

Lessons from Luminaries

3:30PM – 4:50PM Law Update Session

Jl-Lecture Hall

Lessons from Luminaries of Land Law: Latest and Greatest Decisions

Moderator: **Michael D. Zarin, Esq.**, *Partner, Zarin & Steinmetz*

Michael Allan Wolf, Esq.,

*Professor of Law & Richard E. Nelson Chair in Local Government Law,
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**Property Rights in the Supreme Court:
Wetlands, Tax Sales, Impact Fees, and I-10
Flooding**

Michael Allan Wolf

***Richard E. Nelson Eminent Scholar Chair in Local Government
University of Florida Levin College of Law***

***22nd Annual Alfred B. DelBello Land Use and Sustainable Development
Conference***

***Balancing Economic Realities with Environmental and Social Concerns
December 8, 2023***

Geraldine Tyler is 94 years old. In 1999, she bought a one-bedroom condominium in Minneapolis and lived alone there for more than a decade. But as Tyler aged, she and her family decided that she would be safer in a senior community, so they moved her to one in 2010. Nobody paid the property taxes on the condo in Tyler's absence and, by 2015, it had accumulated about \$2300 in unpaid taxes and \$13,000 in interest and penalties. Acting under Minnesota's forfeiture procedures, Hennepin County seized the condo and sold it for \$40,000, extinguishing the \$15,000 debt. The County kept the remaining \$25,000 for its own use.



The Takings Clause “was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.” *Armstrong*, A taxpayer who loses her \$40,000 house to the State to fulfill a \$15,000 tax debt has made a far greater contribution to the public fisc than she owed. The taxpayer must render unto Caesar what is Caesar's, but no more.

Because we find that Tyler has plausibly alleged a taking under the Fifth Amendment, and she agrees that relief under “the Takings Clause would fully remedy [her] harm,” we need not decide whether she has also alleged an excessive fine under the Eighth Amendment.

***Tyler v. Hennepin County*, 143 S. Ct. 1369 (2023)**

Michael and Chantell Sackett have spent well over a decade navigating the CWA, and their voyage has been bumpy and costly. In 2004, they purchased a small lot near Priest Lake, in Bonner County, Idaho. In preparation for building a modest home, they began backfilling their property with dirt and rocks. A few months later, the EPA sent the Sacketts a compliance order informing them that their backfilling violated the CWA because their property contained protected wetlands. The EPA demanded that the Sacketts immediately “undertake activities to restore the Site” pursuant to a “Restoration Work Plan” that it provided. The order threatened the Sacketts with penalties of over \$40,000 per day if they did not comply. . . .

The Sacketts filed suit under the Administrative Procedure Act, alleging that the EPA lacked jurisdiction because any wetlands on their property were not “waters of the United States.” . . . The Ninth Circuit [held] that the CWA covers adjacent wetlands with a significant nexus to traditional navigable waters and that the Sacketts’ lot satisfied that standard.



[W]e hold that the CWA extends to only those “wetlands with a continuous surface connection to [**607] bodies that are ‘waters of the United States’ in their own right,” so that they are “indistinguishable” from those waters. This holding compels reversal here. The wetlands on the Sacketts’ property are distinguishable from any possibly covered waters.

Sackett v. EPA (Sackett II), 143 S. Ct. 1322 (2023)

In July 2016, Sheetz applied for a building permit to construct a 1,854-square-foot single-family manufactured home on his property in Placerville, which is located in geographic zone 6. The County agreed to issue the permit on the condition that Sheetz pay a TIM [traffic impact mitigation] fee in the amount of \$23,420, consisting of \$2,260 for Highway 50 improvements and \$21,160 for local road improvements. After Sheetz paid the fee, the project was approved and the building permit issued in August 2016.

In December 2016, Sheetz sent a letter to the County in which he protested the validity of the TIM fee under the Mitigation Fee Act on various grounds. Thereafter, Sheetz sent the County additional letters reiterating his challenge to the fee and requesting a refund. The County did not respond to any of the letters.



[T]he trial court properly determined that the TIM fee is not subject to the heightened scrutiny of the *Nollan/Dolan* test. The fee is not an “ad hoc exaction” imposed on a property owner on an individual and discretionary basis. Rather, it is a development impact fee imposed pursuant to a legislatively authorized fee program that generally applies to all new development projects within the County. The fee is calculated using a formula that considers various factors. Therefore, the validity of the fee and the program that authorized it is only subject to the deferential “reasonable relationship” test embodied in the Mitigation Fee Act.

***Sheetz v. County of El Dorado*, 84 Cal.App.5th 394 (2022), cert. granted, 2023 U.S. LEXIS 2924 (Sept. 29, 2023)**

The State of Texas appeals the district court's decision that Plaintiffs' federal Taking Clause claims against the State may proceed in federal court. Because we hold that the Fifth Amendment Takings Clause as applied to the states through the Fourteenth Amendment does not provide a right of action for takings claims against a state, we VACATE the district court's decision for want of jurisdiction and REMAND with instructions to return this case to the state courts. The Supreme Court of Texas recognizes takings claims under the federal and state constitutions, with differing remedies and constraints turning on the character and nature of the taking; nothing in this description of Texas law is intended to replace its role as the sole determinant of Texas state law. As such, this Court lacks jurisdiction to review these claims.

***Devillier v. Texas*, 53 F.4th 904 (5th Cir. 2022), cert. granted, 2023 U.S. LEXIS 2958 (Sept. 29, 2023)**



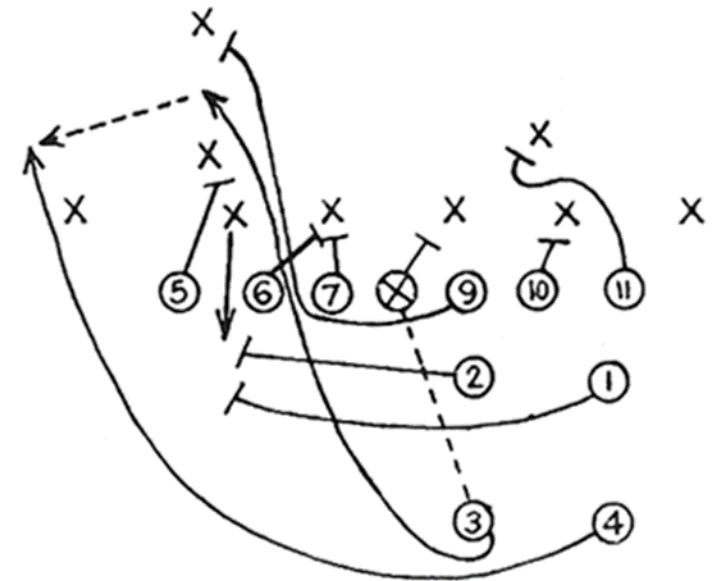
Land Use Luminaries

The Exciting World of Procedural Due Process

(which is probably how
you are going to get in trouble)

Don Elliott, FAICP, Esq

Pace Land Use Law Conference
December 7, 2023



It's Important

Minneapolis 2040 Plan

- Landmark 2020 binding comprehensive plan authorizing 4 units in single-family zoning provokes intense and continued opposition
- Suit under Minnesota Environmental Rights Act (MERA) results in 2022 injunction on implementation
- City argues that MERA does not apply to comprehensive plans, which is more oriented towards projects and site specific development
- Lesson – Presumption of validity that applies to substantive actions often does not apply to procedures



Standing

Lockerbie Glove Co. Town Home Owner's Ass'n v. Indianapolis Historic Preserv. Comm'n,
194 N.E. 3d 1175 (Ind. App. 2022)



- Statutory authority does not mean that you have been “aggrieved” as required to support standing
- “[A] person lawfully domiciled in Indiana’ may have a statutory cause of action. But this does not mean the person has necessarily sustained an injury essential to obtaining judicial relief.”
- See also “Sweenie v. A.L. Prime Energy Consultants, 451 Mass. 539, 543 (2008)
- “The language of the bylaw cannot be sufficient in itself to confer standing: the creation of a protected interest (by statute, ordinance, bylaw, or otherwise) cannot be conflated with the additional, individualized requirements that establish standing.”

Standing

Baldwin v. Sharon Standing Building Comm. 2023 WL 2490990 (Mass. Land Ct. 2023)

- Burden shifting approach to standing
 - Abutting appellant alleges harm -- more traffic
 - Defendant produces “any additional evidence” contrary – expert traffic study showing de minimus impacts
 - Abutting appellant must produce specific “by direct fact and not by speculative personal opinion, that his difference is special and different from the concerns of the rest of the community” – and she did not
- “Baldwin is not qualified to offer a traffic engineering opinion”



Exhaustion

Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City, 473 U.S. 172 (1985)

- A federal regulatory takings claim is not ripe for consideration until all state court regulatory takings claims or remedies have been pursued and resolved

Knick v. Township of Scott, 139 S. Ct. 2162 (2019)

- Overturned Williamson County – holding that a federal court claim for regulatory takings is ripe even if a state court claim for regulatory taking has not been filed or resolved



Exhaustion

WG Woodmere LLC v. Town of Hempstead, 2022 WL 17359339 (E.D. N.Y. 2022)

- Although Knick allows for federal takings to be filed before local and state alternatives and remedies have been determined, it does not require that the federal claim be treated as “ripe” for federal adjudication
- It is a fact-based determination as to whether the remaining local and state options would be “futile” and the certainty as to the amount of “taking” that has occurred.
- In this case, the federal claim is not “ripe” because – even though single-target zoning has been adopted:
 - Unclear whether ability to run a private golf course on required open space result in “no economically viable use”
 - Unclear whether or under what terms subdivision will be approved



Questions and Discussions

Don Elliott, FAICP, Esq,

- delliott@clarionassociates.com

Don't Forget the Substance

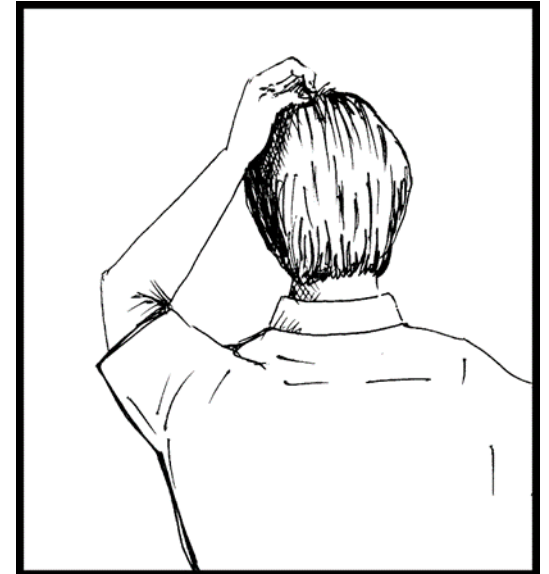
Lemmon v. Town of Scipio, 2023 WL 3265287 (N.Y. App. Div. 4th Dep't 2023)

- The ZBA violated the zoning code by (1) permitting an absent member to vote and (2) not issuing findings and conclusions with respect to its vote. but these technical violations were 'nonprejudicial' and 'of no consequence' to the ultimate determination.
- On the merits, though, the ZBA's interpretation of the zoning code was not rational or reasonable, because there were two conflicting definitions of what a recreational vehicle is – and the ZBA did not explain how those could be reconciled or why it chose one over the other.

Notice

Markatos v. Planning and Zoning Comm'n. of Town of New Canaan, 2022 WL 17101529 (Conn. Super. Ct. 2022)

- P&Z wide ranging discussion on permit with 100+ conditions results in a “final” vote to approve subject to the changes discussed tonight – and published notice
- Two weeks later, text amending 3 conditions condition published.
- Neighbors appeal but Town holds they missed the filing deadline based on first published notice
- Commission’s decision invalidated since public notice was woefully inefficient as a review of the record would not provide any reasonable understanding behind the commission’s decision. The published notice provides no information whatsoever as to what the “changes” approved by the commission to conditions 41, 59, and 92 might actually be.





RICHMOND
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Case Law Update: Lessons from Luminaries of Land Law

“The Latest and Greatest Sign Decisions of the Past Year”

Friday, December 8, 2023

3:30PM-4:50PM

Carol N. Brown

The University of Richmond School of Law

**City of Austin, Texas v. Reagan
National Advertising of Austin,
LLC, 596 U.S. 61 (2022)**

Sign regulation is not automatically content based, so that strict scrutiny for a violation of First Amendment free speech rights would be applicable, merely because to apply the regulation, a reader must ask who is speaking and what the speaker is saying.



**Reagan National Advertising
of Austin, Incorporated v. City
of Austin, 64 F.4th 287 (5th Cir.
2023)**

After the U.S. Supreme Court held that the Austin Sign Code was facially content-neutral and subject to intermediate scrutiny, absent an impermissible purpose, the case was remanded to the Fifth Circuit Court of Appeals. The circuit court held the Sign Code survived intermediate scrutiny.



***Adams Outdoor Advert. LTD
v. City of Madison, 56 F.4th
1111 (7th Cir. 2023)***

Sign ordinance prohibiting off-premises digital billboards bearing commercial messages was subject to intermediate scrutiny and did not violate the First Amendment.



*Noblesville Bd. of Zoning App.
v. Reagan Outdoor Advert., 217
N.E.3d 510 (Ind. 2023)*

Sign ordinance stating that signs lost their legal nonconforming status if “relocated,” was ambiguous; therefore, the meaning to be construed in favor of pole sign owner where posts were moved 18 to 36 inches behind their original location.



NOBLESVILLE

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Norton Outdoor Advertising, Inc. v. Village of St. Bernard, Slip Copy (2023)

Sign Code provisions disallowing “changeable messaging” and distinguishing between on-premises and off-premises signs were not content-based as there was no evidence that the provisions were adopted to regulate speech because of a disagreement with the content.



St. Bernard is an independent community centrally located in the heart of Greater Cincinnati.



Lessons from Luminaries of Land Law: Latest and Greatest Decisions

Data Centers, Drive-throughs, and Diversions

Friday, December 8, 2023

3:30 – 4:50 PM

Dwight Merriam, FAICP

www.dwightmerriam.com

Data centers



Chad Davis / Flickr (CC BY 2.0)



A hyperscale Google data center in Council Bluffs, Iowa.

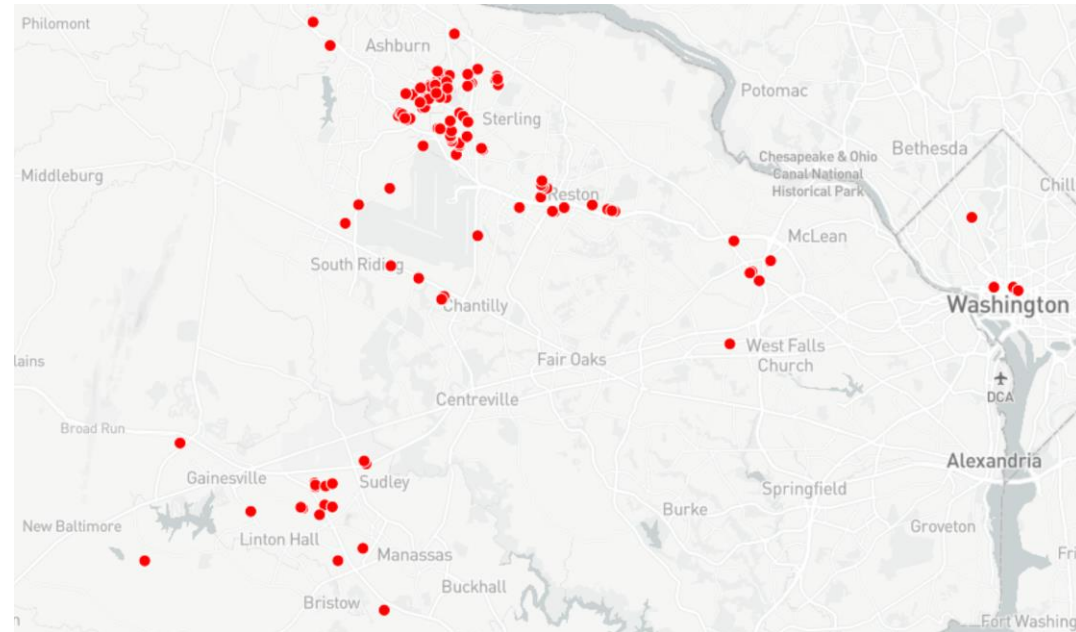
What are they?



- Physical facility that organizations or companies use to store their critical data and run their applications
- Key components include routers, switches, firewalls, storage systems, and servers.
- They support business services and functions, such as data storage and backup, file sharing, communication services, machine learning, and artificial intelligence.

Many and more coming...

- 5,375 in U.S. (Sept. 2023)
 - The most in the world
 - 522 in Germany
 - 517 in the U.K.
 - Northern Virginia is “ground zero”
 - 300 of them
 - Why?
 - Similar hub in Silicon Valley



How many, who, and why?

- Public cloud ecosystem revenues: double by 2026
- Number of hyperscale data centers: up 50% by then
- Amazon, Google, Meta and Microsoft, collectively \$94 billion in data center capital in 2022

The New York Times

SQUARE FEET

More Data in the Cloud Means More Centers on the Ground to Move It

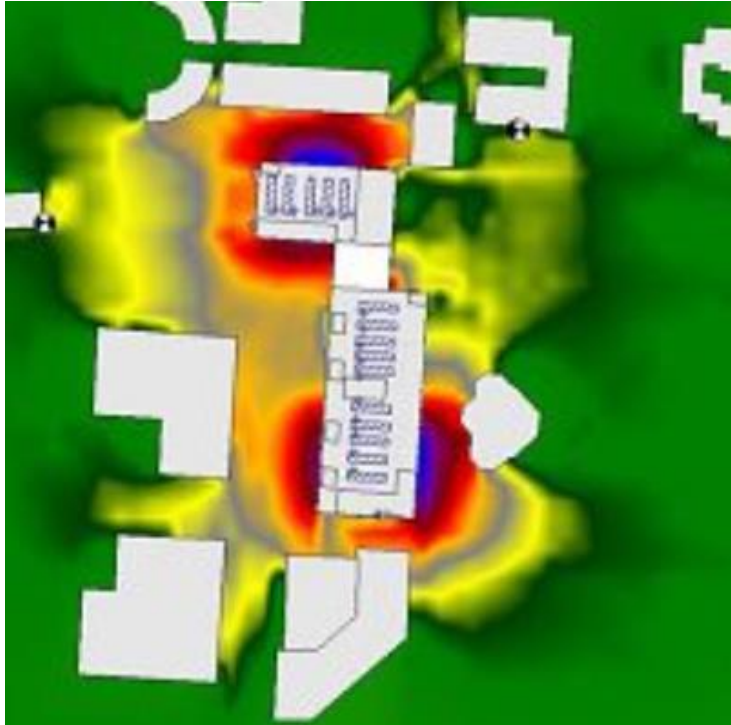
The need for data centers has soared, fueled by remote work and the growth of high-speed streaming. But finding the necessary land and energy can be a challenge.

Be ready, they are coming to a town near you...

- Need to be closer to the user
- Running out of sites
- The Audrey II of electricity consumers
 - 1-2 or maybe 3 % global electricity use
 - 10-50 x office use
 - Close to airline energy use
 - With the same greenhouse gases
 - 200-250 terawatt hours (TWH) annually for all data centers



Impacts



- 1 TWH will fully power 70,000 homes
- 250 TWH = 17.5 million homes
- Noise from back up generators
- Noise from equipment and cooling
- Water for cooling in some

Things to consider

- Definitions
- Special zoning, e.g., an overlay or floating zone
- Usually in commercial and industrial districts
- Science-backed noise regulation
- Buffering



Benefits

Quantum Center Could Bring \$41M in Tax Revenue to County

A study commissioned by the Maryland Tech Council estimates that Quantum Loophole's planned data center campus would annually generate almost \$41 million in county tax revenue and employ 1,700 in its facilities.

- Great ratable
- Low employee numbers means lower supportive services
- Clean industry

Drive-throughs



Watch the training film: <https://www.youtube.com/watch?v=BQAsYunEmPc>

The needless conflict

- Cars versus pedestrians

Conceptual
Retail Service Window
Drive-Through Restaurant or Pharmacy



Pharmacy

Conceptual
Retail Teller
Drive-Through Bank



Bank

Standish, Maine, includes examples of pedestrian-friendly site designs for drive-throughs in its Form Based Code Village Districts regulations (§181-7.1) (Credit: Town Planning and Urban Design Collaborative / Town of Standish)

Walk-up, bike-up



“When a drive-through facility is open and other pedestrian-oriented customer entrances to the business are unavailable or locked, the drive-through facility must serve customers using modes other than a vehicle such as pedestrians and bicyclists.”
Portland, Oregon



aria
GROUP

Things to think about...

- Definitions
- Opening day
- Litter patrol
- Noise, as in outside speakers
- Hours
- Lighting
- Stacking ...a crapshoot...
 - By numbers of vehicles, by dimension, by W.A.G.
 - Build in ways to fix it..make them come back if it's not working
- Landscaping

This Starbucks has a drive-thru on one side and a walkup window on the other



29th Annual Zoning and Planning Law Report ("ZiPLeR") Awards



20 ZiPLeR Awards this year

- **World's Biggest Cover-Up Award**
- **Half-Baked Zoning Enforcement Award**
- **Working to Transform the Neighborhood Award**
- **What the Hey, HOA? Award**
- **Let Me Show You How It All Stacks Up Award**
- **Zoning Made Me Do It Award**
- **Zoned Out Award**
- **Retail Run Amok Award**
- **Going Out on a Limb Award**

- **Proud Boys Not Welcome Award**
- **INCOMING! Award**
- **Bigger Is Not Better Award**
- **Ultimate Enforcement Remedy Award**
- **Zoning Definition of the Year Award**
- **Fungus Amongst Us Award**
- **You Actually Look Better in Drag Award**
- **Prurient Zoning Award**
- **Informal Salary Adjustment Award**
- **NBA NIMBY Award**
- **You Can't Clown Around With Freedom of Information Law Award**
- **Dress for Success Award**



“a type of behaviour which is unapologetically self-indulgent, lazy, slovenly, or greedy, typically in a way that rejects social norms or expectations.”

World's Biggest Cover-Up Award Vermont Law School



Half-Baked Zoning Enforcement Award North Conway, New Hampshire



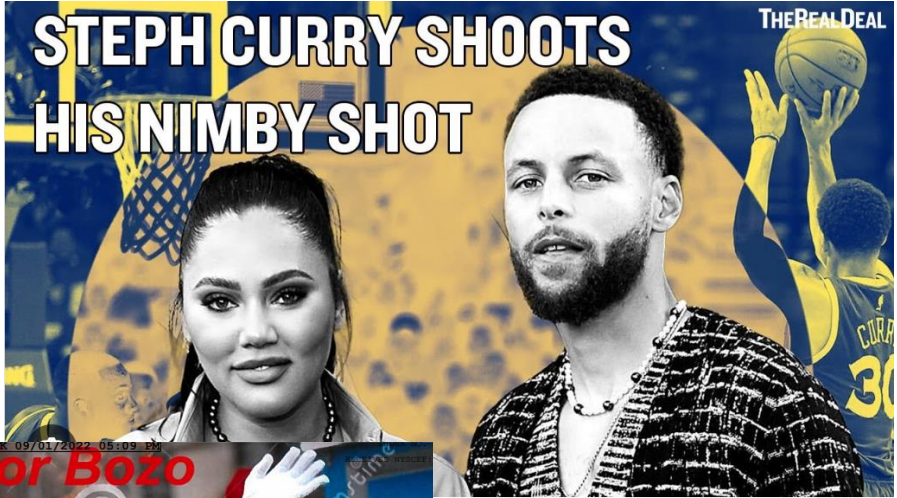
Fungus Amongst Us Award Jack Daniel's Distillery



Whiskey fungus on tree branches in Lincoln County, Tenn. Residents have been complaining about the ethanol-fueled fungus from a Jack Daniel's distillery in neighboring Moore County. Patrick Long



And others...



Thank you, always my pleasure to
join you...send me your ZiPLeR
nominations...

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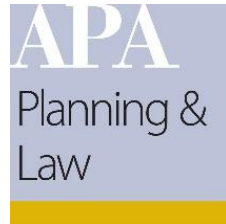
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Happy 30th Anniversary to the Land Use Law Center

Wine and Cheese Reception