THE LAW OF PROPERTY

SUPPLEMENTAL READINGS

Class 13

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CHAPTER 8

JUDICIAL CONTROL OF LAND USE: NUISANCE AND SUPPORT

ChapterScope

This chapter examines control of land use through the tort concept of nuisance, and various ways the judiciary can resolve these claims of nuisance. A related concept, lateral and subjacent support, is also discussed. Here are the most important points in this chapter.

- Nuisance is a relative concept. Nuisance consists of an intentional use of one's property that is unreasonable and substantially interferes with another person's use and enjoyment of their property, or an unintentional use that is negligent, reckless, or inherently dangerous and substantially interferes with another person's use and enjoyment of their property. However, none of this answers the question of which use should be preferred.
  - There are three views of when an intentional use is unreasonable. First, a use is unreasonable if the gravity of the harm it inflicts outweighs its social utility; second, a use is unreasonable if the harm inflicted is serious and the actor could compensate for this and similar harms without ceasing the activity; and, third, a use is unreasonable if the harm it inflicts exceeds some minimal threshold of discomfort that no one should be expected to endure.
- Because nuisance necessarily involves a weighing of the utility of two competing uses courts have begun to experiment with the use of liability rules (which force the transfer of rights upon compensation) as well as property rules (which protect against forced transfer of rights). The result is four possible outcomes of nuisance suits, two of which use property rules and two which use liability rules.
  - Under either of the property rule outcomes, any later transfer of the right must be voluntary and economically efficient transfers may be inhibited by high transaction costs.
    - No nuisance, no remedy.
    - Nuisance enjoined.
  - Under either of the liability rule outcomes, the judicial system forces a transfer of rights upon compensation to the other party. The justification for using liability rules instead of property rules is that this will produce a socially efficient outcome.
    - Nuisance permitted to continue upon payment of full compensation to affected property owners for the past and future damages
    - No nuisance, but the activity is enjoined upon payment of compensation to the enjoined user of the full costs of relocation
- Nuisances can be public or private. A public nuisance is a use that imposes harms on the entire public with no particularized harm on any private landowner.

I. THE SUBSTANCE OF NUISANCE

A. The general principle: An ancient common law maxim, *sic utere tuo ut alienum non laedas* ***(one must use one's property so as not to injure another's property)*** is the root of nuisance. Unfortunately, the maxim is not much help, because often one person's beneficial use is another person's injury and, in practice, some injuries to another's land are permitted and others not. It is more helpful to say that a person may not use his own land in an ***unreasonable manner*** that ***substantially*** lessens another person's ***use and enjoyment*** of his land. A nuisance may be ***private*** or ***public.*** A private nuisance involves interference with purely private rights to the use and enjoyment of land — usually one or more nearby landowners. A public nuisance involves interference with public rights — those held in common by everybody — but a public nuisance can also be a private nuisance.

B. Private nuisances: A private nuisance occurs when there is ***substantial interference*** with private rights to use and enjoy land, produced by ***either*** of the following:

- ***Intentional and unreasonable*** conduct, or
- ***Unintentional*** conduct that is either ***negligent, reckless,*** or so ***inherently dangerous*** that ***strict liability*** is imposed.

★**Example:** High Penn operated an oil refinery that emitted noxious odors several times each week, polluting the air for about a 2-mile radius from the refinery. Along with many other people who owned land located within that radius, Morgan sued to enjoin the refinery's operations, alleging that the noxious odors made him sick and deprived him of use and enjoyment of his property. In ***Morgan v. High Penn Oil Co.,*** 238 N.C. 185 (1953), the North Carolina Supreme Court agreed, applying the hornbook rule that a use is a nuisance if it is *either* ***intentional and unreasonable*** or ***unintentionally produced by negligence, recklessness, or extremely dangerous activity.*** High Penn intended to operate the refinery and knew or should have known that its operation would produce the noxious odors and the court assumed its use was unreasonable but did not explain quite why.

1. **Intentional conduct:** This is the most common form of nuisance. Intentional conduct is action that is known by the actor to interfere with another's use of land, but which is continued nevertheless. The focus here is upon whether the conduct is an ***unreasonable interference*** with another's land, but what is unreasonable? There are three views.

   a. **Balancing: Harm and social utility:** If the **gravity of the harm** ***inflicted by the conduct outweighs its social utility*** (unconstrained by nuisance law) the conduct is unreasonable. See Restatement (2d) Torts §826(a). To measure the gravity of the harm, the Restatement (2d) of Torts suggests that courts should consider the ***extent*** of the harm, its ***character,*** the ***social value*** of the use, the ***suitability of the use to the location,*** and the ***burden of avoiding the harm.*** See Restatement (2d) Torts §827 (1979). To measure the utility of the offending conduct, the Torts Restatement suggests that courts should consider the ***social value*** of the conduct, its ***suitability to the location,*** and the ***practical difficulty of preventing the harm.*** See Restatement (2d) Torts §828. The first Restatement of Torts, §827, distinguished between harm that damaged property and harm to personal comfort: "Where the invasion involves physical damage to tangible property, the gravity of the harm is ordinarily regarded as great even though the extent of the harm is relatively small. But where the invasion involves only personal discomfort and annoyance, the gravity of the harm is

generally regarded as slight unless the invasion is substantial and continuing." That distinction is discarded by the second Restatement, which applies its balancing formula globally. In practice, this multifaceted balancing test makes the issue of unreasonable use turn on the specific facts: "A nuisance may be merely the right thing in the wrong place — like a pig in the parlor instead of the barnyard." ***Village of Euclid v. Ambler Realty Co.***, 272 U.S. 365 (1926). In theory fault is not an issue — the most careful and prudent use is a nuisance if its harm outweighs its utility. In essence, this test gives judges the opportunity to assess the worth of competing uses and to decide which user should shoulder the costs inherent in two incompatible uses. This becomes quite indeterminate when you consider the possibility that any use inflicts some costs on others, and that the label "nuisance" simply becomes a way of allocating presumptive entitlement to any particular use. Perhaps for this reason the traditional remedies for nuisance have become considerably more sophisticated and capable of nuance, which suggests that some of the work of deciding what constitutes a nuisance has been transferred into the law of remedies for nuisance. See section II, below.

b. Balancing: Uncompensated harm and ruinous liability: A variation on balancing harm and social utility is contained in Restatement 2d Torts §826(b), which holds that an intentional activity is unreasonable if it causes ***serious harm* and *the actor could compensate for that and similar harm without going out of business.*** This test becomes problematic only when the defendant would be forced out of business by compensating for the harm he causes, for in such circumstances this test would conclude that the activity is not unreasonable and thus not a nuisance. In essence, under those circumstances a court is asked to decide which is worse — uncompensated harm or forcing businesses to close. There are at least two reasons why an actor inflicting serious harm might be excused from liability because he can't afford to pay for the harm: (1) the injured party is able to avoid the harm at less cost than the compensation, and (2) the harm-inflicting activity generates positive externalities — benefits that the actor cannot capture and use to compensate the injured party but which outweigh the harm. The latter point takes you back to harm versus social utility. In theory this test could be used globally but its application inevitably becomes bound up in the remedies for nuisance. When the plaintiff seeks to enjoin a claimed nuisance compensation is not a factor and the general balancing of harm and social utility is applicable, but when the issue is whether a nuisance should continue upon payment of compensation to those harmed (see section II.D. below), this test becomes relevant.

c. Substantial harm: The liability threshold: A number of courts tacitly or explicitly ignore the balancing test if ***substantial harm*** is inflicted. In these jurisdictions a nuisance exists if the injury it inflicts is severe enough to be above some maximum level of interference that a person can be expected to endure without redress — a "threshold of liability." An old Wisconsin case, *Pennoyer v. Allen*, 56 Wis. 502 (1883), is typical in defining substantial injury as "tangible" injury or a "discomfort perceptible to the senses of ordinary people."

Example: Dairyland Power's electrical generation plant spewed sulphur dioxide into the air, causing tangible but minor property damage to Jost's house and farm (e.g., rusty screens, inability to grow flowers or garden vegetables, and loss of about 5 percent of Jost's alfalfa crop). In *Jost v. Dairyland Power Cooperative*, 45 Wis. 2d 164 (1969), the Wisconsin Supreme Court ruled that the generation plant was a nuisance. The court invoked the principle, derived from the first Restatement of Torts, §827, that "where the invasion involves physical damage to tangible property, the gravity of the harm is ordinarily regarded

as great even though the extent of the harm is relatively small." To permit a socially useful public utility to "deprive others of the full use of their property without compensation . . . would constitute the taking of property without due process of law." See also *Dolata v. Berthelet Fuel & Supply*, 254 Wis. 194 (1949), in which an admittedly socially and economically useful coal yard was enjoined as a nuisance because it caused substantial damage to an adjacent landowner. Note that although the court in ***Morgan v. High Penn Oil Co.*** did not state why the refinery's operation was unreasonable, a second look at the facts suggests that it was applying the *Jost* threshold invasion test.

2. **Unintentional conduct:** When an actor uses his land in a way that unintentionally injures another's use or enjoyment of land, the action is a nuisance if ***either*** the conduct is below the standard of care commonly required (i.e., it is negligent or reckless) ***or*** the ***risk of harm*** is so great that the conduct ought not be tolerated (i.e., it is inherently dangerous, like the unshielded storage of plutonium or large quantities of dynamite). Here the focus is entirely upon the actor's conduct — does it pose an unreasonable risk of harm either because it is careless or inherently dangerous?

3. **Substantial interference:** The alleged nuisance, whether intentional or not, must be a substantial impediment to the use and enjoyment of land. The average person is the standard measurement for substantial interference. See, e.g., ***Morgan v. High Penn Oil Co.,*** 238 N.C. 185 (1953); *Rose v. Chaikin,* 187 N.J. Super. 210 (1982).

   Example: An operator of a drive-in movie theater sued an adjacent amusement park, on the theory that the bright lights from the amusement park constituted a nuisance. Not so, said the Oregon Supreme Court in *Amphitheaters, Inc. v. Portland Meadows,* 184 Or. 336 (1948); the movie operator's use was "abnormally sensitive." But why should the theater operator's reliance on natural darkness be abnormal? Couldn't the introduction of vast amounts of artificial lighting be considered abnormal? A commonly accepted cultural baseline is required; here, in the midst of the electrified, urbanized industrial economy, the baseline was bright lights at night in an urban area.

   The necessity of using some cultural baseline produces mixed results when cultural attitudes vary or are in flux.

   Example: A halfway house for paroled criminals is established in a residential neighborhood, producing fear of criminal activity and a decline in property values. While one might think that the fear and declining values are indicators of a cultural baseline, courts divide on this issue. In *Arkansas Release Guidance Foundation v. Needler,* 252 Ark. 194 (1972), the Arkansas Supreme Court ruled that such a house was a nuisance, but in *Nickolson v. Connecticut Halfway House,* 153 Conn. 507 (1966), the Connecticut Supreme Court said it was not, even though the fear and the decline in values were present. In *Adkins v. Thomas Solvent Co.,* 440 Mich. 293 (1992), the Michigan Supreme Court ruled that a toxic waste dump did not constitute a nuisance where property values in the area had declined on the strength of well-publicized but unfounded fears of contamination.

C. **Public nuisances:** A public nuisance affects rights held in common by everybody — the public — rather than just private rights of land use held by landowners.

Example: A factory discharging pollutants into a publicly owned watershed, thereby contaminating the municipal water supply, is likely engaging in a public nuisance. Only the common right to potable water for the municipality is affected.

A pure public nuisance is rare — more commonly, a public nuisance is also a private nuisance.

Example: A factory discharging pollutants into a stream that supplies drinking water to downstream farmers as well as a municipality even further downstream is likely engaging in both a public and private nuisance.

The substantive test for a public nuisance is the same as for a private nuisance.

1. **Enforcement:** Public nuisances are normally abated by suits brought by public officials, but a ***private citizen*** may bring suit to abate a public nuisance if he has been ***specially injured*** by the nuisance. This means that the private plaintiff has suffered some particularized and personalized injury, but not necessarily in the use and enjoyment of land.

   Example: A factory discharges pollutants into the sea in a quantity sufficient to render the water unsafe for public bathing or fishing, thus creating a public nuisance. Jill, who owns no land, cultivates oysters in the tidal waters and her oyster farming is ruined by the pollution. Jill may maintain suit to abate the public nuisance. She has suffered a particularized injury, one different from the injury inflicted on the public at large.

   This rule of special injury has been relaxed by statute or judicial decision in some states to permit a private person to sue as the representative of affected persons to abate environmental nuisances.

D. Relationship to trespass: Nuisance and trespass are closely related. Trespass involves a physical invasion of a person's land — an interference with his ***exclusive right of possession.*** By contrast, nuisance involves an interference with another person's right to ***use and enjoy his land*** and does not necessarily involve interference with the exclusive right of possession. Of course, there is some overlap: If a viscous sludge of animal waste from a hog farm crosses over the boundary to the neighbor's land, the neighbor can assert both trespass and nuisance. As well, the physical invasion that constitutes trespass can be microscopic.

Example: Reynolds's aluminum plant emitted gases that poisoned Martin's cattle, and Martin prevailed on a trespass theory. On appeal, the Oregon Supreme Court, in *Martin v. Reynolds Metals Co.*, 221 Or. 86 (1959), affirmed, concluding that physical invasion occurred even when the invasion was by "invisible pieces of matter or by energy." Somewhat inexplicably, however, the court applied a balancing test to determine liability. By contrast, in *Wilson v. Interlake Steel Co.*, 32 Cal. 3d 229 (1982), the California Supreme Court ruled that noise alone, unaccompanied by physical property damage or other tangible invasion, did not support a trespass claim. Trespass, once proven, entitles the landowner to damages and an injunction regardless of his lack of any substantial injury. By contrast, a landowner in a nuisance action must prove significant injury in order to recover, as well as unreasonable interference, and (usually) that equity is in his favor. The remedy available to a successful plaintiff in a nuisance action may be an injunction, damages, or even an obligation to pay damages to a defendant as the price for an injunction. See section II, below.

II. REMEDIES: FOUR VIEWS OF NUISANCE

A. Introduction: The economic theory of modern nuisance law: The fundamental problem of nuisance law is that property uses are often incompatible. My beneficial use is your injury, and your beneficial use is my injury. If Eve operates a dairy farm on Blackacre, necessarily producing odors that interfere with Adam's outdoor tanning salon on Whiteacre, the two uses are incompatible. Each use interferes with the other — Eve's dairy farm interferes with Adam's tanning salon (the odors inhibit the spa patrons from tanning) and Adam's tanning salon interferes with Eve's

dairy farm (by preventing Eve from maintaining a dairy farm in order to accommodate the spa patrons). Each use produces ***externalities*** — costs that are not imposed on the person producing them. Eve's dairy farm produces the cost (external to Eve) of inhibiting Adam's use as a tanning salon. Adam's tanning salon produces the cost (external to Adam) of preventing Eve's use as a dairy farm in order to accommodate Adam's tanning spa. Economic theorists argue that decisions are more efficient if all of the costs of the decision are internalized — borne by the decisionmaker. If Adam and Eve were a single unit, the relative costs of these incompatible uses would be weighed by the single decisionmaker, and the more economically desirable use would prevail. But Adam and Eve are not a single unit. Nevermind, said Ronald Coase in his famous Coase Theorem. In a perfect world free of transaction costs, it doesn't matter which of Adam and Eve are entitled to continue their use, because the use right will end up in the hands of the person whose use is the more valuable.

Example: Suppose the damage to Eve from ceasing to use Blackacre as a dairy farm is $100,000 and the damage to Adam from ceasing to use Whiteacre as a tanning salon is $40,000. If the law gives Eve the use right she will continue her dairy farming because Adam will pay her no more than $39,999.99 to stop and that sum is not enough to compensate her for the costs of stopping. But if the use right is given to Adam he will sell that right to Eve for some price greater than $40,000 and less than $100,000, because both Adam and Eve will be better off by such a bargain. Similarly, if Adam suffered a greater damage than Eve from ceasing his activity then the use right would end up in Adam's hands no matter where it was initially assigned. All of this, of course, assumes the absence of any transaction costs.

1. **Transaction costs — The gap between theory and reality:** We do not live in a perfect world free of transaction costs. The cost of moving the right from Adam to Eve or Eve to Adam is not zero; it is not even insignificant. Why? There are three standard answers.

   a. **Bilateral monopoly:** When there are only two persons involved in the transfer there is an inherent bilateral monopoly problem. There is only one seller and only one buyer — dueling monopolies.

   Example: If Adam is given the use right and Eve values it more highly, Adam has only one potential buyer: Eve. And Eve has only one source from which she can acquire the right she desires: Adam. They are forced to deal with only each other, if they are to deal at all. Adam is likely to want to extract as much of the potential gain of $60,000 ($100K – $40K) as he can, but Eve has the same objective. They will haggle; they will bluster; they will hire lawyers to threaten more litigation and thus spend gains before acquiring them. In short they will play negotiation games with each other, expending money and time as they do, thus making it harder to reach a deal and diminishing its value even if reached.

   Paradoxically, some empirical research suggests that bilateral monopoly situations frequently do result in efficient outcomes, perhaps because people recognize in advance the prospect of wasteful haggling. See, e.g., Hoffman & Spitzer, The Coase Theorem: Some Experimental Tests, 25 J.L. & Econ. 73 (1982).

   b. **Free riders:** When there are numerous parties to the negotiation, different problems emerge. One of them is caused by the human impulse to get a free ride at somebody else's expense.

   Example: Suppose that in addition to Adam there were 99 other property owners, all using their property for uses incompatible with Eve's dairy farm. Suppose that a cessation of each of those additional uses would damage each affected property owner by $40,000. The total

cost imposed by giving the use right to Eve would thus be $4,000,000 ($40K × 100), but suppose that Eve's use is not a nuisance despite these disparate numbers (perhaps Eve was there first and the other people all "came to the nuisance" fully aware of the problem). The rational response of Adam and his fellow landowners is to contribute something more than $1,000 apiece to amass a fund of more than $100,000 to purchase Eve's use right from her, but some landowners will not contribute because they hope to receive the benefit of Eve's cessation of use without paying for it. The knowledge that this may happen will inhibit other landowners from making their contributions because they dislike giving a free ride to someone else. Moreover, to complete the transfer the contributing landowners will have to contribute the share of the free riders and many of them may balk at this. Because there is no effective way to compel contribution Eve's use right may not be purchased, even though it is clearly economically efficient to do so.

c. **Holdouts:** The mirror image to the free rider problem is the problem of holdouts.

Example: Suppose that the damage to Adam of ceasing his use is only $500 (he can use Whiteacre as an exotic vegetable farm) and there is also damage to 99 other property owners (each in the amount of $500), or total damages of $50,000 (100 × $500). Now suppose that Eve's use is found to be a nuisance and she is ordered to stop. It is efficient for Eve to purchase the use right vested in her 100 neighbors for some amount greater than $500 each and less than $1,000 each, but it does Eve no good to purchase the use right from 99 owners if even one refuses to sell. One owner is almost sure to hold out, because he will know that the marginal value of the last right is higher than $500 to $1,000. To see this, imagine that Eve has purchased 99 use rights for $600 each, or a total of $59,400. The last holdout will realize that Eve will rationally pay as much as another $40,599 to obtain the holdout's right. This simple fact is likely to spur holdouts. Of course, Eve can make her purchases conditional upon obtaining all rights but that condition does not eliminate the incentive to hold out. Because Eve cannot compel everyone to sell on reasonable terms (e.g., three people may each demand $40,000) she may never be able to complete the transaction and the right will stay with Adam and his cohorts, the inefficient outcome.

However, some empirical studies suggest that efficient results may occur by private bargaining even when there are as many as 40 parties involved, so the holdout problem may not be as intractable as it is often thought to be. See, e.g., Hoffman & Spitzer, Experimental Tests of the Coase Theorem with Large Bargaining Groups, 15 J. Legal Stud. 149 (1986).

2. **Who gets the initial entitlement?** Economic theory answers this by stating that the initial entitlement of land use should belong to the party whose use is the more valuable, but there are rival answers, too.

a. **More valuable use:** The most efficient and economically logical answer is that the ***more valuable use*** should receive the initial entitlement, because this is the outcome that (but for transaction costs) would ultimately result. The prevailing balancing test for intentional and unreasonable use partially addresses these economic efficiency concerns by assessing the relative social utility of competing uses and other issues of practicality.

b. **First user:** Some would give the initial entitlement to the ***first user,*** on the theory that later users should adapt themselves to existing conditions. This approach is embodied in the ***"coming to the nuisance"*** doctrine, by which courts hold that those who knowingly acquire and use land in a manner incompatible with existing uses have voluntarily assumed the

This pattern is in fact seen in the modern law of nuisance remedies. A court must ***allocate the right* and *decide whether to protect that right by a* property rule *(injunction) or a* liability rule *(damages).***

B. No nuisance: Continue the activity: If a challenged activity is found not to be a nuisance the use right is allocated to the challenged user and is implicitly protected by a property rule. Because it is not a nuisance, the challenged user cannot be forced to stop the use without his consent. The use will continue unless the challenged use is the less valuable one and transaction costs do not inhibit its transfer.

Example: Eve's dairy farm is found not to be a nuisance. She receives the use right and cannot be made to stop unless she agrees to, but if the cost to Adam of ceasing his use is $200,000 and the cessation cost to Eve is $100,000, the use right should voluntarily shift to Adam upon his payment to Eve of something between $100,000 and $200,000 (assuming modest transaction costs).

C. Nuisance: Enjoin and abate the activity: If a challenged activity is found to be a nuisance and the challenger's use is protected by a property rule, the challenged activity will be enjoined and it will thus stop. The challenger can continue his use at his pleasure. If the enjoined activity is the more valuable the use right will likely be shifted to the enjoined user unless transaction costs prevent the transfer.

Example: Eve's dairy farm is found to be a nuisance and she is enjoined from continuing her dairy farming. Adam's tanning use is protected by a property rule, but if the damage to Eve is $100,000 and the cost to Adam of ceasing to operate his tanning spa is $50,000, the use right should shift to Eve upon her payment to Adam of some price between $50,000 to $100,000 (assuming minimal or zero transaction costs).

★**Example:** Estancias Dallas constructed an apartment complex in Dallas adjacent to Schultz's residence. To save $40,000 Estancias located its central air conditioning unit about 5 feet from Schultz's lot line, 55 feet from his house, and 70 feet from his bedroom. The air conditioner was quite noisy ("the unit sounds like a jet plane or helicopter"), prevented Schultz from entertaining outdoors, and even interfered with indoor conversation and his sleep. To change the location of the unit would cost Estancias $150,000 to $200,000. The apartments could not be rented in sweltering Dallas without air conditioning. The value of Schultz's house was $25,000. In ***Estancias Dallas Corp. v. Schultz,*** 500 S.W. 2d 217 (Tex. 1973), the Texas Court of Civil Appeals upheld a trial court's determination that the air conditioner was a nuisance and injunction of its further operation. Why was it a nuisance? Surely the gravity of the harm (the loss of the ***entire value*** of Schultz's house — $25K) was outweighed by the social utility of the air conditioner (measured by the dollar cost of avoiding the harm — $40K at the outset, $150K to $200K after the injunction issued). Although the harm may have been serious and Estancias could have compensated Schultz without ceasing business, that test is used when the plaintiff is seeking compensation. Without saying so the Texas courts were applying the "threshold of harm" test exemplified by *Jost v. Dairyland Power Coop.* Although economic theory says that this result should have resulted in a shift of the use right from Schultz to Estancias upon payment of some amount between $25K and $150K that did not happen, which means that either Schultz was irrational, or transaction costs consumed the entire surplus, or that Schultz simply valued his peace and quiet in his long-time residence far more than an economic gain.

D. Nuisance: Pay damages and continue the activity: It is not possible to ignore the real-world presence of transaction costs. Thus, in situations where there are a large number of landowners affected by a more valuable use that is, on balance, a nuisance, the presence of holdout transaction

costs (see section II.A.1.c, above) may prompt a court to protect the use right of the numerous landowners by a liability rule instead of a property rule. In short, the court may award damages to the affected landowners instead of enjoining the nuisance. The damages awarded are ***permanent damages*** — an amount sufficient to compensate now for all past and future injury that may be inflicted by continuation of the nuisance.

★**Example:** Atlantic Cement's factory produced dirt, smoke, noise, and vibration that substantially interfered with the use and enjoyment of land owned by a large number of neighbors. In ***Boomer v. Atlantic Cement Co.,*** 26 N.Y. 2d 219 (1970), the New York Court of Appeals upheld a trial court's finding that the factory was a nuisance and award of damages instead of an injunction. The case was remanded for determination of the amount of permanent damages to be awarded for the "servitude" thus created over the affected land. The Court's rationale was partly the technological impossibility of abatement, coupled with recognition that the factory was the more valuable use (it produced positive externalities in the form of jobs and other economic benefits to the region) but that the holdout possibility might well frustrate a market transfer of the right if the factory was enjoined from further operation. In essence the court applied the balancing formula that asks whether the defendant could compensate for all the serious harm it causes without ceasing business and concluded that Atlantic Cement could do so. Because we are not clairvoyant there is the possibility of considerable error in ascertaining permanent damages — the present value of future injury that has not yet been inflicted — but if the damage award is not permanent, transaction costs (in the form of repeated litigation to determine future damages as incurred) will be high. An injunction is of dubious efficacy because of the nearly insurmountable transactions costs that would inhibit transfer of the use right from the affected homeowners to Atlantic Cement.

E. Nuisance or not: Enjoin the activity but award damages to the enjoined actor: Under some conditions courts may enjoin an activity but require that the benefitted landowners compensate the enjoined actor for the lost use. Typically, this may occur when (1) the plaintiff asserts that his activity is the more valuable, (2) it is not clear either that (i) the challenged activity is a nuisance or, if it is, that (ii) equity favors an unadorned injunction, and (3) it is unlikely that the plaintiff is able or willing to acquire the use right in the market.

★**Example:** Spur operated a cattle feed lot in a rural part of Arizona. The feed lot necessarily generated enormous quantities of manure, attracting clouds of insects and creating noxious odors, but nobody objected because there were no neighbors. Later, the Del Webb Corporation created Sun City, a retirement city, and expanded Sun City until it was sufficiently close to Spur's feed lot to make the two uses incompatible. In ***Spur Industries, Inc. v. Del E. Webb Development Co.,*** 108 Ariz. 178 (1972), the Arizona Supreme Court enjoined Spur from further operation of the feed lot, but required Del Webb to pay Spur "a reasonable amount of the cost of moving or shutting down." Equity required Del Webb to compensate Spur because Webb came to the nuisance. The older common law view of nuisance (either nuisance and injunction or no nuisance and no remedy) would have dealt with this by declaring Spur's feed lot to be no nuisance and denying any relief to Webb and the retirees it induced to come to the nuisance. That is an unsatisfactory result, especially when the feed lot constituted a public nuisance on health grounds. The court's solution forced Webb to bear the cost of his coming to the nuisance. This remedy also forces the complaining user to "put his money where his mouth is." Because the plaintiff claims to have the more valuable use he ought to be willing to shoulder some of the lesser cost of his adversary's cessation of use, particularly when he bears considerable

responsibility for the use conflict. For this remedy to be effective it is necessary to join all parties who are adversely affected by the use to be enjoined; otherwise, the free rider problem can become insuperable.

III. SUPPORT RIGHTS

A. **Introduction:** Every landowner has the right to continued physical support of his land by abutting land. In essence, the natural topography may be altered only insofar as a neighbor's land is left with sufficient support. There are two types of support. ***Lateral support*** is the right to support from adjacent land — like the support supplied by a bookend to a row of books. ***Subjacent support*** is the right to support from underneath one's land — like the support supplied by the bookshelf to a row of books.

B. **Lateral support:** The scope of the right of lateral support is different for ***land itself*** and ***structures*** placed on the land.

1. **Land itself:** A landowner who alters his land by removing the lateral support from his neighbor's land is strictly liable for any resulting damage to his neighbor's land. No matter how careful the alteration, if lateral support is removed, strict liability follows. The same principle applies to artificial supports, like retaining walls. Once an artificial support is substituted for natural support the landowner and any successor in interest is obligated to keep the artificial support in place and effective.

2. **Structures:** Most states hold that a landowner is liable for damage to structures from withdrawal of lateral support if either of two conditions is met: (1) the landowner was ***negligent*** and the ***collapse would not have occurred but for the added weight of the structures,*** or (2) the ***collapse would have occurred whether or not the structures were there.*** If the withdrawal of lateral support is so extensive that the natural contours would have collapsed, the excavating landowner is strictly liable for all resulting injury to land or structures, but if the withdrawal of lateral support was not enough to cause the natural contours to collapse (i.e., the collapse was due to the added weight of the structures) the excavating landowner is liable only if he is negligent.

   a. **Minority rule:** Some jurisdictions hold that a landowner is strictly liable for removal of lateral support to adjacent buildings. This rule makes sense in dense urban locales, but probably not in rural locations. It is also justified on the ground that the second landowner to build can more easily avoid the costs of collapse, but this rule does give a boon to the first to build.

C. **Subjacent support:** The right of subjacent support is never an issue unless ownership has been split into two parts: (1) ownership of the surface and (2) ownership of the right to mine under the surface. When this happens the owner of the underground mineral rights is ***strictly liable*** for any damage caused to land or structures on the surface resulting from withdrawal of subjacent support.

Exam Tips on *JUDICIAL CONTROL OF LAND USE: NUISANCE AND SUPPORT*

- Nuisance issues can easily be combined with other issues involving use, such as defeasible fees, servitudes, or quiet enjoyment by leasehold tenants.

- Even more than in some other areas, nuisance requires you to assess policy. Because either of two competing and incompatible uses can be a nuisance you must have some theory to explain why the use you prefer should be protected. Economic theory may be useful to you, but other theories will work, too. Decide in advance which theory makes the most sense to you, apply it consistently and accurately to the facts, and be prepared to defend it and explain why other alternatives are less satisfactory.

- If economic theory is your preferred theory, be certain you understand the Coase Theorem and how transaction costs manifest themselves. If other theories suit your taste better, be able to explain why economic efficiency is not so important when resolving the problem of incompatible uses.

- Lateral and subjacent support are rarely tested.

CHAPTER 10

PUBLIC CONTROL OF LAND USE: ZONING

ChapterScope

This chapter examines zoning laws, the way in which we use the political process to control land use. Here are the most important points in this chapter.

- Zoning is usually done at the local level, pursuant to authority conferred by a state enabling act. Zoning must comply with the enabling act, the state and federal constitutions, and all other state or federal laws that limit zoning power.
- Zoning limits the use that may be made of property. Usually an area is zoned for a particular use. Some zoning laws are cumulative, meaning that in an area zoned for the least favored use all other uses are permitted, but in an area zoned for the most favored use only that use is permitted. Other laws are mutually exclusive. Zoning laws may address many other topics; e.g., density, aesthetics, or household composition.
- Zoning laws, when enacted, restrict or prohibit some prior lawful uses. To avoid challenges to the validity of the newly imposed regulation, zoning laws typically permit such nonconforming uses to continue for a limited period of time. If an owner discontinues the use, however, it may not be renewed.
- Zoning laws typically confer some discretion on a zoning board. Abuses of discretion can occur.
  - Variances permit otherwise prohibited uses or deviations from density or area controls. Variances are granted only to alleviate undue hardships not of the applicant's manufacture.
  - Exceptional uses are permitted by the zoning law under flexible criteria specified in the law.
  - Zoning amendments present the problem of spot zoning, an amendment that confers benefits on a discrete parcel without any public benefit, and often in disregard of the comprehensive use plan that zoning is supposed to implement.
  - Floating zones are uses that are not tethered to a specific area — the zoning board decides when the use becomes relevant where it should be located.
  - Contract or conditional zoning involves a change in zoning conditioned upon imposition of a servitude restricting use that is designed to produce public benefits.
- Constitutional and statutory law impose limits on the zoning power. Zoning for aesthetic purposes is generally permitted, particularly when it upholds property values. When zoning restricts free speech it is presumed void and the government has a heavy burden of justification. Zoning that restricts the ability of people related by blood or marriage to live together is presumed void; zoning that restricts the ability of unrelated people to live together is presumptively valid under the federal constitution but not under some state constitutions.

- Under some state constitutions zoning that has the effect of making it impossible for people of low income to live in a community is invalid. These states impose an affirmative duty on local communities to adopt zoning laws that make housing accessible to people of all economic strata.

I. ZONING BASICS

A. Introduction: Zoning is the use of governmental power to regulate land use. Zoning laws divide a political jurisdiction into specific separate geographic areas and impose limits on the permissible uses of land within each area. Zoning has several legitimate objectives: (1) to ***prevent incompatible uses*** from occurring (thus reducing the need for nuisance law), (2) to ***increase property values*** generally by minimizing use conflicts (thus increasing the property tax base), and (3) to ***channel development into patterns that may serve larger social goals*** (e.g., reduce urban sprawl to conserve resources and reduce air pollution from auto commuting). Zoning is the use of public power to impose uniform results that might otherwise be accomplished in more piecemeal and selective fashion by private bargains (via servitudes) and nuisance law.

B. General constitutional validity: In general, zoning laws are constitutionally valid, even though they restrict the uses to which a landowner may devote his property (possibly to his economic detriment).

★**Example:** Euclid, Ohio, adopted a comprehensive zoning ordinance that restricted the permissible uses of property, limited the height of structures, and imposed minimum lot size requirements for certain types of structures. In ***Village of Euclid v. Ambler Realty Co.,*** 272 U.S. 365 (1926), the Supreme Court upheld the validity of the law against a due process and equal protection challenge. The law's objective — minimizing land use conflicts to prevent nuisances from ever occurring — was a legitimate exercise of the state's inherent police power because its content was neither unreasonable nor arbitrary.

A valid law can, however, be applied to an individual in an unconstitutional manner. See *Nectow v. City of Cambridge*, 277 U.S. 183 (1928). A zoning law that so severely restricts use that no economically viable use is permitted is an unconstitutional taking of property without compensation. See ***Lucas v. South Carolina Coastal Council,*** 505 U.S. 1003 (1992), discussed in Chapter 11. Zoning ordinances that openly infringe constitutionally fundamental rights (e.g., free speech) or that employ suspect criteria (e.g., race) are presumptively unconstitutional. Zoning laws that lack such damning characteristics, however, are presumptively valid.

C. Statutory schemes: The point of zoning is to separate land uses and regulate the density of use within use districts. This can be done by ***cumulative*** zoning or ***mutually exclusive*** zoning.

1. Cumulative zoning: This type of zoning law identifies land use in a spectrum from "higher" to "lower." The least dense single-family residential use is the highest use, proceeding downward to more dense residential (e.g., apartments and other multiple-family dwellings), light commercial (e.g., a corner bookstore), heavy commercial (e.g., a supermarket or an office building), industrial (e.g., a factory or power plant). The idea of cumulative zoning is that all uses at the level of the zoned district ***and higher*** will be permitted.

Example: A cumulative zoning law divides a city into four districts, labeled Single-Family Residential (SFR), Dense Residential (DR), Commercial (C), and Industrial (I). Only single-family residences will be permitted in SFR. Single-family residences and apartments will be permitted in DR. Those two uses plus commercial uses will be permitted in C, and all uses will be permitted in I.

2. **Mutually exclusive zoning:** This type of zoning law permits some uses and excludes all others within the zoned area.

Example: A city's mutually exclusive zoning law divides the city into four districts: Industrial, Commercial, Dense Residential, and Single-Family Residential. Only the defined uses are permitted within each district, and all others are excluded. The result will be a city that has four separate monolithic use districts.

Mutually exclusive zoning is most often used with respect to industrial or heavy commercial districts. Residential use is often barred in such districts, partly to dampen use conflicts, partly out of public health concerns, and partly to preserve space for industrial users. Zoning laws may be partly mutually exclusive and partly cumulative.

Example: A city's zoning law divides the city into four districts: Single-Family Residential, Dense Residential, Commercial, and Industrial. Cumulative zoning applies to the first three classifications but not to Industrial. The result will be a monolithic industrial zone, mixed uses within the Commercial and Dense Residential classifications, and a monolithic single-family residential zone.

3. **Density zoning:** In addition to use regulation, zoning laws often seek to control the density of occupation within any given use district. This is usually done through a wide variety of limits on the size or height of structures, their location upon their site, and the functional uses created within the structure (e.g., limits on the number of bathrooms or bedrooms within a single-family structure). Density controls supplement use controls; they are not generally considered an alternative to use controls.

II. AUTHORIZATION FOR ZONING

A. **Enabling legislation:** Most zoning laws are adopted at the local level, although some states (e.g., Oregon) have enacted laws regulating land use statewide. The powers of local governments in relation to the government of the state in which they are located is controlled by the state constitution and state statutes. Usually, the power to adopt zoning laws is reserved to the state government. When this is the case a state's legislature must enact legislation authorizing local governments to adopt zoning laws. Some state constitutions recognize a semi-autonomous status for certain cities and, in those states, a city with such status may have power to adopt zoning laws without express legislative authority from the state. In general, though, a local zoning law is void unless it is in conformity to the state's ***enabling act*** — the law authorizing localities to engage in zoning. Every state — even those with "home rule" cities — has enacted legislation authorizing localities to zone.

1. **Defective enabling act:** Every state has its own constitutional law concerning the proper scope of a legislature's ***delegation of legislative authority.*** While legislatures may not simply hand over to someone else (e.g., the state's governor, or a city, or a private entity) unbounded

discretion to legislate, they are generally permitted to delegate to administrative agencies, cities, and other nonlegislative bodies the power to make rules that look exactly like laws, so long as that law-making power is exercised in conformity with clear standards in the authorizing legislation.

Example: The Standard State Zoning Enabling Act (which, with some modifications, is in effect in every state) empowers cities to: (1) "regulate and restrict the height, number of stories, and size of buildings and other structures, the percentage of lot that may be occupied, the size of yards, courts, and other open spaces, the density of population, and the location and use of buildings, structures, and land for trade, industry, residence, or other purposes"; (2) create use zones with differing regulations; and (3) modify zoning laws and grant variances when in the public interest to do so. The Standard Act also requires cities to (1) create a comprehensive plan designed to accomplish various public objectives specified in the Standard Act; (2) create procedures to establish, enforce, and alter zoning regulations; and (3) establish a zoning commission and an appeal mechanism for affected landowners. Because the limits on local discretion are clearly expressed in the Standard Act it is not an unconstitutional delegation of legislative authority.

2. ***Ultra vires* local action:** If a local zoning law violates some express provision of the enabling act, or if it deals with matters not authorized by the enabling act, the law is void to that extent. It is *ultra vires* — beyond the authority given the locality under the zoning act.

   Example: The state of Nirvana has enacted the Standard Act. The city of Saint Cecilia, located in Nirvana, enacts a zoning law that prohibits the ownership of more than one motor vehicle by any individual. The law is *ultra vires:* While nothing in the Standard Act expressly forbids such local legislation, its subject matter — regulation of motor vehicle ownership — is beyond the scope of the powers granted Saint Cecilia under the Standard Act. The purported zoning law is not a regulation of land use. By contrast, a Saint Cecilia law forbidding the parking of more than one motor vehicle on any lot zoned single-family residential would be within the scope of Saint Cecilia's authority under the Standard Act.

B. **Comprehensive plan:** The Standard Act (the common enabling act) requires that zoning decisions be made "in accordance with" a comprehensive plan for land use in the locality, which is intended to be a general guide for overall development of a locality. Zoning laws are the specific means of implementing the vision of the comprehensive plan. The requirement of a comprehensive plan has received sporadic serious treatment. Unwritten plans have sufficed, or sometimes the zoning laws themselves were the plan. In some states the comprehensive plan is treated more seriously, hastened perhaps by enabling acts that require zoning to be consistent with a written and adopted comprehensive plan, but a persistent practical problem to the utility of a comprehensive plan is that no planner can accurately predict the future, nor control events that affect future land use.

   1. **Legal status of the comprehensive plan:** Generally, the plan itself is not binding but must be implemented by actual zoning ordinances. However, a few courts have held that, even without implementing law, local action violative of a comprehensive plan is void. See, e.g., *Baker v. City of Milwaukie,* 271 Or. 500 (1975). Even though a comprehensive plan may not, by itself, be binding law it is an important legal benchmark to assess the validity of ***discretionary action*** by zoning officials under a zoning law. See section III, below.

III. STATUTORY DISCRETION AND RESTRAINT

A. Introduction: Communities are dynamic. Appropriate land usage should change as the underlying economic and social conditions dictate. Zoning responds to this fact in several ways: (1) tolerating the continued existence of land uses existing prior to adoption of the zoning law, (2) providing for amendment of the zoning law, and (3) conferring discretion on administrators in the application of the zoning statute. None of these mechanisms is without controversy.

B. Nonconforming uses: When zoning is introduced some existing land uses will not be in conformity with the uses permitted under the new zoning law. These ***nonconforming uses*** are permitted to continue to exist because their immediate abatement would amount to either a taking of property without just compensation (see Chapter 11) or an unreasonable exercise of the zoning power. However, nonconforming uses may be, and often are, eliminated gradually.

1. **Forced phase-out:** One mechanism to abate the nonconforming use is the forced phase-out. The zoning law (or zoning administrators, exercising discretion under the law) may specify a period after which the nonconforming use must cease. This so-called ***amortization period*** will vary, depending on the investment in the nonconforming use. The amortization period must be long enough to avoid a successful charge that the forced phase-out amounts to an uncompensated taking or denial of substantive due process.

   a. **Majority rule: Valid if reasonable period:** The majority view in American states is that forced phase-outs are valid so long as the amortization period is reasonable as to the affected nonconforming user. The general calculus of reasonableness "involves a process of weighing the public gain to be derived from a speedy removal of the nonconforming use against the private loss which removal of the use would entail." *Metromedia, Inc. v. City of San Diego,* 26 Cal. 3d 848 (1980). Every case, however, will turn on its own facts. Factors courts use to make this determination include the ***nature of the use,*** the ***character of the structure,*** the ***location,*** what ***portion of the user's total business is affected,*** the ***salvage value,*** the ***extent of depreciation*** of the use, and ***any monopoly or other advantage conferred on the user by reason of the foreclosure of similar and competing uses.*** See ***Art Neon Co. v. City and County of Denver,*** 488 F. 2d 118 (10th Cir. 1973).

   b. **Minority rule: Invalid per se:** A minority of states hold that forced phase-outs are invalid. Some states conclude that localities lack statutory authority to impose forced phase-outs. See, e.g., *James J.F. Laughlin Agency, Inc. v. Town of West Hartford,* 166 Conn. 305 (1974). Other states conclude that forced phase-outs constitute an uncompensated taking of property, no matter what the length of the amortization period may be.

   ★**Example:** Moon Township, Pennsylvania adopted a zoning ordinance extensively regulating the location of stores vending pornography, the effect of which was to make illegal the store operated by PA Northwestern Distributors. The ordinance permitted Northwestern 90 days in which to cease operations. In ***PA Northwestern Distributors, Inc. v. Zoning Hearing Board,*** 526 Pa. 186 (1991), the Pennsylvania Supreme Court ruled that the "amortization and discontinuance of a lawful pre-existing nonconforming use is per se confiscatory and violative of the Pennsylvania Constitution." A concurring justice thought that the ordinance was void because the amortization period was unreasonable — it did not "provide adequate time for elimination of the non-conforming use."

2. **No expansion:** Typically, zoning ordinances stipulate that the nonconforming use may not be expanded beyond the precise boundaries of the existing use. Thus, a successful and growing business located as a nonconforming use will be forced to move to expand. A new occupant will be required to conform to the zoning law.

3. **Destruction or abandonment:** Another common provision is to stipulate that if the nonconforming use is destroyed or abandoned permission to continue the nonconforming use terminates. Any replacement structure or new use must conform to the current zoning law. Abandonment usually requires proof that the user has voluntarily intended to abandon the nonconforming use, but some ordinances supplement abandonment with a bright-line rule that discontinuance of the nonconforming use for a specified period terminates permission for the use.

   Example: The community's zoning ordinance specified that discontinuance of a nonconforming use for 2 years terminated permission to continue the use. The owner of a warehouse that was a nonconforming use vacated the warehouse after it had agreed to sell the site to a residential developer. Nineteen months later, after the deal had failed to close, the warehouse owner moved some goods back in and installed a property manager. In *Toys 'R' Us v. Silva,* 89 N.Y. 2d 411 (1996), the New York Court of Appeals ruled that even though the owner had resumed the nonconforming use before the 2-year period had expired the discontinuance was sufficiently substantial to cause loss of the right to continue the use.

C. **Administrative discretion: Variances, exceptions, amendments, spot zoning, and more:** Zoning laws, like all other exercises in central government planning, cannot deal with the incredible kaleidoscopic complexity of human nature. Accordingly, zoning laws attempt to respond to this by conferring discretion upon zoning administrators in the actual application of the law. The problems and possibilities of such devices are discussed in this section.

1. **Variances:** Virtually every zoning law establishes a ***zoning appeals board,*** or ***board of adjustment,*** usually a group of people appointed by the local executive who are authorized to grant variances from the zoning law in the interest of alleviating ***practical difficulties*** or ***unnecessary hardships.*** The appeals board is typically assisted by and relies upon zoning officials in discharging this power to dispense with the law. Variances may be ***area variances,*** those awarded to alleviate siting problems (e.g., setback requirements or minimum yard area), or ***use variances,*** those permitting an otherwise prohibited use (e.g., a multiple-family residence in a single-family residential district). The theory of variances is that they should be granted when compliance with the law would impose such extreme burdens on the owner that application of the law might be unconstitutional or otherwise invalid. A variance is thus an administrative safety-valve to avoid judicial determinations that the zoning law is invalid as applied to the particular circumstances.

   a. **General standard for granting variances:** Almost every zoning law provides that a variance may be granted upon a showing that compliance with the zoning law would impose ***undue hardship*** on the applicant. This hardship must ***not*** be created by or be ***peculiar*** to the owner.

   Example—No hardship: Aronson wished to add a porch on the back of his house to accommodate his invalid child. The porch would violate setback requirements but was well screened by shrubs and thus posed no visual intrusion on neighbors' privacy, nor would it lower property values. There was no other spot for the porch. A variance was denied: The invalid condition of Aronson's child, while a personal infirmity and perhaps a tragedy, was

not a hardship within the meaning of variance law. *Aronson v. Board of Appeals of Stoneham*, 349 Mass. 593 (1965).

★**Example — Hardship:** Commons owned a residential lot, 50 feet wide with a total area of 5,190 square feet, that had been created before the current zoning law, which required lots to be a minimum of 75 feet wide with an area of 7,500 square feet. Commons's builder proposed to construct a residence conforming to setback requirements that would be of the same value as existing homes. In the past Commons had attempted to sell the lot to a neighbor and to acquire additional land adjacent to his lot, but both attempts had been unsuccessful. In ***Commons v. Westwood Zoning Board of Adjustment***, 81 N.J. 597 (1980), the New Jersey Supreme Court reversed the denial of a variance, reasoning that "undue hardship" means that, absent a variance, the property may not effectively be used, a condition that Commons had established by his efforts to either sell the land to his neighbors or acquire additional adjacent land to conform to the ordinances's area requirements.

b. **Alternate standards for granting variances:** Because use variances generally have broader impact than area variances the standard that must be met in order to grant a use variance is sometimes higher. One version of this is simply to impose a greater burden of proving the general standard when an applicant is seeking a use variance. See, e.g., *Hertzberg v. Zoning Board of Adjustment of Pittsburgh*, 554 Pa. 249 (1998). A different version is to impose the general standard — undue hardship — for use variances but to relax that standard for area variances. When relaxed, the standard for area variances is proof that compliance with the zoning law would impose ***practical difficulties*** on the owner. However, courts applying the "practical difficulties" seem to examine the same factors that are relevant to the undue hardship test. See, e.g., *Duncan v. Village of Middlefield*, 23 Ohio St. 3d 83 (1986).

2. **Exceptional uses:** Unlike variances, which are administrative deviations from the zoning law made in order to avoid judicial determinations that strict application of the zoning law is invalid, ***exceptional uses*** (also called ***exceptions,*** or ***conditional uses,*** or ***special uses***) are uses that are permitted by the zoning law but which might impose material external costs on neighbors. The standards set out in the zoning law governing an exception are rarely phrased in terms of external costs; usually the standard is something like "compatibility with existing uses," or "in furtherance of public health, safety, and general welfare." These standards may be sufficiently vague to raise concern about an impermissible delegation of legislative power.

★**Example:** Brunswick, Maine's zoning law permitted apartment houses in "suburban residential" zones "only as an exception granted by" the zoning board. The zoning board refused to grant an exception for a 48-unit apartment complex proposed to be located in a suburban residential zone. The law permitted exceptions which did not "adversely affect the health, safety or general welfare of the public" and which would not "alter the essential characteristics of the surrounding property," but the zoning board thought that the apartment complex would produce adverse effects and alter the essence of the surrounding property. In ***Cope v. Inhabitants of the Town of Brunswick***, 464 A. 2d 223 (Me. 1983), the Maine Supreme Court held that the zoning law was an impermissible delegation of legislative authority to the zoning board because the quoted standards "refer only to the same general considerations which the legislative body was required to address and resolve in enacting the ordinance." The court's view was that the ordinance embodied a determination "that an apartment building was generally suitable for location in a suburban residential zone" and that the quoted standards gave the

zoning board no lawful "basis for determining that a particular location was unsuitable because of the existence of certain characteristics which rendered the general legislative determination inapplicable." However, to the extent that administrative discretion is reduced by specific and detailed criteria set forth in the zoning law (which must be met to be within an exception) the pitfalls exemplified by ***Cope*** can be avoided.

3. **Zoning amendments and spot zoning:** While enabling acts provide for amendment of zoning laws, this power may be abused. The usual problem is ***spot zoning*** — a zoning amendment that delivers special private benefits (and no public benefits) to a small, discrete parcel of land and which is not in conformity with the comprehensive plan. A recurrent problem in this area is to decide on the degree of deference that courts should pay to such zoning amendments.

   a. **Presumptive deference:** The traditional approach is to presume (as with other legislation) that the zoning amendments are valid until the challenger has proven otherwise.

   ★**Example:** Rochester, Minnesota's City Council amended the city's zoning ordinance to rezone an acre-plus tract on the edge of the central business district from low-density residential use to high-density residential use, thus permitting Younge to construct a 49-unit condominium building. The site was bounded on two sides by multiple-unit apartment buildings and on the other two sides by lower-density residential use (a mix of single- and multiple-family dwellings). The City Council concluded that the proposed use was compatible with the existing uses and that there was a need for more high-density housing in Rochester. A neighborhood group sought to invalidate the amendment on three grounds: (1) the amendment was "quasi-judicial" in character and thus the courts should not presume its validity absent substantial documentary evidence supporting the change, (2) even if legislative, the amendment was "arbitrary and capricious because it was inconsistent with the city's land use plan," and (3) the amendment was invalid spot zoning. A trial court denied relief and, in ***State v. City of Rochester,*** 268 N.W. 2d 885 (Minn. 1978), the Minnesota Supreme Court affirmed. Because amendments to zoning acts are in form legislative and "a legislative body can best determine which zoning classifications best serve the public interest," there was no need to depart from the customary presumption of validity of legislation. The fact that the amendment was not consistent with Rochester's existing land use plan (it was later amended) was not, *by itself,* reason to void the amendment or to shift the burden of proof onto the city. Because there was ample evidence to show that the new use was compatible with existing uses and served the public need for more high-density housing, the amendment was reasonably related to the public health, safety, morals, and general welfare, and surely not arbitrary, capricious, or irrational. Because there was no proof that the rezoned property was "an island of nonconforming use," and no showing of any "substantial diminution" in property values due to the rezoning, there was no basis for characterizing the amendment as invalid spot zoning.

   The presumption of validity is the default position, but even the states that employ it will not defer uncritically to legislative judgment when ***spot zoning*** is established. A zoning amendment that delivers *special private benefits* to a *small, discrete parcel,* produces *little or no public benefits,* and which is *inconsistent with the comprehensive use plan* is presumed to be invalid spot zoning. The burden then shifts to the government to prove that the changes wrought by the amendment bear a ***substantial relationship to the general welfare of the affected community.*** See, e.g., *Save Our Rural Environment v. Snohomish County,* 99 Wash. 2d 363 (1983).

b. **Presumptive skepticism:** Some states exhibit a generally skeptical attitude toward zoning amendments that apply to relatively small tracts, whether or not the other indicia of spot zoning are present. These states employ a variety of devices, considered below, to decide when judicial scrutiny should be sharply higher.

   i. **Legislative or judicial character?** For a time, some states focused on the particular events pertinent to a zoning amendment in order to determine whether the action was more akin to a *legislative* or a *judicial* decision. The more the decision appeared to be adjudicative, the stronger the burden placed upon the municipality to prove a demonstrable public need for the change and that the property affected by the change is the most suitable property for the change. *Fasano v. Board of County Commissioners of Washington County*, 264 Or. 574 (1973), was the leading case. That approach was severely criticized, both conceptually and for the practical difficulties of implementation. Even Oregon, the originator of the approach, has retreated from it. See *Neuberger v. City of Portland*, 288 Or. 155 (1979).

   ii. **Correct original mistake or respond to changed conditions:** Some jurisdictions require the government to prove that the zoning amendment is necessary either to (1) correct a mistake in the existing law, or (2) adapt to a substantial change in conditions affecting land use. See, e.g., *Greenblatt v. Toney Schloss Properties Corp.*, 235 Md. 9 (1964).

4. **Floating zones:** Some zoning laws provide for ***floating zones***, a use designation not attached to any particular land until a landowner seeks to have his land designated as the recipient of the floating classification.

   Example: Because it desires to encourage the responsible disposal of toxic wastes (e.g., motor oil, paints, or chemicals) the city of Ford Cove creates a floating zone, designated TWC, dedicated to toxic waste collection and shipment to a disposal facility. The floating zone specifies the criteria that any land must meet to receive the TWC designation: a site of at least 1/2 acre, no residences, schools, office buildings, churches, or retail establishments within 1,000 yards, and drive-through vehicle access. The TWC designation does not attach to any land. Fred, owner of a 1-acre lot surrounded by heavy industrial uses for over 1,000 yards in every direction, applies for the TWC designation. Fred's land is suitable to be rezoned TWC. The objection to floating zones is that they violate the comprehensive plan. The comprehensive plan is supposed to inform people about the future direction of land use, but a floating zone can conceivably land anywhere, thus undermining the predictive value of the plan. This objection loses some of its force if the criteria for its attachment to land are drawn with great specificity. Moreover, the discretion created by floating zones is no more than that exercised by granting variances and conditional uses. See, e.g., *Rodgers v. Village of Tarrytown*, 302 N.Y. 115 (1951) (upholding floating zones).

5. **Conditional zoning:** Sometimes a developer wishes to use land in a fashion not permitted by the zoning law, and requests rezoning in exchange for the creation of a servitude burdening the land that is intended to eliminate or dampen the negative externalities of the proposed use.

   Example: A developer wishes to build townhouses on land zoned for "fully detached single-family residences." The developer offers to cluster the townhouses in a portion of the site shielded from view from neighbors, and covenant that the undeveloped portion of the site will

remain undeveloped forever. Upon execution of the servitude the land is rezoned. In essence, imposition of the servitude is the condition of rezoning.

a. **Criticisms:** Conditional zoning is criticized on several grounds. A good review of the following criticisms is contained in *Collard v. Incorporated Village of Flower Hill,* 52 N.Y. 2d 594 (1981), in which the New York Court of Appeals upheld conditional zoning.

i. **Illegal spot zoning:** Some say it is illegal spot zoning, but the servitude partially offsets the claim that an individual parcel is receiving a special benefit, thus suggesting that conditional zoning ought to be assessed by the same standards applicable to any zoning amendment.

ii. **Invalid disposal of the police power:** This claim is that governments may not bargain away their legislative power, but the municipality is not precluded from changing the zoning use at some time in the future if public welfare so requires.

iii. ***Ultra vires:*** Enabling acts typically do not expressly authorize the attachment of conditions to zoning amendments, but neither do they forbid the practice.

iv. **Waiver of restrictions:** Some object that conditional zoning amounts to a waiver of governmental ability to restrict use of the affected land any further, an argument resting on the assumption that conditional zoning amounts to a binding contract between the landowner and the city preventing future zoning restrictions. Most courts reject this claim, reasoning that the only bargain is imposition of a servitude in exchange for an *immediate* rezoning, thus leaving the government free to change the zoning classification in the future.

6. **Cluster zoning:** The idea of cluster zoning is to zone a particular area for a particular use at a specified level of density of occupation, but confer upon zoning administrators discretion to decide exactly how that use and density will be achieved.

Example: The city of Grassy Point designates a particular area as single-family residential with no more than three such residences per acre. The city is then free to permit division of this area into three lots per acre, each with a single-family residence, or to permit the construction of 60 single-family townhouses on a 20-acre parcel, with the structures clustered on 8 acres and the remaining 12 acres devoted to common amenities, such as a swimming pool, tennis courts, park, and gardens.

Cluster zoning is usually not problematic, so long as it is in conformity with the comprehensive plan.

IV. LIMITS ON THE ZONING POWER

A. **Introduction:** States possess an inherent ***police power*** — the power to act to achieve the people's vision of public welfare, as communicated through their governmental agents — but that power is not unlimited. Exercise by a municipality of zoning power must conform to (1) the U.S. Constitution, (2) valid federal law preemptive of the local zoning law, (3) the relevant state constitution, and (4) state law, particularly the state's zoning enabling act and judicial doctrines developed to curb unreasonable and arbitrary exercises of the police power. This section focuses on the use of one or more of these sources of authority to limit the scope of zoning. Chapter 11 considers in more detail the general limitations imposed by the U.S. Constitution's takings clause on zoning and other

regulations of property that are sufficiently invasive of property to be treated as *de facto* uncompensated takings of private property for public use.

B. Zoning for aesthetic objectives: The traditional, judicially created, rule was that the use of zoning to achieve aesthetic objectives was beyond the permissible scope of the police power. The traditional view embodied the idea that beauty is subjective, entirely in the eye of the beholder, and thus governments have no business imposing their aesthetic judgments on others. This view has, however, broken down; a substantial number of courts have upheld aesthetic land use regulations banning uses that result in *lower property values*. This view seems to be that if enough beholders have the same notion of beauty, it is objective enough to be enforced by law.

Example: The city of Rye, New York, enacted an ordinance banning clotheslines in front or side yards abutting streets. In *People v. Stover*, 12 N.Y. 2d 462 (1962), the New York Court of Appeals concluded that it was a permissible exercise of the police power to legislate for aesthetic concerns and that the ordinance was reasonably related to those legitimate concerns, even though there was evidence that Rye might have been trying to squelch the Stovers' practice of protesting high municipal taxes by the odd means of stringing old clothes on a line in their front yard. See also *State v. Jones*, 305 N.C. 520 (1982) (upholding a regulation restricting use of land as an auto junkyard).

About 20 states permit regulations solely for aesthetic reasons; another 15 or so permit regulation for aesthetic reasons if coupled with other objectives; less than 10 have never addressed the issue; and only a half-dozen cling to the rule that aesthetic regulation is wholly outside the police power.

1. Architectural review: One of the principal applications of aesthetic zoning is the proliferation of architectural review controls. Typically, such a scheme conditions a land use permit of some kind (e.g., planning approval, building permit) on (1) the conformity of the proposed structure to the ***existing character*** of the neighborhood, and (2) the likelihood that the proposed structure will ***not*** cause ***substantial depreciation*** of neighboring property values.

★**Example:** The affluent St. Louis suburb of Ladue enacted an architectural review ordinance designed to preserve property values and maintain Ladue's conventional neo-colonial architectural aesthetic sensibilities. Stoyanoff proposed to build a pyramidal, flat-topped residence with triangular window and door openings arranged asymmetrically on the structure. The proposal was rejected and Stoyanoff attacked the validity of the entire scheme as unauthorized by the enabling act, outside the scope of the police power if so authorized, and a violation of due process if within the otherwise permissible scope of the police power. In ***State ex rel. Stoyanoff v. Berkeley,*** 458 S.W. 2d 305 (Mo. 1970), the Missouri Supreme Court upheld the Ladue law, reasoning that architectural review is for the general welfare and thus authorized by the enabling act. The rejection of Stoyanoff's "monstrosity of grotesque design," as Ladue termed it, was reasonably related to preserving land values and the prevailing (if conventional) aesthetic sense of the community. The court emphasized the probable adverse effect of Stoyanoff's design on property values, an effect which, if true, is merely the market's expression of prevailing aesthetic sensibilities.

It is hardly a foregone conclusion that this trend toward permitting exercise of the police power in furtherance of aesthetics is a good thing. Some of the nation's leading architects have expressed the view that architectural review promotes trite mediocrity, going so far as to suggest Frank Lloyd Wright would never have constructed anything if he had faced architec-

tural review. Perhaps beauty really is wholly subjective; if so, aesthetic zoning may be inherently vague and capricious. Common law judges long dead would agree; most of their descendants currently occupying the bench do not. But not all judges of today embrace architectural review controls as valid; when the application of such review is so vague as to cause ordinary people to guess as to its meaning, it becomes an unconstitutional deprivation of property without due process.

★**Example:** Anderson, owner of a suitably zoned parcel on Gilman Boulevard in Issaquah, Washington, wished to construct a retail commercial building on the site, but under an Issaquah ordinance needed the approval of his design by the Development Commission. The Commission was charged by the ordinance to approve designs "compatible" with neighboring structures, "harmon[ious] in texture, lines, and masses," with "building components" of "appropriate proportions and relationship[s]," using "harmonious" colors, "harmonious" lighting, resulting in an "interesting project by use of complimentary details [and] functional orientation [that relates] the development to the site" and avoids "monotony." Anderson proposed an off-white stucco structure with a blue metal roof in "modern" style, featuring a facade of "large retail style windows." The Commission told Anderson the color was wrong and that the design was not "compatible with the image of Issaquah." Anderson then proposed a wood roof, a facade adorned with brick and painted "Cape Cod" gray with "Tahoe" blue trim. The Commission again balked, telling Anderson to "drive up and down Gilman and look at both good and bad examples." Anderson then modified the design to create larger roof overhangs, more brick, more trees and other landscaping, but the Commission told him that the building did not deliver the right "feeling," that it was not in harmony with the "certain feeling you get when you drive along Gilman Boulevard," and denied its approval. In ***Anderson v. City of Issaquah,*** 70 Wash. App. 64 (1993), a Washington appeals court ruled that the denial had deprived Anderson of due process because the statute, both as written and as applied, required persons of ordinary intelligence to "guess at its meaning and differ as to its application." ***Connally v. General Construction Co.,*** 269 U.S. 385 (1926).

2. **Aesthetic regulation and free speech:** In general, laws that regulate speech based on its ***content*** (e.g., "no political speech") are subject to ***strict scrutiny,*** which means that they are *presumptively void* and the government has the burden of proving that the speech restriction is *necessary* to accomplish a *compelling government objective,* and laws that regulate speech in a ***content-neutral*** fashion (e.g., "no amplified speech in the park between midnight and 6 A.M.") are subjected to more relaxed scrutiny.

   a. **Zoning that is based on the content of speech:** Zoning laws sometimes classify on the basis of the content of speech; such laws are presumptively invalid and may be saved only if the government can overcome the burden of strict scrutiny.

   Example: The zoning law of the New Jersey borough of Mt. Ephraim prohibited "all live entertainment." The Court struck down the law as applied to an "adult bookstore" that permitted its customers to watch a live nude dancer through peepholes. The flat ban on live entertainment entirely suppressed whatever expression component there is to nude dancing so, as applied, it banned a form of expression — nude dancing — because of its content and without proof either that the ban was necessary to achieve a compelling interest or that the government's interest was indeed compelling. *Schad v. Borough of Mt. Ephraim,* 452 U.S. 61 (1981).

i. The "secondary effects" exception: If a zoning law discriminates on the basis of speech content but does so to regulate the ***secondary effects of speech*** — consequences that are **not** *produced by the communicative impact of speech* — the law is presumptively valid and will generally be upheld.

Example: Detroit adopted a zoning law that dispersed "adult theaters," cinemas displaying nonobscene pornography. The objective of the law was to eliminate the critical mass of seedy establishments that attracted "an undesirable quantity and quality of transients, adversely affect[ed] property values, cause[d] an increase in crime, . . . and encourage[d] residents and businesses to move elsewhere." In *Young v. American Mini-Theatres*, 427 U.S. 50 (1976), the U.S. Supreme Court upheld the law against a free speech challenge, reasoning that it was not designed to suppress speech on account of its sexual content, or expression of any particular viewpoint, but was intended to disperse a "low value" form of speech in order to mitigate the secondary, nonspeech effects empirically associated with it. See also *City of Renton v. Playtime Theatres*, 475 U.S. 41 (1986), in which the Court ruled that a zoning law that consolidated adult theaters and bookstores into about 5 percent of the land area of the city was a valid content-neutral regulation of the secondary effects of such speech.

b. Zoning that is neutral as to the content of speech: Zoning laws that regulate speech in a content-neutral fashion are invalid if they are ***either*** (1) broader than reasonably necessary to achieve a significant government purpose other than speech regulation, or (2) so restrictive that they fail to leave open ample alternative channels of communication.

★**Example:** In order to minimize "visual clutter" the affluent St. Louis suburb of Ladue banned all signs except "for-sale" signs, business or home identification signs, and a few others, but certainly forbade Gilleo's 81/2 by 11 inch window sign declaring "For Peace in the Gulf." Even though Ladue's regulation was content-neutral (it was not attempting to regulate the message on signs) the U.S. Supreme Court in ***City of Ladue v. Gilleo,*** 512 U.S. 43 (1994), unanimously voided it because its "near-total prohibition" on signs failed to leave open enough alternative means of communication. Ladue's law banned an entire medium of communication. A narrower prohibition of signs — one that left open ample alternative channels of communication — would likely have been valid.

Example: Los Angeles prohibited the posting of signs on public property. Roland Vincent, a political candidate, attached signs advertising his candidacy to utility poles. The city removed them and Vincent's supporters attacked the validity of the ban. In *Members of the City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789 (1984), the U.S. Supreme Court upheld the law, reasoning that it was content neutral and that the ban left Vincent free to attach his signs to private property (e.g., distribute bumper stickers, rent space) and to use other low-cost substitute means to reach voters (e.g., distribute handbills).

3. Zoning and the free exercise of religion: Although generally applicable laws that impede religious conduct without the intent to do so are presumptively valid, *Employment Division, Dept of Human Resources of Oregon v. Smith*, 494 U.S. 972 (1990), laws that prohibit acts only when engaged in for religious reasons, or because of the religious belief that they display, are invalid attempts to suppress the free exercise of religion.

Example: The city of Hialeah, Florida, prohibited the "ritual slaughter" of animals, but exempted almost every such ritual killing except those engaged in for religious purposes. Hialeah is home to a large number of adherents to the Santeria religion, a sect that has as its central sacramental rite the ritual slaughter of an animal. Because the law had been carefully drawn to apply only to ritual slaughter of animals for religious purposes it was found to be an invalid suppression of free exercise of religion. *Church of the Lukumi Babalu Aye v. City of Hialeah,* 508 U.S. 520 (1993).

A zoning law can run afoul of this rule. Hialeah, Florida could have achieved the same unconstitutional end by enacting a zoning ordinance that prohibited the use of land anywhere in Hialeah for the "ritual slaughter" of animals, with the same exceptions contained in the actual ordinance at issue in *Lukumi Babalu Aye.* A federal law, the Religious Land Use and Institutionalized Persons Act of 2000, 114 Stat. 803 (2000), 42 USC §2000cc, requires all governments to justify land use regulations that impose substantial burdens on religious exercise by proving that the regulations are the least restrictive means of achieving a compelling government objective.

C. **Zoning controls of household composition:** Zoning laws can interfere with important civil liberties concerning living arrangements, liberties protected by the federal and various state constitutions, or by federal and state law that is paramount to a local zoning ordinance.

1. **The fundamental liberty of family association:** Under the U.S. Constitution's due process clauses, laws that substantially interfere with the constitutionally fundamental liberty of people to marry and associate together in traditional family relationships are presumptively void. To sustain their validity, the government must prove a close connection between the regulation and the government purpose for the regulation, and establish that the government interest in regulating is sufficiently important to merit the challenged regulation. This may or may not be *strict scrutiny* — the requirement that the government prove that the regulation is necessary to achieve a compelling government purpose; the U.S. Supreme Court has been deliberately vague about the standard of review it employs in these cases. In any case, zoning laws can easily interfere with these liberties by limiting use and occupation of residential property to people who bear some specified relationship with each other.

★**Example:** East Cleveland's zoning ordinance limited occupancy of dwellings to members of the same family, and defined "family" so narrowly that it excluded a family unit consisting of Inez Moore, her son Dale, Dale's son Dale, Jr., and another grandson, John, who was a nephew of Dale and Dale, Jr.'s first cousin. In ***Moore v. City of East Cleveland,*** 431 U.S. 494 (1977), the U.S. Supreme Court applied a higher level of scrutiny because the zoning law substantially interfered with the right of members of the same extended family to arrange their living relationships. The Court said it "must examine carefully the importance of the governmental interests advanced and the extent to which they are served by the challenged regulation," and when it engaged in that examination it found that East Cleveland's ordinance cut deeply into the "institution of the family" — including the extended family — that is "deeply rooted in this Nation's history and tradition." So examined, East Cleveland's objective was insufficiently important to merit this regulation; its legitimate concerns — overcrowding, traffic and parking congestion, avoiding an undue burden on the public schools — were only "serve[d] marginally, at best" by the law.

a. **Unrelated persons: When does "family" begin?** Zoning laws that substantially interfere with the ability of *unrelated persons* (persons not related by blood, marriage, or adoption) to live together are presumed valid and subject only to minimal scrutiny.

★**Example:** The village of Belle Terre's zoning law prohibited occupancy of dwellings by more than two unrelated persons. In ***Village of Belle Terre v. Boraas,*** 416 U.S. 1 (1974), the U.S. Supreme Court applied minimal scrutiny because the law did not substantially burden the deeply rooted liberty of related family members to arrange their living patterns. The Court's view was that the liberty of unrelated persons to live together in a group is simply not constitutionally fundamental. Because the law was rationally related to the legitimate governmental objectives of residential tranquility and low residential density it was upheld. Justice Marshall dissented, arguing that the "choice of household companions . . . involves deeply personal considerations as to the kind and quality of intimate relationships within the home," and was a constitutionally fundamental liberty. Accordingly, Marshall thought that the zoning law "can withstand constitutional scrutiny only upon a clear showing [by the government] that the burden imposed is necessary to protect a compelling and substantial governmental interest."

i. **Unrelated persons and state constitutions:** State constitutions can produce a different result. The highest courts of New York, New Jersey, California, and Michigan, at least, have construed their state constitutions to protect the right of unrelated people to live together. These courts regard the concept of family as more functional than biological or legal; if people associate together exhibiting the characteristics of permanence and intimacy that traditionally identify a unit as family, the association is a fundamental liberty interest under the relevant state constitution. See *McMinn v. Town of Oyster Bay,* 66 N.Y. 2d 544 (1985); *New Jersey v. Baker,* 81 N.J. 99 (1979); *City of Santa Barbara v. Adamson,* 27 Cal. 2d 123 (1980); *Charter Township of Delta v. Dinolfo,* 419 Mich. 253 (1984). Some states interpret their state constitutions no more generously than the U.S. Supreme Court's position in ***Belle Terre v. Boraas.*** See, e.g., *City of Ladue v. Horn,* 720 S.W. 2d 745 (Mo. App. 1986).

2. **Statutory limits on zoning controls of household composition:** Federal and state laws prohibit housing discrimination against persons with handicaps, the most important such statute being the federal Fair Housing Act. The mandates of this law can collide with local zoning laws limiting occupancy by unrelated persons when handicapped people seek to live together in group homes for various therapeutic purposes.

★**Example:** While the federal Fair Housing Act (FHA) prohibits discrimination in housing against handicapped people, it exempts from that prohibition "reasonable local . . . restrictions regarding the number of occupants permitted to occupy a dwelling." 42 USC §3607(b)(1). The zoning code of Edmonds, Washington limited occupancy of single-family dwellings to any number of people "related by genetics, adoption, or marriage, or a group of five or fewer [unrelated] persons." In ***City of Edmonds v. Oxford House, Inc.,*** 514 U.S. 725 (1995), the U.S. Supreme Court interpreted the FHA to exempt only "total occupancy limits," not occupancy limits based on the familial composition of the household. Because the Edmonds law permitted an unlimited number of related people to live together in a single-family dwelling, and capped occupancy of such structures only when unrelated persons live together, the Court ruled that the Edmonds law illegally discriminated against handicapped people when it was applied to bar occupancy by a group of 10 to 12 recovering alcoholics and drug addicts, living together under the auspices of Oxford House, a substance abuse treatment program.

D. Exclusionary zoning: All zoning is exclusionary in that it seeks to exclude unwanted *uses,* but sometimes zoning is used to exclude unwanted *people,* though perhaps not for constitutionally or statutorily forbidden reasons. A typical example is a zoning law that, in the interest of preserving open space, aesthetics, and high property values (with its corollary, a high tax base), requires a minimum lot size of 2 acres. The result is a landscape of expensive homes occupied almost entirely by affluent owners. The poor (often disproportionately composed of a racial minority) are excluded. However, excluding the poor, even if done intentionally, does not trigger any presumption of invalidity under the federal Constitution. See *James v. Valtierra,* 402 U.S. 137 (1971). The exclusion is rationally related to the legitimate objectives of preserving open space, aesthetics, and high property values and is thus valid under the federal Constitution. States, however, remain free to interpret their own constitutions and enabling acts to ban actions permitted under the federal Constitution.

★**Example:** The New Jersey township of Mount Laurel developed rapidly from 1950 to 1970. The zoning law in effect excluded all multi-family residential dwellings and mobile homes, and required minimum lot and dwelling sizes for single-family residences that were sufficiently large that low-income persons were effectively excluded from Mount Laurel. In ***Southern Burlington County NAACP v. Township of Mount Laurel (Mount Laurel I),*** 67 N.J. 151 (1975), the New Jersey Supreme Court ruled that the New Jersey constitution and the state's zoning enabling act both required that local zoning further the "general welfare," and that Mount Laurel's failure to accommodate the housing needs of poor people was contrary to the general welfare. The court's opinion was that a "developing community," one expanding in size and population and thus taking shape, could not adopt land use regulations that make it "physically and economically impossible to provide low and moderate income housing in the municipality," but must "make realistically possible the opportunity for an appropriate variety and choice of housing for all categories of people who may desire to live there." Mount Laurel's efforts to comply were found wanting in ***Southern Burlington County NAACP v. Township of Mount Laurel (Mount Laurel II),*** 92 N.J. 158 (1983), in which the court extended the duty identified in ***Mount Laurel I*** to *all* New Jersey *communities,* not just "developing" ones, increased the scope of that duty from simple removal of barriers to one requiring all communities to take active steps to accommodate its "fair share" of the poor, and introduced remedial devices to enable builders of low-income housing to construct such housing despite local refusal to permit construction. ***Mount Laurel II*** impelled the New Jersey legislature to enact a statute that created an administrative agency to enforce the "fair share" obligation of ***Mount Laurel II.*** The statute was upheld in *Hills Development Co. v. Bernards Township,* 103 N.J. 1 (1986).

The ***Mount Laurel*** approach remains a minority view. Most states hold that so long as a zoning law does not exclude people on a suspect basis (e.g., race) it need only be rationally related to a legitimate state interest to be valid. Thus, when minimum lot sizes are rationally related to legitimate local interests, they are upheld. See, e.g., *County Commissioners of Queen Anne County v. Miles,* 246 Md. 355 (1967); *Ketchel v. Bainbridge Township,* 52 Ohio St. 3d 239 (1990). Some economists, notably Charles Tiebout, argue that it is more efficient to let communities specialize in land use, so that people will have a choice of various types of communities in which to live. The ***Mount Laurel*** approach "produces great diversity *within* neighborhoods, but no diversity *between* neighborhoods, and thus may limit the variety of residential choices available to households." Ellickson & Tarlock, Land Use Controls 812 (1981). See also Tiebout, A Pure Theory of Local Expenditures, 64 J. Pol. Econ. 416 (1956). Massachusetts and Connecticut have enacted legislation that is designed to override local controls that operate to exclude low- or moderate-income residents. In Oregon, a state agency has authority to require localities to permit higher density housing

when regional housing needs are unmet. Oregon, however, is one of the few states to have adopted a statewide land use plan." by the law.

1. **Growth controls:** Growth controls are either temporary stoppages (e.g., a building moratorium) or permanent limitations on the rate of new entrants (e.g., annual quotas for building permits). These techniques have generally been upheld as within the authority conferred by the enabling act and as constitutionally valid exercises of that power, rationally related to the legitimate state interest of orderly growth. See, e.g., *Associated Home Builders v. City of Livermore,* 18 Cal. 3d 582 (1976) (building moratorium upheld); *Golden v. Planning Board of Ramapo,* 30 N.Y. 2d 359 (1972) (timing controls upheld); *Construction Industry Assn. v. City of Petaluma,* 522 F. 2d 897 (9th Cir. 1975) (annual building quota upheld).

Exam Tips on *PUBLIC CONTROL OF LAND USE: ZONING*

- This is an area where examination possibilities can take several distinctly different forms. Some professors emphasize the administrative process aspects of zoning, which focuses attention on the various devices that inject flexibility into the zoning process. Some professors are more interested in pursuing the limits on zoning, many of which are constitutional. Others may focus on the policy behind zoning, and raise questions about its wisdom and direction. Pay attention to these possibilities and tailor your exam preparation to the emphasis your professor places on these materials.

- An administrative law focus on zoning is apt to emphasize the ways in which the process is vulnerable to abuse, or the ways in which the process can be used to reinforce values of democratic participation. Develop a good sense of the policy values underlying the administrative process.

- Constitutional limits on zoning represent a sliver of constitutional law. Make sure you understand what triggers the presumption of invalidity and what the government must prove to sustain such laws.

- Zoning produces a top-down approach to development, often characterized by monolithic uses, but the absence of zoning can produce a crazy quilt of shifting uses, responding to discrete economic events that may lack any pattern. If your professor wants you to engage zoning on this level you will need to develop a coherent theory of why zoning is good or bad, and that may entail development of a theory of an ideal city, and how it may best be achieved, or some theory of human liberty and how zoning advances or retards your theory.

CHAPTER 11

TAKINGS: THE POWER OF EMINENT DOMAIN AND REGULATORY TAKINGS

ChapterScope

This chapter examines the government's eminent domain power, the power to take private property for public purposes, so long as just compensation is paid. The particular focus is upon regulatory takings, the point at which a government regulation of property becomes a taking requiring compensation. Here are the most important points in this chapter.

- The takings clause limits takings to those for public purposes and requires just compensation for all takings. The clause applies to all governments and protects all forms of property.
- The public use requirement is satisfied so long as there is a conceivable public purpose for the taking.
- There are three principal *per se* tests that indicate when a regulatory taking has or has not occurred.
  - A taking occurs whenever a regulation permanently dispossesses an owner by stripping the owner of the right to exclude others.
  - A taking does ***not*** occur whenever a regulation does no more than duplicate the result under the prior applicable law of nuisance, even if the regulation deprives the owner of all economically viable use of the property, on the theory that the owner never had the right to use the property in such a fashion.
  - A taking occurs when a regulation deprives an owner of all economically viable use of the property, except when the regulation does no more than duplicate prior nuisance law.
- If the per se rules do not dispose of the case, a balancing test applies. The balancing test involves assessment of multiple factors: the degree to which the owner's investment-backed expectations are diminished, the nature of the government regulation, the breadth of the public benefits achieved as well as the breadth of the impact of the regulation.
- Special rules apply when governments seek to impose conditions on issuance of land use permits. If a condition, by itself, would be a taking it is saved only if it bears a direct and essential nexus to a valid purpose underlying the land use permit scheme to which it is attached. Even if the condition has such an essential nexus, the nature of the condition must be roughly proportional to the impact of the use on the validly regulated problem that the land use scheme addresses.
- Compensation is required for regulations that constitute takings, no matter how long or short the regulation may endure.

I. INTRODUCTION

A. **The eminent domain power:** All governments in the United States have the power to take private property for public purposes, but that power (the ***eminent domain*** power) is limited by the U.S. Constitution, state constitutions, statutory law, and judicial decisions. The U.S. Constitution's Fifth Amendment provides that "private property [shall not] be taken for public use without just compensation." This is often called the "takings clause" or the "eminent domain" clause.

B. **All property protected:** The Constitution's takings clause protects ***all property,*** no matter whether it is tangible or intangible. See *Ruckelshaus v. Monsanto Co.,* 467 U.S. 986 (1984).

C. **Applies to all governments:** The takings clause applies to the states as well as the federal government. The substance of the takings clause is "incorporated" into the Fourteenth Amendment's due process clause, which is applicable to the states. See *Chicago, Burlington & Quincy Ry. v. Chicago,* 166 U.S. 226 (1897). The takings clause surely applies to governmental action taken by the ***legislative*** or ***executive*** branches. There is more uncertainty about the degree to which ***judicial*** action might constitute a taking. See *Hughes v. Washington,* 389 U.S. 290 (1967); Thompson, Judicial Takings, 76 Va. L. Rev. 1449 (1990).

D. **The purposes of the takings clause:** The takings clause serves two important and related purposes.

1. **Prevent forcible redistribution of property:** The takings clause ***prevents forcible redistribution of property*** by stipulating, through the ***just compensation*** requirement, that when governmental power is used to take private property the public pays the property owner the value of the property taken.

2. **Takings permitted only for public benefit:** The ***public use*** requirement of the takings clause was designed to ***prevent any taking,*** **whether or not compensated,** that forces a transfer of property from one private person to another with no public benefit in the forced transfer. Governmental power to take property may only be exercised for public benefit.

E. **The principal issues under the takings clause:** There are three principal issues that arise under the takings clause.

1. **Public use:** Is a governmental taking of property for ***public use?*** Governments sometimes take private property and convey it to another private person in order to reap some alleged collateral public benefit. See section II, below.

2. **Regulatory takings:** At what point does a governmental regulation of property (restricting its use, possession, or disposition) become so burdensome that it is a *de facto* taking of property which triggers the constitutional requirement of just compensation? See section III, below.

3. **Compensation:** It is well settled that the private property owner is entitled to the ***fair market value*** of the taken property — the price that a willing buyer and a willing seller would agree upon. Fair market value includes any ***reasonable expectations*** that a buyer may have about possible future uses (e.g., a change from cattle grazing to vineyard cultivation). An owner is not entitled to any additional value that is subjective and peculiar to the owner (e.g., the sentimental value of the family homestead). If there is no practical market for the property (e.g., it is a Gothic cathedral) any fair valuation method may be used. Common alternatives are capitalization of earnings and replacement value.

a. **Severance damages:** When only a portion of a private parcel is taken the owner is entitled to ***severance damages*** — compensation for the resulting damage to the remaining portion. Severance damages are measured by a ***before-and-after*** rule — the owner must be paid the difference between the value of the entire parcel before taking and the value of the parcel the owner is left with after the taking. It does not matter that the value of property actually taken is less than this sum.

Example: Blackacre, a 10-acre tract, is worth $500,000 prior to condemnation of 5 acres for use as a public park. The condemned 5-acre parcel, by itself, is worth $150,000. The remaining 5-acre parcel is worth $200,000. Blackacre's owner is entitled to $300,000 in compensation ($500K - $200K), ***not*** $150,000 (the value of the condemned portion considered in isolation).

b. **Effect of condemnation on value:** The fair market value due to a property owner is calculated without regard to the effect of condemnation itself on values. This can work to the advantage or disadvantage of property owners.

Example — advantage: The government announces that it will condemn all property in a defined area for a new highway, but that the condemnation will not occur for 3 years. The market value of affected property will drop, because few people will wish to purchase a property that must be surrendered to the government in a few years. The government must pay the fair market value that existed ***before*** its market-depressing action.

Example — disadvantage: The government announces that it will build a huge ground control center for space probes in a certain city marked by economic depression and low property values, and that it will shortly condemn property for that purpose. In the weeks that follow the announcement and before the actual condemnation, speculators bid up the value of Blackacre, a parcel that is thought suitable for the center, from $100,000 to $200,000. When Blackacre is actually condemned, its owner is entitled to $100,000, not $200,000.

c. **Effect of condemnation on business located on the property:** Compensation is not generally required for damage to a business conducted on condemned property. The rationale for this rule is that damage to a business is merely incidental to the loss of the land itself. This rule also applies (absent specific statutory provision to the contrary) to the loss of business goodwill that results from condemnation.

F. **Constitutionally noncontroversial takings:** Most governmental takings of property are not constitutionally controversial. When a government condemns private property for a new public road it is clearly doing so for public use and will admit that it is obligated to compensate the private landowners. The only issue is the amount of the compensation. Constitutional issues arise if the government denies that it has taken the property or if the taking is arguably not for public use.

II. THE PUBLIC USE REQUIREMENT

A. **Constitutional text:** The Constitution states "... nor shall private property be taken for ***public use,*** without just compensation."

1. **No takings except for "public use":** The near-universally accepted reading of the "public use" phrase is that it means that no governmental seizure of private property may occur, ***even if just compensation is paid,*** unless it is for a public use.

2. **The meaning of "public use":** A literal reading of the Constitution's text would limit governmental power to take private property to instances where the property will actually be used by the public (e.g., as a park, school, road, or military base). On this reading, seizures designed to produce some collateral public benefit are not permissible (e.g., a seizure of private property to convey it to a private corporation in order to construct a factory that will provide economic benefits to the community). In fact, the public use limitation has virtually been eliminated by the Supreme Court's extreme deference to legislative judgments about what constitutes public use. So long as a taking is ***rationally related to any conceivable public purpose*** the public use requirement is satisfied. In essence, "public use" is whatever the legislature rationally thinks is conducive to "the public welfare."

★**Example:** New London, Connecticut decided to condemn a number of private residential properties in the Fort Trumbull area of the city in order to assemble a 90-acre tract for an integrated redevelopment plan. Significant portions of the property were to be conveyed to private developers to construct (1) a "small urban village," consisting of shops, restaurants, and a waterfront hotel; (2) 80 new residences; (3) office and retail space; and (4) a marina, parking, and "water-dependent commercial uses." The Court had ruled in *Berman v. Parker*, 348 U.S. 26 (1954) that an "urban renewal" scheme in which blighted property was condemned and transferred to a private developer was a public use. In *Hawaii Housing Authority v. Midkiff*, 465 U.S. 1097 (1984), the Court had upheld as a public use the forced transfer of fee titles to long-term (e.g., 99 years) lessees of the ground on which their residences were located, given that only "22 landowners owned 72.5% of the fee simple titles" to land on Oahu, the most heavily populated Hawaiian island. Hawaii's desire to eliminate "the perceived social and economic evils" of this "land oligarchy" was "rationally related to a conceivable public purpose." Despite these precedents, the landowners contended that condemnation of non-blighted property for purely economic development purposes was not for a public purpose. In ***Kelo v. City of New London***, 125 S. Ct. 2655 (2005), the Court rejected that argument, concluding that so long as the condemnation was part of a "comprehensive development plan" that had been subjected to "thorough deliberation," the Court would defer to the judgment of government officials. In short, and with these additional caveats, the taking was rationally related to a conceivable public purpose. Justice Kennedy concurred because there was no clear evidence that this taking was primarily to benefit a private party, with only "incidental or pretextual public benefits." Justice O'Connor, joined by Rehnquist, Scalia, and Thomas, dissented. Justice O'Connor noted that the Court had upheld takings for later transfer to private persons only when the seizure was to cure a public harm. By contrast, the taking in ***Kelo*** involved only incidental public benefits and raised the possibility that anyone's property could be taken so long as the government could offer some plausible possibility that the new private user would make it more economically productive.

a. **State constitutional alternatives:** States are free to interpret their own constitutions independently, and so have the power to define the public use limit upon takings differently than the U.S. Supreme Court.

Example: In *Poletown Neighborhood Council v, City of Detroit*, 410 Mich. 616 (1981), the Michigan Supreme Court upheld the condemnation of an entire viable residential neighborhood for transfer to General Motors as the site for an assembly plant. The court found sufficient public use in the intended purpose of "alleviating unemployment and revitalizing the economic base of the community." But the Michigan Supreme Court overruled

Poletown in *County of Wayne v. Hathcock*, 471 Mich. 445 (2004), ruling that when property is taken for transfer to another private owner public use is satisfied only when any of three tests is met: (1) the taking is *necessary* to accomplishment of the public purpose; (2) the property "remains subject to public oversight after transfer" (e.g., transfer to a publicly regulated utility); or (3) the condemnation itself (as distinguished from the later transfer) produces independent public benefits (e.g., condemnation of blighted property). The first test probes the *means* to the public end; the remaining two tests probe the sufficiency of those *ends*.

b. Means v. ends analysis: The traditional way to determine public use is to assess the ends of the condemnation. The Supreme Court used ends analysis when it stated in *Midkiff* that public use is satisfied if the condemnation is "rationally related to a *conceivable* public purpose." That form of inquiry was continued in ***Kelo***, where the Court deferred to governmental judgment about the ends of the taking. Ends analysis need not be so deferential. Richard Epstein, Takings (1985), argued that public use should be confined to the provision of "public goods" — items from which nobody can be excluded from consuming and the consumption of which by one person does not affect other people's ability to consume the good (e.g., a lighthouse) — and "quasi-public goods." Means analysis was advocated by Merrill, The Economics of Public Use, 72 Cornell L. Rev. 61 (1986), in which he urged that forced transfers should occur only when transaction costs are sufficiently high to prevent voluntary transfers. The Michigan Supreme Court adopted a means test as one part of its *Hathcock* trilogy: Is the taking *necessary* to accomplish the public end?

3. The relationship of public use and just compensation: Because the compensation provided for a taking does not include the subjective value of the property to the owner (the personal value above its market value), or the potential gains above market value that might be reaped in a voluntary sale, the public use requirement functions as a "property rule" to prevent absolutely those takings failing the public use test. But because the public use test is so weak, this is not much of a barrier. Moreover, the property rule approach is susceptible to large errors. Courts are reluctant to deny to governments the eminent domain power, fearing that desirable public benefits would be lost because the transaction costs of proceeding through voluntary transfers are insurmountable; hence the weakness of the public use test. But this reluctance to incur these errors of omission induces other errors of commission: A weak public use test approves some projects of little or no public benefit and provides inadequate compensation. Here are two responses to this problem.

a. Liability rule: Courts could use a "liability rule" instead of a "property rule." Traditional fair market value compensation would be paid for takings for unquestioned public use (e.g., roads) but the compensation would increase to reflect subjective values and lost opportunity costs as the taking appears to edge closer to the precipice of a purely private-to-private forced transfer. The defect of this approach is its subjectivity, but its proponents argue that the errors that would occur under it would be of lesser magnitude than at present. See Krier & Serkin, Public Ruses, 2004 Mich St. L. Rev. 859.

b. "Usings:" Jed Rubenfeld, Usings, 102 Yale L.J. 1077 (1993), argued that the takings clause was intended to prevent the government from making individuals mere instrumentalities of the state. To that end, he contended that the public use requirement should mark the line between takings and mere regulation. When the government forces private property into state use it has effected a taking. Thus, a regulation requiring property suitable for

economic development to be kept forever wild is a conscription of that property for a state use: conservation. When the government does not conscript that property, but its policy ends could as well be served by destruction of the property, it has not taken the property. Thus, a requirement that cedar trees harboring a fungus destructive to economically valuable apple trees be destroyed is not a taking, because there is no state use of the property.

III. REGULATORY TAKINGS: HOW MUCH REGULATION OF PROPERTY IS TOO MUCH?

A. Introduction: At some point government regulation of property becomes so extensive that it amounts to a *de facto* taking, even though the government denies that it is taking the property. But when? Everyone agrees that a seizure of title is a taking, but regulations may also interfere substantially with an owner's right to use, dispose, or possess property. In an early regulatory takings case, ***Pennsylvania Coal Co. v. Mahon,*** 260 U.S. 393 (1922), the Court declared that "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." The Court has devised three categorical, or per se rules and several balancing tests to determine when a regulation goes "too far" and becomes a taking.

B. The *per se* rules: One of the Court's categorical rules identifies a form of regulation that, *per se*, ***does* not *constitute a taking.*** The other two categorical rules identify when a taking ***has occurred.***

1. Permanent dispossession: When a government regulation ***permanently dispossesses*** an owner of her property, the regulation is a taking.

a. Real property: As applied to real property, a taking has occurred if a regulation produces a **permanent *physical occupation*** of all or a part of the property. Temporary occupations are not a per se taking.

★**Example:** New York required landlords to permit cable television operators to install cable facilities on their property. Loretto, a landlord, claimed that the forced cable installation was a taking of her property, even though the physical occupation consisted entirely of a 1/2-in. diameter coaxial cable along the roof and descending to the apartments within, together with associated small directional taps and junction boxes for the cable, most or all of which were on the roof of the building. In ***Loretto v. Teleprompter Manhattan CA TV Corp.,*** 458 U.S. 419 (1982), the U.S. Supreme Court agreed, ruling that a "permanent physical occupation authorized by government is a taking without regard to the public interests that it may serve." The Court reasoned that the permanent loss of the ability to exclude others was especially destructive of property expectations — "the character of the invasion is qualitatively more intrusive than perhaps any other category of property regulation."

b. Personal property: A taking has occurred when governments, by regulation, confiscate personal property.

Example: Florida law provided that the interest earned on private funds deposited into court in interpleader cases must be turned over to the state. In *Webb's Fabulous Pharmacies v. Beckwith,* 449 U.S. 155 (1980), the U.S. Supreme Court ruled that a taking had occurred because the property owner had been permanently dispossessed.

c. Physical *invasion* distinguished: A physical invasion of property by the government that is not permanent, and which does not permanently deprive the landowner of the right to

exclude others, is not a per se taking, but must be assessed under the balancing process that applies to claims of regulatory takings that cannot be disposed of under the categorical rules. However, when government action strips all utility from an owner's possession the action may be treated as a government invasion of property that constructively dispossesses the owner.

Example: Government aircraft continually flew over Causby's land at low altitude, thus making his property virtually unusable. In *United States v. Causby,* 328 U.S. 256 (1946), the U.S. Supreme Court held that a taking had occurred, because Causby's loss was "as complete as if the United States had entered upon the surface of the land and taken exclusive possession of it."

2. **Nuisance abatement:** If a government regulates property to ***abate activities that are common law nuisances*** there is **no taking,** even though the regulations might bar all economically viable uses of the property. The theory is that ownership of the property never included the right to inflict nuisances, so nothing has been taken by forbidding what was never lawful.

   a. **Origins:** This categorical rule originated in cases that sought to distinguish between regulations designed to prevent harmful (or noxious) uses and those designed to reap a public benefit. Only the latter were said to be takings.

   ★**Example:** In the 1890s Hadacheck acquired rural land outside of Los Angeles that was ideal for brick-making because of the extent and fine quality of the clay deposits. Hadacheck invested heavily in machinery and equipment and developed a thriving brick business. Eventually the city grew out to his brickyard and kiln and Los Angeles enacted an ordinance forbidding his continued operations, on the grounds that the continued activity was annoying and inconvenient to his newly arrived residential neighbors. Because the ordinance allowed Hadacheck to remove his clay (but not to make bricks) there was no taking, said the U.S. Supreme Court in ***Hadacheck v. Sebastian,*** 239 U.S. 394 (1915). The Court never expressly declared that Hadacheck's brickyard was a nuisance, but was persuaded that Los Angeles was seeking to regulate a "noxious" use, even if it might be lawful. The concept of permissible regulation to address noxious-but-lawful uses was extended in *Miller v. Schoene,* 276 U.S. 272 (1928), in which the Court upheld a Virginia law that mandated uncompensated forcible destruction of red cedar trees harboring cedar rust fungus, a killer of apple trees.

   In these cases the Court thought that the cedar trees were harmful to apple trees and the brickyard was harmful to residential neighbors, but it is equally true to say that the cedar trees were destroyed to reap the public benefit of a continued apple industry, or that the brickyard was quashed to reap the public benefit of residential tranquility. The problem with this approach is the unstable, and ultimately indeterminate, distinction between harm and benefit.

   Example: Suppose a government bans billboards on private land abutting public highways. As Frank Michelman, Property, Utility, and Fairness, 80 Harv. L. Rev. 1165, asks: Does the regulation prevent "the 'harms' of roadside blight and distraction, or [secure] the 'benefits' of safety and amenity?" Michelman asserts that for this distinction to work "we [must] establish a benchmark of 'neutral' conduct" which distinguishes between regulations that seize public benefits (compensation required) and those that control private harms inflicted on the public (no compensation required).

b. **Contemporary statement:** The modern approach to cut the Gordian knot of harm-or-benefit is to use the common law of nuisance, as it exists in a state prior to the imposition of a regulation that is claimed to be a nuisance abatement measure, as the benchmark. The only regulations that fall within this rule are those designed to stop common law nuisances, as determined by an *objectively reasonable application* of the precedents pertinent to nuisance.

★**Example:** South Carolina prohibited *any* development of Lucas's beachfront lots on the Isle of Palms in order to protect its ecologically fragile barrier islands. The South Carolina Supreme Court ruled that the legislation was not a taking, but in ***Lucas v. South Carolina Coastal Council,*** 505 U.S. 1003 (1992), the United States Supreme Court reversed and remanded the case to determine whether the law simply abated a common law nuisance. Regulation of private property is no taking if the regulations "do no more than duplicate the result [obtainable by private parties] . . . under the State's law of private nuisance, or by the State under its complementary power to abate [public] nuisances." Even if a regulation forbids the only economically viable use of the property, it does not "proscribe a productive use that was previously permissible under relevant property and nuisance principles." A government desire to "prevent harm" is not, by itself, enough to trigger per se validity because "the distinction between 'harm-preventing' and 'benefit-conferring' is . . . in the eye of the beholder." On remand, the South Carolina courts ruled that the uses prohibited by the law were not common law nuisances. After ***Lucas,*** regulations that address "harms," but which are *not* common law nuisances, are evaluated under the balancing tests. There is no per se insulation of such regulations from the takings clause.

3. **Loss of all economically viable use:** If a government regulation leaves the owner with ***no economically viable use*** of his property, and the regulation does **not *abate a common law nuisance,*** a taking has occurred. There are two rationales for this rule: (1) the severity of such regulations impeach the usual assumption that government regulation of property is for the advantage of everyone, including affected property owners, and (2) the effect of these regulations is to achieve public benefits by imposing the costs of such benefits ***entirely upon affected property owners.***

★**Example:** Refer to the ***Lucas v. South Carolina Coastal Council*** example. South Carolina's Beachfront Management Act, as applied to Lucas's lots on Isle of Palms, a barrier island near Charleston, forbade the construction of "any permanent habitable structures." Assuming this rendered the property "valueless," as the trial court had concluded, the U.S. Supreme Court in ***Lucas v. South Carolina Coastal Council,*** 505 U.S. 1003 (1992), held that a regulation that deprives a landowner of all economically viable uses is a per se taking, unless the loss of all economically viable use results entirely from abatement of a common law nuisance (which would make the regulation a per se nontaking). The Court justified the rule partly because "total deprivation of beneficial use is, from the landowner's point of view, the equivalent of a physical appropriation," and partly because such regulations "carry with them a heightened risk that private property is being pressed into some form of public service under the guise of mitigating serious public harm."

a. **Partial destruction—"Conceptual severance":** The "loss of all economically viable use" rule applies only to a regulation that strips the owner of all economically viable use of the *entire* property. If a regulation operates to deprive the owner of all economically viable use of only *part* of his property, the question of whether or not the regulation is a

taking will be decided by the balancing tests. ***Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency,*** 535 U.S. 302 (2002).

★**Example:** Suppose a newly imposed regulation requires a landowner to leave 90 acres of a single 100-acre tract in its natural state forever. In ***Lucas*** the Court admitted that "it is unclear whether we would analyze the situation as one in which the owner has been deprived of all economically beneficial use of the burdened portion of the tract, or as one in which the owner has suffered a mere diminution in value of the tract as a whole." Without deciding the issue, the ***Lucas*** Court suggested the answer "may lie in how the owner's reasonable expectations have been shaped by the State's law of property — i.e., whether and to what degree the State's law has accorded legal recognition and protection to the particular interest in land with respect to which the takings claimant alleges a diminution in (or elimination of) value." In ***Tahoe-Sierra,*** the Court applied the balancing test to a multi-year moratorium on *all* development. Taken together, ***Lucas*** and ***Tahoe-Sierra*** suggest that if the hypothetical 100-acre tract were split into two separate titles — one of 10 acres, still usable after the regulation, and the other of 90 acres, with no economic value left after the regulation — the ***Lucas*** loss-of-all-economically-viable-use rule would govern the 90-acre parcel, but if the 100-acre parcel were a single title the ***Lucas*** rule would not apply.

C. Balancing public benefits and private costs: If the per se rules do not resolve the issue of whether a regulation is a taking, courts weigh the public benefits achieved by the regulation against the private costs imposed. A regulation is not a taking if it ***substantially advances a legitimate state objective.*** To determine whether this test has been met at least the following conditions must exist: (1) ***public benefits from the regulation must outweigh the private costs of the regulation,*** (2) the regulation must ***not be arbitrary,*** and (3) the property owner must be permitted to ***earn a*** **reasonable return** ***on investment*** in the property.

1. Origins: Regulatory takings law effectively originated with ***Pennsylvania Coal Co. v. Mahon,*** 260 U.S. 393 (1922), and its significance and meaning has been debated ever since. Pennsylvania's Kohler Act prohibited underground coal mining that would cause surface subsidence, but only where the surface and the underground coal were owned by two different people. Mahon, owner of the surface, had expressly assumed the risk of subsidence when he purchased his property, but invoked the Kohler Act to restrain the owner of the underground coal, Pennsylvania Coal Company, from further underground mining. In ***Mahon,*** the Court recognized that "property may be regulated to a certain extent," but added that "if regulation goes too far it will be recognized as a taking." The Court voided the Kohler Act because it went "too far" — it destroyed the economic viability of Pennsylvania Coal's property, the underground coal the Kohler Act required to be left in place. The law made "it commercially impracticable to mine . . . coal," a result with "very nearly the same effect for constitutional purposes as appropriating or destroying" the right to mine coal. Justice Brandeis dissented on the ground that the Kohler Act prohibited a "noxious use" and that the diminution in value was not absolute — the appropriate measure should not be the decline in value "of the coal alone, but . . . the value of the whole property."

a. "Average reciprocity of advantage": In his dissent in ***Mahon*** Justice Brandeis charged that the Court was creating a rule that regulations in aid of public safety must display "'an average reciprocity of advantage' as between the owner of the property restricted and the rest of the community" in order to be valid without compensation. The concept of "average

reciprocity of advantage" suggests that a regulation must bestow some public benefits (and, perhaps, that some of those benefits must be enjoyed by the affected landowner). Brandeis denied that "average reciprocity of advantage" was *necessary* to a regulation's validity, but did concede that was "an important consideration." This concept comes back in the ***Penn Central*** multifactor test, in the form of evaluation of the nature or character of the regulation, and also figures in some academic perspectives on takings. See, e.g., section III.F.4, below.

b. Application of *Mahon* balancing: Conceptual severance: The balancing calculus that ***Mahon*** employed was mostly to assess whether the diminution in value attributable to the regulation was so much that the regulation's effect was practically indistinguishable from an appropriation or destruction. In order to reach this conclusion the Court conceived of the coal required to be left in place as a distinct property interest, but Justice Brandeis argued that the appropriate measure was the effect the regulation had on the *entire* property interest held by Pennsylvania Coal. Years later, in *Keystone Bituminous Coal Assn. v. De Benedictis,* 480 U.S. 470 (1987), the Supreme Court adopted Justice Brandeis's approach to uphold the validity of a later Pennsylvania law, the Subsidence Act, which required coal miners to leave sufficient coal in place to support the surface. The Court distinguished the Subsidence Act from the Kohler Act on two grounds: (1) the coal forcibly left in place to support the surface did "not constitute a separate segment of property for takings law purposes," and (2) the miners had "not come close to . . . proving that they have been denied the economically viable use of [their] property" because the coal left in place was only a small fraction of the entire coal deposit owned by them.

★2. Contemporary statement: The principal modern case developing the balancing approach is ***Penn Central Transp. Co. v. New York City,*** 438 U.S. 104 (1978), in which the Supreme Court upheld New York City's Landmarks Preservation law. As applied to Penn Central the law prevented Penn Central from building an office tower over Grand Central Station but left Penn Central with the economic return from the terminal building and "transferable development rights" — the right to develop other properties in the vicinity owned by Penn Central more intensively than New York's zoning law would otherwise allow. The Court admitted that the balancing test was an "essentially ad hoc, factual inquir[y]" that turned on a number of factors: (1) the nature of the government regulation (the more akin to a physical invasion the more likely a taking, the more it merely "adjust[s] the benefits and burdens of economic life to promote the common good" the more likely it is not a taking); (2) the reasonable expectations of the property owner (the stronger the "investment-backed expectations" and the more thoroughly frustrated they are by the regulation the more likely there is a taking); (3) the degree to which the regulation is designed to stop uses that cause "substantial individualized harm" but are not common law nuisances; and (4) the degree to which the regulation enables the government actually to use the property for "uniquely public functions." The Landmarks Law posed no threat of physical invasion, left Penn Central with the ability to earn a "reasonable return" on its "investment-backed expectations" and did not raise issues of government use.

a. Application of *Penn Central* balancing: "Investment-backed expectations": The concept of investment-backed expectations has proven to be enigmatic. First, it is related to conceptual severance: The phrase might refer to an interest in a distinct property interest (e.g., Pennsylvania Coal's interest in its "support estate," a property interest totally wiped out by the Kohler Act), or it might mean a financial interest in a larger estate that is much

diminished, though not totally eliminated (e.g., the diminution in value to coal miners of the Subsidence Act upheld in ***Keystone***). Second, the phrase is suggestive of inherent limits: If either "investment" or reasonable "expectations" are lacking, there might be no protected interest at all.

★**Example:** From 1959 to 1978, SGI, a Rhode Island corporation, owned a 20-acre parcel that was mostly a salt marsh wetland. During that period, various new regulations were adopted that effectively barred development of the wetland, but permitted construction of one large residence on an upland portion of the property. Upon dissolution of SGI in 1978, title to the parcel passed to Palazzolo, the sole shareholder of SGI, who sought approval to develop the parcel more intensively. Upon denial of his plans, Palazzolo brought suit, contending that Rhode Island had taken his property. The Rhode Island Supreme Court ruled that the use restrictions in place in 1978, when Palazzolo acquired title, were part of the "background title" he had acquired and thus he could not assert that they constituted a taking. In ***Palazzolo v. Rhode Island,*** 533 U.S. 606 (2001), the U.S. Supreme Court reversed that ruling, reasoning that such a rule would immunize extreme and unreasonable regulations against future attack, would be capricious (e.g., older owners or those with the will and means to hold property for a long time could challenge regulations but younger owners or those who have recently arrived in a locality and acquired property could not), and would deny to in-place owners the ability to transfer to others the same title they had. The Rhode Island Supreme Court also ruled that the use regulations did not deprive Palazzolo of all economically viable use of his land because he could still build a large residence. On that point, the U.S. Supreme Court affirmed. Palazzolo argued that the upland portion (on which he was permitted to build the residence) was a separate parcel and that he had been stripped of all economically viable use in the wetlands, but because he had not made that argument in the lower courts the U.S. Supreme Court declined to address it. The Court concluded that the regulation did not deny to Palazzolo all economically viable use of his property but remanded the case for a determination of whether, under the ***Penn Central*** test, the regulations constituted a taking. Justice O'Connor concurred, suggesting that regulations in place at the time an owner acquires property are relevant to the ***Penn Central*** issue of the owner's reasonable investment-backed expectations.

b. Application of *Penn Central* balancing: "Parcel as a whole": The problem of conceptual severance can occur in several different dimensions. Although it is usually thought of as a physical or geographic problem (e.g., can a 100-acre parcel be conceptually split if only 90 acres are subjected to regulations that bar all economically viable use?), it can also be a functional problem (e.g., loss of the right to possess, or to use, or dispose), or a temporal problem. Suppose a government bars all economically viable use of the entirety of a parcel, but only for a limited period of time? An incomplete answer was provided in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987), in which the Court ruled that *if a regulation constitutes a taking* compensation is required from the moment the regulation is first effective, even if it is later rescinded. *First English* thus held that regulatory takings, however short their duration, require compensation, but the case did not decide whether a temporary loss of all economically viable use constitutes a taking.

★**Example:** An interstate regional agency controlling land use in the Lake Tahoe basin adopted a moratorium on any development of certain properties in the basin. The

moratorium was intended to halt all development until a land use plan could be put into effect that permitted development in a manner that would not contribute to the continued degradation of the water purity of Lake Tahoe. Affected property owners asserted that the moratorium denied them all economically viable use of their property and, under *First English,* they were entitled to compensation for the duration of the moratorium. Not so, said the Supreme Court in ***Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency***, 535 U.S. 302 (2002). Justice Stevens, writing for the majority, declared that the effect of the regulation on the value of the parcel must be considered with respect to the "parcel as a whole," and that it was improper to sever the time the fee simple absolute title was subject to a moratorium from its otherwise infinite duration. If the moratorium was a *permanent* ban on development that resulted in loss of all economically viable use, it would be a taking, but this ban was merely temporary. Left unanswered were such questions as: How long must a "temporary" moratorium last before it becomes "permanent"? (5 years? 10 years? 30? 100? 1000?) If conceptual severance is improper for temporal losses of all economically viable use, why is it proper for permanent losses of only one function, as in *Loretto*?

D. Exactions: Conditional burdens: Governments frequently regulate land use by requiring landowners to obtain a permit for the use. A typical example is a building permit. The regulation requiring a building permit is not problematic, so long as the condition of obtaining the permit is compliance with reasonable health and safety standards or the like. Problems occur when the government imposes as a condition to the obtaining of a building or other use permit some condition that could not independently be imposed without compensating the landowner. In essence, the question becomes: May the state condition the grant of a building permit on the landowner's consent to what would otherwise be an uncompensated taking? There are two dimensions to this problem.

1. **"Essential nexus":** The first issue may be framed by a question: Is a condition which, *standing alone,* is a taking rendered valid and ***not a taking*** if it is ***substantially related*** to the purposes of a valid land use regulation (e.g., a building permit requirement)? If a government may validly forbid someone from building an unsafe structure, it must validly be able to attach conditions to issuance of a building permit that advance the purpose of ensuring safety (e.g., no flammable materials may be used in the structure); but the government may not validly attach conditions to issuance of a building permit that are unrelated to the purpose of enhancing safety (e.g., erection of a flagpole from which the city flag must be flown daily). A *condition that would be a taking, if imposed in isolation, is* ***not a taking*** when attached as a condition of issuance of a land use permit under an otherwise valid regulation *only if the government can prove* the condition is ***substantially related*** to the ***government's valid regulatory objective.*** This requirement is sometimes described as an ***essential nexus*** between the legitimate regulatory interest and the condition, so that the condition advances the state's reason for limiting development in the first place.

★**Example:** Nollan owned a beachfront lot along the Southern California coast on which was a dilapidated cottage. Nollan's lot extended to the mean high-tide mark along the beach, a point some distance seaward of a concrete retaining wall on his lot. He sought approval from the California Coastal Commission for permission to demolish the structure and construct a new, somewhat larger, residence consistent in size and design with the neighboring houses. Preexisting regulations of the Coastal Commission forbade construction on Nollan's site if the

structure would impede public access to the public portion of the beach (seaward of the mean high-tide mark) or would promote congestion on the beach. The Commission refused to grant Nollan a permit unless he consented to a recorded easement which would permit unrestricted public use of Nollan's beachfront lying between his retaining wall and the mean high-tide mark. Nollan refused and brought suit, contending that the easement condition was a taking. In ***Nollan v. California Coastal Commission,*** 483 U.S. 825 (1987), the U.S. Supreme Court agreed with Nollan. The Court assumed that the underlying regulation — prohibition of beachfront construction when it impedes public beach access or promotes beach congestion — was valid (although it did not so decide), but concluded that the condition imposed for a permit to build — Nollan's grant of a permanent right to the public to use the private beach portion of his lot — "utterly fail[ed] to further the end advanced as the justification for the prohibition." The Coastal Commission had failed to prove that the easement-for-public-access condition **substantially advanced** the purposes of the pre-existing regulations of coastal construction; thus the easement condition was simply "an out-and-out plan of extortion."

2. **"Rough proportionality":** The second issue posed by the problem of exactions, or conditional burdens, is whether the government can impose a condition to a land use permit that is disproportionate to the impact of the proposed use on the activity that the government sought to regulate in the first place. Even if a condition which would be a taking if imposed in isolation is valid because it satisfies the ***essential nexus*** test, it *is a taking unless the government proves that the nature and scope of the condition* are ***roughly proportional*** to the impact of the proposed development on matters that the underlying regulation addresses.

★**Example:** Dolan wished to expand her plumbing and electrical supply store in Tigard, Oregon, in a fashion that was consistent with the city's zoning law. The site fronted a street and backed up against Fanno Creek. Although a portion of the site was within the 100-year flood plain of Fanno Creek, none of the proposed new construction was within that flood plain. The city conditioned a building permit upon Dolan's agreement to dedicate to public use (for storm drainage) the entire portion of her lot within Fanno Creek's flood plain, and to "dedicate an additional 15-foot strip of land adjacent to the flood plain as a pedestrian [and] bicycle pathway." The city denied Dolan's request for a variance exempting her from these conditions, after concluding that it was "reasonable to assume that customers and employees of the future uses of the site could utilize a pedestrian [and] bicycle pathway adjacent to this development for their transportation and recreational needs," that the pathway "could offset some [auto] traffic [and alleviate] traffic congestion," and that "increased storm water flow from [Dolan's] property to an already strained creek and drainage basin can only add to the public need to manage the stream channel and flood plain for drainage purposes." Dolan sued, claiming that the required dedications of her property constituted takings. In ***Dolan v. City of Tigard,*** 512 U.S. 374 (1994), the U.S. Supreme Court agreed. First, it concluded that the conditions satisfied the "essential nexus" test of ***Nollan*** because "the prevention of flooding . . . and the reduction of traffic congestion" were legitimate public purposes of the underlying regulation and the required dedications were substantially related to those purposes. However, the city had failed to prove that either required dedication was even "roughly proportional" to the impact of Dolan's development on the legitimate public purposes of preventing flooding and reducing traffic congestion. While a ban on development within the flood plain was valid, the city was unable to prove "why a public greenway, as opposed to a private one, was required in the interest of flood control." While the Court had "no doubt that the city was correct in finding that [Dolan's development] will increase [auto] traffic," it had "not met its burden of demonstrating

that the additional number of vehicle and bicycle trips generated by [Dolan's development] reasonably relate to the city's requirement for a dedication of the pedestrian [and] bicycle pathway easement."

The "rough proportionality" test applies *only to exactions;* it does not apply to ordinary land use regulations, the underlying regulations to which exacting conditions are attached. See *City of Monterey v. Del Monte Dunes,* 526 U.S. 687 (1999).

3. **Summary:** The essential nexus and rough proportionality tests are cumulative, not alternatives. Each test must be satisfied for an exaction to be valid without compensation. If a condition is a taking by itself, the condition *cum* regulation is a taking unless the government can prove (1) the condition is ***substantially related*** to the ***government's valid regulatory objective,*** and (2) the nature and scope of the condition are ***roughly proportional*** to the impact of the proposed development. The logical order of analysis is, first, to establish that the condition would be a taking if imposed independently, second, to prove that such a condition satisfies the essential nexus test and, third, to show that such a condition exacts concessions that are roughly proportional to the development's impact.

   Example — "Essential nexus": The city of Esmeralda imposes a building permit system in order to limit development because Esmeralda's city-owned electrical utility is unable to increase substantially its power production and no other sources of electricity are available. Cassie applies for a building permit to enlarge her house and is told that a building permit will be issued only if she deeds a strip in front of her house to Esmeralda for a public pedestrian path. The condition — donation of a portion of her property to the city — is clearly a taking when considered in isolation. It is not saved because it is imposed as a condition to an otherwise valid building permit scheme because the condition — dedication of the bicycle path — is wholly unrelated to the reason for limiting development — conservation of scarce electrical power. See ***Nollan v. California Coastal Commission,*** 483 U.S. 825 (1987).

   Example — "Rough proportionality": Now suppose that the city of Esmeralda offers Cassie a building permit on the condition that she install a windmill to generate electricity and that the electricity generated be sent into the city's power grid. The condition likely satisfies the essential nexus test because the condition is directly related to the reason for the development limit. Suppose that Cassie's proposed addition will add 100 kilowatts monthly to the demand on the city electrical utility and that the windmill will likely generate 110 kilowatts each month. The condition is roughly proportional to the electrical energy impact of Cassie's proposed development. See ***Dolan v. City of Tigard,*** 512 U.S. 374 (1994).

   These tests are criticized by some as adding little protection against overreaching regulations and discouraging "mutually beneficial land use deals and generating vast inefficiencies." See Fennell, Hard Bargains and Real Steals: Land Use Exactions Revisited, 86 Iowa L. Rev. 1 (2000).

E. **Remedies:** Once a regulation is found to be a taking the affected property owner has several remedies.

1. **Injunctive and declaratory relief:** Enforcement of a regulation that is a taking will be enjoined and the regulation will be declared to be a taking. If the government wishes to proceed with the regulation, it must pay just compensation.

2. **Damages:** A regulation may take effect immediately but it takes some time for it to be determined to be a taking. Because injunctive and declaratory relief provide no redress for

an "interim taking," the affected property owner is entitled to damages for the loss of his property during the period a regulatory taking was in effect. *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987). Suits for damages raise a number of procedural and choice of law issues.

a. **Measure of damages:** For interim takings, the fairest measure may be the market rate of return on the difference between the fair market value of the affected property burdened by a regulation that constitutes a taking and its fair market value free of the regulation, over the time the regulatory taking is in effect.

b. **Duration of an interim taking:** Generally, the taking occurs when the regulation becomes effective. A corollary is that statutes of limitation upon actions to recover for injuries to property also begin to run from that date.

c. **Choice of forum:** The constitutional claim that a regulation constitutes a taking is not perfected until the affected landowner has exhausted his or her remedies in state court. To the extent that a state court decides issues or claims under federal law, the doctrines of issue and claim preclusion may bar later litigation of these claims in federal court.

d. **Choice of law:** Although most regulatory takings claims must first be brought in state court, in order to allow the state an opportunity to pay compensation if the regulation is a taking, that rule does not apply if the regulation or taking is *not for a legitimate public purpose*. In such cases (e.g., the taking is not for a public use), the affected landowner may seek damages under 42 U.S.C. §1983, which permits damages actions to be brought for deprivation of constitutional rights under color of state law. Jury trials are permitted in §1983 actions, which may not always be the case with respect to state court inverse condemnation proceeding.

F. **Academic theories about regulatory takings:** There is a vast literature on takings. Summarized here are the main points of some of the more influential commentators.

1. **Joseph Sax:** Sax, a law professor at U.C. Berkeley, argues that when governments act as "sovereigns" — to resolve disputes about land use — there should be no compensation requirement, but when governments act as "entrepreneurs" — performing functions that are functionally indistinguishable from private economic activity — there should be compensation. Sax, Takings and the Police Power, 74 Yale L.J. 36 (1964). Sax also asserts that no compensation should be required when a government acts to control external costs of land use, but should pay compensation when its regulations do not address such externalities. Sax, Takings, Private Property and Public Rights, 81 Yale L.J. 149 (1971).

2. **Frank Michelman:** Michelman, a law professor at Harvard, offers an abstract utilitarian calculus to determine when compensation should be paid with respect to any given regulation: "[C]ompensation should be paid whenever demoralization costs exceed settlement costs, [and demoralization costs are less than the efficiency gains from the regulation], and not otherwise." To understand this, you must comprehend Michelman's definitions. *Efficiency gains* are the excess of benefits over losses attributable to a measure, measured by the market price people would pay to gain the benefits or avoid the losses. *Demoralization costs* are the sum of (1) the money that would have to be paid to people "to offset disutilities" that result from the realization that no compensation will be paid, and (2) the "present capitalized dollar value of lost future production caused by demoralization" resulting from failure to compensate. *Settlement*

costs are a monetized version of the transaction costs necessary to avoid demoralization: "[T]he dollar value of the time, effort, and resources which would be required in order to reach compensation settlements adequate to avoid demoralization costs." Michelman defends utilitarian refusal to compensate on combined grounds of altruism and distributive fairness — an uncompensated loser "ought to . . . appreciate [that lack of compensation] holds forth a lesser long term risk to people like him than [any alternative]." Exactly *why* this is so is less clear. Michelman, Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law, 80 Harv. L. Rev. 1165 (1967).

3. **Bruce Ackerman:** Ackerman, a Yale law professor, eschews dense abstraction about property in favor of colloquial, lay, understandings of property. At bottom, Ackerman's view is the prosaic observation that, if the government takes physical possession of property away from its owner compensation is required (see ***Loretto*** and the per se taking rule that applies to permanent dispossession), but if regulations diminish the value of property no compensation is required unless the diminution is so severe that it would be a "bad joke" to claim that the property owner is left with something of value. However, humor, like beauty, is subjective. Ackerman's threshold of "bad jokes" might be lower than that of many others; Ackerman does not make clear how the courts are to determine which "bad joke" threshold is constitutionally required. Ackerman, Private Property and the Constitution (1977).

4. **Richard Epstein:** Epstein, a University of Chicago law professor, argues that regulations that redistribute wealth are presumptive takings. Some may be saved by the fact that they confer *implicit in-kind compensation,* an updated version of "average reciprocity of advantage." See Justice Brandeis's dissent in ***Mahon,*** section III.C.1.a, above. Others may be valid because they do no more than control common law nuisances, a view explicitly embraced by the Court in ***Lucas.*** Epstein's conclusions are sweeping; much of the social welfare state (which is premised on the assumption that the use of political power to redistribute wealth among the people is valid) would be constitutionally suspect under his view of the scope of the takings clause. Many people reject Epstein's view because they don't like the conclusions it produces; nevertheless, Epstein poses a basic question: If the takings clause was intended to prevent governments from redistributing property for public benefit without compensating the losers of their property, why is it permissible to use the regulatory state pervasively to do just that?

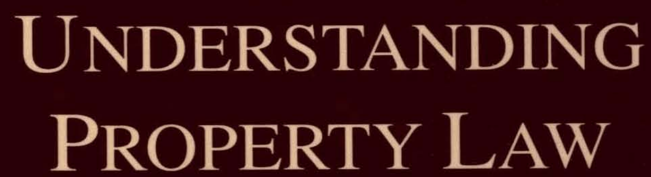
5. **Jed Rubenfeld:** Rubenfeld, another Yale law professor, argues that a compensable taking occurs when a regulation enables the government actually to *use* the property in question. Without *public use* there would be no compensable taking. He grounds this view in a theory that the function of the takings clause is to prevent people from being forced to become instrumentalities of the state. The government's purpose in regulating becomes of paramount importance: If the government's purpose would be served equally by regulation or destruction of the property, "no use-value of the thing is being exploited" and no compensation is needed. Only if the government's regulatory purpose cannot be achieved except by enlisting the property in the service of the state would compensation be required. Rubenfeld, Usings, 102 Yale L.J. 1077 (1993).

6. **William Fischel:** Fischel, a Dartmouth economist, thinks that the legislative process is adequate to protect against overreaching government regulation, except when that process is distorted. Courts are good at overseeing process, so Fischel argues that courts ought to examine regulatory takings claims mostly to see whether insiders are using their political muscle to extract gains from outsiders, people who can't protect themselves either by *exit* (leaving the

jurisdiction) or *voice* (voting). The risk of this exploitation is highest when the regulated property is land (it can't be taken out of the jurisdiction) and the political unit imposing the land use regulation is small in population and area. These small towns and suburbs are especially apt to impose restrictive zoning and other regulations designed to keep property values high and taxes low, mostly at the expense of builders, owners of fallow land, and would-be residents. Fischel posits that governments with large populations and area are less susceptible to this insider versus outsider warfare, and more susceptible to special interest group capture. His conclusion is that courts should defer to regulations imposed by large governments but exercise careful scrutiny of land use regulations by small governments. Is it so clear that large government susceptibility to interest group capture is not a process failure that should merit close judicial scrutiny of regulations that ensue from such governments? Fischel, Regulatory Takings: Law, Economics, and Politics (1995).

Exam Tips on *TAKINGS: THE POWER OF EMINENT DOMAIN AND REGULATORY TAKINGS*

- Regulatory takings is easily combined with zoning and nuisance.
- The most difficult part of applying the loss-of-all-economically-viable-use test is to decide what constitutes the property to which the regulation applies. Pay particular attention to the fee titles to which the regulation applies and when they were created. It is far less likely that courts will recognize separate property interests when those interests are created by developers for the instrumental purpose of coming within this rule.
- Remember that to apply the per se "nontaking" rule of nuisance replication you must necessarily apply nuisance law.
- The balancing test is ad hoc, so use the facts with care and imagination if you are required to apply this test. This is a multifactor test and you must assess the relative importance of the various factors in light of the particular facts.



John G. Sprankling

Chapter 29

NUISANCE

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§ 29.01 "An Impenetrable Jungle"?

A's factory emits foul odors onto B's farm; noise from C's tuba practice routinely pervades the quiet of D's bookstore; and E's smelter produces

vibrations that make it impossible for F to sleep in her home.[1] Can B, D, and F assert any claim? As a general rule, an owner is free to use his land as he sees fit. But this freedom is not unlimited. For example, it is often said that one may not use land in a manner that injures the land of others.[2] This precept is the foundation of the law of nuisance, which governs the rights of B, D, and F.

The common law divided nuisances into two categories: private nuisances and public nuisances. Broadly speaking, a *private nuisance* arises when one uses his land in a manner that injures a private owner or occupant in the use or enjoyment of that person's land. The Restatement (Second) of Torts offers a more precise definition: "a nontrespassory invasion of another's interest in the private use and enjoyment of land."[3] A's odors, C's noise, and E's vibrations are all considered to be private nuisances under this standard. This chapter—and most of the law in the field—deals primarily with the private nuisance. Indeed, when judges, scholars, and attorneys use the term "nuisance," this is usually a shorthand reference to the private nuisance. In contrast, a *public nuisance* is an activity that interferes with the rights of the public in general, usually by threatening the public health, safety, or morals.

The modern law of nuisance is complex and confusing. As one authority observed, "[t]here is perhaps no more impenetrable jungle in the entire law than that which surrounds the word 'nuisance.' "[4] Two key issues arise: (a) what constitutes a nuisance? and (b) what is the appropriate remedy? Traditional English law was straightforward on these points: virtually any conduct that seriously injured another's land constituted a private nuisance and was automatically enjoined. American nuisance law has gradually moved away from this rigid, pro-owner view toward more flexible standards founded on utilitarian principles. The utility of the defendant's conduct is increasingly considered in determining whether nuisance liability exists; thus, for example, socially-beneficial conduct that clearly interferes with the plaintiff's use of land may not constitute a nuisance. And even if nuisance liability is found, the plaintiff may be unable to obtain an injunction against the offending conduct.

Before the widespread adoption of zoning ordinances in the early twentieth century, nuisance was the principal tool used to reconcile incompatible land uses. Indeed, nuisance law is sometimes called "judicial zoning." Its importance has diminished as land use regulation has expanded. As one observer summarized, nuisance law has been "relegated to marginal cases,

[1] *See generally* Raymond R. Coletta, *The Case for Aesthetic Nuisance: Rethinking Traditional Judicial Attitudes,* 48 Ohio St. L.J. 414 (1987); Jeff L. Lewin, Boomer *and the American Law of Nuisance: Past, Present, and Future,* 54 Alb. L. Rev. 189 (1990); John Copeland Nagle, *Moral Nuisances*, 50 Emory L.J. 265 (2001); Stewart E. Sterk, *Neighbors in American Land Law,* 87 Colum. L. Rev. 55 (1987).

[2] This is a loose translation of the ancient Latin maxim that is the foundation of nuisance law—*sic utere ut alienum non laedas.*

[3] Restatement (Second) of Torts § 821D.

[4] W. Page Keeton, et al., Prosser and Keeton on the Law of Torts § 86, at 616 (5th ed. 1984).

involving small-scale, localized land use conflicts."[5] If the zoning process permits a use that neighbors dislike, nuisance law may provide a basis for attacking the use through litigation. And the doctrine also remains useful in rural regions that have little or no zoning.

Despite the declining importance of nuisance law, academic interest in the topic has grown in recent decades. In particular, the efforts of Guido Calabresi, Robert Ellickson, and other disciples of the law and economics movement to apply economic principles to this area have helped to shape the law's modern evolution.[6] Insights from law and economics scholarship have been especially useful on the question of the appropriate remedy for a private nuisance.

§ 29.02 What Is a Private Nuisance?

[A] Nuisance Defined

A leading authority once suggested that nuisance was "incapable of any exact or comprehensive definition."[7] The term "nuisance" simply means "harm" in old French. Of course, this literal definition is far too broad to be helpful. Centuries of legal evolution have produced a complex and unwieldy body of nuisance law that defies quick explanation.

Our starting point is the Restatement (Second) of Torts, which defines the private nuisance as "a nontrespassory invasion of another's interest in the private use and enjoyment of land."[8] Even this definition is overbroad: only *some* nontrespassory invasions of another's interest in the private use and enjoyment of land are private nuisances, not *all* such invasions (*see* § 29.04). However, the Restatement definition is useful because it focuses on the key factors that distinguish nuisance from other legal doctrines. First, nuisance involves a special type of harm—interference with the interest of an owner, tenant, or other land occupant in the *use and enjoyment of land.* Suppose F's factory emits an unpleasant odor. Although the odor may offend P, a pedestrian who walks by the factory, it does not affect P's use or enjoyment of his land; hence, P cannot bring a nuisance claim. Conversely, if the odor makes it difficult for N to live in his home which adjoins F's factory, N may be able to sue F in nuisance; the foul odor interferes with N's use and enjoyment of his home. Second, nuisance involves a special type of conduct—a *nontrespassory invasion.* A physical entry onto land owned or occupied by another is a trespass, not a nuisance. A nuisance involves conduct *other than physical entry*—such as producing

[5] Jeff L. Lewin, Boomer *and the American Law of Nuisance: Past, Present, and Future,* 54 Alb. L. Rev. 189, 230 (1990).

[6] *See, e.g.,* Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral,* 85 Harv. L. Rev. 1089 (1972); Robert C. Ellickson, *Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land Use Controls,* 40 U. Chi. L. Rev. 681 (1973).

[7] W. Page Keeton, et al., Prosser and Keeton on the law of Torts § 86, at 616 (5th ed. 1984).

[8] Restatement (Second) of Torts § 821D.

dust,[9] fumes, gases, light, noise,[10] odors,[11] shadow,[12] smoke, or vibration—that interferes with the use or enjoyment of land.

[B] Distinguishing Nuisance from Trespass

The traditional distinction between nuisance and trespass hinges on the *nature of the intrusion*: is there a physical entry or not? A physical entry onto the land of another interferes with the occupant's right to possession and hence constitutes a trespass. For example, if F stands on his factory site and throws a rock into the back yard of N's adjacent house, this is a physical entry of N's land and thus a trespass. Any conduct that interferes with the use and enjoyment of land, other than a physical entry, is governed by nuisance law. Suppose F's factory routinely emits loud noises throughout the night, making it difficult for N to sleep. This noise is not a physical entry onto the land, and accordingly N's claim is governed by nuisance law.

However, scientific progress has blurred the once-clear boundary line between nuisance and trespass (*see* § 30.02[B]). Common law courts considered only a *visible* intrusion to be a physical entry. For example, throwing a rock onto N's land was a trespass, while emitting an invisible gas was a nuisance. This distinction reflected the primitive science of the era. Modern science teaches that odors, fumes, and other gasses consist of microscopic particles. Thus, we now know that when F's factory emits a smelly gas, small particles of matter physically enter N's land. Should such an intrusion be considered a trespass? Many courts now extend trespass liability to include air pollution, toxic contamination, and other entries by microscopic particles, effectively allowing the injured plaintiff to sue on either theory.

[C] Categories of Nuisances

[1] Nuisance *Per Se* or Nuisance *Per Accidens*?

Private nuisances are usually divided into two types: the nuisance *per se* and the nuisance *per accidens*. The nuisance *per se* is an act or condition that is always considered to be a nuisance, regardless of the surrounding circumstances; most commonly, this is some type of activity that is prohibited by law (e.g., an illegal garbage dump).[13] The nuisance *per accidens*,

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[9] *Cf.* Boomer v. Atlantic Cement Co., 309 N.Y.S.2d 312 (N.Y. 1970) (emissions of dirt, smoke, and vibration from cement plant).

[10] *Cf.* Estancias Dallas Corp. v. Schultz, 500 S.W.2d 217 (Tex. Ct. Civ. App. 1973) (noise from air conditioning equipment).

[11] *See, e.g.*, Spur Indus., Inc. v. Del E. Webb Dev. Co., 494 P.2d 700 (Ariz. 1972) (odors and flies from cattle feedlot); Penland v. Redwood Sanitary Sewer Service Dist., 965 P.2d 433 (Or. Ct. App. 1998) (odors from sewage composting facility).

[12] *See, e.g.*, Prah v. Maretti, 321 N.W.2d 182 (Wis. 1982) (observing that structure on adjacent land that blocks sunlight from plaintiff's solar heating system might be a nuisance). *But see* Fountainebleau Hotel Corp. v. Forty-Five Twenty-Five, Inc., 114 So. 2d 357 (Fla. Dist. Ct. App. 1959) (hotel project that cast shadow on beach of plaintiff's adjacent hotel was not a nuisance).

[13] *See* Luensmann v. Zimmer-Zampese & Assocs., 103 S.W.3d 594 (Tex. App. 2003) (drag racing strip not nuisance *per se*).

in contrast, is a nuisance only because of the surrounding circumstances, such as its location and manner of operation. For example, a hog farm in the city probably constitutes a nuisance, while a hog farm in a rural area may not. The bulk of private nuisance law—and of this chapter as well—concerns the nuisance *per accidens*.

[2] Temporary Nuisance or Permanent Nuisance?

The law also distinguishes between the *temporary* or *continuing nuisance* and the *permanent nuisance*. In general, a permanent nuisance exists where the nuisance is certain or likely to continue in the future due to the physical nature of the condition, the cost of abatement, or other factors; any other nuisance is deemed temporary. For example, if B's cement plant has emitted dust every day since its operations began 20 years ago and there is no technology available to remedy this problem, it is probable that the emissions will continue in the future. The cement plant is a permanent nuisance. On the other hand, if B's cement plant emitted dust for only two years—before modern air pollution control technology was installed—the plant was only a temporary nuisance. The distinction is important in two settings: (1) the appropriate measure of damages (*see* § 29.06[B]) and (2) the running of the statute of limitations.[14]

§ 29.03 Evolution of Nuisance Law

As it evolved in post-medieval England, the law governing private nuisances was relatively straightforward. Only one factor was considered to determine whether nuisance liability existed: the *gravity of harm* to the land owner or occupant. A nuisance occurred when a person used his land in a manner that caused substantial harm to another's use and enjoyment of land. And the remedy for a nuisance was equally simple: the court issued an injunction against the harmful conduct. For example, suppose F started a pig farm in the backyard of his city house; if the resulting odor was so offensive that F's neighbors could not reasonably live in their homes, they could obtain an injunction closing the farm.[15] Thus, the law strictly protected the neighbors' property rights to use and enjoy their lands free from any nuisance.

These simple rules made sense in an agricultural society, but proved unduly rigid as industrialization proceeded. The main problem was that this approach failed to consider the utility of the conduct in question, and thereby tended to prevent new development. For instance, a new railroad might be shut down merely because its noise caused one farmer's chickens

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[14] For example, assume the jurisdiction has a three-year limitations period for bringing an action against a private nuisance. If the nuisance is permanent, the statute of limitations starts running on the first day the nuisance begins; thus, if such a nuisance began in 2007, a suit commenced in 2011 is too late. If the nuisance is temporary, the limitations period begins anew each day that the nuisance continues; a suit against a temporary nuisance that exists in 2011 is timely, regardless of when the nuisance began.

[15] *Cf.* Pendoley v. Ferreira, 187 N.E.2d 142 (Mass. 1963) (pig farm near residential subdivision was a nuisance).

to stop laying eggs. The benefits that the railroad provided to society in general were seen as irrelevant. In this manner, the law provided absolute protection for property rights regardless of the resulting social cost.

Early American courts accepted the English view. During the late nineteenth century, however, the law began to shift toward a more flexible approach: only an *unreasonable* land use would be considered a nuisance. The gravity of harm was important in assessing reasonableness, but courts tended to consider other factors as well (e.g., the locality of the use, the nature of the wrongful conduct). The evolution of American nuisance law during the twentieth century brought another major change, as courts gave increasing weight to *utility*. This affected both (1) the liability standard for determining when a private nuisance existed and (2) the appropriate remedy if a nuisance were found.

On the liability side, this change was sparked by the adoption of the first Restatement of Torts in 1939. The Restatement proposed a new liability standard known as the *balance of utilities* test: a use was unreasonable unless the utility of the actor's conduct outweighed the gravity of the harm.[16] The 1977 Restatement (Second) of Torts repeated this standard, but added an alternative basis for unreasonableness that ignores utility. Similarly, an injunction is no longer the automatic remedy once nuisance liability is established. Rather, most courts will *balance the equities* between the parties to determine if an injunction is appropriate; this process inevitably considers the utility of the defendant's conduct as a factor in the balance. Accordingly, the successful plaintiff may be awarded only damages.

§ 29.04 Elements of Private Nuisance

[A] Overview

The existence of a private nuisance is a question of fact that turns on the unique circumstances of each case. For instance, a halfway house for parolees might be deemed a nuisance under some circumstances, but not under others. Examples of land uses found to be nuisances on the facts of the particular case include: airports, bakeries, cement plants, cemeteries, dairies, dog kennels, feed lots,[17] funeral parlors, gas stations, halfway houses,[18] hog farms, hospitals, laundries, lumber mills, music stores, rifle ranges, roosters, slaughter houses, smelters, soup kitchens, stables, trees, and windmills.

Five elements are required to establish liability for a private nuisance. The plaintiff must prove that the defendant's conduct produced an

(1) intentional,[19]

[16] Restatement of Torts § 826.

[17] *See, e.g.*, Spur Indus., Inc. v. Del E. Webb Dev. Co., 494 P.2d 700 (Ariz. 1972).

[18] *See, e.g.*, Arkansas Release Guidance Found. v. Needler, 477 S.W.2d 821 (Ark. 1972).

[19] Under narrow circumstances (*see* [B], *below*), liability for a private nuisance may be based on unintentional conduct.

(2) nontrespassory,

(3) unreasonable, and

(4) substantial interference

(5) with the use and enjoyment of the plaintiff's land.

The second element—a nontrespassory interference—has already been discussed (*see* § 29.02[B]). The remaining elements are discussed below.

[B] "Intentional" Interference

As the Restatement (Second) of Torts explains, a person's harmful conduct is deemed "intentional" if *either* (a) he acts for the purpose of causing the harm *or* (b) he knows that the harm is resulting or is substantially certain to result from his conduct.[20]

Suppose that E's factory routinely emits extremely loud noise that keeps N, the owner of an adjacent house, awake all night. N complains, but the noise continues. It is possible that E's conduct is motivated by malice; perhaps E desires to harm N. If so, E's conduct is considered "intentional" under the first prong of the Restatement test. It is more likely, however, that E does not actually intend to harm N. Yet under the second prong of the Restatement test, E's conduct is still deemed "intentional," because E knows from N's complaint that the noise from the continued operation of the factory will cause harm to N.

For instance, in *Morgan v. High Penn Oil Co.*,[21] the defendant operated an oil refinery that periodically emitted nauseating gases and odors that sickened plaintiffs and other nearby landowners. Plaintiffs notified defendant about these problems and demanded that it stop the emissions. Thus, defendant knew that plaintiffs would be harmed, but continued to operate the refinery without stopping the emissions. Applying the second prong of the Restatement test, the North Carolina Supreme Court held that this conduct was intentional; the defendant "intentionally . . . caused noxious gases and odors to escape onto the nine acres of the plaintiffs to such a degree as to impair in a substantial manner the plaintiffs' use and enjoyment of their land."[22]

Under limited circumstances, a private nuisance may arise from unintentional conduct. The Restatement (Second) of Torts provides that nuisance liability may be premised on conduct that is "unintentional and otherwise actionable under the rules controlling liability for negligent or reckless conduct, or for abnormally dangerous conditions or activities."[23] In this special situation, it is not necessary to show that the defendant's conduct

[20] Restatement (Second) of Torts § 825.

[21] 77 S.E.2d 682 (N.C. 1953).

[22] *Id.* at 690. *But see* Waschak v. Moffat, 109 A.2d 310, 316 (Pa. 1954) (emission of gas from coal processing facility that discolored paint on plaintiffs' house was not intentional interference because defendants "did not know, and had no reason to be aware, that this particular gas would be so emitted and would have the effect upon the painted house").

[23] Restatement (Second) of Torts § 822(b).

is either intentional or unreasonable. For example, if E stores a large quantity of explosives in the backyard of his suburban house, this is probably an abnormally dangerous condition—and hence a nuisance—regardless of E's intent or the reasonableness of his conduct.

[C] "Unreasonable" Interference

[1] Overview

If nuisance law is indeed an "impenetrable jungle," the heart of the jungle is the concept of unreasonable interference. In the typical case, the other nuisance elements are easily proven; thus, the outcome usually hinges on whether the interference was unreasonable.

[2] Traditional Approach

Many states still follow the traditional, pre-Restatement approach to unreasonableness.[24] Some seem to equate unreasonableness with serious injury to the plaintiff, a view that harkens back to the gravity of harm approach.[25] Others employ a multi-factor test to assess unreasonableness, although the factors considered vary widely from state to state. Sample factors include: the character of the neighborhood; the nature of the wrongful conduct; its proximity to plaintiff's property; its frequency, continuity, and duration; and the nature and extent of resulting injury to the plaintiff.[26] A number of states also consider the utility of the defendant's conduct as one factor.

[3] Restatement Approach

[a] Basic Test: Balance of Utilities

Under the basic Restatement approach—adopted in about one-third of the states—an intentional interference is deemed "unreasonable" if the "gravity of the harm outweighs the utility of the actor's conduct."[27] In order to apply this standard, a court must compare (a) the "utility" of the

[24] *See generally* Jeff L. Lewin, Boomer *and the American Law of Nuisance: Past, Present, and Future,* 54 Alb. L. Rev. 189, 234–35 (1990). *See also* Jost v. Dairyland Power Coop., 172 N.W.2d 647, 653 (Wis. 1969) (noting that whether the "economic or social importance" of defendant's power plant "dwarfed the claim of a small farmer is of no consequence in this lawsuit").

[25] *Cf.* Morgan v. High Penn Oil Co., 77 S.E.2d 682 (N.C. 1953); Estancias Dallas Corp. v. Schultz, 500 S.W.2d 217 (Tex. Ct. Civ. App. 1973).

[26] *See, e.g.,* Escobar v. Continental Baking Co., 596 N.E.2d 394 (Mass. App. Ct. 1992) (bakery that generated noise was not a nuisance, because it was located in a industrial district and existed before plaintiff moved into area); Bove v. Donner-Hanna Coke Corp., 258 N.Y.S. 229 (App. Div. 1932) (coke oven that produced steam, dust, gases, and odors was not an unreasonable use because it was situated in an industrial district); Blanks v. Rawson, 370 S.E.2d 890 (S.C. Ct. App. 1988) (neighboring family's dog pen, basketball goal, and ten-foot fence were not nuisances).

[27] Restatement (Second) of Torts § 826(a).

defendant's conduct with (b) the "gravity of the harm" that this conduct causes to the plaintiff.[28] Thus, unreasonableness is determined on a case-by-case basis after considering the particular facts of each dispute.

The Restatement lists eight factors to be used in this balancing process. Five factors bear on the gravity of harm: the extent of the harm (mainly in terms of degree and duration); the character of the harm (physical damage or personal discomfort); the social value of the plaintiff's use and enjoyment; the suitability of the particular use or enjoyment invaded to the character of the locality; and the burden on the plaintiff of avoiding the harm.[29] The remaining three factors help assess the utility of the defendant's conduct: the social value of the primary purpose of the defendant's conduct; the suitability of the conduct to the character of the locality; and the impracticability of preventing or avoiding the interference.[30]

Consider a hypothetical application of the Restatement standard. Suppose that A operates a cement factory in a rural and uninhabited area.[31] The factory regularly emits large quantities of cement dust into the atmosphere, and there is no technological method of preventing these emissions. B purchases a tract of land next to the factory, builds a home, plants a flower garden, and soon discovers that the cement dust stunts the growth of one particular type of flower.

Under the Restatement standard, this interference is not unreasonable. The overall gravity of harm to B is quite low. The extent of harm is minor because B can grow other types of flowers in the garden. Although the nature of the harm is physical damage, it is almost trivial in character, and B still has almost all of the use and enjoyment of the property. The area appears to be unsuitable for a residential flower garden; B might be better off trying to grow this type of flower inside his home or perhaps in a small greenhouse. On the other hand, the utility of A's conduct is high. Cement production is crucial to the construction of homes and other buildings; the uninhabited area is well-suited to cement production; and A is unable to prevent the emissions without closing the factory.

[b] Alternative Test: Severe Harm

In 1977, the Restatement (Second) of Torts added an alternative test for "unreasonableness" that seemed to turn the law back toward the traditional

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[28] *See, e.g.*, Hendricks v. Stalnaker, 380 S.E.2d 198 (W. Va. 1989) (using Restatement test to conclude that water well was not a nuisance); *cf.* Page County Appliance Ctr., Inc. v. Honeywell, Inc., 347 N.W.2d 171 (Iowa 1984) (discussing use of Restatement-like standard to determine whether computer that produced radiation interfering with television reception was a nuisance); Rose v. Chaikin, 453 A.2d 1378 (N.J. Super. Ct. Ch. Div. 1982) (applying variant of Restatement standard to conclude that noisy windmill in residential area was a nuisance).

[29] Restatement (Second) of Torts § 827.

[30] Restatement (Second) of Torts § 828.

[31] Of course, these facts are quite different from those at issue in the celebrated Boomer v. Atlantic Cement Co., 309 N.Y.S.2d 312 (N.Y. 1970), discussed in § 29.06[A][The trial court in *Boomer* apparently did not apply the Restatement standard for unre ness, while the Court of Appeals considered only the appropriate remedy, not li

"gravity of harm" approach, and thereby generated extensive controversy. An intentional interference is deemed unreasonable under this test if "the harm caused by the conduct is serious and the financial burden of compensating for this and similar harm to others would not make the continuation of the activity not feasible."[32] The utility of the defendant's conduct is irrelevant under this alternative test.[33]

For example, imagine that N's steel factory produces noxious fumes that reach F's nearby farm, killing his entire corn crop. This harm is sufficiently severe to trigger the alternative test for unreasonableness, entitling F to relief if the other nuisance elements are established, as long as N can bear the cost while remaining in business.

[D] "Substantial" Interference

Slight inconveniences or petty annoyances are insufficient to establish nuisance liability. "The law does not concern itself with trifles, and therefore there must be a real and appreciable invasion of the plaintiff's interests before he can have a cause of action for . . . a private nuisance."[34] If a normal person living in the community would regard the interference as strongly offensive or seriously annoying, then the level of interference is substantial enough to impose liability. However, nuisance law does not protect hypersensitive persons.[35]

Suppose L's lemon-processing factory occasionally emits a mild lemon odor that wafts over nearby homes. The odor does not disturb normal residents, and thus is not a substantial interference; nearby residents A, B, and C, for example, cannot sue L for a private nuisance. Moreover, even if the odor causes severe discomfort to resident D, who is allergic to lemons, D cannot sue L on a private nuisance theory either, because D's discomfort stems from a unique sensitivity to lemons.

[E] Interference with "Use and Enjoyment of Land"

Nuisance liability arises only from interference with the interests of an owner, tenant, or other land occupant in the use and enjoyment of the land. This element is clearly met when the defendant's conduct causes physical injury to the land itself (e.g., if fumes from defendant's plant destroy plaintiff's apple orchard) or to tangible personal property located on the

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[32] Restatement (Second) of Torts § 826(b).

[33] *See also* Restatement (Second) of Torts § 829A (setting forth a similar alternative test); Crest Chevrolet-Oldsmobile-Cadillac, Inc. v. Willemsen, 384 N.W.2d 692 (Wis. 1986) (finding nuisance liability under § 826(b) test). *But see* Carpenter v. Double R Cattle Co., 701 P.2d 222 (Idaho 1985) (reversing court of appeal decision that endorsed § 826(b) test).

[34] Restatement (Second) of Torts § 821F cmt. c. For example, most courts are unwilling to impose nuisance liability based only on aesthetic concerns.

[35] *See, e.g.*, Page County Appliance Ctr., Inc. v. Honeywell, Inc., 347 N.W.2d 171 (Iowa 1984) (where radiation emitted by defendant's computer interfered with television reception at plaintiff's appliance store, case was remanded to trial court for consideration of claim that appliance store was an unusually sensitive use).

land (e.g., if the fumes ruin the paint on plaintiff's truck).[36] The same is true when the offending conduct causes death, bodily injury, sickness, or substantial discomfort or annoyance, to persons who are physically present on the land.[37]

§ 29.05 Defenses to Liability for Private Nuisance

[A] Generally

The range of defenses available in private nuisance cases is fairly broad. A plaintiff cannot recover if he consented or acquiesced to the nuisance. And the defense of laches may be available if the plaintiff seeks equitable relief. Similarly, if the defendant has continued the nuisance for a sufficiently long period to acquire a prescriptive easement for the conduct at issue, this is a complete defense. The statute of limitations may also bar the plaintiff's claim. Beyond this point, two additional defenses have special importance: the historic doctrine of "coming to the nuisance" and the modern "right-to-farm" statutes.[38]

[B] "Coming to the Nuisance"

Suppose B establishes a boat-manufacturing factory in a rural, uninhabited area; for 20 years, the factory routinely emits fumes, noise, and odors. H now purchases an adjacent parcel, builds a home on the land, and promptly complains that the emissions constitute a private nuisance. Can B assert any defense?

At one time, many courts recognized a defense known as "coming to the nuisance." A plaintiff like H who moved into the region after the offending conduct began was not entitled to recover; rather, the law protected the first-in-time use. Today, however, almost all courts reject this defense because it effectively allows first-in-time residents to stifle new development in the community.[39] Instead, a number of courts consider the plaintiff's "coming to the nuisance" as one factor in determining reasonableness.[40]

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[36] *See also* Prah v. Maretti, 321 N.W.2d 182 (Wis. 1982) (suggesting that interference with plaintiff's right to receive sunshine for his solar heating system might be a nuisance).

[37] *See* Powell on Real Property § 64.02[4] (Michael Allan Wolf ed., Matthew Bender).

[38] *See* Powell on Real Property § 64.05 (Michael Allan Wolf ed., Matthew Bender).

[39] *Cf.* Carpenter v. Double R Cattle Co., Inc., 669 P.2d 643 (Idaho Ct. App. 1983). *But cf.* Spur Industries, Inc. v. Del E. Webb Dev. Co., 494 P.2d 700 (Ariz. 1972) (suggesting that the defense would have barred recovery by developer who constructed new residential subdivision near existing cattle feedlot).

[40] *See* Powell on Real Property § 64.05[2] (Michael Allan Wolf ed., Matthew Bender).

[C] Right-to-Farm Statutes

"Right-to-farm" statutes in about two-thirds of the states create a special defense to nuisance liability.[41] Although the details vary from state to state, the general approach of these statutes is the same: farms and other agricultural activities are immune from nuisance liability if the facts giving rise to the claim have existed for a specified period of time. The goal of these statutes is to protect farms in urbanizing areas against nuisance claims.[42] In a sense, these statutes revive the "coming to the nuisance" defense in the specialized context of agricultural nuisances. For example, suppose that F owns a large farm in an agricultural area; he installs an irrigation system and operates it for 25 years. Fleeing the pressures of urban life, C purchases an adjacent farm; C soon discovers that F's irrigation pumps emit ear-splitting noise during the early morning hours. When C complains, F informs her that the pumps have been making the same amount of noise for 25 years. In all probability, the state's right-to-farm statute will prevent C from successfully suing F on a private nuisance theory.

§ 29.06 Remedies for Private Nuisance

[A] Injunction

[1] "Balance of Equities" Approach

The traditional remedy in private nuisance cases was an injunction against the offending conduct. This rule reflected an absolutist view of property rights: every owner was entitled to enjoy his land free from any nuisance. If a person creating a nuisance could take away this right simply by paying compensation to the owner in the form of damages, this would be the equivalent of eminent domain—an owner would be compelled to sell the right over his objection. Because only the government has eminent domain power, courts reasoned that an injunction was necessary to protect the owner's right. The social utility of the defendant's conduct was seen as irrelevant.

This view began to break down in the late nineteenth century, as courts became increasingly concerned that it would disrupt industrial development.[43] In almost all jurisdictions today, the plaintiff no longer has an automatic right to an injunction. Instead, the court will use a balancing test—usually called "balancing the equities"—to determine if an injunction is appropriate on the facts of the case. By far, the single most important factor in this process is the relative economic impact of the injunction on the parties. All other things being equal, then, a court will issue an

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[41] *See, e.g.*, Tex. Agric. Code Ann. § 251.004. *But see* Bormann v. Board of Supervisors, 584 N.W.2d 309 (Iowa 1998) (holding right-to-farm law was a regulatory taking that violated the Takings Clause of the Fifth Amendment).

[42] *See, e.g.*, Buchanan v. Simplot Feeders Ltd. Partnership, 952 P.2d 610 (Wash. 1998).

[43] *See generally* Paul M. Kurtz, *Nineteenth Century Anti-Entrepreneurial Nuisance Injunctions—Avoiding the Chancellor*, 17 Wm. & Mary L. Rev. 621 (1976).

injunction only if the resulting benefit to the plaintiff is greater than the resulting damage to the defendant. However, the public interest in continuing or preventing the defendant's conduct is usually weighed in the balance as well. If an injunction is refused, the plaintiff receives compensatory damages (*see* [B], *below*).

For example, suppose a court determines that D's noisy dance studio is a nuisance. It will cost D $100,000 to install soundproofing materials to eliminate the noise. But the noise problem only lowers the value of P's land by $1,000. The social value of D's use is relatively low and no other neighbors are disturbed by the noise, so the public interest is a neutral factor. Granting an injunction here would impose $100,000 in costs on D, but only confer $1,000 in benefits on P. Because the costs outweigh the benefits, the court will deny an injunction and instead award $1,000 in damages to P.

[2] *Boomer v. Atlantic Cement Co.*

[a] Overview

The well-known New York decision of *Boomer v. Atlantic Cement Co.*[44] exemplifies the current approach. Before *Boomer* was decided in 1970, some courts had already adopted the "balance of equities" standard. But New York still followed the view that an injunction was automatic if a nuisance caused substantial continuing harm. In *Boomer,* the New York Court of Appeals adopted the emerging modern rule and thereby created a precedent that greatly influenced the evolution of nuisance law in other jurisdictions.

The facts of *Boomer* are simple. Defendant, Atlantic Cement Co., operated a large cement plant near Albany, New York. The facility emitted dirt, smoke, and vibrations that injured lands owned by Boomer and other plaintiffs. Apparently without considering the utility of Atlantic's conduct, the trial court concluded that the plant was a private nuisance; but it refused to issue an injunction. Instead, the court awarded plaintiffs compensatory damages for their injuries to date and authorized them to bring suits in the future as further injury was suffered. For the guidance of the parties, however, the court determined that plaintiffs' total permanent damages were $185,000. Plaintiffs appealed.

[b] Rationale

The court of appeals stressed that compliance with the traditional rule would close the plant immediately. There was no known technological method to control the dust and other by-products from the plant. Accordingly, the only way to comply with an injunction to abate the emissions would be to stop operations altogether. This would eliminate most of the value in Atlantic's $45,000,000 plant and put more than 300 employees out of work. With little analysis, the court announced that it was "fully agreed" to avoid the "drastic remedy" of closing the plant.[45] The court apparently

[44] 309 N.Y.S.2d 312 (N.Y. 1970).

[45] *Id.* at 316.

reached this result by balancing the equities between the parties, although its opinion is remarkably vague. The harm to the defendant and the public caused by granting an injunction (loss of the $45,000,000 plant, elimination of 300 jobs, and—presumably—higher cement prices for the public) vastly outweighed the benefits to plaintiffs (avoidance of $185,000 in damages). As the court expressed it, there is "large disparity in economic consequences of the nuisance and of the injunction."[46]

Thus, the court considered alternative remedies that would avoid plant closure. One option was granting an injunction, but postponing its effect to allow research on technology that would prevent the emissions. But this technology was unlikely to be developed in the short run, and Atlantic had no ability to control the rate of research. In addition, such an injunction would give plaintiffs immense and unfair economic leverage over Atlantic. If research efforts were unsuccessful, Atlantic might be forced to pay plaintiffs a price far in excess of their actual damages in order to settle the case and thus eliminate the injunction. Accordingly, the court chose a second option: directing the trial court to grant an injunction to be vacated when Atlantic paid permanent damages to plaintiffs. In effect, this essentially awarded plaintiffs compensatory damages in lieu of an injunction.

[c] Reflections on *Boomer*

Boomer is probably the most celebrated decision in modern nuisance law. It generated immediate scholarly controversy which continues today;[47] and it is customarily included in property casebooks. Why?

The main reason is that *Boomer* marks a turning point in our approach to the appropriate remedy for a private nuisance. The basic scenario in *Boomer*—a socially-valuable factory causing comparatively minor damage to a small group of plaintiffs—was a common one. In many jurisdictions, pre-*Boomer* courts confronted with this scenario could choose from only two outcomes: (a) find no nuisance (thereby allowing the factory to continue harming plaintiffs) or (b) issue an injunction against the nuisance (thereby either closing the socially-valuable factory or, more likely, forcing the factory owner to pay plaintiffs a "windfall" settlement to eliminate the injunction). Neither option was entirely palatable. *Boomer* provided a third option—the payment of permanent damages in lieu of an injunction—essentially by shifting the "balancing" standard from liability analysis into remedy analysis. It became an important precedent that influenced other jurisdictions to adopt the same approach.[48]

At the same time, *Boomer* sparked new scholarly interest in the application of economic principles to nuisance law. The damages remedy is usually

[46] *Id.* at 315.

[47] *See, e.g.*, Daniel A. Farber, *The Story of* Boomer: *Pollution and the Common Law*, 32 Ecology L.Q. 113 (2005); *Symposium on Nuisance Law: Twenty Years After* Boomer v. Atlantic Cement Co., 54 Alb. L. Rev. 171 (1990).

[48] As Joel Dobris summarized, "no *Boomer*, no change." *See* Joel C. Dobris, Boomer *Twenty Years Later: An Introduction, with Some Footnotes About "Theory,"* 54 Alb. L. Rev. 171, 172 (1990).

seen as a more efficient solution than an injunction, because it helps to allocate resources to the most valuable use. The *Boomer* court properly concluded that a damages award was the cheapest method of resolving the conflict between the parties, thereby maximizing overall utility. It was more efficient to have Atlantic pay permanent damages to plaintiffs (estimated at $185,000) than to issue an injunction that would solve the problem by shutting down the factory (at the cost of the $45,000,000 plant, the 300 jobs, and higher cement prices to the public). But why not issue an injunction and then allow the parties to negotiate their way to a settlement, consistent with the Coase Theorem (*see* § 2.05[A], *supra*)? Richard Posner explains that this approach would be inefficient due to high transaction costs. The parties in *Boomer,* he argues, were locked into a bilateral monopoly. Any price for settling the case between $185,000 and $45,000,000 would have benefited both sides more than if an injunction were issued. Because of this large bargaining range, "it would have paid each party to invest substantial resources to engross as much of it as possible."[49] For example, Atlantic might have spent $2,000,000 in attorneys fees to negotiate the settlement, while the Boomer side could have spent the same amount. The court's solution—an award of permanent damages—reached an efficient outcome without the need for the parties to incur such high transaction costs. Inspired in part by *Boomer,* an extensive body of law and economics scholarship has contributed to the continued evolution of American nuisance law.

[3] An Alternative Approach: The Compensated Injunction

Another remedial option is to issue an injunction against the nuisance, but require the plaintiff to compensate the defendant for costs of compliance. The pioneer decision adopting this alternative is *Spur Industries, Inc. v. Del E. Webb Development Co.*[50] Defendant Spur operated a commercial feedlot for up to 30,000 cattle in an agricultural area. Plaintiff later developed a residential community on nearby land, and sued to enjoin the feedlot as a nuisance because of the flies and odor that it produced. The Arizona Supreme Court agreed that the public interest justified an injunction closing the feedlot. Yet, because plaintiff was the direct cause of the problem, the court exercised its equitable powers to require plaintiff to indemnify the defendant for the costs of moving or shutting down. "It does not seem harsh to require a developer, who has taken advantage of the lesser land values in a rural area as well as the availability of large tracts of land on which to build and develop a new town or city in the area, to indemnify those who are forced to leave as a result."[51] *Spur* is a controversial decision that has attracted much scholarly interest,[52] but has not been followed by other courts.

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[49] Richard A. Posner, Economic Analysis of Law 71 (6th ed. 2003).

[50] 494 P.2d 700 (Ariz. 1972).

[51] *Id.* at 708.

[52] *See* Jeff L. Lewin, *Compensated Injunctions and the Evolution of Nuisance Law,* 71 Iowa L. Rev. 775 (1986); *see also* Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral,* 85 Harv. L. Rev. 1089 (1972).

[B] Damages

The appropriate measure of compensatory damages turns on whether the nuisance is deemed permanent or temporary. If the nuisance is permanent, the plaintiff receives all damages—covering both past and future harm—in one lawsuit. Damages are measured by the extent to which the nuisance diminishes the fair market value of the affected property. For example, suppose the court determines that D's noisy smelter is a nuisance and further concludes that the noise will never be abated. If this permanent noise problem reduces the value of P's land from $200,000 to $150,000, P recovers $50,000 in damages.

On the other hand, if the nuisance is temporary or "continuing," the plaintiff only recovers damages that compensate for past harm; the plaintiff may bring successive lawsuits in the future as additional damages are incurred. In this setting, the plaintiff recovers damages equal to the diminished rental or use value of the property, together with any special damages. Suppose that D installs new noise suppression equipment at the smelter, completely eliminating the problem. If the noise problem lasted two years and reduced the rental value of P's land from $15,000 to $12,000 per year, P recovers $6,000 in compensatory damages.

§ 29.07 Public Nuisance

A *public nuisance* is "an unreasonable interference with a right common to the general public."[53] Although it sometimes overlaps with private nuisance law, the public nuisance doctrine is fundamentally different. A private nuisance merely interferes with the rights of a particular person or small number of persons in the use and enjoyment of their land. In contrast, the public nuisance doctrine involves conduct that interferes with the rights of the public in general, in situations that go far beyond the use and enjoyment of land. However, under some circumstances, the same conduct may create both a public nuisance and a private nuisance.[54]

Virtually any intentional conduct that unreasonably interferes with the public health, safety, welfare, or morals may constitute a public nuisance. Factors that bear on unreasonableness include:

(1) whether the conduct "involves a significant interference" with the public heath, safety, peace, comfort, or convenience;

(2) whether the conduct is prohibited by a statute, ordinance, or regulation; and

(3) whether the conduct is continuing or permanent and has a "significant effect upon the public right."[55]

Examples of conduct that normally constitutes a public nuisance include keeping diseased cattle, running a house of prostitution, operating an

[53] Restatement (Second) of Torts § 821B(1).

[54] *See, e.g.*, Spur Indus., Inc. v. Del E. Webb Dev. Co., 494 P.2d 700 (Ariz. 1972) (finding that cattle feedlot was both a public nuisance and a private nuisance).

[55] Restatement (Second) of Torts § 821B(2).

unlicensed casino, maintaining a vicious dog, holding a very loud rock concert, and detonating explosives on a residential street.[56]

The typical plaintiff in a public nuisance action is a city or other governmental entity that brings suit on behalf of the general public and seeks damages, an injunction, or an abatement order. A private party may sue on this theory only if "special injury" can be demonstrated.[57] In this context, special injury means a "harm of a kind different from that suffered by the general public."[58] The rationale for the special injury rule is that it prevents a multiplicity of identical lawsuits from being filed against the same defendant, which is seen as an unfair burden.

Suppose F's factory routinely emits invisible radiation that completely disrupts television reception in Town T; as a result, no one in town can watch television. Because the radiation unreasonably interferes with the public welfare, it probably constitutes a public nuisance; Town T may accordingly sue F. Here, resident V has not suffered harm that is different in kind from the harm suffered by other residents; true, V cannot watch television, but neither can anyone else in town. Accordingly, V cannot demonstrate special injury and hence cannot bring suit. Suppose instead that the radiation tragically causes V to contract lung cancer. Because this harm is different in kind, V may sue F.

§ 29.08 Special Problem: Landowner Liability for Hazardous Substance Contamination

The United States enjoyed an unprecedented economic boom after World War II. But this post-war prosperity came at a price. Industries such as chemical manufacturing, plastics, petroleum refining, electronics, mining, and agriculture began generating large quantities of chemical wastes that threatened both human health and the environment. The vast bulk of these hazardous wastes were disposed of improperly, often through "midnight dumping" in remote regions. As a result, DDT, dioxin, PCBs, formaldehyde, vinyl chloride, and similar toxic substances contaminated the land surface and imperiled supplies of drinking water. Nuisance and other common law doctrines were blunt weapons against this new danger.

Faced with a potential public health crisis, Congress enacted the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA").[59] CERCLA imposes *strict liability* for the cleanup of hazardous substances on four categories of persons:

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[56] Would the emission of greenhouse gasses that contribute to global climate change constitute a public nuisance? For a discussion of this question, see Thomas W. Merrill, *Global Warming as a Public Nuisance*, 30 Colum. J. Envtl. L. 293 (2005).

[57] *See, e.g.*, Armory Park Neighborhood Ass'n v. Episcopal Community Servs., 712 P.2d 914 (Ariz. 1985) (neighbors of center that provided free meals to indigent had suffered special injury and thus had standing to maintain a public nuisance action); Mark v. Oregon, 974 P.2d 716 (Or. Ct. App. 1999) (residents near state-owned beach area where public nudity occurred could sue on both private and public nuisance theories).

[58] Restatement (Second) of Torts § 821C.

[59] 42 U.S.C. §§ 9601 et seq. For an overview of CERCLA, see John G. Sprankling & Gregory S. Weber, The Law of Hazardous Wastes and Toxic Substances in a Nutshell (1997).

(1) the current "owner" or "operator" of the land;

(2) persons who were owners or operators of the land at the time of disposal;

(3) persons who arranged for disposal or treatment; and

(4) persons who transported the substances to the land.

However, under limited circumstances, an owner may qualify for protection under the *innocent landowner* or *innocent buyer* defense.[60] This defense arises when the owner

(1) acquires the land after the disposal of the hazardous substance;

(2) conducts a pre-purchase investigation into the previous ownership and uses of the land "in accordance with generally accepted good commercial and customary standards and practices";[61]

(3) has no reason to know about the contamination; and

(4) meets various other criteria.

Suppose B, a developer, is considering the purchase of an abandoned industrial site owned by I. B walks across the land—which is covered with grass and wildflowers—and observes no contamination. She purchases the land for $100,000, begins grading the site in preparation for building a condominium project, and discovers toxic contamination in the soil from I's past operations. The federal Environmental Protection Agency investigates the site and estimates that the cleanup will cost $5,000,000. If EPA cleans up the site and then sues B for reimbursement, B will be personally liable for the entire cleanup cost as the current owner *unless* she qualifies for the innocent landowner defense. The main issue here is the adequacy of B's pre-purchase inspection. Given B's sophistication as a developer and the past industrial use of the land, her visual inspection was probably insufficient. Of course, if the I-B sales contract contains a warranty from I that the land is uncontaminated—and I is still solvent—B will be able to obtain indemnity from I. But B's indemnity right against I is not a defense to EPA's action for recovery of cleanup costs.

Now suppose that the toxic contamination on B's land pollutes the underlying groundwater; the plume of toxic groundwater eventually reaches and contaminates N's adjacent parcel. N might sue B for private nuisance. However, CERCLA also creates a cause of action in private parties. Therefore, N may prefer to clean up the contamination and sue B for reimbursement under CERCLA.

60 42 U.S.C. §§ 9601(35), 9607(b)(3).

61 42 U.S.C. § 9601(35)(B).

Chapter 30

TRESPASS

SYNOPSIS

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[A] Trespass Defined
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§ 30.03 Trespass and Rights of Migrant Farmworkers
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§ 30.01 The Right to Exclude

The common law cherished an owner's virtually absolute right to exclude others from his land.[1] The law of trespass, which evolved to safeguard this right, was, as a result, extraordinarily broad.

Blackstone expressed this common law view by defining property as "that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe."[2] Blackstone's eighteenth-century approach was quite influential in the young United States. As the Supreme Court ultimately explained, the right to exclude is "one of the most essential sticks in the bundle of rights that are commonly characterized as property."[3]

Why prohibit trespass? The main reason is utilitarian. As Richard Posner explains, the law protects a landowner's right to exclusive possession in order to maximize the efficient use of land.[4] Suppose farmer A plants

[1] *See generally* David J. Bederman, *The Curious Resurrection of Custom: Beach Access and Judicial Takings*, 96 Colum. L. Rev. 1375 (1996); Curtis J. Berger, PruneYard *Revisited: Political Activity on Private Lands*, 66 N.Y.U. L. Rev. 633 (1991); Kelvin H. Dickinson, *Mistaken Improvers of Real Estate*, 64 N.C. L. Rev. 37 (1985); Thomas W. Merrill, *Trespass, Nuisance, and the Costs of Determining Property Rights*, 14 J. Legal Stud. 13 (1985).

[2] Erlich's Blackstone 113 (J.W. Erlich, ed., Nourse 1959).

[3] Kaiser Aetna v. United States, 444 U.S. 164, 176 (1979).

[4] *See generally* Richard A. Posner, Economic Analysis of Law 32–34 (6th ed. 2003).

wheat; he waters, weeds, and fertilizes his growing crop. When the wheat is ripe, T, a neighbor, enters the field, harvests the wheat, and sells it at market. In a world without trespass liability, A has no claim against T. Absent the protection afforded by the trespass doctrine, Posner argues, owners like A have no incentive to use their land productively. Why would A expend time and money in raising wheat if T or anyone else may appropriate the crop? By protecting owners like A, the trespass doctrine encourages an owner to undertake the investment necessary for optimum use of land. This results in maximum production of food and other goods that benefit society in general. Another important—but distinctly secondary theme—is that the trespass doctrine minimizes the risk of violence. If the law did not protect A's rights, he might be tempted to defend his wheat field through self-help (e.g., with a shotgun).[5]

In recent decades, the scope of the right to exclude—and consequently the trespass doctrine—has been curtailed for reasons of public policy. The productivity rationale underlying Posner's simple model has less force, for example, when applied to residential or commercial property. And other, countervailing policies have emerged. The absolutism of traditional trespass law is out of step with the needs of our increasingly crowded society. Thus, for example, the landlord's common law right to refuse to rent to a prospective tenant, or to evict an existing tenant, is no longer absolute (*see* §§ 16.02, 19.04). Similarly, a business open to the public cannot exclude potential customers based on discrimination.[6]

There is a clear movement toward crafting new exceptions to trespass liability in diverse areas, including beach access, migrant farmworker housing, and free speech activities in privately-owned shopping centers. As the New Jersey Supreme Court observed in *State v. Shack*, while overturning a criminal trespass conviction: "Property rights serve human values. They are recognized to that end, and are limited by it."[7] Courts are slowly building on this utilitarian sentiment by limiting the right to exclude in specialized situations.

§ 30.02 What Is a Trespass?

[A] Trespass Defined

At common law, any intentional and unprivileged entry onto land owned or occupied by another constituted a trespass. The scope of this doctrine was quite expansive, reflecting an absolutist view of property rights. The modern law of trespass—as reflected by the Restatement (Second) of Torts—largely follows the common law approach. Contemporary

[5] *See* Jacque v. Steenberg Homes, Inc., 563 N.W.2d 154 (Wis. 1997) (affirming $100,000 punitive damages award against company that delivered mobile home by trespassing across plaintiffs' field, based in part on the law's policy against self-help remedies).

[6] 42 U.S.C. §§ 2000a et seq.; *see also* U.S. Jaycees v. McClure, 305 N.W.2d 764 (Minn. 1981) (effort of Jaycees club to exclude women members violated state law).

[7] 277 A.2d 369, 372 (N.J. 1971).

developments in the law have focused on carving out special exceptions to liability, not on changing the basic liability standards.

The element of intent has a special meaning in trespass law. A trespasser is strictly liable; good faith, knowledge, and fault are irrelevant.[8] T commits a trespass, for example, if he merely walks across O's land, mistakenly believing it to be his own. The trespass doctrine requires only that T intend to enter onto the land as a matter of free choice, not that he had a subjective intent to trespass or even knew he was trespassing. T's mistaken belief that he actually owns the land is not a defense, although it will presumably bar punitive damages.

Although trespass always involves a physical invasion, a trespass may occur without any personal entry by the trespasser. T will be liable in trespass, for example, if he causes a thing or a third person to enter O's land.[9] Further, although most trespass cases involve entry onto the surface of land, the doctrine also applies to entries below the land surface (e.g., through tunnels or caves)[10] and—at least partially—to entries in the air space over the land.[11]

A trespasser is liable even if the entry causes no actual damage.[12] A court will hold a trespasser like T liable to O for nominal damages and, upon O's request, will routinely enjoin any further trespass. The recent decision of *Jacque v. Steenberg Homes, Inc.*[13] illustrates the potential severity of this rule. The defendant, attempting to deliver a mobile home, discovered that the only road to the delivery site was nearly impassible. The road was covered with seven feet of snow, and contained a sharp curve that could be negotiated only with extensive labor. Defendant accordingly delivered the mobile home by crossing plaintiffs' snow-covered field, over their strong objection. Although the crossing caused no harm at all to the land, plaintiffs received $1 in nominal damages and $100,000 in punitive damages, a result affirmed by the Wisconsin Supreme Court.

[B] Distinguishing Trespass from Nuisance

The boundary between trespass and nuisance—once quite clear—is quite murky today. Traditionally, the distinction turned on the nature of the intrusion. Trespass protected the owner's right to exclusive *possession*. Any physical entry onto another's land was deemed to interfere with possession, and was thus a trespass. For example, T could commit an actionable entry if (a) he crossed O's land, (b) he tossed rocks onto O's land, or (c) debris from his factory fell onto O's land.

[8] Restatement (Second) of Torts §§ 158, 164.

[9] Restatement (Second) of Torts § 158.

[10] *Cf.* Edwards v. Sims, 24 S.W.2d 619 (Ky. Ct. App. 1929) (suggesting entry into cave beneath owner's property constituted a trespass).

[11] *But see* Geller v. Brownstone Condominium Ass'n, 402 N.E.2d 807 (Ill. App. Ct. 1980) (temporary construction scaffolding intruding into air space from adjacent land was not a trespass).

[12] Restatement (Second) of Torts § 163.

[13] 563 N.W.2d 154 (Wis. 1997).

Nuisance, on the other hand, protected the owner's *use and enjoyment* of land (*see* § 29.02). Any conduct—other than physical entry—that interfered with the use and enjoyment of land was accordingly governed by nuisance law. Thus, for example, if T emitted smoke, odors, noise, vibration, light, or gases onto O's property, this was a nuisance, not a trespass.

Today, many courts reject this simplistic distinction. In a very real sense—reflecting the limited scientific knowledge of the era—the common law distinction ultimately turned on *visibility*: were the invading particles large enough to be visible (usually a trespass), or so small as to be invisible (a nuisance)? Courts are now increasingly willing to stretch the boundary of trespass (e.g., in air pollution or toxic contamination cases) to encompass microscopic particles, usually by focusing on the nature of the harm caused, not the size of the particle.[14] Thus, in borderline cases, a plaintiff may choose to sue in either trespass or nuisance.

[C] General Exceptions to Trespass Liability

An entry under a legally-recognized privilege does not constitute a trespass. The classic example of a privileged entry is one made with the landowner's *consent*. If owner O invites plumber P onto O's land to fix a leaky pipe, for example, P's entry is privileged.[15] The other main privilege may be broadly described as *necessity*. For example, a firefighter may enter private property to save an adjacent house from fire, just as a police officer may enter to arrest a suspect. Similarly, private persons are privileged to enter another's land in an emergency situation (e.g., while fleeing from an attacking bear).[16]

§ 30.03 Trespass and Rights of Migrant Farmworkers

O, a farmer, employs and houses migrant farmworkers on his property. P, a social worker, wishes to visit one of the farmworkers. Does the trespass doctrine permit O to exclude P from the farm?

This question was posed in the celebrated case of *State v. Shack*.[17] Two employees of government-funded organizations entered upon a privately-owned New Jersey farm in order to aid migrant farmworkers housed on the land. One, a health care provider, needed to remove sutures from a farmworker; the other, an attorney, wanted to discuss a legal problem with another worker. The farm owner, one Tedesco, confronted them with his shotgun and demanded that they leave the land. When they refused,

[14] *But see* Adams v. Cleveland-Cliffs Iron Co., 602 N.W.2d 215 (Mich. Ct. App. 1999) (entry of dust particles was not a trespass).

[15] *See, e.g.*, Desnick v. American Broadcasting Companies, Inc., 44 F.3d 1345 (7th Cir. 1995) (even though owner's consent to entry was obtained by fraud, entry was not trespass).

[16] *See generally* Powell on Real Property § 64A.02[2] (Michael Allan Wolf ed., Matthew Bender).

[17] 277 A.2d 369 (N.J. 1971). *See also* Michele Cortese, Note, *Property Rights and Human Values: A Right of Access to Private Property for Tenant Organizers*, 17 Colum. Hum. Rts. L. Rev. 257 (1986).

Tedesco then summoned a state trooper to eject them and initiated a successful criminal prosecution for trespass. The New Jersey Supreme Court overturned the convictions, finding that defendants' entry was privileged. Refusing to reach defendants' constitutional claims, the court grounded its ruling in New Jersey law; "under our State law the ownership of real property does not include the right to bar access to governmental services available to migrant workers."[18]

The rationale for this decision, however, is far from clear. The court seemed to suggest that the traditional privileges of consent and necessity contributed to its ruling. Having opened up his property to house farmworkers, perhaps Tedesco impliedly consented to entries by at least some visitors. Similarly, the visits of the health care worker and the attorney were arguably prompted by considerations of necessity. Medical care, for instance, is a basic human necessity. On the other hand, why couldn't such services have been provided off Tedesco's land? Another view of the case relies on a federal preemption argument; the federal statutes creating the publicly-funded programs at issue implicitly established a right of access across private land in order to implement the program goals, which impliedly preempted the state law of trespass.

At bottom, however, *Shack* appears to rest on a more abstract utilitarian analysis. The court observed that rights are not absolute, but rather are relative. Thus, the law requires an accommodation between the right of a property owner and the "right of individuals who are parties with him in consensual transactions relating to the use of the property."[19] Trying to strike a fair adjustment of the competing needs of the parties, the court concluded that Tedesco could not isolate a farmworker "in any respect significant for the worker's well-being."[20] He was thus obligated to allow access by employees of government agencies and charitable organizations providing services to migrant workers.[21]

§ 30.04 Trespass and Freedom of Speech

[A] Rights Under Federal Constitution

Suppose P wishes to distribute Communist party literature to customers at a shopping center owned by O. Can O enjoin this conduct as a trespass? Or may P exercise her right of free speech on O's property?

The First Amendment protects the right of freedom of speech from state action, not private action. Accordingly, while P has a right to distribute her literature on public property, this right does not necessarily extend to private property as well. One might argue, of course, that O's shopping

[18] State v. Shack, 277 A.2d 369, 371–72 (N.J. 1971).

[19] *Id.* at 374.

[20] *Id.*

[21] *See also* Uston v. Resorts Int'l Hotel, Inc., 445 A.2d 370 (N.J. 1982) (partially relying on *State v. Shack* in holding Atlantic City casino could not exclude "card counter" from blackjack tables).

center should be subject to the First Amendment because it is the functional equivalent of a small town.[22] Like the business district of a small town, the typical shopping center has its own sidewalks, parking spaces, traffic controls, security force, fire protection, and so forth. Further, the shopping center serves both commercial and social functions. More than a mere collection of stores, it increasingly serves as a social meeting place. However, the Supreme Court rejected this argument in *Lloyd Corp. v. Tanner*,[23] reasoning that property does not lose its private character merely because the public is invited to use it for specific purposes. Thus, the First Amendment will probably not shelter P from trespass liability.

[B] Rights Under State Constitutions

The right to free speech contained in state constitutions, however, is sometimes broader than the First Amendment protection. A number of high-profile decisions have examined whether state constitutions allow citizens to exercise a right of freedom of speech at privately-owned shopping centers, with mixed results.[24] Although varying widely in other respects, these decisions typically focus on one issue: is today's shopping center the functional equivalent of yesterday's downtown business district? Answering "yes," courts in California, New Jersey, and a few other states interpret their state constitutions to protect such speech by P and other citizens. However, most jurisdictions find no state constitutional right under these circumstances.[25]

The leading decision exploring such a state constitutional right is *PruneYard Shopping Center v. Robins*.[26] The case arose when a group of high school students sought to enlist public support to oppose a pending United Nations resolution condemning "Zionism" by distributing literature and soliciting petition signatures in a privately-owned California shopping mall. Politely ejected from the mall by a security guard, they sued to obtain access. The California Supreme Court held that the state constitution protected the reasonably-exercised right of free speech even in private shopping centers. The mall owners subsequently attacked this decision before the United States Supreme Court, claiming, inter alia, that it constituted an illegal taking and violated their own federal right to freedom of speech. The Court found that no taking had occurred, reasoning that the

[22] *See* Marsh v. Alabama, 326 U.S. 501 (1946) (First Amendment's guarantee of free speech applied to privately-owned "company town").

[23] 407 U.S. 551 (1972).

[24] *See, e.g.*, New Jersey Coalition Against War in the Middle East v. J.M.B. Realty Corp., 650 A.2d 757 (N.J. 1994) (New Jersey constitution protects right to distribute leaflets at shopping center); Western Pennsylvania Socialist Workers 1982 Campaign v. Connecticut Gen. Life Ins. Co., 515 A.2d 1331 (Pa. 1986) (Pennsylvania constitution does not protect right to collect signatures on nomination petition at shopping center).

[25] *See, e.g.*, United Food & Comm. Workers Union v. Crystal Mall Assocs., L.P., 852 A.2d 659 (Conn. 2004); Cross v. Texas, 2004 Tex. App. LEXIS 6098.

[26] 447 U.S. 74 (1980). *See also* Curtis J. Berger, PruneYard *Revisited: Political Activity on Private Lands*, 66 N.Y.U. L. Rev. 633 (1991).

owners lacked any evidence suggesting that such activity would unreasonably impair the value of their land as a shopping center. Any potential adverse impact, the Court observed, could be mitigated by reasonable time, place, and manner regulations. Nor did the ruling interfere with the owners' own freedom of speech. It was unlikely that patrons would conclude the owners were endorsing the views in question and, in any event, the owners could avoid this danger by expressly disclaiming any sponsorship.

§ 30.05 Trespass and Beach Access

[A] Who Owns the Beach?

Roman law held that the ocean—and, by extension, ocean beaches as well—could not be privately owned, but rather was common property open to all. The *public trust doctrine* produces much the same result in the United States. It holds that state governments act as trustees over navigable waters and certain related lands in order to protect the public's right to use these areas for navigation, commerce, fishing, swimming, and other activities.

Under this doctrine, the public has a clear right to use wet-sand ocean beaches *below* the mean high tide line; these beaches are subject to the "ebb and flow" of the tide.[27] Suppose P, a member of the public, wishes to use the wet-sand beach. May P cross O's land—the dry-sand beach *above* the mean high tide line—to reach the wet-sand beach? Even better, may P use O's dry-sand beach? Or would such acts constitute trespasses?

[B] Extending the Public Trust Doctrine

One judicial approach to these issues relies on the public trust doctrine itself, as illustrated by the New Jersey Supreme Court's decision in *Matthews v. Bay Head Improvement Association.*[28] There, the defendant association effectively controlled public access to most of the beach in the Borough of Bay Head, New Jersey; it owned the dry-sand parcels that separated the wet-sand beach from the ends of seven public streets, and leased or owned much of the rest of the dry-sand beach. Except for association members, no one could travel from these street ends to reach the wet-sand beach without the association's consent. The court first concluded that the public had a right of access across the association's dry-sand beach parcels. To deny public access, it reasoned, would seriously threaten or perhaps even nullify the public trust doctrine.

Extending this line of analysis, the *Matthews* court held that the public was entitled to use and occupy the dry-sand beach itself where this use was essential or reasonably necessary for enjoyment of the ocean. For example,

[27] *See, e.g.*, Phillips Petroleum Co. v. Mississippi, 484 U.S. 469 (1988); Matthews v. Bay Head Improvement Ass'n, 471 A.2d 355 (N.J. 1984); Opinion of the Justices (Public Use of Coastal Beaches), 649 A.2d 604 (N.H. 1994).

[28] 471 A.2d 355 (N.J. 1984).

it noted that swimming must be accompanied by periods of rest on land; during high tides, the effective exercise of this right required that a swimmer be allowed to rest on the dry-sand beach.

The result in *Matthews* rests heavily on the identity of the defendant, whose relationship with the Borough and virtual monopoly over the local beach gave it a quasi-public status. A city or other public entity—as a component of the state itself—is obviously restricted by the public trust doctrine. Just as a city would be obligated to provide general access to a city beach, the court ruled that the defendant association must provide beach access for members of the public, such as our hypothetical beach-lover P. *Matthews* offers little guidance, however, on whether the public trust doctrine imposes similar obligations on an ordinary private landowner.[29]

[C] Other Approaches

Two other approaches are utilized in access disputes where there is a long history of public use. Four states with extensive coastlines—Florida, Hawaii, Oregon, and Texas—rely on customary rights. In these states, lengthy and uninterrupted public use of the beach creates a perpetual right of access.[30]

Alternatively, a few states apply the prescriptive easement doctrine in these circumstances (*see* § 32.06). It is often difficult, however, to establish the elements of the doctrine in beach access cases. Continuous use by the public is hard to prove as a factual matter. And because many courts presume that the owner consented to prior public access, adverse use is rarely established.

§ 30.06 Encroachments

Suppose T mistakenly builds her new house in the wrong location: it extends two inches over her lot line onto the adjoining lot owned by O. What is O's remedy for this trespass?

A permanent or continuing trespass caused by the construction of a building or other improvement that *partially* extends onto another's land is known as an *encroachment*. The common law treated an encroachment just like any other type of trespass. Thus, under the traditional view, O had a choice. He could either (a) obtain an injunction forcing T to remove the encroachment or (b) recover damages from T.[31] This standard may produce harsh results. Suppose that removing the encroachment (by rebuilding part of the house) will cost T $10,000, while allowing the

[29] *Cf.* Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987) (state's attempt to condition building permit for beachfront lot on owner's grant of beach access easement violated the Takings Clause of the Fifth Amendment).

[30] *See, e.g.,* State of Oregon *ex rel.* Thornton v. Hay, 462 P.2d 671 (Or. 1969).

[31] *See, e.g.,* Peters v. Archambault, 278 N.E.2d 729 (Mass. 1972) (house encroached 15 feet); Geragosian v. Union Realty Co., 193 N.E. 726 (Mass. 1935) (fire escape encroached 11 inches over plaintiff's land, and drain extended under land); Pile v. Pedrick, 31 A. 646 (Pa. 1895) (foundation wall encroached 1 3/8 inches).

encroachment to remain will cause only minor damage to O, perhaps $500. Should the law permit O to inflict costs of $10,000 on T merely to save O $500?

Driven by concern for both equity and efficiency, most modern courts restrict the owner's remedy where the encroachment results from an innocent, good faith mistake. If the injury to the owner is minor compared to the cost of removing the innocent encroachment—as in the O-T example above—a court will deny the owner's requested injunction and award damages instead.[32] Under this standard, O will receive $500. The common law view, however, still governs intentional encroachments. Accordingly, O could obtain an injunction compelling removal of the encroachment regardless of equity or efficiency if T's conduct was intentional.

§ 30.07 Good Faith Improvers

What if an owner mistakenly builds a new house *entirely* on land owned by another? Suppose T intends to build on her own lot, but due to a survey error, inadvertently builds her house on an adjacent lot owned by O. Because the owner of land is also deemed to own buildings on the land, O now owns the house. Yet O has been unjustly enriched by T's good faith mistake. Does T have any recourse?

English common law accorded only meager protection to the improver of another's land. In general, the improver was considered a trespasser subject to punishment, not a laborer entitled to compensation. In the United States, this standard still governs the fate of the "bad faith" improver who purposely builds on another's land; he loses ownership of the improvements without compensation.

Yet, to prevent unjust enrichment, most states afford limited relief to the *good faith improver*—one who improves land under the mistaken but good faith belief[33] that he owns it.[34] Case law in some states entitles the good faith improver to either (a) remove the improvements or (b) receive compensation equal to the amount by which the improvements increase the market value of the owner's land.[35] Other states—usually by statute—require the owner to either compensate the improver for the enhanced value produced by the improvements or to simply sell the land to the improver for its fair market value before improvement.[36]

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[32] *See, e.g.*, Goulding v. Cook, 661 N.E.2d 1322 (Mass. 1996) (recognizing rule).

[33] *But see* Raab v. Casper, 124 Cal. Rptr. 590 (Ct. App. 1975) (remanding case to trial court for determination on improver's possible negligence).

[34] *See generally* Kelvin H. Dickinson, *Mistaken Improvers of Real Estate*, 64 N.C. L. Rev. 37 (1985); John H. Merryman, *Improving the Lot of the Trespassing Improver*, 11 Stan. L. Rev. 456 (1959).

[35] *See, e.g.*, Madrid v. Spears, 250 F.2d 51 (10th Cir. 1957) (good faith improver can recover compensation measured by enhanced value of land); Hardy v. Burroughs, 232 N.W. 200 (Mich. 1930) (same); Somerville v. Jacobs, 170 S.E.2d 805 (W. Va. 1969) (good faith improver entitled to receive either enhanced value of land or conveyance of improved land in return for payment of land's value before improvement).

[36] *See* Powell on Real Property § 64A.05[5] (Michael Allan Wolf ed., Matthew Bender).

Chapter 36

FUNDAMENTALS OF ZONING

SYNOPSIS

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§ 36.07 Zoning and Vested Rights

§ 36.01 The Land Use Revolution

Suppose that O owned fee simple absolute in Greenacre, a 500-acre tract of farm land, in 1900. Did government regulation affect O's ability to use Greenacre as he desired? The answer is a resounding "no." At the dawn of the twentieth century, there were essentially no government restraints on how a private owner could use land, except for the common law doctrine of nuisance. Land use was seen as a private matter, not a public concern. Thus, an owner like O enjoyed complete discretion to use his land as he saw fit, as long as no nuisance resulted.

Today, only a century later, almost every parcel of land in the United States is subject to *zoning*: a complex maze of ordinances, regulations, and

statutes that restrict the use of land.[1] Comprehensive government regulation of private land use is now the norm. Urbanization, industrialization, population growth, technological change, and other economic and social forces have all contributed to this revolutionary change. Increasingly, land use is viewed as a public matter, not solely a private concern. Local governments regulate land use pursuant to the *police power*—the inherent government power to promote the public health, safety, welfare, and morals.

Suppose that O owns fee simple absolute in Greenacre as of today. Local ordinances probably restrict Greenacre to agricultural use only. For example, O cannot build a subdivision of tract homes, open a bookstore, start a school, or develop a factory on the land; indeed, he may not even be able sell his crops from a roadside stand on the property. While the law will probably allow O to build his personal residence on Greenacre, it may regulate such matters as the height, size, location, and design of the house. In short, modern law substantially restricts O's discretion regarding how Greenacre may be used.

§ 36.02 What Is "Zoning"?

The meaning of the term "zoning" evolved over the course of the twentieth century. During most of the century, zoning referred to the form of land use regulation that emerged in the 1920s—the division of communities into geographical districts or "zones," where particular types of land use were allowed, together with restrictions on the height, bulk, and density of buildings in the zone.

During the second half of the century, however, the nature of land use regulation expanded well beyond the concept of geographical zones. For example, today a city might regulate the architectural design of buildings, impose environmental restraints on new development, mandate the preservation of historic structures, or even ban new construction (*see* Chapter 38). Even though none of these controls relate to geographical zones, they are frequently grouped together under the traditional label of zoning. In effect, "zoning" today is often used to mean all forms of government land use regulation.

§ 36.03 The Birth of Zoning

[A] A Rural, Agricultural Nation

Before the twentieth century, there was virtually no government regulation of land use in the United States. Nor was such regulation needed. America was essentially an agricultural nation; and its predominantly rural

[1] *See generally* Richard A. Epstein, *A Conceptual Approach to Zoning: What's Wrong with* Euclid, 5 N.Y.U. Envtl. L.J. 277 (1996); Bradley C. Karkkainen, *Zoning: A Reply to the Critics*, 10 J. Land Use & Envtl. L. 45 (1994); Patricia E. Salkin, *From* Euclid *to Growing Smart: The Transformation of the American Local Land Use Ethic into Local Land Use and Environmental Controls*, 20 Pace Envtl. L. Rev. 109 (2002).

population enjoyed an abundant supply of undeveloped land. In this era, land use restrictions arose—if at all—by private action.[2] Private parties could voluntarily impose restrictions on their lands by agreement. The rights of hypothetical owner O, holding fee simple absolute in Blueacre, might be limited by a real covenant, equitable servitude, or easement (*see* Chapters 32–34). And private parties could bring nuisance actions in response to egregious behavior by their neighbors (*see* Chapter 29). Thus, the government role in land use was normally restricted to judicial proceedings—courts enforced private agreements and adjudicated nuisance disputes.

Legislation restricting land use was both rare and fragmentary. Only a handful of large cities regulated land use at all. And the typical ordinance targeted only a single problem, such as limiting the height of buildings or restricting the location of one particularly noxious use (e.g., slaughterhouses).

[B] The Movement Toward Comprehensive Zoning

[1] An Urban, Industrial Nation

By the 1920s, the twin forces of industrial development and urbanization had transformed the United States. Two statistics symbolize this shift. In 1870, only 26% of Americans lived in urban areas; fifty years later, the figure was 51%. In 1900, automobiles were so unusual that auto registrations were not required; by 1920, over nine million autos were registered.

Living conditions in urban areas were often abysmal. Smoke, odors, noise, disease, filth, overcrowding, and other problems threatened the welfare of city residents. This crisis overwhelmed the traditional system of piecemeal, private land use planning. For example, the industrial properties responsible for much of the problem were not burdened by private land use restrictions. Nuisance litigation was similarly ineffective for a variety of reasons.

[2] Zoning as a Utilitarian Response

Zoning is best understood as a utilitarian response to these problems. It restricts the rights of private landowners in order to promote the health, safety, and welfare of the general public. In other words, zoning is a means to an end.

The pioneers of zoning reasoned that the evils of urban life could be overcome through comprehensive land use regulation. Two key principles—adapted from the "garden city" movement in England—guided this effort. First, the zoning pioneers assumed that separation of uses was desirable. Industrial, commercial, and residential uses should be located in different districts, rather than mixed together. Thus, for example, residential areas would be free from the nuisance-like impacts of industrial uses.

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[2] *See* Robert C. Ellickson, *Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land Use Controls*, 40 U. Chi. L. Rev. 681 (1973).

Second, early zoners firmly believed in the moral virtues of rural life. If the city was corrupt and artificial, the country remained pure and natural. Residential areas should consist of detached single-family houses, each standing alone in its own park-like garden, much like country cottages scattered around a village green. It was accordingly necessary to regulate the height, size, and location of houses, as well as the size and configuration of lots. The result, of course, was the modern housing tract—detached single-family residences in the middle of large lots.

[3] Impact of the Standard State Zoning Enabling Act

Comprehensive, standardized zoning spread quickly throughout the United States during the 1920s. In 1920, only New York and a few other cities had comprehensive zoning. Yet by 1930, over 1,000 municipalities had adopted zoning ordinances, almost all following the same pattern.

The catalyst that produced this rapid growth was the 1922 "Standard State Zoning Enabling Act," issued by the U.S. Department of Commerce as a model act for state legislatures to adopt. Cities and other local governmental entities possess no inherent police power that enables them to enact zoning ordinances. Zoning was possible only if states delegated police power to local governments for this purpose. The Standard State Zoning Enabling Act both (1) authorized local governments to enact a comprehensive zoning ordinance and (2) set forth the basic provisions of the standard ordinance to be enacted (*see* § 36.04). By 1930, most states had expressly adopted the Act, while others had enacted legislation patterned on the Act. As a result, municipalities across the nation adopted zoning ordinances.

Today, zoning ordinances are in place in almost every American city. Most of these ordinances are based on the Standard State Zoning Enabling Act and, accordingly, are remarkably similar. This form of zoning is often called *Euclidean zoning*, named after the Euclid, Ohio zoning ordinance that the Supreme Court approved in its landmark decision *Village of Euclid v. Ambler Realty Co.*[3]

§ 36.04 A Sample Zoning Ordinance

[A] Enacting the Ordinance

The typical state zoning enabling act empowers a city council or other local legislative body to

(1) adopt a "comprehensive plan,"

(2) enact a zoning ordinance, and

(3) delegate administrative authority to an appointed board.

The adoption of a zoning ordinance is a legislative act. The ordinance is enacted by the city council or similar body in the usual course of business,

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[3] 272 U.S. 365 (1926).

just like any other law or ordinance. It reflects a legislative judgment that its particular mix of land use restrictions will best serve the health, safety, welfare, and morals of local residents.

The Standard State Zoning Enabling Act required that zoning be "in accordance with a comprehensive plan," and this requirement led to a certain amount of confusion. The drafters of the Act apparently intended that the local legislative body would first prepare a comprehensive, long-term plan for its community, and then, in a second step, adopt a zoning ordinance that implemented the plan.[4] Yet only a minority of jurisdictions—including California, Florida, and Virginia—require that zoning ordinances be consistent with a previously-adopted comprehensive plan.[5] In most jurisdictions, the local legislative body can enact zoning ordinances even though no comprehensive plan is in place. This result is defended on various grounds. Probably the most common explanation is that a detailed zoning ordinance itself constitutes a comprehensive plan, without any need for a separate document.

[B] Use Regulations

Use regulation is the heart of zoning. Zoning theorists assumed that separation of uses was desirable: residential areas, commercial districts, and industrial regions, for example, should all be separated from each other. Thus, the typical zoning ordinance divides the community into separate regions or "zones," which are shown on detailed maps, and specifies the uses permitted in each zone.[6]

Zoning ordinances adopted in the 1920s were "cumulative" in nature, and many modern ordinances still reflect this approach. Under a cumulative zoning system, the relationship between use zones resembles a pyramid. At the top of the pyramid is a zone that only allows one use: detached single-family homes. The next zone might permit both duplexes and detached single-family homes; the third zone might allow duplexes, detached single-family homes, and also apartment buildings; the fourth zone might permit retail stores in addition to all "higher" uses, and so forth. At the bottom of this zoning pyramid is a district where heavy industrial uses (e.g., smelters, refineries) are permitted, together with all "higher" uses.

[C] Height and Bulk Regulations

The typical zoning ordinance also imposes restrictions on the buildings that house each particular type of use. These restrictions are justified on

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[4] *See, e.g.*, Watergate West, Inc. v. District of Columbia Board of Zoning Adjustment, 815 A.2d 762 (D.C. 2003) (holding that zoning decision was consistent with comprehensive plan).

[5] *See, e.g.*, Town of Jonesville v. Powell Valley Village Ltd. Partnership, 487 S.E.2d 207 (Va. 1997) (invalidating zoning ordinance due to lack of comprehensive plan); *see also* Udell v. Haas, 235 N.E.2d 897 (N.Y. 1968) (invalidating amendment to ordinance due to lack of consistency with plan).

[6] *See, e.g.*, Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 379–84 (1926) (describing provisions of Euclid, Ohio ordinance).

a number of bases, including fire safety, density control, and protection of access to light and air.

Maximum height limits for buildings—measured in either stories or feet—are common. Buildings in a residential zone may be limited to one story, for example, while a four-story structure might be allowed in a district zoned for office use. The standard ordinance also contains bulk regulations. These typically include:

(1) minimum lot size requirements (e.g., each building lot in a residential zone must contain at least 5,000 square feet);

(2) lot coverage requirements (e.g., no more than 50% of the lot may be occupied by a building);

(3) minimum frontage requirements (e.g., each lot must have at least 50 feet of frontage on a public street); and

(4) setback requirements (e.g., each building must be set back at least 30 feet from the street, 5 feet from each side lot line, and 20 feet from the rear lot line).

One modern alternative to the traditional height and bulk requirements is the floor-area ratio or "FAR."[7] Suppose an ordinance imposes a 1:2 FAR for commercial office buildings. Developer D can choose to build a one-story office building that covers half of the lot, a two-story building that covers one-quarter of the lot, and so forth.

[D] Administering the Ordinance

The typical ordinance is administered by a local agency usually called a zoning board, board of zoning adjustment, or board of zoning appeals. The members of this board are appointed by the local legislative body (e.g., the city council).

The board has two basic functions. First, it considers appeals from decisions made by zoning officials. For example, if official G wrongly concludes that the roof of H's home exceeds the applicable height limit, H can appeal this ruling to the board. Second, and more importantly, the ordinance usually authorizes the board to approve landowner applications for *variances* (§ 37.03) and *special exceptions* (§ 37.04). Suppose that the strict application of the zoning law imposes a severe hardship on landowner L; L's residential lot is so oddly shaped that it is impossible to build a house that complies with all the setback requirements. Under these circumstances, the board may grant a variance—a special deviation from the strict enforcement of the ordinance—that allows L to build close to his lot lines.

[7] *See, e.g.*, Raritan Dev. Corp. v. Silva, 689 N.E.2d 1373 (N.Y. 1997) (discussing FAR standards).

§ 36.05 The Constitutionality of Zoning

[A] The Issue

Is zoning constitutional? During the 1920s, opponents hoped to invalidate zoning on constitutional grounds. They argued that zoning (1) deprived owners of property without due process of law, (2) violated owners' rights to the equal protection of the laws, and (3) took property without just compensation.

Zoning opponents raised attacks based on substantive due process and equal protection in a famous test case that challenged the zoning ordinance in Euclid, Ohio. Ironically, the Supreme Court's eventual decision in *Village of Euclid v. Ambler Realty Co.*[8] firmly established the constitutionality of zoning in general. The landmark *Euclid* decision is discussed below, while the argument that zoning is a taking of property without just compensation is addressed in Chapter 40.

[B] *Village of Euclid v. Ambler Realty Co.*

[1] Factual Setting

Plaintiff purchased a 68-acre tract of undeveloped land in the Village of Euclid, near Cleveland, Ohio. The southern edge of the land bordered Euclid Avenue, a major street, and was suitable for retail store uses. The balance of the land, which adjoined a railroad to the north, seemed destined to accommodate the growing regional demand for industrial property.

In 1922, the village adopted its first comprehensive zoning ordinance. The ordinance divided the village into six districts and restricted the uses permitted in each, in cumulative fashion (*see* § 36.04[B]). The only major use permitted in the U-1 district was single-family residences; the U-2 district was extended to include duplexes; the U-3 district allowed the U-1 and U-2 uses, together with apartments, public buildings, and the like. The U-4 district was further extended to include retail uses; the U-5 district added light industrial uses; and every use, including heavy industry, was permitted in the U-6 district. The ordinance also regulated building height and lot size.

The new ordinance substantially restricted the uses allowed on plaintiff's land, and thereby reduced its value. The southern one-third of the tract bordering Euclid Avenue was zoned U-2, while the northern half adjoining the railroad was zoned U-6; a thin strip in the middle was zoned U-3. According to plaintiff, the land was worth $10,000 per acre as industrial property, but only $2,500 per acre as residential property.

Plaintiff argued that the zoning ordinance violated its rights to substantive due process and equal protection. The federal district court struck down the ordinance, holding that the police power did not permit a municipality

[8] 272 U.S. 365 (1926). For perspectives on *Euclid*, see *Symposium on the Seventy-Fifth Anniversary of* Village of Euclid v. Ambler Realty Co., 51 Case W. Res. L. Rev. 593 (2001).

to "classify the population and segregate them according to their income or situation in life."[9]

[2] The Decision

In upholding the constitutionality of the Euclid ordinance, the Supreme Court established principles that still dominate American zoning law. Writing for the majority, Justice Sutherland focused on the new problems created by population growth and urbanization. Modern conditions justified regulations that would have been rejected as arbitrary and oppressive in the past. The source of local zoning authority was the police power—the power to protect the public health, safety, welfare, and morals. But how far did the police power extend? Sutherland answered this question by analogizing to nuisance law; after all, he observed: "A nuisance may be merely a right thing in the wrong place—like a pig in the parlor instead of the barnyard."[10] Sutherland accordingly found that the Euclid ordinance was facially constitutional because it essentially regulated nuisance-like impacts (*see* [3], *infra*). For example, the provisions of the ordinance that separated industrial uses from residential uses protected homes from noise, smoke, fumes, and similar intrusions. This nuisance-control rationale had little impact on later cases, but the rules it initially justified still endure.

Three interrelated principles emerge from the majority opinion. First, a zoning ordinance is presumed to be constitutional. Second, the ordinance will be upheld against substantive due process and equal protection attacks unless it is arbitrary and unreasonable, having no substantial relation to the public health, safety, welfare, or morals. Finally, a court may not conduct an independent review of the wisdom or policy of a zoning ordinance; if the validity of the legislative classification is "fairly debatable, the legislative judgment must be allowed to control."[11]

[3] Reflections on *Euclid*

Euclid is easily the most important decision in the evolution of American zoning law. With the Supreme Court's stamp of approval firmly in place, Euclidean zoning swept across the nation.[12] Municipal officials and planners promoted Euclid-like ordinances, confident that they would withstand constitutional attack.

Yet from the perspective of the twenty-first century, the judicial reasoning underlying *Euclid* seems somewhat antique. The Court defends comprehensive zoning—in essence—as a method to prevent nuisance-like impacts. This analysis makes sense to a point. Certain types of industrial uses—for example, refineries, smelters, and tanneries—are likely to be nuisances if located in a residential district. Thus, the exclusion of industrial uses from the U-1, U-2, and U-3 zones is easily explained.

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[9] Ambler Realty Co. v. Village of Euclid, 297 F. 307, 316 (N.D. Ohio 1924), *rev'd*, 272 U.S. 365 (1926).

[10] Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 388 (1926).

[11] *Id.*

[12] For a history of zoning in the United States, see Seymour I. Toll, Zoned American (1969).

But the nuisance-control rationale collapses when the Court tries to explain why apartment houses are barred from the single-family residential zone. The Court's suggestion that an apartment house is "a mere parasite" whose coming destroys the "residential character of the neighborhood and its desirability as a place of detached residences"[13] implies reasons for zoning that go far beyond the nuisance doctrine. Zoning suddenly seems more like social engineering, which serves broad "quality of life" goals by shielding single-family residential neighborhoods from change. And the Court ignores the toughest question: why exclude duplexes from the single-family residential zone? Could anyone seriously argue that a duplex is a nuisance?

[C] Post-*Euclid* Developments

As the leading Supreme Court decision on the constitutionality of zoning, *Euclid* became the foundation for American zoning law. In the wake of *Euclid*, federal and state courts routinely followed its mandate that comprehensive zoning *in general* was constitutional unless arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare.[14] Under this deferential standard of review, courts did not question the wisdom or necessity of zoning ordinances. These broad standards, of course, went far beyond the logic of nuisance-control. And later courts utilized them to uphold zoning ordinances that served quite different purposes, including protection of property values, preservation of neighborhood character, and controls on growth (*see* Chapter 38).

One reason for the extraordinary influence of *Euclid* is its isolation. The Supreme Court decided only two significant zoning cases before 1974: *Euclid* in 1926, and then *Nectow v. City of Cambridge*[15] in 1928.[16] *Euclid* stands alone as the leading case establishing the constitutionality of zoning *in general*. *Nectow* established the important principle that a zoning ordinance might be unconstitutional *as applied* to a particular parcel. There, part of plaintiff's land was restricted to residential use, even though adjacent industrial and railroad uses made the land highly undesirable for housing. At the trial level, a special master concluded that "no practical use can be made of the land in question for residential purposes."[17] Based on this record, the Court had no difficulty in holding that the application of the ordinance to plaintiff's land failed to promote the public health, safety, or welfare, and accordingly was unconstitutional.

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[13] Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 394 (1926).

[14] *See, e.g.,* Messiah Baptist Church v. County of Jefferson, 859 F.2d 820 (10th Cir. 1988) (upholding ordinance that excluded churches from residential zone); Pierro v. Baxendale, 118 A.2d 401 (N.J. 1955) (upholding ordinance that excluded motels from residential zone). *But see* Robinson Township v. Knoll, 302 N.W.2d 146 (Mich. 1981) (invalidating ordinance that excluded mobile homes from all residential districts except for special mobile home parks).

[15] 277 U.S. 183 (1928).

[16] *See also* Gorieb v. Fox, 274 U.S. 603 (1927) (upholding ordinance imposing set back lines on residential and commercial lots).

[17] Nectow v. City of Cambridge, 277 U.S. 183, 187 (1928). *See also* Krause v. City of Royal Oak, 160 N.W.2d 769 (Mich. Ct. App. 1968) (upholding single-family zoning ordinance, even though land was more valuable for multiple-family residences).

§ 36.06 Zoning and the Nonconforming Use

[A] The Problem

Imagine a City that adopts its first zoning ordinance in 1925. Following the standard Euclidean zoning pattern, the ordinance neatly divides the City into zones where particular uses are allowed. One predominantly residential neighborhood, for example, is zoned for single-family residential use only. How does this new zoning ordinance affect an existing non-residential use in the neighborhood—for example, a bakery?

In general, zoning regulates only *future* development. Thus, from the 1920s onward, virtually all zoning ordinances allowed the prior *nonconforming use* to continue.[18] A nonconforming use is a use of land that lawfully existed before the zoning ordinance was enacted, but that does not comply with the ordinance. It might be a type of land use that violates the use restrictions in the zone, such as the bakery example above. Or it might be a building that fails to comply with the ordinance restrictions on height, lot coverage, set back, lot size, frontage, parking, or other similar items.[19] A nonconforming use may also arise when a zoning ordinance is amended (*see* § 37.02).

Why allow nonconforming uses to continue? The early advocates of zoning realized that nonconforming uses threatened the success of comprehensive land use regulation. Allowing a bakery in a residential zone, for instance, violated the zoning axiom that different uses should be geographically separate. However, zoning advocates understood that banning nonconforming uses could cause major problems. A flat ban might encourage public opposition to the adoption of zoning ordinances in general. And it would increase the vulnerability of zoning to constitutional attacks based on the Due Process and Equal Protection Clauses. Finally, it might constitute a regulatory taking under the Takings Clause.

[B] Restricting the Nonconforming Use

The pioneers of zoning anticipated that nonconforming uses would slowly wither away; the "weeds" in the Euclidean garden would eventually die. Zoning ordinances seek to accelerate this process by restricting the nonconforming use.

Most ordinances bar the expansion of a nonconforming use.[20] For example, the nonconforming bakery in a residential zone will not be allowed to build a new addition that increases the area of the store. Under the same logic, if the bakery only operated between 8:00 a.m. and 8:00 p.m. before the zoning ordinance took effect, it cannot now operate 24 hours each day.

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[18] *See, e.g.,* City of Akron v. Chapman, 116 N.E.2d 697 (Ohio 1953).

[19] *See, e.g., In re* Appeal of Miserocchi, 749 A.2d 607 (Vt. 2000) (set-back requirement); Snake River Brewing Co., Inc. v. Town of Jackson, 39 P.3d 397 (Wyo. 2002) (parking requirement).

[20] *See* Denver Police Protective Ass'n v. City & County of Denver, 710 P.2d 3 (Colo. Ct. App. 1985).

In contrast, some jurisdictions allow the nonconforming use to expand in response natural or normal growth in demand.

Similarly, one nonconforming use cannot be transformed into a different nonconforming use.[21] The nonconforming bakery in a residential zone, for example, cannot be changed into a nonconforming video store. And although the owner of a nonconforming use can effect minor repairs, major alterations or structural repairs that will extend the duration of the use cannot be made.

[C] Terminating the Nonconforming Use

[1] Abandonment or Destruction

Early zoners anticipated that the right to continue a nonconforming use would be lost either through abandonment or destruction. In most jurisdictions, abandonment occurs only if both (1) the owner intends to abandon the use and (2) the use is discontinued for a substantial period.[22] Some ordinances provide that discontinuance during a specific time period—usually six months or a year—is sufficient to end the use, regardless of the owner's intent.[23] Similarly, the destruction of a nonconforming use—or the structure containing the use—usually terminates the right to continue the use. In most jurisdictions, for example, if the building that houses a nonconforming bakery is entirely destroyed by an accidental fire, the bakery use ends.[24] However, many ordinances allow rebuilding if only partial destruction occurs.

[2] Amortization

Contrary to the expectations of the early zoners, many nonconforming uses not only survived abandonment and destruction, but actually flourished. Why? By barring new businesses from certain districts, zoning ordinances gave existing nonconforming uses an artificial monopoly. The only bakery in a residential zone, for example, enjoyed high demand and little competition. How could these persistent nonconforming uses be eliminated? During the 1950s, the new technique of *amortization* came into widespread use.

Amortization gives the owner of a nonconforming use a fixed period of time to operate the use; when the period ends, the right to continue the use ends.[25] Suppose B owns rights in a nonconforming billboard. The amortization provision of the local ordinance might give B a five-year period

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[21] *See, e.g.*, Town of Belleville v. Parrillo's, Inc., 416 A.2d 388 (N.J. 1980) (holding that nonconforming restaurant could not be converted into discotheque).

[22] *See, e.g.*, A.T. & G., Inc. v. Zoning Bd. of Review, 322 A.2d 294 (1974).

[23] *See, e.g.*, Anderson v. City of Paragould, 695 S.W.2d 851 (Ark. Ct. App. 1985).

[24] *See, e.g.*, Weldon v. Zoning Bd. of Des Moines, 250 N.W.2d 396 (Iowa 1977).

[25] *See generally* Osborne M. Reynolds, Jr., *The Reasonableness of Amortization Periods for Nonconforming Uses—Balancing the Private Interest and the Public Welfare*, 34 Wash. U. J. Urb. & Contemp. L. 99 (1988).

to continue the billboard use. During this period, B can continue to derive rental revenue from the billboard. The theory underlying amortization is that the owner will be able to recover his investment by continuing the nonconforming use for a reasonable period of time. Accordingly, the city or other government entity can later end the use without any constitutional obligation to compensate the owner. Suppose, for example, that B invested $10,000 to construct the billboard before the billboard ban took effect. If B receives net rents of $2,500 each year and is allowed to continue the billboard use for five years, he will receive $12,500, thus recovering more than his original investment.

In most jurisdictions, amortization is valid if the length of the amortization period is reasonable.[26] There is no fixed formula to calculate a reasonable period. Despite the precision that the term "amortization" suggests, courts normally do not determine whether the particular period mathematically allows the owner to recoup the investment. Rather, they assess reasonableness in a more general sense, examining factors such as the amount of the owner's investment, the nature of the nonconforming use, its remaining useful life, and the potential harm to the public if the use continues.

The leading decision of *City of Los Angeles v. Gage*,[27] for example, upheld the constitutionality of a five-year period to amortize a nonconforming plumbing business. The court noted that the ordinance merely required the defendants to move their nonconforming business to a new location only about a half-mile away; the moving cost was less than 1% of the gross income generated during the amortization period. In addition, the move would eliminate the noise and traffic burden that the business imposed on the surrounding residential neighborhood. Taken as a whole, the court found that the ordinance struck a proper balance between public gain and private loss. Conversely, in *PA Northwestern Distributors, Inc. v. Zoning Hearing Board*,[28] a concurring justice observed that a 90-day amortization period for an adult bookstore was unreasonably short because, among other factors, it would not permit the owner to obtain a reasonable return on his investment.

A handful of jurisdictions hold that amortization is per se unconstitutional.[29] Thus, a nonconforming use can be eliminated only if it constitutes a nuisance or is abandoned, destroyed, or purchased through eminent domain.[30]

[26] *See, e.g.*, Village of Valatie v. Smith, 632 N.E.2d 1264 (N.Y. 1994) (upholding validity of amortization period that permitted nonconforming mobile home use until transfer of ownership of mobile home or underlying land).

[27] 274 P.2d 34 (Cal. Ct. App. 1954).

[28] 584 A.2d 1372 (Pa. 1991).

[29] *See, e.g., id.*

[30] *Cf.* City of Akron v. Chapman, 116 N.E.2d 697 (Ohio 1953) (invalidating ordinance that allowed city council to discontinue any nonconforming use that had existed for a "reasonable time").

§ 36.07 Zoning and Vested Rights

Zoning ordinances mainly regulate future development. Suppose City amends its zoning ordinance on January 1, 2008, by banning fast food restaurants from its downtown district. Fast food restaurants that already exist before enactment of the ordinance are exempted as nonconforming uses (*see* § 36.06). The zoning ordinance clearly applies to anyone who decides on January 1, 2008, or thereafter to establish such a restaurant.

But what law applies to a project caught in the middle? Suppose B's fast food restaurant is under construction—but not yet open for business—when the amended ordinance takes effect on January 1, 2008. The answer to B's dilemma is the doctrine of *vested rights.*[31] In most states, the owner who obtains a building permit and makes substantial expenditures in good faith reliance on the permit obtains a vested right to the use, regardless of any later change in the law. States vary widely on the extent of the required reliance. Construction of the building foundation, or even mere excavation on the site, may suffice. On the other hand, the developer who expends large sums for architectural, engineering, and planning services—but never actually begins construction—is unlikely to acquire vested rights.[32]

[31] *See, e.g.,* Davidson v. County of San Diego, 56 Cal. Rptr. 2d 617 (Ct. App. 1996); H.R.D.E., Inc. v. Zoning Officer, 430 S.E.2d 341 (W. Va. 1993). *See also* Roger D. Wynne, *Washington's Vested Rights Doctrine: How We Have Muddled a Simple Concept and How We Can Reclaim It*, 24 Seattle U. L. Rev. 851 (2001).

[32] *See, e.g.,* Stone v. City of Wilton, 331 N.W.2d 398 (Iowa 1983) (developer who spent $7,900 on architectural, engineering, and financing costs for planned multi-family housing project, but never started construction, did not acquire vested rights). *But see* Western Land Equities, Inc. v. City of Logan, 617 P.2d 388 (Utah 1980) (developer who spent $2,225 for survey and preliminary subdivision map had vested rights).

Chapter 37

TOOLS FOR ZONING FLEXIBILITY

SYNOPSIS

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§ 37.01 A Modern Approach to Zoning

The American law of zoning is undergoing fundamental change.[1] The rigid Euclidean zoning system is slowly collapsing; at the same time, new

[1] *See generally* Carol M. Rose, *New Models for Local Land Use Decisions*, 79 Nw. U. L. Rev. 1155 (1984–1985); Carol M. Rose, *Planning and Dealing: Piecemeal Land Controls as a Problem of Local Legitimacy*, 71 Cal. L. Rev. 837 (1983); Patricia E. Salkin, *From* Euclid *to Growing Smart: The Transformation of the American Local Land Use Ethic Into Local Land Use and Environmental Controls*, 20 Pace Envtl. L. Rev. 109 (2002).

methods of land use regulation are gaining acceptance. This chapter examines the techniques that bring flexibility to the traditional zoning system, while Chapter 38 explores the new purposes that contemporary land use regulation serves.

The national model for Euclidean zoning—the Standard State Zoning Enabling Act—grudgingly recognized three flexibility devices: the *zoning amendment*, the *variance,* and the *special exception*. But it was anticipated that these "loopholes" would be rarely used. Euclidean zoning rested on the assumption that the public interest is best served by a stable comprehensive plan. If zoning could be changed on a piecemeal, lot-by-lot basis, the comprehensive plan would gradually wither away, reviving the problems zoning sought to remedy.

Potential piecemeal zoning presented a second danger: zoning officials might betray the public trust for private gain.[2] One impact of Euclidean zoning was to create an economic scarcity of land zoned for particular high-value uses; this, in turn, increased the market value of land in certain districts. Suppose that only 50 acres in Town T were zoned for shopping center use, while O's 20-acre parcel was limited to agricultural use. O's land might be worth $2,000 per acre as farm land, but $100,000 per acre if it could be used as a shopping center site. If T's zoning officials had discretion to reclassify O's property into a shopping center zone, O might be able to affect their decision through ties of friendship, political pressure, or outright bribery. Zoning decisions based on self-interest, corruption or favoritism would injure the public interest.

The modern approach to land use regulation places less reliance on the comprehensive plan and more emphasis on discretionary, lot-by-lot zoning decisions. It recognizes that blind adherence to the comprehensive plan will impair the overall public interest in many instances. This approach values zoning decisions that are individually tailored to implement the public interest according to the unique circumstances of each case. Flexible zoning, in short, is seen as effective zoning. The risk of corruption or abuse of power, while still quite real, can be controlled through various techniques.

Accordingly, the three traditional flexibility devices—the zoning amendment, the variance, and the special exception—are used quite frequently today; and they have been expanded to situations that the founders of Euclidean zoning never imagined. Further two new layers of innovative regulatory devices have been added atop this historic foundation: (1) novel forms of zoning; and (2) the subdivision regulation process.

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[2] *See, e.g.,* Schauer v. City of Miami Beach, 112 So. 2d 838 (Fla. 1959) (affirming rezoning decision even though councilman who voted for rezoning owned property that thereby increased in value by $600,000); Fleming v. City of Tacoma, 502 P.2d 327 (Wash. 1972) (overturning rezoning decision based on councilman's apparent conflict of interest).

§ 37.02 Zoning Amendments

[A] Role of the Amendment

A zoning ordinance may be modified by a *zoning amendment* adopted by the city council or other local governmental entity. Section 5 of the Standard State Zoning Enabling Act provides that "regulations, restrictions, and boundaries may from time to time be amended, supplemented, changed, modified, or repealed." In practice, state zoning acts routinely permit local governments to amend their ordinances.

There are two types of zoning amendments. First, the zoning map might be amended by placing certain land in a wholly different zone. Suppose O owns a 500-acre farm within the city limits of Smithville; the farm is currently in the A-2 zone, which allows only agricultural uses (e.g., crops, livestock). O wishes to construct and operate a grain elevator on his land. The Smithville city council might rezone O's farm into the A-3 zone, which allows grain elevators and other additional uses (e.g., feed mills, warehouses). Alternatively, the text of the zoning ordinance might be amended by changing the uses that are allowed in a particular zone. The city council might, for example, amend its ordinance by adding "grain elevators" to the list of uses permitted in the A-2 zone.

[B] Standards for Amendments

[1] Legislative Judgment

Traditionally, a zoning amendment is viewed as legislative action, just like the adoption of the initial zoning ordinance or any other type of legislation. The city council or other local legislative body decides in its sole discretion whether rezoning serves the public interest. Because the separation of powers principle requires judicial deference to legislative judgments, this decision is largely insulated from later judicial review.

A zoning amendment is presumed to be valid. Absent proof that the rezoning decision was arbitrary or unreasonable, courts will uphold the amendment against constitutional attack under the Due Process and Equal Protection Clauses.[3] As the Supreme Court observed in *Village of Euclid v. Ambler Realty Co.*, a zoning ordinance is valid unless "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare."[4]

[3] *See, e.g.*, H.H.B., LLC v. D & F, LLC, 843 So. 2d 116 (Ala. 2002) (upholding amendment on basis that decision was "fairly debatable," such that court should defer to legislative judgment); Stone v. City of Wilton, 331 N.W.2d 398 (Iowa 1983) (discussing standard); Karches v. City of Cincinnati, 526 N.E.2d 1350 (Ohio 1988) (holding amendment was "unreasonable, arbitrary and confiscatory" and thus violated the Due Process and Takings Clauses); Anderson v. Island County, 501 P.2d 594 (Wash. 1972) (holding amendment was "arbitrary and capricious").

[4] 272 U.S. 365, 395 (1926). *See also* Pharr v. Tippitt, 616 S.W.2d 173 (Tex. 1981).

But should a zoning amendment be treated with the same deference accorded to normal legislation? The founders of Euclidean zoning anticipated that amendments would (a) be rare, (b) affect many parcels owned by many owners, and (c) be initiated by local government. Yet in practice, the rezoning power is used quite differently. Rezoning applications (a) are very common, (b) often affect only one parcel, and (c) are usually initiated by the owner of the parcel. In effect, many landowners view the rezoning power as a major "loophole" in the zoning system that may be utilized for private gain.

Improper rezoning decisions erode the very foundation of Euclidean zoning: comprehensive land use planning. If individual parcels can be rezoned on an ad hoc, case-by-case basis, then the comprehensive plan may become riddled with exceptions and slowly wither away. Further, abuse of the rezoning power serves the interests of individual landowners, at the expense of the community as a whole. Closely tied to this concern is the danger of corruption or other official misconduct.[5] Restricting the rezoning power helps to ensure that zoning officials will properly perform their duties.

As a result of these concerns, virtually all jurisdictions impose additional restrictions on the rezoning power. Most jurisdictions will invalidate a zoning amendment if it constitutes "spot zoning" (*see* [2], *infra*), while a few jurisdictions follow the narrow "change or mistake" rule (*see* [3], *infra*). Procedural constraints may also limit the rezoning power in some jurisdictions. The most common constraints are judicial review of zoning amendments as quasi-judicial action (*see* [C][1], *infra*) and rezoning by initiative or referendum (*see* [C][2], *infra*). A final restriction is that zoning amendments may not violate "vested rights" held by individual landowners (*see* § 36.07).[6]

[2] Spot Zoning

In practice, the main limitation on rezoning is the doctrine of *spot zoning*. If a zoning amendment violates this doctrine, it is generally held invalid.[7] The essence of spot zoning is simple: rezoning that confers a special benefit on a small parcel of land regardless of the public interest or the comprehensive plan.

Unfortunately, the case law interpreting the spot zoning doctrine is vague, confusing, and often wildly inconsistent. Courts commonly consider a number of factors when applying the doctrine, including:

(1) the size of the parcel;

(2) the benefits conferred on the parcel compared to surrounding parcels;

[5] *See, e.g.*, Fleming v. City of Tacoma, 502 P.2d 327 (Wash. 1972) (invalidating zoning amendment based on councilman's apparent conflict of interest).

[6] *See, e.g.*, Stone v. City of Wilton, 331 N.W.2d 398 (Iowa 1983) (plaintiff's expenditures for architectural and engineering services on future project were not substantial enough to create vested rights against rezoning).

[7] *See, e.g.*, Little v. Winborn, 518 N.W.2d 384 (Iowa 1994).

(3) any injury or detriment to surrounding landowners and the public in general;

(4) any changed conditions in the area; and

(5) whether the rezoning is in accordance with a comprehensive plan.[8]

Yet many courts find spot zoning even if some of these criteria are not met. And other courts seem to find spot zoning only if the rezoning is inconsistent with the overall public interest, even if all other criteria are present.[9] Still other courts find spot zoning whenever a rezoning conflicts with the comprehensive plan regardless of other factors.[10]

Suppose A owns Blueacre, a vacant lot that is one-quarter acre in size and zoned for residential use only; the lot is located in the middle of a large tract of single-family homes. A convinces the city council to rezone Blueacre for commercial use, so that he can operate a video rental store. Most courts would agree that this action constitutes spot zoning. The rezoning affects only one small parcel. And it confers a special privilege—the right to operate a commercial enterprise—that the adjacent parcels do not share. The rezoning will presumably cause adverse traffic, parking, noise, and other impacts on neighboring owners, and cannot be justified by changed conditions. Finally, the action is inconsistent with the residential use contemplated by the comprehensive plan.

The importance of the spot zoning doctrine is slowly waning with the demise of Euclidian zoning. There is a clear trend toward more flexible forms of zoning and, accordingly, away from the rigidity of the Euclidean approach. The spot zoning doctrine is less relevant in this new climate. A rezoning that might have been condemned in the 1950s as illegal spot zoning may well be praised today as a shining example of innovative planning.

[3] "Change or Mistake" Rule

A few states follow the narrow "change or mistake" rule.[11] Under this view, rezoning is appropriate only (a) to correct a mistake made in the original zoning ordinance or (b) if physical conditions in the neighborhood have fundamentally changed since the ordinance was adopted.

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[8] *See, e.g.*, Pharr v. Tippitt, 616 S.W.2d 173 (Tex. 1981) (finding no spot zoning); Anderson v. Island County, 501 P.2d 594 (Wash. 1972) (finding spot zoning); Bell v. City of Elkhorn, 364 N.W.2d 144 (Wis. 1985) (finding no spot zoning).

[9] *Cf.* Bartram v. Zoning Comm'n, 68 A.2d 308, 311 (Conn. 1949) (no spot zoning where rezoning would "serve the best interests of the community as a whole"); Chrismon v. Guildford County, 370 S.E.2d 579, 590 (N.C. 1988) (no spot zoning because, in part, use was "valuable to the surrounding community").

[10] *See* Cannon v. Murphy, 600 N.Y.S.2d 965 (App. Div. 1993).

[11] *See, e.g.*, White v. Spring, 675 A.2d 1023 (Md. Ct. Spec. App. 1996).

[C] Other Constraints on Amendments

[1] Judicial Review of Quasi-Judicial Action

In *Fasano v. Board of County Commissioners*,[12] the Oregon Supreme Court pioneered a new approach toward curbing abuses of the rezoning power: treating zoning amendments as quasi-judicial action. The court reasoned that a rezoning decision by a local legislative body that affects only one parcel of land is essentially judicial, not legislative, in character. Legislative action connotes the *creation* of a general rule that is applicable to all citizens. But the single-parcel rezoning decision involves the *application* of a general rule to one owner's specific factual situation; this process, the court explained, is the hallmark of judicial action. And, as quasi-judicial action, the rezoning decision is subject to a more rigorous standard of judicial review. The court held that rezoning is appropriate only if the owner seeking approval proves both (a) there is a public need for the proposed change and (b) the need is best served by rezoning the particular parcel rather than other property.

The *Fasano* approach is controversial.[13] A handful of jurisdictions endorse the approach as an appropriate safeguard in single-parcel rezoning.[14] But most jurisdictions reject the *Fasano* view, relying on differing rationales.[15] One objection is that *Fasano* is out of step with the modern movement toward zoning flexibility; by imposing new hurdles on any rezoning application, it returns to the outdated notion of a timeless comprehensive plan. Another objection focuses on the institutional competence of the judiciary to make land-use planning decisions. The local legislative process, although imperfect, may be a superior method of reconciling the interests of competing constituencies. Further, if zoning amendments are characterized as quasi-judicial, then they are exempt from public scrutiny through an initiative or referendum. Finally, case-by-case determinations of whether particular land-use approvals are legislative or quasi-judicial action would produce substantial administrative costs.

[2] Zoning by the Electorate

Another potential solution to rezoning abuses is the ballot box. In some jurisdictions, the public may vote on zoning amendments, either through a referendum or an initiative. The issue arises most commonly when neighbors object to a developer's plan to build a high-density residential project on a large tract of vacant land. Suppose D intends to build a 400-unit apartment complex on a ten-acre parcel currently used for cattle grazing but already zoned for multi-family residential use. E and other neighbors may try to block the project by placing an initiative on the next ballot to

[12] 507 P.2d 23 (Or. 1973).

[13] *See generally* Jan Z. Krasnowiecki, *Abolish Zoning*, 31 Syracuse L. Rev. 719 (1980); Carol M. Rose, *New Models for Local Land Use Decisions*, 79 Nw. U. L. Rev. 1155 (1984–1985).

[14] *See, e.g.,* Board of County Comm'rs v. Snyder, 627 So. 2d 469 (Fla. 1993).

[15] *See, e.g.,* Arnel Dev. Co. v. City of Costa Mesa, 620 P.2d 565 (Cal. 1980).

rezone the land for non-residential use (e.g., agriculture only). Alternatively, suppose the land is currently restricted to agricultural use only; if the city council rezones the property for multi-family use, this decision may be subject to review through a referendum.

The leading case examining the review of zoning amendments by referenda is *City of Eastlake v. Forest City Enterprises, Inc.*[16] There, a developer obtained city council approval to rezone its eight-acre parcel from "light industrial" to high-rise residential use. The city charter required that any land use changes be approved by a referendum, but the developer leveled various constitutional attacks at this requirement. The Supreme Court ultimately upheld the charter provision, finding that it was not an unconstitutional delegation of legislative power, because the state constitution expressly reserved this power to the electorate. Nor did the mere use of the referendum procedure to review a rezoning decision violate the Due Process Clause. The Court observed that the developer could challenge the referendum if it could demonstrate the result was clearly arbitrary and unreasonable. Three Justices dissented, arguing that the referendum process is not an appropriate method to resolve issues affecting individual rights.

Subsequently, in *Arnel Development Co. v. City of Costa Mesa*,[17] the California Supreme Court rejected a due process challenge to rezoning by initiative. The case arose when plaintiff proposed to construct a 50-acre housing development, consisting of 127 single-family homes and 539 apartment units. A neighborhood group successfully campaigned for an initiative to rezone the land (and two small adjacent parcels) for single-family residential use only, and plaintiff challenged the result. Relying on *City of Eastlake*, the court held that (a) the use of the initiative process per se did not violate the Due Process Clause and (b) plaintiff could seek judicial invalidation of the rezoning if it was arbitrary or unreasonable. The court brushed aside plaintiff's claim that procedural due process mandated a hearing for the rezoning of small parcels. It noted that rezoning is legislative action, not subject to the notice and hearing requirements that restrict judicial action. In any event, the court concluded, the initiative process allows the landowner an opportunity for a "hearing" before the voters.

Is zoning by the electorate a good idea? Most legal scholars are sharply critical of the concept.[18] Voter turnout is typically low; and the voters who do participate generally fail to understand the issues. A high-profile media campaign may attract support for a poor project, while vigorous opposition by a few disgruntled residents may sabotage a worthy project. As a result, the electoral outcome is unlikely to reflect sound planning judgment. Even the foremost advocates of zoning flexibility condemn electoral zoning as the

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[16] 426 U.S. 668 (1976).

[17] 620 P.2d 565 (Cal. 1980).

[18] *See, e.g.*, David L. Callies, et al., *Ballot Box Zoning: Initiative, Referendum and the Law*, 39 Wash. U. J. Urb. & Contemp. L. 53 (1991); Ronald H. Rosenberg, *Referendum Zoning: Legal Doctrine and Practice*, 53 U. Cin. L. Rev. 381 (1984).

epitome of piecemeal zoning. Finally—despite *City of Eastlake* and *Arnel Development*—zoning by the electorate might violate the procedural due process rights of affected property owners. A "hearing" before the electorate may well lack the safeguards that our constitutional tradition requires.

§ 37.03 Variances

[A] Role of the Variance

Suppose O's vacant lot Blueacre is located in a zone that (a) allows residential use only and (b) requires a minimum lot size of 7,500 square feet.[19] But the total area of Blueacre is only 5,000 square feet. How can O develop his lot? The solution to O's dilemma is a *variance*—an authorized deviation from strict enforcement of the zoning ordinance in an individual case due to special hardship. In effect, a variance permits a particular parcel of land to be used in a way that would otherwise violate the ordinance. Here, O may be able to obtain a variance from the local zoning board that allows him to build a home on his undersized lot.[20]

At bottom, the variance is a "safety valve" in the basic zoning ordinance. It both protects the rights of individual property owners and helps to insulate the ordinance from attack as an unconstitutional taking of property. After all, if a zoning ordinance prohibited any economically beneficial or productive use of Blueacre, O might be able to recover damages for a regulatory taking (*see* § 40.08).

[B] Types of Variances

There are two basic types of variances: the *area variance* and the *use variance*. The area variance allows modification of height, location, setback, size, or similar requirements for a use that is permitted in the zone.[21] For instance, suppose A plans to build an office building on her parcel, which is the only use allowed in the zone; because the parcel is triangular in shape, however, she cannot construct an office building that is large enough to be commercially viable under the current height (20 feet maximum) and setback (ten feet away from all property lines) requirements. She might obtain a variance that allows a higher building (e.g., 25 feet high) or a smaller setback (e.g., five feet away from property lines). Either one would be considered an area variance.

In contrast, the use variance allows a use that would normally be prohibited in the zone. Suppose, for example, that B owns a vacant corner lot that is zoned for residential use only, but wishes to build and operate a grocery store. A use variance, if available, would permit this commercial use in the residential zone.

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[19] *See generally* David W. Owens, *The Zoning Variance: Reappraisal and Recommendations for Reform of a Much-Maligned Tool*, 29 Colum. J. Envtl. L. 279 (2004).

[20] *See, e.g.*, Commons v. Westwood Zoning Bd. of Adjustment, 410 A.2d 1138 (N.J. 1980).

[21] *See, e.g.*, *id.* (involving application for variance from minimum lot size and minimum street frontage requirements).

The use variance is controversial. Statutes, ordinances, or case law prohibit the use variance in many jurisdictions, based on the logic that it constitutes a rezoning of the parcel. While a variance is administratively issued by the local zoning board, the power to amend a zoning ordinance is vested solely in the local legislature. Even in jurisdictions that allow the use variance, a particular use variance may be held invalid if it resembles a rezoning in practice. For example, a use variance for a large parcel that substantially alters the character of the district—such as allowing a retail mall in the middle of a residential zone—will normally be disallowed. Because of these concerns, the burden of proof is usually greater for a use variance than for an area variance.[22]

[C] Standards for Variance

[1] General Rule

The birthplace of the variance was Section 7 of the Standard State Zoning Enabling Act (*see* § 36.03[B][3]). It empowered the local zoning board to authorize "in specific cases such variance from the terms of the ordinance as will not be contrary to the public interest, where, owing to special conditions, a literal enforcement of the provisions of the ordinance will result in unnecessary hardship, and so the spirit of the ordinance shall be observed and substantial justice done." Most modern statutes and ordinances still utilize this standard—or one similar to it—as the test for granting a variance. Broadly speaking, then, the prevailing variance standard focuses on two issues: (1) hardship to the property owner; and (2) overall protection of the public interest.[23]

[2] Hardship

What type of hardship is required for a variance? Most courts define hardship to mean that the owner cannot obtain a reasonable return under the existing zoning due to some special characteristic of the property itself that is not generally shared by other parcels in the district.[24]

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[22] *See, e.g.*, Village Bd. v. Jarrold, 423 N.E.2d 385 (N.Y. 1981) (under New York law, use variance is available only if owner proves he cannot obtain a reasonable return from a permitted use).

[23] *Cf.* Topanga Ass'n for a Scenic Community v. County of Los Angeles, 522 P.2d 12 (Cal. 1974) (holding that issuance of a variance must be accompanied by administrative findings, supported by substantial evidence, showing that the requirements for a variance have been satisfied).

[24] *See, e.g.*, Puritan-Greenfield Improvement Ass'n v. Leo, 153 N.W.2d 162 (Mich. Ct. App. 1967); Village Bd. v. Jarrold, 423 N.E.2d 385 (N.Y. 1981); *cf.* Cochran v. Fairfax County Board of Zoning Appeals, 594 S.E.2d 571, 578 (Va. 2004) (hardship found only if ordinance interferes with "all reasonable beneficial uses of the property"). *But see* Simplex Technologies, Inc. v. Town of Newington, 766 A.2d 713 (N.H. 2001) (abandoning traditional hardship test in favor of more flexible standard).

The hardship must stem from the nature of the land, not from the owner's private need.[25] In other words, there must normally be an unusual physical condition on the land—such as mountainous terrain[26] or irregular lot size[27] —that is not found on surrounding parcels. And, in most jurisdictions, the owner must prove that this condition precludes a reasonable return on the land when used in accordance with the current zoning. Suppose, for example, that B owns a ten-acre tract that is zoned only for agricultural use. But because the parcel is essentially a deep, rocky canyon, B cannot obtain a reasonable return by using it for agriculture. Under these unique circumstances, a use variance is appropriate. It should be noted that some jurisdictions utilize a less stringent test for the area variance, requiring only that the existing zoning create "practical difficulties" in using the parcel.[28]

Suppose that O owns a residential lot containing 10,000 square feet; the zoning ordinance requires a minimum lot size of 7,500 feet. O splits his lot into two parcels, one containing 7,500 feet and the other 2,500 feet, and constructs a house on the larger parcel. Can O now claim hardship to obtain a variance to build on the smaller parcel? The answer to this question is "no." O cannot take advantage of the hardship he created.[29]

Another variant on the theme of self-imposed hardship is the buyer who acquires undeveloped property with full knowledge of a zoning problem. Suppose the local zoning ordinance requires that each lot have 75 feet of street frontage; B purchases a vacant lot that has only 50 feet of street frontage and applies for a variance. Some courts will deny relief to a party such as B, reasoning that she created her own dilemma.[30] Presumably B paid a lower purchase price because of the zoning problem, and does not need a variance in order to receive a reasonable return on her investment. The majority approach, however, allows B to obtain the variance; otherwise, society loses the productive value of the land.

The owner's personal hardship is irrelevant. Suppose O owns a home in a zone where the height restriction permits only one-story homes. O has five children and applies for a height variance to add a second story. Here the hardship stems from O's personal needs, not from any unusual characteristic of her land. The variance is designed to ensure that each parcel in the zone receives equal treatment with other parcels, not a special advantage. O's application will be denied.

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[25] *See, e.g.*, Puritan-Greenfield Improvement Ass'n v. Leo, 153 N.W.2d 162 (Mich. App. 1967) (proximity of home to heavy traffic and closeness to business district were not sufficient hardships to justify converting home to dental and medical clinic).

[26] *Cf.* Topanga Ass'n for a Scenic Community v. County of Los Angeles, 522 P.2d 12 (Cal. 1974).

[27] *See, e.g.*, Commons v. Westwood Zoning Bd. of Adjustment, 410 A.2d 1138 (N.J. 1980).

[28] *See, e.g.*, Kisil v. City of Sandusky, 465 N.E.2d 848 (Ohio 1984).

[29] *Cf.* LeBlanc v. City of Barre, 477 A.2d 970 (Vt. 1984).

[30] *See, e.g.*, Clark v. Board of Zoning Appeals, 92 N.E.2d 903 (N.Y. 1950).

[3] Protection of Public Interest

The public interest standard focuses on the impact the variance will have on the neighborhood or zoning district. Is the variance consistent with the "spirit of the ordinance" and "substantial justice"? For most courts, the key question is whether the variance will alter the essential character of the area. For example, in *Commons v. Westwood Zoning Board of Adjustment*,[31] the New Jersey Supreme Court noted that the zoning board could properly deny a variance to construct a home on an undersized parcel if it would adversely affect the "character of the neighborhood," considering its impact both on aesthetics and property values.

[D] Procedure for Obtaining Variance

The power to issue variances is typically delegated by ordinance to the board of zoning appeals or a similar agency. After the property owner applies for the variance, the board provides notice to the public and conducts a public hearing on the application. Most states allow the board to impose conditions on the use when granting a variance.[32] An administrative appeal—and eventually a challenge through litigation—is available to parties dissatisfied with the board's decision.

The issuance of a variance is an administrative decision, generally seen as "quasi-judicial" in nature. As a general rule, it is far easier to obtain a variance than to defend it successfully in later litigation. Courts often observe that variances should be sparingly granted.[33] Consistent with this approach, they rigorously review contested variances to ensure that all requirements are met, according little deference to administrative decisions.

§ 37.04 Special Exceptions (aka Conditional or Special Uses)

[A] Role of the Special Exception

The *special exception* is a use that is authorized by the zoning ordinance if specified conditions are met.[34] Typically, it is an unusual use—such as an airport, school, landfill, golf course, or hospital—that may injure the neighborhood. Potential problems include traffic congestion, noise, odors, population density, impact on property values, and similar concerns. The special exception reflects a legislative decision that while the particular use is appropriate in the zone as a *general* matter, certain restrictions are needed to ensure that it does not harm surrounding uses at its *specific* location. Thus, the zoning board reviews applications for special exceptions

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[31] 410 A.2d 1138 (N.J. 1980).

[32] *See, e.g.,* St. Onge v. Donovan, 522 N.E.2d 1019 (N.Y. 1988).

[33] *See* Matthew v. Smith, 707 S.W.2d 411, 413 (Mo. 1986) (citing numerous cases).

[34] *See generally* Kotrich v. County of Du Page, 166 N.E.2d 601 (Ill. 1960); Zylka v. City of Crystal, 167 N.W.2d 45 (Minn. 1969).

on a case-by-case basis to ensure the required conditions are met. Depending on the jurisdiction, the special exception may instead be called a conditional use, conditional use permit, special use, or special use permit.

For example, suppose owner O wishes to use her property Greenacre for a dump. The ordinance might allow this use in a particular zone only if O demonstrates to the zoning board that Greenacre meets certain predetermined criteria: (1) it is 50 acres or more in size; (2) it is at least 1,000 feet from the nearest residential use; and (3) it is at least 400 feet from any stream, river, or lake.

The special exception provides a flexible method for mitigating the impacts of desirable but unusual uses. Without this tool, a zoning ordinance could only prohibit a use (e.g., no dumps are allowed in the zone) or automatically authorize it (e.g., dumps are permitted everywhere in the zone).

[B] Special Exception Distinguished from Variance

Although the special exception is often confused with the variance, it is fundamentally different. The special exception involves a use authorized by the zoning ordinance; in contrast, the variance allows a use that deviates from the ordinance. And the concern underlying the special exception is to prevent harm to surrounding uses, while the variance serves to relieve the property owner from unusual hardship.

[C] Standards for Special Exception

The special exception originated in Section 7 of the Standard State Zoning Enabling Act (*see* § 36.03[B][3]). This section authorized the local zoning board "in appropriate cases and subject to appropriate conditions and safeguards, [to] make special exceptions to the terms of the ordinance in harmony with its general purpose and intent." It was originally intended that zoning ordinances would list detailed criteria for special exceptions. Thus, the zoning board would have little or no discretion in evaluating an application; it would simply determine whether the criteria were met. Many ordinances still follow this pattern. For example, in the dump hypothetical (*see* [A], *supra*), O's application must be approved if Greenacre meets three specific tests, one relating to parcel size and two concerning location. Criteria for special exceptions may also relate to project design, noise levels, traffic impacts, parking impacts, and related issues.

On the other hand, many ordinances contain only vague, general criteria for approving special exceptions. An ordinance might authorize a special exception, for example, if it is "consistent with the public health, welfare, and safety." Courts are divided on the issue of whether such vague standards are valid.[35] Ordinances utilizing these standards vest extraordinarily broad discretion in zoning boards and similar administrative bodies.

[35] *See* 8 Patrick J. Rohan, Zoning & Land Use Controls § 44.03 (Matthew Bender).

This discretion may allow a zoning board to perform its task more effectively, by carefully tailoring individual conditions to ameliorate the unique impacts of the project. At the same time, vague standards create the danger that decision-making may be arbitrary or unreasonable;[36] this undercuts the Euclidean goal of zoning in accordance with a comprehensive plan. Further, by vesting uncontrolled discretion in an administrative body, these standards may present concerns about separation of powers. While some courts permit vague standards, others invalidate them as an improper delegation of legislative authority.[37]

[D] Procedure for Obtaining Special Exception

The procedure for obtaining a special exception involves the same application, notice, hearing, and appeal steps that govern the variance (*see* § 37.03[D]). Where litigation ensues, however, the judicial attitude toward special exceptions is much more favorable than it is toward variances. Because the special exception reflects a legislative decision that the use is permitted in the zone as a general matter, many courts effectively presume that the applicant is entitled to receive the exception.[38]

§ 37.05 New Zoning Tools

[A] Contract Zoning

Suppose O owns a house, Greyacre, located on a busy corner in a residential zone. He plans to convert Greyacre into a grocery store, and accordingly asks the city to rezone the property for commercial use. The neighborhood residents like the idea of having a corner grocery store conveniently nearby. But they are worried that O's store will sell alcohol late at night, which might produce drunken or rowdy behavior. Can O and the city accommodate this concern by entering into an agreement, under which the city consents to rezone Greyacre and O promises to record a covenant that bars his store from selling alcohol after 6:00 p.m.?

A number of decisions hold that such *contract zoning* is invalid. Some courts reason that contract zoning constitutes illegal spot zoning, while others rely on the principle that a public entity cannot contract away its police powers. Recent decisions, however, reflect a trend toward accepting contract zoning.[39]

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[36] *See, e.g.*, Zylka v. City of Crystal, 167 N.W.2d 45 (Minn. 1969) (holding that city council's denial of application was arbitrary).

[37] *See, e.g.*, Cope v. Inhabitants of the Town of Brunswick, 464 A.2d 223 (Me. 1983) (ordinance deemed unconstitutional).

[38] *See, e.g.*, North Shore Steak House, Inc. v. Board of Appeals, 282 N.E.2d 606 (N.Y. 1972).

[39] *See generally* 1 Patrick J. Rohan, Zoning & Land Use Controls, Ch. 5 (Matthew Bender).

[B] Conditional Zoning

Conditional zoning closely resembles contract zoning, but with a slight twist: the city or other governmental entity makes no official promise. It identifies the conditions that must be met before rezoning is approved, but—in theory—does not legally bind itself to rezone the land. The owner unilaterally fulfills the conditions, applies for the rezoning, and presumably receives approval.

Consider how conditional zoning might apply to O's effort to rezone Greyacre. The city informs O that he must record a covenant precluding the sale of alcohol after 6:00 p.m. as a condition to any future rezoning. O duly records the covenant, and then reappears before the city council on his rezoning application. The city is free, in theory, to deny the application. But in practice, the application will invariably be granted. Both good faith and the fear of negative publicity will preclude the city from altering its position.

There is a clear national trend toward accepting conditional zoning.[40] In the leading case of *Collard v. Incorporated Village of Flower Hill*,[41] the New York Court of Appeals upheld conditional zoning despite arguments that it constituted spot zoning and bargained away the defendant village's police power. The court reasoned that the test for spot zoning turned on the reasonableness of the rezoning in relation to neighboring uses; the standard for judging the validity of conditional zoning, then, was no different from that applied to unconditional zoning.

[C] Floating Zones

Another emerging tool is the *floating zone.* The city or other government entity approves the creation of a new zoning district with particular characteristics but does not specify its location. A developer can then apply for a rezoning to attach the floating zone to specific property. The main advantage of the floating zone is that it allows a city enhanced control over the location of shopping centers, industrial complexes, and other large-scale projects that may produce significant traffic, parking, and other impacts. Today the floating zone is valid in almost all states. A few states reject the concept, most commonly as either spot zoning or an illegal delegation of legislative power.[42]

[D] Cluster Zones

The *cluster zone* is an innovative approach to the design of the residential subdivision. The traditional zoning ordinance (1) requires that each single-family house be a detached, free-standing building on its own lot and (2) specifies exactly where the house may be built on each lot (e.g., at least 20 feet away from the front and rear lot lines, at least five feet away from

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[40] *See, e.g.*, Chrismon v. Guildford County, 370 S.E.2d 579 (N.C. 1988).

[41] 421 N.E.2d 818 (N.Y. 1981).

[42] [illegible] Zoning & Land Use Controls, Ch. 13 (Matthew Bender).

each side line). Suppose developer D owns 25 acres zoned for single-family residential use; under the standard formula, she might devote five acres to roads, sideways, and the like, and divide the remaining 20 acres up into 80 lots, each one-quarter acre in size. D would then build 80 houses, one per lot, producing another ordinary suburb.

In contrast, cluster zoning merely imposes a limit on the density of a residential subdivision, allowing the developer to "cluster" the units on part of the land. This, in turn, allows the planned preservation of open space or the creation of new amenities for the development. Suppose D's land is located within a cluster zone that permits 80 housing units on 25 acres of land. D can still build only 80 units, but now she can arrange them in a manner that produces maximum benefit. For example, D might opt to cluster all 80 units on ten acres (e.g., using small lot sizes and common walls), in order to preserve a small lake and surrounding wetlands that occupy the remaining 15 acres.

[E] Planned Unit Developments

The *planned unit development* or *PUD* is the very antithesis of Euclidean zoning, saved from condemnation as "spot zoning"—if at all—by the large size of the typical parcel.[43] In a sense, the PUD is simply the expansion of cluster zoning to include non-residential uses. Within general guidelines, the owner is allowed to master-plan the specific details of a large-scale development project, including the types and locations of permitted uses. The final plan is then presented to zoning authorities for approval.

A PUD ordinance might provide, for example, that no more than 70% of the tract may be devoted to residential use, no more than 15% may be devoted to commercial or retail uses, and at least 10% must be preserved as open space. Within these parameters, the developer is free to select the type and location of housing units, shopping centers, commercial facilities, and other improvements. In effect, the PUD technique permits a private entrepreneur to plan an entire community or neighborhood in a comprehensive manner.

§ 37.06 The Subdivision Process

Although this chapter focuses on zoning, land use controls may also be imposed through a separate and independent method: the subdivision approval process. Suppose E, an entrepreneur, wishes to develop Greenacre, a 500-acre tract of farm land, into a residential subdivision. E confronts two hurdles. First, he must convince the local zoning authority to rezone Greenacre for residential use. Second, he must obtain permission from the planning commission or local legislative body to subdivide Greenacre into separate lots. In order to obtain subdivision approval, E must comply with conditions and restrictions specified by the approving agency; and in some

[43] *See, e.g.*, Price v. Planning Board, City of Keene, 417 A.2d 997 (N.H. 1980); Cheney v. Village 2 at New Hope, Inc., 241 A.2d 81 (Pa. 1968).

jurisdictions, the agency has broad discretion to deny subdivision applications altogether. The subdivision approval process is thus a second method for ensuring comprehensive land use planning.[44]

A subdivision is simply the legally-recognized division of one parcel of land into multiple parcels, typically four or more lots. Virtually every residential housing tract requires subdivision approval. The typical residential developer seeks to subdivide a large tract of "raw land"—usually agricultural property—into separate lots that accommodate individual houses. Subdivision approval is also required for certain commercial developments (e.g., industrial parks).

Modern subdivision regulation addresses three basic issues: design review; infrastructure financing; and overall acceptability. At the most basic level, local ordinances govern the design or physical layout of the tract to ensure that lots, streets, and utilities are situated in the appropriate locations.

The standard ordinance also requires the developer to construct the streets, sidewalks, storm drains, lighting, parks, and other public infrastructure improvements necessitated by the development. It may also force the developer to mitigate the effect of the project on other public facilities such as schools, libraries, and police and fire services by dedicating land for public use or by paying impact fees. The government power to compel such *exactions* is in turn limited by the Takings Clause of the Fifth Amendment. As the Supreme Court concluded in *Dolan v. City of Tigard*,[45] such exactions must bear a "rough proportionality" to the impacts caused by the development (*see* § 40.08).

In many jurisdictions, the responsible agency is obligated to approve each subdivision application that meets the minimum standards imposed by local ordinance. In some jurisdictions, however, the agency has discretion to deny the application or delay the project, if required by the public health, safety, or welfare (e.g., if the project would cause unreasonable off-site traffic impacts).[46] There is a clear national trend toward authorizing such discretionary denial in order to enhance planning flexibility.

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[44] *See generally* Youngblood v. Board of Supervisors, 586 P.2d 556 (Cal. 1978).

[45] 512 U.S. 374 (1994).

[46] *See, e.g.,* Durant v. Town of Dunbarton, 430 A.2d 140 (N.H. 1981) (subdivision application properly denied because project posed threat of flooding and contamination of groundwater by sewage).

Chapter 38

MODERN LAND USE CONTROVERSIES

SYNOPSIS

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§ 38.06 Growth Control and Zoning

§ 38.01 From "Zoning" to Land Use Regulation

The pioneer zoners of the 1920s would undoubtedly be shocked by our modern system of land use regulation.[1] Particularly in recent decades, the

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[1] *See generally* Robert C. Ellickson, *Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land Use Controls*, 40 U. Chi. L. Rev. 681 (1973); Bradley C. Karkkainen, *Zoning: A Reply to the Critics*, 10 J. Land Use & Envtl. L. 45 (1994); Patricia E. Salkin, *From* Euclid

simple world of Euclidean zoning has yielded to a complex universe of pervasive land use restrictions. The goals and the nature of "zoning" have fundamentally changed.

In its classic 1926 decision of *Village of Euclid v. Ambler Realty Co.*,[2] the Supreme Court justified a typical zoning ordinance as little more than a nuisance control measure; the ordinance minimized the adverse effects of smoke, fumes, noise, and other problems. Today, land use regulation serves a broad array of additional social and economic goals. These new goals include

(1) protecting property values (particularly for single-family homes),

(2) preserving the "character" of neighborhoods,

(3) preventing environmental degradation,

(4) enhancing the property tax base, and

(5) encouraging tourism and other economic development.

The nature of zoning has evolved over time to serve these expanded goals. Euclidean zoning merely regulated the geographic location of particular uses; the basic question was *where* a use could be placed. But modern land use regulation prohibits various uses, even those that are not common law nuisances. Increasingly, we ask *if* a particular use (or sometimes, a particular user) should be allowed at all within the municipality. At its outer edges, the transformation of zoning raises difficult questions about individual liberty, economic efficiency, public welfare, democratic theory, and social justice. For example, should Town A be allowed to bar unrelated persons from living together? May City B prohibit all apartments and other multi-family housing, thereby excluding low-income residents? Can Village C ban an unusually-designed house? And may Town D proscribe all new residential development? In short, how far can a democratically-elected city council or other local legislature go in exercising its land use regulation power?

Questions like these have generated extensive litigation since the 1970s. Challenges to land use regulations based on the federal Constitution, state constitutions, and the Fair Housing Act in particular have enjoyed occasional but limited success. The resulting case law is dominated by a small number of well-known decisions—mainly from the Supreme Court—that provide only limited guidance. Thus, this area requires the careful study of individual decisions that illuminate the broad contours of the law, but in fact resolve fairly narrow issues.

Will our current system of land use regulation undergo major change in the foreseeable future? Probably not. A handful of legal scholars—led by Robert Ellickson and Richard Epstein—urge that the system should be either abolished or dramatically curtailed. Epstein's laissez faire approach

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to Growing Smart: The Transformation of the American Local Land Use Ethic Into Local Land Use and Environmental Controls, 20 Pace Envtl. L. Rev. 109 (2002); Bernard H. Siegan, *Non-Zoning Is the Best Zoning*, 31 Cal. W. L. Rev. 127 (1994).

[2] 272 U.S. 365 (1926).

would largely rely on market forces to make efficient land use decisions, on the model of Houston—the only major United States city without zoning.[3] In contrast, Ellickson argues that a blend of private covenants, nuisance law, and administrative fines—together with minimal land use regulations—would minimize the negative externalities that Epstein's model permits.[4] Yet there is no widespread demand for abolition or radical change. Indeed, in all likelihood, land use regulation will become even more pervasive in future decades, as government confronts the increasing demands placed on our finite land surface by population growth, economic development, technological change, environmental degradation, and other pressures.

§ 38.02 Zoning and the Constitutional Framework

[A] Federal Constitution

[1] Overview

The Constitution is the ultimate constraint on the zoning power. A short (and admittedly simplistic) overview of relevant provisions will help the reader to understand the balance of the chapter. Zoning challenges most frequently involve the Equal Protection, Due Process, and Takings Clauses (*see* Chapter 40) and the First Amendment protection for freedom of speech.[5]

[2] Equal Protection

The Equal Protection Clause of the Fourteenth Amendment provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws."[6] Equal protection challenges to land use regulations are usually reviewed under either the "strict scrutiny" or "rational basis" standard. The more searching standard—*strict scrutiny*—applies when an ordinance or other regulation discriminates against a "suspect class" (e.g., a class based on race, alienage, or national origin) or infringes a "fundamental right" (e.g., freedom of speech or religion). Under this standard, the ordinance is valid only if it is supported by a compelling state interest; the party seeking to uphold the ordinance has the burden of proof.

Otherwise, the regulation is presumed to be valid and is reviewed under the deferential *rational basis* test. "When social or economic legislation is

[3] *See* Richard A. Epstein, *A Conceptual Approach to Zoning: What's Wrong with* Euclid?, 5 N.Y.U. Envtl. L.J. 277 (1996).

[4] *See* Robert C. Ellickson, *Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land Use Controls,* 40 U. Chi. L. Rev. 681 (1973).

[5] Land use regulation occasionally triggers review under the Free Exercise Clause of the First Amendment, which guarantees freedom of religion (e.g., where a municipality refuses to rezone land to allow operation of a church). *See, e.g.*, Messiah Baptist Church v. County of Jefferson, 859 F.2d 820 (10th Cir. 1988).

[6] U.S. Const. amend. XIV.

at issue, the Equal Protection Clause allows the States wide latitude, . . . and the Constitution presumes that even improvident decisions will eventually be rectified by the democratic processes."[7] Under this standard, a regulation will be upheld if it is rationally related to a legitimate state interest—usually the public health, safety, or welfare.[8] And the party challenging the regulation has the burden of establishing that no rational relationship exists. As one authority noted, this traditional standard is so deferential to the local legislature that it "borders on being a rule of non-review."[9] There is some suggestion that the Supreme Court is moving toward a more rigorous version of the rational basis test, dubbed "rational basis with bite."[10] In practice, the applicable review standard usually determines the outcome of an equal protection challenge. Courts rarely find a compelling state interest, but usually find a rational basis.

[3] Due Process

The Due Process Clause of the Fourteenth Amendment provides that no state shall "deprive any person of life, liberty, or property, without due process of law."[11] Due process has two prongs: procedural and substantive. Procedural due process focuses on the fundamental fairness of the procedures used to deprive a person of life, liberty, or property. For example, procedural due process ordinarily requires that the state provide notice and an opportunity for a hearing before depriving an owner of his or her property rights.

Substantive due process, in contrast, is a rather vague and ill-defined doctrine. Since the early twentieth century, the Supreme Court has been reluctant to apply substantive due process to economic and social legislation. This has contributed to uncertainty about the meaning of the doctrine. Substantive due process examines the substance or content of the governmental decision, as opposed to the procedure by which the decision was reached. It provides a safeguard against arbitrary, capricious, or unreasonable decisions. In general, the basic test for substantive due process seems to be the same used for equal protection: unless a fundamental right is involved, a land use regulation will be upheld if it has a rational relationship to the public health, safety, or welfare, or another legitimate governmental interest.[12] If a fundamental right is involved, the regulation will be subject to strict scrutiny review.

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[7] City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 440 (1985).

[8] *See, e.g.*, City of New Orleans v. Pergament, 5 So. 2d 129 (La. 1941) (historic preservation ordinance did not violate equal protection).

[9] Julian C. Juergensmeyer & Thomas E. Roberts, Land Use Planning and Development Regulation Law 534 (2003). *But see* Village of Willowbrook v. Olech, 528 U.S. 562 (2000) (plaintiff alleged an equal protection violation by asserting that the village's demand for an easement as a condition of obtaining municipal water service was motivated solely by ill will against him).

[10] *See* City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432 (1985) (applying more rigorous "rational basis" standard).

[11] U.S. Const. amend. XIV.

[12] *See, e.g.*, Richardson v. Township of Brady, 218 F.3d 508 (6th Cir. 2000) (restrictions on swine farm did not violate substantive due process).

[4] Freedom of Speech

Government regulation of forms of speech—such as signs and sexually-oriented businesses[13] —may invoke review under the First Amendment.[14] The key distinction is between land use restrictions that regulate the content of speech ("content-based") and those that do not ("content-neutral"). Content-neutral regulations on the time, place, and manner of speech are upheld when (a) the government interest is "substantial," (b) the regulation directly advances that interest, and (c) the regulation is no broader than necessary to serve that interest.[15] Especially in the context of sexually-oriented businesses, courts emphasize that the regulation must not unreasonably limit alternative avenues of communication. On the other hand, a content-based regulation is valid only if the government demonstrates that the regulation serves a "compelling" interest rather than a mere substantial interest, and also establishes the final two criteria above.

[B] State Constitutions

State constitutions usually include provisions that parallel the federal Constitution, such as rights to equal protection, due process,[16] privacy, and freedom of speech. Yet state courts are free to construe these provisions more broadly than their federal counterparts. Because a state's own supreme court holds the ultimate authority to interpret its state constitution, a decision based on state constitutional grounds cannot be overturned by federal courts. For example, a land use regulation might be invalidated under the state equal protection clause, even though it satisfies the federal Equal Protection Clause. And state courts are far more willing than federal courts to strike down regulations based on substantive due process.

§ 38.03 "Family" Zoning

[A] The Issue

Town A's zoning ordinance permits only one type of residential use—"single-family dwellings." The ordinance defines "family" as "one or more persons related by blood, adoption, or marriage, or a group of two persons who are not related by blood, adoption, or marriage." In effect, such zoning excludes groups of unrelated people. Suppose that college student E wishes to share a house in Town A with three unrelated students. And N, a charitable association, plans to open a "group home" in the town that will shelter ten mentally-ill children. Can E or N successfully attack A's ordinance?

[13] *See, e.g.,* City of Renton v. Playtime Theatres, 475 U.S. 41 (1986); Buzzetti v. City of New York, 140 F.3d 134 (1998).

[14] U.S. Const. amend. I.

[15] Central Hudson Gas & Elec. Co. v. Public Serv. Comm'n, 447 U.S. 557 (1980).

[16] *See, e.g.,* Guimont v. Clarke, 854 P.2d 1 (Wash. 1993) (invalidating ordinance under due process clause in state constitution).

Family zoning is usually justified on the basis that it reduces traffic, noise, congestion, overcrowding, and other problems related to density, and—more vaguely—protects the family or residential character of a neighborhood. For example, consider two adjacent single-family homes: one is occupied by 20 members of a motorcycle gang, while a nuclear family consisting of two parents and two children resides in the other. All other things being equal, we would reasonably expect more density problems from the first house. Of course, a city might deal with such problems by simply imposing a reasonable maximum occupancy limit regardless of any relationship among the occupants.

Challenges to the validity of family zoning surface most frequently in the two scenarios outlined above: (a) a group of unrelated persons—typically college students—decides to live together as roommates; or (b) a non-profit organization seeks to establish a group home for persons in need of special supervision. As a general matter, courts tend to uphold family zoning against attacks based on the federal or state constitutions; thus E will probably not prevail. On the other hand, in the specialized context of group homes for the handicapped, there is a clear trend in the other direction. N's challenge will probably be successful, based either on constitutional principles or the federal Fair Housing Act.

[B] Unrelated "Families" Generally

[1] *Village of Belle Terre v. Boraas*

In 1974, the Supreme Court upheld "family" zoning against due process and equal protection challenges in *Village of Belle Terre v. Boraas.*[17] The Village of Belle Terre is a community near the New York State University at Stony Brook. Apparently hoping to exclude college students, the Village enacted a typical "family" zoning ordinance. The ordinance permitted only one-family dwellings, expressly barring fraternity houses and similar uses. "Family" was defined as "[o]ne or more persons related by blood, adoption, or marriage" or up to "two (2) [persons] . . . not related by blood, adoption, or marriage."[18] In effect, only two unrelated persons could inhabit a particular dwelling, but an unlimited number of related persons could occupy the adjacent house. The case arose when six unrelated students leased a house together; the Village objected; the landlords and tenants jointly sued for a declaratory judgment that the ordinance was unconstitutional.

The pivotal question before the Court was the applicable standard of review. Writing for the majority, Justice Douglas blended the equal protection and due process issues together. He viewed the ordinance as mere social and economic regulation that did not involve either a fundamental

[17] 416 U.S. 1 (1974).

[18] *Id.* at 2. Courts may circumvent less precise ordinances through interpretation, without the need to confront constitutional issues. *See, e.g.,* Borough of Glassboro v. Vallorosi, 568 A.2d 888, 889 (N.J. 1990) (construing "traditional family unit or the functional equivalency [sic] thereof" to include ten unrelated college students living together).

right or a suspect class.[19] Under these circumstances, the ordinance would be upheld if it was reasonable and not arbitrary, having a rational relationship to a permissible state objective. Douglas concluded that the ordinance easily met this deferential standard because it reduced the traffic, parking, noise, and other urban problems caused by group living arrangements. "The police power is not confined to elimination of filth, stench, and unhealthy places. It is ample to lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people."[20]

Dissenting, Justice Marshall argued that the ordinance unreasonably burdened two fundamental rights—the rights of association and privacy—and thus was subject to "strict scrutiny" review. "The choice of household companions . . . involves deeply personal considerations as to the kind and quality of intimate relationships within the home. . . . The instant ordinance discriminates on the basis of just such a personal lifestyle choice as to household companions."[21] The ordinance certainly would have been struck down under strict scrutiny review. Marshall reasoned that as a means to control density problems, the ordinance was both underinclusive (e.g., because it did not limit the total number of persons who could live in a house) and overinclusive (e.g., because it barred groups such as "three elderly and retired persons").[22]

[2] Developments After *Belle Terre*

After *Belle Terre,* challenges to "family" zoning mainly focused on state constitutional theories. State courts are split on the issue. Following the lead of *Belle Terre,* a majority hold that their state constitutions do not prohibit "family" zoning.[23] States that reject this approach—often employing a more rigorous standard of review—stress Justice Marshall's point that the means are not rationally related to the end of controlling density-related problems. "Under the instant ordinance, twenty male cousins could live together, motorcycles, noise, and all, while three unrelated clerics could not."[24] Two interesting examples of the minority view are decisions from New Jersey[25] and Michigan,[26] both invalidating "family" zoning in cases involving Christian groups who live together as nontraditional families because of their religious beliefs.

In 1977—three years after *Belle Terre*—the Supreme Court addressed a related issue in *Moore v. City of East Cleveland.*[27] The East Cleveland

[19] It is well-settled that the Constitution does not create any right to housing. Lindsey v. Normet, 405 U.S. 56 (1972). And wealth is not considered a suspect classification under the Equal Protection Clause. San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1 (1973).

[20] Village of Belle Terre v. Boraas, 416 U.S. 1, 9 (1974).

[21] *Id.* at 16 (Marshall, J., dissenting).

[22] *Id.* at 19 (Marshall, J., dissenting).

[23] *See, e.g.,* City of Ladue v. Horn, 720 S.W.2d 745 (Mo. Ct. App. 1986).

[24] Charter Township of Delta v. Dinolfo, 351 N.W.2d 831, 841 (Mich. 1984).

[25] State v. Baker, 405 A.2d 368 (N.J. 1979).

[26] Charter Township of Delta v. Dinolfo, 351 N.W.2d 831 (Mich. 1984).

[27] 431 U.S. 494 (1977).

zoning ordinance provided that only a "family" could occupy a dwelling, but defined the term so narrowly that some blood relations were excluded. Defendant Moore lived in a single-family residence with three relatives: one of her sons (Dale) and two of her grandchildren (Dale, Jr. and John, Jr.). The City filed criminal charges against Moore on the basis that John, Jr.—the son of Moore's nonresident son John—was not a family member as defined by the ordinance. While acknowledging that substantive due process was a "treacherous field," a divided Court struck down the ordinance on this basis.[28] The plurality opinion distinguished *Belle Terre* as involving only unrelated individuals, while the East Cleveland ordinance directly interfered with "the sanctity of the family."[29] Under the more rigorous scrutiny triggered by this distinction, the ordinance failed. While the ordinance was intended to serve legitimate goals (e.g., reducing traffic, parking, and other density-related problems), in fact it did little to advance these goals.

In the wake of *Belle Terre* and *Moore,* could a city constitutionally bar an unmarried couple from a "family" zone? The *Belle Terre* majority had no need to reach this issue because the ordinance expressly permitted two unrelated persons to cohabit. Concern for the rights of privacy and association might well be greater if an ordinance barred all unrelated cohabitants. On the other hand, *Moore* seemed to reinforce the traditional definition of a family by sharply distinguishing between blood relations and unrelated persons. Accordingly, one state court upholding such an ordinance acknowledged the "governmental interest in marriage and in preserving the integrity of the biological or legal family," but found no parallel interest in "keeping together a group of unrelated persons."[30]

[C] Group Homes

[1] Nature of Group Homes

The typical group home is a small non-profit facility for the treatment or rehabilitation of persons who need special care, such as battered women, teenage delinquents, elderly persons, persons infected with AIDS, drug addicts, paroled prisoners, mentally-ill persons, and alcoholics. Thus, the group home serves persons who might otherwise be placed in hospitals, asylums, prisons, or similar public institutions.

Controversy has flared in recent years over the development of group homes in single-family residential neighborhoods. Supporters stress that the group home provides better care than large institutions and at a smaller cost; in particular, the residential neighborhood surrounding a group home helps to create a comfortable atmosphere that facilitates effective treatment. Opponents complain about (1) noise, traffic, and other density-related problems, (2) the heightened risk of violence or other criminal activity, and

[28] *Id.* at 502.

[29] *Id.* at 503.

[30] City of Ladue v. Horn, 720 S.W.2d 745, 752 (Mo. Ct. App. 1986).

(3) the reduction of property values. Once the local legislative body weighs these competing policy arguments and renders a decision on a proposed group home, the losing side frequently turns to litigation.

[2] Equal Protection

The landmark Supreme Court decision in the area is *City of Cleburne v. Cleburne Living Center, Inc.*[31] Plaintiffs wished to open a group home for 13 mentally-retarded persons in a single-family residence. The residence was located in a district that allowed apartment houses, boarding houses, most hospitals, and similar multi-occupant uses as a matter of right; however, a special use permit was required for any hospital for the "feeble-minded." Plaintiffs brought suit after their use permit application was denied, claiming that the ordinance on its face and as applied violated the Equal Protection Clause.

In a rather curious decision, the Court invalidated the ordinance. Concluding that the mentally retarded were not a suspect class or "quasi-suspect class," it recited that the ordinance should be reviewed under the rational basis standard. Yet the Court seemed to apply a form of heightened scrutiny—later dubbed "rational basis with bite"—by imposing the burden of proof on the party seeking to uphold the ordinance, contrary to traditional practice. For example, the city had objected to the facility in part based on its location: across the street from a junior high school and in a flood plain. One might easily find a "rational basis" here for treating mentally retarded persons differently from others; they are more likely to be harassed by teenage students, and are less able to care for themselves during a flood emergency. But the Court brushed aside these concerns, seemingly because the city had failed to provide proof that supported the differential treatment.

[3] Fair Housing Act

During the last decade, the federal Fair Housing Act has become the principal weapon against zoning ordinances that exclude group homes for the handicapped. The 1998 amendments to the Act extend its anti-discrimination protections to handicapped persons, defined to include persons with "a physical or mental impairment which substantially limits one or more of such person's major life activities."[32] Under the Act as amended, it is unlawful to make housing "unavailable . . . because of a handicap"[33] or to refuse to make "reasonable accommodations in rules [or] policies" to allow handicapped persons to occupy a dwelling.[34] Although the Act is primarily aimed at discriminatory conduct by private persons (mainly sellers and landlords), these provisions also apply to zoning ordinances and

[31] 473 U.S. 432 (1985).

[32] 42 U.S.C. § 3602(h)(1).

[33] 42 U.S.C. § 3604(f)(1).

[34] 42 U.S.C. § 3604(f)(3).

other governmental activities that effectively exclude group homes for the handicapped.[35]

The Supreme Court brushed aside one potential roadblock to such application of the Fair Housing Act in *City of Edmonds v. Oxford House, Inc.*[36] Under the zoning ordinance in Edmonds, Washington, a single-family dwelling could be occupied by (1) an unlimited number of persons related by genetics, adoption, or marriage or (2) five or less unrelated persons. When the city brought criminal charges against Oxford House—which operated a group home for 10-12 recovering alcoholics and drug addicts in a single-family zone—Oxford House raised the Fair Housing Act as a defense. Yet the Act expressly does not apply to any "reasonable . . . restrictio[n] regarding the maximum number of occupants permitted to occupy a dwelling."[37] The city then filed a separate action seeking a declaratory judgment that its ordinance was entirely exempt from the Act on this basis, which eventually wound up before the Court. The Court flatly held that the ordinance was not a maximum occupancy restriction, because it did not cap the total number of persons who could live in a dwelling; it clearly allowed occupancy by an unlimited number of related persons. The ordinance was intended to preserve the family character of a neighborhood, not to control density-related problems.

Although the *City of Edmonds* court expressly refused to decide the broader question—whether the ordinance in fact violated the Fair Housing Act—a number of lower courts have applied the Act to invalidate similar ordinances[38] and this seems to be the modern trend.[39]

§ 38.04 Exclusionary Zoning

[A] The Issue

City B zones 90% of its land for single-family residential use only, with a required minimum lot size of five acres; the remaining land is zoned for commercial, industrial, or governmental purposes. No land is zoned for apartments or other multi-family residential uses. O wishes to construct an apartment complex for low-income tenants. Can O successfully challenge B's zoning plan?

[35] *See* Doe v. City of Butler, 892 F.2d 315 (3d Cir. 1989) (group home for abused women and children); Association of Friends and Relatives of AIDS Patients v. Regulations and Permits Administration, 740 F. Supp. 95 (D.P.R. 1990) (AIDS hospice).

[36] 514 U.S. 725 (1995).

[37] 42 U.S.C. § 3607(b)(1).

[38] *See, e.g.,* Association for Advancement of the Mentally Handicapped, Inc. v. City of Elizabeth, 876 F. Supp. 614 (D.N.J. 1994). *But see, e.g.,* Oxford House-C v. City of St. Louis, 77 F.3d 249 (8th Cir. 1996) (upholding ordinance).

[39] *See also* Larkin v. Michigan Dep't of Social Servs., 89 F.3d 285 (6th Cir. 1996) (invalidating ordinance provisions that mandated 1,500 foot separation between group homes and required notice to municipality before beginning operation). *But see* Familystyle of St. Paul, Inc. v. City of St. Paul, 923 F.2d 91 (8th Cir. 1991) (upholding rules requiring a one-quarter mile separation between group homes).

Exclusionary zoning refers to land-use controls that tend to exclude low-income and minority groups.[40] The most obvious example is the refusal to allow high-density, low-income housing, as in the above hypothetical. Other exclusionary zoning techniques include requirements for large lot sizes and minimum floor space, and prohibitions on the use of manufactured housing. Whatever the technique, the result is the same: the cost of housing becomes so high that low-income residents are priced out of the housing market. And—because minority residents are more likely to be poor—these techniques tend to foster racial discrimination.[41]

Three justifications for exclusionary zoning are commonly advanced. First, it protects open space and aesthetic values by ensuring low-density development. Second, such zoning upholds property values by restricting low-cost development. Finally, it promotes high-quality public services at a minimal tax cost, by limiting the number of residents who utilize schools and other governmental services. A simplistic example illustrates this final point. Suppose a $500,000 single-family home in a city with exclusionary zoning adds two children to the local school system. In contrast, assume that a $500,000 apartment complex with 10 units in an ordinary city adds 20 children to the system. Assuming a property tax rate of 1% in both cities, each property will yield $5,000 in tax revenue each year. If the entire amount is devoted to education, schools in the first city receive $2,500 per student, while those in the second receive only $250 per student.

Is exclusionary zoning a legitimate use of the zoning power? In the wake of the landmark *Village of Euclid v. Ambler Realty Co.* decision (*see* § 36.05), American courts were extremely deferential to local legislative zoning decisions, even if they had exclusionary effects. Yet the underlying rationale for such deference—respecting the will of voters who selected the legislative body—had less force when applied to exclusionary zoning, because potential residents excluded by this practice were not entitled to vote. In the modern era, exclusionary zoning ordinances have been invalidated in suits premised on state constitutions or the federal Fair Housing Act; but challenges based on the federal Constitution have been less successful.

[40] *See generally* Martha Lamar et al., Mount Laurel *at Work: Affordable Housing in New Jersey, 1983-1988,* 41 Rutgers L. Rev. 1197 (1989); Lawrence G. Sager, *Tight Little Islands: Exclusionary Zoning, Equal Protection and the Indigent,* 21 Stan. L. Rev. 767 (1969).

[41] A related problem is the placement of waste treatment plants and other undesirable land uses in poor or minority communities, often attacked as *environmental racism. See, e.g.,* Coalition of Concerned Citizens Against I-670 v. Damian, 608 F. Supp. 110 (S.D. Ohio 1984) (refusing injunction against highway project); Bean v. Southwestern Waste Management Corp., 482 F. Supp. 673 (S.D. Tex. 1979) (refusing injunction against solid waste facility).

[B] Exclusion of Multi-Family Housing

[1] Federal Decisions

[a] *Village of Arlington Heights v. Metropolitan Housing Development Corporation*

The most influential decision on the constitutionality of exclusionary zoning is *Village of Arlington Heights v. Metropolitan Housing Development Corporation*,[42] where the Supreme Court upheld a rezoning denial against an equal protection challenge in 1977. The defendant Village, an overwhelmingly white suburb of Chicago, was mainly zoned for single-family residences. Plaintiff planned to develop a federally-subsidized, racially integrated housing project for low and moderate-income residents; the project site was a 15-acre parcel in a neighborhood zoned for single-family use only. The Village denied plaintiff's application to rezone the land for multi-family use, consistent with its policy that multi-family uses were permitted only as a buffer zone between single-family and industrial uses. Plaintiff sued, alleging that the denial was based on racial discrimination that violated (a) the Equal Protection Clause of the Fourteenth Amendment and (b) the Fair Housing Act.

The pivotal question before the Court was the applicable standard of equal protection review. It refused to apply the strict scrutiny standard, because there was insufficient proof that discriminatory *intent* was a motivating factor in the Village's decision. The discriminatory *effect* of the decision—standing alone—did not trigger such review. The Court observed that a racially discriminatory effect could be considered in assessing intent where, for example, facially-neutral government action reflected a departure from official policy or produced "a clear pattern, unexplainable on grounds other than race."[43] However, the Court found that neither situation was present. The facts demonstrated that the Village had consistently applied its "buffer zone" policy in the past. Yet the Court failed to explain why a "clear pattern" of discriminatory effect was absent. Racial minorities constituted 18% of Chicago area residents; but African-American residents comprised only about 1/20th of 1% of the Village's population (27 of 64,000 residents). The Court implicitly accepted the district court's conclusion that the rezoning denial was valid under the "rational basis" standard. It remanded the Fair Housing Act claim, however, for further consideration below.

Arlington Heights effectively closed the door to exclusionary zoning challenges based on the Equal Protection Clause. Absent unusual circumstances, it is impossible to prove that an exclusionary zoning ordinance was motivated by discriminatory intent.

[42] 429 U.S. 252 (1977).

[43] *Id.* at 266.

[b] Fair Housing Act

With *Arlington Heights* looming as a roadblock to equal protection challenges, attention shifted in the late 1970s to challenges based on the Fair Housing Act of 1968 (*see* § 16.02[B][1]). The Act is mainly aimed at discrimination in the sale or rental of housing, and thus focused on actions of sellers and landlords. But the Act also provides that it is unlawful to "otherwise make unavailable or deny, a dwelling to any person" because of covered discrimination, and federal courts have utilized this provision to invalidate exclusionary zoning ordinances.

Lower federal courts generally agree that proof of a racially discriminatory *effect* is sufficient to establish a prima facie case that a zoning decision violates the Act, even without evidence of discriminatory *intent*. As a result, the Act has become a powerful weapon against exclusionary zoning.

The leading case on point is *Huntington Branch, NAACP v. Town of Huntington*,[44] whose facts are quite similar to those in *Arlington Heights*. Plaintiffs planned to construct a racially integrated housing project for low-income residents in a neighborhood that was 98% white. Because the project site—like almost all residential land in the town—was zoned for single-family residences only, plaintiffs requested that the site be rezoned for multi-family use. The town board denied the application, citing traffic, health, and other concerns. The Second Circuit found that the decision had racially discriminatory effects because (1) it perpetuated segregation and (2) it disproportionately affected African-American residents, who had a greater need for low-income housing than did white residents. This established a prima facie case of discrimination under the Act, and shifted the burden to the town (1) to present legitimate justifications for its action and (2) to demonstrate that less discriminatory alternatives were unavailable. Because the town was unable to meet this burden, the court ordered that the site be rezoned.

[2] State Decisions

Even before *Arlington Heights*, exclusionary zoning had been successfully attacked under state constitutional law. The state court attack on exclusionary zoning is dominated by twin decisions of the New Jersey Supreme Court—both entitled *Southern Burlington County NAACP v. Township of Mt. Laurel*—commonly called *Mt. Laurel I*[45] and *Mt. Laurel II*.[46] Based on the New Jersey Constitution, the court held that almost every local government was obligated to meet its "fair share" of the regional need for low- and moderate-income housing. This "fair share" approach has been

[44] 844 F.2d 926 (2d Cir.), *aff'd*, 488 U.S. 15 (1988).

[45] 336 A.2d 713 (N.J. 1975). For analysis of developments after *Mt. Laurel I*, see *Symposium: Twists in the Path from* Mount Laurel, 30 B.C. Envtl. Aff. L. Rev. 433 (2003).

[46] 456 A.2d 390 (N.J. 1983).

followed in other jurisdictions, notably New Hampshire,[47] New York,[48] and Pennsylvania.[49]

In 1975, when *Mt. Laurel I* was decided, the Township of Mt. Laurel was a developing suburb within commuting distance of both Camden, New Jersey and Philadelphia, Pennsylvania. Only about 35% of the township's 14,000 acres had been developed, mainly in the form of detached single-family residences. Mt. Laurel effectively excluded all low-income housing because virtually the entire township was zoned for industrial use (29%), detached single-family residences (70%), and retail uses (1%). Multi-family housing developments were simply not allowed anywhere under the basic zoning ordinance.[50] Although a substantial number of apartments and townhouses were included in three planned unit developments, the ordinance required the developers to provide various amenities that increased the price of these units beyond the reach of low- and moderate-income families.

In *Mt. Laurel I,* the New Jersey Supreme Court concluded that the township's zoning ordinance violated the equal protection and due process provisions of the state constitution. The court attributed Mt. Laurel's zoning plan to the state's tax structure, which created a fiscal incentive for developing communities to exclude the poor: "Almost every one acts solely in its own selfish and parochial interest and in effect builds a wall around itself to keep out those people or entities not adding favorably to the tax base."[51] Yet, because a municipality exercises zoning power delegated by the state, the court concluded that it was restricted in the same manner as the state. Thus, a community like Mt. Laurel was obligated to consider the general welfare of all persons in the region, not simply the parochial interests of its current residents. As a result, the court held that every developing municipality has a presumptive obligation to provide "an appropriate variety and choice of housing," including low- and moderate-income housing, to satisfy its fair share of the regional need.[52] On the facts, Mt. Laurel failed to establish "valid superseding reasons"[53] that would overcome this presumption. The court accordingly ordered Mt. Laurel to correct its zoning ordinance within 90 days or such additional time as the trial court permitted.

[47] *See, e.g.,* Britton v. Town of Chester, 595 A.2d 492 (N.H. 1991).

[48] *See, e.g.,* Berenson v. Town of New Castle, 341 N.E.2d 236 (N.Y. 1975). *But see* Asian Americans for Equality v. Koch, 527 N.E.2d 265 (N.Y. 1988) (refusing to apply *Mt. Laurel* standard to New York City).

[49] *See, e.g.,* Surrick v. Zoning Hearing Board, 382 A.2d 105 (Pa. 1977); Fernley v. Board of Supervisors, 502 A.2d 585 (Pa. 1985).

[50] Indeed, such exclusionary zoning appeared to be valid under prior New Jersey law. *See, e.g.,* Vickers v. Gloucester Township, 181 A.2d 129 (N.J. 1962) (upholding zoning ordinance that banned mobile homes).

[51] Southern Burlington County NAACP v. Township of Mt. Laurel, 336 A.2d 713, 723 (N.J. 1975).

[52] *Id.* at 731.

[53] *Id.* at 730.

An outraged New Jersey Supreme Court revisited the controversy eight years later. Despite the court's order in *Mt. Laurel I,* the township's zoning ordinance continued to exclude the poor; only 20 acres had been rezoned for low-income housing. Determined to "put some steel into that doctrine," the *Mt. Laurel II*[54] court crafted a 120-page opinion that expanded the "fair share" principle in three important ways. First, it held that all municipalities designated by the state as growth areas were bound by the doctrine, not merely "developing" municipalities; this extended the doctrine to almost all of New Jersey other than urban areas. Second, it required municipalities to take affirmative measures to encourage construction of low- and moderate-income housing. The court reasoned that merely eliminating obstacles like exclusionary zoning ordinances was insufficient. Rather, municipalities were obligated to

(1) help developers obtain state and federal subsidies for low- and moderate-income housing projects,

(2) provide incentives to developers to build such housing (e.g., allowing increased density),

(3) require that developers include a minimum amount of low- and moderate-income housing in any future housing project, and/or

(4) utilize other affirmative methods for meeting the fair share requirement.

Actual success—not merely good faith effort—was required. Finally, the court authorized an innovative procedure known as the *builder's remedy*; if a municipality refused to allow construction of a housing project in violation of its "fair share" obligation, a trial court could allow the project to proceed unless it "is clearly contrary to sound land use planning."[55]

By adding teeth to the toothless *Mt. Laurel I, Mt. Laurel II* generated extraordinary controversy.[56] Ultimately, New Jersey supplanted part of the holding through legislation[57] that created a new agency to grapple with the low-income housing problem and suspended the builder's remedy. Yet it was not until 1997—22 years after *Mt. Laurel I*—that the Township of Mt. Laurel finally approved its first low-income housing project.

[C] Other Exclusionary Zoning Techniques

Other zoning techniques—such as minimum lot size requirements, minimum floor space requirements, and bans on manufactured housing—can produce the same exclusionary effect as an outright prohibition on multi-family housing. By increasing the cost of housing, they price

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[54] Southern Burlington County NAACP v. Township of Mt. Laurel, 456 A.2d 390, 410 (N.J. 1983).

[55] *Id.* at 452.

[56] The principles of *Mt. Laurel II* have not been adopted by other jurisdictions. *But cf.* Britton v. Town of Chester, 595 A.2d 492 (N.H. 1991) (upholding trial court's use of builder's remedy).

[57] *See generally* Hills Dev. Co. v. Township of Bernards, 510 A.2d 621 (N.J. 1986) (upholding constitutionality of legislation).

low-income families out of the community. Yet attacks on such exclusionary techniques have produced mixed results.

Large minimum lot size requirements in residential zones (e.g., 5,000 square feet, two acres, or five acres) are usually upheld as appropriate methods to reduce traffic congestion, sanitation problems, fire danger, and density concerns. Minimum floor space standards (e.g., 1,400 square feet) have proven somewhat more vulnerable to challenge. Particularly when no limit is placed on the number of residents, it is difficult to justify such standards as necessary to protect the health, safety, or general welfare. Finally, although bans on manufactured housing have long been upheld, the law is gradually changing. Most courts still reason—as in the past—that concerns based on aesthetics, protection of property values, and health and safety risks are sufficient to bar mobile homes and other forms of manufactured housing. However, a number of states have enacted legislation that curtails the ability of local governments to ban or restrict such housing.

§ 38.05 Aesthetic Zoning

[A] The Issue

C, a small western village, seeks to attract tourists and thereby support local businesses; the village council enacts an ordinance that mandates that all new buildings must utilize an architectural design "consistent with those found in small towns in the western United States between 1860 and 1880." O now wishes to build a geodesic dome home on his undeveloped lot. Is C's ordinance enforceable?

Land use restrictions based on aesthetics—loosely known as *aesthetic zoning*—are controversial.[58] One issue dominated the debate for much of the twentieth century: does the police power permit municipalities to regulate aesthetics? The law has evolved in three distinct stages. Early twentieth-century courts held flatly that the police power could not be exercised based on aesthetic considerations alone; thus, ordinances that attempted to regulate the visual impact of billboards, for example, were deemed to violate substantive due process. By the 1960s, the law had progressed to the point where aesthetic zoning was upheld if it furthered some legitimate governmental purpose other than pure aesthetics (e.g., traffic safety, fire safety, preservation of property values, or promotion of tourism), and some jurisdictions still follow this approach.[59] Under this view, C's ordinance is presumably valid because it serves the economic goal of encouraging local tourism.

By the end of the twentieth century, a majority of American courts had embraced yet a third position—holding that aesthetics alone was an

[58] *See generally* Raymond R. Coletta, *The Case for Aesthetic Nuisance: Rethinking Traditional Judicial Attitudes,* 48 Ohio St. L.J. (1987); John Nivala, *Constitutional Architecture: The First Amendment and the Single Family House,* 33 San Diego L. Rev. 291 (1996).

[59] *See, e.g.,* A-S-P Associates v. City of Raleigh, 258 S.E.2d 444 (N.C. 1979); Village of Hudson v. Albrecht, 458 N.E.2d 852 (Ohio 1984).

appropriate governmental purpose.[60] As Justice Douglas explained in a related context: "The concept of the public welfare is broad and inclusive. . . . The values it represents are . . . aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy . . . ."[61] Under this approach, C's ordinance is valid simply because it serves aesthetic goals.

As a general matter, municipalities are now empowered to regulate billboards, junkyards, and other unsightly uses based on aesthetic considerations alone. In recent decades, attention has accordingly shifted to other constitutional constraints on aesthetic zoning, notably the First Amendment guarantee of freedom of speech.

[B] Structures

One widespread form of aesthetic zoning is the architectural design review ordinance. The usual ordinance establishes an administrative board that evaluates the design of proposed single-family residences and other structures in light of particular criteria. Typical criteria include:

(1) the appearance of the surrounding area;

(2) specified design standards; and

(3) impact on the property value of nearby parcels.[62]

If the board rejects a particular design, the affected owner cannot obtain a building permit for the project.

State ex rel. Stoyanoff v. Berkeley[63] —a 1970 decision by the Missouri Supreme Court—illustrates the concept. The city of Ladue, a wealthy suburb of St. Louis, adopted a design review ordinance. It required all structures to "conform to certain minimum architectural standards of appearance and conformity with surrounding structures, and that unsightly, grotesque and unsuitable structures . . . be avoided, and that appropriate standards of beauty and conformity be fostered and encouraged."[64] After petitioners' application to build a pyramid-style home in a neighborhood of Colonial, French Provincial and English Tudor houses was rejected, they sought a writ of mandamus to compel the city to issue a building permit on the basis that the ordinance violated the state constitution's due process clause. The Missouri Supreme Court upheld the ordinance as a legitimate exercise of the police power, using essentially the same "rational basis" standard applied under the federal Due Process Clause. Following the minority approach, the court refused to rest its

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[60] *See, e.g.*, Omnipoint Communications Enterps., LP v. Zoning Hearing Bd. of Easttown Township, 248 F.3d 101 (3d Cir. 2001) (applying Pennsylvania law); State v. Jones, 290 S.E.2d 675 (N.C. 1982) (adopting majority view, with slight modifications).

[61] Berman v. Parker, 348 U.S. 26, 33 (1954).

[62] A recurring problem is whether such criteria provide sufficient guidance to applicants or are void for vagueness. *Compare* State *ex rel.* Stoyanoff v. Berkeley, 458 S.W.2d 305 (Mo. 1970) (sufficient), *with* Anderson v. City of Issaquah, 851 P.2d 744 (Wash. Ct. App. 1993) (void).

[63] 458 S.W.2d 305 (Mo. 1970).

[64] *Id.* at 306–07.

decision on aesthetics alone. Rather, it reasoned that the proposed home would adversely affect property values and otherwise disrupt the general welfare of area residents; thus, the decision was neither arbitrary nor unreasonable.[65] In a sense, of course, this reasoning is circular. The pyramid house would affect property values and community welfare *because of* its unusual appearance, i.e., its aesthetics.

Is architecture a form of speech safeguarded by the First Amendment? Although the Supreme Court has never considered the issue, some scholars suggest that architecture should be so protected. Under this view, an ordinance that prohibits a particular architectural style might be seen as a form of content-based censorship, not merely a restriction on the time, place, or manner of expression. For instance, might the pyramid-style architecture in *Stoyanoff* be construed as a cultural or political statement and thereby be entitled to First Amendment protection?[66]

[C] Signs

Signs are a traditional form of speech. Accordingly, controls on signs pose obvious First Amendments concerns. And the city of Ladue—already familiar to the reader from the discussion of *State ex rel. Stoyanoff v. Berkeley* (*see* § 38.05[B])—has contributed to the evolution of the law in this area as well. In general, municipalities may regulate signs under the police power. Yet, as the Supreme Court explained in *City of Ladue v. Gilleo*,[67] a sign ordinance might be invalid because it (a) "simply prohibit[s] too much protected speech" or (b) discriminates based on the content of the sign's message,[68] and hence, "in effect restricts too little speech."[69]

City of Ladue arose when the city adopted an ordinance that banned all signs, except those falling into one of ten exemptions. For example, "for sale" signs on residences, signs for religious institutions, and commercial signs were all exempt from the ban. The ordinance was accompanied by legislative findings that it was necessary to avoid "ugliness, visual blight and clutter," diminution of property values, safety and traffic hazards, and threats to the "special ambience" of the city.[70] In 1991, during the Gulf War era, plaintiff Gilleo posted an 8 ½ by 11-inch sign in the window of her home that stated: "For Peace in the Gulf." When the city refused to allow the sign, plaintiff challenged the ordinance as a violation of her right to freedom of speech.

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[65] *See also* Reid v. Architectural Board of Review, 192 N.E.2d 74, 77 (Ohio Ct. App. 1963) (upholding board's disapproval of design for one-story home consisting of twenty modules in neighborhood of two and one-half story "dignified, stately, and conventional" structures).

[66] *See* Janet Elizabeth Haws, Comment, *Architecture as Art? Not in My Neocolonial Neighborhood: A Case for Providing First Amendment Protection to Expressive Residential Architecture*, 2005 BYU L. Rev. 1625.

[67] 512 U.S. 43 (1994).

[68] For example, in Metromedia, Inc. v. San Diego, 453 U.S. 490 (1981), the Court held a sign ordinance invalid because it treated commercial signs more favorably than some noncommercial signs, and thereby discriminated based on the content of the message.

[69] City of Ladue v. Gilleo, 512 U.S. 43, 50–51 (1994).

[70] *Id.* at 47.

A unanimous Court struck down the ordinance, because it entirely foreclosed a traditional and important medium of expression: residential signs. Just as the ordinance barred plaintiff from expressing her political views about the Gulf War, it similarly prohibited signs for particular political candidates, and other political, religious, and personal statements. The Court rejected the claim that the ordinance merely regulated the time, place, and manner of speech, because substitute methods of speech were inadequate. Displaying a sign at one's own residence is cheap, convenient, and uniquely identifies the speaker, features that other alternative methods do not possess. Finally, the Court noted that Ladue's legitimate regulatory concerns could be satisfied through a more narrowly-tailored ordinance.

§ 38.06 Growth Control and Zoning

In rapidly-growing Town D, over 200 homes have been built annually in recent years. The result is increased traffic congestion, crowded schools, a shortage of sewage treatment capacity, and loss of the small-town ambience that its citizens have long valued. The town council adopts an ordinance that restricts the rate of development to 50 homes per year. Each developer may file an annual application for a permit to build new homes, and permits will be allocated based on objective criteria that measure the impacts of the proposed project (e.g., amount of added traffic). Subdivider S wishes to build 400 homes this year in the town. Can S successfully challenge D's ordinance?

Growth control ordinances[71] are generally upheld against due process and equal protection attacks.[72] The pioneering decision is *Golden v. Planning Board of Town of Ramapo*,[73] where the New York Court of Appeals upheld a "phased growth" ordinance somewhat like the hypothetical ordinance above. Due to rapid growth, the infrastructure of Ramapo was inadequate to provide the sewage, school, recreation, road, and fire service facilities necessary to continue the recent rate of development; the ordinance allocated permits for new homes based on the availability of these services. Reviewing the ordinance under the deferential "rational basis" standard, the court found that the circumstances easily justified the growth restriction.

The Ninth Circuit went even farther in *Construction Industry Association of Sonoma County v. City of Petaluma*.[74] The court rejected a substantive due process attack on an ordinance that limited growth in order to "preserve [the city's] small town character, its open spaces and low density of population, and to grow at an orderly and deliberate pace."[75] The *Petuluma*

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[71] *See generally* Robert C. Ellickson, *Suburban Growth Controls: An Economic and Legal Analysis*, 86 Yale L.J. 385 (1977).

[72] *See, e.g.*, Associated Home Builders v. City of Livermore, 557 P.2d 473 (Cal. 1976) (finding insufficient facts to overcome the presumption of constitutionality under the "rational basis" test).

[73] 285 N.E.2d 291 (N.Y. 1972).

[74] 522 F.2d 897 (9th Cir. 1975).

[75] Construction Industry Ass'n of Sonoma County v. City of Petaluma, 522 F.2d 897, 909 (9th Cir. 1975).

court relied in part on the Supreme Court's decision in *Belle Terre,* concluding that the ordinance served the legitimate governmental interest of preserving quiet residential neighborhoods.

Of course, an ordinance intended to regulate growth might conceivably be so restrictive as to constitute a regulatory taking (*see* Chapter 40). For example, in *Lucas v. South Carolina Coastal Council,*[76] the Supreme Court held that a state statute that effectively prevented any development or other beneficial use of two residential lots was a compensable taking, absent proof that background principles of property and nuisance law justified the ban.

[76] 505 U.S. 1003 (1992).

Chapter 39

EMINENT DOMAIN

SYNOPSIS

§ 39.01 Eminent Domain in Context
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§ 39.07 Eminent Domain Procedure

§ 39.01 Eminent Domain in Context

O owns fee simple absolute in a ten-acre tract of land where the federal government plans to build a post office. O refuses to sell even though the government offers a fair price. Can the government "take" the property over O's loud and vigorous protests? Yes. Federal, state, and local governments have the inherent power to take private property for public use over the owner's objection, through a process known as *eminent domain* or *condemnation*.[1] Although this chapter will discuss the eminent domain power mainly

[1] *See generally* Abraham Bell & Gideon Parchomovsky, *The Uselessness of Public Use*, 106 Colum. L. Rev. 1412 (2006); Lawrence Berger, *The Public Use Requirement in Eminent Domain*, 57 Or. L. Rev. 203 (1978); Thomas W. Merrill, *The Economics of Public Use*, 72 Cornell L. Rev. 61 (1986); William B. Stoebuck, *A General Theory of Eminent Domain*, 47 Wash. L. Rev. 553 (1972).

in connection with real property, it may also be used to acquire personal property.

Eminent domain was an uncontroversial—and indeed dull—subject until the middle of the twentieth century. Until this point, the exercise of the power was relatively infrequent. More importantly, its exercise was almost always limited to acquiring land for uses that were purely governmental in character (e.g., military bases, post offices, highways, parks, or schools). But attempts in recent decades to extend the eminent domain power to new arenas such as urban renewal, land redistribution, and commercial development have sparked vigorous controversy. In turn, the controversy has focused attention on how the Constitution limits this power.

This chapter examines the formal eminent domain process. Chapter 40 explores the closely related issue of when government land use regulation goes "too far" and thus becomes a regulatory taking for which compensation must be paid.

§ 39.02 The Takings Clause of the Fifth Amendment: "Nor Shall Private Property Be Taken for Public Use, Without Just Compensation"

[A] Scope of the Takings Clause

The Constitution does not expressly grant eminent domain power to the federal government. Apparently, the framers viewed this power as an essential element of sovereignty. Just as the British Crown had the inherent power to take private property, the framers assumed that the new United States would possess this power. Instead, the Constitution *restricts* the eminent domain power.[2]

The key provision is the final sentence of the Fifth Amendment, commonly called the Takings Clause. It states: "[N]or shall private property be taken for public use, without just compensation." Literally, the Takings Clause only restricts the federal government. But its provisions have been held equally applicable to state and local governments through the conduit of the Fourteenth Amendment. In addition, all state constitutions contain parallel provisions that directly bind state and local governments.

The Takings Clause applies only when *private property* (*see* § 39.03) is *taken* (*see* § 39.04). It imposes two restrictions on the eminent domain power. Government (1) may take private property only for *public use* (*see* § 39.05) and (2) must pay *just compensation* to the owner (*see* § 39.06).

[2] *See generally* William M. Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 Colum. L. Rev. 782 (1995); William M. Treanor, Note, *The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment*, 94 Yale L.J. 694 (1985).

[B] Origin of the Takings Clause

Under English law, a landowner whose property was physically taken by the sovereign had no right to compensation. However, even before the Revolutionary War, the custom in the American colonies was quite different. Although not legally obligated to pay, the colonies usually provided compensation when taking land for public use. The main exception to this practice involved the condemnation of rural land for a public highway or road, where payment was rarely provided. Yet even here, the affected landowner received indirect compensation: the new highway typically increased the value of his or her remaining land.

In light of this background, the origin of the Takings Clause is somewhat murky. Citizens of the new United States could reasonably anticipate that the colonial practice of paying compensation would continue. Even in the feverish debate that preceded the ratification of the Constitution, little public concern was expressed about the lack of a clause requiring compensation for government takings. In this sense, the Takings Clause stands out from the rest of the Bill of Rights. Every provision ultimately included in the Bill of Rights was specifically requested by two or more states, except for the Takings Clause. Not a single state demanded such a clause.

History reflects that James Madison drafted and proposed the Takings Clause as one of several suggested amendments to the Constitution. But Madison's motivation is unclear. It has been suggested that Madison was responding to popular outcry against a frequent practice of the American army during the Revolutionary War: seizing privately-owned food, supplies, and other personal property necessary for the war effort without compensation. Yet Madison's writings suggest that the Takings Clause was intended to serve broader economic and political goals.[3] It would protect large property owners against government-mandated redistribution of wealth and other arbitrary actions. Even if poor or impoverished citizens someday formed a majority, they could not use the machinery of government to confiscate property without payment. Similarly, Madison firmly believed that the ownership of property was fundamental to political freedom. Democracy could prosper only if individuals were sufficiently independent from government pressure and influence to act in the best interests of the nation. In Madison's vision, this political independence stemmed from private property: the landowner who could support his family by growing crops on his own land had no reason to sacrifice the national good for personal gain. By protecting private property, the Takings Clause would help to safeguard democracy.

[C] Modern Rationale for the Takings Clause

In recent decades, the Supreme Court has stressed that one of the principal purposes of the Takings Clause is "to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice,

[3] *See generally* William M. Treanor, Note, *The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment*, 94 Yale L.J. 694, 710–13 (1985).

should be borne by the public as a whole."[4] This rationale combines two key themes that reflect Madison's concerns. First, the Takings Clause is seen as a check on arbitrary government action. Government cannot capriciously single out certain individuals or groups for disparate treatment. Second, the Takings Clause ensures that all citizens bear their fair share of public burdens. One citizen cannot be unfairly forced to assume obligations that all citizens should meet.

§ 39.03 "Nor Shall Private Property . . ."

Any type of private property may be acquired through eminent domain. The vast majority of cases involves the condemnation of a possessory estate in land, almost always fee simple absolute. All possessory estates (both freehold and nonfreehold)[5] and other interests (e.g., easements, CC&Rs, and future interests) in real property may similarly be condemned.[6] Tangible and intangible personal property are also subject to condemnation.[7]

§ 39.04 ". . . Be Taken . . ."

In the standard eminent domain case, a state or other government entity takes permanent physical possession of a particular parcel of land. For example, State A might condemn 10 acres of O's land in order to build a new state prison; when the process is complete, O's possessory rights will be extinguished. As the Supreme Court explained in *Loretto v. Teleprompter Manhattan CATV Corp.*,[8] any permanent physical occupation of property authorized by government is deemed a compensable taking.

Beyond this point, however, the definition of a "taking" is extraordinarily uncertain.[9] Under some circumstances, a temporary physical "invasion" of land authorized by government or an overly-restrictive land use regulation may be compensable takings, as discussed in Chapter 40.

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[4] Dolan v. City of Tigard, 512 U.S. 374, 384 (1994) (quoting Armstrong v. United States, 364 U.S. 40, 49 (1960)).

[5] *See, e.g.*, Almota Farmers Elevator & Warehouse Co. v. United States, 409 U.S. 470 (1973) (condemnation of leasehold estate).

[6] *See, e.g.*, Palm Beach County v. Cove Club Investors Ltd., 734 So. 2d 379 (Fla. 1999) (right to receive recreation fee imposed on lots by CC&Rs was a property right for which compensation must be paid).

[7] *See, e.g.*, City of Oakland v. Oakland Raiders, 646 P.2d 835 (Cal. 1982) (suggesting city had right to condemn professional football franchise).

[8] 458 U.S. 419 (1982).

[9] *See, e.g.*, Rubano v. Department of Transp., 656 So. 2d 1264 (Fla. 1995) (elimination of U-turn and other changes in traffic flow caused by highway construction, which did not significantly impair access to petitioners' properties, was not a taking).

§ 39.05 ". . . For Public Use . . ."

[A] The Problem of Defining "Public Use"

American courts have struggled for over two centuries to define "public use."[10] The phrase implies that condemnation is permitted only if the affected land will be physically used or occupied by members of the public (e.g., as a public park or library). Under this approach, public use is defined by the *identity* of the future land users or occupiers. This "physical use" standard was adopted by nineteenth-century courts, but withered away during the twentieth century under the pressure of changing political and social conditions. As government undertook new and expanded functions—such as housing development and urban renewal—the physical use test proved unduly restrictive.

[B] The Public Purpose Test

[1] Shift to a New Standard

Two landmark Supreme Court decisions—*Berman v. Parker*[11] and *Hawaii Housing Authority v. Midkiff*[12] —signaled the shift to a new standard: the *public purpose* test. Under this approach, public use is defined by the *purpose* underlying the government action. As long as property is taken for a legitimate public purpose—that is, a purpose within the scope of the government's police power—the public use requirement is satisfied. Today virtually all courts utilize the public purpose test.

[2] *Berman v. Parker*

The public purpose test gained prominence in the 1954 Supreme Court decision of *Berman v. Parker*. The case arose when the District of Columbia condemned plaintiffs' department store in a "blighted" area as part of a large-scale urban renewal program to eliminate unsafe, unsanitary, and unsightly buildings. The District intended to resell the land to entrepreneurs who would build privately-owned projects consistent with the urban renewal plan. Plaintiffs sued to enjoin the condemnation, arguing that it was merely "a taking from one businessman for the benefit of another businessman,"[13] in other words, a taking of private property for private use.

Writing for the Court, Justice Douglas focused on the purpose for the government action, not the identity of the future land users. If government has the right to exercise the police power for a particular public purpose,

[10] *See generally* Lawrence Berger, *The Public Use Requirement in Eminent Domain*, 57 Or. L. Rev. 203 (1978); Comment, *The Public Use Limitation on Eminent Domain: An Advance Requiem*, 58 Yale L.J. 599 (1949).

[11] 348 U.S. 26 (1954).

[12] 467 U.S. 229 (1984).

[13] Berman v. Parker, 348 U.S. 26, 33 (1954).

he reasoned, then it has the right to condemn property as well. He observed: "Once the object is within the authority of Congress, the right to realize it through the exercise of eminent domain is clear. For the power of eminent domain is merely the means to the end."[14] Here, the District sought to upgrade housing conditions for an entire neighborhood through a comprehensive redevelopment plan, rather than through a piecemeal, structure-by-structure approach. This goal was a legitimate public purpose and, accordingly, the condemnation was for a "public use." In effect, Douglas suggested that the scope of the government's eminent domain power was coextensive with the police power.[15]

[3] *Hawaii Housing Authority v. Midkiff*

In 1984, *Hawaii Housing Authority v. Midkiff*[16] posed a more challenging question: could the state of Hawaii condemn land from a landlord and then convey it to his tenant? The issue arose because fee simple ownership of private land in Hawaii was highly concentrated in a few owners. For example, 22 owners held 72.5% of all fee simple land on the island of Oahu. Residents could easily lease land, but found it difficult to purchase fee simple title. The Hawaii legislature adopted a statute that sought to remedy this problem. It authorized tenants living in single-family homes to petition a state agency to condemn these properties, and then resell them to the tenants. Plaintiffs, trustees of a charitable trust that owned extensive lands, sued to invalidate the statute as authorizing an unconstitutional exercise of the eminent domain power. The Ninth Circuit agreed. It construed the statute as permitting a taking for purely private use, referring to the statute as "a naked attempt . . . to take the private property of A and transfer it to B solely for B's private use and benefit."[17]

In upholding the constitutionality of the Hawaii statute, the Supreme Court broadened the scope of the public purpose test in two important respects. First, Justice O'Connor, writing for the majority, confirmed what *Berman* had suggested: the public use standard is coterminous with the scope of the police power. The *Midkiff* plaintiffs argued that the public use standard included a requirement that government possess and use the land

[14] *Id.* at 33.

[15] Two significant state court decisions further illustrate the evolution of the public purpose test after *Berman*. Poletown Neighborhood Council v. City of Detroit, 304 N.W.2d 455 (Mich. 1981), held that Detroit could condemn homes in a non-blighted residential neighborhood, and then transfer the land to General Motors to build a Cadillac assembly plant; the Michigan Supreme Court found that the taking served a public purpose because it would provide employment and help revitalize the economic base of the community. *But see* County of Wayne v. Hathcock, 684 N.W.2d 765 (Mich. 2004) (overruling *Poletown*). A year later, the California Supreme Court suggested in City of Oakland v. Oakland Raiders, 646 P.2d 835 (Cal. 1982), that Oakland's attempted condemnation of the Raiders football team might meet the public use test because it served the public purpose of providing recreational benefits to city residents.

[16] 467 U.S. 229 (1984). *See generally* Susan Lourne, Comment, Hawaii Housing Authority v. Midkiff: *A New Slant on Social Legislation: Taking from the Rich to Give to the Well-to-Do*, 25 Nat. Resources J. 773 (1985).

[17] Midkiff v. Tom, 702 F.2d 788, 798 (9th Cir. 1983), *rev'd sub nom.* Hawaii Housing Authority v. Midkiff, 467 U.S. 229 (1984).

at least temporarily, just as the District of Columbia had temporarily possessed the land condemned in *Berman*. In contrast, the state of Hawaii had never held possession of the lands condemned in *Midkiff*; rather, the private tenants had always retained possession. The Court's holding that this distinction was irrelevant extinguished any lingering traces of the "physical use" test. Under the Fifth Amendment, public use is now defined by the purpose underlying the government action, not by the identity of the land user.

Second, *Midkiff* established that condemnation decisions are judicially reviewed under the deferential "rational basis" standard. Thus, when a particular exercise of the legislature's eminent domain power is attacked, the appropriate question is not whether *in fact* the condemnation serves a public purpose. Rather, a court may only inquire whether the decision is rationally related to a conceivable public purpose. In other words, could the legislature *rationally have believed* that the condemnation would serve a permissible public purpose?

Applying its expanded public purpose test to the *Midkiff* facts, the Court found no difficulty in upholding the Hawaii statute. Regulating a land oligopoly to reduce its social and economic evils was seen as a classic exercise of the police power. The scarcity of fee simple land both artificially increased its price and precluded many residents from enjoying the economic and social benefits of owning their own homes. The statute was a rational approach to correcting what the Court perceived as a malfunctioning land market.[18]

[4] *Kelo v. City of New London*

Can a city condemn an owner-occupied home and then convey it to a private company as part of an economic development project?[19] In *Kelo v. City of New London*,[20] the Supreme Court answered "yes" to this question, sparking widespread controversy.[21]

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[18] *But see* Manufactured Housing Communities of Washington v. Washington, 13 P.3d 183 (Wash. 2000) (invalidating state law that gave mobile home tenants a right of first refusal to purchase their lots if the landlord decided to sell, on basis that public use test not met).

[19] Most state courts would answer "no" to this question. *See, e.g.*, Southwestern Illinois Development Authority v. National City Environmental, LLC, 768 N.E.2d 1 (Ill. 2002) (parking lot for private racetrack was not a public use under Illinois and U.S. Constitutions); County of Wayne v. Hathcock, 684 N.W.2d 765 (Mich. 2004) (private business and technology park was not a public use under Michigan Constitution). *Cf.* Georgia Dept. of Transportation v. Jasper County, 586 S.E.2d 853 (S.C. 2003) (private marine terminal was not a public use under South Carolina Constitution).

[20] 125 S. Ct. 2655 (2005). *See generally* Eric Rutkow, Comment, Kelo v. City of New London, 30 Harv. Envtl. L. Rev. 261 (2006).

[21] As two scholars summarized, "[e]veryone hates *Kelo*." Abraham Bell & Gideon Parchomovsky, *The Uselessness of Public Use*, 106 Colum. L. Rev. 1412, 1413 (2006) (noting that although *Kelo* "merely affirmed a longstanding rule," the reactions of critics were "immediate, intense, and harsh"); Daniel H. Cole, *Why* Kelo *Is Not Good News for Local Planners and Developers*, 22 Ga. St. U. L. Rev. 803, 803 (2006) (observing that "all hell broke loose" after *Kelo* was decided). *But see* Joseph L. Sax, Kelo: *A Case Rightly Decided*, 28 Hawaii L. Rev. 365 (2006).

New London, Connecticut was an economically-depressed area with a high unemployment rate. The city adopted a comprehensive redevelopment plan for 90 acres in the downtown district, which provided for the construction of new homes, shops, restaurants, marinas, a hotel, and other uses. The project was anticipated to create over 1,000 jobs, increase tax revenue, provide recreational opportunities, and generally revitalize the city. However, the city had to acquire title to all 115 privately-owned parcels in the redevelopment area in order for the project to proceed. While most owners sold voluntarily, Kelo and a few other homeowners objected, stressing that their properties were in good condition and not "blighted."

When the city began condemnation proceedings, Kelo and others sued the city, asserting that taking their properties would not serve a public use. Before the Supreme Court, their principal argument was that economic development should not be considered a "public use."

Writing for the majority, Justice Stevens relied on *Berman* and *Midkiff* in finding that the redevelopment plan "unquestionably serves a public purpose."[22] The downtown area was economically depressed; the city believed that its plan would provide new jobs, increased tax revenue, and other benefits to the public; and it would be improper for the Court to "second-guess the City's considered judgments about the efficacy of its development plan."[23] Thus, the majority viewed its decision as a fairly straightforward application of the Court's prior "public use" jurisprudence. Still, Justice Stevens noted that nothing in the opinion precluded states from further restricting the eminent domain power.

At the same time, the Court suggested a limit on the extent of its deference to local government. Thus, if a city transferred the property of citizen A to citizen B "for the sole reason that citizen B will put the property to a more productive use and thus pay more taxes," such a one-on-one transfer would "certainly raise a suspicion that a private purpose was afoot."[24] But two factors distinguished *Kelo* from this hypothetical. The Court emphasized the comprehensive nature of the plan, involving many parcels and a wide variety of uses; it also applauded the careful deliberation that preceded adoption of the plan, a process that minimized the risk of abuse.[25]

In her dissent, Justice O'Connor asserted that the decision "significantly expands the meaning of public use," effectively allowing a government entity to "take private property currently put to ordinary private use, and give it over for new, ordinary private use, so long as the new use is predicted to generate some secondary benefit for the public—such as increased tax revenue, more jobs, maybe even aesthetic pleasure."[26] She viewed the

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[22] Kelo v. City of New London, 125 S. Ct. 2655, 2665 (2005).

[23] *Id.* at 2668.

[24] *Id.* at 2666–67.

[25] Concurring in the judgment, Justice Kennedy noted that a more stringent standard of review might be appropriate on occasion, such as where "the risk of undetected impermissible favoritism of private parties is so acute that a presumption . . . of invalidity is warranted." *Id* at 2670 (Kennedy, J., concurring).

[26] *Id.* at 2675 (O'Connor, J., dissenting).

outcome as a serious threat to private property rights, because "nearly all real property is susceptible to condemnation on the Court's theory."[27]

Kelo ignited a national debate about eminent domain.[28] The family home has always occupied a special place in our legal culture, and many citizens worried that their own homes might be condemned. As a result, most state legislatures adopted legislation that imposed new constraints on the use of the eminent domain power by local governments.[29]

[C] The Future of the Public Use Standard

Is the public use requirement meaningless? Almost, but not quite. In the wake of *Hawaii Housing Authority v. Midkiff* (*see* [B][3], *supra*), scholars generally agreed that the Public Use Clause had little impact as an independent restriction on government action.[30] They reasoned that if the police power permitted a city or other government entity to take a particular action, then it was automatically authorized to use the eminent domain power to implement that decision.

Except in unusual cases, virtually every taking could be defended as an action that conceivably provides a public benefit and thus serves a public purpose. While *Midkiff* noted that a "purely private taking" would violate the public use requirement, this situation was unlikely to occur because it would presumably exceed the government's police power authority in the first place.

Kelo changed this picture in two ways.[31] First, as noted above, it led a majority of states to enact legislation that abandoned the public purpose test altogether, and imposed greater constraints on eminent domain. Of course, the *Kelo* standard still governs eminent domain by the federal government, and applies directly to states that have not adopted post-*Kelo* legislation. Second, some commentators interpret *Kelo* as a signal that the Court is prepared to restrict the scope of the public purpose test.[32] If so, *Kelo* may eventually be viewed as a transitional case—one leading to a new public use standard.

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[27] *Id.* at 2677 (O'Connor, J., dissenting).

[28] The outcome in *Kelo* was highly unpopular with the public. *See* Daniel H. Cole, *Why* Kelo *Is Not Good News for Local Planners and Developers*, 22 Ga. St. U. L. Rev. 803, 822-24 (2006) (summarizing survey data); *see also* John Fee, *Eminent Domain and the Sanctity of Home*, 81 Notre Dame L. Rev. 783 (2006).

[29] *See, e.g.*, Tex. Govt. Code § 2206.001 (prohibiting eminent domain for economic development, unless such development is a "secondary purpose" resulting from activities to "eliminate an existing affirmative harm on society from slum or blighted areas").

[30] *See, e.g.*, Thomas W. Merrill, *The Economics of Public Use*, 72 Cornell L. Rev. 61 (1986).

[31] Justice O'Connor suggested in her dissent that *Kelo* itself eviscerated the public use test, observing that after *Kelo* "the words 'for public use' do not realistically exclude *any* takings, and thus do not exert any constraint on the eminent domain power." Kelo v. City of New London, 125 S. Ct. 2655, 2675 (2005) (O'Connor, J., dissenting) (emphasis in original). But most scholars conclude that *Midkiff* had already led to this result.

[32] *See, e.g.*, Julia D. Mahoney, Kelo's *Legacy: Eminent Domain and the Future of Property Rights*, 2005 Sup. Ct. Rev. 103.

§ 39.06 ". . . Without Just Compensation"

[A] Defining "Just Compensation"

[1] The Fair Market Value Standard

An unbroken line of Supreme Court decisions defines "just compensation" as the fair market value of the property when the taking occurs. "Fair market value," in turn, means the amount that a willing buyer would pay in cash to a willing seller.[33] The goal is to put the owner in as good a monetary position as if the property had not been taken, but rather voluntarily sold on the open market. Fair market value is usually established by evidence concerning recent sales of the property at issue or sales of comparable properties.[34] If the type of property involved is so rarely sold that fair market value is difficult to ascertain, the court may apply other just and equitable standards (e.g., the cost to acquire substitute facilities).[35]

[2] Impact of Owner's Sentimental Attachment or Special Need

What if an owner places sentimental or subjective value on the property? Suppose O owns fee simple absolute in Greenacre, a home where her family has lived for 200 years. The state now condemns the home to build a new sewage disposal plant. The fair market value of Greenacre to an objective buyer is $200,000. From O's perspective, however, Greenacre is a unique family treasure. Moreover, she is not a "willing seller." It is quite possible that she would never voluntarily sell the property; in this sense, it is "priceless" to O. If O were forced to place a dollar value on Greenacre, it would be far more than $200,000, perhaps $1 million. Yet, by definition, fair market value is measured only by the market. It does not consider the sentimental or subjective value that the property may have for any particular owner. O will thus receive $200,000, not $1 million.

Similarly, fair market value does not necessarily compensate the owner for the full economic value of the land. For example, in one case, the federal government condemned three church-owned summer camps with a fair market value just under $500,000.[36] The cost to develop replacement camps, however, was almost $6 million, because the new camps would have to comply with expensive regulatory requirements from which the existing camps were exempt. The Supreme Court held that fair market value does

[33] Almota Farmers Elevator & Warehouse Co. v. United States, 409 U.S. 470 (1973).

[34] *Cf.* J.J. Newberry Co. v. City of East Chicago, 441 N.E.2d 39 (Ind. Ct. App. 1982) (measure of damages for condemnation of leasehold interest was determined by fair market value of the unexpired term minus the future rent due under the lease, not by capitalization of income method of valuation).

[35] *See generally* United States v. 564.54 Acres of Land, 441 U.S. 506 (1979) (concluding alternate standard was not appropriate on facts of case); United States v. 50 Acres of Land, 469 U.S. 24 (1984) (same).

[36] United States v. 564.54 Acres of Land, 441 U.S. 506 (1979).

not include the special value of property to the owner arising from its adaptability to a particular need.

[B] Future Land Uses

In a free market transaction, the prudent buyer of land will evaluate the future uses for which the property may be suitable. Suppose B contemplates purchasing a 400-acre turnip farm owned by S. In negotiating a sales price, both B and S will assess the possibility that the land may someday be desirable for another use (e.g., residential development), and therefore be more valuable than ordinary agricultural property. To what extent must future expectancies be considered in setting the fair market value of condemned property?

As a general rule, property must be valued at the *highest and best use* for which it could be adapted, not merely its existing use. But the potential future use must be reasonably probable; the owner's fantasy or speculation about possible uses is irrelevant. Three factors are typically important in making this determination:

(1) the physical condition of the land (including location, topography, etc.),

(2) the current and reasonably probable future zoning of the parcel, and

(3) the market demand for the particular future use.

Controversy often focuses on the likelihood of a future zoning change (e.g., a rezoning from agricultural to residential use). In most jurisdictions, only zoning changes that are reasonably probable may be considered.[37]

The Supreme Court addressed the expectancy issue in *Almota Farmers Elevator & Warehouse Co. v. United States*,[38] where the federal government brought an eminent domain action to acquire a term of years leasehold in a grain elevator complex. The government asserted that the property being taken consisted only of the tenant's rights during the remaining 7 ½ years of the lease; thus, it argued that it was not required to pay additional value because of the *possibility* that the lease might be renewed at the end of the term. The Court concluded, however, that a willing private buyer in a free market transaction would consider the likelihood of lease renewal, particularly since renewal seemed probable on the facts of the case. Observing that eminent domain should not place the tenant in a worse position than if it had voluntarily sold its leasehold to a private buyer, the Court reasoned that the government should not escape paying what a willing buyer would pay for the same property.

[37] *See, e.g.,* New Jersey v. Caoili, 639 A.2d 275 (N.J. 1994) (trial court properly allowed jury to consider evidence that use variance could be obtained to change property from residential to commercial use because variance was reasonably probable).

[38] 409 U.S. 470 (1973).

[C] Goodwill

The condemnation of a business presents a special problem. Assume the state condemns O's grocery store in order to build a government office building on the site. The state obviously must compensate O for the fair market value of the property taken. But is the property taken defined as (1) the lot and store building regardless of the current use or (2) the lot and store building as an ongoing, profitable business? The difference between the two is *goodwill*, that is, the going-concern value of a business. Must the state compensate for the loss of goodwill?

In most jurisdictions, the condemning agency is not required to compensate for goodwill.[39] This result stems from the apparent assumption that goodwill is portable, i.e., that the displaced business owner can readily relocate the business to new premises. Yet frequently, the success of a business is produced more by its unique location than by the owner's personal abilities. In such a situation, this rule effectively prevents the owner from receiving full compensation.[40]

[D] Partial Takings

The law governing the measure of damages for partial takings is particularly complex. Suppose the state condemns 50 acres from O's 120-acre farm in order to build a new freeway interchange. The state must compensate O for the fair market value of the 50 acres so taken. Further, if the taking reduces the value of O's remaining 70 acres (e.g., by cutting off irrigation water), the state must pay O *severance damages* to compensate for this loss.[41]

On the other hand, what if the taking of O's 50 acres actually *increases* the value of his remaining parcel? O's 70 acres may now be suitable for commercial use (e.g., gas stations, fast food restaurants) and thus far more valuable than farm land. Where the owner's retained property receives a *special benefit* from the new project—that is, one that directly affects the particular property, not merely one enjoyed by the public at large—most states allow the condemning agency to offset this special benefit against any severance damages due the owner. For example, suppose the condemnation of O's 50 acres causes $50,000 in severance damages to O's remaining land, but also increases the value of that land by $100,000; in most jurisdictions, O will receive no severance damages.

The more difficult question is whether the condemning agency can offset a special benefit against the compensatory damages otherwise due to the owner for the land physically taken. Suppose now that the fair market value

[39] *See generally* Lynda J. Oswald, *Goodwill and Going-Concern Value: Emerging Factors in the Just Compensation Equation*, 32 B.C. L. Rev. 283 (1991).

[40] *But see* City of Detroit v. Michael's Prescriptions, 373 N.W.2d 219 (Mich. Ct. App. 1985) (evidence as to going-concern value of pharmacy was properly admitted before trial court, because business value stemmed in part from unique location and could not be transferred to new location).

[41] *See, e.g.*, State Dept. of Transp. & Dev. v. Regard, 567 So. 2d 1174 (La. Ct. App. 1990).

of O's 50 acres is $150,000, O suffers no severance damages, and the freeway project provides a special benefit that increases the value of O's 70 acres by $100,000. Must the agency still pay O $150,000 (fair market value) or can it pay only $50,000 (fair market value less the special benefit conferred on the remaining land)? Although the federal rule allows an agency to offset any special benefit in these circumstances,[42] most states do not permit such an offset.

§ 39.07 Eminent Domain Procedure

The procedure for eminent domain varies widely from state to state. The process usually begins with the government's effort to negotiate a voluntary purchase from the owner. Statutes in many states require such negotiations, often on the basis of an appraisal performed by the condemning agency and provided to the owner.[43] If negotiations fail, the agency will typically file suit to condemn the property.

At its core, an eminent domain action is simply a specialized form of litigation, involving essentially the same pleading, motion, discovery, and trial stages found in ordinary civil ligation. The issues involved, however, are quite limited. On occasion, the agency's right to take becomes an issue, such as where the affected owner can overcome the deferential "public use" standard (*see* § 39.05) to demonstrate that the taking is for a private purpose or where the agency lacks the eminent domain power. But in the vast majority of cases, the only issue is the fair market value of the property. Market value is determined directly by the trial judge or jury in some states. In a slightly larger group of states, a commission, master, or referee makes the initial determination of value; this decision may then be appealed to a judge or jury. Thus, the central focus of the garden-variety eminent domain action is a battle between expert appraisal witnesses on the issue of fair market value.

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[42] *See, e.g.*, Acierno v. Delaware, 643 A.2d 1328 (Del. 1994) (allowing offset).

[43] *See, e.g.*, Texas-New Mexico Power Co. v. Hogan, 824 S.W.2d 252 (Tex. Ct. App. 1992).

Chapter 40

LAND USE REGULATION AND THE TAKINGS CLAUSE

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§ 40.01 The Takings Problem

When does land use regulation become a "taking" of private property?[1] The Takings Clause of the Fifth Amendment provides: "[N]or shall private property be taken for public use, without just compensation."[2] At some point, regulation may so restrict an owner's rights as to become a taking—thus requiring payment of compensation—even though government does not physically occupy the land. Defining when such a regulatory taking occurs is one of the most controversial issues in property law today.

An example illustrates the problem. Assume L's 1,000-acre tract is one of the last undeveloped forest parcels in County, a fast-growing suburban county, but is zoned for residential development. County wishes to keep the forest land within its borders in natural condition in order to protect views, preserve open space, and minimize adverse impacts from development (e.g., additional traffic and air pollution). How should County proceed? Undoubtedly, County could use its eminent domain power to acquire title to L's land upon payment of just compensation (*see* Chapter 39). But can County secure the same public benefits through regulation? Suppose that County instead rezones L's parcel into the newly-created "Forest Preservation" zone, where the only permitted uses are harvesting wild hay, livestock grazing, and camping. This regulation is an effective substitute for acquiring title to L's land by eminent domain; under either approach, L's forest is preserved. Yet the rezoning greatly lowers the market value of L's land. Must County now compensate L?

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[1] *See generally* Abraham Bell & Gideon Parchomovsky, *Givings*, 111 Yale L.J. 547 (2001); J. Peter Byrne, *Ten Arguments for the Abolition of the Regulatory Takings Doctrine*, 22 Ecology L.Q. 89 (1995); David A. Dana & Thomas W. Merrill, Property: Takings (2002); Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 Harv. L. Rev. 1165 (1967); Joseph L. Sax, *Takings and the Police Power*, 74 Yale L.J. 36 (1964); William M. Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 Colum. L. Rev. 782 (1995).

[2] U.S. Const. amend. V. The Takings Clause is made applicable to state and local governments by judicial interpretation of the Fourteenth Amendment. *See* Chicago, Burlington & Quincy R.R. Co. v. Chicago, 166 U.S. 226 (1897).

The Supreme Court's landmark 1922 decision in *Pennsylvania Coal Co. v. Mahon*[3] established that regulation will be recognized as a taking if it "goes too far."[4] But how far is too far? Although the Court has addressed this question in a number of major decisions, it has never provided a clear answer. The Court has offered various tests for determining when a regulatory taking occurs. But these tests—and the results of their application—are all too often uncertain, confusing, and inconsistent. Rather than proceeding in a uniform direction from case to case, the law of regulatory takings resembles a roller coaster: it lurches, jerks, spins, whirls, loops, and reverses direction, leaving the dazed rider unable to predict the next turn. The resulting body of case law is variously described as a "mess," a "muddle," and a "swamp."

In order to understand takings law, the reader must examine the key Supreme Court decisions in detail and fit them together—like pieces of a jigsaw puzzle—to form a recognizable picture. Two clues are helpful in this process. First, the Court's modern decisions generally agree on the purpose underlying the Takings Clause: "to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."[5] Second, despite different phrasing and emphasis, all of the Court's various takings tests involve one or more of only three core variables. The variables are:

(1) the economic impact of the government action on the owner,

(2) the nature of the public interest underlying the government action, and

(3) whether the government action involves physical intrusion or merely regulation.

One consistent theme emerges from this puzzling body of case law: a regulation is not a taking simply because it somewhat reduces the market value of an owner's land. Why not? As the Court explained in *Pennsylvania Coal*: "Government could hardly go on if to some extent values incident to property could not be diminished without paying for every such change in the general law."[6]

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[3] 260 U.S. 393 (1922).

[4] *Id.* at 415.

[5] *See, e.g.*, Dolan v. City of Tigard, 512 U.S. 374, 384 (1994) (quoting Armstrong v. United States, 364 U.S. 40, 49 (1960)).

[6] Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413 (1922). *See also* Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 535 U.S. 302, 324 (2002) ("Land-use regulations are ubiquitous and most of them impact property values in some tangential way. . . . Treating them all as *per se* takings would transform government regulation into a luxury that few governments could afford.").

§ 40.02 The Foundation Era of Regulatory Takings: 1776–1922

[A] Original Intent and the Takings Clause

Did the framers intend the Takings Clause to apply to regulations that restrict the use of private property? The answer to this question is a resounding "no!"[7] Although the origin of the Takings Clause is somewhat murky, "one thing is clear: the draftsmen were not troubled by any issue involving regulation of the use of land."[8] Colonial law occasionally restricted the use of land; for example, an early New York City ordinance effectively banned all slaughterhouses.[9] But land use regulation generated no controversy during this era.

Legal scholars agree that the Takings Clause was originally intended to apply only if government physically seized or occupied property.[10] Two concerns—both involving physical takings—apparently contributed to the adoption of the clause (*see* § 39.02[B]). First, during the turmoil of the Revolutionary War, the American army had often taken privately-owned food, livestock, and other supplies without making any payment; some feared this practice might return. Second, and more fundamentally, James Madison—the principal author of the clause—was seemingly motivated by fear that populist democracy might lead to the forced redistribution of land from the rich to the poor.

[B] Early Decisions

[1] The "Nuisance" or "Noxious Use" Exception

Consistent with the framers' intent, American courts followed a clear rule during the foundation era: regulation of land use under the police power was not a taking. The police power authorizes government to regulate the use of land to protect the public health, morals, safety, and welfare; and early courts viewed the Due Process Clause as the only constitutional check on this power. A land use regulation would be upheld against substantive due process attack if it had a rational relationship to a legitimate government interest, such as public health or safety (*see* § 38.02[A][3]). Thus, if government used its police power to regulate a nuisance or other harm to the public caused by the use of land, the affected landowner was not entitled

[7] *See generally* William M. Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 Colum. L. Rev. 782 (1995).

[8] Fred Bosselman, et al., The Taking Issue: An Analysis of the Constitutional Limits of Land Use Control 104 (1973).

[9] *Id.* at 82–84.

[10] *See, e.g.*, William M. Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 Colum. L. Rev. 782 (1995); *see also* Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1028 n.15 (1992) ("[E]arly constitutional theorists did not believe the Takings Clause embraced regulations of property at all.").

to compensation under the Takings Clause.[11] Two early Supreme Court decisions—*Mugler v. Kansas*[12] in 1887 and *Hadacheck v. Sebastian*[13] in 1915—illustrate this approach.

Mugler v. Kansas[14] arose when Kansas adopted a statute prohibiting the manufacture of alcohol. Mugler, who owned a profitable brewery, argued that the law greatly reduced the market value of his property; the brewery buildings and machinery were of "little value" for any purpose other than making beer.[15] The Court saw this as a simple case. All property in the nation, it reasoned, is held under the implied obligation that the owner's use will not harm the community. Thus, "[a] prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community, cannot . . . be deemed a taking or an appropriation of property for the public benefit."[16] The police power "is not . . . burdened with the condition that the State must compensate such individual owners for pecuniary losses they may sustain, by reason of their not being permitted, by a noxious use of their property, to inflict injury upon the community."[17] Here, the property had not been seized or physically taken away. Mugler was free to devote it to any use he desired, except for making alcohol—the particular "noxious use" banned by the statute.

The Court confronted a similar situation in *Hadacheck v. Sebastian*.[18] Hadacheck purchased land containing a valuable bed of clay and established a profitable brick-manufacturing factory; at the time, the property was in an undeveloped area outside of Los Angeles. Later, the area became a residential district that was annexed to the city. The city adopted an ordinance that prohibited brick manufacturing in the region and thereby reduced the value of Hadacheck's land from $800,000 to $60,000. Evidence in the record showed that Hadacheck's factory emitted "fumes, gases, smoke, soot, steam, and dust" that "caused sickness and serious discomfort to those living in the vicinity."[19] On these facts, the Court easily concluded that the police power allowed the city to regulate the offensive effects of the factory, thereby protecting the health and comfort of the community. Hadacheck's resulting financial loss was seen as essentially irrelevant: "There must be progress, and if in its march private interests are in the way, they must yield to the good of the community."[20]

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[11] *See also* Raymond R. Coletta, *Reciprocity of Advantage and Regulatory Takings: Toward a New Theory of Takings Jurisprudence,* 40 Am. U. L. Rev. 297, 305–19 (1990) (discussing "reciprocity of advantage" theme in early case law).

[12] 123 U.S. 623 (1887).

[13] 239 U.S. 394 (1915).

[14] 123 U.S. 623 (1887).

[15] *Id.* at 657.

[16] *Id.* at 668–69.

[17] *Id.* at 669.

[18] Hadacheck v. Sebastian, 239 U.S. 394 (1915).

[19] *Id.* at 408.

[20] *Id.* at 410.

In short, the *Mugler-Hadacheck* line of cases held that police power regulation that prevents harm to the public is not a taking. Although this doctrine is often called the "nuisance" or "noxious use" exception, its scope is broader than these terms imply.[21]

[2] "Reciprocity of Advantage"

A secondary doctrine sometimes used to uphold comprehensive zoning ordinances and other regulation during the foundation era was *reciprocity of advantage,* sometimes called *average reciprocity of advantage.* The gist of the doctrine was that the reciprocal benefits or "advantages" of regulation compensate for its burdens. A regulation was justified when the burdens it imposed on landowners were offset by the benefits it conferred on them. For example, suppose a local ordinance provides that no building may exceed two stories in height. The ordinance burdens landowner K because he cannot build, for instance, a three-story structure on his parcel. But, at the same time, the ordinance benefits K because the adjacent lots owned by his neighbors J and L are similarly restricted. J, for example, cannot construct a five-story house that would block light and air from reaching K's land. The ordinance is constitutional because it provides reciprocity of advantage.

§ 40.03 The *Pennsylvania Coal Co. v. Mahon* Revolution and Its Aftermath: 1922–1978

[A] Birth of the Regulatory Takings Doctrine

The Supreme Court's 1922 decision in *Pennsylvania Coal Co. v. Mahon*[22] is generally recognized as the birthplace of the regulatory takings doctrine.[23] The Court struck down a state statute as unconstitutional under the Takings Clause—thus establishing the rule that mere regulation could be a taking—but offered little guidance about what constitutes a taking.

[B] Facts of *Pennsylvania Coal*

The case arose in the coal country of northeastern Pennsylvania, a region long troubled by surface subsidence. Subsurface mining removed the coal supporting the surface; the land surface then collapsed, sometimes causing personal injury and property damage. The Pennsylvania Coal Company conveyed a parcel of land to plaintiffs' predecessor in title, but reserved in the deed the right to remove all the coal under the land surface. The

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[21] *See, e.g.,* Miller v. Schoene, 276 U.S. 272 (1928).

[22] 260 U.S. 393 (1922). *See also* Carol M. Rose, Mahon *Reconstructed: Why the Takings Issue is Still a Muddle,* 57 S. Cal. L. Rev. 561 (1984).

[23] A minority of scholars reject the view that *Pennsylvania Coal* is a takings case at all, instead arguing that it rests on substantive due process. *See, e.g.,* Robert Brauneis, *"The Foundation of Our 'Regulatory Takings' Jurisprudence": The Myth and Meaning of Justice Holmes's Opinion in* Pennsylvania Coal Co. v. Mahon, 106 Yale L.J. 613 (1996).

plaintiff Mahons later purchased the property (apparently with notice of this restriction) and moved into the house built on the land.

In the interim, the state adopted a statute that prohibited the mining of coal under residential areas in a manner that caused the subsidence of any dwelling. In effect, the statute required that pillars of coal be left in place underground to support the land surface. When the coal company warned the Mahons that its future mining operations would soon cause their home to subside, they sought an injunction pursuant to this statute. In reply, the coal company argued that the statute was an unconstitutional taking of its mineral rights.

[C] Holmes' Majority Opinion

Writing for the majority, Justice Holmes concluded that the statute was a taking of the coal company's property rights. He conceded that "[g]overnment could hardly go on if to some extent values incident to property could not be diminished without paying for every such change in the general law."[24] On the other hand, "if regulation goes too far it will be recognized as a taking."[25] Holmes found that the Pennsylvania statute indeed went "too far." But the test he used to reach this result was far from clear.

Holmes emphasized that "[o]ne fact" for consideration was the "extent of the diminution," that is, the extent to which the regulation diminished the fair market value of the property.[26] At the time, Pennsylvania law divided subsurface mineral rights into two separate estates in land: (a) the mineral estate (ownership of minerals that can be removed without disturbing the land surface) and (b) the support estate (ownership of minerals that remain in place to support the land surface). Holmes found that the extent of the taking was "great," because the statute took the coal company's *entire* support estate; "[i]t purports to abolish what is recognized in Pennsylvania as an estate in land—a very valuable estate."[27]

In addition, Holmes considered the extent of the public interest served by the statute. He stressed that the case involved damage only to a single private house, which could not be viewed as a public nuisance or as damage to the public in general. Implicit in this analysis was the assumption that plaintiffs knowingly purchased the surface rights only, aware that they had no right to support of their house or the land surface itself. Moreover, the statute was not necessary to protect the plaintiffs' personal safety because the mining company could provide advance notice of its intention to mine, as indeed had happened here. Based on this analysis, Holmes found that the "plaintiffs' position" did not create "a public interest sufficient to warrant so extensive a destruction of the defendant's constitutionally protected rights."[28]

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[24] Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413 (1922).

[25] *Id.* at 415.

[26] *Id.* at 413.

[27] *Id.* at 414.

[28] *Id.*

In the balance of the opinion, Holmes proceeded to discuss the general validity of the statute regardless of "plaintiffs' position." He failed to explore the possible public interest in favor of preventing personal injury or property damage caused by surface subsidence generally, nor did he discuss the *Mugler-Hadacheck* rule.[29] Rather, he focused only on diminution in value. Because the statute made it illegal to mine the pillars of coal that supported the surface, this had "very nearly the same effect for constitutional purposes as appropriating" the coal.[30]

[D] Brandeis' Dissenting Opinion

Dissenting, Justice Brandeis argued that the case was clearly controlled by the *Mugler-Hadacheck* rule: a "restriction imposed to protect the public health, safety or morals from dangers threatened is not a taking."[31] The statute merely prohibited a "noxious use"—subsurface mining that endangered the public.

Brandeis then opened a debate that remains alive today. Assuming that the "diminution in value" of property is relevant, to what "property" does this standard apply? Holmes had viewed the "property" as only the pillars of coal left in place to support the surface. Brandeis argued, however, that the relevant "property" was the whole property owned by the coal company; thus, the extent of diminution in value could be determined only by comparing (a) the "value of the coal kept in place" with (b) the "value of the whole property."[32]

For example, suppose the coal company could comply with the statute by removing 98% of the underground coal (the mineral estate) and leaving only 2% of the coal (the support estate) in pillars to support the surface. On these facts, Brandeis would argue that the statute diminished the value of the "whole property" only by 2%, which would be a minor impact. Holmes, in contrast, would argue that the statute eliminated all value from the support estate (the 2% of coal left in place), causing "total taking": a 100% diminution in the value of the "property." The Brandeis approach to this issue has prevailed in later decisions (*see* § 40.04[B]).

[E] Aftermath of *Pennsylvania Coal*

The *Pennsylvania Coal* decision left the law of regulatory takings in confusion. A regulation could indeed be a taking if it went "too far," but exactly what did this mean? Legal scholars even failed to agree on what test Holmes had applied. Many interpreted the decision as creating a *diminution in value test,* in which the only relevant factor was the extent to which the regulation diminished the value of the property; these scholars

[29] Holmes mentioned—but quickly dismissed—reciprocity of advantage, implicitly finding that the statute conferred no reciprocal advantage on the coal company.

[30] Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 414 (1922).

[31] *Id.* at 417 (Brandeis, J., dissenting).

[32] *Id.* at 419 (Brandeis, J., dissenting).

focused on Holmes' observation that when diminution "reaches a certain magnitude, in most if not in all cases there must be . . . compensation."[33] Other scholars argued that Holmes had actually used a *balancing test*, comparing the extent of the public interest with the extent of diminution; this approach placed great weight on Holmes' conclusion that the statute did not manifest a public interest "sufficient to warrant so extensive a destruction."[34] So, what was the test? And how much diminution in value was too much? Equally troublesome was the relationship between the new *Pennsylvania Coal* test (whatever it was) and the historic "nuisance" or "noxious use" standard. Had the Court superseded the historic standard or merely created an additional test?

Over 50 years elapsed before the Supreme Court revisited the takings issue in its 1978 decision of *Penn Central Transportation Co. v. New York City*.[35] During this period, the meaning of *Pennsylvania Coal* remained unclear. The Court failed to even cite the decision in its next two important zoning cases—*Village of Euclid v. Ambler Realty Co.*[36] in 1926 and *Nectow v. City of Cambridge*[37] in 1928—although it later characterized both as "takings" cases. Over the ensuing decades, *Pennsylvania Coal* was rarely cited by any court, and the law of regulatory takings became dormant. Takings claims were infrequent, and almost always dismissed under the "nuisance" or "noxious use" test. Regulations enacted to prevent harm to the public were deemed valid under the police power, while—as a matter of logic—regulations enacted to benefit the public might presumably require compensation under the Takings Clause. But the weakness of this approach, often called the *harm-benefit test*, was apparent: almost any regulation could be seen as either harm-preventing or benefit-conferring, depending on one's perspective.[38]

Another chapter in the *Pennsylvania Coal* saga was written in 1987, when the Supreme Court reached the opposite result in an almost identical case, *Keystone Bituminous Coal Ass'n v. DeBenedictis*.[39] The case concerned a later Pennsylvania surface subsidence statute that—like its predecessor—effectively required coal companies to leave pillars of coal in place to support the land surface. Applying its modern test (*see* § 40.05), the Court held that the statute was not a regulatory taking. The Court found that the newer statute was supported by a broader range of policies than its predecessor, including the public interest in health, the environment, and the fiscal integrity of the region, and prevented mining activity that was akin to a public nuisance. More importantly, the Court followed Justice Brandeis's approach to the question of defining the relevant "property." The statute

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[33] *Id.* at 413.

[34] *Id.* at 414.

[35] 438 U.S. 104 (1978).

[36] 272 U.S. 365 (1926).

[37] 277 U.S. 183 (1928).

[38] *See, e.g.*, Just v. Marinette County, 201 N.W.2d 761 (Wis. 1972) (zoning ordinance that prevented filling of wetlands seen as harm-preventing).

[39] 480 U.S. 470 (1987).

required coal companies to leave less than 2% of their coal in place, and the Court found this 2% diminution in the value of the whole property to be insignificant.

§ 40.04 Overview of the Modern Era in Regulatory Takings: 1978–Present

[A] Current Takings Tests

After 56 years of silence, the Supreme Court reentered the takings arena with its 1978 decision in *Penn Central Transportation Co. v. New York City*.[40] Since then, the Court has further developed its regulatory takings jurisprudence in a number of other key decisions. These decisions have established a series of new (and somewhat inconsistent) standards for determining when a regulatory taking occurs. Although echoes of the Court's earlier tests may linger, they have been largely swept aside by these new standards. Thus, the "nuisance" or "noxious use" test, the "reciprocity of advantage" approach, and the *Pennsylvania Coal* test have all apparently been superseded. But they remain helpful in understanding the current law, and indeed are still used or cited occasionally, together with more modern standards.

What are the current takings tests? Although generalizations about takings law are notoriously risky, there appear to be four independent tests. The Court opened the modern era by adopting an "ad hoc" approach in *Penn Central*. Justice Brennan explained that the Court had "been unable to develop any 'set formula' for determining when 'justice and fairness'" required compensation.[41] Thus, each future takings case was to be decided under a new multi-factor balancing test (*see* § 40.05[C]). The three relevant factors are:

(1) the economic impact of the regulation on the claimant,

(2) the extent to which the regulation interferes with the claimant's distinct investment-backed expectations, and

(3) the character of the governmental action.

However, the Court's subsequent opinion in *Agins v. City of Tiburon* temporarily cast doubt on the role of the *Penn Central* test (*see* footnote 68, *infra*).

In later decisions, the Court crafted three more-or-less "bright line" rules that supplement the *Penn Central* standard. Greatly oversimplified, these "categorical" rules provide that a taking will be found:

(1) if government authorizes a *permanent physical occupation* of land (*Loretto v. Teleprompter Manhattan CATV Corp.*) (*see* § 40.06);

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[40] 438 U.S. 104 (1978).

[41] *Id.* at 124.

(2) if regulation causes the loss of *all economically beneficial or productive use of land,* unless justified by *background principles of property or nuisance law* (*Lucas v. South Carolina Coastal Council*) (*see* § 40.07); or

(3) if government demands an exaction that either lacks an *essential nexus* with a legitimate state interest or lacks *rough proportionality* to the impacts of the proposed project (*Nollan v. California Coastal Commission; Dolan v. City of Tigard*) (*see* § 40.08).

Accordingly, four different tests might potentially apply to a takings problem. So—as a practical matter—when does each one apply? The conventional wisdom is as follows. First, determine if the regulation is a taking under any of the three special rules (*Loretto, Lucas,* and *Nollan-Dolan*). If not, proceed to a second step: determine whether the regulation is a taking under the *Penn Central* standard.[42] Of course, the only safe prediction about the future of regulatory takings jurisprudence is that the law will continue to change. The four tests of today may well evolve into a quite different set of standards in the near future.

[B] Defining the Relevant "Property"

What "property" do these standards apply to? Suppose O buys an undeveloped parcel of land that contains 100 acres, and later government action adversely affects five acres of the parcel. Do we apply the takings tests to the 100-acre parcel or the five-acre parcel? First discussed in *Pennsylvania Coal,* this question is called the "denominator" or "conceptual severance" issue.

The law is clear when the government action is a physical occupation. Under *Loretto,* any permanent physical occupation of land authorized by government is a taking (*see* § 40.06[C]). For example, if the county constructs a public school on five acres of O's property, this is clearly a taking of the five acres even though O retains possession of the remaining 95 acres.

On the other hand, when the government action is mere regulation—without any physical occupation—the "whole parcel" is considered.[43]

[42] *See* Lingle v. Chevron USA, Inc., 125 S. Ct. 2074, 2081 (2005). *See also* Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 535 U.S. 302 (2002) (refusing to adopt new *per se* rule governing temporary takings and relying instead on *Penn Central* test); Phillip Morris, Inc. v. Reilly, 312 F.3d 24 (1st Cir. 2002) (Massachusetts statute requiring disclosure of ingredients in tobacco products was a taking of manufacturers' trade secrets under *Penn Central* test).

[43] Two further issues arise. If the same owner sold adjacent parcels before the regulation took effect, are these considered together with the affected parcel as the "whole property"? Probably not, although some contrary authority exists. *Compare* Deltona Corp. v. United States, 657 F.2d 1184 (Ct. Cl. 1981) (yes), *with* Loveladies Harbor, Inc. v. United States, 28 F.3d 1171 (Fed. Cir. 1994) (no). And are other contiguous or noncontiguous parcels owned by the same owner as of the claimed taking date considered part of the "whole property"? There is a split of authority on this point as well. In particular, the Supreme Court seemed to indicate in Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1016–17 n.7 (1992), that noncontiguous parcels—at least—would not be included.

Suppose O's 100-acre parcel is initially zoned for low-density residential development (e.g., one house for every 10 acres), but the county rezones five acres of the parcel into a "Rural Agriculture" district where no development of any kind is permitted. As *Penn Central* makes clear, we would apply its takings criteria to "the parcel as a whole"—here, the entire 100-acre parcel (*see* § 40.05[C]).[44] Thus, at worst, the economic effect of the rezoning is a 5% loss in value of the 100-acre parcel, not a 100% loss in value of the five-acre parcel.[45]

§ 40.05 Basic Modern Standard for Regulatory Takings: *Penn Central Transportation Co. v. New York City* (1978)

[A] *Penn Central* in Context

The single most important modern decision about regulatory takings is *Penn Central Transportation Co. v. New York City*.[46] The takings test it established brought much-needed coherence to the law and signaled renewed judicial interest in the topic. The *Penn Central* test is admittedly vague and imprecise, sometimes leading to unpredictable results; but it is an improvement over the mystifying *Pennsylvania Coal* approach. Although the three "bright line" rules later created by the Court have somewhat reduced the role of the *Penn Central* test, it remains the basic standard used to resolve most regulatory takings cases today.

[B] Facts of *Penn Central*

One of the most famous buildings in New York City—Grand Central Terminal—was designated a "landmark" under the city's Landmarks Preservation Law. Constructed in 1913, the eight-story terminal was considered a "magnificent example of the French beaux-arts style."[47] Under the landmarks law, any change in the exterior architectural features of a landmark, or construction of any exterior improvement on its site, required advance approval from a city commission. However, city ordinances also allowed the owner of a landmark to transfer unused development rights from the landmark parcel to other nearby parcels.

The owners of the terminal property—Penn Central Transportation Co. and affiliated companies ("Penn Central")—leased the airspace above the

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[44] *See also* Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 535 U.S. 302, 331 (2002) (refusing to "sever a 32-month segment from the remainder of each landowner's fee simple estate").

[45] *But see* State *ex rel.* R.T.G., Inc. v. Ohio, 780 N.E.2d 998, 1009 (Ohio 2002) (where statute prevented removal of subsurface coal, the relevant parcel was defined as the coal itself and did not include the surface rights, which were merely "an impediment to acquiring the coal").

[46] 438 U.S. 104 (1978). *See generally* Eric R. Claeys, *The* Penn Central *Test and Tensions in Liberal Property Theory*, 30 Harv. Envtl. L. Rev. 339 (2006); John D. Echeverria, *Making Sense of* Penn Central, 23 UCLA J. Envtl. L. & Pol'y 171 (2005).

[47] Penn Central Transp. Co. v. New York City, 438 U.S. 104, 115 (1978).

terminal to UGP Properties, Inc. ("UGP") for a 50-year term. Even without the lease, the existing terminal use provided Penn Central with a reasonable return on its investment; the lease would provide millions of dollars in additional income each year. UGP's plan to construct a 55-story office building in the airspace over the terminal required approval from the landmarks commission. The commission rejected both the initial design proposal and 53-story alternative proposal, based mainly on aesthetic considerations. For example, the commission stated: "To balance a 55-story office tower above a flamboyant Beaux-Arts facade seems nothing more than an aesthetic joke. Quite simply, the tower would overwhelm the Terminal by its sheer mass."[48]

At this point—without submitting a proposal for a smaller office building or trying to transfer development rights to another parcel—Penn Central and UGP filed suit, alleging that the application of the landmarks law to the property was a taking. Plaintiffs made two main arguments. First, the law constituted a total taking of their property rights in the airspace, just as the statute in *Pennsylvania Coal* took the coal company's entire support estate. Second, in the alternative, considering the property as a whole, the law substantially diminished the value of the land in order to confer the benefits of landmark preservation on the public; the *Mugler-Hadacheck* rule was inapplicable because the law was not intended to prevent public harm.[49]

[C] The *Penn Central* Balancing Test

In a 6-3 decision, the Supreme Court held that no taking had occurred. Writing for the majority, Justice Brennan quickly dismissed the plaintiffs' first argument that the law was a total taking of their airspace rights. " 'Taking' jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated."[50] The Court would consider the impact of the law on "rights in the parcel as a whole—here, the city tax block designated as the 'landmark site,' " not merely its impact on the airspace rights.[51] This language clearly repudiated the Court's contrary suggestion in *Pennsylvania Coal* (*see* § 40.03[C]).

Brennan characterized the Court's past takings decisions as "essentially ad hoc, factual inquiries" based on several factors, without any "set formula."[52] He then proceeded to create a new multi-factor balancing test for determining when a regulation constituted a taking. The factors were:

(1) "[t]he economic impact of the regulation on the claimant";

[48] *Id.* at 117–18.

[49] A third argument was that reciprocity of advantage did not justify the law. It affected only a few buildings—all separated from each other—which were singled out and treated differently from the surrounding buildings, and accordingly produced no reciprocal benefits.

[50] Penn Central Transp. Co. v. New York City, 438 U.S. 104, 130 (1978).

[51] *Id.* at 130–31.

[52] *Id.* at 124.

(2) "particularly, the extent to which the regulation has interfered with distinct investment-backed expectations"; and

(3) "the character of the governmental action."[53]

Applying this test to plaintiffs' second argument, Brennan found that all three factors supported the conclusion that no taking existed. First, the economic impact of the law on plaintiffs was not severe. Even without the office building, Penn Central could derive a reasonable return on its investment by operating the terminal. Moreover, plaintiffs could still seek to construct a smaller office building in the airspace or transfer the valuable development rights to another parcel. Nor did the law interfere with Penn Central's primary investment-backed expectation concerning use of the parcel: operating the terminal as it had been used for the last 65 years. Finally, turning to the character of the government action, the landmarks law was found to be a regulation reasonably related to the promotion of the general welfare, not a physical invasion by government.

[D] Exploring the *Penn Central* Factors

[1] "Economic Impact of the Regulation on the Claimant"

The most important factor appears to be the economic impact of the regulation on the claimant. Yet the Court provided little information about how this factor should be applied. Suppose a regulation reduces the fair market value of B's land from $500,000 to $25,000—a 95% reduction in value. Is this a taking? Presumably, if a regulation eliminates all economically viable use of the land or reduces its fair market value to zero, the economic impact on the claimant would be seen as extremely severe.

On the other hand, the Court made it quite clear that even when a regulation causes significant "diminution in property value," it is not a taking if the regulation is "reasonably related to the promotion of the general welfare."[54] It observed, for example, that neither the "87 ½% diminution in value" in *Hadacheck v. Sebastian* nor the "75% diminution in value" in *Village of Euclid v. Ambler Realty Co.* constituted a taking because the regulations at issue met this standard.[55] But because almost every land use regulation meets the highly-deferential "rational relationship" standard, this language literally seems to mean that a regulation that causes even an extreme reduction in market value (e.g., a 95% reduction or more) would not be a taking. Adding more confusion, the Court later suggested in *Lucas v. South Carolina Coastal Council* that a 95% reduction in value might result in a taking under the *Penn Central* test.[56]

Another approach to this factor focuses on whether the regulation prevents the owner from obtaining a "reasonable return" from the land. The

[53] *Id.*

[54] *Id.* at 131.

[55] *Id.*

[56] Lucas v. South Carolina Coastal Comm'n, 505 U.S. 1003, 1019 n.8 (1992).

Court stressed that Penn Central could obtain a reasonable return on its investment by continuing to use the land as a terminal, regardless of any transferable development rights.[57]

[2] "Extent to Which the Regulation Has Interfered with Distinct Investment-Backed Expectations"

This rather confusing factor examines the owner's reasonable "investment-backed" expectations about the use of his or her land.[58] The scant case law on point seems to distinguish between existing uses and potential future uses. In most instances, the buyer who purchases land already devoted to a legally-permitted use has a reasonable investment-backed expectation that the use will continue. For example, the *Penn Central* Court stressed that the landmarks preservation ordinance did not interfere with the owner's "primary expectation"—continuing the existing terminal use.[59] Suppose buyer B purchases a 40-acre shopping center complex—a use clearly allowed by the local zoning ordinance—consisting of retail stores, parking lot, and related facilities. If the city council now rezones part of the parking lot into a district where only "urban recreational uses" (e.g., skateboarding) are permitted, curtailing parking for shopping center customers, the shopping center might no longer be profitable. This would be a severe interference with B's investment-backed expectations.

On the other hand, if a parcel of land is already subject to a zoning ordinance or other land use regulation at the time of purchase, the buyer may not have a reasonable investment-backed expectation that he or she will be able to violate the law.[60] Suppose B wants to develop a new shopping center on vacant land owned by the county, which is located in an "open space" zone where no building is permitted. He purchases the parcel and is later unable to change the zoning to allow development. Under these circumstances, presumably all courts would agree that the ordinance does not interfere at all with B's reasonable expectations. B either knew—or, as a prudent investor, should have known—about the use restriction.[61]

On the other hand, what if B purchases the land from a private owner? In *Palazzolo v. Rhode Island*,[62] the Supreme Court rejected the claim that such a later buyer was "deemed to have notice of an earlier-enacted restriction" and was thus *necessarily* "barred from claiming that it effects

[57] *See also* Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470 (1987) (mine owner failed to show that regulation rendered mine operation unprofitable).

[58] *See* Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 Harv. L. Rev. 1165, 1233 (1967) (suggesting the "investment-backed expectations" standard later adopted in *Penn Central*); *see also* Daniel R. Mandelker, *Investment-Backed Expectations in Taking Law*, 27 Urb. Law. 215 (1995) (discussing standard).

[59] Penn Central Transp. Co. v. New York City, 438 U.S. 104, 136 (1978).

[60] *But cf.* Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987).

[61] What about owners who acquire their interests by gift, descent, or devise? Whether such owners can have investment-backed expectations is "dubious." Irving v. Hodel, 481 U.S. 704, 715 (1987).

[62] 533 U.S. 606 (2001).

a taking."[63] The Court reasoned that one private owner somewhere in the chain of title should be able to bring a takings claim, whether it was the owner at the time the regulation was enacted or a successor owner. The Court noted, for example, that the original owner might be barred from suit by the ripeness requirement; thus, it would be "illogical and unfair, to bar a regulatory takings claim because of the post-enactment transfer of ownership where the steps necessary to make the claim ripe were not taken, or could not have been taken, by a previous owner."[64] Concurring in the decision, Justice O'Connor emphasized that the existence of regulation at the time of purchase could be considered *as one factor* in determining the extent of investment-backed expectations—but not the only factor.

[3] "Character of the Governmental Action"

The final factor is the character of the government action. The Court explained that a taking is more likely to be found if the government interference is a "physical invasion . . . than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good."[65] This factor became less important when the Court adopted its *Loretto* rule that any permanent physical occupation authorized by government is a taking. So what does this factor mean after *Loretto*?

The Court's phrasing of the factor suggests that a benefit-conferring regulation is less likely to be a taking than a physical invasion. Indeed, in a famous footnote, the Court seemed to abandon the harm-benefit test entirely. It explained that the *Mugler-Hadacheck* line of cases was best understood not as turning on any "noxious" use of land, but rather "on the ground that the restrictions were reasonably related to the implementation of a policy . . . expected to produce a widespread public benefit and applicable to all similarly situated property."[66] Therefore, in the *Penn Central* context, this factor seems to mean that a regulation that is reasonably related to the public health, safety, or welfare is not a taking even if it substantially diminishes the value of the affected land; it is irrelevant whether the regulation is harm-preventing or benefit-conferring.

Yet the Court clearly backs away from this broad interpretation in later cases, leaving the modern significance of this factor somewhat unclear.[67] In all probability, a nuisance-prevention regulation is less likely to be viewed as a taking than one that—like the historic preservation ordinance in *Penn Central*—is mainly oriented toward benefiting the public.[68]

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[63] *Id.* at 613.

[64] *Id.* at 614.

[65] Penn Central Transp. Co. v. New York City, 438 U.S. 104, 124 (1978).

[66] *Id.* at 134 n.30.

[67] *See, e.g.*, Hodel v. Irving, 481 U.S. 704 (1987) (where statute prohibited Native Americans from devising small undivided interests in reservation lands, the "extraordinary" character of the government regulation supported finding a taking).

[68] Two years after *Penn Central*, the Supreme Court cast doubt upon its test when deciding Agins v. City of Tiburon, 447 U.S. 255 (1980). In *Agins*, the Court seemed to say that a

§ 40.06 Special Rule for Permanent Physical Occupations: *Loretto v. Teleprompter Manhattan CATV Corp.* (1982)

[A] A "Bright Line" Rule

Suppose H owns 200 acres of vacant land destined for future residential development. Without obtaining H's consent, the U.S. Post Office installs a permanent mailbox on the edge of H's land. Embedded in a concrete slab, the mailbox occupies about four square feet of land, less than .00005% of the total surface area of H's parcel. Is this a taking?

The answer is clearly "yes" under *Loretto v. Teleprompter Manhattan CATV Corp.*[69] In *Loretto,* the Supreme Court established a special exception to the ad hoc *Penn Central* approach. For the first time, the Court recognized a bright line rule: any "permanent physical occupation authorized by government is a taking without regard to the public interests that it may serve."[70] Here, the mailbox is a permanent physical occupation of H's land, and hence a taking, regardless of the public interest that its placement on the land might promote.

Loretto only applies to physical takings. It can be classified as a regulatory takings case only in the narrow sense that government had authorized the permanent physical occupation of land by a third party. Yet *Loretto* is crucial to understanding the development of regulatory takings jurisprudence.

[B] Facts of *Loretto*

Loretto revolves around the installation of cable television equipment at a New York City apartment building. In 1970, the building owner permitted the local cable television company to install and maintain a "crossover" line on the building roof. This crossover line had three parts: (1) a thin cable about 36 feet long; (2) two "directional taps," each one a 4-inch cube; and (3) two metal boxes, each approximately 18″ by 12″ by 6″ in size. The crossover line was part of a cable "highway," which served other buildings on the block, not this particular building. Loretto purchased the building in 1971, unaware that the crossover line existed.

In 1973, New York enacted a statute that (a) authorized cable television companies to install cables and related facilities on residential rental property without the landlord's consent and (b) provided that the landlord would receive a "reasonable" payment in return, as determined by a state

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regulatory taking would also occur if a regulation "did not substantially advance legitimate state interests." *Id.* at 260. However, the Court resolved this uncertainty in Lingle v. Chevron USA, Inc., 125 S. Ct. 2074, 2087 (2005), by flatly stating that the *Agins* test was a due process standard, "not a valid takings test," and that it had "no proper place in our takings jurisprudence."

[69] 458 U.S. 419 (1982).

[70] *Id.* at 426.

commission; the commission later found that a one-time payment of $1.00 was reasonable. Shortly thereafter, the local cable television company installed a "noncrossover" cable line at Loretto's building; this line provided cable television service to Loretto's tenants. Loretto later sued, claiming that the state law was a taking of property without just compensation.

[C] The *Loretto* Test

The Court held flatly that any "permanent physical occupation" of land is a taking, regardless of "whether the action achieves an important public benefit or has only minimal economic impact on the owner."[71] It made no difference whether government occupied the property itself, or merely—as here—authorized a third party to do so. The Court reasoned that such an occupation effectively destroys all of the owner's basic property rights: the rights to possess, use, and dispose of property. "[T]he government does not simply take a single 'strand' from the 'bundle' of property rights: it chops through the bundle, taking a slice of every strand."[72] Moreover, the Court observed, in such an extreme case "the property owner entertains a historically rooted expectation of compensation."[73] After reviewing more than a century of precedent, the Court concluded that its decisions had uniformly found a taking in such circumstances.[74]

Under this standard, the cable installation on Loretto's building was a taking. The cables and related facilities were attached to the building with bolts and screws and thus were permanent; this equipment constituted a physical occupation because it occupied space on and above the roof, and along the exterior wall of the building. Although the extent of the occupation was admittedly small, this was relevant only in assessing the amount of compensation due for the taking.

The Court stressed that not all physical intrusions were takings under this standard. It distinguished sharply between a "permanent physical occupation" and a mere "temporary invasion."[75] A temporary invasion—such as an occasional demonstration at a shopping center[76] or intermittent flooding of agricultural land—is a much smaller interference with an owner's property rights. It does not wholly eliminate the owner's right to use,

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[71] *Id.* at 435.

[72] *Id.*

[73] *Id.* at 441. *But see* Yee v. City of Escondido, 503 U.S. 519 (1992) (rent control ordinance that severely restricted landlords' ability to evict tenants was not governed by *Loretto* rule because the tenants were initially invited onto the property by the landlords, not forced upon them by government).

[74] *See also* United States v. Causby, 328 U.S. 256 (1946) (low altitude flights by airplanes through air space above owner's land constituted a taking); Griggs v. Allegheny County, 369 U.S. 84 (1962) (same).

[75] As the dissent pointed out, it is difficult in many cases to distinguish between a "permanent physical occupation" and a "temporary physical invasion." Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 447–48 (1982) (Blackmun, J., dissenting).

[76] *See, e.g.,* PruneYard Shopping Center v. Robins, 447 U.S. 74 (1980).

or exclude others from, the land.[77] Thus, the *Penn Central* balancing test applies to "cases of physical invasion short of permanent appropriation."[78]

[D] Reflections on *Loretto*

The core of *Loretto* is uncontroversial. The concept that government seizure or occupation of privately-owned land constitutes a taking is the historic foundation of the Takings Clause. And, logically, it should make no difference whether the occupation is performed, or merely authorized, by government.[79]

But should this rule extend to trivial and insignificant occupations? For example, as the dissent noted, New York law requires landlords to supply mailboxes for their tenants; in effect, a landlord is compelled to purchase and install mailboxes at his or her own expense. Yet, under the *Loretto* standard, if the state purchases mailboxes and installs them at its own expense in a landlord's building, this is a permanent physical occupation and hence a taking. Is this distinction of constitutional significance? The dissent argues that an "intelligible takings inquiry must also ask whether the *extent* of the State's interference is so severe as to constitute a compensable taking."[80] Indeed, it seems doubtful that the framers originally intended the Takings Clause to apply to trivial intrusions. However, these concerns may be more theoretical than real. Cases involving de minimis occupations are unlikely to be brought because the small amount of damages at stake will not warrant the expense of litigation.

Suppose M illegally dumps hazardous wastes on her rural property, creating a toxic nightmare that will endanger human life for years to come. In order to protect the public, the state installs a brick fence around the contaminated area and erects large warning signs on steel posts. Is this a taking, such that the state must pay M for the land occupied by the fence and signs? Seemingly, yes. The fence and signs are as permanent as the cable equipment in *Loretto*; and they physically occupy space on M's land. The *Loretto* rule is apparently applied regardless of the nature of the public interest at stake—or the culpability of the landowner—so the strong public interest in protecting human health and safety here is irrelevant. Of course, if the occupied land has little or no value—as seems likely—a token payment to M may satisfy the just compensation requirement.

[77] If government compels a landowner to provide a non-exclusive easement for public access, this is apparently considered a "permanent physical occupation" and thus governed by the *Loretto* rule. *See* Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987).

[78] Loretto v. Teleprompter Manhattan CATV Corp. 458 U.S. 419, 433 n.9 (1982).

[79] *See also* United States v. Sioux Nation of Indians, 448 U.S. 371 (1980) (1877 statute that abrogated treaty with tribe, thereby legitimatizing settlers' occupancy of Indian lands, was a taking).

[80] Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 453 (1982) (Blackmun, J., dissenting).

§ 40.07 Special Rule for Loss of All Economically Beneficial or Productive Use: *Lucas v. South Carolina Coastal Council* (1992)

[A] A "Bright Line" Rule?

Suppose R owns 20 acres of desert land in pristine natural condition. The state adopts a desert preservation statute that designates R's land and similar undeveloped desert property as "conservation zones." In order to "protect the fragile desert ecosystem for future generations," the statute provides that land in conservation zones may be used only for one purpose: nature study. Assume that the statute reduces the fair market value of R's land from $20,000 to zero. Is this a taking?

In *Lucas v. South Carolina Coastal Council*, the Supreme Court adopted a "categorical" takings rule: a taking will always be found if regulation eliminates "all economically beneficial or productive use of land," unless the regulation is justified under background principles of property or nuisance law.[81] Under this standard, the desert preservation statute would be considered a taking. By reducing the value of R's land to zero, the statute eliminates all economically beneficial or productive use; and no previously-existing rule of property or nuisance law would justify this intrusion.

[B] Facts of *Lucas*

Lucas, a real estate developer, paid $975,000 for two beachfront lots in a residential development located on a barrier island off the coast of South Carolina. At the time, a state statute required that owners of certain coastal lands—including beaches and areas adjacent to sand dunes—obtain a permit before developing their property. Because Lucas's lots were 300 feet away from the beach when he purchased, they were not covered by this statute. However, for many years in the recent past, the lots had been either part of the beach or flooded regularly by the ebb and flow of the tide.

Two years after Lucas's purchase, South Carolina adopted a more comprehensive statute to preserve its shoreline and beaches. The state legislature explained, among other things, that by preserving the beach/dune system as a barrier to hurricanes and other storms, the statute would protect life and property from serious injury. Accordingly, the statute prohibited all construction along a long stretch of shoreline, including both of Lucas's lots. Concluding that the statute reduced the value of Lucas's lots to zero, the trial court found a regulatory taking had occurred and awarded over $1,200,000 in compensatory damages. The South Carolina Supreme Court reversed, finding that the statute was a valid exercise of the police power to prevent nuisance-like activities under the *Mugler-Hadacheck* standard.

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[81] 505 U.S. 1003, 1005 (1992).

[C] The *Lucas* Test

Writing for the Court, Justice Scalia carved out a special exception to the *Penn Central* standard. Acknowledging that the Court generally preferred to resolve takings cases on an ad hoc basis—as in *Penn Central*—he nonetheless identified two "categories" where a taking could be found without a fact-specific inquiry: (a) "regulations that compel the property owner to suffer a physical 'invasion' of his property" (as in *Loretto*) and (b) regulations that deny "all economically beneficial or productive use of land."[82]

This second standard—which governed the outcome in *Lucas*—is clearly linked to the Court's early *Pennsylvania Coal* approach and to the *Agins* standard. Under the *Lucas* test, a regulation that denies the landowner all economically beneficial or productive use of his land is a taking, *unless* the regulation is justified by "background principles of the State's law of property and nuisance."[83] Applying its new test, the Court held that the statute clearly eliminated all economically beneficial or productive use of Lucas' land. But it remanded the case to determine if the statute could be justified under background principles of South Carolina law, which it appeared to doubt. "It seems unlikely that common-law principles would have prevented the erection of any habitable or productive improvements on petitioner's land; they rarely support prohibition of the 'essential use' of land."[84]

[D] Exploring the *Lucas* Factors

[1] Loss of "All Economically Beneficial or Productive Use of Land"

The first prong of the *Lucas* test is quite rigorous: the regulation must deprive the owner of *all* economically beneficial or productive use of land.[85] This standard was met in *Lucas* because the trial court found that the construction ban rendered the lots totally valueless—a clear case. But market value may not be the only relevant yardstick. The test concerns whether land can be *used* in a manner that is economically beneficial or productive. And the meaning of "economically beneficial or productive use" is far from clear.

For example, is a use "economically" beneficial or productive if it generates *any* income at all, even if less than a reasonable return on investment? Suppose that O purchases a tract of wild land for $100,000; later, the county adopts an "open space" ordinance that requires that the land be kept in its natural condition. Mining, timber harvesting, agriculture, residential development, and all other uses that might provide a reasonable return on

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[82] *Id.* at 1015.

[83] *Id.* at 1029.

[84] *Id.* at 1031.

[85] Does *temporary* elimination of all economically beneficial or productive use of land meet this standard? The Supreme Court answered "no" to this question in Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 535 U.S. 302 (2002).

O's investment (e.g., $5,000 per year) are all prohibited. However, assume that O could rent the land to C, a veteran camper, for $100 per year; C will use the land for recreational camping. Do these facts trigger the *Lucas* test? Presumably not. Here O retains an economically beneficial and productive use because the land produces rental income. The *Lucas* test apparently does not mandate a "profitable" use, and the Court noted that its rule would apply only in "relatively rare situations."[86] On the other hand, the Court suggested that "requiring land to be left substantially in its natural state" was a typical example of regulation that deprived an owner of all economically beneficial or productive options for land use.

Certainly, the precise factual situation before the Court—a statute that (purportedly) reduced the property value to zero—is highly unlikely to recur. Even if a law now prohibits all use of a particular parcel of land, a speculator would probably be willing to purchase it at a low price because the prohibition might well be lifted or relaxed in the future.

The Court later clarified this factor in *Palazzolo v. Rhode Island*,[87] where the only permitted use on 18 acres of coastal wetlands was one home. The owner's planned 74-lot subdivision was valued at $3,150,000, while under the state's wetlands regulations the land was worth only $200,000 as a homesite—a 94% diminution in value. But the Court found that the *Lucas* standard was not met: "A regulation permitting a landowner to build a substantial residence on an 18-acre parcel does not leave the property 'economically idle.'"[88]

[2] Unless Justified by "Background Principles of the State's Law of Property and Nuisance"

Having established a new "categorical" rule, the Court immediately proceeded to create a huge exception. In a rather confusing turnabout, Justice Scalia first condemned the harm-benefit test as unworkable, and then revived the *Mugler-Hadacheck* nuisance exception in modified form.

If the first prong of the *Lucas* test is met, Scalia explained, this creates a presumption that a taking has occurred, without the need for fact-specific inquiry into the public interest that underlies the regulation. This presumption shifts the burden to the government. In order to avoid takings liability, the government must now show that the prohibited use would violate the "background principles of the State's law of property and nuisance" that govern land ownership.[89] In other words, it must be proven that the right to engage in the particular use was not in the "bundle of rights" that the owner acquired when purchasing the land.

What are the relevant "background principles"? While state nuisance law is obviously included, the exception also seems to encompass all aspects

[86] Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1018 (1992).

[87] 533 U.S. 606 (2001).

[88] *Id.* at 616.

[89] What about the reverse? Perhaps *Lucas* also stands for the proposition that a regulation based on background principles of property or nuisance law can *never* be a taking.

of the particular state's body of property law. This would include, for example, the public trust doctrine and the right to destroy property without compensation in emergency situations. Because these "background principles" differ from state to state, the scope of the exception will vary in each state. The exception also extends to regulations based on federal law, according to another section of the opinion.

Yet the scope of this exception remains somewhat unclear on two key points: (a) which types of law are considered? and (b) when is the relevant date for determining the law? Referring often to "common-law" principles, the Court certainly implies that only case law is relevant, not statutes, voter-adopted initiatives, administrative regulations, or state constitutional provisions.[90] In effect, a legislature cannot adopt a statute that eliminates all economically beneficial and productive use *unless* courts could already reach the same result under common law principles. And the Court suggests that the restriction must be a "pre-existing limitation" on the owner's title, presumably existing when the owner acquired title or at some undefined earlier point. Does this standard "freeze" the state's law in the past or are courts (or legislatures) able to craft new rules in response to changing conditions? The majority hints that "changed circumstances or new knowledge" may justify new regulation.[91] If the relevant law is frozen at the time each owner acquires title, then—even within a single state—the scope of the exception will vary for every owner.

Justice Scalia stressed the narrow context in which this exception operates. A property owner, he reasoned, "necessarily expects the uses of his property to be restricted, from time to time, by various measures newly enacted by the State in legitimate exercise of its police powers."[92] But regulation that eliminates all economically valuable use after an owner buys his or her land has an extraordinarily severe impact on the owner. Thus, it can be justified only if this restriction already exists in the law when the owner acquires title.[93]

[E] Significance of *Lucas*

Although *Lucas* ignited scholarly controversy, its practical effect has been quite limited. State courts and lower federal courts tend to interpret *Lucas* narrowly, stressing that it applies only to the unusual situation where regulation eliminates *all* economically beneficial or productive use. Thus, one study of state court opinions concluded that *Lucas* "has not resulted

[90] *See also* Palazzolo v. Rhode Island, 533 U.S. 606, 615 (2001) (rejecting claim that "any new regulation, once enacted, becomes a background principle of property law which cannot be challenged by those who acquire title after the enactment").

[91] Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1031 (1992).

[92] *Id.* at 1027. On remand, the South Carolina Supreme Court found no background principles of state law that justified the statute and accordingly instructed the trial court to award compensatory damages to Lucas. Lucas v. South Carolina Coastal Comm'n, 424 S.E.2d 484 (S.C. 1992).

[93] *See, e.g.*, Hunziker v. State, 519 N.W.2d 367 (Iowa 1994) (holding *Lucas* test inapplicable because statute in question was enacted before the plaintiff owners purchased the land).

in more than a trivial number of constitutional invalidations of state and local regulations."[94] However, the *Lucas* saga is far from over. As the case law continues to evolve, the *Lucas* standard may be applied to wetland-preservation laws or similar regulations that seek to protect environmentally-sensitive lands.

The *Lucas* majority also signaled interest in reopening the "conceptual severance" debate, which *Penn Central* had seemingly resolved. If a regulation forces a developer to leave 90% of a rural parcel in its natural condition, for example, the Court opined that "it is unclear whether we would analyze the situation as one in which the owner has been deprived of all economically beneficial use of the burdened portion of the tract, or as one in which the owner has suffered a mere diminution in value of the tract as a whole."[95]

§ 40.08 Special Rule for Exactions: The *Nollan-Dolan* Duo (1987/1994)

[A] The Problem of Exactions

Suppose developer D hopes to build 200 homes on a 50-acre parcel that is currently zoned for residential use. D needs subdivision approval from County in order to proceed with the project. In all probability, County will either (a) deny D's application or (b) grant the application subject to certain conditions known as exactions. An *exaction* is a requirement that the developer provide specified land, improvements, payments, or other benefits to the public to help offset the impacts of the project. Why demand exactions? Exactions shift the financial burden of accommodating new development from local government to the private developer, thereby avoiding the need for additional taxes or other public revenues. And the developer typically shifts this cost to buyers through higher prices.

For example, D's project will require construction of roads, sidewalks, storm drainage, and other public facilities on the 50-acre site. County will undoubtedly require D to provide these "on-site" improvements. In order to do this, D will *dedicate* the necessary land to public use, meaning that D will convey the land to County for these purposes; D will also construct the improvements at his own expense. County might also require D to provide "off-site" improvements (e.g., installing traffic lights at the intersection that adjoins the site in order to mitigate the impact of extra traffic) or to pay "impact" fees that compensate for other effects of the project (e.g., to help finance construction of additional school, water, and sewage facilities). The logic of these requirements is apparent: since D's project generated the need for these improvements, D should provide them. D can

[94] *See* Ronald H. Rosenberg, *The Non-Impact of the United States Supreme Court Regulatory Takings Cases on the State Courts: Does the Supreme Court Really Matter?*, 6 Fordham Envtl. L.J. 523, 548 (1995).

[95] Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1016–17 n.7 (1992). *But see* Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 535 U.S. 302, 331 (2002) (following *Penn Central* approach to issue).

presumably pass on these costs to future residents of the project by increasing the sales prices of the homes.

What happens if County demands an exaction that has little or no relationship to the impacts of D's project? For example, suppose County insists that D convey 10 acres of his land to County for a public park as a condition of subdivision approval. This park is far bigger than needed to serve D's development. In effect, County is forcing D to provide a free park for the general public, instead of using its eminent domain power to purchase the land for this purpose (*see* Chapter 39). Courts applying state law generally require that exactions have a "reasonable relationship" with the project in question, but this is a fairly deferential test. Can D instead challenge this exaction as an unconstitutional taking?

[B] *Nollan v. California Coastal Commission*: An "Essential Nexus" (1987)

The Supreme Court first addressed the exaction issue in *Nollan v. California Coastal Commission.*[96] The Nollans owned a beachfront lot in Southern California. A dilapidated house covered part of the lot; the rest of the lot—between a seawall and the mean high tide line—consisted of a "dry sand" beach. California law required that the Nollans obtain a special coastal development permit in order to build a new home on the lot. The state coastal commission granted the Nollans' permit application subject to a condition: the Nollans were required to "dedicate" or grant an easement that allowed the public to cross the portion of their lot on the ocean side of the seawall. Such an easement would, for example, allow the public to walk along the beach even at high tide, by crossing through the "dry sand" part of the Nollans' lot. The Nollans argued that the easement condition was a taking, and the Supreme Court agreed by a 5-4 vote.

Writing for the majority, Justice Scalia first considered a hypothetical: assuming the Nollans had never applied for a permit, could the state force them to provide an easement for public use without compensation? The answer to this question was clearly "no." Under the *Loretto* standard (*see* § 40.06[C]), this would be the equivalent of a permanent physical occupation authorized by government, and hence a taking. Thus, the question became whether requiring the easement as a condition for a land-use permit changed this result.

Under one prong of the *Agins* standard (*see* footnote 68, *supra*), a land use regulation is a taking if it does not "substantially advance legitimate state interests." Scalia reasoned that a regulation substantially advances a state interest only if there is an "essential nexus" between an exaction and a state interest that the exaction is intended to serve. In other words, there must be a sufficient connection between the end (the state interest) and the means used to achieve that end (the exaction).

Here, the commission claimed that three state interests supported the easement condition: protecting the public's ability to see the beach; helping

[96] 483 U.S. 825 (1987).

the public overcome a "psychological barrier" to using the beach; and avoiding beach congestion. But on the facts of the case, Scalia found that the easement had no relationship at all with these state interests. Although the Nollan's new house might adversely affect these state interests, the easement condition did not prevent or mitigate this problem. For example, if the planned house would block the public's prior view of the beach from the street in front of the house, then the commission could legally impose a height limit or other condition to protect the view. But the easement condition had no logical connection to this "view from the street" problem; it merely provided easier travel for people who were *already* walking on the beach and who thus already enjoyed an unimpaired view of the beach.[97] Thus, the requisite "essential nexus" did not exist.

[C] *Dolan v. City of Tigard*: The "Rough Proportionality" Test (1994)

In *Dolan v. City of Tigard*, the Court answered an issue left unresolved in *Nollan*: "[W]hat is the required degree of connection between the exactions . . . and the projected impacts of the proposed development?"[98]

Dolan, who owned a plumbing and electric supply store in Oregon, planned to double the size of her store, pave the existing gravel parking lot, and build an additional retail building on her land. The city granted Dolan's application for a building permit, but imposed two key conditions that effectively required her to convey or "dedicate" about 10% of her land to the city. First, because the project would increase the amount of impervious surface on the land—thus increasing storm-water runoff into the adjacent creek—Dolan was required to dedicate the part of her land lying within the creek's 100-year floodplain. Second, because the expanded store would attract additional customers—thus increasing traffic congestion on local streets—the city insisted that Dolan also dedicate an easement for a pedestrian/bicycle pathway over a 15-foot strip of her land.

The Court found an unconstitutional taking on these facts—again by a 5-4 vote—because the dedications demanded by the city lacked the required degree of connection with the impacts of the project. Chief Justice Rehnquist, writing for the majority, quickly concluded that the conditions satisfied the *Nollan* "essential nexus" standard. Limiting development within the floodplain promoted the city's interest in preventing floods; and providing the pedestrian/bicycle pathway served its interest in minimizing traffic congestion. Rehnquist then explored the degree of connection needed between the conditions and the impacts of Dolan's project, based on the *Nollan* premise that exactions must "substantially advance" such interests. He concluded that the Fifth Amendment required "rough proportionality": "[T]he city must make some sort of individualized determination that the

[97] *See also* Blue Jeans Equities West v. City & County of San Francisco, 4 Cal. Rptr. 2d 114 (Ct. App. 1992) (refusing to apply *Nollan* standard to ordinance requiring payment of transit impact fee as approval condition).

[98] Dolan v. City of Tigard, 512 U.S. 374, 377 (1994).

required dedication is related both in nature and extent to the impact of the proposed development."[99] Although based on the state court "reasonable relationship" test, the "rough proportionality" standard is somewhat more stringent. Moreover, contrary to traditional law, it shifts the burden of proof to government to justify the exaction.

Under this new standard, no evidence in the record before the Court justified the floodplain dedication. Rehnquist suggested that the city's interest in flood control could be satisfied by a less intrusive condition—allowing Dolan to retain title to the floodplain land, but prohibiting any future development. Similarly, he found no evidence that the pedestrian/bicycle path easement was adequately related to the increased traffic that the project would cause. The record merely reflected that the path "could" offset some of the increased traffic, not that it "would" offset this traffic.

[D] Aftermath of *Nollan-Dolan*

Both *Nollan* and *Dolan* involved conditions that compelled an owner to convey an interest in land to the public in exchange for a discretionary land use approval. In order to withstand constitutional scrutiny under the Takings Clause, such an exaction must satisfy two separate tests:

(1) there must an "essential nexus" between the exaction and a legitimate state interest that it serves, and

(2) the exaction must be "roughly proportional" to the nature and extent of the project's impact.

In light of the *Loretto* rule that a permanent physical occupation is always deemed a taking, the *Nollan-Dolan* standards are not particularly surprising.

But do these standards apply to impact fees or other types of non-possessory exactions? In both *Nollan* and *Dolan,* the Court stressed the special nature of the condition at issue: the conveyance of an interest in land. A conveyance completely eliminates the owner's right to exclude others, "one of the most essential sticks in the bundle of rights that are commonly characterized as property."[100] The Court repeated this theme in a 1999 decision: "[W]e have not extended the rough-proportionality test of *Dolan* beyond the special context of exactions—land-use decisions conditioning approval of development on the dedication of property to public use."[101] Focusing on this distinction, most state courts and lower federal courts refuse to extend *Nollan-Dolan* to non-possessory exactions.

A notable exception is *Erlich v. City of Culver City,*[102] where the California Supreme Court applied the *Nollan-Dolan* standards to a monetary exaction. The owner of a private tennis club planned to demolish the

[99] *Id.* at 391.

[100] *See, e.g., id* at 393 (quoting Kaiser Aetna v. United States, 444 U.S. 164, 176 (1979)).

[101] City of Monterey v. Del Monte Dunes, 119 S. Ct. 1624, 1635 (1999).

[102] 911 P.2d 429 (Cal. 1996).

club and build a residential condominium project in its place; the city conditioned project approval on the owner's payment of a $280,000 mitigation fee to compensate for the loss of recreational facilities. The *Erlich* court reasoned that the purpose underlying the *Nollan-Dolan* approach—avoiding illegitimate government demands that unfairly burden individual owners—applies equally to conveyances and monetary exactions. Although finding an "essential nexus" between the mitigation fee and the public interest in providing recreational facilities, the court held that the "rough proportionality" test was not met. The record before the court "was devoid of any individualized findings to support the required 'fit' between the monetary exaction and the loss of a parcel zoned for commercial recreational use."[103]

§ 40.09 Remedies for Regulatory Takings

[A] *First English Evangelical Lutheran Church v. County of Los Angeles*

Suppose that City adopts a land-use ordinance in 2008 that prevents O from constructing a planned shopping center on his vacant land. O sues City. In 2012, when O's takings case finally comes to trial, the court concludes that the ordinance is a taking. What remedy will O receive?

After decades of uncertainty, the law is now fairly straightforward: the remedy for a regulatory taking is compensatory damages. For decades, many believed that the appropriate remedy was a judgment invalidating the regulation at issue or similar equitable relief. The Supreme Court clarified the law in 1987 with its decision in *First English Evangelical Lutheran Church v. County of Los Angeles*.[104] The Court explained that the Takings Clause is designed "not to limit the governmental interference with property rights *per se*, but rather to secure *compensation* in the event of an otherwise proper interference amounting to a taking."[105] In short, the Constitution requires compensation for a taking.

Under *First English*, the successful plaintiff always receives compensation for the "temporary taking" of property at least for the period between (a) the date the regulation first adversely affected the land and (b) the date of judgment. But the owner has no right to demand that a "temporary taking" be made permanent, for this might force government to use its eminent domain power against its will. Rather, the government has a choice. "Once a court determines that a taking has occurred, the government retains the whole range of options already available—amendment of the regulation, withdrawal of the invalidated regulation, or exercise of eminent domain."[106] If the government elects to keep the regulation in place,

[103] *Id.* at 448.

[104] 482 U.S. 304 (1987).

[105] *Id.* at 315.

[106] *Id.* at 321.

the owner is entitled to compensation for a permanent taking. Alternatively, if the government chooses to cancel the regulation, the owner only receives compensation for the temporary taking that occurred during the period when the regulation was effective.

[B] Measure of Damages for Permanent Taking

For example, suppose that City elects to keep its ordinance in force. The measure of damages for a permanent taking is well-established. Just as in the case of eminent domain, the owner is entitled to receive the fair market value of the property on the date of the taking (*see* § 39.06). Thus, O will receive the fair market value of his land as of 2008, plus interest on this sum.

[C] Measure of Damages for Temporary Taking

On the other hand, if City rescinds its ordinance in 2012, O will receive compensation only for the temporary taking of his land between 2008 and 2012. Under *First English*, the measure of damages for a temporary taking is the fair market value of the use of the property during the takings period. Although clear in theory, this standard is usually difficult to apply. The typical regulatory takings case involves a government restriction on the future use of vacant land. For instance, but for the city's ordinance, O would have tried to build his planned shopping center. The fair rental value of O's property in its undeveloped condition is not adequate compensation for the loss of revenues from a shopping center. Conversely, the shopping center might not have been successful, and hence any potential lost profits are too speculative to provide a basis for damages.

In this situation, most courts determine the difference in the value of the land with and without the regulation in place, and then compute damages based on this differential. Suppose that O's property is worth $300,000 burdened by the ordinance, and $1,000,000 without it, a differential of $700,000. One common approach is to provide a market rate of return on the value differential. If a reasonable rate of return is 8%, for instance, O will receive $168,000 in damages (8% of $700,000 per year for three years).