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Foundational Land Use Law Cases

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The following summaries of major land use cases in the U.S. were compiled by Planning and Law Division Daniel J. Curtin Fellow David Gest (Spring 2007) and updated in 2018 by Planning and Law Division Daniel J. Curtin Fellow Matt Norchi (Spring 2018) and Planning and Law Division Chair-Elect Evan J. Seeman.

- Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922)
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- Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection, 560 U.S. 702 (2010)
Pennsylvania Coal Co. v. Mahon

260 U.S. 393 (1922)

Facts
In 1878, Pennsylvania Coal Company granted a deed to homeowner Mahon for all surface property rights, but expressly reserved the right to mine coal beneath the surface, with Mahon waiving all rights to any damages caused. Mahon sued under Pennsylvania's Kohler Act (1921), which forbade mining activities that caused any homes to subside.

Discussion
The court focused on the constitutionality of the Kohler Act. Reviewing property rights broadly, it maintained that "[g]overnment hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law." However, the court argued that since Mahon was only a single property owner, "A source of damage to such a house is not a public nuisance. ... The damage is not common or public." Therefore, "the statute does not disclose a public interest sufficient to warrant so extensive a destruction of the defendant's constitutionally protected rights."

Holding
The court held that the Kohler Act did not constitute an exercise of legitimate police power, because it would prevent the property owner (in this case, Pennsylvania Coal, the subsurface property owner) from its right to gain profit from the use of its property (by mining coal). In other words, "To make it commercially impracticable to mine certain coal has very nearly the same effect for constitutional purposes as appropriating or destroying it." According to the court, "The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."

Significance
For the first time, the U.S. Supreme Court indicated that regulation of land use, including regulation that destroys the economic value of a property, might constitute a taking.
Village of Euclid v. Ambler Realty Co.

272 U.S. 365 (1926)

Facts
In 1922, Euclid, a suburb outside of Cleveland, adopted "a comprehensive zoning plan for regulating and restricting the location of trades, industries, apartment houses, two-family houses, etc., the lot area to be built upon, the size and height of buildings, etc." Ambler Realty claimed that the zoning ordinance as applied to its individual property (which would mostly allow only residential, as opposed to industrial, uses) violated its constitutional property rights, and constituted an attempt to restrict and control the lawful uses of its land by confiscating and destroying much of its value.

Discussion
The court reviewed the history of nuisance law and zoning ordinances, the latter of which had been in effect throughout the country for about 25 years. Asserting that "[a] nuisance may be merely a right thing in the wrong place, like a pig in the parlor instead of the barnyard," the court supported deference to the legislative, arguing that generally "[i]f the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control." Although a zoning ordinance that is intended to restrict the location of nuisances may in fact also restrict non-nuisance properties, the court said that it is difficult to define what exactly constitutes a nuisance (e.g., an apartment building can be considered a nuisance if it causes increased traffic and noise), and this regulation of uses generally falls within the police power.

Holding
For a zoning ordinance to be declared unconstitutional, it must be clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare. For claims such as Ambler's, which protest the general validity of the zoning ordinance, the court will defer to the legislature, although complaints about specific provisions of an ordinance may prove unconstitutional.

Significance
Established zoning as a valid exercise of police power by local government that in general does not violate the constitutional protection of the right to property.
Golden v. Planning Board of Ramapo

285 N.E.2d 291 (N.Y. 1972)

Facts
The Town of Ramapo, New York, enacted a concurrency ordinance prohibiting any proposed development unless developers obtained a special permit. Permits were awarded based on a point system that took into account available municipal facilities in the development area, including sewerage, drainage, roads, firehouses, park and recreation space, and public schools. The ordinance was designed to phase development over time — as long as 18 years — although developers could accelerate the approval process by constructing their own infrastructure. Golden protested the denial of a special permit to construct a residential subdivision.

Discussion
After confirming that the ordinance was permissible under the local zoning enabling act, the court asserted that the "restrictions conform to the community's considered land use policies as expressed in its comprehensive plan and represent a bona fide effort to maximize population density consistent with orderly growth." Furthermore, the court argued, the temporary nature of the growth controls allowed properties to be put to profitable uses within a reasonable time, meaning that the permit system did not qualify as a form of confiscation. In addition, property owners could develop their land if they provided their own infrastructure.

Holding
"...where it is clear that the existing physical and financial resources of the community are inadequate to furnish the essential services and facilities which a substantial increase in population requires, there is a rational basis for 'phased growth,'" validating the Ramapo ordinance.

Significance
Recognized growth phasing programs as valid exercises of police power.

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Southern Burlington County NAACP v. Township of Mount Laurel [Mount Laurel I]

336 A.2d 713 (N.J. 1975)

Facts
In 1964, the suburban community of Mount Laurel, New Jersey, adopted an ordinance zoning 29.2 percent of all land as industrial, 1.2 percent retail, and the remaining nearly 70 percent residential. Residential zones permitted only one detached, single-family dwelling per lot, with large minimums for lot size and building floor area. In 1968, a private nonprofit sought to build a subsidized multifamily housing development in a residentially zoned area of Mount Laurel, but zoning that required 20,000-square-foot lots effectively killed the project. The NAACP argued that the town's zoning ordinance discriminated against low-income families.

Discussion
The court asserted that the township had restricted multifamily housing in order to reduce the number of school children in its jurisdiction, and thus keep property taxes low by not paying for additional school facilities. This type of land use planning exhibited a "selfish and parochial interest" in attracting "sizeable industrial and commercial 'ratables'" to increase municipal revenues. Concerning the case at hand, the court sought to answer the question of "whether a developing municipality can validly, by a system of land use regulation, make it physically impossible to provide low and moderate income housing in the municipality for the various categories of persons who need and want it and thereby, as Mount Laurel has, exclude such people from living within its borders because of their limited income and resources."

Holding
The court held that every "municipality must, by its land use regulations, presumptively make realistically possible an appropriate variety and choice of housing ... it cannot foreclose the opportunity of the classes of people mentioned for low and moderate income housing and in its regulations must affirmatively afford that opportunity, at least to the extent of the municipality's fair share of the present and prospective regional need therefore." The Mount Laurel ordinance "is presumptively contrary to the general welfare and outside the intended scope of the zoning power," and as such "no municipality may exclude or limit categories of housing" for fiscal purposes.

Significance
Formalized the concept of a regional "fair share" affordable housing burden.
Village of Arlington Heights v. Metropolitan Housing Development Corp.

429 U.S. 252 (1977)

Facts
A religious order operating in the mostly white, low-density suburban community of Arlington Heights outside of Chicago sought, with help from non-profit Metropolitan Housing Development Corp. (MHDC), to construct low- and moderate-income housing on some of its land. The Village's Board of Trustees denied MHDC's application for a variance to construct 20 two-story buildings with a total of 190 units on property zoned R-3 single-family housing, citing the community's desire to preserve single-family housing at the proposed location. MHDC filed suit against the Village, claiming racial discrimination and violation of the Equal Protection Clause.

Discussion
Citing its 1976 decision in Washington v. Davis, the court recalled that "[d]isproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination." The court asserted that "[p]roof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause. ... When there is a proof that a discriminatory purpose has been a motivating factor in the decision, [] judicial deference is no longer justified." Departures from normal procedural sequences and legislative or administrative history may be "highly" relevant to determine whether such intent exists.

Holding
Because the rezoning request progressed according to the usual procedures, the property in question had been zoned for single-family housing since the Village first adopted a zoning map, and the public comments of the Plan Commission and Board of Trustees did not support inferences of invidious purposes, the zoning decision was rationally determined and the plaintiffs failed to carry their burden of proving that discriminatory purpose was a motivating factor in the village's decision.

Significance
Established that discriminatory intent is required to invalidate zoning actions with racially disproportionate impacts.
Penn Central Transportation Co. v. City of New York

438 U.S. 104 (1978)

Facts
In 1965, two years after the demolition of historic Pennsylvania Station in Manhattan, New York adopted its Landmarks Preservation Law. The law established a Landmarks Preservation Commission, which among other duties regulated alterations to landmarked buildings, and included a provision allowing historic property owners to sell air development rights to owners of nearby parcels. Penn Central, owner of the historic landmark Grand Central Terminal, leased the building to a developer in 1968 in order to increase its income by building a 50-plus story skyscraper on top of the terminal. The Landmarks Commission denied building permits for the project, citing impact both to the historic resource and the surrounding viewshed. Claiming that the denial constituted both a taking and a violation of due process, Penn Central sought compensation from the City equal to the fair market value of the property's air rights.

Discussion
To decide whether the Landmark Commission's action had effected a taking, the court focused on the "economic impact of the regulation ... [and] the extent to which the regulation [...] interfered with distinct investment backed expectations," as well as "the character of the governmental action", i.e. whether the action "can be characterized as a physical invasion" versus "some public program adjusting the benefits and burdens of economic life to promote the common good." Citing Euclid, the court argued that diminution in property value alone cannot establish a taking, which must apply to an entire property, not just a "discrete segment" (in this case, air space). In addition, because the landmarks program, which benefited the public, applied to hundreds of properties, Penn Central was not solely burdened by the law. The court thus concluded that the Landmark Commission's action did not constitute a taking, that the Landmarks Law did not interfere with the "present uses" of the terminal, and that Penn Central could still obtain a reasonable return on its investment by selling its development rights.

Holding
"The restrictions imposed [by the Landmarks Law] are substantially related to the promotion of the general welfare and not only permit reasonable beneficial use of the landmark site but afford ... opportunities further to enhance not only the Terminal site property but also other properties."

Significance
Introduced a means-end balancing test for regulatory takings and validated historic preservation controls.

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Metromedia, Inc. v. City of San Diego


Facts
In 1972, San Diego enacted an ordinance prohibiting all off-site outdoor advertising display signs, i.e. any signs not identifying the use, facility, or service located on the premises where a product was produced, sold, or manufactured. Under the ordinance, all existing signs had to be removed after an amortization period ranging from 90 days to four years, depending on the location and depreciated value of the sign. Metromedia, Inc., owner of many off-site billboards in the San Diego area, filed several complaints against the city, centering on the financial consequences of the ban for billboard companies. The Supreme Court considered the case after the Supreme Court of California held that the billboard ban fell within the police power of San Diego.

Discussion
The court began its analysis by discussing the communicative and non-communicative aspects of billboards, e.g. their publicly beneficial uses from political campaign ads to promotion of charities, and the difficulty posed by their size and immobility. Addressing the lesser Constitutional protection of commercial speech, the court then reviewed its 1980 Central Hudson Gas & Electric Corp. v. Public Service Communication decision, which established a "four-part test for determining the validity of government restrictions on commercial speech as distinguished from more fully protected speech." The ordinance passed the Central Hudson test because it followed substantial public interests — increasing traffic safety and improving the appearance of the city — and did not limit all speech via the medium of billboards.

Holding
Although San Diego met the constitutional requirements of Central Hudson, the court held that the ordinance violated First Amendment free speech protections by restricting noncommercial speech via billboards to a similar degree as its commercial restrictions. The court asserted that "[t]he city does not explain how or why noncommercial billboards located in places where commercial billboards are permitted would be more threatening to safe driving or would detract more from the beauty of the city."

Significance
Established a high standard for aesthetic regulation of billboards by providing First Amendment protection to commercial firms that advertise goods or services not available at the location of the sign.

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Southern Burlington County NAACP v. Township of Mt. Laurel [Mount Laurel II]

456 A.2d 390 (N.J. 1983)

Facts
Despite the 1975 Mount Laurel decision, the New Jersey Supreme Court felt that the township had continued its exclusionary housing policies, and that not enough legislative action had been taken to mandate provision of affordable housing on a regional level throughout the state. This second case consolidated six exclusionary housing cases.

Discussion
In a lengthy discussion, the court reviewed the criteria for "fair share" housing distributions described in Mount Laurel I within the context of the new (1980) State Development Guide Plan (SDGP). This Plan provided "a statewide blueprint for future development" and its "remedial use in Mount Laurel disputes will ensure that the imposition of fair share obligations will coincide with the State's regional planning goals and objectives." In particular, the SDGP defined "growth areas" throughout the state, which the court asserted should be held to the Mount Laurel doctrine.

Holding
Among several rulings, the court concluded that:

1. "every municipality's land use regulations should provide a realistic opportunity for decent housing for at least part of its resident poor who now occupy dilapidated housing."
2. SDGP-defined "growth areas" must "provide a realistic opportunity for fair share of a region's present and prospective low and moderate income housing."
3. Litigation should reference specific numbers of units needed in a municipality, both immediately and for a reasonable period of time in the future.
4. A special three-judge panel would hear all Mount Laurel exclusionary housing cases.
5. Beyond elimination of obstacles to affordable housing, municipalities should use affirmative policies such as density bonuses and mandatory set-asides.
6. "Builder's remedies" may allow developers, given judicial approval, to circumvent local zoning decisions and build affordable housing units if a need has been established.

Significance
Created the model fair housing remedy for exclusionary zoning.
Nollan v. California Coastal Commission

483 U.S. 825 (1987)

Facts
The Nollans owned beachfront property in Ventura County, California, bordered on either side by publicly accessible beaches. Their lease required that upon purchase of the property, an existing bungalow on the lot be demolished. Similar to its decisions in other beachfront property cases, the California Coastal Commission (CCC) conditioned the Nollans' building permit application to demolish the bungalow and build a new home upon their allowing the public an easement to pass across a portion of their beachfront. The Nollans appealed the California Court of Appeal decision that the CCC action did not constitute a taking.

Discussion
The court asserted that a permanent physical occupation had occurred since the public was continuously allowed to pass through the Nollans' property without compensation. But does requiring the public easement as part of a condition still constitute a taking? Analyzing the CCC's motives, the court determined that in fact the legitimate state interests leading to the conditional approval centered on providing the public with visual access to the beach so as to reduce the psychological barrier against beach use — not on the physical use of the beach on the Nollans' property by the public.

Holding
The constitutionality of a building permit condition "disappears ... if the condition substituted for the prohibition utterly fails to further the end advanced as the justification for the prohibition." In other words, "the lack of [an essential] nexus between the condition and the original purpose of the building restriction converts that purpose to something other than it was" — a taking for a legitimate state interest, but without compensation. The building permit condition thus constituted a taking, and compensation must be paid.

Significance
Created "essential nexus" takings test for conditioning development approvals on dedications and exactions. There must be a strong relationship between the problem created by proposed development and the proposed exaction (or mitigation), or else compensation may be required.
LUCAS v. SOUTH CAROLINA COASTAL COUNCIL

505 U.S. 1003 (1992)

FACTS
In 1986, Lucas paid $975,000 for two residential lots on the South Carolina coast, intending to build single-family homes. In 1988, the state enacted the Beachfront Management Act, which barred Lucas and other coastal property owners from erecting any permanent habitable structures, in order to prevent erosion. Lucas claimed that the regulation constituted a taking. The state trial court awarded $1.2 million compensation, but the South Carolina Supreme Court reversed, contending that the state could take property without compensation in order to prevent serious public harm.

DISCUSSION
The court reviewed its previous rationales for takings requiring compensation: (1) any degree of permanent physical invasion, or (2) the denial of all economically feasible or beneficial use of property. While previous cases "suggested that 'harmful or noxious' uses of property may be proscribed by government regulation without the requirement of compensation," in this case the line between "harm-preventing" and "benefit-conferring" regulation was too blurred to justify a nuisance exception to these rules, requiring the creation of a new standard for regulatory takings.

HOLDING
"Where the State seeks to sustain regulation that deprives the land of all economically beneficial use ... it may resist compensation only if ... the proscribed use interests were not part of [the] title to begin with." In cases where property owners' titles included such interests, "Any limitation so severe [as to remove all economically beneficial use of the property] cannot be newly legislated or decreed (without compensation), but must inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership." To determine whether such a "total taking" of economic value has occurred, courts must examine: (1) the degree of harm to public lands and resources, (2) the social value of the claimant's activities and their suitability to their locality, (3) the relative ease with which the alleged harm can be avoided, and (4) how long the use has been engaged in by similarly situated owners. The case was remanded to allow the state to determine "background principles of nuisance and property law" applicable to the case.

SIGNIFICANCE
Defined categorical regulatory takings and an exception for regulations rooted in background principles of law; compensation to be paid to landowners when regulations deprive them of all economically beneficial land use unless uses are disallowed by title or by state law background principles of private and public nuisances.
Dolan v. City of Tigard
512 U.S. 374 (1994)

Facts
Dolan owned a plumbing and electrical supply store in Tigard's Central Business District (CBD). The town's Community Development Code required property owners in the CBD to reserve 15 percent of their property for open space and landscaping, and its Master Drainage Plan called for mitigation of flood damage around a creek that runs through the CBD. When Dolan applied for a permit to nearly double the size of her store, the local planning commission approved the application on the condition that she dedicate roughly 10 percent of her property, located in the creek's floodplain, toward a flood drainage system and a public pedestrian and bike path. Dolan appealed this exaction.

Discussion
The court evaluated the proposed conditions using the Nollan standard, and determined that a nexus did indeed exist between the city's dual goals of minimizing development in the creek's floodplain and reducing traffic congestion in the CBD, and its proposed conditions dedicating a portion of Dolan's property to open space and a public pathway, respectively. However, the court sought to "determine whether the degree of the exactions demanded by the city's permit conditions bear the required relationship to the projected impact of [the] petitioner's proposed development." Reviewing several state laws regarding exactions, the court agreed that "the dedication should have some reasonable relationship to the needs created by the [development]."

Holding
"No precise mathematical calculation is required, but the city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development" — a "rough proportionality" between the proposed dedication and the development's potential impact. In this case, because the city used vague standards to justify its conditions on development (the proposed landscaping could have been private, and traffic studies did not prove that the public pathway would alleviate traffic), taking 10 percent of Dolan's property was excessive compared to the potential harm of the building expansion.

Significance
Established a higher standard for takings by extending Nollan's "essential nexus" test to require "rough proportionality" between development impact and conditions.
City of Edmonds v. Oxford House

514 U.S. 725 (1995)

Facts
The City of Edmonds, Washington, enacted a zoning ordinance that required single-family dwelling units to be inhabited only by a "family," which was defined as "an individual or two or more persons related by genetics, adoption, or marriage, or a group of five or fewer persons, who are not related by genetics, adoption or marriage." Oxford House-Edmonds, located in a single-family neighborhood and subject to the family definition, operated a group home for 10-12 persons recovering from alcohol and drug addiction. After learning of Oxford House's operation, the City issued criminal citations to the owner and a resident of the house on the ground that the occupants did not constitute a family. Oxford House requested a reasonable accommodation under the Fair Housing Act, 42 U.S.C. §3604 et seq. (a change in rules, policies, or practices when necessary to afford handicapped persons an equal opportunity enjoy the housing of their choosing) allowing it to operate as, but the City denied the request. The City sued Oxford House seeking a declaration that the FHA was inapplicable to the City's definition of family under the FHA's maximum occupancy exemption. The FHA exempts any "restriction[s] regarding the maximum number of occupants permitted to occupy a dwelling." 42 U.S.C. §2607(b)(1). Oxford House filed a counterclaim, alleging that the definition of family was not exempt under the FHA, and that the City violated the FHA by denying Oxford House's request for a reasonable accommodation.

Discussion
The court distinguished between ordinances capping the number of individuals who may occupy a dwelling and ordinances limiting who may occupy a dwelling. Capping ordinances are meant to limit the total number of occupants in order to prevent overcrowding and generally do so in relation to floor space or the number and type of rooms. Ordinances defining family composition are intended to preserve the family character of a neighborhood rather than the total number of occupants.

Holding
The Court determined that the family composition ordinance does not cap the number of individuals who may occupy a dwelling. Rather, it describes who may live in the dwelling. The Court noted that the City had a separate ordinance which limited the number of occupants of a dwelling based on floor area. Accordingly, the ordinance was subject to the requirements of the FHA. The Court remanded the case to the lower courts to determine whether the ordinance was unlawful under the FHA.

Significance
Recognizes that definitions of "family" contained in zoning ordinances that limit who may occupy a dwelling are subject to the requirements of the FHA.
Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency

Facts
Nevada and California established the Tahoe Regional Planning Agency (TRPA) to study the impact of growth on Lake Tahoe and to create moratoria, one lasting two years and another for an ensuing eight months (for a total of 32 months), on all development in the Lake Tahoe Basin. The petitioners, the Tahoe-Sierra Preservation Council, Inc., representing about 2,000 owners of about 400 individual owners of vacant lots in the basin, filed suit in federal court, alleging that the moratoria facially violated the takings clause of the Fifth Amendment to the Constitution.

Discussion
The Court reviewed its historical treatment of takings issues, with particular focus on the distinction between physical takings, where a government physically acquires land, and regulatory takings, where a government restricts the use of a property so much that it renders the property economically or practically useless for a landowner. Relying on Lucas v. South Carolina Coastal Council, the petitioners contended that the Court should establish a bright line rule that a regulation that imposes a temporary deprivation of all economically viable use of property — no matter how brief — is an unconstitutional taking. The Court refused to do so, and found that claims of temporary deprivation are regulatory takings claims that should be analyzed under the multi-factor framework of Penn Central Transportation Co. v. New York City. The Court observed that creating a categorical rule that temporary deprivations always constitute a taking would run afoul of important planning principles advanced through moratoria.

Holding
The Court held that the moratoria did not constitute a taking. The Court noted that its ruling was narrow in that the petitioners had brought only a facial challenge, and that the petitioners did not challenge the moratoria under the Penn Central factors.

Significance
Recognizes that partial, temporary deprivations of property may constitute a taking under the Fifth Amendment, but must be analyzed on a case-by-case basis under the regulatory taking framework of Penn Central.
Lingle v. Chevron USA, Inc.
544 U.S. 528 (2005)

Facts
The difficulties presented by travel between the continental United States and the large number of islands comprising the state of Hawaii resulted in a small concentration of oil refineries and distributors in Hawaii. The unique circumstances in Hawaii led to most gasoline stations in the state operating under an independent lessee-dealer model. Chevron operated in the area predominately on the independent lessee model, charging monthly rent for lessees and stipulating that all gasoline from the stations under contract use Chevron oil. Concern that the concentration of industry under this model could inflate gasoline prices prompted the Hawaii state legislature to enact a law that capped the amount of rent that an oil company could charge lessee-dealers at 15 percent of a dealers gross profit from sales. Chevron sued the state, alleging that this law constituted a regulatory taking of its property under the Fifth Amendment. Chevron argued that the rent control statute was a regulatory taking because it failed to advance Hawaii's goal of protecting consumers against high gasoline prices. According to Chevron, the rent control statute failed to substantially advance a legitimate state interest and thus constituted an unconstitutional regulatory taking under Agins v. City of Tiburon, 447 U.S. 255 (1980).

Discussion
The Court reviewed its holdings in previous takings cases, noting that there were two situations where the government must compensate a landowner: (1) where government physically invades a landowner’s land, no matter how small the intrusion; and (2) where regulations deprive a landowner of all economically viable use of the property. The Court noted that outside of these two set categories, regulatory takings claims should be evaluated under Penn Central Transportation v. New York City (1978). The Court found that the test established in Agins was more appropriate to due process claims, as whether a regulation substantially advances a legitimate state interest is irrelevant to whether that regulation affects a taking of property without just compensation.

Holding
The court overruled Agins's "substantially advances a legitimate state interest" test to determine whether there has been a regulatory taking. The Court clarified that such a test is more appropriate in due process challenges. Instead, regulatory takings challenges that do not deprive a landowner of all economically viable use or property must be analyzed under Penn Central.

Significance
Recognizing that regulatory takings claims that do not deprive an owner of all economically viable use of land or property must be evaluated under the factors set forth in Penn Central.
Kelo v. City of New London

125 U.S. 2655 (2005)

Facts
Decades of economic decline and job losses had left New London, Connecticut, a "distressed municipality," as defined by the state. In the 1990s, the New London Development Corporation (NLDC) was reactivated to promote economic development in the city. NLDC devised a plan calling for construction of a research facility for the pharmaceutical company Pfizer on a site then containing 115 privately owned properties. As a means of creating jobs, generating tax revenue, and sparking downtown revitalization, NLDC proposed to use eminent domain to acquire the private properties, most of which were non-blighted single-family homes. Susette Kelo and eight other petitioners protested the city's use of eminent domain to acquire their properties.

Discussion
The court reviewed basic propositions of takings law, positing that the government "may not take the property of A for the sole purpose of transferring it to another private party B, even though A is paid just compensation," while it may "transfer from one private party to another if future 'use by the public' is the purpose of the taking," such as when land is condemned for construction of a passenger railroad. The court believed that the case hinged on whether the development plan served a "public purpose," and looked to the precedents of Berman v. Parker (approval of urban renewal project planned as a whole, even though some properties taken were not blighted) and Hawaii Housing Authority v. Midkiff (special case of taking to eliminate an oligopoly) to find the answer.

Holding
"Given the comprehensive character of the plan, the thorough deliberation that preceded its adoption, and the limited scope of our review, it is appropriate for us ... to resolve the challenges of the individual owners ... in light of the entire plan. Because that plan unquestionably serves a public purpose, the takings challenged here satisfy the public use requirement of the Fifth Amendment." The well-researched nature of the city's "integrated development plan" further justified deference to local decision makers, in the court's opinion.

Significance
Upheld the use of eminent domain for economic development purposes.

American Planning Association planning.org
Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection
560 U.S. 702 (2010)

Facts
Under Florida law, littoral owners have the right of access to the water, the right to use the water for certain purposes, the right to an unobstructed view of the water, and the right to receive accretions and relictions to the littoral property. In Florida, the littoral owner takes title to dry land added to his property by accretion, but formerly submerged land that has become dry land by avulsion continues to belong to the owner of the seabed (usually the State) because the property abutting the water belongs to the State. The mean high-water line is the ordinary boundary between private beachfront, or littoral property, and state-owned land. In 1961, Florida passed the Beach Shore Preservation Act which establishes procedures for "beach restoration and nourishment projects," under which a fixed erosion control line replaces the fluctuating mean high-water line as the boundary between privately owned littoral property and state property. When accretion to the shore moves the mean high-water line seaward, the property of littoral owners is not extended to that line (as the prior law provided). In 2003, the City of Destin, Florida, and Walton County, Florida, applied to the state to add a large quantity of sand to beach that had been eroded by several hurricanes. Beachfront property owners were upset by the decision and incorporated a nonprofit organization known as Stop the Beach Renourishment, Inc. to halt the action. The petitioners argued that the additional sand deprived the owners of their rights to accretion and a water boundary, and that the government action amounted to a taking of their land in violation of the Fifth Amendment.

Discussion
The Court began the opinion by reviewing the overarching principles of takings jurisprudence, including the principle that states effect a taking if they recharacterize private property as public property. The Court noted that state law defines property interests and therefore looked to Florida property law to determine whether beachfront landowners had a perpetual right for their property to touch the water. Under Florida law, the State has the right to fill its own seabed and that filled land will belong to the State.

Holding
The Court held that there was no taking because the submerged land at Florida's shoreline continued to belong to the State even after the State added new sand to extend the beach.

Significance
Recognizes that states may fill submerged land without constituting a taking on the rights of littoral property owners.
Koontz v. St. Johns River Management District

133 S.Ct. 2586 (2013)

Facts
Coy Koontz, Sr. owned 14.9 acres of land in Florida containing wetlands. He applied to the St. Johns River Management District to develop 3.7 acres. To mitigate adverse environmental impacts, Koontz offered to restrict future development on the remaining 11 acres with a conservation easement. The District considered the conservation easement for the 11 acres inadequate. The District Court stated that it would approve Koontz's development proposal only if he either: (a) reduced the size of his development to one acre and deeded a conservation easement on the remaining 13.9 acres, or (b) built on the 3.7 acres, deeded a conservation easement to the District on the remainder of property, and agreed to hire contractors to make improvements to District-owned land several miles away. Koontz sued because he believed that the District's demands for mitigation were excessive.

Discussion
The Court began its opinion by discussing the doctrine of unconstitutional conditions, which prevents the government from coercing individuals into giving up Constitutional rights. The Court discussed this doctrine as relating to its decisions in Nollan v. California Coastal Commission (1987) and Dolan v. City of Tigard (1994), noting that the land use permitting process leaves permit applicants particularly susceptible to coercion from governments, but that proposed land uses often invoke costs on the public that dedications of land can offset. For instance, the Court noted that a development may cause more traffic congestion which can be offset by the permit for development being conditioned on the owner's agreement to deed land to widen the adjacent road. The Court then reiterated the principles established by Nollan and Dolan that the government is allowed to condition the approval of a permit on the dedication of property, so long as the property the government demands and the social costs of the development share a "nexus" and "rough proportionality." The Court wrote that the principles of Nollan and Dolan apply regardless of whether the government approved a permit on the condition that the applicant turn over property or denied a permit because an applicant refused to do so. Further, the Court discussed the rising trend of monetary exactions (such as those imposed on Koontz by the District) in land use, noting that they are a commonplace alternative to common alternatives to easements.

Holding
Government's demand for property from a land use permit applicant must satisfy the requirements of Nollan and Dolan even where (a) the government denies the permit, and (b) the demand is for money. The Court remanded for further proceedings on the merits of Koontz's claims.

Significance
Recognized that monetary exactions are subject to the per se takings test of Nollan and Dolan.

Reed v. Town of Gilbert
Facts
The Town of Gilbert, Arizona, had a sign code that imposed different requirements on ideological signs, political signs, and temporary directional signs. Ideological signs included any "sign communicating a message or ideas for noncommercial purposes that is not a Construction Sign, Directional Sign, Temporary Directional Sign Relating to a Qualifying Event, Political Sign, or a sign owned or required by a governmental agency." Of the three categories, the sign code treats ideological signs most favorably in terms of allowable size, location, and duration. Political signs included any "temporary sign designed to influence the outcome of an election called by a public body." The sign code treated political signs more restrictively than ideological signs in terms of allowable size, location, and duration. Temporary directional signs relating to a qualifying event included any "temporary sign intended to direct pedestrians, motorists, and other passersby to a 'qualifying event.'" A qualifying event is any "assembly, gathering, activity, or meeting sponsored, arranged, or promoted by a religious, charitable, community service, educational, or other similar non-profit organization." The sign code treated temporary directional signs more restrictively than political signs.

Clyde Reed is the pastor of Good News Community Church. As a small, cash-strapped entity, the church holds services at a variety of locations. The church relies on temporary directional signs to inform the public about where it will hold services. The Town of Gilbert issued two citations to the church for violating the sign code's durational limits and for failing to include the date of the events on the signs. The church and Reed sued to challenge the Town's sign code as an abridgment of their freedom of speech.

Discussion
The Court began by discussing the concept of content-neutrality, a central tenet of First Amendment law, that requires the government to regulate speech without regard to its content, subject matter, or message. If a law is considered content-based, it triggers strict scrutiny, under which government can prevail only if it the challenged law furthers a compelling interest that is narrowly tailored. A law can be content-based either on its face or, if facially neutral, with respect to its governmental purpose. But governmental purpose cannot be used to justify a law that is content-based on its face. Content-based discrimination occurs where the speech regulations target specific subject matter, even if they do not differentiate among viewpoints within that subject matter. Finally, the Court stated that sign codes may regulate many aspects that have nothing to do with a sign's message, including size, building materials, lighting, moving parts, and portability.

Holding
The Court held that the sign code was content-based on its face because it targeted specific subject matter: temporary directional signs were treated worse than ideological or political signs. The sign code failed strict scrutiny because it was underinclusive. While the Town of Gilbert argued that the sign code was meant to advance the compelling governmental interests of aesthetics and traffic, political
Signs and ideological signs affected these alleged interests the same as temporary directional signs but were treated better.

**Significance**
Recognized that subject matter distinctions are facially content-based and subject to strict scrutiny, and clarified the relevance of governmental purpose in enacting the challenged law.
Murr v. Wisconsin

137 S.Ct. 1933 (2017)

Facts
In the 1960s, the parents of Joseph Murr and his siblings purchased two adjacent lots, Lots E and F, along the St. Croix River in Troy, Wisconsin. Lot E was transferred from the Murr parents to their children (Joseph Murr and his siblings) in 1994, while Lot F was transferred to the children in 1995. State and local regulations prohibited the sale of adjacent lots under common ownership unless each lot has at least one acre of land suitable for development. The regulations allowed a merger of adjacent lots including for a single residential dwelling extending over both lots. Lot F was developed with a small cabin and Lot E remained undeveloped. Though both of the lots were over one acre in area, the topography of the Murrs’ property meant that each lot had under one acre suitable for development. Because the lots were under common ownership, the regulation precluded the Murrs from selling or developing one of the adjacent lots. The Murrs wanted to move the cabin on Lot F and sought to sell Lot E to fund the project. They applied for a variance to allow the separate sale or use of the lots, but were denied. The Murrs sued alleging that the regulations constituted a regulatory taking in violation of the Fifth Amendment.

Discussion
The issue is whether for purposes of a regulatory taking analysis the focus should be on the single Lot E or both Lot E and Lot F together (that is, what is the property unit that is being taken, known as the “denominator”). The court created a three-factor test to analyze the denominator: (a) whether state and local law treats the land as a single parcel or separate parcels; (b) the physical characteristics of the property; and (c) the value of the property under the challenged regulation, with special attention to the effect of the burdened and on the value of other holdings.

Holding
The court applied the three-factor test to conclude that the regulations did not amount to a regulatory taking, focusing on Lots E and F a single property unit. First, the court noted that under state law, Lots E and F merged. Second, the court noted the physical characteristics of the property ( contiguous along their longest edge with rough terrain and along the St. Croix River, which was regulated under federal, state, and local law). Third, the restriction was mitigated by the benefits of using the property as a single unit, including increased privacy and recreational space, and the value of the lots taken as a single unit is greater than the value of each lot individually.

Significance
Created a new test to determine the property unit (the denominator) for a regulatory takings analysis.
Legal Foundation, Property Rights, and Enforcement

Class #11
November 20, 2014
Learning Objectives

- Laws and authorities that govern planning
- Constitutional provisions
- Property rights
- Enforcement issues
What are the authorities under which local governments undertake planning?

- Constitution provisions-Police power
- State enabling legislation (ID LLUPA)
- State and federal laws
- Power of eminent domain/condemnation
- Power to raise revenues, tax and spend
- Case law
What are some of the federal laws that impact local government planning?

- RLUIPA
- TCA
- FHAA
- NEPA
- CWA
- CAA
- ESA
- ADA
- MHA
Supreme Court Justice Brennan:

“After all, if a policeman must know the constitution, then why not a planner? “

San Diego Gas and Electric Company v. San Diego
Why should planners know the Constitution?

• Planning is implementing community values—but cannot ignore individual rights.

• Constitutional protections at every turn.

• Most municipal attorneys do not know land use law

• Law is always changing
What are the Federal Constitutional protections that are important to planning?

<table>
<thead>
<tr>
<th>First Amendment</th>
<th>Fifth Amendment</th>
<th>Fourteenth Amendment</th>
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<tbody>
<tr>
<td>Freedom of religion</td>
<td>Takings</td>
<td>Due process</td>
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<td>Freedom of expression</td>
<td>Just compensation</td>
<td>Equal protection</td>
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<tr>
<td></td>
<td>Due process</td>
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</table>
First Amendment-Freedom of Religion and Expression

“The Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech; or of the press; or the right of the people to peaceably assemble, and to petition the government for a redress of grievances.”
Religious Expression

Constitutional Provisions
• No encroachment on the exercise of religious expression
• No favoritism
• Neutrality
• Separation between church and state

Planning Issues
• Land use regulation of religious institutions
  o Mega churches
  o Storefront churches
  o Evolving churches
• What is a religion?
• RLUIPA
Religious Land Use and Institutionalized Persons Act (RLUIPA)

- may not treat “a religious assembly on less than equal terms with a nonreligious assembly...”

- “..with some exception ...government may not impose or implement a land use regulation ... that imposes a **substantial burden** on the religious exercise of a person, including a religious assembly or institution.”
Best practices

• Treat all assemblies the same.
• Be careful on the definition of “religious land use”.
• Conditional use seems to be ok.
  o Base decisions on facts, not bias.
  o Consistency
    o Offer alternatives and suggested improvements
• **Connect zoning restrictions to sound rational basis contained in the comprehensive plan.**
Freedom of Expression

Constitutional Provisions
- No encroachment on speech
- Content neutral
- Prior restraint
- Limit but not prohibit by: time, place, manner

Planning Issues
- Newspaper racks
- Signs
- Adult entertainment uses
- Public spaces
Best practices

Newspaper Racks

• Time, Location (place) and Design (manner)
Best Practices

Signs

- Time, location (place), and design (manner)
- Content neutral
- Equal or more flexible for non-commercial signs (political signs)
- Definitions
Signs

Least Protect to Most Protected

“Joe’s Burger – 2 miles ahead”

“Joe’s Big Burger” (On premise)

“Vote for Joe” political sign
Prior Restraint Issues
conditioning the ability to speak upon prior governmental approval.

- Clear standards
  - objective standards
  - minimize discretion
- Timely decisions
Adult Entertainment

Challenge:

• How do you regulate when the regulations must be content neutral?
• What is the difference between an adult bookstore and a Barnes and Noble?

Answer: The purpose of the regulations is to mitigate the secondary affects of the business.

• Crime
• Property Values

Playtime Theaters vs. City of Renton, WA
Best Practices

• Alternative locations
• Limit number and location
  • 1% of total land area
  • 5% of nonresidential land area
• Separation distance from “sensitive” land uses
Fourteenth Amendment

“[no] state shall... deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”
Due Process-Procedural

**Constitutional Provisions**
- Meaningful Participation
- Open, orderly, fair hearing

**Planning Issues**
- Notice, hearing, right to be heard
- Public Information
- Open meeting
- Impartial and reasoned decision-making
Due Process-Substantive

**Constitutional Provisions**
- Legitimate public purpose
- Rational relationship

**Planning Issues**
- Regulations have a “nexus” with purpose
- Conditions have a “nexus” with the impact
Best Practices - Due process

Procedural
Procedures are codified and are followed!

Substantive
• Purpose of regulations clear and based on the Comprehensive Plan.
• Nollan-Dolan test for exactions
Equal Protection

Constitutional Provisions

• Likes treated equally
• No greater burden than others in same condition
• Narrow application

Planning Issues

• Single family zoning
• Minimum house and lot sizes
• Exclusionary zoning
• Group homes
• Regulation of protected class
Best Practices – equal protection

• Definitions for family that does not exclude non-related individuals
• Allowance for protected class under Fair Housing.
• Multiple residential zoning districts
Fifth Amendment

“No person shall be ...deprived of life, liberty, or property, without the due process of law; nor shall property be taken for public use without just compensation”.
Takings

Government Action that interferes with private property

- Direct Taking
  - Eminent domain
- Indirect taking
  - Inverse condemnation

- Voluntary property sale
- Condemnation
- Physical Takings
- Regulatory takings
Regulatory Takings

- Destroy all use or value
- Disproportionate burden
- No legitimate public purpose
- Interference with vested rights
- Exactions
Exactions-requirements

Nollan

• Essential **nexus** between the condition imposed and the public purpose

Dolan

• Rough **proportionality** between the condition and the impact created by the development.
Idaho Regulatory Taking Act
ID Code §67-80

• Requires Attorney General to prepare a checklist for “taking analysis”
• Use by state and local government
  1. Physical occupation?
  2. Dedicate or grant an easement?
  3. Deprive all economic use?
  4. Impact Landowner’s economic interest?
  5. Deny a fundamental attribute of ownership?
  6. The same as prohibits a use?
• Property owner can request takings analysis
Private Property

“Whoever owns the land owns all the way to heaven and all the way to the depths”
Bundle of Rights
Property Rights History

• 60’s and environmental legislation
• Sage Brush rebellion
• Oregon Proposition 37
• 11 Anti-takings ballot measures (2006)
  • Proposition 2 defeated by 76%
COMING ON THE FALL BALLOT: "The GREED INITIATIVES!"

LET SOMEBODY ELSE PAY FOR SERVICE TO THE POOR!

LET SOMEBODY ELSE PAY FOR PROTECTING THE ENVIRONMENT!

LET SOMEBODY ELSE PAY FOR ROADS!

NO CAR FEES

NO ESTATE TAX

WIT917

Let me build whatever I want or pay me with tax dollars!
Compensating for Regulatory Takings

**Pro Arguments**
- Regulations seriously erode property value
- Undermine fundamental rights granted under the constitution
- Threat to democracy
- Appropriation of property for the common good is a modern day form of feudalism

**Con Arguments**
- Tragedy of the commons
- Bankrupt government
- Property rights already protected
- Insurance for speculation
- Judicial relief is already available
- Eliminates the democratic process in planning
McMahon's Arguments

- Sensible use of land increases property values
- Value is created by government
- Value is created in location
- Down zoning ≠ loss of value
- Land use protects values
- The planning process maintains the balance between the right of public v. private
We shot it, stabbed it, poisoned it, and threw it in a river...

So why do I get the feeling that this isn't over?
Legal Case Studies

1. Read the article
2. Does the case imply an infringement of a constitutional protection?
3. Any other ethical or legal issues?
Enforcement
What is enforced?

- Nuisances
- Housing and safety standards
- Fire safety
- Conditions of approval of a permit
- Zoning Code violations
- Property maintenance
- Other quality of life issues

What is not enforced?

- Property disputes among neighbors
- Enforcement of CC & Rs
- Contracts among business owners
How is the enforcement conducted?

Levels of service
• Complaint basis
• Selectively based on the severity of the issue
• Enforce every issue

Who is responsible?
• Planning Administrator
• Code Enforcement Official
• Police Department
• Public Works Department
How is code enforcement carried out?

**Tools**
- Web-based
- Complaint forms
- Data
- Letter writing
- Phone calls
- Site visits

**Techniques**
- Collaboration
- Partnership
- Education
- Clean-up Programs
What are the penalties?

• Civil – infractions
• Criminal - misdemeanor
• Community Court
Code Enforcement Cases

1. Is this a land use issue or some other kind of enforcement issue?
2. How significant is the issue?
3. If you received this issue as a staff planner, what would you do?
Next Class: December 4: Class #12, Zoning process and procedures

Readings:
- Chapter 4 Elliott (review Chapter 7)
- Chapter 6, pages 137 – 152 and 162 – 172, Duerksen

Blackboard Posts:
- APA “Practice Better Staff Reports”, Zoning Practice, November 2004
- APA “Practice Smart Development Review”, Zoning Practice, January 2005
- “The Ten Commandments of Good Decision-making”
Assignment for Next Class

At the class, each student will present their evaluation of the staff reports reviewed:

• How well was the staff report organized?
• How well was the information presented?
• Were the facts and subjective information clearly delineated?
• Was there too much or too little detail?
• Was there information or analysis that was missing?
• Did the recommendation make sense based on the information presented?
How Courts Limit Access to Justice

Jurisdiction, Standing, & Ripeness

Jurisdiction - Does the Court Have the Power to Decide?

- Federal courts are limited to “Cases and Controversies.”
  - Cases between individuals
  - Controversies between states
  - No advisory opinions
- Diversity Jurisdiction
  - Cases between the citizens of different states
  - Gives you a choice of forums
  - Often settled by contract in advance

Standing - Do You Have a Right to Sue?

- People who sue must have:
  - Direct stake, and
  - Concrete injury, and
  - Redress possible through
    - Monetary damages (“law”) or
    - Injunctions (“equity”)
- Typical “Land Use” Complaints
  - “Procedural defects” in adoption of the ordinance
    - Who? Any directly affected resident, citizen, or property owner
  - “Unreasonable exercise” of legislative authority
    - Who? Only persons adversely affected
  - “Stop (or Mandate) Enforcement”
    - Who? Persons suffering special damages, different in kind and degree from community-at-large
  - “I’m a taxpayer & you clowns are wasting my money”
    - Taxpayer status is insufficient to sue in federal court; state laws vary
- Standing may be redefined by a legislature

Ripeness and Res Judicata - Is It Too Soon or Too Late to Sue?

- Williamson County Regional Planning Commission v. Hamilton Bank (1985)
  - FACTS: RPC approves plan; improvements made; county changes zoning & lowers density; application filed for revised plan; RCP applies new density standards; developer appeals & wins; RCP ignores appeal & denies plan; bank forecloses & sues in federal court alleging 5th Amendment “taking” & 14th Amendment “due process” violation; bank wins in US District Court & on appeal in US Circuit Court, but…
  - SCOTUS: Case dismissed as “unripe”
    - Bank did not exhaust all local administrative remedies (variances & appeals)
    - Bank failed to seek compensation through state means (condemnation)
Jurisdiction, Standing, & Ripeness

- **San Remo Hotel v. City of San Francisco** (2005)
- **FACTS:** City Hotel Conversion Ordinance restricts use of hotel rooms by tourists; favors SRO by poor; San Remo has tourist hotel license, but to keep must pay $567,000 “in lieu fee” & is required to give “lifetime” leases to low-income “guests;” pay under protest; sue in state court; lose; sue in federal court as 5th Amendment taking

- **SCOTUS:** Case dismissed as “over-ripe”
  - San Remo lost in state court on state law merits; can’t now raise federal claims
  - Creates a “catch 22” for San Remo—too late to reinstitute suit in state courts = “res judicata”—you only get one shot
  - Must combine state & federal claims in state court
  - Case took 12 years!
Can You Rely on the Law?

Moratoria, Equitable Estoppel, & Vested Rights

Can You Rely on the Law? Moratoria

- **General Rule:** You have a right to rely on the law, but government has right to protect public health, safety, and welfare.

- **Purpose of Moratorium**
  - Temporarily preserve the status quo while new law is developed and adopted
    - Plan for extraordinary public facilities
    - Prevent a surge of permits that undermine intent public health and safety
    - Avoid creation of excessive numbers of “nonconforming uses” or structures
  - Stop issuing permits or stop accepting permit applications

- **When Is a Moratorium Valid?**
  - Legal authority → home rule (unless statute intervenes)
  - Must follow proper procedural steps; same as any ordinance
  - Typical requirements:
    - Good faith adoption
    - Nondiscriminatory
    - Limited duration
    - Act promptly to adopt the new regulations
  - **NOTE:** Tahoe-Sierra “takings” issues

Can You Rely on Official Actions? Equitable Estoppel

- **General Rule:** Courts can’t stop government from “governing,” but courts have power to examine the fairness (equity) of the exercise of power in individual cases.

- A local government may be “estopped” (enjoined) from exercising its police power when a property owner
  - Relied in good faith
  - Upon some government act or omission
  - Has made such a substantial change in position or incurred such extensive obligations and expenses
  - That it would be highly inequitable and unjust to destroy the rights he acquired

- **4 Typical Cases** (all fact driven)
  - Reliance on a validly issued permit that is revoked
  - Reliance on the probable issuance of a permit
  - Reliance on a permit issued in error
  - Reliance on nonenforcement of code violation

- General rezoning or planning of land (adopting maps) does not result in an equitable estoppel (or vested rights)

- “Zoning in Progress” moratoria – avoids equitable estoppel claims
Moratoria, Equitable Estoppel, & Vested Rights

Can You Rely on Official Actions? Vested Rights

- **Issue:** Can government *retroactively apply* new rules to take away “rights” that were conferred by law?
  - **Origin of Concept:** Constitutional & Common Law
    - “Nothing lasts forever”
    - Government can set time limits for exercise or use of “rights”
      - “Use It or Lose It” ordinances
    - Government can force you to prove you have rights
    - You are not exempt from later changes in taxes, impact fees, construction or design regulations, etc.
  - **Statutory Vested Rights**
    - Legislatures may define “vested rights”
  - **Development Agreements**
    - Government may establish rights by contract, but
    - Beware of “contract zoning” (no “quid pro quos;” zoning is not “for sale”)
Score Four for Planning: The 2005 Supreme Court Decisions

By Lora Anne Lucero, AICP

Not since perhaps 1987—when the U.S. Supreme Court had a blockbuster year in the land-use and planning arena with *Keystone Bituminous Coal Assn.*, *Granite Rock Co.*, *First English*, and *Nollan*—have the Justices provided so much food for thought to planners and others concerned about land-use law as they did this term.

Taking Justice William J. Brennan’s admonition in 1981 to heart—“If a policeman must know the Constitution, then why not a planner?”—a description of the four cases decided this year follows in this issue of *Zoning Practice*, as does a discussion on why planners should take note of each.

**LINGLE**
On May 23, the U.S. Supreme Court said, “To day we correct course.” In the *Lingle v. Chevron* [525 S. Ct. 2074 (May 23, 2005)] decision, written by Justice Sandra Day O’Connor and joined by all the other Justices, the Supreme Court jettisoned the “substantially advances” test that made its way into regulatory takings law a quarter century ago in *Agins v. City of Tiburon* [447 U.S. 255 (1980)]. In the process, they provided much-needed clarity in takings jurisprudence.

**THE FACTS**
The controversy arose in Hawaii when that state’s legislature passed Act 257 in June 1997. Among other things, the statute limits the amount of fuel that an oil company may charge a lessee-dealer to 15 percent of the dealer’s gross profits from gasoline sales. Chevron U.S.A. Inc. was the largest refiner and marketer of gasoline in Hawaii at the time, controlling 60 percent of the market for gaso line produced or refined in-state and 30 percent of the wholesale market on the island of Oahu. The legislature was concerned about the effects of this market concentration on retail gasoline prices and thought the rent cap would help.

Chevron sued the state, claiming that Act 257 violated an unconstitutional regulatory taking because it did not substantially advance a legitimate governmental purpose. Hawaii responded that Chevron was using the wrong test. The “substantially advances” test is a due process test, the state argued, not a takings test. The substantial advances test requires the court to take a closer look at the legislation passed by local and state governments—a higher level of scrutiny than the more deferential rational basis test the courts use when they review regulatory takings claims.

After a trial with the battle of the economists (one for the state and one for Chevron), the trial court and the Ninth Circuit Court of Appeals concluded that Chevron was right. Act 257 did not substantially advance any legitimate state interest. Hawaii asked the U.S. Supreme Court to reverse the decision.

**ARGUED BY APA**
Although it was not a typical land-use case, the American Planning Association filed an amicus brief, drafted by Professor Tom Roberts of Wake Forest Law School and Ed Sullivan of Garvey Schubert Barer in Portland, Oregon, because of the importance of the outcome on future regulatory takings cases. APA urged the Court to jettison the “substantially advances” test in regulatory takings cases.

“The adoption of legislation, particularly at the local government level, aided by the planning process, involves the participation of all segments of the community working to define the public interest. Allowing judges to second-guess legislation will undermine the public’s role in the democratic process. Intermediate judicial scrutiny is neither needed nor justified to protect those who are well represented in legislative halls.”

**THE COURT’S DECISION**
Justice O’Connor acknowledged that “the language the Court selected [in the *Agins* opinion] was regrettable and imprecise.” The “substantially advances” test, she said, asks whether a regulation of private property is effective in achieving some legitimate public purpose.

“An inquiry of this nature has some logic in the context of a due process challenge, for a regulation that fails to serve any legitimate governmental objective may be so arbitrary or irrational that it runs afoul of the Due Process Clause . . . . But such a test is not a valid method of discerning whether private property has been ‘taken’ for purposes of the Fifth Amendment . . . . Instead of addressing a challenged regulation’s effect on private property, the ‘substantially advances’ inquiry probes the regulation’s underlying validity.”

By removing the “substantially advances” test as a valid method of identifying regulatory takings, courts will not be sec-
From September 19 to 30, go online to participate in our “Ask the Author” forum, an interactive feature of Zoning Practice. Lora Anne Lucero, AICP, will be available to answer questions about this article. Go to the APA website at www.planning.org and follow the links to the Ask the Author section. From there, just submit your questions about the article using an e-mail link. The author will reply, posting the answers cumulatively on the website for the benefit of all subscribers. This feature will be available for selected issues of Zoning Practice at announced times. After each online discussion is closed, the answers will be saved in an online archive available through the APA Zoning Practice web pages.

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About the Author
Lora Anne Lucero, AICP, is staff attorney to the American Planning Association’s Amicus Curiae Committee and interim editor of Planning & Environmental Law.

ond-guessing the wisdom of the legislation enacted by state legislatures and city councils. One wonders if we will see more due process challenges now, with the elimination of the “substantially advances” test in takings cases.

Justice O’Connor’s Lingle opinion is a must-read for planners. Although the decision will likely have a greater impact on the work of land-use attorneys, planners will find that the decision changes the dynamics between applicants and zoning boards, perhaps taking some of the steam out of frivolous threats to file a regulatory takings claim against the city.

KELO
The Fifth Amendment of the U.S. Constitution provides: “[N]or shall private property be taken for public use, without just compensation.” This year, the Supreme Court was asked to consider whether economic development is a “public use” for which the power of eminent domain may be exercised. None of the land-use/planning cases on the Supreme Court’s docket this term have captured as much media attention as Kelo v. City of New London [125 S. Ct. 2655 (June 23, 2005)]. Perhaps Justice O’Connor’s scathing dissent has received more air time and ink than the majority’s opinion written by Justice John Paul Stevens.

The facts in this case were misplaced in much of the news coverage since the Kelo opinion was announced June 23, but they were an important reason why the Supreme Court decided not to expand or restrict the power of eminent domain.

THE FACTS
Since the closure of the Naval Undersea Warfare Center in 1996, New London, Connecticut, has lost more than 1,500 jobs. By 1998, the city’s unemployment rate was nearly double that of the state, which designated New London a “distressed municipality.”

A private, nonprofit development agency was enlisted to assist the city in planning for the revitalization of the Fort Trumbull area in New London. In February 1998, a pharmaceutical company announced it would build a $300 million research facility adjacent to Fort Trumbull. Hoping the facility would be a catalyst for further revitalization, the city held neighborhood meetings and prepared an economic development plan. The state committed more than $15 million to the effort.

The state reviewed and approved the economic development plan, which called for a waterfront conference hotel, restaurants and shopping, and marinas with a pedestrian riverwalk. On one parcel, 90,000 square feet of research and development office space was planned to complement the pharmaceutical research facility. Negotiations with the majority of property owners were successful, but nine owners refused to sell and condemnation proceedings were initiated.

The property owners argued their properties were not blighted and said the taking violated the “public use” requirement of the Fifth Amendment. The city argued that its plan for economic development of the Fort Trumbull area was a proper public use.

The Connecticut Supreme Court ruled that all
of the proposed takings were valid and that economic development qualified as a valid public use.

ARGUED BY APA

Suzette Kelo and the organizations that supported her position asked the Supreme Court to either declare that economic development is never, under any circumstance, a “public use” for the purposes of condemnation or, alternatively, to create a higher standard of judicial review for these types of questions so that courts would look with greater scrutiny at economic development projects.

The American Planning Association, its Connecticut chapter, and the National Congress for Community Economic Development joined together to urge the Supreme Court to retain its long history of jurisprudence applying a deferential standard of review to public use determinations. The APA amicus brief was written by Professor Thomas W. Merrill of Columbia University and John D. Echeverria of the Georgetown Environmental Law & Policy Institute.

APA wrote:

“Eminent domain is concededly an unsettling power, and is subject to misuse or overuse if not properly constrained. But eminent domain is disruptive for all who experience it, not just those who might be able to persuade a reviewing court that a particular condemnation is not ‘public’ enough. The dangers of eminent domain should be added by asserting that it remains a second-best alternative to market exchange as a means of acquiring resources, by encouraging careful planning and public participation in decisions to invoke eminent domain, and by building on current legislative requirements that mandate additional compensation beyond the constitutional minimum for persons who experience uncompensated subjective losses and consequential damages.

“Another source of protection for all property owners is to assure, to the extent possible, that eminent domain is exercised only in conjunction with a process of land-use planning that includes broad public participation and a careful consideration of alternatives to eminent domain.

“Integrating the decision to use eminent domain into a sound planning process has a number of desirable consequences. Such a process can help minimize the use of eminent domain, by identifying alternatives to proposed development projects, such as relocating or re-sizing projects, or perhaps forgone them altogether. It can also reduce public concerns about the use of eminent domain by providing a forum in which the reasons for opposition can be considered, offering explanations for the proposed course of action and possible alternatives, and perhaps instilling a greater degree of understanding on the part of both the proponents and opponents of the proposed project.”

THE COURT’S DECISION

The Court’s majority opinion mentioned “planning” “plan,” “planner” 39 times. Justice Stevens, along with Justices Stephen G. Breyer, David H. Souter, Ruth Bader Ginsburg, and Anthony M. Kennedy, concluded that “The city has carefully formulated an economic development plan that it believes will provide appreciable benefits to the community . . . Given the comprehensive character of the plan, and the thorough deliberation that preceded its adoption . . . [the] plan unquestionably serves a public purpose.” For more than a century, the Court has “wisely eschewed rigid formulas and intrusive scrutiny in favor of affording legislatures broad latitude in determining what public needs justify the use of the takings power.” The Court was unwilling to “second-guess the city’s considered judgments about the efficacy of its development plan” or “to ‘second-guess the city’s determinations as to what land it needs to acquire in order to effectuate the project’.”

The final ruling, Justice Kennedy said in his concurring opinion, does not “alter the fact that transfers intended to confer benefits on particular, favored private entities, and with only incidental or pretextual public benefits, are forbidden by the Public Use Clause.” Those types of condemnations have always been unconstitutional, and they remain unconstitutiona. The Kelo v. City of New London decision might be the Supreme Court’s strongest validation of the important role of planning since Euclid [Village of Euclid, Ohio v. Ambler Realty Co., 272 U.S. 365 (1926)] nearly 80 years ago.

What should planners take away from this opinion? First, plans are important because if they are comprehensive and preceded by thorough deliberation—including public participation and public input—they serve a public purpose and the public interest. The Supreme Court is telling lower courts that they should look to the community’s plan to discern what is in the public interest. Second, the courts will refrain from second-guessing the decision of the local and state elected officials about such matters. But the Supreme Court also cautions us that if a condemnation occurs that transfers
property from one private owner to another private owner “outside the confines of an integrated development plan,” it would certainly raise a suspicion that the condemnation was for a private purpose and not for a public use. *Kelo* is a good decision for planners and the communities they serve.

**CITY OF RANCHO PALOS VERDES**

What remedies are available to a property owner if a municipality violates the Telecommunications Act of 1996 (TCA)? The Supreme Court answered this question in *City of Rancho Palos Verdes v. Abrams* [125 S.Ct. 1453 (March 22, 2005)].

Planners know that the TCA prohibits local governments from:

- unreasonably discriminating among providers of functionally equivalent services § 332(c)(7)(B)(i)(I);
- taking actions that “prohibit or have the effect of prohibiting the provisions of personal wireless services,” § 332(c)(7) (B)(i)(II); or
- limiting the placement of wireless facilities “on the basis of the environmental effects of radio frequency emissions,” § 332(c)(7) (B)(iv).

Furthermore, local governments must:

- act on requests for authorization to locate wireless facilities “within a reasonable period of time,” § 332(c)(7)(B)(ii); and
- explain each decision denying such a request “in writing and supported by substantial evidence contained in a written record,” § 332(c)(7)(B)(iii), and “any person adversely affected by any final action or failure to act” may bring an action in court within 30 days after such action or failure to act, § 332(c)(7)(B)(v).

Mark Abrams took the City of Rancho Palos Verdes, California, to court because the city denied him a conditional use permit for the second antenna tower he wanted to build on his residential hillside property. He successfully argued that the city had violated the TCA and the district court ordered the city to issue him a permit for the tower. When Abrams asked the court for money damages and attorneys fees pursuant to 42 U.S.C. § 1983, the court refused because the TCA does not provide a remedy of such damages and fees.

Although Abrams won the right to build his second tower, he appealed the issue of the damages and fees to the Ninth Circuit Court of Appeals, which agreed with him, ruling that remedies from both the TCA and § 1983 are available to successful plaintiffs. They sent the case back to the district court for a determination of money damages and attorneys fees. The City then asked the U.S. Supreme Court to review the case.

What is 42 U.S.C. § 1983? A person states a claim under 42 U.S.C. § 1983 if he alleges that the defendant deprived him of a constitu-
tional right while acting “under color” of state law. More importantly, § 1983 provides money damages and § 1988 provides attorneys fees to the successful litigant, which is different from the American Rule where litigants generally cover their own litigation costs.

Section 1983 was passed by Congress in 1871 but was rarely used until nearly 90 years later, when the U.S. Supreme Court gave private litigants a federal court remedy as a first resort rather than only in default of (or after) state action. [Monroe v. Pape, 365 U.S. 167 (1961)] Today, § 1983 actions most commonly involve First Amendment issues like freedom of speech; Fourth Amendment issues like search and seizure or use of force; Eighth Amendment issues like cruel and unusual punishment; and Fourteenth Amendment claims of due process violations. But in this case, the Supreme Court was asked to decide whether Abrams was entitled to a § 1983 remedy for a violation of the Telecommunications Act.

of the State and Local Legal Center in Washington, D.C.

"There are thousands of counties, municipalities, and townships in the United States, including many with few inhabitants, limited resources, and no full-time counsel. Faced with the threat of large claims for attorneys fees and damages by well-financed corporations represented by high-priced counsel, local governments may be deterred from vigorously protecting visual, aesthetic, and safety concerns. Such a result would defeat Congress's intention to allow local governments to retain 'the flexibility to treat facilities that create different visual, aesthetic, or safety concerns differently to the extent permitted under generally applicable zoning requirements.' (H.R. Conf. Rep. No. 458, 104th Cong., 2d Sess. 208 1996.)"

In addition to the potential serious fiscal impacts, APA noted that the TCA provides a swift review of potential violations (30 days) while property owners would presumably have four years to bring a claim for damages under § 1983. Congress patterned the TCA remedies after the state review mechanisms and took a deferential stance toward state and local zoning processes. APA discussed the State Zoning Enabling Act in detail to show the Court why Congress drafted the TCA the way it did.

"Resulting delays in obtaining final judgments—whether from a longer limitations period or slower judicial decision-making—can harm local governments and the public. Such delays will slow the roll-out of personal wireless facilities and increase the adverse fiscal consequences that § 1983 damages and § 1988 attorneys fee liability poses to local governments."

THE COURT'S DECISION

In a unanimous decision written by Justice Antonin Scalia, the Supreme Court concluded that Congress did not intend for the judicial remedy provided by § 332(c)(7) to coexist with an alternative remedy available in a § 1983 action. This is a good decision for local governments and for planners because it means property owners who successfully challenge municipalities and counties on violations of the TCA can ask the court to remedy the violation and issue the permit but cannot obtain money damages and attorneys fees.

SAN REMO

Which court should decide what? And when? That was the conundrum presented to the U.S. Supreme Court in San Remo Hotel, L.P. v. City and County of San Francisco [125 S. Ct. 2491 (June 20, 2005)].

To set the stage, one must remember that the American judicial system is made up of both the federal courts (which include trial and appellate courts divided into 13 circuits) and the state courts (which also include trial and appellate courts and the state supreme courts). Above it all is the United States Supreme Court.

Generally, the federal courts handle cases involving federal laws and the U.S. Constitution while the state courts handle cases involving state laws and the state constitutions. Decisions from a trial court might be appealed to an appellate court so there is an opportunity to review and correct mistakes. But imagine the chaos that would ensue if a litigant, dissatisfied with the decision from one court, could simply take her case to another court, not to review the first court’s decision, but to make her arguments anew. What a boon for the lawyers, but a mess for everyone else who want some closure and finality to these disputes.

The Founding Fathers anticipated such mischief when they included the “full faith and credit clause” in the U.S. Constitution. Article IV, § 1 demands that

“Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts,
Records and Proceedings shall be proved, and the Effect thereof.”

Congress passed the full faith and credit statute in 1790 to implement Article IV, § 1. The modern version of the statute, 28 U.S.C. § 1738, provides that “judicial proceedings . . . shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State . . .” In this case, the owner of the San Remo Hotel in San Francisco as ked the Supreme Court to make an exception to the full faith and credit statute. He wanted to bring his federal takings claim into federal court after the state court had already entered a final judgment denying him just compensation. San Remo’s argument went this way: Since takings claims based on the U.S. Constitution against a state or local government cannot be brought into federal court until the property owner has been denied just compensation in state court (see Williamson County v. Hamilton Bank [473 U.S. 172 (1985)]), a federal takings claim might never be heard in federal court unless the state court’s decision is dis regarded. San Remo argued that the federal courts should hear the takings claim anew. The U.S. Supreme Court, in a decision written by Rights Counsel, the California State Association of Counties, and the League of California Cities in filing the brief written by Timothy J. Dowling and Douglas T. Kendall of the Community Rights Counsel in Washington, D.C.

“Ninety percent of American municipalities have less than 10,000 people and cannot afford a full-time municipal lawyer. For these municipalities, defending against a single takings suit by a wealthy developer can result in debilitating costs. For example, Hudson, Ohio, a community of 22,000, had to spend more than $400,000 in an ultimately successful effort to defend against a challenge to the city’s growth management ordinance spearheaded by the Home Builders Association of Greater Akron . . . Litigation costs for small communities have soared in recent years.” APA acknowledged that “Landowners deserve a fair forum and a full hearing for their constitutional claims.” But once a landowner has received a fair hearing, to grant a request for a second hearing in a different forum “would unfairly put two hammers to the heads of local officials.”

The Court’s Decision

The Court agreed with the position advanced by APA and others and refused to create an exception to the full faith and credit statute. Congress had not expressed an intent to create such an exception when it passed the full faith and credit act, the Court said, and the “weighty interests in finality and comity trump the interest in giving losing litigants access to an additional appellate tribunal.”

Justice Stevens concluded his opinion by stating, “State courts are fully competent to adjudicate constitutional challenges to local land-use decisions. Indeed, state courts undoubtedly have more experience than federal courts do in resolving the competing factual, technical, and legal questions related to zoning and land-use regulations.”

Conclusion

Four cases and four very different outcomes, and each a “win” for planners and the planning profession. The first jettisoned a troublesome test from future regulatory takings cases (Lingle v. Chevron); the second held the course and made no changes to the eminent domain clause (Kelo v. City of New London); the third clarified that there are no money damages and attorneys fees available for challenges of zoning decisions made pursuant to the Telecommunications Act (City of Rancho Palos Verdes v. Abrams); and the fourth said there will not be two bites at the litigation apple. When a state court makes a final decision on a federal takings claim, there will be no further pursuit of a higher court. (San Remo Hotel, L.P. v. City and County of San Francisco)

Electronic copies of the Supreme Court decisions are available to ZoningPractice subscribers by contacting Michael Davids on, editor, ZoningPractice at the American Planning Association, 122 South Michigan Avenue, Suite 1600, Chicago, IL 60603, or by sending an e-mail to mdavidson@planning.org. The full opinion of each can be found on APA’s website at www.planning.org/amicusbriefs/ along with the amicus curiae brief APA filed in each case.

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Extract of U.S. Constitution

(Effective March 4, 1789)

The Preamble

We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defense, promote the general Welfare, and secure the Blessings of Liberty, to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

Article 1 - The Legislative Branch

- Section 8 – Powers of Congress: The Congress shall have Power…
  - To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;
  - To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

Article 3 - The Judicial Branch

- Section 2 – Trial by Jury, Original Jurisdiction, Jury Trials*
  - The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; to all Cases affecting Ambassadors, other public Ministers and Consuls; to all Cases of admiralty and maritime Jurisdiction; to Controversies to which the United States shall be a Party; to Controversies between two or more States; between a State and Citizens of another State; between Citizens of different States; between Citizens of the same State, or the Citizens thereof, and foreign States, Citizens or Subjects. (*Note: This section was modified by the 11th Amendment)

Amendments to the US Constitution

- Amendment 1 – Freedom of Religion, Press, Expression
  - Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

- Amendment 5 – Trial and Punishment, Compensation for Takings
  - No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

- Amendment 10 – Powers of the States and People
  - The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.
Extract of the US Constitution

- **Amendment 14 – Citizenship Rights** (Effective June 13, 1866)
  - All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
  - The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

- **Amendment 16 – Status of Income Tax Clarified** (Effective July 12, 1909)
  - The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.