Property
Professor Grimmelmann
New York Law School
Spring 2009

Supplement

GARY KREMEN et al.
v.
STEPHEN MICHAEL COHEN,
NETWORK SOLUTIONS, INC., et al.
337 F.3d 1024 (9th Cir. 2003)

KOZINSKI, Circuit Judge:

We decide whether Network Solutions may be liable for giving away a registrant's domain name on the basis of a forged letter.

Background

"Sex on the Internet?," they all said. "*That'll* never make any money." But computer-geek-turned-entrepreneur Gary Kremen knew an opportunity when he saw it. The year was 1994; domain names were free for the asking, and it would be several years yet before Henry Blodget and hordes of eager NASDAQ day traders would turn the Internet into the Dutch tulip craze of our times. With a quick e-mail to the domain name registrar Network Solutions, Kremen became the proud owner of sex.com. He registered the name to his business, Online Classifieds, and listed himself as the contact.

Con man Stephen Cohen, meanwhile, was doing time for impersonating a bankruptcy lawyer. He, too, saw the potential of the domain name. Kremen had gotten it first, but that was only a minor impediment for a man of Cohen's boundless resource and bounded integrity. Once out of prison, he sent Network Solutions what purported to be a letter he had received from Online Classifieds. It claimed the company had been "forced to dismiss Mr. Kremen," but "never got around to changing our administrative contact with the internet registration [sic] and now our Board of directors has decided to *abandon* the domain name sex.com." Why was this unusual letter being sent via Cohen rather than to Network Solutions directly? It explained:

> Because we do not have a direct connection to the internet, we request that you notify the internet registration on our behalf, to delete our domain name sex.com. Further, we have no objections to your use of the domain name sex.com and this letter shall serve as our authorization to the internet registration to transfer sex.com to your corporation. [2]

Despite the letter's transparent claim that a company called "*Online* Classifieds" had no Internet connection, Network Solutions made no effort to contact Kremen. Instead, it accepted the letter at face value and transferred the domain name to Cohen. When Kremen contacted Network Solutions some time later, he was told it was too late to undo the transfer. Cohen went on to turn sex.com into a lucrative online porn empire.

> 2 The letter was signed "Sharon Dimmick," purported president of Online Classifieds. Dimmick was actually Kremen's housemate at the time; Cohen later claimed she sold him the domain name for $ 1000. This story might have worked a little better if Cohen hadn't misspelled her signature.

And so began Kremen's quest to recover the domain name that was rightfully his. He sued Cohen and several affiliated companies in federal court, seeking return of the domain name and

disgorgement of Cohen's profits. The district court found that the letter was indeed a forgery and ordered the domain name returned to Kremen. . . . It awarded $ 40 million in compensatory damages and another $ 25 million in punitive damages.

Kremen, unfortunately, has not had much luck collecting his judgment. The district court froze Cohen's assets, but Cohen ignored the order and wired large sums of money to offshore accounts. His real estate property, under the protection of a federal receiver, was stripped of all its fixtures— even cabinet doors and toilets — in violation of another order. The court commanded Cohen to appear and show cause why he shouldn't be held in contempt, but he ignored that order, too. . . . Cohen, so far as the record shows, remains at large.

[I]t should come as no surprise that Kremen seeks to hold someone else responsible for his losses. That someone is Network Solutions, the exclusive domain name registrar at the time of Cohen's antics. Kremen sued it for mishandling his domain name. . . . The district court granted summary judgment in favor of Network Solutions on all claims. . . .

Conversion

Kremen's conversion claim is another matter. To establish that tort, a plaintiff must show "ownership or right to possession of property, wrongful disposition of the property right and damages." *G.S. Rasmussen & Assoc., Inc. v. Kalitta Flying Service, Inc., 958 F.2d 896, 906 (9th Cir. 1992)*. The preliminary question, then, is whether registrants have property rights in their domain names. Network Solutions all but concedes that they do. . . .

Property is a broad concept that includes "every intangible benefit and prerogative susceptible of possession or disposition." We apply a three-part test to determine whether a property right exists: "First, there must be an interest capable of precise definition; second, it must be capable of exclusive possession or control; and third, the putative owner must have established a legitimate claim to exclusivity." Domain names satisfy each criterion. Like a share of corporate stock or a plot of land, a domain name is a well-defined interest. Someone who registers a domain name decides where on the Internet those who invoke that particular name — whether by typing it into their web browsers, by following a hyperlink, or by other means — are sent. Ownership is exclusive in that the registrant alone makes that decision. Moreover, like other forms of property, domain names are valued, bought and sold, often for millions of dollars . . . .

Finally, registrants have a legitimate claim to exclusivity. Registering a domain name is like staking a claim to a plot of land at the title office. It informs others that the domain name is the registrant's and no one else's. Many registrants also invest substantial time and money to develop and promote websites that depend on their domain names. Ensuring that they reap the benefits of their investments reduces uncertainty and thus encourages investment in the first place, promoting the growth of the Internet overall. *See G.S. Rasmussen, 958 F.2d at 900*.

Kremen therefore had an intangible property right in his domain name, and a jury could find that Network Solutions "wrongfully disposed of" that right to his detriment by handing the domain name over to Cohen. *Id. at 906*. The district court nevertheless rejected Kremen's conversion claim. It held that domain names, although a form of property, are intangibles not subject to conversion. This rationale derives from a distinction tort law once drew between tangible and intangible property: Conversion was originally a remedy for the wrongful taking of another's lost goods, so it applied only to tangible property. Virtually every jurisdiction, however, has discarded this rigid limitation to some degree. Many courts ignore or expressly reject it. . . .

Indeed, the leading California Supreme Court case rejects the tangibility requirement altogether. In *Payne v. Elliot, 54 Cal. 339 (1880)*, the Court considered whether shares in a corporation (as opposed to the share certificates themselves) could be converted. It held that they could, reasoning: "The action no longer exists as it did at common law, but has been developed into a remedy for the conversion of *every species of personal property*." *Id. at 341* (emphasis added). While *Payne*'s outcome might be reconcilable with the *Restatement*, its rationale certainly is not: It recognized conversion of shares, not because they are customarily represented by share certificates, but because they are a species of personal property and, perforce, protected. *Id. at 342*. [7]

> 7 Intangible interests in *real* property, on the other hand, remain unprotected by conversion, presumably because trespass is an adequate remedy. . . .

Kremen's domain name is protected by California conversion law, even on the grudging reading we have given it. Exposing Network Solutions to liability when it gives away a registrant's domain name on the basis of a forged letter is no different from holding a corporation liable when it gives away someone's shares under the same circumstances. We have not "created new tort duties" in reaching this result. We have only applied settled principles of conversion law to what the parties and the district court all agree is a species of property.

The district court supported its contrary holding with several policy rationales, but none is sufficient grounds to depart from the common law rule. The court was reluctant to apply the tort of conversion because of its strict liability nature. This concern rings somewhat hollow in this case because the district court effectively exempted Network Solutions from liability to Kremen altogether, whether or not it was negligent. Network Solutions made no effort to contact Kremen before giving away his domain name, despite receiving a facially suspect letter from a third party. A jury would be justified in finding it was unreasonably careless.

We must, of course, take the broader view, but there is nothing unfair about holding a company responsible for giving away someone else's property even if it was not at fault. Cohen is obviously the guilty party here, and the one who should in all fairness pay for his theft. But he's skipped the country, and his money is stashed in some offshore bank account. . . .The question becomes whether Network Solutions should be open to liability for its decision to hand over Kremen's domain name. Negligent or not, it was Network Solutions that gave away Kremen's property. Kremen never did anything. It would not be unfair to hold Network Solutions responsible and force *it* to try to recoup its losses by chasing down Cohen. This, at any rate, is the logic of the common law, and we do not lightly discard it. . . .

The evidence supported a claim for conversion, and the district court should not have rejected it.

An Act to Authorize Protection to Be Given to Citizens of the United States Who May Discover Deposites of Guano

Aug. 18, 1856, 11 Stat. 119, *codified at* 48 U.S.C. § 1411 *et seq*.

48 U.S.C. § 1411

Whenever any citizen of the United States discovers a deposit of guano on any island, rock, or key, not within the lawful jurisdiction of any other government, and not occupied by the citizens of any other government, and takes peaceable possession thereof, and occupies the same, such island, rock, or key may, at the discretion of the President, be considered as appertaining to the United States.

48 U.S.C. § 1412

The discoverer shall, as soon as practicable, give notice verified by affidavit, to the Department of State, of such discovery, occupation, and possession, describing the island, rock, or key, and the latitude and longitude thereof, as near as may be, and showing that such possession was taken in the name of the United States; and shall furnish satisfactory evidence to the State Department that such island, rock, or key was not, at the time of the discovery thereof, or of the taking possession and occupation thereof by the claimants, in the possession or occupation of any other government or of the citizens of any other government, before the same shall be considered as appertaining to the United States.

48 U.S.C. § 1414

The discoverer, or his assigns, being citizens of the United States, may be allowed, at the pleasure of Congress, the exclusive right of occupying such island, rocks, or keys, for the purpose of obtaining guano, and of selling and delivering the same to citizens of the United States, to be used therein, and may be allowed to charge and receive for every ton thereof delivered alongside a vessel, in proper tubs, within reach of ship's tackle, a sum not exceeding $8 per ton for the best quality, or $4 for every ton taken while in its native place of deposit.

McAvoy v. Medina
93 Mass. 548 (1866)

[T]he defendant was a barber, and the plaintiff, being a customer in the defendant's shop, saw and took up a pocket-book which was lying upon a table there, and said, "See what I have found." The defendant came to the table and asked where he found it. The plaintiff laid it back in the same place and said, "I found it right there." The defendant then took it and counted the money, and the plaintiff told him to keep it, and if the owner should come to give it to him; and otherwise to advertise it; which the defendant promised to do. Subsequently the plaintiff made three demands for the money, and the defendant never claimed to hold the same till the last demand. It was agreed that the pocket-book was placed upon the table by a transient customer of

the defendant and accidentally left there, and was first seen and taken up by the plaintiff, and that the owner had not been found. . . .

Dewey, J. It seems to be the settled law that the finder of lost property has a valid claim to the same against all the world except the true owner, and generally that the place in which it is found creates no exception to this rule. 2 Parsons on Con. 97. *Bridges* v. *Hawkesworth*, 7 Eng. Law & Eq. R. 424.

But this property is not, under the circumstances, to be treated as lost property in that sense in which a finder has a valid claim to hold the same until called for by the true owner. This property was voluntarily placed upon a table in the defendant's shop by a customer of his who accidentally left the same there and has never called for it. The plaintiff also came there as a customer, and first saw the same and took it up from the table. The plaintiff did not by this acquire the right to take the property from the shop, but it was rather the duty of the defendant, when the fact became thus known to him, to use reasonable care for the safe keeping of the same until the owner should call for it. In the case of *Bridges* v. *Hawkesworth* the property, although found in a shop, was found on the floor of the same, and had not been placed there voluntarily by the owner, and the court held that the finder was entitled to the possession of the same, except as to the owner. But the present case more resembles that of *Lawrence* v. *The State*, 1 Humph. (Tenn.) 228, and is indeed very similar in its facts. The court there take a distinction between the case of property thus placed by the owner and neglected to be removed, and property lost. It was there held that "to place a pocket-book upon a table and to forget to take it away is not to lose it, in the sense in which the authorities referred to speak of lost property."

We accept this as the better rule, and especially as one better adapted to secure the rights of the true owner.

In view of the facts of this case, the plaintiff acquired no original right to the property, and the defendant's subsequent acts in receiving and holding the property in the manner he did does not create any.

JANET SUE LANHAM STEVENS
v.
PAUL DOUGLAS CASDORPH, AS EXECUTOR OF THE LAST WILL AND TESTAMENT OF HOMER HASKELL MILLER

203 W. Va. 450 (1988)

Per Curiam:

. . . On May 28, 1996, [Patricia Eileen Casdorph and Paul Douglas Casdorph] took Mr. Homer Haskell Miller to Shawnee Bank in Dunbar, West Virginia, so that he could execute his will. [1] Once at the bank, Mr. Miller asked Debra Pauley, a bank employee and public notary, to witness the execution of his will. After Mr. Miller signed the will, Ms. Pauley took the will to two other bank employees, Judith Waldron and Reba McGinn, for the purpose of having each of them sign the will as witnesses. Both Ms. Waldron and Ms. McGinn signed the will. However, Ms. Waldron and Ms. McGinn testified during their depositions that they did not actually see

Mr. Miller place his signature on the will. Further, it is undisputed that Mr. Miller did not accompany Ms. Pauley to the separate work areas of Ms. Waldron and Ms. McGinn.

1 Mr. Miller was elderly and confined to a wheelchair.

Mr. Miller died on July 28, 1996. The last will and testament of Mr. Miller, which named Mr. Paul Casdorph as executor, left the bulk of his estate to the Casdorphs. The Stevenses, nieces of Mr. Miller, filed the instant action to set aside the will. . . .[4]

4 As heirs, the Stevenses would be entitled to recover from Mr. Miller's estate under the intestate laws if his will is set aside as invalidly executed. . . .

The Stevenses' contention is simple. They argue that all evidence indicates that Mr. Miller's will was not properly executed. Therefore, the will should be voided. The procedural requirements at issue are contained in *W.Va. Code § 41-1-3* (1997). The statute reads:

> No will shall be valid unless it be in writing and signed by the testator, or by some other person in his presence and by his direction, in such manner as to make it manifest that the name is intended as a signature; and moreover, unless it be wholly in the handwriting of the testator, *the signature shall be made or the will acknowledged by him in the presence of at least two competent witnesses, present at the same time; and such witnesses shall subscribe the will in the presence of the testator, and of each other*, but no form of attestation shall be necessary. (Emphasis added.)

The relevant requirements of the above statute calls for a testator to sign his/her will or acknowledge such will in the presence of at least two witnesses at the same time, and such witnesses must sign the will in the presence of the testator and each other. In the instant proceeding the Stevenses assert, and the evidence supports, that Ms. McGinn and Ms. Waldron did not actually witness Mr. Miller signing his will. Mr. Miller made no acknowledgment of his signature on the will to either Ms. McGinn or Ms. Waldron. Likewise, Mr. Miller did not observe Ms. McGinn and Ms. Waldron sign his will as witnesses. Additionally, neither Ms. McGinn nor Ms. Waldron acknowledged to Mr. Miller that their signatures were on the will. It is also undisputed that Ms. McGinn and Ms. Waldron did not actually witness each other sign the will, nor did they acknowledge to each other that they had signed Mr. Miller's will. . . .

Our analysis begins by noting that "the law favors testacy over intestacy." However, we clearly held in syllabus point 1 of *Black v. Maxwell, 131 W. Va. 247, 46 S.E.2d 804 (1948)*, that "testamentary intent and a written instrument, executed in the manner provided by [*W.Va. Code § 41-1-3*], existing concurrently, are essential to the creation of a valid will." *Black* establishes that mere intent by a testator to execute a written will is insufficient. The actual execution of a written will must also comply with the dictates of *W.Va. Code § 41-1-3*. The Casdorphs seek to have this Court establish an exception to the technical requirements of the statute. In *Wade v. Wade, 119 W. Va. 596, 195 S.E. 339 (1938)*, this Court permitted a narrow exception to the stringent requirements of the *W.Va. Code § 41-1-3*. This narrow exception is embodied in syllabus point 1 of *Wade*:

> Where a testator acknowledges a will and his signature thereto in the presence of two competent witnesses, one of whom then subscribes his name, the other or first witness, having already subscribed the will in the presence of the testator but out of the presence of the second witness, may acknowledge his signature in the

> presence of the testator and the second witness, and such acknowledgment, if there be no indicia of fraud or misunderstanding in the proceeding, will be deemed a signing by the first witness within the requirement of Code, 41-1-3, that the witnesses must subscribe their names in the presence of the testator and of each other. . . .

Wade stands for the proposition that if a witness acknowledges his/her signature on a will in the physical presence of the other subscribing witness *and the testator*, then the will is properly witnessed within the terms of *W.Va. Code § 41-1-3*. In this case, none of the parties signed or acknowledged their signatures in the presence of each other. This case meets neither the narrow exception of *Wade* nor the specific provisions of *W.Va. Code § 41-1-3*.

Workman, J., dissenting:

The majority once more takes a very technocratic approach to the law, slavishly worshiping form over substance. In so doing, they not only create a harsh and inequitable result wholly contrary to the indisputable intent of Mr. Homer Haskell Miller, but also a rule of law that is against the spirit and intent of our whole body of law relating to the making of wills.

There is absolutely no claim of incapacity or fraud or undue influence, nor any allegation by any party that Mr. Miller did not consciously, intentionally, and with full legal capacity convey his property as specified in his will. The challenge to the will is based solely upon the allegation that Mr. Miller did not comply with the requirement of *West Virginia Code 41-1-3* that the signature shall be made or the will acknowledged by the testator in the presence of at least two competent witnesses, present at the same time. The lower court, in its very thorough findings of fact, indicated that Mr. Miller had been transported to the bank by his nephew Mr. Casdorph and the nephew's wife. Mr. Miller, disabled and confined to a wheelchair, was a shareholder in the Shawnee Bank in Dunbar, West Virginia, with whom all those present were personally familiar. When Mr. Miller executed his will in the bank lobby, the typed will was placed on Ms. Pauley's desk, and Mr. Miller instructed Ms. Pauley that he wished to have his will signed, witnessed, and acknowledged. After Mr. Miller's signature had been placed upon the will with Ms. Pauley watching, Ms. Pauley walked the will over to the tellers' area in the same small lobby of the bank. Ms. Pauley explained that Mr. Miller wanted Ms. Waldron to sign the will as a witness. The same process was used to obtain the signature of Ms. McGinn. Sitting in his wheelchair, Mr. Miller did not move from Ms. Pauley's desk during the process of obtaining the witness signatures. The lower court concluded that the will was valid and that Ms. Waldron and Ms. McGinn signed and acknowledged the will "in the presence" of Mr. Miller. . . .

The majority embraces the line of least resistance. The easy, most convenient answer is to say that the formal, technical requirements have not been met and that the will is therefore invalid. End of inquiry. Yet that result is patently absurd. That manner of statutory application is inconsistent with the underlying purposes of the statute. Where a statute is enacted to protect and sanctify the execution of a will to prevent substitution or fraud, this Court's application of that statute should further such underlying policy, not impede it. When, in our efforts to strictly apply legislative language, we abandon common sense and reason in favor of technicalities, we are the ones committing the injustice.

JEROD HEIMAN
v.
HEATHER L. PARRISH

262 Kan. 926 (1997)

McFARLAND, C.J.: The issue before us concerns the ownership of an engagement ring after the engagement was terminated.

The case was called for jury trial. After a brief in-chambers conference (no record of which is before us), the court orally decided the issue in open court. What transpired is concisely journalized as follows:

> "The parties stipulate to the following facts:
>
> "1. The issue to be determined is the ownership of an engagement ring.
>
> "2. The plaintiff purchased the engagement ring.
>
> "3. The ring was given to defendant as an engagement ring in contemplation of marriage between the parties.
>
> "4. The plaintiff is the party who ended the relationship.
>
> "5. Neither party stipulates to whose fault caused the relationship to terminate.
>
> "Based upon the stipulated facts, the pleadings in the Court file, arguments of counsel and the supporting briefs, the Court finds as a matter of law that since the engagement ring was given in contemplation of marriage, the marriage itself is a condition precedent to the ultimate ownership of the ring. Since the parties did not perform the condition of marriage, the purchaser is entitled to the return of the ring. The Court further finds that the issue of who ended the relationship is not determinative of the ownership of the ring.
>
> . . . .
>
> "IT IS, THEREFORE ORDERED, ADJUDGED AND DECREED that the plaintiff is entitled to the return of the engagement ring and costs are assessed to the defendant."

Defendant appeals therefrom. Additional uncontroverted facts are that the ring was purchased in August 1994 for $ 9,033. Plaintiff terminated the engagement in October 1995. Defendant refused to return the ring, and this action was filed April 3, 1996. For the sake of simplicity, plaintiff will henceforth be referred as Jerod and defendant will be referred to as Heather. . . .

The issues may be summarized as follows. Was the engagement ring a conditional gift given in contemplation of marriage? If this question is answered affirmatively, then, upon termination of the engagement, should ownership of the ring be determined on a fault or no-fault basis? These are issues of first impression in Kansas.

Conditional Gift

Heather argues that the gift of an engagement ring should be gauged by the same standards as for any other inter vivos gift, and that, once delivery and acceptance have occurred, the gift is irrevocable. She contends Kansas does not recognize conditional gifts.

Jerod argues that an engagement ring is inherently a conditional gift, as it is given in contemplation of marriage. If the wedding does not occur, the ring should be returned to its donor.

To establish a gift inter vivos there must be (a) an intention to make a gift; (b) a delivery by the donor to the donee; and (c) an acceptance by the donee. The gift must be absolute and irrevocable. . . .

While there is a paucity of Kansas law on gifts in contemplation of marriage in general, and engagement rings in particular, courts in many other states have wrestled with the issues arising therefrom. Most courts recognize that engagement rings occupy a rather unique niche in our society. . . .

By tradition and the mores of our society, an engagement ring is the symbol of the parties' mutual promises to marry. It is unlike any other gift given or exchanged by lovers. The single sentence "She returned his ring" illustrates this. These four words, standing alone, paint the picture of mutual promises to wed, a ring being given and received to symbolize these promises, and the intended bride reneging on her promise and so advising the would-be groom by returning the ring. No like picture is engendered by the phrase "She returned his bracelet." Nothing about the relationship of the parties or the circumstances surrounding the exchange can be implied from these four words.

In the absence of a contrary expression of intent, it is logical that engagement rings should be considered, by their very nature, conditional gifts given in contemplation of marriage. Once it is established the ring is an engagement ring, it is a conditional gift.

Other courts have reached a similar conclusion. See *Simonian v. Donoian, 96 Cal. App. 2d 259, 215 P.2d 119 (1950)*; *White v. Finch, 3 Conn. Cir. Ct. 138, 209 A.2d 199 (1964)*; *Gill v. Shively, 320 So. 2d 415 (Fla. Dist. App. 1975)*; *Vann v. Vehrs, 260 Ill. App. 3d 648, 633 N.E.2d 102, 198 Ill. Dec. 640 (1994)*; *Harris v. Davis, 139 Ill. App. 3d 1046, 487 N.E.2d 1204, 94 Ill. Dec. 327 (1986)*; *Fierro v. Hoel, 465 N.W.2d 669 (Iowa App. 1990)*; *Aronow v. Silver, 223 N.J. Super. 344, 538 A.2d 851 (1987)*; *Mate v. Abrahams, 62 A.2d 754 (N.J. County Ct. 1948)*; *Vigil v. Haber, 119 N.M. 9, 888 P.2d 455 (1994)*; *Wion v. Henderson, 24 Ohio App. 3d 207, 494 N.E.2d 133 (1985)*; *Lyle v. Durham, 16 Ohio App. 3d 1, 473 N.E.2d 1216 (1984)*; *Spinnell v. Quigley, 56 Wash. App. 799, 785 P.2d 1149 (1990)*; *Brown v. Thomas, 127 Wis. 2d 318, 379 N.W.2d 868.*

Other types of property may be shown to be conditional gifts given in contemplation of marriage, but such a classification would require specific evidence of such intent as opposed to just showing the ring was an engagement ring given in contemplation of marriage. As was stated in *Fierro v. Hoel, 465 N.W.2d at 671*, of an engagement ring: "There is no need to establish an express condition that marriage will ensue. A party meets the burden of establishing the conditional nature of the gift by proving by a preponderance of evidence that the gift was given in contemplation of marriage."

In the action herein, the parties stipulated that the object in dispute is an engagement ring given in contemplation of marriage. We conclude the district court correctly held that it was a conditional gift.

Fault or No Fault

We turn now to who is entitled to the ring under the facts herein. There is a split of authority on this issue. Should ownership be determined on the basis of fault? Or should a no-fault rule be applied and the ring returned to its donor after the engagement is broken, regardless of fault? . . .

Generally, with regard to who is entitled to the engagement ring once the engagement has been broken, courts have taken two divergent paths. One rule states that when an engagement has been unjustifiably broken by the donor, the donor shall not recover the ring. However, if the engagement is broken by mutual agreement or, unjustifiably by the donee, the ring should be returned to the donor. This is the fault-based line of cases. The other rule, the so-called "modern trend" (*46 A.L.R.3d at 584*), holds that as an engagement ring is an inherently conditional gift, once the engagement has been broken the ring should be returned to the donor. Thus, the question of who broke the engagement and why, or who was "at fault," is irrelevant. This is the no-fault line of cases.

Heather argues that we should adopt the fault-based rule and award the ring to her, as Jerod ended the engagement. Jerod, for obvious reasons, urges us to affirm the district court's adoption of the no-fault rule and award the ring to him. . . .

Justification for the fault-based rule was picturesquely stated in *Pavlicic v. Vogtsberger, 390 Pa. 502, 507, 136 A.2d 127 (1957)*, as follows:

> "A gift given by a man to a woman on condition that she embark on the sea of matrimony with him is no different from a gift based on the condition that the donee sail on any other sea. If, after receiving the provisional gift, the donee refuses to leave the harbor,—if the anchor of contractual performance sticks in the sands of irresolution and procrastination—the gift must be restored to the donor."

Presumably, if the donor of the ring was the party refusing to leave the pier, the Pennsylvania court would rule the donee was entitled to the ring. . . .

We turn now to the no-fault line of cases. . . . The same result was reached in *Aronow v. Silver, 223 N.J. Super. 344, 538 A.2d 851*. Although "the majority rule in this country concerning the disposition of engagement rings is a fault rule: the party who unjustifiably breaks the engagement loses the ring" (*223 N.J. Super. at 346*), the Aronow court believed the majority rule to be "sexist and archaic," giving the following explanation:

"The history is traced in 24 A.L.R.2d at 582-586 [superseded by *46 A.L.R.3d 578]*. In ancient Rome the rule was fault. When the woman broke the engagement, however, she was required not only to return the ring, but also its value, as a penalty. No penalty attached when the breach was the man's. In England, women were oppressed by the rigidly stratified social order of the day. They worked as servants or, if not of the servant class, were dependent on their relatives. The fact that men were in short supply, marriage above one's station rare and travel difficult abbreviated betrothal prospects for women. Marriages were arranged. Women's lifetime choices were limited to a marriage or a nunnery. Spinsterhood was a centuries-long personal tragedy. Men, because it was a man's world, were much more likely than women to break engagements. When one did, he left behind a woman of tainted reputation and ruined prospects. The law, in a de minimis gesture, gave her the engagement ring, as a consolation prize. When the man was jilted, a seldom thing, justice required the ring's return to him. Thus, the rule of life was the rule of law—both saw women as inferiors

. . . .

After careful consideration, we conclude the no-fault line of cases is persuasive.

What is fault or the unjustifiable calling off of an engagement? By way of illustration, should courts be asked to determine which of the following grounds for breaking an engagement is fault or justified? (1) The parties have nothing in common; (2) one party cannot stand prospective in-laws; (3) a minor child of one of the parties is hostile to and will not accept the other party; (4) an adult child of one of the parties will not accept the other party; (5) the parties' pets do not get along; (6) a party was too hasty in proposing or accepting the proposal; (7) the engagement was a rebound situation which is now regretted; (8) one party has untidy habits that irritate the other; or (9) the parties have religious differences. The list could be endless. . . .

The engagement period is one where each party should be free to reexamine his or her commitment to the other and be sure he or she desires the commitment of marriage to the other. If the promise to wed were rashly or improvidently made, public policy would be better served if the engagement promise to wed would be broken rather than the marriage vows.

The ring which was given on the promise of a future marriage and is the symbol of the parties' commitment to each other and their life together is, after the engagement is broken, a symbol of failed promises and hopes, hardly a treasured keepsake for its formerly betrothed wearer. Broken engagements engender hurt pride, anger, and wounded egos. They do not ordinarily present the major questions of changes in lifestyles, standards of living, etc., that broken marriages involve. Yet the legislature has applied the no-fault principle to divorces on the grounds of public policy. It is difficult to see how the public policies involving divorce and the division of marital property are best served by no-fault principles, but broken engagements should require a fault-based determination as to ownership of the engagement ring. Litigating fault for a broken engagement would do little but intensify the hurt feelings and delay the parties' being able to get on with their lives.

We conclude that fault is ordinarily not relevant to the question of who should have ownership and possession of an engagement ring after the engagement is broken. Ordinarily, the ring should be returned to the donor, regardless of fault. . . . The district court did not err in awarding the ring to Jerod after concluding fault was irrelevant.

MARQUARDT, J., dissenting: I respectfully dissent from the majority's holding.

. . . Where there is an intent to make a gift, the gift is complete when it has been delivered and accepted. In applying gift law, Heather's position that the ring is a valid inter vivos gift is supported in that the engagement took place. As far as we know from the limited record, the gift was complete; all the conditions were met. Jerod, without fraud or coercion, intended to make the gift, and the ring was delivered by him and accepted by Heather. . . .

. . . Those jurisdictions that rely on the analysis that an engagement ring is a conditional gift ignore general gift law, which holds that a gift is complete if there is intent, delivery, and acceptance.

JON MATTHEW
v.
ELTON SMITH, et al.

707 S.W.2d 411 (Mo. 1986)

OPINION BY: WELLIVER

This is an appeal from a circuit court judgment affirming the Board of Zoning Adjustment's decision to grant Jim and Susan Brandt a variance. The Brandts purchased a residential lot containing two separate houses upon a tract of land zoned for a single-family use. The court of appeals reversed the circuit court judgment, and the case was then certified to this Court by a dissenting judge. We reverse and remand.

The Brandts own a tract of land comprising one and one-half plotted lots. When they purchased the property in March of 1980, there already were two houses on the land, one toward the front of Erie Street and one in the rear. Each of the buildings is occupied by one residential family as tenants of the Brandts. The two houses apparently have been used as separate residences for the past thirty years, with only intermittent vacancies. The property is zoned for Single Family Residences. At the suggestion of a city official, the Brandts applied for a variance which would allow them to rent both houses with a single family in each house. After some delay, including two hearings by the Board of Zoning Adjustment of Kansas City, the Board granted the application. Appellant, Jon Matthew, a neighboring landowner challenged the grant of the variance and sought a petition for certiorari from the Board's action. *§ 89.110, RSMo 1978.* The circuit court affirmed the Board's order; on appeal, the court of appeals held that the Board was without authority to grant the requested variance. A dissenting judge certified the case to this Court.

Prompted by the persuasive opinions of both the majority of the Western District and the dissenting judge who certified the case to this Court, we believe that a review of the applicable law is warranted.

Zoning law developed during the early part of this century as a mechanism for channeling growth. Zoning acts authorize municipalities to pass ordinances, which designate the boundaries for districts and which define the allowable land uses in such districts. Board of Zoning Adjustments (Appeals) were created to review specific applications of the zoning ordinances.

Under most zoning acts, these boards have the authority to grant variances from the strict letter of the zoning ordinance. The variance procedure "fulfils a sort of 'escape hatch' or 'safety valve' function for individual landowners who would suffer special hardship from the literal application of the . . . zoning ordinance." It is often said that "the variance provides an administrative alternative for individual relief that can avoid the damage that can occur to a zoning ordinance as a result of as applied taking litigation." The general rule is that the authority to grant a variance should be exercised sparingly and only under exceptional circumstances.

Both the majority of courts and the commentators recognize two types of variances: an area (nonuse) variance and a use variance.

> The two types of variances with which cases are customarily concerned are "use" variances and "nonuse variances." The latter consist mostly of variances of bulk restric-

> tions, of area, height, density, setback, side line restrictions, and restrictions covering miscellaneous subjects, including the right to enlarge nonconforming uses or to alter nonconforming structures.
>
> As the name indicates, a use variance is one which permits a use other than one of those prescribed by the zoning ordinance in the particular district; it permits a use which the ordinance prohibits. A nonuse variance authorizes deviations from restrictions which relate to a permitted use, rather than limitations on the use itself, that is, restrictions on the bulk of buildings, or relating to their height, size, and extent of lot coverage, or minimum habitable area therein, or on the placement of buildings and structures on the lot with respect to required yards. Variances made necessary by the physical characteristics of the lot itself are nonuse variances of a kind commonly termed "area variances."

A. Rathkopf, *supra*, § 38.01. Many zoning acts or ordinances expressly distinguish between the two types of variances. *N. Williams, supra*, § 129.07, at 17. When the distinction is not statutory, "the courts have always distinguished use from area variances." D. Mandelker, Land Use Law, at 167. (1982). Some jurisdictions, whether by express statutory directive or by court interpretation, do not permit the grant of a use variance.

Past decisions in this State have placed Missouri within those jurisdictions not permitting a use variance. This line of cases would suggest that the Brandts are not entitled to the variance. They seek a variance to use the property in a manner not permitted under the permissible uses established by the ordinance. The ordinance clearly permits only the use of the property for a single family residence. § 8.A(1) North Kansas City Zoning Ordinance. The applicant is not seeking a variance from the area and yard restrictions which are no doubt violated because of the existence of the second residence. § 8.B-G North Kansas City Zoning Ordinance. Such an area variance is not necessary because the applicant has a permissible nonconforming structure under the ordinance. § 5.B North Kansas City Zoning Ordinance.

Commentators, however, have questioned the rationale underlying the Missouri cases. These past cases, beginning with *State ex rel. Nigro v. Kansas City, 325 Mo. 95, 27 S.W.2d 1030* (Mo. banc 1930), are based upon the premise that the granting of a use variance would be an unconstitutional delegation of power to the Board to amend the ordinance. *See generally* Mandelker, "Delegation of Power and Function In Zoning Administration," 1963 Wash. U. L. Q. 60, 68-71. This view has long since been repudiated by most jurisdictions, and it is contrary to the express language of *§ 89.090, RSMo 1978*, which grants the Board the "power to vary or modify the application of any of the regulations or provisions of such ordinance relating to the *use*, construction or alteration of buildings or structures, or the *use* of land" (emphasis added). We, therefore, hold that under the proper circumstances an applicant may obtain a use variance. . . .

Unfortunately, any attempt to set forth a unified structure illustrating how all the courts have treated these conditions would, according to Professor Williams, prove unsuccessful. Williams observes that the law of variances is in "great confusion" and that aside from general themes any further attempt at unifying the law indicates "either (a) [one] has not read the case law, or (b) [one] has simply not understood it. Here far more than elsewhere in American planning law, muddle reigns supreme." *N. Williams, supra*, § 129.01, at 12. Yet, four general themes can be distilled from variance law and indicate what an applicant for a variance must prove:

(1) relief is necessary because of the unique character of the property rather than for personal considerations; and

(2) applying the strict letter of the ordinance would result in unnecessary hardship; and the

(3) imposition of such a hardship is not necessary for the preservation of the plan; and

(4) granting the variance will result in substantial justice to all.

See A. Rathkopf, *supra*, § 37.06; *N. Williams, supra*, § 129.06. Although all the requirements must be satisfied, **[**14]** it is generally held that "'unnecessary hardship' is the principal basis on which a variance is granted." . . .

While today we enter a field not yet developed by case law in our own jurisdiction, other jurisdictions provide some guidance for determining what is required to establish unnecessary hardship when granting a use variance. It is generally said that *Otto v. Steinhilber, 282 N.Y. 71, 24 N.E.2d 851, 853 (1939)* contains the classic definition of unnecessary hardship:

> Before the Board may exercise its discretion and grant a variance upon the ground of unnecessary hardship, the record must show that (1) the land in question cannot yield a reasonable return if used only for a purpose allowed in that zone; (2) that the plight of the owner is due to unique circumstances and not to the general conditions in the neighborhood **[*417]** which may reflect the unreasonableness of the zoning ordinance itself; and (3) that the use to be authorized by the variance will not alter the essential character of the locality.

Quite often the existence of unnecessary hardship depends upon whether the landowner can establish that without the variance the property cannot yield a reasonable return. "Reasonable return is not maximum return." *Curtis v. Main, 482 A.2d 1253, 1257 (Me. 1984)*. Rather, the landowner must demonstrate that he or she will be deprived of all beneficial use of the property under any of the permitted uses:

> A zoning regulation imposes unnecessary **[**18]** hardship if property to which it applies cannot yield a reasonable return from *any* permitted use. Lack of a reasonable return may be shown by proof that the owner has been deprived of *all* beneficial use of his land. All beneficial use is said to have been lost where the land is not suitable for any use permitted by the zoning ordinance.

Greenawalt v. Zoning Bd. of Adj., of Davenport, 345 N.W.2d 537 (Iowa 1984) at 542-43 (quoting 3 Anderson, American Law of Zoning, § 18.17 (1968)). Most courts agree that mere conclusory and lay opinion concerning the lack of any reasonable return is not sufficient; there must be actual proof, often in the form of dollars and cents evidence. In a well-reasoned opinion, Judge Meyer of the New York Court of Appeals stated:

> Whether the existing zoning permits of a reasonable return requires proof from which can be determined the rate of return earned by like property in the community and proof in dollars and cents form of the owner's investment in the property as well as the

> return that the property will produce from the various uses permissible under the existing classification.

N. Westchester Prof. Park v. Town of Bedford, 60 N.Y.2d 492, 458 N.E.2d 809, 814, 470 N.Y.S.2d 350 (1983). Such pronouncements and requirements of the vast majority of jurisdictions illustrate that, if the law of variances is to have any viability, only in the exceptional case will a use variance be justified.

The record before this Court is fraught with personality conflicts and charges of bias on the part of one of the Board members. Also, the record is without sufficient evidence to establish unnecessary hardship. The only evidence in the record is the conclusory opinion of Brandt that they would be deprived of a reasonable return if not allowed to rent both houses. No evidence of land values was offered; and, no dollars and cents proof was presented to demonstrate that they would be deprived of all beneficial use of their property. Appellant, in fact, was not permitted to introduce such evidence. The Board, therefore, was without authority to grant a use variance upon this record.

The record, however, indicates that the Brandts may be entitled to a nonconforming use under the ordinance. A nonconforming use differs from a variance. Nonconforming uses are those that are in existence prior to and at the time of adoption of the zoning ordinance and which have been maintained from that time to the present. *See Missouri Rock, Inc. v. Winholtz, 614 S.W.2d 734, 739 (Mo. App. 1981)*. *See generally* D. Mandelker, Land Use Law, at 130-135. The North Kansas City Zoning Ordinance provides:

> Any nonconforming building, structure or use which existed lawfully at the time of the adoption of this ordinance and which remains nonconforming, and only such building, structure or use which shall become nonconforming upon the adoption of this ordinance or any subsequent amendment thereto, may be continued in accordance with the regulations which follow.

§ 5.B North Kansas City Zoning Ordinance. The ordinance further provides that one loses the right to a nonconforming use if the property is abandoned as a nonconforming use for a period of more than six months. § 5.C(4). The record indicates that a city official, based upon what was apparently scant evidence, suggested to the Brandts that they may have lost their right to a nonconforming use. There is no substantial evidence in this record indicating the length of time the property may have been unoccupied. Nothing in the record indicates whether the Brandts may have been refurbishing the property or looking for tenants during any such time. Nothing suggests that the Brandts intended to abandon their nonconforming use during the period of time the property may have been unoccupied. *See generally* D. Mandelker, Land Use Law, at 134; *N. Williams, supra*, at § 115.03 (1965). Both the trial court and counsel for the Board suggest that the Brandts "may very well have a valid nonconforming use of the premises in question." We do not believe that anything in the record indicates that the Brandts have waived their right to or abandoned their claim of a nonconforming use.

The judgment of the circuit court is reversed and the cause is remanded back to the circuit court with directions that the cause be remanded back to the Board of Adjustment with directions that the applicants be permitted to present evidence warranting the grant of a variance and

to amend their application to claim a nonconforming use of the premises and for such hearing and decision as may be required consistent with this opinion.

[concurring opinion of Judge Robertson omitted]

Charles B. Blackmar, Judge.

The property owner has laid the foundation for the grant of a variance by showing that two separate houses were located on a single lot at the time the zoning ordinance was adopted. There would be a substantial waste if habitable structures were required to be torn down. This showing should permit the Board to find, in its discretion, after hearing all evidence, that the tests of "unnecessary hardship" and "practical difficulties" are met.

Rate of return is an important consideration. Although initial cost may not be a controlling circumstance in determining the base from which reasonable return is to be calculated, it is a starting point. The Board was plainly wrong in denying the plaintiff the right to inquire about the initial cost. This error taints the hearing, and the order based on it cannot stand.

I concur, therefore, in the judgment of reversal and remand to the Board.

M. BRUCE ANDERSON
v.
THE CITY OF ISSIQUAH

70 Wn. App. 64 (Ct. App. 1993)

OPINION BY: KENNEDY

Appellants M. Bruce Anderson, Gary D. LaChance, and M. Bruce Anderson, Inc. (hereinafter referred to as Anderson), challenge the denial of their application for a land use certification, arguing, inter alia, that the building design requirements contained in Issaquah Municipal Code (IMC) 16.16.060 are unconstitutionally vague. The Superior Court rejected this constitutional challenge. We reverse and direct that Anderson's land use certification be issued.

The City of Issaquah cross-appeals, contending the trial court erroneously granted summary dismissal of its affirmative defenses. Anderson contends the cross appeal is wholly frivolous and seeks an award of reasonable attorney fees incurred in responding thereto. We affirm the trial court's summary dismissal of the affirmative defenses. We resolve our considerable doubts with respect to sanctions in favor of the City of Issaquah and deny Anderson's request for attorney fees.

Facts

Anderson owns property located at 145 N.W. Gilman Boulevard in the city of Issaquah (City). In 1988, Anderson applied to the City for a land use certification to develop the property. The property is zoned for general commercial use. Anderson desired to build a 6,800-square-foot commercial building for several retail tenants.

After obtaining architectural plans, Anderson submitted the project to various City departments for the necessary approvals. The process went smoothly until the approval of the Issaquah Development Commission (Development Commission) was sought. This commission was created to administer and enforce the City's land use regulations. It has the authority to approve or deny applications for land use certification.

Section 16.16.060 of the IMC enumerates various building design objectives which the Development Commission is required to administer and enforce. Insofar as is relevant to this appeal, the Development Commission is to be guided by the following criteria:

> IMC 16.16.060(B). Relationship of Building and Site to Adjoining Area.
>
> 1. Buildings and structures shall be made compatible with adjacent buildings of conflicting architectural styles by such means as screens and site breaks, or other suitable methods and materials.
>
> 2. Harmony in texture, lines, and masses shall be encouraged.
>
> . . . .
>
> IMC 16.16.060(D). Building Design.
>
> 1. Evaluation of a project shall be based on quality of its design and relationship to the natural setting of the valley and surrounding mountains.
>
> 2. Building components, such as windows, doors, eaves and parapets, shall have appropriate proportions and relationship to each other, expressing themselves as a part of the overall design.
>
> 3. Colors shall be harmonious, with bright or brilliant colors used only for minimal accent.
>
> 4. Design attention shall be given to screening from public view all mechanical equipment, including refuse enclosures, electrical transformer pads and vaults, communication equipment, and other utility hardware on roofs, grounds or buildings.
>
> 5. Exterior lighting shall be part of the architectural concept. Fixtures, standards and all exposed accessories shall be harmonious with the building design.
>
> 6. Monotony of design in single or multiple building projects shall be avoided. Efforts should be made to create an interesting project by use of complimentary details, functional orientation of buildings, parking and access provisions and relating the development to the site. In multiple building projects, variable siting of individual buildings, heights of buildings, or other methods shall be used to prevent a monotonous design.

As initially designed, Anderson's proposed structure was to be faced with off-white stucco and was to have a blue metal roof. It was designed in a "modern" style with an unbroken "warehouse" appearance in the rear, and large retail-style windows in the front. The City moved a Victorian era residence, the "Alexander House", onto the neighboring property to serve as a visitors' center. Across the street from the Anderson site is a gasoline station that looks like a gasoline station. Located nearby and within view from the proposed building site are two more gasoline stations, the First Mutual Bank Building built in the "Issaquah territorial style", an Elks hall

which is described in the record by the Mayor of Issaquah as a "box building", an auto repair shop, and a veterinary clinic with a cyclone-fenced dog run. The area is described in the record as "a natural transition area between old downtown Issaquah and the new village style construction of Gilman [Boulevard]."

The Development Commission reviewed Anderson's application for the first time at a public hearing on December 21, 1988. Commissioner Nash commented that "the facade did not fit with the concept of the surrounding area." Commissioner McGinnis agreed. Commissioner Nash expressed concern about the building color and stated that he did not think the building was compatible with the image of Issaquah. Commissioner Larson said that he would like to see more depth to the building facade. Commissioner Nash said there should be some interest created along the blank back wall. Commissioner Garrison suggested that the rear facade needed to be redesigned.

At the conclusion of the meeting, the Development Commission voted to continue the hearing to give Anderson an opportunity to modify the building design.

On January 18, 1989, Anderson came back before the Development Commission with modified plans which included changing the roofing from metal to tile, changing the color of the structure from off-white to "Cape Cod" gray with "Tahoe" blue trim, and adding brick to the front facade. During the ensuing discussion among the commissioners, Commissioner Larson stated that the revisions to the front facade had not satisfied his concerns from the last meeting. In response to Anderson's request for more specific design guidelines, Commissioner McGinnis stated that the Development Commission had "been giving direction; it is the applicant's responsibility to take the direction/suggestions and incorporate them into a revised plan that reflects the changes." Commissioner Larson then suggested that "the facade can be broken up with sculptures, benches, fountains, etc." Commissioner Nash suggested that Anderson "drive up and down Gilman and look at both good and bad examples of what has been done with flat facades."

As the discussion continued, Commissioner Larson stated that Anderson "should present a [plan] that achieves what the Commission is trying to achieve through its comments/suggestions at these meetings" and stated that "architectural screens, fountains, paving of brick, wood or other similar methods of screening in lieu of vegetative landscaping are examples of design suggestions that can be used to break up the front facade." Commissioner Davis objected to the front facade, stating that he could not see putting an expanse of glass facing Gilman Boulevard. "The building is not compatible with Gilman." Commissioner O'Shea agreed. Commissioner Nash stated that "the application needs major changes to be acceptable." Commissioner O'Shea agreed. Commissioner Nash stated that "this facade does not create the same feeling as the building/environment around this site."

Commissioner Nash continued, stating that he "personally liked the introduction of brick and the use of tiles rather than metal on the roof." Commissioner Larson stated that he would like to see a review of the blue to be used: "Tahoe blue may be too dark." Commissioner Steinwachs agreed. Commissioner Larson noted that "the front of the building could be modulated [to] have other design techniques employed to make the front facade more interesting."

With this, the Development Commission voted to continue the discussion to a future hearing.

On February 15, 1989, Anderson came back before the Development Commission. In the meantime, Anderson's architects had added a 5-foot overhang and a 7-foot accent overhang to the plans for the front of the building. More brick had been added to the front of the building.

Wood trim and accent colors had been added to the back of the building and trees were added to the landscaping to further break up the rear facade.

Anderson explained the plans still called for large, floor to ceiling windows as this was to be a retail premises: "[A] glass front is necessary to rent the space . . .". Commissioner Steinwachs stated that he had driven Gilman Boulevard and taken notes. The following verbatim statement by Steinwachs was placed into the minutes:

> "*My General Observation From Driving Up and Down Gilman Boulevard*".
>
> I see certain design elements and techniques used in various combinations in various locations to achieve a visual effect that is sensitive to the unique character of our Signature Street. I see heavy use of brick, wood, and tile. I see minimal use of stucco. I see colors that are mostly earthtones, avoiding extreme contrasts. I see various methods used to provide modulation in both horizontal and vertical lines, such as gables, bay windows, recesses in front faces, porches, rails, many vertical columns, and breaks in roof lines. I see long, sloping, conspicuous roofs with large overhangs. I see windows with panels above and below windows. I see no windows that extend down to floor level. This is the impression I have of Gilman Boulevard as it relates to building design.

Commissioner Nash agreed stating, "There is a certain feeling you get when you drive along Gilman Boulevard, and this building does not give this same feeling." Commissioner Steinwachs wondered if the applicant had any option but to start "from scratch". Anderson responded that he would be willing to change from stucco to wood facing but that, after working on the project for 9 months and experiencing total frustration, he was not willing to make additional design changes.

At that point, the Development Commission denied Anderson's application, giving four reasons:

> 1. After four [sic] lengthy review meetings of the Development Commission, the applicant has not been sufficiently responsive to concerns expressed by the Commission to warrant approval or an additional continuance of the review.
>
> 2. The primary concerns expressed relate to the building architecture as it relates to Gilman Boulevard in general, and the immediate neighborhood in particular.
>
> 3. The Development Commission is charged with protecting, preserving and enhancing the aesthetic values that have established the desirable quality and unique character of Issaquah, reference IMC 16.16.010C. [3]
>
> 4. We see certain design elements and techniques used in various combinations in various locations to achieve a visual effect that is sensitive to the unique character of our Signature Street. On Gilman Boulevard we see heavy use of brick, wood and tile. We see minimal use of stucco. We see various methods used to provide both horizontal and vertical modulation, including gables, breaks in rooflines, bay windows, recesses and protrusions in front face. We see long, sloping, conspicuous roofs with large overhangs. We see no windows that extend to ground level. We see brick and wood panels at intervals between windows. We see earthtone colors avoiding extreme contrast.

Anderson, who by this time had an estimated $ 250,000 into the project, timely appealed the adverse ruling to the Issaquah City Council (City Council). After a lengthy hearing and much

debate, the City Council decided to affirm the Development Commission's decision by a vote of 4 to 3. . . .

Anderson filed a complaint in King County Superior Court. . . .

Following trial, the court dismissed Anderson's complaint, rejecting the same claims now raised in this appeal.

Discussion

. . .

2. Constitutionality of IMC 16.16.060 (Building Design Provisions).

> [A] statute which either forbids or requires the doing of an act in terms so vague that men [and women] of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law.

Connally v. General Constr. Co., 269 U.S. 385, 391, 70 L. Ed. 322, 46 S. Ct. 126 (1926). In the field of regulatory statutes governing business activities, statutes which employ technical words which are commonly understood within an industry, or which employ words with a well-settled common law meaning, generally will be sustained against a charge of vagueness. The vagueness test does not require a statute to meet impossible standards of specificity.

In the area of land use, a court looks not only at the face of the ordinance but also at its application to the person who has sought to comply with the ordinance and/or who is alleged to have failed to comply. *Burien Bark Supply, 106 Wash. 2d at 871*; *Grant Cy. v. Bohne, 89 Wash. 2d 953, 955, 577 P.2d 138 (1978)*. The purpose of the void for vagueness doctrine is to limit arbitrary and discretionary enforcements of the law. *Burien Bark Supply, 106 Wash. 2d at 871*.

Looking first at the face of the building design sections of IMC 16.16.060, we note that an ordinary citizen reading these sections would learn only that a given building project should bear a good relationship with the Issaquah Valley and surrounding mountains; its windows, doors, eaves and parapets should be of "appropriate proportions", its colors should be "harmonious" and seldom "bright" or "brilliant"; its mechanical equipment should be screened from public view; its exterior lighting should be "harmonious" with the building design and "monotony should be avoided." The project should also be "interesting". IMC 16.16.060(D)(1)-(6). If the building is not "compatible" with adjacent buildings, it should be "made compatible" by the use of screens and site breaks "or other suitable methods and materials." "Harmony in texture, lines, and masses [is] encouraged." The landscaping should provide an "attractive . . . transition" to adjoining properties. IMC 16.16.060(B)(1)-(3).

As is stated in the brief of amicus curiae, we conclude that these code sections "do not give effective or meaningful guidance" to applicants, to design professionals, or to the public officials of Issaquah who are responsible for enforcing the code. Brief of Amicus Curiae, at 1. Although it is clear from the code sections here at issue that mechanical equipment must be screened from public view and that, probably, earthtones or pastels located within the cool and muted ranges of the color wheel are going to be preferred, there is nothing in the code from which an applicant can determine whether his or her project is going to be seen by the Development Commission as "in-

teresting" versus "monotonous" and as "harmonious" with the valley and the mountains. Neither is it clear from the code just what else, besides the valley and the mountains, a particular project is supposed to be harmonious with, although "harmony in texture, lines, and masses" is certainly encouraged. IMC 16.16.060(B)(2).

In attempting to interpret and apply this code, the commissioners charged with that task were left with only their own individual, subjective "feelings" about the "image of Issaquah" and as to whether this project was "compatible" or "interesting". The commissioners stated that the City was "making a statement" on its "signature street" and invited Anderson to take a drive up and down Gilman Boulevard and "look at good and bad examples of what has been done wit h flat facades." One commissioner drove up and down Gilman, taking notes, in a no doubt sincere effort to define that which is left undefined in the code.

The point we make here is that neither Anderson nor the commissioners may constitutionally be required or allowed to guess at the meaning of the code's building design requirements by driving up and down Gilman Boulevard looking at "good and bad" examples of what has been done with other buildings, recently or in the past. We hold that the code sections here at issue are unconstitutionally vague on their face. The words employed are not technical words which are commonly understood within the professional building design industry. Neither do these words have a settled common law meaning.

As they were applied to Anderson, it is also clear the code sections at issue fail to pass constitutional muster. Because the commissioners themselves had no objective guidelines to follow, they necessarily had to resort to their own subjective "feelings". The "statement" Issaquah is apparently trying to make on its "signature street" is not written in the code. In order to be enforceable, that "statement" must be written down in the code, in understandable terms. The unacceptable alternative is what happened here. The commissioners enforced not a building design code but their own arbitrary concept of the provisions of an unwritten "statement" to be made on Gilman Boulevard. The commissioners' individual concepts were as vague and undefined as those written in the code. This is the very epitome of discretionary, arbitrary enforcement of the law.

Councilwoman McHenry said it very well during the appeal to the City Council:

> Maybe we haven't done a good job in . . . communicating what kind of image we want. We all want an image. I bet you if I stated my image it would be certainly different from everyone of you here and everyone in the audience. . . . If we want a specific design, I agree with proponent's counsel, and that is that we come up with a specific district design . . . We don't have such a design requirement. So we all have to rely on some gut feel. And often times this gut feel gets us into trouble because it could be misinterpreted or misconstrued . . .[.]

Although the City argues that its code is not unconstitutionally vague, it primarily relies upon the procedural safeguards contained in the code. Because aesthetic considerations are subjective in concept, the City argues that they cannot be reduced to a formula or a number. The vagueness test does not require a statute to meet impossible standards of specificity. *Chicago, M., St. P. & P.R.R. v. State Human Rights Comm'n, 87 Wash. 2d at 805.*

As well illustrated by the appendices to the brief of amicus curiae, aesthetic considerations are not impossible to define in a code or ordinance. Moreover, the procedural safeguards contained

in the Issaquah Municipal Code (providing for appeal to the City Council and to the courts) do not cure the constitutional defects here apparent. . . .

Certainly, the IMC grants Anderson the right to appeal the adverse decision of the Development Commission. But just as IMC 16.16.060 provides no standards by which an applicant or the Development Commission or the City Council can determine whether a given building design passes muster under the code, it provides no ascertainable criteria by which a court can review a decision at issue, regardless of whether the court applies the arbitrary and capricious standard as the City argues is appropriate or the clearly erroneous standard as Anderson argues is appropriate. Under either standard of review, the appellate process is to no avail where the statute at issue contains no ascertainable standards and where, as here, the Development Commission was not empowered to adopt clearly ascertainable standards of its own. The procedural safeguards provided here do not save the ordinance. . . .

Clearly, however, aesthetic standards are an appropriate *component* of land use governance. Whenever a community adopts such standards they can and must be drafted to give clear guidance to all parties concerned. Applicants must have an understandable statement of what is expected from new construction. Design professionals need to know in advance what standards will be acceptable in a given community. It is unreasonable to expect applicants to pay for repetitive revisions of plans in an effort to comply with the unarticulated, unpublished "statements" a given community may wish to make on or off its "signature street". It is equally unreasonable, and a deprivation of due process, to expect or allow a design review board such as the Issaquah Development Commission to create standards on an *ad hoc* basis, during the design review process.

Conclusion

It is not disputed that Anderson's project meets all of the City's land use requirements except for those unwritten and therefore unenforceable requirements relating to building design which the Development Commission unsuccessfully tried to articulate during the course of several hearings. We order that Anderson's land use certification be issued, provided however, that those changes which Anderson agreed to through the hearing before the City Council may validly be imposed.