

# Municipal Law Report

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July-August

## Does a Sale of Land Include Sale of a "Taking" Action?

by Prof. Osborne Reynolds Jr.

Your client purchases land that is subject to a "wetlands" zoning ordinance and finds that the zoning restriction leaves little or no leeway for development of the property. Can the client successfully sue the zoning authority for a "taking" of the property, using inverse condemnation, or is the client's suit precluded because the alleged taking occurred prior to the client's purchase? This is the type of question presented in a number of recent cases in which a landowner has sued under the increasingly popular theory of inverse condemnation for a taking that resulted from laws enacted under a prior owner. So far, courts are split on the result.

In a Massachusetts wetlands-zoning case similar to the one described, the present property owner was allowed to sue for the taking. *Lopes v. City of Peabody*, 629 N.E.2d 1312 (Mass. 1994). The same decision has been made by courts in Florida, *Vatalaro v. Depart-*



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Admitted to the Arizona Bar in 1964, Reynolds is a member of the Order of the Coif, Phi Beta Kappa, Phi Alpha Theta, and the American Bar Association. He is author of *Handbook on Local Government Law*, published by West, and coauthor of *Advanced Torts: Cases and Materials*, which he wrote with Professor Peter B Kutner.

ment of Environmental Regulation, 601 So.2d 1223 (Fla. App. 1992) (due to previously enacted wetlands zoning, plaintiff was denied permit for building residence and septic tank); in Michigan, *K & K Construction, Inc. v. Department of Natural Resources*, 217 Mich. App. 56, 551 N.W.2d 413 (1996) (permit to construct restaurant denied); and in New Jersey, *Moroney v. Mayor & Council of Borough of Old Tappan*, 268 N.J. Super. 458, 633 A.2d 1045 (1993) (variance denied to build house on undersized lot). These courts all found that the right to sue for the taking passed with the sale of the property, since no such action had previously been brought.

But recent cases in New York and Alaska have reached a contrary result. Plaintiffs in a New York wetlands case argued that a taking of their property had occurred when they were denied permission to build thereon, not when the zoning restrictions that led to the denial were enacted. While this argument had succeeded in the above-cited cases, the New York Court of Appeals reasoned that plaintiffs had purchased not only a bundle of rights when acquiring the land but also a bundle of limitations

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## Visiting Home — Orange County Reorganization and Bankruptcy Setoff

by Paul Quackenbush, Esq.

In recent bankruptcy proceedings related to the Orange County reorganization, Federal National Mortgage Association v. County of Orange, (Bankruptcy Nos. SA 94-22272 JR, SA 94-22273 JR.) (U.S.Bankr.Ct./C.D.CA., May 26, 1995), 183 B.R. 609, 33 Collier Bankr.Cas.2d 1604, 27 Bankr.Ct.Dec. 435, 28 UCC Rep.Serv.2d 631, the court distinguished that the Orange County Investment Pool (OCIP), although an instrument of the county, was a separate entity for bankruptcy-setoff purposes. OCIP was the investment arm of the county government, from which the devastating interest-rate-sensitive securities investment failure arose, which failure in turn, prompted the Orange County bankruptcy.

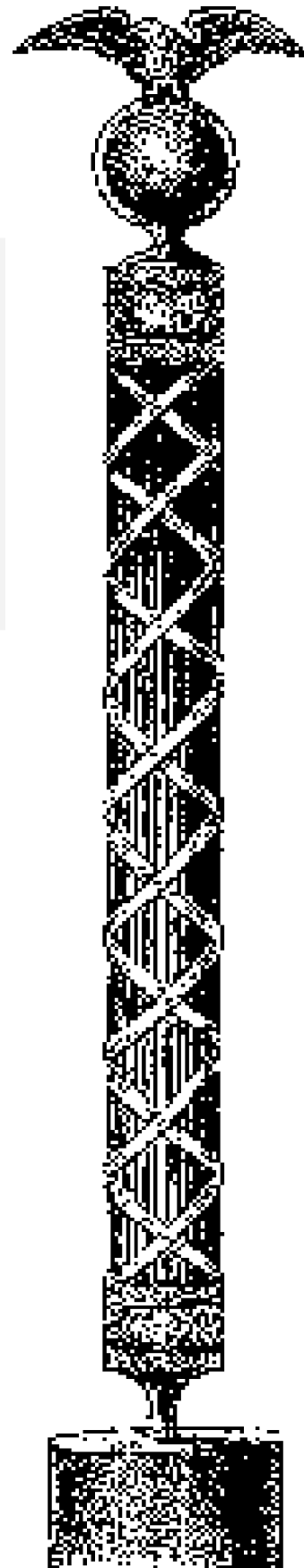
The Court found that the two entities, Orange County and OCIP, were distinct for bankruptcy-setoff purposes. 11 U.S.C. §553(a) This determination resulted in the ultimate denial of the creditor's asserted right of setoff against its own liability to the OCIP. The creditor's source of setoff monies arose from prepetition transacting with Orange County, not OCIP.

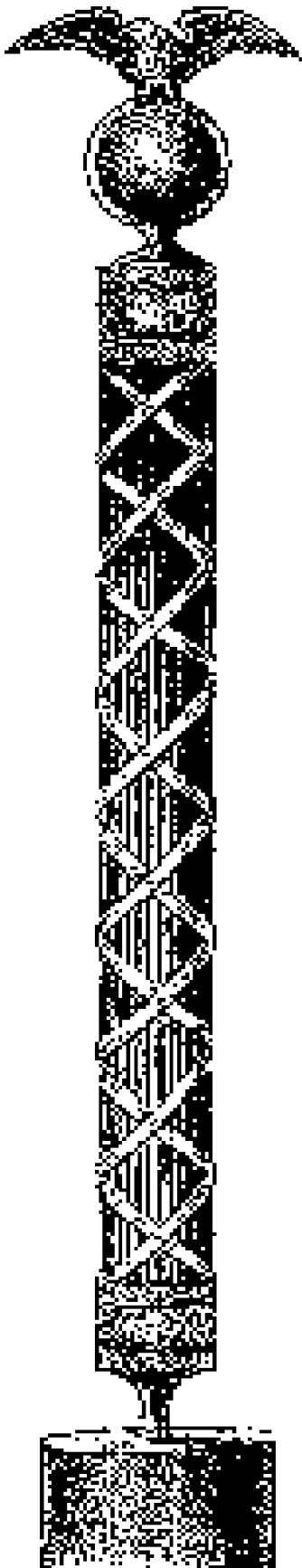
First, the Bankruptcy Court's equitable powers enable it to override §553's permissive pro-

vision when warranted. Id. at 615, citing Cascade Roads, 34

***Orange County Investment Pool, although an instrument of the county, was a separate entity for bankruptcy setoff purposes.***

F.3d at 763; Federal Deposit Ins. Corp. v. Bank of America Nat'l Trust and Savings Ass'n, 701 F.2d 831, 836-37 (9th Cir.1983), cert. denied, 464 U.S. 935, 104 S.Ct. 343, 78 L.Ed.2d 310 (1983). Second, setoffs run contrary to fundamental bankruptcy policies by permitting "serendipitous advantages to accrue to creditors who happen to hold mutual obligations, thus disfavoring other equally-deserving creditors and interrupting the debtor's cash flow." Id. at 616, citing Public Service Co. of New Hampshire v. New Hampshire Electric Cooperative, Inc. (In re Public Service Co. Of New Hampshire), 884 F.2d 11, 13 (1st Cir.1989), citing, H.R.Rep. No. 595 reprinted in 1978 U.S.Code Cong. & Admin. News 6143-45. Therefore courts strictly construe mutuality of the parties for





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and had thus never owned an absolute right to build on the property. *Gazza v. New York State Department of Environmental Conservation*, Lawyers Weekly USA No. 9910153 (Feb. 18, 1997). The New York Court of Appeals applied the same reasoning on the same day to a plaintiff who had purchased land subject to zoning restrictions that were based on the property's location on a steep slope and who had, after the purchase, been denied permission to make the desired development of the property. *Anello v. Zoning Board of Appeals of Village of Dobbs Ferry*, Lawyers Weekly USA No. 9910152 (Feb. 18, 1997). The same result was reached on the same date by New York's highest court even when a physical intrusion had occurred after purchase. In that case, the city had, prior to plain-

grade of the road by filling-in 2400 square feet of plaintiffs' land. The court ruled that, under both common law and the city charter, the plaintiffs had an obligation to provide lateral support to the adjacent public road and that they had bought the land subject to this obligation. Two dissenting justices stated that a permanent occupation of private property was being allowed to occur without compensation. *Kim v. City of New York*, Lawyers Weekly USA No. 9910151 (Feb. 18, 1997). Alaska has similarly held that a plaintiff who did not own property on the date of the alleged taking by inverse condemnation is not entitled to compensation since the right to compensation is a personal one that does not pass to a purchaser unless the parties explicitly so agree. *Mount Juneau Enterprises, Inc. v. City & Borough of Juneau*, 923 P.2d 768 (Alaska 1996) (alleged inverse condemnation of tunnel).

*The problem presented is somewhat similar to that which is posed when a purchaser buys land that is subject to a zoning restriction.*

The problem presented is somewhat similar to that which is posed when a purchaser buys land that is subject to a zoning restriction and then seeks relief in the form of a variance from that restriction. The majority view in that situation is that the right to seek the variance passes with the property and that the purchaser is not precluded from obtaining the desired relief even though he purchased with actual or constructive knowledge

tiffs' purchase, filed a plan to regrade the street that ran by the property. After the purchase, the regrading occurred, raising the

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## Municipal Law Report: Internet Sites of Interest

Click on the address while online to go to it!

American City Business Journals	<a href="http://www.amcity.com/">http://www.amcity.com/</a>
California Government Homepage	<a href="http://www.ca.gov/s/govt/official.html">http://www.ca.gov/s/govt/official.html</a>
California Municipal Sites	<a href="http://www.oc.ca.gov/southcourt/o_sites.htm">http://www.oc.ca.gov/southcourt/o_sites.htm</a>
City of Burbank, California	<a href="http://www.courts.org">http://www.courts.org</a>
City of Los Angeles, California	<a href="http://www.lamuni.org">http://www.lamuni.org</a>
City of Oklahoma City	<a href="http://www.ionet.net/~okcpio/index.html">http://www.ionet.net/~okcpio/index.html</a>
City of Sacramento, California	<a href="http://www.sna.com/courts">http://www.sna.com/courts</a>
City of Stanislaus, California	<a href="http://www.co.stanislaus.ca.us">http://www.co.stanislaus.ca.us</a>
County of Ventura, California	<a href="http://www.ventura.org/courts/vencrts.htm">http://www.ventura.org/courts/vencrts.htm</a>
Indiana Code & Local Government Laws	<a href="http://www.law.indiana.edu/codes/in/incode.html">http://www.law.indiana.edu/codes/in/incode.html</a>
Kansas Local Government Links	<a href="http://www.ink.org/public/kmin/government/localgovt.html">http://www.ink.org/public/kmin/government/localgovt.html</a>
Kansas Municipal Information Network	<a href="http://www.ink.org/public/kmin/">http://www.ink.org/public/kmin/</a>
Library of Congress Mun. Resources Page	<a href="http://lcweb.loc.gov/global/state/stategov.html">http://lcweb.loc.gov/global/state/stategov.html</a>
Local Government Institute (LGI): Home Page	<a href="http://www.lgi.org/">http://www.lgi.org/</a>
LGI: Links to Gov't. Related Sites of Interest	<a href="http://www.lgi.org/p10.htm">http://www.lgi.org/p10.htm</a>
MCC, Municipal Attorney Listserv (mailing list)	<a href="http://www.municode.com/attylist.html">http://www.municode.com/attylist.html</a>
Municipal Code Corporation Home Page	<a href="http://www.municode.com/database">http://www.municode.com/database</a>
Municipal Law Review, Winter 1996	<a href="http://www.osler.com/Resources/Munwin_2.html">http://www.osler.com/Resources/Munwin_2.html</a>
North Carolina Assoc. County Commrs.	<a href="http://ncinfo.iog.unc.edu/NCACC/">http://ncinfo.iog.unc.edu/NCACC/</a>
North Carolina League of Municipalities	<a href="http://ncinfo.iog.unc.edu/NCLM/">http://ncinfo.iog.unc.edu/NCLM/</a>
Oklahoma City Action Page	<a href="http://www.ionet.net/~actnctr/index.html">http://www.ionet.net/~actnctr/index.html</a>
Oklahoma Government Page	<a href="http://www.ou.edu/okgov">http://www.ou.edu/okgov</a>
Pennsylvania Municipal Laws	<a href="http://ctcnet.net/gdsbm/law.htm">http://ctcnet.net/gdsbm/law.htm</a>
Public Technologies for Governments	<a href="http://pti.nw.dc.us">http://pti.nw.dc.us</a>
Schwabe, Williamson & Wyatt Mun.Lawyers	<a href="http://www.racc.org/~schwabe/municipal.htm">http://www.racc.org/~schwabe/municipal.htm</a>
Seattle's List of Municipal Codes Nationwide	<a href="http://www.spl.lib.wa.us/collec/lawcoll/municode.html">http://www.spl.lib.wa.us/collec/lawcoll/municode.html</a>
Textbook: Canadian Municipal Law Digest	<a href="http://www.carswell.com/cgi-bin/Carswell/cart/redirect.cgi?page=L459-54362-8.html">http://www.carswell.com/cgi-bin/Carswell/cart/redirect.cgi?page=L459-54362-8.html</a>
Textbook: Mun.Land Use Law FAQ	<a href="http://vidkraft.com/njpo/mlulfaq.htm">http://vidkraft.com/njpo/mlulfaq.htm</a>
Texbook: Statutory Planning in Victoria	<a href="http://www.butterworths.com.au/catalog/t0380.htm">http://www.butterworths.com.au/catalog/t0380.htm</a>
Virginia Local Government Law Section	<a href="http://www.vsb.org/sections/gv/gv-bg.html">http://www.vsb.org/sections/gv/gv-bg.html</a>
Washburn University Mun.L.References	<a href="http://law.wuacc.edu/washlaw/reflaw/refmunicipal.html">http://law.wuacc.edu/washlaw/reflaw/refmunicipal.html</a>

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Additionally, the Publisher welcomes all comments, suggestions and observations regarding

this newsletter or the nature of its content; it is intended to be a common forum and valuable resource for all municipal law personnel. A listserver is currently under consideration, as well as an Internet web distribution and archive site for this publication. Professor of Law, O.M. Reynolds' and the Editor, Paul D. Quackenbush, Esq. thank you in advance for subscribing to the Municipal Law Report.

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### VISITING HOME

the Visiting Home criteria, so long as state "mutuality" law is compatible with the federal counterpart.

For further background concerning the Orange County Bankruptcy see, via the Internet, Quackenbush, Governmental Investments in Over-the-Counter Derivatives: Will the Patient Survive the Surgery? <http://www.uoknor.edu/okgov/96/lart/2.htm> (Lgl.Egl. 1995).

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of the zoning—though the knowledge is one factor that may be weighed in balancing the equities and determining whether the variance should be granted. See Reynolds, Self-Induced Hardship in Zoning Variances: Does a Purchaser Have No One But Himself to Blame?, 20 Urban Lawyer 1 (1988). But there is a difference in that the grant of a variance is basically a matter of grace, while compensation for a taking is an absolute right. The question in the latter cases would thus seem to revolve around the issue of when the taking occurred: Was the regulation so restrictive that it clearly left no room for reasonable development of the property, causing a taking at the time of the regulation's enactment? Or did the regulation leave open the possibility that permission for development could be granted, so that the taking took place only when such permission was denied? If the taking is found to have occurred under the prior owner, then the further question must be reached of whether the right to sue for that taking passed with the property or is a right personal to the prior owner. No doubt more cases presenting these questions will arise, and perhaps such a case will eventually reach the U.S. Supreme Court.

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**“Does a Sale of Land Include Sale of a Taking Action?” Municipal Bankruptcy Caselaw  
and Municipal Law Internet Sites of Interest**

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