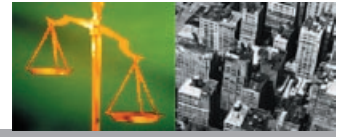


Planning & Law



APA

American Planning Association | Planning and Law Division Newsletter

Late Summer 2006

News, Announcements and Information

From the Chair



Greetings from Baltimore, Maryland as I look out my office window now at the waterfront development currently underway along the shoreline of the Inner Harbor. The rapidly changing skyline in this urban area reminds me of the strategic interplay between the architectural, engineering, legal and planning disciplines necessary to bring any successful development project to fruition. No matter which discipline you call home, we all benefit when the strategic players have an understanding of design, development and planning that crosses disciplines.

The current membership of the Planning and Law Division appears to exhibit the advantageous trait of cross-discipline appreciation. While our division's name may imply that we are the home to lawyers, the majority of our membership do not work in the legal field. The results of the 2006 PLD membership survey reported that while approximately 25% of members are employed in either a public sector or private sector legal position, over 60% of members surveyed are employed in the urban/land use planning field. The remaining 15% of members polled reported to work in a collection of fields including environmental planning, transportation planning, engineering, landscape architecture, and architecture. A division is as strong as its members so PLD certainly benefits from the professional diversity in its members!

So how do we tap into this strength and how can we help serve our members? In 2006, PLD will continue to (i) sponsor the successful and competitive Annual R. Marlin Smith Student Writing Competition; (ii) seek continuing legal education credits for participants of the annual and well attended Bettman Symposium during the APA National Conferences; (iii) award two PLD Fellowships to students of planning and law each academic semester; (iv) coordinate with APA's Amicus Committee to ensure our members have clear and concise information on developments in legal areas such as environmental, land use and zoning law; and (v) distribute a quarterly newsletter that provides important information and tools for our members' benefit.

We do want to improve upon specific products of our division. We currently need a website coordinator who can volunteer an hour or two per month to update the PLD website with valuable links and materials drafted by members as we receive them. Several respondents of the 2006 PLD survey submitted that improving the division's website is important. I agree completely! If interested in serving as the website coordinator, please contact me or any of the other PLD officers, Brad Torgan as Chair-elect and Bryan Wenter as Secretary/Treasurer, as soon as possible.

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PLD Website Update

PLD continues to build the Division's website at www.planning.org/planningandlaw/overview.htm. The Division's website includes archived issues of the Newsletter, minutes of PLD's business meetings, the Division's roster, an events listing, and other information of interest to Division members. Bookmark the site and use it as a resource. We encourage feedback about the PLD website and ask visitors to send suggestions, comments, and/or additional information to post on the site to Nicole Lacoste at LACOSTEN@BALLARDSPAHR.COM.

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And I want to welcome Elisa Paster of Paul Hastings in Los Angeles as the new PLD newsletter editor. Elisa agreed to take the responsibility of the division's newsletter after Bryan was elected as the Secretary/Treasurer.

2006 APA Planning and Law Division Survey

This year's American Planning Association Planning and Law Division membership survey provided valuable insight into the composition and desires of APA PLD members. A total of 169 members responded, or approximately 18% of PLD membership, to the 2006 APA PLD Membership survey.

Survey Results:

- 32% of the surveyed members have been in PLD for more than 9 years, and 44% have been in the division for 1-3 years.
- Most surveyed members work in environmental, land use planning and/or legal services.
- 40% of those that answered the survey are in other APA divisions, and 20% are also members of the American Bar Association.
- 85-90% of the survey takers are satisfied with the PLD division.
- When asked how valuable the newsletters produced by the Planning and Law Division have been, 78% of survey takers thought that they were neutral to very valuable.
- 70-75% of the members surveyed found it important or very important that PLD increase the content of both the newsletter and website.
- 50-55% of the members surveyed wanted more member-written original articles from the newsletter and website.
- 80% of members surveyed want a stronger relationship with

the American Bar Association. We welcome new contributions for inclusion in the newsletter as well as on the website. Elisa can be reached at ELISAPASTER@PAULHASTINGS.COM.

Thank you for your involvement with PLD and do not ever

hesitate to contact any of the PLD officers with questions, ideas, and/or suggestions about how PLD can serve you better.

Sincerely,

Nicole Lacoste
LACOSTEN@BALLARDSPAHR.COM

2006 APA National Conference in San Antonio

More than 5,000 planners, local government officials, and community leaders attended APA's 2006 National Planning Conference, April 22-26, in San Antonio, Texas.

PLD sponsored three sessions at this year's National Conference in San Antonio, Texas, Fair Housing Laws and Planning Decisions and Exactions and Takings Law.

PLD had a substantial jump in attorneys taking advantage of CLE credit: eighteen attorneys applied for about 50 hours of credit. Attorneys applied for credit for the following states: California, Colorado, Illinois, Missouri, New Mexico, North Carolina, Oregon, Texas and Washington.

A Note from the First APA PLD Fellows

It has been a wonderful experience to be an APA PLD Fellow this past semester. Our time with PLD was inspiring and informative. Gwen and I learned quite a bit from the PLD Board,

which is full of talented planner-lawyers who use their spare free-time contributing to PLD. We spent most of the San Antonio conference with Eric, Nicole, Bryan and Brad as they shared their experience with PLD and the planning/law field.

The Annual PLD survey Erin conducted as part of my fellowship was very insightful into the strengths and weaknesses of PLD. APA PLD has places to improve as an organization, however thankfully the survey identified several members who are willing to help with those improvements. Among the improvements to be made are in securing CLE credits for attorneys who attend the Bettman Symposium. Thanks to Brad and Gwen, the symposium was accredited for those who attended from Texas and California, and numerous others were able to submit applications and materials to their respective states. I look forward to PLD's further expansion in the upcoming years. The fellow program has helped both of us become involved — and for that we thank you, PLD members!

The semester went by so quickly that we feel our time with PLD has come to an abrupt halt. Accordingly, we both plan to continue being a part of APA PLD. For those we have not met yet, we hope to meet you in the future.

Thank you for the great experience,

Erin (Burg) Hupp & Gwen Allen

One of APA's functions is to provide legal support on matters of critical interest to the planning community. The Amicus Curiae Committee, which files "friend of the court" briefs in key federal and state court cases, is made up of a distinguished group of land use law experts and is staffed by well-known land use lawyer and planner Lora A. Lucero, AICP. Lora provided the following report; her reports are regular features of the PLD Newsletter.

LITTER ON A STICK

BY LORA LUCERO, AICP

Half the battle in litigation, as many PLD members know, is first getting your foot in the courthouse door to have the opportunity to make your case. E. Adam Webb, an attorney from Atlanta, Georgia, has been knocking on courthouse doors around the country in the past few years, challenging local governments' sign codes on behalf of his clients, the billboard companies. Although he has had some success in the past, it appears the tide is turning and he may be losing ground on his standing argument.

His strategy is simple — apply for sign permits which don't meet the requirements of the sign code; expect and receive the permit denials; file a claim in federal district court challenging the constitutionality of the entire sign code; and argue that the overbreadth doctrine allows the company to attack provisions in the code which weren't even applicable to the company or the basis for the permit denial. A review in January 2006 found 113 such sign cases filed in the federal courts since 1997, and 8 filed in state courts in the same time period.

The APA, concerned about

this litigation strategy and the ultimate proliferation of billboards in some of our most scenic viewsheds, has filed a number of amicus briefs in the past few months to alert the courts in the different circuits about this strategy. (See www.planning.org/amicusbriefs.) We argued that the billboard company lacks standing

to challenge provisions of the sign code which are inapplicable to its applications and that the overbreadth doctrine doesn't give the company a free pass.

The *Tanner* case in the Eleventh Circuit is one example. In 2003, Tanner Advertising Group, LLC ("Tanner") applied for eight sign permits to erect 50' high billboards, 672 square feet in size, in commercial and industrial zones in Fayette County, Georgia. The county denied the applications because they did not comply with Section 1-43 of the county's 1998 sign ordinance, which regulated

the size and height of off-premise signs, among other things. *Tanner* asked the trial court to enjoin enforcement of the 1998 sign ordinance, arguing that it violated the First Amendment.

Federal courts have repeatedly affirmed that the First Amendment allows local governments to ban billboards and to limit their size and location. *Tanner* couldn't invalidate those specific prohibitions so it attacked different rules in the county's sign code, hoping to topple the entire sign code. *Tanner's* goal was to erect its billboards in the absence of regulatory oversight, grandfathering its non-conforming billboards before the local government could revise the sign code. During the litigation, Fayette County amended portions of its sign code in 2005, imposed a 30-day limit on the decision to

Tanner and its cohorts seek to litigate in the stratosphere of free speech theory on behalf of unknown, unidentifiable third parties. ... their goal is on the ground: huge, multi-ton, permanent structures which do nothing but display advertising, blocking the public view, for decades.

grant or deny a sign permit, and specified that appeals from the zoning administrator's decision must go to the zoning board of appeals.

The trial court denied *Tanner's* request for a permanent injunction. The court dismissed *Tanner's* lawsuit, concluding that Section 1-43 was content-neutral and a valid time, place, and manner restriction and constitutional. The court also ruled that *Tanner* did not have standing to challenge other provisions of the county's sign code unrelated to its applications for permits. *Tanner* appealed.

A panel of the Eleventh Circuit Court of Appeals reversed in *Tanner's* favor, and held that the billboard company had standing to challenge facially all provisions in the county's 1998 sign ordinance. In November 2005, Fayette County's petition for rehearing en banc was granted.

In its amicus curiae brief APA argued, "*Tanner* and its cohorts seek to litigate in the stratosphere of free speech theory on behalf of unknown, unidentifiable third parties. Despite the high-minded posturing, their goal is on the ground: huge, multi-ton, permanent structures which do nothing but display advertising, blocking the public view, for decades." The *amicus curiae* brief was prepared by Shauna F. Morris of Frazer, Hubbard, Brandt, Trask & Yacovone, LLP in Dunedin, Florida; Randal R. Morrison of Sabine & Morrison in San Diego; and John M. Baker of Greene Espell, P.L.L.P. in Minneapolis.

The Eleventh Circuit's En Banc Decision:

On June 9th, the entire Eleventh Circuit Court of Appeals dismissed *Tanner's* motion for a permanent injunction, ruling in Fayette County's favor on all points. The court concluded:

1. The 2005 amendments to the sign code mooted all but one of the challenges brought by *Tanner*,
2. *Tanner* did not have a vested property right to construct its billboards,

The CAA, the EPA, the APA, the Supremes and Al Gore

BY LORA LUCERO, AICP

Have you seen “An Inconvenient Truth” yet, Al Gore’s recently released wake-up call on global warming? Check out www.climate-crisis.net for dates and locations. I’m hoping the Justices, clerks, and the kitchen help at the U.S. Supreme Court see the film this summer. The EPA Administrator, his staff and others inside the Beltway shouldn’t miss it either.

Almost everyone, with the exception of a few in the White House perhaps, understands the serious consequences we face by putting our collective heads in the sand and refusing to address global warming and the greenhouse gas (GHG) emissions which directly contribute to global warming. New Mexico Governor Richardson has created a Climate Change Advisory Group to recommend strategies for reducing New Mexico’s total greenhouse gas emissions to 2000 levels by 2012, and then 10% below 2000 levels by 2020, and then 75% below 2000 levels by 2050.

» www.nmclimatechange.us Other states are following suit. But not the EPA, that agency charged with the responsibility of enforcing air quality standards under the Clean Air Act (CAA).

Section 202 mandates that the EPA regulate tailpipe emissions of any “air pollutant” that “may reasonably be anticipated to endanger public health or welfare.” The EPA has concluded it doesn’t have authority under the CAA to regulate air pollutants such as carbon dioxide, and has substituted its policy preferences for the clear language of the CAA.

The DC Circuit ruled in the EPA’s favor last year in *Massachusetts v. EPA* and then denied a request for en banc review, with Judge David Tatel commenting in his dissent, “if global warming is not a matter of exceptional importance, then those words have no meaning.”

In a fractured opinion, the Court of Appeals affirmed. One judge affirmed on standing grounds, another judge affirmed on

policy grounds that go beyond what the CAA allows, and the third judge dissented. So now we’re left with the federal government not regulating what comes out of the tailpipes of those monster SUVs, while many states and cities are grappling with greenhouse gas emissions and trying to comply with the spirit of the Kyoto Accords. Remember that international negotiated agreement to meet targets for GHG emissions by 2012 which 140 nations signed, but not the United States?

Earlier this spring, the City of Seattle, the U.S. Conference of Mayors, the National Association of Counties, and the American Planning Association, filed an amicus brief to support the plaintiffs’ request to the U.S. Supreme Court for review.

» www.planning.org/amicusbriefs. The brief was drafted by Tim Dowling and Jennifer Bradley from the Community Rights Counsel in Washington, DC. The APA joined because we know that planners are on the front line in the fight to address global warming. We also know that the future effectiveness of the Clean Air Act is in doubt if the EPA won’t assume its responsibility to enforce GHG emissions. That must suit General Motors just fine.

On May 23rd, GM announced its “fuel price protection program.” If you live in California or Florida and purchase certain GM vehicles (probably trucks and SUVs) by July 5, GM will guarantee you a gasoline cap price of \$1.99/gal. for one year with no limit on mileage. As Thomas Friedman says, “Guzzle away.” Seems GM is putting its head in the sand too — hoping customers will follow!

Hopefully, some sanity will prevail on the U.S. Supreme Court. If cert is granted, APA will be following up with a merit brief, thanks to Dowling and Bradley, and you’ll be hearing a lot more about *Massachusetts v. EPA* in the 2006 Term. Meanwhile, check out “An Inconvenient Truth.”

Planning and Law Division Officers

The Planning and Law Division elections results are in! Congratulations to the new PLD Chair Nicole M. Lacoste, PLD Chair-Elect Bradly S. Torgan, and PLD Secretary-Treasurer Bryan W. Wenter.

National, Regional Events Listing

You can make announcements of upcoming national and regional events of interest to PLD members by sending them to the Editor. We’re looking for events by the

American Bar Association, Association of Collegiate Schools of Planning, state and regional APA chapters, law schools, and other similar organizations. Help us build the network of planners and lawyers concerned with planning law issues. (Note that by including an announcement here, PLD is not indicating its sponsorship or endorsement unless specifically stated.)

New Publications and Resources

The Newsletter periodically lists new publications and other resources that have recently become available. We rely upon our

members to help keep the membership informed of these new developments. Please report new books, articles, reports, websites, etc., to the Editor. We’ll provide notice of these new publications and resources in the next issue of the Newsletter.

Subscribers to *Planning & Environmental Law*, edited by Lora Lucero, now have access to a powerful new online research tool, PEL Online, which is available at www.planning.org/pel/pelonline. PEL Online provides easy access to all of the judicial decisions and legislation covered in *Planning & Environmental Law* during the past two years.

Each month, the latest judicial decisions and legislation will be added. PEL Online’s flexible search function makes it easy to sort through a comprehensive collection of legal abstracts. You can tailor searches to your needs — by state, topic, and date — and create custom folders to organize and save your research.

APA recently published a new book, entitled *The Good News About Takings*, by Timothy J. Dowling, Douglas Kendall, and Jennifer Bradley (APA Planners Press 2006). The book is a plain-English guide to the clearer takings stan-

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dards established by the Supreme Court during its 2004–2005 session. The guidebook explains what commissioners and other officials need to know about the new takings standards in easy-to-understand language. It's a handy reference with information about how recent developments affect specific planning techniques that often give rise to regulatory takings challenges, and is available at www.planning.org/bookservice/description.htm?BCODE=AGNT.

APA has also published a new book, entitled *Planning Reform in the New Century* (APA Planners Press 2005). Edited by Daniel R. Mandelker, the book contains the strategies and visions of some of the brightest minds in planning, who debate major issues in land-use planning and policy. Do urban growth boundaries actually manage growth? How can the chaotic common law of vested rights be tamed? How can we make the development review process fair? Should housing policies be taken out of the hands of local boards? Leading thinkers in planning tackled these questions and others in a December 2004 conference sponsored by the Center for Interdisciplinary Studies at the Washington University School of Law and the American Planning Association. *Planning Reform in the New Century* is the record of their spirited debate. The book may be obtained at www.planning.org/bookservice/description.htm?BCODE=APRN.

PLD Members Build Annotated On-line Resource List

In response to member requests for more information on resources to help keep abreast of planning law developments throughout the country, an annotated list of on-line planning law resources has become a regular feature of the Newsletter. We're relying on our members to build this resource by sending information on websites, listservs, on-line sources for statutes and cases, etc., to the Editor. When you do so, include a brief description of the site. Please note that including a resource in the Newsletter is not an endorsement by PLD of the site or the positions or opinions expressed therein.

Professor Dan Mandelker's "Land Use Law" website (ls.wustl.edu/landuselaw) is a core element of his land use law course at Washington University School of Law. It includes course materials, a variety of land use law related links (including statutes, ordinances, cases, and commentary). Not to be missed is the "Photos" section, which includes pictures from the sites of many important land use cases.

Findlaw (www.findlaw.com/casecode). Findlaw provides access to federal and state constitutions, statutes, regulations, and published court opinions.

Community Rights Counsel. CRC is a nonprofit, public interest law firm based in Washington, DC that provides strategic assistance to state and local government attorneys in defending land use laws and environmental regulations. CRC's website (www.community-rights.org/legalresources/legalmain.asp) provides briefs

filed by CRC, pending Supreme Court regulatory takings cases, Supreme Court opinions in key takings cases, and petitions for certiorari.

Pace Law School Land Use Law Center. The website for the Land Use Law Center (www.pace.edu/lawschool/landuse) provides a variety of resources, including an online data base and training and other materials for attorneys, planners, government officials, community leaders, and citizen groups.

News of PLD Members

A continuing feature of the Newsletter continues a feature is News of PLD Members. Help nourish PLD's grapevine by sending us news of our members — job changes, retirements, awards, appointments to boards and commissions, and the like. Send submittals to the Editor.

In July, Bryan W. Wenter joined the land use practice of Morgan Miller Blair in Walnut Creek, California. Bryan may be reached at BWENTER@MMBLAW.COM.

Volunteer Opportunities with PLD and Beyond

If you're interested in volunteering some time to PLD's work, get in touch with Nicole Locoste, Division Chair.

If you're working on an effort that would benefit from the volunteer efforts of your PLD colleagues, drop a note to the Editor. Your request will be posted here.

Associate Opportunity

Clarion Associates, a land use consulting firm, seeks an associate to work on projects for public-sector clients. This position is based in the firm's Chapel Hill, NC office. Legal experience a plus, urban planning or equivalent degree required. Excellent computer, written, and oral communication skills are essential. Please submit resumes by 10/16 to CKERN@CLARIONASSOCIATES.COM or fax to (919) 967-9077.

Call for Articles

Send us your proposals for articles for future issues of the Newsletter. Be creative; think beyond the ordinary and propose an interview, a Q&A with a panel of differing viewpoints, or something else our membership is not likely to find anywhere else. Submit your ideas to the Editor.

PLD Newsletter Now All-Electronic

As a reminder, we've eliminated mailed hard copy editions of the PLD Newsletter and it's now distributed digitally only. Notice of each issue is emailed to every PLD member, with a link enabling members to access the designed version of the Newsletter. In addition, a text only version is available on the Planning and Law Division website. Make sure your member profile with APA is up to date in order to ensure receiving the Newsletter and other division communications. To update your email address or other contact information, go to the APA website, <https://www.planning.org/myprofile>.