INSTRUCTOR: PETER M. MALAGUTI

INSTRUCTIONS: This is a three hour examination consisting of three (3) questions, each of which will comprise one-third (1/3) of your grade. This is not an open book examination; therefore, you may not refer to any notes, books, memoranda, etc. Please write clearly. You get no credit for that which I cannot read. Please attempt to address both sides of each issue and fully explain the reasons for your conclusions.

Please do not use your name or otherwise identify yourself to me. Only use your social security number.

Good Luck!
QUESTION ONE

Officials in Slumberton, Massachusetts first considered adopting a sign ordinance in 1985, after nearly a decade of advice from planning experts, who viewed reduction of the number of signs in the city as a necessary step toward Slumberton's economic and aesthetic revitalization. The proposed preamble to the regulation stated that its purposes were:

to preserve and enhance the substantial interests of the City of Slumberton in the appearance of the City; to preserve and enhance the public interest in aesthetics; to preserve and increase the amenities of the municipality; and to control and reduce visual clutter and blight.

The proposed ordinance contained specific size, height and location restrictions applicable to all signs. It also contained a "grandfather" provision that exempted all existing nonconforming signs from the regulation's requirements unless they were used for offsite commercial advertising. In other words, signs that failed to meet the size, height, etc. requirements could nevertheless remain in use provided they did not carry messages advertising business, goods, or products available in places other than at the sign's location. Therefore, all signs that carried noncommercial messages, whether onsite or offsite and signs that displayed onsite commercial messages could continue in use, regardless of their sizes and locations.

After the proposal was submitted to the Slumberton Board of Aldermen, Visual Signs, Inc., ("Visual") a billboard company, sought to work out a compromise with City officials. Visual maintained nearly all the billboards in Slumberton. Eventually, the negotiations broke down. However, at the last meeting with City officials, Visual stated that it would not remove its billboards; rather, it would use them exclusively for either noncommercial messages or to advertise products offered for sale on the premises. Such uses would be exempted under the proposed sign ordinance.

In response to this pronouncement, the Slumberton Board of Aldermen passed a sign ordinance on July 24, 1986, which contained only the following "grandfather" exemptions:

(1) signs carrying onsite messages on the date of enactment of the ordinance, and which had carried those messages at least one (1) previous year, whether commercial or noncommercial; and

(2) signs carrying offsite messages on the date of enactment of the ordinance only if their messages are noncommercial, and had been so
for at least one (1) previous year.

(3) Owners of signs displaying onsite messages have the additional option of replacing their onsite messages with offsite noncommercial ones.

At the time of enactment of the sign ordinance, there were 83 billboards in Slumberton that carried offsite messages. Of these, 81 were owned by Visual. None of Visual’s signs conformed to the location, size, height, etc. requirements of the ordinance. Nearly all of Visual’s billboards in Slumberton were first used after July 24, 1985 (1 year prior to enactment of the ordinance) to display offsite commercial advertising. Thus, Visual would have to remove nearly all of its billboards at great expense.

There were approximately 200 onsite signs in Slumberton at the enactment of the ordinance. Virtually all of those would be grandfathered under the new sign ordinance. The practical, and ironic, effect of the new ordinance would be to eliminate virtually all noncommercial messages conveyed by nonconforming signs in Slumberton while leaving undisturbed nonconforming signs delivering on-premises commercial advertising. This is because virtually all offsite signs change messages regularly, would have almost certainly carried a commercial message at least once in the previous year, and thus would not qualify for an exemption.

Visual has challenged the ordinance on constitutional grounds. Please fully discuss Visual’s causes of action and determine whether it will win or lose on each one. Please support your conclusions.
QUESTION TWO

Benny Benevolent owns a 200 acre parcel of land in the R-1 zoning district of Stabletown, Massachusetts. Under the Stabletown zoning ordinances, enacted in 1970, only single family residential uses were permitted. However, Benny had, for the past 23 years, been using 50 acres of his property as a horse stable which boards, trains and sells horses, and provides veterinary services. He also has run a tack store, sold related riding apparel and other accessories. In 1985, Benny began planning to develop his remaining acreage into a combination harness horse racing track and 100 unit low income housing project.

Stabletown is a suburb 32 miles west of Boston with a population of about 4,200 people. Stabletown's inhabitants are 96 percent white and predominantly middle class. The town has 120 square miles of land, of which only 65 are developed. Adjacent to Stabletown is the small city of Majestic, which has a high concentration of racial minorities and low income inhabitants. Majestic is fully developed, with no further room for growth.

Benny applied to the Stabletown Board of Appeals for a special permit to erect his harness racing/low income housing project. Although numerous neighbors and citizens of Stabletown appeared to voice their objection, as well as shout racial slurs and disparaging comments about low income people, the Board of Appeals granted the special permit. Some of the neighbors appealed the grant of special permit and the Superior Court reversed the Board's decision and annulled the special permit. Benny did not appeal that decision.

Instead, Benny took steps to rezone his property from R-1 to "GB," which permitted general business, entertainment facilities and unlimited multifamily dwellings provided density requirements were satisfied. As soon as Benny's neighbors uncovered his efforts, they too took steps to amend Stabletown's zoning ordinance. The neighbors proposed a change to the ordinance which would not allow any "horse harness racing" or low and moderate income multifamily dwelling units within the entire town of Stabletown. Both petitions moved through town channels at approximately the same time.

The Finance Committee recommended that Benny's petition be adopted and that the neighbors' petition be rejected. The Planning Board agreed with the Finance Committee. The Board of Appeals recommended to reject the neighbors' petition. However, they suggested that Benny's petition be approved only if specific conditions were attached to the rezoning. These conditions were:
1. The residential portion of the project be for "moderate income" dwellings rather than for "low income" dwellings.

2. The occupants of the moderate income multifamily dwellings must be restrained from using the harness racing facility.

3. Trees and shrubbery, at least forty feet in height, be erected to surround the residential portion of the site, so that it cannot be seen from the public roads. The Board would impose no such requirement upon the harness racing portion of the project.

The two petitions came to the Stabletown town meeting for vote, with the aforementioned recommendations. The town meeting warrant contained three proposals:

1. To accept Benny's rezoning petition;

2. To accept Benny's rezoning petition with the suggested recommendations of the Board of Appeals; and

3. To accept the neighbors' petition to exclude harness racing and low or moderate income housing entirely.

The town meeting adopted Benny's petition with the conditions attached that the Board of Appeals recommended. Benny has come to you for advice. He wants to challenge the new rezoning ordinance with what he believes are unacceptable conditions. He would also like to sue the Board of Appeals individually and in their capacity as town officials. Benny believes that the Board of Appeals caused the untenable situation.

Please discuss the rights, liabilities and duties of the parties. Please fully explain the reasons for your conclusions.
Question Three

This is a case about the Barnwell Nuclear Recycling plant owned by Allied-General Nuclear Services ("Allied").

Before the Atomic Energy Act (AEA) of 1954, the United States Government, which had discovered how to achieve nuclear fission, and exploited it in the world's first atom bomb, pretty much kept to itself even the development of peaceful uses. The AEA had, however, as one of its objects, the enlistment of private capital, which was supposedly better able to control its costs, in the development of electric power from nuclear fission. A number of private companies came into being which were to feed electricity into the ordinary power grid, but with such fission as the source, instead of combustion, or the fall of water. One of the problems the newborn companies faced was the disposal of their "spent fuel." The government agreed to take care of that. The best way to do it appeared to be a recycling process. The fuel, enriched uranium dioxide, became "spent" in the course of its use, i.e., no longer able to produce power, but radioactive and dangerous still. It had, in part, been transmuted into plutonium. Disposal was difficult. The government therefore promised the power producers to recycle the spent fuel. This involved separating the plutonium from other components, and it could be used for military purposes or to make more fuel. The plant involved in this case is solely to perform this recycling operation and, except for minor structures which have been dismantled and carried away, it is nearly useless for anything else.

Under the AEA, it could be constructed and operated only under separate licenses which the Nuclear Regulatory Commission (NRC) could grant or withhold, taking into account, among other things, whether issuance "would be inimical to the common defense and security or the health and safety of the public." The NRC "induced" private industry to undertake the awesome reprocessing task, the motive of the NRC being, of course, its commitment to the power producers to dispose of their spent fuel. It believed that this operation, too, could be best performed by private industry with private capital.

Allied, being awarded a construction license in 1970, commenced construction in 1971 on the donated land at Barnwell, South Carolina, after which the plant is named. In 1974 the government commenced to process the operating license and to prepare an environmental impact statement, here called GESMO. This is necessary for every government-sponsored project such as this and has never been completed.

While the record is replete with government "inducement" there is an entire absence of any evidence that the government in any manner, express or implied, contracted to share whatever risks there might be in the venture, to warrant that it would succeed.

Apparently, in connection with the GESMO study, concern began to be expressed as to the impact this plant might have on the problem of "nuclear proliferation." While every application of nuclear fission is fearsome to many, the possibility that nations, whose slogan is "death to the United States," having irresponsible,
unprincipled and bloody-handed dictators, might get nuclear weapons, is pretty near the top of anyone's list of dreads. The bearing of this on the Barnwell plant was evidently not seen when its construction was licensed. Since the recycling produces plutonium, anyone who had a peaceful plant powered by nuclear fission might, if he also had a recycling plant, obtain a nuclear weapon. Thus, checking the use of the recycling process in foreign countries was vital to the control of "nuclear proliferation," and how could the United States assume the lead in such an effort if it ran a recycling plant itself?

On April 7, 1977, President Jimmy Carter announced that because of the above concerns, "we," the United States of America, will "defer indefinitely the commercial reproducing and recycling of the plutonium produced in the United States nuclear power programs." Accordingly, a freeze took effect in the processing of the operating license for the Barnwell plant, and in the GESMO.

On October 8, 1981, President Reagan announced he was "lifting the indefinite ban which previous administrations placed on commercial reprocessing activities in the United States." However, there has been no action by the NRC or the Department of Energy to revive consideration of the operating license or the GESMO. The government used the plant for R&D from 1977 to 1983, but without profit to Allied. Some salvageable portions of the plant have been removed and carried off, but most of it stands there, empty and forlorn. Allied has not made any use of "statutory procedures" to reactivate the license.

The United States Supreme Court granted certiorari to hear this action. You, an Associate Justice, have been assigned to write the opinion. Please address all applicable issues and counterarguments in your opinion.