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**SUPREME COURT BLOCKBUSTERS AND THE
ANNUAL UPDATE ON
MISSOURI LAND USE CASES**

**PRESENTED TO THE
MISSOURI MUNICIPAL ATTORNEYS' ASSOCIATION
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SYNOPSIS OF CASES

SUPREME COURT OF THE UNITED STATES

I. *St. Johns River Water Management District v. Koontz (Pending Decision).*

A. Facts: Koontz owned a parcel of land in Orange County, Florida. All but approximately 1.4 acres of the land was situated within a habitat protection zone and subject to the authority of the St. Johns River Water management District ("St. Johns"). In 1994, Koontz sought a permit from St. Johns to develop approximately 3.7 acres of his parcel into commercial space. St. Johns agreed to allow Koontz to develop the land if he (Koontz) agreed to either (1) reduce the size of his development to 1 acre and deed the remaining acreage to St. Johns or (2) improve government lands located several miles from the property. The issuance of the permit was, essentially, conditioned on Koontz's agreeing to mitigate the damage to the land. Koontz did not agree to either of St. Johns' proposed plans and, subsequently, St. Johns denied the permit. Koontz sued St. Johns in Florida state court; he claimed that St. Johns had essentially effectuated an uncompensated government taking by requiring Koontz to obtain a permit attached with the above mentioned conditions. The Florida circuit court agreed with Koontz and awarded him damages; the Florida appellate court affirmed the circuit court's decision. St. Johns appealed to the Supreme Court of Florida ("Florida"). Although Florida recognized the import of the decisions in *Nollan v. California Coastal Commission* and *Dolan v. City of Tigard*, it ultimately determined that an exaction, that is, a unconstitutional government taking based upon the issuance of a conditional permit, only occurred when a permit is actually issued and, in exchange for the issuance, the private land owner is actually required to dedicate land to the public. Florida held that an exactions analysis was not proper since St. Johns had denied the permit and also based on the fact that no land was ever actually taken.

B. Holding: The question presented to the Supreme Court of the United States was whether the essential nexus and proportionality tests set out in *Nollan* and *Dolan* apply to an exaction that takes the form of a government demand to pay money. The Supreme Court also was presented with whether the holdings in *Nollan* and *Dolan* apply to permits that are denied because a land owner did not accede to a permit condition. Justice Alito delivered the opinion of the Court that held that Florida could not avoid a *Nollan* and *Dolan* analysis (the "test") by denying, rather than approving, a conditioned permit. Further, the Court held that exactions involving the payment of monies must also satisfy the test to jive with the constitutional requirements mandated by the Fifth Amendment and the *Takings Clause*.

In Section II-B of the opinion, the Court addressed the applicability of the test to permits that are approved or denied. Under the unconstitutional conditions doctrine, a government imposed condition, which impermissibly burdens the constitutional rights by coercely withholding benefits, violated the takings clause and would "effectively render *Nollan* and *Dolan* a dead letter." It is of no consequence whether the government was seeking to impose a condition precedent or subsequent. Applying the doctrine to the case at bar, Justice Alito reasoned that, although no property was actually taken, the denial of the development permit by St. Johns had the effect of denying Koontz his constitutional right not to have property taken without just compensation. Therefore, the denial of the permit actually restrained

Koontz's rights as a land owner and, thus, sufficed as a cognizable constitutional injury. The court rejected, as it has historically, the argument that if the government has no duty to confer a benefit at all, it can decline to grant the benefit because of a refusal to give up a constitutional right.

The Court refused to address numerous state law issues, including the appropriate remedy for a *Nollan/Dolan* violation and the Supreme Court of Florida's application of Florida procedural law, but remanded the case to the Florida court to decide those issues. Nor did the Court address St. Johns' argument concerning the alleged viable and constitutional alternative requiring Koontz to develop only 1 acre of land as opposed to 3.7 acres of land. Among the issues the Court did not address were whether a Florida law authorized damages for unconstitutional conditions claim like the one here alleged and whether the demands for property were too indefinite to contravene *Nollan/Dolan*. Importantly, the court made clear that "so long as a permitting authority offers the landowner at least one alternative that satisfies *Nollan* and *Dolan*, the landowner has not been subjected to an unconstitutional condition."

In Section III, the court discussed the question having the greatest consequences from local governments: whether an obligation to pay money, as a condition of development approval, can ever constitute a taking. The Florida Supreme Court had held that it may not. It had based its holding on the interpretation of *Eastern Enterprises v. Apfel*, 524 US 498 (1998), which was a plurality opinion in which the concurring and dissenting justices had argued that "the takings clause does not apply to government imposed obligations that do not operate upon or alter an identified property interest." *Id.* at 540. A great many commentators, including me, on numerous occasions, had written and argued that this case stood for the proposition that general monetary exactions are not subject to the Fifth Amendment takings clause but only to the Fourteenth Amendment substantive due process, rationale basis, analysis.

Unfortunately, the court did not agree with the experts.

The court claimed that argument was based on a 'mistaken premise.' It concluded that the monetary demand did "operate upon ... an identifiable property interest" by demanding an owner of specific property to make a monetary payment. The court said it "burdened petitioner's ownership of a specific parcel of land." It went on to say: "The fulcrum this case turns on is the direct link between the government's demand and a specific parcel of real property."

In concluding its analysis, the court went to great lengths to dispute the dissent and respondent's argument that the holding blurs the line between takings and taxation. It also declined to decide "at precisely at what point a land-use permitting charge denominated by the government as a 'tax' becomes so arbitrary ... that it is not the exertion of taxation but a confiscation of property."

Justice Kagan delivered the dissent; she was joined by Justices Ginsburg, Breyer and Sotomayer. The main thrust of the dissenting opinion was focused on the constitutionality of monetary exactions. The dissent characterized the majority opinion on this as "running

roughshod over *Eastern Enterprise v. Apfel*. Justice Kagan agreed with the Supreme Court of Florida, that, Koontz's property was never actually taken and the obligation to pay the State of Florida did not actually affect a specific and identifiable property right. The obligation to pay merely imposed an obligation to perform an act that happened to cost money; it did not constitute a taking. In Section II of the dissenting opinion, Justice Kagan discussed the applicability of the *Takings Clause* to this case in particular; a case where no property was, in the traditional sense, taken. The government, she opined, acted within its authority during the permitting process and did not illicitly coerce or unlawfully demand anything of Koontz. Finally, in Section II-B of the dissent, Justice Kagan notes that, even if monetary exaction are a takings, and even if St. Johns had imposed an unlawful and unconstitutional condition, the most Koontz could ask for would be for the invalidation of the condition. The dissenters did not believe that Koontz was entitled to compensatory damages for the simple fact that, as they saw it, no taking had actually occurred and, therefore, Koontz had no right to demand just compensation.

II. *Arkansas Game and Fish Commission v. United States* (Decided December 4, 2012).

Facts: The Arkansas Game and Fish Commission ("Commission") is a state entity that owns the Dave Donaldson Black River Wildlife Management Area ("Management Area") in northeast Arkansas. The Management Area is home to various species of trees and wildlife; the Commission utilizes the area as a wildlife preserve, hunting preserve and as a source of timber.

The Clearwater Dam was constructed by the U.S. Army Corps of Engineers in 1948; it is located 115 miles north of the Management Area. The Water Control Manual, adopted by the Corps shortly after the construction of the Dam, controls the release of water from the Dam into the Black River.

In 1993, the Corps adopted a planned deviation from the Water Control Manual to provide a longer harvesting period for area farmers. The deviation called for slower release of water from the Dam during certain periods, followed by reciprocal periods of high water release. The Corps approved similar deviations annually from 1994 to 2000. During the periods of high water release, the Management Area experienced significant downstream flooding throughout the tree growing season. As a result of the flooding, many trees in the Management Area became saturated and were eventually destroyed or significantly degraded. After repeated complaints from the Management Area and an investigation by the Corps in 2000, the deviations from the Water Control Manual were permanently ceased.

The Commission brought an action against the United States in the Court of Federal Claims. Although the flooding occurred only during intermitted periods and only for six years, the Commission claimed that the subsequent damage resulted in a permanent change in the character of the Management Area. The Commission further claimed that the damage to the Management Area constituted a government taking and demanded compensation; the Court of Federal Claims agreed with the Commission, ruling in their favor, and assessed damages accordingly. On appeal, the Federal Circuit reversed the decision stating that flooding can only represent a taking if "permanent or inevitably recurring."

B. Holding: The question presented to the Supreme Court of the United States was whether government actions that impose recurring flood invasions must continue permanently to take property within the meaning of the *Takings Clause*. Justice Ginsburg delivered the opinion of the Court that held that temporary flooding of this sort does constitute a taking under the *Takings Clause*, reversing the decision in the Federal Circuit.

In Section II, Justice Ginsburg discussed established flooding-as-taking precedent. In 1872, the Court ruled that permanently flooded property was taken, within the meaning of the *Takings Clause*, and compensable. Later precedent established that regularly recurring flooding constituted essentially the same type of taking. In 1950, the Court first ruled that even temporary government action giving rise to interference with enjoyment of the land could constitute an actionable government taking. In Section II, essentially, Justice Ginsburg suggests a direct analogous link between established precedent and the temporary flooding in this case. In Section III, the government defendant advocates for a temporary flooding exception to the *Takings Clause*. However, the Court disregards the government's argument; established precedent requires each takings case to be decided on the particular facts and not on "blanket" exceptions. On the facts of this case, the Court concluded that the permanent damage caused by the temporary flooding was not excepted from the *Takings Clause* and did in fact constitute a compensable government taking.

III. *Horne v. U.S. Department of Agriculture* (Decided June 10, 2013).

A. Facts: The Agricultural Marketing Agreement Act of 1937 ("AMAA") grants the Federal Government power to regulate raisin growers in the states; it requires growers to hand over a set quantity (tonnage) of their raisins annually. In 1949, the U.S. Secretary of Agriculture released the California Raisin Marketing Order, establishing the Raisin Administrative Committee ("RAC") and requiring all raisin "handlers" to contribute to federal raisin reserves, which are either sold domestically, internationally, or given away to regulated secondary markets. The RAC does not deal directly with raisin "producers," but rather only regulates "handlers," which are generally defined as growers who place their raisins directly into the commercial market. Under the Marketing Order, raisin *handlers* are paid by the government for "free-tonnage" raisins, which are sold domestically. Raisin *handlers* are compensated for "reserve-tonnage" raisins only after the RAC covers its administrative costs and any other costs incurred while selling the reserve raisins.

Appellants Marvin and Laura Horne (the "Hornes") are California raisin growers. In 2001, the Hornes, in an effort to avoid contributing to the "reserve-tonnage," established a raisin processing operation which cleaned, stemmed, sorted, and boxed raisins for a fee. From 2001-2004, the Hornes refused to set aside "reserve-tonnage" raisins, refused to pay RAC assessments, and refused to allow RAC inspection of their raisins. In 2004, the federal government initiated administrative proceedings against the Hornes and imposed over \$690,000 in fines and assessments against them. On appeal, an administrative judge found that the Hornes were *handlers* and affirmed the penalties and assessments. The Hornes filed for judicial review in the U.S. District Court for the Eastern District of California, which affirmed the administrative decision as to the Hornes' categorization as *handlers* and rejected the Hornes' contention that the "reserve-tonnage" constituted an uncompensated government taking. Subsequently, the Ninth Circuit Court of Appeals affirmed the decision as related to

the categorization as *handlers*. However, the Ninth Circuit refused to rule on the takings defense and concluded that it lacked jurisdiction to do so, that is, in their capacity as *producers*, the Hornes would have to file their takings claim in the Court of Federal Claims.

B. Holding: The question presented to the Supreme Court of the United States was whether the Ninth Circuit erred in determining that it lacked jurisdiction to rule on the Hornes' takings defense. Justice Thomas delivered the opinion of the Court that held that the Ninth Circuit had jurisdiction to adjudicate the takings defense raised by the Hornes as *handlers*. The Court reversed and remanded the case for further proceedings.

In Section II-A, the Court discussed that, since the fines and assessments were levied against the Hornes in their capacity as *handlers*, their takings defense should be decided in a similar capacity. Simply because the Hornes claimed to be *producers* did not entitle them to that status, especially in light of the administrative and District Court decisions, both of which labeled the Hornes as *handlers* and not *producers*.

In Section II-B, the Court determined that the Hornes had exhausted their administrative remedies in an effort to redress their alleged injury. Further, the Court found that the AMAA displaced the Tucker Act (the Tucker Act requires some takings claims to be brought in the Court of Federal Claims). In Section II-C, Justice Thomas concluded by stating that the Ninth Circuit had the power to adjudicate the takings claims since the AMAA did not preclude *handlers* from raising constitutional claims in their defense. He also stated that it would make little sense to have *handlers* pay a fine in one court, then seek reimbursement in another court. Accordingly, the case was remanded to the Ninth Circuit for further consideration.

IV. *McBurney v. Young* (Decided Apr. 29, 2013).

Plaintiffs, non-Virginia citizens, sued Virginia state officials (collectively, "Virginia") after their request for records were denied under Virginia's Freedom of Information Act ("Act"). Plaintiffs sought declaratory and injunctive relief for violations of the *Privileges and Immunities Clause* and the *Commerce Clause*. On motion for summary judgment, the Court of Appeals for the Fourth Circuit granted judgment in favor of Virginia. The Supreme Court of the United States affirmed the Fourth Circuit's decision. The Court found that most of the records sought by Plaintiffs were publically available by other means. Further, the Court found that the Act did not deprive non-Virginia citizens' access to Virginia's public records. Although the Act did provide a service that was related to Virginia citizenship, it did not meaningfully impact interstate commerce, and, instead, the Act provided a service that was not otherwise available.

IV. A. *City of Arlington, Texas v. FCC* (Decided May 20, 2013).

A. Facts: The FCC has been empowered by Congress with the authority to regulate the communications and telecommunications industries. Pursuant to the Telecommunications Act of 1996, the FCC has the power to enact rules and regulations that govern the placement, construction, or modification of personal wireless service facilities (i.e. cell towers). In 2009, in response to a trade association petition, the FCC issued a Declaratory Ruling that defined the "reasonable period of time" in which state and local governments were required to act on

wireless facility placement applications. The Declaratory Ruling declared that state and local governments were to process collocation applications (i.e. an application for the modification of an existing cell tower) within 90 days and were to process all other applications within 150 days of filing.

The cities of Arlington and San Antonio, Texas, petitioned the Fifth Circuit Court of Appeals for judicial review of the FCC's ruling. Under the precedent of *Chevron*, the Fifth Circuit upheld the FCC's ruling, finding that the FCC's interpretation of its own regulation was permissible (and not clearly erroneous). From the Fifth Circuit decision, the government petitioners filed a writ of certiorari with the Supreme Court of the United States.

B. Holding: The question presented to the Supreme Court of the United States was whether an administrative agency, under the *Chevron* framework, may utilize its own general authority to interpret its own rules and regulations. Justice Scalia delivered the opinion of the Court that held that deference should be given to the interpretation of an agency's own regulations if the applicable regulation or statute was a product of or concerned that agency's vested authority (or if that regulation or statute was designed to limit that agency's authority). The Court upheld the determination of the Fifth Circuit.

In Section II-B, Justice Scalia admonishes those who utilize "jurisdictional" references to describe the extent of an agencies power; instead, Scalia and the majority rely exclusively on the extent to which Congress has vested authority in the applicable federal agency. In this case, the FCC had been given the authority, as a matter of federal law, to require state and local governments to process wireless facilities permits within a "reasonable period of time." In Section II-C, the Court explains that, under *Chevron*, deference should be given to an agency's interpretation of any statute which it is charged with administering, unless Congress has expressly spoke on the matter. In this case, since Congress had not otherwise defined a "reasonable period of time" and since Congress had expressly empowered the FCC to promulgate the law under the Telecommunications Act of 1996, the Court gave deference to FCC's interpretation.

In Section III-A, in response to federalism arguments, the Court notes that this case was "indisputably" about the power to interpret federal law. The question was not in regard to whether states should regulate or whether the federal government should regulate, but whether a federal agency would regulate or whether federal courts would regulate. Specifically, the question involved with whom lied the responsibility for interpretation of the Telecommunications Act of 1996.

Justice Breyer concurred in the opinion in part and concurred in the judgment. In his concurring opinion, Justice Breyer agrees with the majority that agencies act as "gap-fillers" where Congress has left a gap to fill. In contrast, however, Justice Breyer discussed the judicial branch's role in determining whether the "gap" actually exists, that is, whether the language of the applicable statute or regulation is ambiguous, whether Congress had empowered the applicable agency, and whether the interpretation of the applicable statute or regulation is a permissible one.

Chief Justice Roberts disagreed with the majority and filed a dissenting opinion; Justices Kennedy and Alito joined the Chief Justice. The Chief Justice's dissent is marked by the notion that deference should not be automatic, that is, the courts should decide whether an agency is granted deference and that power should not be vested with the agencies themselves. The dissent discussed the fundamental notion of separation of powers; it also cited various cases where the courts had determined that an agency should not be granted deference, i.e. where the courts had limited an agency's interpretive powers. In Section V and VI of his dissent, the Chief Justice, essentially, states that it is the role of the courts to determine, from the outset, whether Congress has delegated authority to an agency before any deference is given.

V. *Fisher v. University of Texas at Austin* (Decided June 24, 2013).

Race is a factor used to determine the admissibility of undergraduate applicants to the University of Texas at Austin. After being denied admission to the University, Plaintiffs sought to challenge the University's admissions process on constitutional grounds. Plaintiffs are Caucasian and residents of the State of Texas. On motion for summary judgment, the U.S. District Court for the Western District of Texas granted the motion in favor of the University. On appeal, the Court of Appeals for the Fifth Circuit affirmed the District Court's decision. The Fifth Circuit, relying on *Grutter v. Bollinger* and *Gratz v. Bollinger*, as well as *Regents of University of California v. Bakke*, found that the University's admissions process survived the strict scrutiny applied to state-based racial classifications. Specifically, the Fifth Circuit found that the University had a compelling interest in attaining a diverse campus, the use of race was utilized in good faith, and that the University's means of achieving their interest was narrowly tailored. The Fifth Circuit gave deference to the University in determining the narrow tailoring requirement. The Supreme Court of the United States determined that the Fifth Circuit had misapplied the holdings in *Grutter*, *Gratz*, and *Bakke*, and, accordingly, reversed the decision. The Supreme Court found that the Fifth Circuit, in holding the University to a "good faith" standard and by giving deference to the University's expertise regarding the narrow tailoring of the admissions process, had erred in its application of the strict scrutiny standard. The Supreme Court noted that, under strict scrutiny, a court must perform a rigorous and searching analysis to determine if a race-based admissions process aligns with the Fourteenth Amendment's mandate of equal protection. In this case, the Fifth Circuit failed to hold the University to the higher, strict standard warranted by case precedent. The Supreme Court remanded the case to the Fifth Circuit. On remand, the University will have to prove that its admissions process is narrowly tailored to the achievement of educational diversity.

VI. *Shelby County v. Holder* (Decided June 25, 2013).

Plaintiff Shelby County ("County") sought to have various provisions of the Voting Rights Act ("VRA") declared unconstitutional. The County sued U.S. Attorney General Holder in the U.S. District Court for the District of Columbia seeking to declare the VRA unconstitutional and also to permanently enjoin the Attorney General from enforcing the VRA. On motion for summary judgment, the District Court granted judgment in favor of the Attorney General. On appeal, the Court of Appeals for the D.C. Circuit affirmed the decision rendered in the District Court. The Court of Appeals, in considering the constitutionality of

the VRA, looked at the legislative history of the Act and held that, in enacting the legislation, Congress acted pursuant to the provisions of the Fourteenth and Fifteenth Amendments to the Constitution. Although slightly ambiguous, the Court of Appeals held that Congress acted to prevent racial discrimination in voting while acknowledging constitutional limitations and, thus, the Court of Appeals gave deference to the VRA's legislative purpose. In reversing the decision rendered in the Court of Appeals, the Supreme Court of the United States declared the various provisions of the VRA related to preclearance (i.e. requiring states to seek approval from the U.S. Congress to pass legislation related to election regulation) to be unconstitutional. Specifically, the majority noted that the formula used to determine which jurisdictions were subject to preclearance had not changed since the 1970s and, since then, the Court held, circumstances had changed dramatically as to warrant a change in the preclearance formula as well. Accordingly, the Court reversed the decision and struck down the preclearance formula utilized by the VRA.

VII. *Hollingsworth v. Perry* (Decided June 26, 2013).

Plaintiffs are same-sex couples who sued various state and local officials in the U.S. District Court for the Northern District of California. Plaintiffs contended that California's "Proposition 8" was unconstitutional and in violation of the Fourteenth Amendment. Proposition 8 states that, in California, a marriage will only be legally recognized between a man and a woman; the proposition was adopted by citizen initiative. At trial, the District Court entered judgment in favor of the Plaintiffs. The Court of Appeals for the Ninth Circuit affirmed the District Court's decision, holding that the proposition violated the *Equal Protection Clause* of the Fourteenth Amendment. Proposition 8 was proposed to further a variety of interests, including promoting childrearing and responsible procreation, but the Court of Appeals determined that the proposition did not actually further any of California's proffered interests. Instead, the Court of Appeals inferred that the proposition was enacted because of a general disapproval of gays and lesbians as a class and was therefore unconstitutional. The Supreme Court of the United States vacated the Ninth Circuit's decision and remanded the case. The Court found that the defendants, proponents of Proposition 8, lacked standing. Specifically, the Court found that the proponents of Proposition 8 had no direct stake in their own appeal and suffered no cognizable injury, but, rather, sought only constitutional vindication. This, the Court noted, did not rise to the level of "injury" and was insufficient to confer standing. Since the Ninth Circuit's judgment was vacated, however, the District Court's decision to invalidate Proposition 8 was indirectly upheld.

VIII. *Windsor v. United States* (Decided June 26, 2013).

Plaintiff is the surviving spouse of a same-sex couple married in Canada. In 2009, the couple was residing in New York when Plaintiff's spouse died; Plaintiff sought and was denied the benefit of the spousal deduction for federal estate taxes because her marriage was not recognized by the Federal Government under the Defense of Marriage Act ("DOMA"). DOMA defines, for federal purposes, a marriage as that between a man and a woman. Plaintiff brought an action, alleging that DOMA violated the *Equal Protection Clause*, against the United States in the U.S. District Court for the Southern District of New York. Applying intermediate scrutiny, the District Court found that the applicable section of DOMA was unconstitutional, that is, the District Court determined that the government's gender

classification was not substantially related to an important government interest. The Court of Appeals for the Second Circuit affirmed the District Court's decision. The Supreme Court of the United States affirmed the decisions rendered below. First, the Court noted that DOMA attempted to regulate a matter that was undoubtedly reserved for the states; DOMA conflicted with states' sovereign authority and its interest in protecting its own citizens. A state was within its authority to, for example, protect its citizen's right to same-sex marriage, and the federal government could not preempt that authority through legislation. Next, the Court held that DOMA violated the very principles of equality that the Constitution seeks to uphold. As the District Court found, the Supreme Court also found DOMA to be manifestly unequal to an identifiable subset of citizens; citizens married in state-sanctioned marriages. Accordingly, the Court affirmed the decisions rendered below on essentially the same grounds.

IX. *Los Angeles County Flood Control District v. NRDC, Inc.* (Decided January 8, 2013).

A. Facts: The Los Angeles County Flood Control District ("LAC-FCD") operates a storm water drainage system. Due to the fact that storm water is often heavily polluted, the Clean Water Act and its various implementing regulations require that municipalities that operate drainage systems, similar to the one operated by the LAC-FCD, receive a permit to discharge storm water into navigable waters of the United States. The LAC-FCD obtained the applicable permit in 1990, and the permit has been continually renewed since that time.

The NRDC and Santa Monica Baykeeper (collectively, "NRDC") sued the LAC-FCD in federal court alleging that the LAC-FCD had been violating the terms of its storm water discharge permit. Specifically, the NRDC claimed that the LAC-FCD had been "discharging pollutants" unlawfully and in violation of the Clean Water Act. The NRDC based their allegations on the fact that monitoring stations along the Los Angeles and San Gabriel Rivers had repeatedly found water quality standards exceeded for a number of pollutants, including higher levels of aluminum, copper, cyanide, fecal bacteria, and zinc within the waters of both rivers. The monitoring stations on both rivers are located in man-made concrete channels which transport water from an upstream source to a downstream portion of the same waterway.

On a motion for summary judgment, the U.S. District Court held for the LAC-FCD, finding that there were a number of entities that could have contributed to the pollution in both rivers and that the evidence was insufficient to hold the LAC-FCD accountable. The Ninth Circuit Court of Appeals reversed the District Court's decision. The Ninth Circuit found that, since the LAC-FCD controlled the concrete waterways where the pollutants were found, they should be liable for the pollutants in the waterway.

B. Holding: The question presented to the Supreme Court of the United States was whether water flowing from a naturally occurring portion of navigable water of the United States through a concrete channel or engineered improvement to another portion of the same body of water constitutes as a "discharge of pollutants" under the Clean Water Act. Justice Ginsburg delivered the opinion of the Court that held that the transfer of polluted water from one body of water to another portion of the same body of water does not constitute a "discharge of pollutants" under the Clean Water Act. Its holding relied on the very words of the Clean Water Act, which defined a "discharge of pollutants" as "any addition of any pollutant to

navigable waters from any point source." Technically, the Court opined, the pollutants in the rivers were never added, but simply flowed from one portion of the naturally occurring waterway to another. This technicality was reinforced by precedent; previously the Court had held that the Clean Water Act only applied to pollutants discharged between "meaningfully distinct water bodies." Accordingly, the Court reversed the decision rendered in the Ninth Circuit.

X. *Lozman v. City of Riviera Beach, Fla.* (Decided January 15, 2013).

A. Facts: Fane Lozman ("Lozman") owned a floating home docked in the City of Riviera Beach, Florida ("City"). Lozman had the home towed to a City-owned marina in 2006. The floating home had no motor or steering equipment and could only practically move when towed. Lozman continued to dock his home at the marina even though he did not pay dockage fees and, on multiple occasions, the City tried unsuccessfully to evict Lozman from the marina. The City brought an admiralty action *in rem* against the floating home pursuant to the Federal Maritime Lien Act.

The federal District Court determined that the floating home was a "vessel" and, consequently, that admiralty jurisdiction was proper. After a bench trial, the District Court found in favor of the City and awarded damages. The Court of Appeals for the Eleventh Circuit affirmed the District Court's decision.

B. Holding: The question presented to the Supreme Court of the United States was whether a floating structure that is indefinitely moored, receives power and other utilities from shore, and is not intended to be used in maritime transportation or commerce constitutes a "vessel," thus triggering federal maritime jurisdiction. Justice Breyer delivered the opinion of the Court that held that since the structure in this case is not "practically" capable of water transportation then it is not a "vessel" for purposes of federal maritime jurisdiction.

Accordingly, the Court reversed the decision of the Eleventh Circuit; the Court determined that the Eleventh Circuit's "anything that floats" definition of a "vessel" was far too broad. In Section III-A, the Court proposed a "reasonable observer" test. Essentially, a structure was not to be considered a "vessel" unless a reasonable observer would consider the thing "practically" designed for carrying people or things over water; "theoretical" capability to operate as a water transport is not enough.

In Section III-B, the Court applied this objective test to Lozman's floating home. The lack of self-propulsion and steering equipment were relevant factors in the Court's analysis. The structure was not a houseboat because it had no motor. The home could not "transport" anything or anybody on its own; to move the structure required towing. Outwardly, the structure did not suggest to a reasonable observer that it was "practically" designed for water transportation. In Section III-C, the Court analyzed the statutory text and case precedent. The applicable text included the terms "artificial contrivance" and "watercraft," which the Court interpreted as meaning capable of being used practically for a specific purpose. Furthermore, in a previous decision, the Court had determined that a floating "wharfboat" was not a vessel due to the fact that it was not capable of navigation and was not used to carry freight from port to port. In Section IV, the Court concluded by dispelling the City's argument that the structure

was "actually" used for transportation and, since the structure only practically moved under tow, the Court held that the floating home was neither capable of being used or actually used for water transportation and thus was not a "vessel" under federal law.

Justices Sotomayor and Kennedy disagreed with the majority and dissented. Justice Sotomayor delivered the dissent which focused on the floating structure itself. The dissent agreed with the majority that, typically, "vessel" status is bound up in the physical characteristics of the applicable structure. However, Justice Sotomayor focused on the lack of facts in regard to the capabilities of Lozman's floating home and, thus, recommended that the Court remand the case for further fact-finding.

XI. *Decker v. Northwest Environmental Defense Center* (Decided March 20, 2013).

A. Facts: The Clean Water Act requires entities to apply for and receive permits before discharging pollutants into the navigable waters of the United States. The EPA is in charge of the issuance of these permits. Typically, logging-related entities are required to obtain permits unless excepted from the Clean Water Act's coverage. Also, entities "associated with industrial activity," which discharge storm water, are required to obtain permits.

In 2006, the Northwest Environmental Defense Center ("NEDC") filed a suit against various Oregon state officials and corporate paper and logging companies alleging that their failure to obtain permits constituted a violation of the Clean Water Act. Specifically, the NEDC alleged that storm water runoff from the use of two Oregon roads for logging activities without permits was unlawful. Prior to the NEDC action, Oregon had entered into contracts with various logging and paper companies, allowing them to utilize the roads to harvest timber from Oregon forests. On motion to dismiss, the United States District Court for the District of Oregon dismissed the complaint for failure to state a claim; the District Court concluded that the roads at issue were not "point sources" under the EPA's Silvicultural Rule ("Rule"). Under the Rule, certain activities related to logging required discharge permits, including but not limited to log sorting and log storage, and certain activities related to logging are not required to obtain a permit, such as harvesting, surface drainage, or road construction.

On appeal, the Ninth Circuit reversed the District Court's decision. Since the discharges were generally associated with logging, the Ninth Circuit concluded that they were "associated with industrial activity" and, thus, required to obtain permits pursuant to EPA regulation. Although the EPA concluded that permits were not necessary for these activities, the Ninth Circuit interpreted the regulation differently and held that the entities were operating unlawfully.

B. Holding: The question presented to the Supreme Court of the United States was whether storm water from logging roads should be considered industrial storm water under the Clean Water Act, even though the EPA had determined that it was not industrial storm water. Justice Kennedy delivered the opinion of the Court which held that the EPA acted within its authority when interpreting its own regulation; the EPA properly determined that the disputed logging activities did not require a discharge permit to operate on the Oregon roads. Accordingly, judgment rendered in the Ninth Circuit was reversed in an 8-1 decision.

The EPA interpreted "associated with industrial activity" to include activities traditional industrial sources; those activities that are fixed and permanent. The regulation's mention of "facilities" and "establishments" reinforced this finding; the EPA sought to require permits from established plants and manufacturing facilities. The EPA did not intend to require permits from "temporary, outdoor logging installations." Since the EPA's interpretation of its own regulation was not clearly erroneous, the Court concluded in Section III that the EPA's interpretation was permissible.

Further, the Court noted that the Clean Water Act was intended to work in conjunction with state law. In this case, Oregon and the EPA had worked together in deciding that permits were unnecessary for the logging activities in dispute. Therefore, the Court gave considerable deference to the decision of the Oregon state regulators.

Dissenting in part, Justice Scalia took exception with Section III of the majority's opinion. In his dissent, specifically, Justice Scalia exhibits distaste with the latitude that federal agencies are given while interpreting their own "vague" regulations. In Section II of the dissent, the Justice advocates a "most fair" reading of federal regulations and would conclude, in this case, that the logging activities were in fact covered by the Clean Water Act due to their use of artificial (man-made, not natural) means of storm water discharge.

XII. *Tarrant Regional Water District v. Herrmann* (Pending Decision).

A. Facts: Tarrant Regional Water District ("Tarrant") is located in north Texas and is responsible for supplying water to the region. In 1955, Congress allowed four states, including Texas and Oklahoma, to negotiate over the apportionment of water from the Red River Basin; the agreement, known as the Red River Compact ("Compact"), was ratified by Congress in 1980. Recently, due to an increased demand for water in north Texas, Tarrant sought to import water from Oklahoma. Oklahoma requires a permit be issued before water is appropriated from the state. Oklahoma has also enacted legislation that treats in-state and out-of-state water use differently. Further, in 2005, Oklahoma placed a five-year Moratorium on the exportation of water from the state. After applying for a permit, Tarrant sued Oklahoma in the U.S. District Court for the Western District of Oklahoma seeking to challenge the water statutes on constitutional grounds, including on the bases of the *Commerce Clause* and the *Supremacy Clause*. First, Tarrant alleged that, since Oklahoma was attempting to regulate interstate commerce, the Oklahoma water statutes unconstitutionally violated the dormant *Commerce Clause*. Second, Tarrant alleged that the Compact preempted some of the Oklahoma water statutes and, thus, they were also unconstitutional under the *Supremacy Clause*. To that effect, Tarrant argued that the Compact clearly granted Texas (and the other signatories) the right to apportion water from other signatory states. Ruling in favor of Oklahoma, the District Court found that the plain language of the Compact allowed for states within the Compact to regulate their own water supply. Essentially, the District Court interpreted the language of the Compact as allowing the states to apportion water in whatever manner they deem beneficial and, thus, Congress had narrowly consented to state regulated interstate commerce as related to water rights. Also, under the plain language of the Compact, the District Court had found that the Compact itself was not intended to supplant any state legislation relating to water regulation. Thus, the District Court found that the Oklahoma water statutes were not preempted by the Compact and were not unconstitutional under the

Supremacy Clause. Although the Court of Appeals for the Tenth Circuit elaborated on the District Court's decision, they ultimately upheld the statutes on the same grounds and affirmed the District Court's decision.

B. **Holding:** The question presented to the Supreme Court of the United States was whether Congress had granted clear congressional consent when it approved the Compact to allow Oklahoma to burden interstate commerce in water as long as consistent with the compact and whether the Compact preempted protectionist state laws that obstruct other states from accessing the water to which they are entitled by the Compact. Justice Sotomayor delivered the opinion of the Court that unanimously held that the Compact neither preempted the Oklahoma laws nor did it allow Tarrant to apportion Oklahoma's water without asking permission. The Tenth Circuit's decision was affirmed.

In response to Tarrant's argument that the Compact preempted the Oklahoma water statutes, in Section II-B, the Court began its analysis by examining the express language of the Compact. Tarrant argued that the applicable section governing cross-border rights between Texas and Oklahoma, because of its silence regarding cross-border apportionment, granted Tarrant the authority to apportion water from Oklahoma unconditionally. The Court, treating the Compact as a contract, disagreed.

First, in Section II-B(1), the Court noted the law's presumption against the intrusion on state sovereignty. Accordingly, the Court found that the Compact's silence by no means gave Tarrant the authority to intrude upon Oklahoma's sovereign authority to regulate the water within its borders.

Next, in Section II-B(2), the Court examined the customary practices employed in other interstate compacts. On the whole, other interstate water compacts contained provisions that specifically regulated cross-border water apportionment. From this the Court opined that, since the Compact did not contain an applicable cross-border provision, perhaps the Compact was not meant to allow the signatory states unfettered access to waters in other states. The Court found the express language of the contract and Tarrant's argument to be untenable. And in Section II-C, the Court held that the Compact had not created cross-border rights in Texas.

In Section III, the Court quickly dispatched of Tarrant's *Commerce Clause* arguments. Although Tarrant's reading of the Compact assumed that some of the basin's water was left unallocated and up for grabs by any of the signatory states, the Court read the Compact differently. The Court held that the Compact allocated all water to its respective signatory state unless that state was apportioning more water than it was allowed. Therefore, by enacting regulatory water statutes, Oklahoma was acting within its authority to control the water apportioned to it and did not restrain interstate commerce.

OTHER SUPREME COURT CASES

FTC v. Phoebe Putney Health System, Inc. (Decided Feb. 19, 2013).

Defendant Phoebe Putney Health System, Inc. ("Hospital Authority") proposed to purchase a Georgia hospital in a jurisdiction in which the Hospital Authority already operated. The Federal Trade Commission ("FTC") sued the Hospital Authority alleging antitrust violations. The

Hospital Authority countered by claiming that the State of Georgia had expressly granted it state-action antitrust immunity, that is, the power to act anti-competitively. The Court of Appeals for the Eleventh Circuit upheld the Hospital Authority's claim and ruled accordingly. The Supreme Court of the United States reversed the Eleventh Circuit decision. The Court found that the State did not expressly grant the Hospital Authority power to act anti-competitively and, while the State may have granted the power to impose restrictions, it did not seem inherent, logical, or ordinary that the Hospital Authority would have been granted the power to displace competition. Specifically, the Court noted that for the State to endorse such anticompetitive effects would be inconsistent with Georgia's policy of providing affordable health care to its citizens.

Dan's City Used Cars, Inc. v. Pelkey (Decided May 13, 2013).

Plaintiff vehicle owner ("Owner") sued defendant towing company ("Tower") for an alleged violation of state law regarding storing and disposing of a vehicle. A dispositive issue in the case was whether the Owner's claims were preempted by federal law; the New Hampshire Supreme Court held that the claims were not preempted by federal law. The Supreme Court of the United States unanimously held that the Owner's claims were not preempted by federal law and affirmed the decision of the New Hampshire Supreme Court. The Court found that the federal law in dispute related to the transportation of towed vehicles and not to actions that occur after the transportation of the vehicle had already been completed. In this case, Owner brought claims against Tower alleging misconduct occurring after the car had already been towed and, thus, the state law claims were not preempted by the applicable federal law.

American Trucking Association, Inc. v. City of Los Angeles (Decided June 13, 2013).

Defendants Port of Los Angeles and City of Los Angeles (collectively, "Port"), in an effort to obtain public support of an expansion to the Port's facilities, required that all trucking companies participate in a "Clean Truck Program." The Clean Truck Program required trucking companies doing business in the Port to, among other things, affix a placard on each truck with a phone number for reporting environmental or safety violation and submit an off-street parking plan to the Port. The Port required trucking companies to participate in the program or face criminal penalties for non-compliance. The American Trucking Associations, Inc. ("ATA") sued the Port claiming that the program had the "force and effect of law" and was preempted by the Federal Aviation Administration Authorization Act ("FAAAA"). The District Court and the Court of Appeals for the Ninth Circuit both held in favor of the Port and found that the program did not have the force of law because it was contractual in nature. The Supreme Court of the United States reversed the decisions below and held that the FAAAA preempted some provisions of the Port's Clean Truck Program. Specifically, the Court found that, since a violation of the program's provisions resulted in criminal penalties, the program did in fact have the force of law. The Court noted that government actors are the only parties that could utilize the "hammer" of criminal law to enforce provisions of a contract and, thus, in this instance, the Port was engaging in an act more regulatory than contractual (i.e. acting as regulator rather than market participant). Since the program had the force of law, and since the program attempted in part to regulate behavior governed by the FAAAA, the Court held that the applicable provisions of the program were preempted by federal law. The Court refused to address the Port's penalty structure due to the fact that the Port had yet to enforce any "Major" violations in regard to the Clean Truck Program.

***Arizona v. Inter Tribal Council of Arizona, Inc.* (Decided June 17, 2013).**

Plaintiffs are Arizona voters and advocacy groups who challenged the constitutionality of Arizona's Proposition 200. Specifically, Plaintiffs contended that the proposition violates the Voting Rights Act, various amendments to the United States Constitution, and the National Voter Registration Act ("NVRA"), as well as other federal laws. Proposition 200 was pass by Arizona voters; it required voters to show identification at polling places and also imposed additional requirements on Arizona voters who sought to register to vote in federal elections. The U.S. District Court for the District of Arizona held in favor of the State of Arizona. Plaintiffs appealed from the judgment and the Court of Appeals for the Ninth Circuit reversed the decision in part and affirmed in part. The Court of Appeals affirmed the District Court's decision in regard to identification at the polling places. The Court of Appeals found that the showing of identification was neither a "tax" or "fee" and that it was not in violation of the Twenty-fourth Amendment. The Court of Appeals found that, under the NVRA, the requirement that Arizona voters be subject to additional provisions in order to vote in a federal election was preempted by federal law. The Supreme Court of the United States affirmed the decision. The Court held that the NVRA required states to utilize a uniform federal form to register voters for federal elections and that the states were preempted by the federal law. Further, the Court noted that the Constitution allowed the federal government, in limited circumstances, to regulate the administration of congressional elections.

United States Court of Appeals
Eighth Circuit

I. *Phelps-Roper v. City of Manchester, Mo.*, 697 F.3d 678 (8th Cir. 2012).

A. Facts: Plaintiffs Shirley and Megan Phelps-Roper ("Plaintiffs") are members of the Westboro Baptist Church. As members of the church, they regularly engage in demonstrations at military funerals to protest against homosexuality in America; they believe that God punished America and its citizens for tolerating homosexuality. In 2007, the City of Manchester ("City"), Missouri, enacted an ordinance that barred picketing and protesting within 300 feet of a funeral or burial service during or within one hour before or after that funeral or burial service. The ordinance barred only activities that were designed to disturb or disrupt funerals or burial services and was not designed to affect protest activities inadvertently within the 300 foot prohibition zone. Plaintiffs sued the City seeking to enjoin it from enforcing its ordinance; they alleged that, although they had yet to protest in the City, the ordinance could potentially and unlawfully restrict their First Amendment right of free speech and, thus, cause injury. The U.S. District Court for the Eastern District of Missouri granted summary judgment in favor of the Plaintiffs deciding that the ordinance unlawfully restrained speech and was presumptively invalid. The City appealed the decision to the Eighth Circuit Court of Appeals.

B. Holding: On appeal, the Eighth Circuit reversed the District Court's decision. First, the Court of Appeals addressed whether the ordinance was content-restrictive or content-neutral. While the District Court found that the ordinance would prohibit any protest, within 300 feet of a burial service, that was disruptive, the Court of Appeals took the opposite stance. The Court of Appeals agreed with the City that the ordinance was designed to prohibit any protest aimed

specifically towards the burial service with the intention to disrupt regardless of the protest's message or content. Since the ordinance was, on its face, content-neutral, the Court of Appeals undertook an intermediate scrutiny analysis to decide whether the ordinance was a constitutionally permissible exercise in speech regulation.

To survive intermediate scrutiny, the ordinance had to be related to a significant government interest, it must be narrowly tailored to achieve this interest, and it must allow ample alternatives for communication of the message that the government seeks to restrain. The Court of Appeals found that Manchester had a significant interest in protecting funeral attendees, that is, noting the sacred nature of burial services, Manchester had a legitimate interest in protecting the peace and privacy of attendees for a limited time in a limited space. Also, the ordinance was narrowly tailored to achieve Manchester's proffered interest, that is, the restriction was for a defined and limited duration at a set, delineated location, and did not "float" or unreasonably restrict speech as defined by prior precedent. Further, Manchester's ordinance left open ample alternatives for protesters to communicate their message through alternative channels, such as by mail, flyer, electronically, etc. The ordinance restrained only protesting activities within a defined area and did not restrain most other forms of communication. Accordingly, the Court of Appeals vacated the District Court's decision and entered judgment for the City.

Court of Appeals of Missouri

I. *Ballpark Lofts III, LLC v. City of St. Louis*, No. ED98851 2013 Mo. App. LEXIS 134 (Mo. Ct. App. Jan. 29, 2013).

A. Facts: Pursuant to St. Louis City Ordinance, any application for demolition of a Historic Place or a building located in a Preservation Review District must be filed with the Cultural Resources Office ("CRO"). Ballpark Lofts III, LLC ("Ballpark Lofts") owned a building located in the Cupples Warehouse District in the City of St. Louis. The building was listed in the National Register of Historic Places and was also within a Preservation Review District. Ballpark Lofts wanted to redevelop the building and applied for a demolition permit from the CRO. The CRO denied the permit and Ballpark Lofts appealed the denial to the City of St. Louis Preservation Board (the "Board"). The Board determined, among other things, that the building was in serviceable condition and that it would be economically feasible to redevelop the building without economic hardship. Subsequently, the Board upheld the CRO's denial; Ballpark Lofts filed a petition for review of the Board's decision with the Circuit Court of the City of St. Louis. At trial, the Circuit Court upheld the Board's decision and, again, Ballpark Lofts appealed the decision. On appeal, Ballpark Lofts sought to have the Court of Appeals of Missouri for the Eastern District review the decision rendered by the CRO and the Board. The Court of Appeals upheld the Board's decision to deny the permit and affirmed the decisions rendered below.

B. Holding: The Court of Appeals reviewed the Board's decision to determine whether it was based on competent and substantial evidence. Ballpark Lofts contended that the building was in a state of disrepair and that it could not be redeveloped without incurring undue

economic hardship. Ballpark Lofts also argued that the building was unstable and a danger to public safety.

First, the Court of Appeals addressed the condition of the building. The St. Louis ordinance requires a permit to be issued if portions of the applicable building are unsound; soundness being determined by an external inspection of the building's walls and roof. Although the condition of the interior of the building was questionable, an inspection conducted by the Board found that the exterior portions of the building were sound. Furthermore, although portions of the roof were dilapidated, those portions were salvageable. The Board provided evidence of the building's soundness and also provided examples of similar buildings that were salvaged rather than demolished. The Court of Appeals determined that the Board's decision as to the condition of the building was based on substantial and competent evidence.

Next, the Court of Appeals addressed Ballpark Lofts' potential economic hardship. The St. Louis ordinance allows the Board to consider the economic hardship incurred by the property owner if the demolition permit were to be denied. The Board had denied the permit in part because Ballpark Lofts' cost estimations were "vague" and supported by insufficient evidence. Previously, a Ballpark Lofts representative had testified that it would cost upwards of \$10 million to stabilize the building; the representative did not testify as to Ballpark Lofts' ability to incur this cost nor did he testify as to the viability of such an investment. The Court of Appeals agreed with the Board's decision and held that Ballpark Lofts' testimony as to their potential economic hardship was insufficient at best.

Finally, the Court of Appeals considered the building's potential danger to public safety and welfare. Since the Board had determined the building to be sound, the Court of Appeals concluded that the Board must have accounted for public safety and welfare in making their decision.

II. *Engelge v. City of Warrenton*, 378 S.W.3d 410 (Mo. Ct. App. 2012).

A. Facts: The City of Warrenton ("City"), Missouri, is located within the boundaries of Warren County ("County"). Both the City and the County are imbued with certain governmental powers from the State of Missouri; this power is granted pursuant to Missouri statute. The City utilized this power to enact ordinances requiring those wishing to construct new buildings to pay a fee and obtain a building permit. The County, on the other hand, has been granted the authority to construct buildings anywhere within County limits. In 2009, the City discovered that the County had been planning on constructing a new administrative building within City limits. The City contacted the County and notified the County that, to proceed, it must obtain a building permit from the City. Without obtaining a permit, the County began construction within City limits. A City inspector visited the construction site three times before the County agreed to halt construction; the inspector issued a municipal ordinance violation on the third visit. The County applied for a permit, the permit was approved and the County resumed construction. Subsequently, the County filed a petition with the Circuit Court of Warren County seeking a declaratory judgment. Essentially, the County sought to have a Missouri court declare that a city could not regulate a county. Both parties filed motions for summary judgment and the Circuit Court granted summary judgment in favor

of the City. The County appealed the decision to the Court of Appeals of Missouri for the Eastern District.

B. **Holding:** In reviewing the grant of summary judgment, the Court of Appeals looked specifically at the statutory language and legislative intent regarding the State's grant of power to both the City and the County. The County relied on Missouri Revised Statutes sections 49.270 and 49.470, which appropriated the County the power to control property and construct buildings within the County, respectively. The City relied on Missouri Revised Statutes section 79.110, which appropriated the City general police powers to maintain the health and safety of its citizens. Further, as the Court of Appeals noted, the City has also been granted to power to regulate construction within City limits, contained in Missouri Revised Statutes section 79.450. The City's power to regulate construction within City limits was, essentially, an exercise of its police powers.

The Court of Appeals, while interpreting the statutory language, found that the General Assembly had granted the City with police powers that were without qualification. The Court of Appeals also noted that there was no Missouri law (statute or case) where a third-class county was exempt from a city's building codes. The broad statutory language, the Court of Appeals held, gave the City wide authority to control the County's construction within the City limits. While the City had to respect the County's statutory right to build without conflict, the County was required to abide by the City's building codes and permitting processes.

III. *Curry Inv. Co. v. Bd. Of Zoning Adjustment of Kan. City*, No. WD75479 2013 Mo. App. LEXIS 564 (Mo. Ct. App. May 7, 2013).

A. **Facts:** The Board of Zoning Adjustment of Kansas City ("Board") placed a condition on the issuance of a special use permit for the operation of a pawn shop by Curry Investment Company ("Curry"). The Board required that, to operate the pawn shop, Curry must remove two pre-existing, nonconforming outdoor advertising signs. Although Curry had met all the requirements necessary for approval of the special use permit, the Board nevertheless refused to issue the permit while the signs still stood. Curry brought an action seeking to invalidate the conditions placed upon the issuance of the special use permit; the Circuit Court of Clay County, Missouri, ruled in favor of Curry and invalidated the conditions. On appeal, the Court of Appeals of Missouri for the Western District upheld the Circuit Court's decision.

B. **Holding:** The Court of Appeals affirmed the modification of the Board's decision; the Board was required to issue to Curry the permit without conditions. Since Curry fulfilled all the requirements necessary for approval, the Board had no justified reason to attach conditions to the issuance of the special use permit. If the requirements for issuance are met, the Court of Appeals noted, the permit must be granted; the issuance of a permit was a ministerial act and not a discretionary act. Further, the Board was unreasonable to require Curry to remove the signs. The Board had no authority to condition approval on removal of the signs because the signs represented an existing, although nonconforming, use and, as such, a municipality is without power to require the cessation of an established use of land.