation of money," in the downtown historic district. The ordinance, however, did not prohibit oral pleas for deferred donations or signs requesting money. Just as the Supreme Court rejected the Town of Gilbert's justification that its sign ordinance was neutral with respect to ideas and viewpoints, the Seventh Circuit rejected the same argument advanced by the City of Springfield. *Norton* explains that "[t]he majority opinion in *Reed* effectively abolishes any distinction between content regulation and subject-matter regulation. Any law distinguishing one kind of speech from another by reference to its meaning now requires a compelling justification."

Following *Reed* and now *Norton*, local governments across the country find themselves scrambling to review and revise sign ordinances and other ordinances regulating speech. Because local governments have long regulated by topics and subject matter such as those at issue in *Norton* (oral requests for money) and *Reed* (temporary directional signs), it seems likely that these types of challenges may be more often encountered and problematic. To get out ahead of a potential constitutional quandary, sign codes and all ordinances affecting speech should be carefully reviewed with an eye on *Reed* and amended as necessary.

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To get out ahead of a potential constitutional quandary, sign codes and all ordinances affecting speech should be carefully reviewed with an eye on Reed and amended as necessary.

From the Bench

by Christopher J. Smith, Esquire

On the Importance of Content-Neutrality

The U.S. Supreme Court recently released two interesting land use related decisions; one addresses sign regulations and the second governmental takings of personal property. Both decisions provide excellent summaries of the law concerning regulating signs and takings.

Sign Regulations

In *Reed v. Gilbert*, __U.S. __, *135 S. Ct 2218 (2015)*, the U.S. Supreme Court held that governments, including municipalities, cannot impose sign regulations that differentiate between: (1) "ideological signs" communicating a message or idea not for commercial purposes; (2) "political signs" promoting a candidate or proposition; and (3) "temporary signs" providing direction to a non-profit's event. The Court held that having different height, size, times for display, and location requirements for signs, based upon types of signs, violates the First Amendment right to free speech. The Court noted that such regulatory restrictions "depend entirely on the communicative content of the sign." Since this format is "content based" the regulations are subject to strict scrutiny, whereby government must demonstrate a compelling state interest to justify the regulation.

The municipality's claim that differentiating between these types of signs, especially requiring stricter limitations for temporary signs, is necessary to "preserve aesthetics" fell on deaf ears. The Court noted that "directional signs are 'no greater an eyesore'…than ideological or political ones." Similarly, the Court rejected the municipality's argument that the regulatory scheme is required for traffic safety stating "[i]f anything, a sharply worded ideological sign seems more likely to distract a driver than a sign directing the public to a nearby church meeting." The Court indicated that government can still ban all signage on public land. However, when regulating signs on private land, government must apply "content-neutral options."

Government Takings of Personal Property

Does government's obligation under the Fifth Amendment to pay just compensation when physically taking possession of one's property apply only to real property and not to personal property? In *Horne v. Department of Agriculture*, __ U.S. __, *135 S. Ct. 2419 (2015)*, the U.S. Supreme Court said: "No." The Court stated: "The Government has a categorical duty to pay just compensation when it takes your car, just as when it takes your home."

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

The plaintiff farmer challenged this law claiming that the taking of his raisins requires fair market value compensation at the time of the taking, not payment of what, if any, monies remain after the government's taking and subsequent sale. The Court held that holding a contingent interest (something less than fair market value) in the confiscated raisins wasn't sufficient compensation. The Court also held that this program can't be justified as a "condition" or "tax" to engage in farming — what the Court called the "let the farmer sell wine instead of raisins" option. *Horne* is an interesting decision that provides a succinct overview of takings law.

Note

In *CBIA v. City of San Jose, 61 Cal. 4th 435, 351 P.3d 974 (2015)*, the California Supreme Court upheld an inclusionary zoning regulation requiring that any development with more than twenty dwelling units set aside fifteen (15%) percent of the units as affordable housing. The California Court found that the ordinance is not an "exaction." The Court further found that the ordinance promotes new affordable housing throughout the community, is reasonably related to the broad general welfare, and, therefore, a valid exercise of the police power. There is a pending petition for certification to appeal the California Court's decision to the U.S. Supreme Court. It will be interesting to see if the U.S. Supreme Court grants the petition whereby we may have a decision from our highest court on this important issue in the near future.