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AICP Exam Review

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Planning & Land Use Law Handouts

PART

II

The Legal Framework

Chapter 8 The Law

The following case summaries have been prepared for the express purpose of AICP Exam preparation. Included is a concise summary of the salient holdings in each case for examination purposes; these summaries should not be relied upon as thorough legal analyses of all issues discussed in each case. Equally important, the cases tested on the AICP Exam may not reflect the current state ofthe law in a given jurisdiction, so these summaries should not be relied upon as such.

The cases reviewed are listed below, and the summaries follow the inclusive case

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SUMMARIES

***Munn v. Illinois* 94 U.S. 113 (1876) United States Supreme Court**

BACKGROUND FACTS

The Constitution of Illinois, adopted in 1870, contained guidelines and licensure requirements for the inspection of grain, and the storage thereof in public warehouses. An information (criminal complaint) was filed in the Criminal Court of Cook County, Illinois, against Munn and Scott, alleging that they unlawfully transacted the business of public warehousemen without procuring a license ftom the Circuit Court of Cook County. The license would permit them to transact business as public warehousemen under the laws of the State oHllinois.

Munn and Scott leased the ground occupied by the Northwestern Elevator and erected a grain warehouse or elevator. With their own capital and means, they carried on in said elevator the business of storing and handling grain for hire, for which they charged and received, as compensation, the rates of storage which had been established by the different elevators and warehouses in the City of Chicago. r

Munn and Scott had complied in all respects with the law except in two particulars. First, they had not taken out a license, nor given a bond as required; and, second, they charged for storage and handling grain the rates established and published in January, 1872, which were higher than those fixed by subsequent law. The defendants were found guilty, and fined $100.

Munn alleged that several sections ofthe applicable statute were unconstitutional and void. Munn also alleged that those sections were repugnant to that section of Article 14 of the amendments to the Constitution of the United States which ordains that no state shall deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

Other notable facts are as follows. The grain warehouses and elevators in Chicago were immense structures, holding from 300,000 to 1,000,000 bushels at one time, according to size. In 1874, there were 14 warehouses in Chicago adopted to this particular business, and owned by about 30 persons. Nine business firms controlled the warehouses and all the elevator facilities. The vast grain production of seven or eight states ofthe west had to pass through these warehouses and elevator facilities on the way to four or five of the states on the seashore. The court recognized that "the largest traffic between the citizens of the Country north and west of

Chicago, and the citizens of the Country lying on the Atlantic coast north of Washington, is in grain which passes through the elevators of Chicago."

HOLDING

The applicable statutory provisions, including those requiring a license, were held to be constitutional. Every statute is presumed to be constitutional, and a court should not declare one to be unconstitutional unless it is clearly so. Ifthere is doubt, the expressed will of the legislature should be sustained. Plaintiff s regulation was a thing of domestic concern, and the state may exercise all the powers of government over them, even though in so doing it may indirectly operate upon commerce outside its immediate jurisdiction. For some reason, the people of Illinois, when they revised their Constitution in 1870, saw fit to make it the duty of the general assembly to pass laws for the protection of producers, shippers, and receivers of grain and produce.

Property becomes clothed with a "public interest" when used in a manner to make it of public consequence, and it affects the community at large. When, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good (to the extent ofthe interest he has thus created). It matters not in this case that Munn and Scott had built their warehouses and established their business before the regulations complained of were adopted. What Munn and Scott did was, from the beginning, subject to the power of the body politic to require them to conform to such regulations as might be established by the proper authorities for the common good.

The court concurred that the statute in question was not repugnant to the Constitution of the United States, and there was no error in the lower court's judgment. Like common carriers, Munn and Scott were required by law to receive grain from all persons, and store the same upon equal terms and conditions. Although the ownership of the property is private, the use may be public in a strict, legal sense, and consequently, the challenged sections ofthe statute were constitutional and valid.

Attorney General v. Williams 188 U.S. 491, 23 S.Ct. 440 (1903) United States Supreme Court

BACKGROUND FACTS

The legislature of Massachusetts passed legislation restricting the height ofbuildings on certain Boston streets to 90 feet. The plaintiffs building came within the scope of this statute, and the Attorney General of Massachusetts filed an information (criminal complaint) in the Massachusetts Supreme Judicial Court to enjoin the maintenance ofthat part ofthe building above the 90-foot line. The defendants pleaded that the statute violated the Due Process Clause of the Fourteenth Amendment, as well as' other provisions of the United States Constitution. The defendants then sued the City of Boston for compensation and damages as provided for in the new legislation.

The single question in the case is whether it is consistent with due process ofthe law for a court to decree the actual destruction of property under a statute of eminent domain, by which a City takes certain rights in private property, and provides for compensation only by giving the private property owners a right of action against a city for their damages in another proceeding, which is yet undetermined.

HOLDING

The court treated the Attorney General's action as a condemnation, and as a taking for the p.ublic use. The court did not agree with the building owner's argument that a judgment is essential to establish the liability of the City before it can be affirmed that adequate provision

for compensation has been made. Therefore, the court held there was adequate provision for the payment of damages sustained by the taking, and the statute in question could not be adjudged in conflict with the United States Constitution.

***Cochran v. Preston* 108 Md. 220 (Md. 1908) Maryland Court of Appeals**

BACKGROUND FACTS

The legislature of Maryland passed legislation restricting the height of buildings to 70 feet on certain Baltimore streets surrounding the Washington Monument. The ordinances of Baltimore required all persons who desired to build, alter, or repair any structure within the limits ofthe City to obtain a permit from the building inspector and the appeal tax court ofthe City. The plaintiff was an owner of a large apartment house which was located within the territory to which the prohibition ofthe statute applied. The plaintiff applied for a permit to build an additional story onto the apartment house which would raise the height of the building to 78 feet.

The sole reason for denying the permit was on the ground that the additional story as proposed would raise the building to a height greater than 70 feet above the base line of the Washington Monument, contrary to the provisions of the statute.

The plaintiff contended that the defendants were not justified in their refusal to grant the permit, because the statute upon which their refusal was based was unconstitutional. Plaintiff contended that the purpose of the new legislation was not the exercise of police power, but rather was aesthetic in nature, designed solely to preserve the beauty and architectural symmetry of the environment of the Washington Monument. Plaintiff further argued that it was not a valid exercise of the police power, to impair property rights for purely aesthetical purposes.

HOLDING

The power to prescribe regulations demanded by the general welfare and for the common protection of all is known as the police power of the state. The police power is inherent in every sovereignty. Among the police powers of a state is the right to regulate the height of buildings in a city. Nevertheless, such regulation must be reasonable in character and adapted to accomplish the purpose for which the regulation is designed.

The court held that if the objective of the legislation was to promote the public welfare, and there is a substantial relationship between the objective and the means devised for attaining that objective, every intendment will be in favor of the validity of such legislation.

court found that the reason for the enactment of the statute was to protect the buildings and their contents, located in the described vicinity, including the works of art clustered there, from the ravages of fire. The court considered such a purpose entirely legitimate, and held that the statute was a valid exercise of the police power as far as its purpose was concerned. The court further held that the method adopted (restriction on building height) to accomplish the purpose (lower the danger of fire to ensure public safety), was a valid exercise of the police power as well.

***Welch v. Swasey* 214 U.S. 91 (1909) United States Supreme Court**

BACKGROUND FACTS

The plaintiff applied to the building commissioner of the City of Boston, for a permit to build on his lot located at the comer of Arlington and Marlborough streets in the City. The application was denied. The lot for the proposed building was situated in District B, in which the height ofthe buildings was limited to 80 feet or, in certain cases, to 100 feet, while the height

of buildings in District A could be 125 feet. The height of the building which plaintiff proposed to build was stated by him in his permit application to be 124 feet, 6 inches. The sole reason for refusing the permit was the proposed height of the building, being greater than the law allowed in District B.

The plaintiff contended that the defendants were not justified in their refusal to grant the permit, because the statutes upon which their refusal was based were unconstitutional and void. The plaintiff contended that the statutes were not the valid exercise of police power because in fact their real purpose was of an aesthetic nature designed solely to preserve architectural symmetry and regular sky lines, and that such power cannot be exercised for such a purpose. Moreover, the distinction between 125 feet for the height of buildings in the commercial districts (District A), and 80 to 100 feet in certain other residential districts (District B), was wholly unjustifiable and arbitrary.

HOLDING

Regulations with respect to the height of buildings and mode of construction made by legislative enactment for the safety, comfort, or convenience of the people, and for the benefit of property owners generally are valid if neither umeasonable nor inappropriate.

The classification made between the commercial and residential sections of Boston limiting the maximum height of buildings in the commercial district to 125 feet and the residential districts from 80 to 100 feet was not umeasonable. The height limitation did not deprive the owner of property in the residential section of its profitable use without justification. Accordingly, there was no taking of his property without due process of law, nor should compensation be given him for such invasions of his rights, even though aesthetic considerations may have entered into the reasons for the passage of the regulations.In holding that the statutes and the reports of the commissions were constitutional, the court opined that there is a fair reason for the discrimination between the height of buildings in the residential districts as compared with the commercial districts. That court also held that regulations regarding the height of buildings, and their mode of construction made by legislative enactments for the safety, comfort, or convenience ofthe people, and for the benefit of property owners generally are valid. In sum, the height and construction conditions are reasonable and appropriate exercises of the police power.

Eubank v City of Richmond 226 U.S. 137 (1912) United States Supreme Court

BACKGROUND FACTS

The City of Richmond passed a municipal ordinance which provided as follows: upon request oftwo-thirds ofthe abutting property owners, a committee on streets would establish a building line on the side of the square on which such property abuts, not less than 5 feet, nor more than 30 feet, from the street line.

Plaintiff received a permit to build a detached brick building to be used for a dwelling according to certain plans and specifications that had been approved by the building inspector. Under the City ordinance, the street committee petitioned for the establishment of a building line, and in accordance with the petition, a resolution was passed establishing a building line on the line of a majority of the houses then erected. Plaintiffwas given notice that the line established was "about fourteen (14) feet from the true line ofthe street, and on a line with the majority ofthe houses." He was notified further that all portions of his house, including an octagon bay window, must be set back to conform to that line. Plaintiff appealed to the board of public safety, which sustained the building inspector's orders consistent with the ordinance.

At the time the ordinance was passed, the building conformed to the line, with the exception of the octagon bay window, which projected about 3 feet over the line.

HOLDING

The Supreme Court held the ordinance and the statute under which it was enacted violated the United States Constitution in that they deprived the plaintiff of his property without due process oflaw, and denied him the equal protection ofthe laws. The ordinance enabled the convenience or purposes of one set of property owners to control the property rights of others. One person having a two-thirds ownership of a block inappropriately had that power against a number having a less collective ownership. This was deemed to be an umeasonable exercise of the police power and the ordinance and statute were deemed invalid.

***Hadacheck v. Sebastian* 239 U.S. 394 (1915) United States Supreme Court**

BACKGROUND FACTS

Plaintiff was convicted of a misdemeanor for the violation of a City of Los Angeles ordinance making it unlawful for any person to establish or operate a brickyard within described limits in the City.

Plaintiff owned a tract of land with a very valuable bed of clay. He made excavations covering a very large area of the property rendering the land unsuitable for any purpose other than that for which it was being used. He purchased the land because of such bed of clay, outside of the limits ofthe City and distant from dwellings and other habitations, and he did not expect that the territory would be annexed to the City. He erected expensive machinery for the manufacture of bricks of fine quality which were being used for building purposes in and about the City. The ordinance concerning brickyard operations was enacted after the plaintiff commenced his operations. The plaintiff argued that if the ordinance were declared valid, he would be compelled to abandon his business and be deprived of the use of the property.

HOLDING

A municipal ordinance enacted in good faith as a police measure, prohibiting brickmaking within a designated area, does not take, without due process oflaw, the property of an owner of a tract of land within the prohibited district, although such land: 1) contains valuable deposits of clay suitable for brickmaking which could not profitably be removed and manufactured into brick elsewhere; 2) is far- more valuable for brickmaking than for any other purpose; 3) had been acquired by him before it was annexed to the municipality; and 4) had long been used by him as a brickyard.

The created district had become primarily a residential section, and the occupants of the neighboring dwellings were seriously incommoded by the brickyard operations. Such evidence, when taken in connection with the presumptions in favor of the propriety of the legislative determination, was deemed sufficient to overcome any contention that the prohibitions set forth in the ordinance was a mere arbitrary invasion of a private right.

To so hold would preclude development and fix a city forever in its primitive conditions. "There must be progress, and if in its march private interests are in the way, they must yield to the good of the community."

Finally, in the present case there is no prohibition of the removal of the brick clay; only a prohibition within the designated locality of its manufacture into bricks. Based on all of the facts, the court felt justified in finding that the ordinance was a valid exercise of the City's police powers.

***Thomas Cusack Co. v. City of Chicago* 242 U.S. 526 (1917) United States Supreme Court**

BACKGROUND FACTS

The City of Chicago enacted an ordinance requiring the consent of the owners of a maj ority of the frontage of the property on both sides of the street before any billboard or signboard 12 square feet in size may be erected in any block in which one-half of the buildings are used exclusively for residential purposes. Plaintiff, a corporation engaged in the business of outdoor advertising, claimed that this ordinance was not a valid exercise by the City ofthe power to regulate or control the construction and maintenance of billboards, but a delegation of legislative power to the owners of a majority of the frontage of the property in the block "to subj ect the use to be made of their property by the minority owners of property in such block to the whims and caprices of their neighbors."

HOLDING

The court upheld the ordinance stating that the prohibition ofbillboards over certain dimensions, where buildings on both sides of the street are residences without the consent of a maj ority of home owners, does not deny the due process or equal protection oflaw under the Fourteenth Amendment to the United States Constitution.

Upon the question of the reasonableness of the ordinance, much evidence was introduced that fires had been started in the accumulation of combustible material which gathered about such billboards; that offensive and unsanitary accumulations were habitually found about them, and that they afforded a convenient concealment and shield for immoral practices, and for loiterers and criminals. Furthermore, residential sections of the City did not have as full police or fire protection as other sections had, and the streets of such sections were more frequented by unprotected women and children and were not so well lighted as other sections of the City, and most of the crimes against women and children are offenses against their persons.

Consequently, the enactment of the ordinance was within the City's police power to protect the public health, safety and welfare to allow the affected residents to voice concerns and provide consent.

***Town of Windsor v. Whitney et al.* 111 A. 354 (Conn. 1920) Connecticut Supreme Court**

BACKGROUND FACTS

The Town of Windsor sued the defendants to restrain them from opening, keeping open or using certain streets, establishing building lines, or conveying building lots on certain streets in Windsor. The defendants were engaged in developing for residential purposes a tract of land on Barber Street in Windsor, and they had opened a street parallel to Barber Street and two other streets opening into Barber Street for public use. In addition, the defendants had established building and curb lines on these streets and had sold for building purposes a number oflots on these streets. All of the defendants' acts were in violation of the provisions of the Town's ordinances which provided for the creation of a town plan commission whose duty it was to make surveys and maps of Windsor, section by section, showing locations for any public building, highway, street, or parkway layouts, including street, building and veranda lines.

The defendants claimed that the ordinance upon which the complaint was based was unconstitutional in that it was in violation of the Due Process Clause of the Fourteenth Amendment of the United States Constitution, because it constituted a taking of property without due process of law.

HOLDING

The court found that streets properly located and of suitable width help transportation, add to the safety of travel, furnish better protection against fire, and better light and air to those who live upon the street. They afford better opportunities for laying, maintaining, and inspecting water, sewer, gas and heating pipes and electric and telephone conduits in the streets. Streets of reasonable width add to the value ofthe land along the street and enhance the general value ofland and buildings in the neighborhood, and greatly increase the beauty of the neighborhood.

Where the free exercise of one's rights of property is detrimental to the public interest, the state has the right under the police power to reasonably regulate such exercise

of property rights. Regulations of this character, if reasonable, do not constitute a taking of property. The Due Process Clause does not prevent the state from making all needful regulations for the public welfare, and does not require compensation to be made in cases where these regulations are reasonable, although they may deprive an owner ofthe use ofhis property. The court held that a legislative enactment such as the Town ordinance in this case, requiring private highways laid out in land development schemes to be of a reasonable width, and reasonable building lines established upon streets before the erection of buildings fronting upon those streets shall be pennitted, is well within the police power and does not offend against the Fourteenth Amendment.

***Romar Realty v. Board of Commissioners* 96 N.J.L. 117 (N.J. 1921) New Jersey Supreme Court**

BACKGROUND FACTS

Romar Realty, owner of a tract ofland fronting on Main Street, planned to build onestory stores on the land within 80 feet of the building or fence line. Application for a building pennit was refused, and they were infonned that the erection of the proposed onestory structures at the proposed place oflocation on the land was in violation of an ordinance ofthe borough adopted as follows: "Sec. 2, Be it ordained that no building of any kind less than two stories high shall be erected on the aforesaid street within eighty feet of said building or fence line without the consent of said board of commissioners." It is the second section of the above ordinance under which the requested building pennit was refused.

HOLDING

The legal basis for all land use regulation is the police power of a jurisdiction to protect the public health, safety and welfare of its residents. A land use regulation lies within the police power if it is reasonably related to the public welfare.

The court, however, concluded as follows: 1) a purpose to beautify the appearance of a street by building restrictions is an aesthetic consideration which was a matter ofluxury and indulgence rather than of necessity, and did not justify the exercise of the police power; and 2) the enactment of an ordinance by a borough prohibiting the erection of one story buildings within 80 feet of the building or fence line along a certain street was not a proper exercise of the police power, and was invalid.

***Inspector of Building: of Lowell v. Stoklosa* 250 Mass. 52 (Mass. 1924) Massachusetts Supreme Court**

BACKGROUND FACTS

The City of Lowell sought to restrain defendant Stoklosa from erecting a building for business purposes in violation of an ordinance enacted pursuant to provisions of the City's General Laws. This was a suit in equity by the City building inspector to restrain the defendant from erecting a certain building for business purposes in that City in violation of an ordinance. The ordinance authorized the City by ordinance to divide its territory into districts or zones, to restrict the use of buildings for trade and industry, for tenement houses and for dwelling houses to be in designated areas and to require such buildings to conform to establish regulations as to construction and use. Defendant attacked the constitutionality ofthe statute.

HOLDING

The City ordinance, creating as a business district any building district which had not less than one-half ground floor frontage and frontage on the other side of street and was, at the time the ordinance went into effect, devoted to business or industry: 1) did not provide an unreasonable division of business and residence districts; and 2) was a lawful exercise of the police power.

Second, where building districts were established by some rational general rule, there was no invalidity in a provision in the ordinance which enabled the City Council to relax rigidity of bounds of the districts when three-fourths of landowners in the immediate neighborhood so request. The consent of certain landowners was merely a condition to the City Council's public hearing on a matter affecting the owners of homes in those residential districts and it was not a delegation of legislative power. Accordingly, the ordinance was upheld.

Zahn v. Public Works of Los Angeles 195 Cal. 497 (Cal. 1925) California Supreme Court

BACKGROUND FACTS

The petition attacked two ordinances ofthe City of Los Angeles known as the general and comprehensive zoning ordinance of said City, which provided for the establishment of a setback line. The general comprehensive zoning ordinance was adopted by the City Council in October 1921. Thereafter, the petitioners filed an application with the City Council requesting that the Council declare an exception to the restrictions of said ordinance with respect to the property of the petitioners, and adopt an ordinance permitting the construction and erection of a business building by the petitioners upon their property.

Succinctly stated, the following obj ections were urged by the petitioners as showing an abuse of discretion by the Council: 1) other adjacent territory was zoned for business which was not better suited for business than Wilshire Boulevard; 2) the value of the petitioners' property would be depreciated if it were retained in zone B; and 3) property devoted tQ business uses at the time of the adoption of the ordinance were permitted to continue.

HOLDING

An ordinance enacted pursuant to a general comprehensive zoning plan, and based on consideration of public health, safety, morals, or general welfare, if applied fairly and impartially, is a valid exercise of the police power. Every intendment is to be made in favor of zoning ordinances and courts will not, except in clear cases, interfere with the exercise of the power manifested.

The fact that including the petitioners' property depreciated in value in a zone restricted to residential purposes rather than in a zone restricted to business purposes was not of controlling significance, as every exercise of police power is apt to adversely affect the property interest of somebody.

The ordinance in the instant case was not an arbitrary attempt ofthe City authorities to discriminate between the use of property in one territory and the use of property permitted in another of similar description. On the contrary, the districts created by the ordinance and its various amendments appeared to be established by a rational general rule.

As to the objection that the ordinance was not retrospective, but permitted the continuance of existing uses, it will suffice to say that for the purpose of zoning it is not necessary that existing uses be removed. For future development, all past development not in harmony therewith, would be impractical.

***Village of Euclid v. Ambler Realty* 272 U.S. 365 (1926) United States Supreme Court**

BACKGROUND FACTS

Appellant Amber Realty was the owner of a tract ofland containing 68 acres, situated in the westerly end of the Village of Euclid. On November 13, 1922, an ordinance was adopted by the Village Council which established a comprehensive zoning plan for regulating and restricting the location of trades, industries, apartment houses, two-family houses, the lot area to be built upon, the size and height.

The ordinance was attacked on the grounds that it unconstitutionally deprived appellant of liberty and property without due process of law, and it denied equal protection of law. The lawsuit specifically averred that the ordinance attempted to restrict and control the lawful uses of appellant's land, so as to confiscate and destroy a great part of its value; that prospective buyers were deterred from buying the land because of the ordinance; and that the ordinance constituted a cloud upon the land which diverted development to less favorable locations. A motion was made in court that the suit was premature because the appellant had made no effort to obtain a building permit or apply to the zoning board of appeals for relief, as it might have done under the terms of the ordinance.

HOLDING

A general zoning ordinance creating a residential district and excluding therefrom apartment houses, business houses, retail stores, shops and other like establishments, was held to be a valid exercise of police power and not violative of the Due Process or Equal Protection Clauses of the Fourteenth Amendment of the United States Constitution.

Where injunctive relief against a zoning ordinance was not sought on the ground of a particular injury in the process of actual execution, but on the broad ground that the mere existence and threatened enforcement of the ordinance materially and adversely affected appellant, a court will not closely scrutinize provisions ofthe ordinance to ascertain whether there may be minor provisions which, if attacked separately, would be held unconstitutional.

The relief sought here was of the same character. Namely, the appellant sought an injunction against the enforcement of any of the restrictions, limitation, or conditions ofthe ordinance. The gravamen of the complaint was that a portion of the land of the appellant could not be sold for certain enumerated uses because ofthe general and broad restraints of the ordinance.

Under those circumstances, the court determined that the ordinance in its general scope and dominant features, so far as its provisions where involved, was a valid exercise of author-

ity. Judicial scrutiny of individual provisions of the ordinance would be dealt with as cases arose on an individual basis.

***Washington Ex ReI. Seattle Trust Co. v. Roberge* 278 U.S. 116 (1928) United States Supreme Court**

BACKGROUND FACTS

Since 1914, the trustee owned and maintained a philanthropic home for the aged and poor located about six miles from the business center of Seattle. The home was built for and formerly used as a private residence. It was large enough to accommodate about 14 guests and usually had about that number. The trustee proposed to remove the old building and to replace it with an attractive 1- Yi story fire proof house large enough to be a home for 30 persons at a cost of $100,000.

The City zoning ordinance provided that a philanthropic home for children or for old people shall be permitted in the first residence district when the written consent has been obtained from the owners oftwo-thirds ofthe property within four hundred (400) feet ofthe proposed building.

The section purported to give the owners of less than one-half the land within four hundred (400) feet of the proposed building, authority to keep plaintiff from using its land for the proposed home. The City was bound by the decision or inaction of such owners. There was no provision for review under the ordinance; the failure to give consent was final.

HOLDING

The City ordinance, permitting the erection of philanthropic homes for children or old people in the first residence district only on procuring written consent of owners oftwothirds of property within four hundred (400) feet of the proposed building, violated the due process clause as an unwarranted delegation of power to other property owners to arbitrarily prevent use ofland for such purpose, without any standard or rule prescribed by legislative action.

The court determined that the delegation of power so attempted was repugnant to the Due Process Clause of the Fourteenth Amendment of the United States Constitution.

***Jones v. City of Los Angeles* 211 Cal. 304 (Cal. 1930) California Supreme Court**

BACKGROUND FACTS

This was an action to enjoin the enforcement of a zoning ordinance ofthe City of Los Angeles. The ordinance was enacted independently ofthe general zoning plan for the City, and its restrictive provisions were directed toward one type of business. It provided that outside of certain designated districts, it was unlawful for any person to erect, establish, operate, maintain or conduct any hospital, asylum, sanitarium, home, retreat or "other place for the care or treatment of insane persons, persons of unsound mind, or persons affected by or suffering from mental or nervous diseases" (collectively "mental health facility"). Penalties of fines and imprisonment were specified for its violation.

In March, 1927, the City of Los Angeles annexed the territory known as the Mar Vista District. At that time, there were already in operation in this district four mental health facilities. The above-mentioned zoning ordinance excluded the Mar Vista District from the area in which the establishment and maintenance of mental facilities was permitted. When the ordinance went into effect, the plaintiffs, as the owners of the institlltions, sought to enjoin its enforcement.The lower court found that the restricted districts were mainly residential in character and this was sufficient to justify the exclusion of business such as that carried on by plaintiffs.

HOLDING

The ordinance prohibiting the establishment of mental health facilities within certain districts, viewed as part of general zoning plan, was held valid. The residential character of restricted districts was held sufficient to justify exclusion therefrom of mental health facilities. Viewing the ordinance as part of a general zoning plan, and disregarding for the moment the question of its applicability to the plaintiffs, there can be no doubt of its validity.

Where, however, a retroactive zoning ordinance causes substantial injury and a prohibited business is not a nuisance, the ordinance is to that extent an unreasonable exercise ofthe police power. The ordinance in question, in so far as it prohibits the establishment of certain types of facilities is valid. Notwithstanding, the police power does not justify the taking away of the right to engage in such businesses in certain territories, by the destruction of existing businesses.

Similarly drafted, ordinances have usually proceeded with due regard for valuable, vested property interests, and have permitted existing, nonconforming uses to remain. The destruction of an existing nonconforming use would be a dangerous innovation of doubtful constitutionality, and such a retroactive provision might jeopardize the entire ordinance.

Therefore, the ordinance in question was valid in so far as it prohibited the further establishment of businesses of this type in the restricted districts; and was invalid in its application to the plaintiffs in that it took away plaintiffs' right to conduct existing businesses.

***Dowsey v. Kensington* 257 N.Y. 221 (N.Y. 1931) N.Y. Court of Appeals**

BACKGROUND FACTS

The Village of Kensington is situated in a territory known as the Great Neck section of Long Island. The plaintiffs land included the whole Middle Neck Road frontage of the Village south of the entrance to the Village back to Parkland, one of the Village streets. Its area was about 76,000 square feet.

The Village passed a zoning ordinance restricting land uses in that area ofthe Village to detached single family dwellings. The plaintiff claimed that the attempted restriction of the use of her land was unreasonable and beyond the police power ofth_ Village authorities.

She brought an action to obtain a declaratory judgment that the zoning ordinance was ineffective and void. The plaintiff maintained that the inclusion of her property in such a district was so umeasonable that it could not be supported under even the broadest interpretation of the police power.

The Village relegated business and industry to a very small section which the evidence showed was not adapted to business, and excluded from the main portion of the Village all residences excepting single-family detached houses. The Village argued that apartment buildings or stores on the Middle Neck Road frontage or in any other part ofthe Village might cause traffic congestion, fire hazards, ,and other dangers to the health and safety of the community. In truth, the inference from the evidence was clear that the Village's arguments were without substance, and that the zoning ordinance was :tramed for the purpose of excluding such buildings :trom the Village in order to preserve it as a secluded, quiet community of single- family detached homes.

HOLDING

The court recognized that the line which separates the legitimate from the illegitimate assumption ofthe police power is not capable of precise delimitation. Certainly an ordinance is umeasonable when it restricts property development to a use for which the property is not

adopted as in the area relegated to businesses and thereby destroys the greater part of its value in order that the beauty of the Village as a whole may be enhanced. In this case, the restriction umeasonably imposed a special hardship on the plaintiff and constituted an invasion of the plaintiffs property rights, as it was not a valid exercise of the police power.

***Welton v. Hamilton* 344 Ill. 82 (Ill. 1931) Illinois Supreme Court**

BACKGROUND FACTS

An owner of property in Chicago applied to the City commissioner of buildings for a permit to erect a 20-story apartment hotel building. The proposed building would be located in a commercial district, would exceed the alley line height limit by 141 feet, and would violate district regulations of the zoning ordinance.

The application was not approved because the proposed building improvements did not conform with the requirements ofthe zoning ordinance. The owner filed an appeal with the City board of appeals, which found that there was unnecessary hardship in carrying out the strict letter of the zoning ordinance, and the spirit of the zoning ordinance may be observed, public safety and welfare secured, and substantial justice done, by permitting the erection of the proposed building. The permit was granted.

The plaintiffs opposed the City's granting of the pennit and sued, claiming that the authority upon the City Council to establish a board of appeals in conferring the Zoning Act was in excess of the constitutional limitation on the City's legislative power. Plaintiffs further claimed that that power was exceeded because it conferred upon the board of appeals the unfettered authority to detennine and vary the application of the zoning regulations without restriction.

HOLDING

The court found invalid that part of the ordinance which purported to confer upon the board of appeals the authority to vary or modify the application of the provisions of the ordinance where there are practical difficulties or unnecessary hardship in carrying out the letter ofthe ordinance. This clearly was an unconstitutional delegation oflegislative authority to the board of appeals by the City. The statute gave no direction, furnished no rule, and provided no criteria for detennining what constituted practical difficulties or unnecessary hardships to justify setting aside the provisions of the ordinance, or to vary or modify their application. The ordinance left those questions to be detennined by the unguided and unlimited discretion of the board of appeals.

The ordinance had been in existence for years before owner bought the lot in question with full knowledge that it could not lawfully construct the building it was proposing to erect. The commissioner of buildings refused a pennit for the construction ofthe building, and could not have lawfully done otherwise. The only difficulty or hardship is that the building would be smaller. Accordingly, the owner would be unable to make as much money as he would have otherwise made. It cannot be supposed that this was the kind of hardship or difficulty which the Legislature had in mind when it exercised its police power for the benefit of the safety, health and general welfare of the inhabitants of the City of Chicago.

The mere fact that the owner can make more money is nether a difficulty nor a hardship authorizing the board of appeals to pennit such owner to disregard the ordinance so far as it interferes with his plans for a more profitable use, and the City was without power to authorize an administrative board to grant such pennission. This part ofthe ordinance was arbitrary and unconstitutional, because it was delegated to an administrative body of the power of legislation, which can only be exercised by a legislative body.

***US v. Certain Lands, City of Louisville Kentucky* 9 F.Supp. 137 (W.D. Ky. 1935) United States Federal District Court**

BACKGROUND FACTS

In this action and in two companion actions, the United States of America sought to condemn certain property in the City of Louisville for the purpose of securing fee-simple title thereto in order to erect thereon a Low-Cost Housing and Slum Clearance Project, under the provisions of the National Industrial Recovery Act (48 Stat. 195). One of the landowners filed a petition asking the court to appoint commissioners to assess the damages of the respective owners ofthe property described in the petition. The landowners alleged that the United States of America was without power to exercise the right of eminent domain for the purpose of acquiring property for the Low-Cost Housing and Slum Clearance Projects.

HOLDING

The court recognized that the national government may condemn private property only for a "public use," which means a use by the government for legitimate governmental purposes, or a use open to all the public, even though available to only a part of the public. This power exists whether the property is held by the government or by some private agency, and this public right to use must result from the law itself, rather than the will of the governmental agency upon which the power is conferred.

Furthermore, the universal rule in this country is that the states can condemn private property only for a public use, and the language of the Fifth Amendment shows that the framers ofthe Federal Constitution intended that the national government should be similarly restricted. The prohibition in that amendment against the taking of private property for public use, except upon the payment of just compensation, clearly implies that it cannot be taken for private use at all.

Lastly, as the action by the United States of America was an attempted exercise of the police power, not of the power of eminent domain for a public use, and the national government was not clothed with any such police power within the states, the attempted condemnation was unlawful.

***NYC Housing Authority v. Muller* 270 N.Y. 333 (N.Y. 1936) New York Court of Appeals**

BACKGROUND FACTS

The New York City Housing Authority sought to condemn certain premises in the City of New York owned by the defendant Muller. The public use for which the premises were required was stated in the petition to be the clearance, replanning and reconstruction of part of an area of the City wherein there existed, unsanitary and substandard housing conditions.

As part of its proj ect, the City purchased properties contiguous on both sides to the premises in question. Acquisition ofthe defendant's property was deemed necessary to carry out the project. The premises consisted of two old tenement houses. Muller opposed the condemnation upon the ground that the City Municipal Housing Authorities Law violated the State Constitution and the Federal Constitution because it granted to the City the power of eminent domain for a use which was not a public use.

When this case was decided, governmental housing projects constituted a comparatively new means of removing unsanitary and substandard housing, or as it is now referred to as, "redevelopment."

HOLDING

Property cannot, without the owner's consent, be devoted to the private use of another, even when there is an incidental or colorable benefit to public. In this case, however, in a matter of far-reaching public concern, the City sought to take the defendant's property and to administer it as part of a project conceived and to be carried out in its own interest and for its own protection. That constituted a public benefit purpose, and therefore a public use.

***Austin v. Older* 283 Mich. 667 (Mich. 1938) Michigan Supreme Court**

BACKGROUND FACTS

On the eve ofthe passage of a zoning ordinance by the City of Ypsilanti, but the day before it became effective, the plaintiff erected a building and appurtenances for a gas station on his property. The property was in a residential district under the City ordinance, thus rendering his use a nonconfonning use. The ordinance pennitted the continuation of such uses as existed at the time of the effective date of the ordinance. Over ten years after the construction of the building and adoption of the ordinance, the plaintiff filed an application with the City engineer for a pennit to remodel and re-modernize the gas station. The City engineer refused to issue a pennit, and the plaintiff sought mandamus in the circuit court of Washtenaw County to compel the issuance of a building pennit.

HOLDING

The court noted first that every intendment is in favor of the constitutionality of an ordinance, and a plaintiff has the burden of showing that an ordinance has no real or substantial relation to the public health, morals, safety or general welfare. Zoning ordinances are constitutional in principle as a valid exercise of the police power.

In this circumstance, the continuation of such nonconfonning uses as existed at the time of the adoption of the ordinance was pennitted by the police power. The plaintiffs property, which was used for nonconfonning purposes, was next to a residence. The plaintiff s contemplated new building, if erected, would have been no more than 10 feet from the side ofthe_house on the adjoining lot. The court concluded that since the contemplated structure was not in accordance with the provisions ofthe zoning ordinance, the refusal was proper and there was no abuse of discretion. In light of these facts, a failure to vary the restrictions in this case could not be considered an abuse of discretion. Accordingly, the court dismissed the claim that the City's action of refusing the pennit was arbitrary or umeasonable.

***People Tuohy v. City of Chicago* 394 Ill. 477 (Ill. 1946) Illinois Supreme Court**

BACKGROUND FACTS

After passing a statutory amendment to the Cities and Villages Act, the City of

Chicago adopted an ordinance authorizing the issuance of$5 million in slum clearance bonds and provided for the levy of taxes to repay the bonds. The ordinance authorized the City to acquire, by purchase or condemnation, certain property for the rehabilitation of blighted areas. The ordinance was submitted to a vote at a special election held in the City of Chicago and the ordinance was approved by a majority of the voters voting on the question.

Plaintiffs brought an action claiming: 1) the ordinance attempted to empower municipalities to acquire private property and use and dispose of the same for other than public purposes; and 2) it violated section 9 of Article 9 ofthe United States Constitution in that it

attempted to vest municipalities with authority to assess and collect taxes for other than municipal corporate purposes.

The City averred that the public purposes ofthe Cities and Villages Act met all ofthe following requirements: 1) the law affected a community as distinguished from an individual; 2) the law controlled the use to be made ofthe property, namely, the elimination of a slum district, and other public uses; 3) the title was vested in a person or corporation as private property to be used and controlled as private property; 4) the public would reap the benefit of public possession and use, and no one could exercise control except the municipality. If there were any surplus land left which was not needed for any of these purposes, it could be sold, leased or exchanged as provided therein. This construction was consistent with the context and the purposes of the Act, and it did not authorize the taking of land for the sole and only purpose of sale, leasing, or exchange thereof.

HOLDING

Before the right of eminent domain may be exercised, the law requires that the use for which the land is taken shall be public as distinguished from a private use. Under the United States Constitution, property cannot be condemned for a private use. While from time-to-time the United States Supreme Court has attempted to define public use, all courts agree that tl;te determination of whether a given use is public is ajudicial function.

The contention that the power to lease manifests a private purpose is not sound, because it is settled that a city may lease property it owns when it is empowered to do so by the statutes.

The court further opined that the acquiring ofland for such use as set forth in the Act is public and not private, for which the granting of the power of eminent domain is amply justified.

Further, the statute in question declares as a matter of public policy that a slum area is detrimental to public safety, health or morals. When this has been declared and authority given to a city to eliminate a slum area, it becomes a corporate purpose within the meaning of section 9 of Article 9 of the United States Constitution, and the power of taxation or the issuance of bonds, is authorized by an unbroken line of decisions.

Ayres v. City of Los Angeles (Cal. 1949) 34 Cal.2d 31 California Supreme Court

BACKGROUND FACTS

Pursuant to the California Subdivision Map Act, the petitioner submitted a tentative map to the City Planning Commission for a 13 acre subdivision located in the 3,023 acre Westchester District in the City of Los Angeles. The triangle shaped subdivision was the last of the subdivisions proposed in the district.

The Planning Commission attached four conditions of approval to which the petitioner objected. These conditions, which were approved by the City Council and trial court were:

1. A ten foot strip abutting Sepulveda Boulevard would be dedicated for the widening of that highway.
2. An additional ten foot-wide strip along the rear ofthe lots would be restricted to the planting oftrees and shrubbery for the purpose of preventing direct ingress and egress between the lots and Sepulveda Boulevard.
3. The extension of Seventy-Seventh Street would be dedicated to a width of 80 instead of 60 feet.
4. The area which would be covered by an extension of Seventy-Ninth Street and south to the point of the triangle would be dedicated for street use for the purpose of eliminating it as a traffic hazard.

The petitioner objected to the foregoing conditions on the ground that they were not expressly provided for in the Subdivision Map Act nor by City ordinance. Moreover, the conditions, in so far as they required dedication in excess of 60 feet in width, bore no reasonable relationship to the protection of the public health, safety or general welfare, and amounted to a taking of private property for public use without compensation.

HOLDING

The court concluded that all four conditions of approval were valid in that they were reasonably related to the protection of the public health, safety and general welfare. A developer seeking to acquire the advantage of development has a duty to comply with reasonable conditions on the community so long as there is a legal nexus. A nexus between the conditions imposed and the burden the proposed development would have on the City roadways was clarion in these circumstances.

***Lordship Park Assoc. v. Board of Zoning Appeals* 137 Conn. 84 (Conn. 1950) Connecticut Supreme Court**

BACKGROUND FACTS

The court considered whether a Town's board of zoning appeals acted illegally or arbitrarily when it refused to approve the plaintiffs plan for subdivision of its land.

The plaintiffs land was comprised of approximately 40 acres in the southeasterly part ofthe Town. The portion which the plaintiff desired to subdivide had a shore front on Long Island Sound which was about 2,860 feet. The plaintiff submitted a petition to the board for the approval of its proposed subdivision. This petition was accompanied by a map depicting the plans. The map showed a projected road which ran roughly parallel with, but 150 feet north of, the shore. The space between the road and the water was designated as "Reserved for Park Purposes." The layout provided for no other road to parallel the shoreline anywhere in the subdivision.

While the plaintiffs petition was pending before the board, negotiations ensued regarding the possible purchase of the plaintiffs property by the Town. The board refused to approve the plan. The record of its vote showed that "[t]he consensus of the Board was that ... it felt that a roadway or drive eventually should be constructed along the shore side on Long Island Sound to turn northerly and connect with Short Beach Road." The plaintiff appealed to the board of zoning appeals, stating that modification of its plan to comply with the conditions would cost thousands of dollars.

HOLDING

The record reflected that the sole ground upon which the board of zoning appeals rested its disapproval of the plaintiffs application was that it was bound by the action ofthe Town Council in adopting the Preliminary Town Plan in 1936. The Town Council at that time did not adopt a final Town plan. Instead, the "preliminary plan" was adopted and used as a guide for future development subj ect to future changes. No opportunity had been given to the Town's property owners to be heard with reference to the vote, and no regulations were ever adopted compelling compliance with the Preliminary Town Plan.

The court opined that if the use of a person's property is to be affected by any such restrictions as may be imposed by a town plan, there must be at least a determination by the legislative body authorized to adopt such a plan that the public welfare will be furthered by the imposition ofthe restrictions. Such a determination may not be made except after notice to the

property owners affected, with the opportunity for them to be heard.

In the present case, the Town Council never fonnally adopted a definite town plan. Before submitting its subdivision plan, the plaintiff never had an opportunity to be heard either by the Town Councilor by a court on the question of whether the restrictions imposed by the preliminary plan on the plaintiffs property were within the police power or were reasonably necessary to promote the public welfare.

The purpose of the Town plan was to provide a list of goals and criteria which the Town officials should have considered when it came to laying out new highways and parks. It was not intended as anything which would operate to curtail the rights of private property. It is apparent that the board of zoning appeals was not justified in refusing to approve plaintiffs plan for the subdivision of its property on the ground that the plaintiffs plan did not contemplate the construction of a road in the location suggested on the Preliminary Town Plan.

***Miller v. City of Beaver Falls* 368 Pa. 189 (Pa. 1951) Pennsylvania Supreme Court**

BACKGROUND FACTS

The City Council of Beaver Falls passed an ordinance adopting a general plan for City parks and playgrounds. The ordinance included parks and playgrounds which "have been or may be laid out but not opened." Several months prior to passing the ordinance, appellants' predecessor began the construction of 12 houses on a portion of 16 acres of their land, but had not commenced the erection of any dwellings in the area covered by the ordinance. Plaintiffs filed an action seeking a court decree that the ordinance was an encumbrance on their property, a cloud upon their title, was unconstitutional and, therefore, void.

HOLDING

Whenever lawful rights of an individual to the possession, use or enjoyment of his land are in any degree abridged or destroyed by the exercise of eminent domain, his property is deemed "taken" and he is entitled to compensation. The Constitution of Pennsylvania and the Fourteenth Amendment to the United States Constitution provide: "... nor shall any State deprive any person of life, liberty, or property without due process of law."

The court found that the action ofthe City of Beaver Falls in plotting this ground for a park or playground and freezing it for three years was a taking of property by "possibility, contingency, blockade and subterfuge," in violation ofthe clear mandate ofthe United States Constitution and that property cannot be taken or injured or applied to public use without just compensation to the owner thereof.

***Fischer v. Bedminister Township* 11 N.J. 194 (N.J. 1952) New Jersey Supreme Court**

BACKGROUND FACTS

In 1946, following a report of its zoning commission and the holding of public hearings, Bedminister Township adopted a zoning ordinance dividing the Township into three zones: an 'A' residence zone in which no residence may be constructed upon a plot less than onc_-half acre; a 'B' residence zone in _vhich no residence may be constructed upon a plot of less than five acres; and a business zone.

At the time the zoning ordinance was adopted, the plaintiff s mother owned a 24-acre tract ofland about half of which was in the 'A' zone and half in the 'B' zone. The plaintiff owned no property in the Township at the time of the adoption of the ordinance, but almost three years thereafter, his mother conveyed to him less than an acre ofland located in the "B" zone requir-

ing a five-acre lot. Immediately after the conveyance, the plaintiff challenged the validity of the ordinance. The plaintiff argued that the ordinance was arbitrary and umeasonable and deprived him of the use of his property without just compensation and without due process of law in violation of the United States and New Jersey Constitutions.

HOLDING

The evidence presented by the plaintiff failed to demonstrate that the ordinance was umeasonable per se, and therefore it need not be invalidated as an unlawful exercise of the township's police power.

Experts for the Township testified that the five-acre provision was not umeasonable, and even the plaintiff s expert stated that as to 10 acres would not be umeasonable. Such 10acre provisions had been in effect in adjoining boroughs for several years, that there was more than ample justification for the five acre provisions. The court pointed out that if the plaintiff'Yas dissatisfied with the application of the zoning laws to his particular property, he could have applied for a variance.

***Lionshead Lake. Inc. v. Township of Wayne* 10 N.J. 165 (N.J. 1952) New Jersey Supreme Court**

BACKGROUND FACTS

The plaintiff, the owner and developer of a large tract of land in the Township of Wayne, challenged the validity of the Township's zoning ordinance which fixed the minimum size of dwellings and placed some of the plaintiff s properties in a residential district. The problem evolved when, four years after the plaintiff had commenced the development of its Lionshead Lake properties and after more than a hundred houses had been constructed there, the Township adopted a revised zoning ordinance dividing the entire Township into four districts; Residence Districts A and B, a Business District and an Industrial District. In section 3 of the ordinance pertaining to Residence District A, the Township fixed the minimum size of dwellings of not less than: 768 square feet for a onestory dwelling; 1,000 square feet for a two-story dwelling having an attached garage; and 1,200 square feet for a two-story dwelling not having an attached garage.

In the plaintiff s challenge to the ordinance, he presented testimony to the effect that costs of building a house for year-round occupancy having the minimum 768 square feet of living space would range from $10,000 to $12,000, if mass produced. Moreover, only 30 percent of the population was financially able to afford such homes.

HOLDING

When the enabling zoning statutes are read in the light ofthe constitutional mandate to construe them liberally, there can be no doubt that a municipality has the power to impose minimum living floor space requirements for dwellings by adopting a suitable zoning ordinance.

The court recognized that it is the prevailing view in municipalities throughout the state that such minimum floor area standards are necessary to protect the character of the community. In the light of the United States Constitution and of the enabling statutes, the right of a municipality to impose minimum floor area requirements is beyond doubt. In conclusion, the Township ordinance was upheld.

***Akron v. Chapman* 160 Ohio St. 382 (Oh. 1953) Ohio Supreme Court**

BACKGROUND FACTS

In 1922, the City Council of Akron enacted a comprehensive zoning ordinance. Certain property ofthe defendant was included in a residential district under the ordinance. The defendant or his father, the predecessor in title, had operated a junk yard business on the property since 1916. The zoning ordinance provided that a nonconforming use shall be discontinued when, in the opinion ofthe City Council, such use had been permitted to exist or continue for a reasonable time.

In January 1950, the Council passed another ordinance determining that as of January 1, 1951, the nonconforming use of the property had existed for a reasonable period of time. Accordingly, the use was required to now conform to the classification provided for in the zoning ordinance. The defendant continued to use the property as ajunk yard after January 1, 1951. Thereafter, the City of Akron instituted an action against the defendant under a General Code provision which granted municipalities the power to enforce zoning ordinances by injunction.

HOLDING

The right to continue to use one's property in a lawful manner which does not constitute a nuisance and which was lawful at the time it was acquired is within the protection of Article 4 of the United States Constitution and Article 1 of the Ohio Constitution. These clauses provide that no person shall be deprived of life, liberty or property without due process of law.

The court determined that the effect of the 1922 ordinance and the 1950 ordinance was to &prive the defendant of a continued lawful use of his property and therefore were in violation of both the State and United States Constitutions.

***Berman v. Parker* 348 U.S. 26 (1954) United States Supreme Court**

BACKGROUND FACTS

The District of Columbia Redevelopment Agency sought to acquire property for the redevelopment of blighted areas of the City. The first project undertaken related to Project Area B in Southwest Washington, D.C. Surveys revealed that in Area B, 64.3 percent ofthe dwellings were beyond repair, 18.4 percent needed major repairs, only 17.3 percent were satisfactory; 57.8 percent of the dwellings had outside toilets, 60.3 percent had no baths, 29.3 percent lacked electricity, 82.2 percent had no wash basins or laundry tubs, and 83.8 percent lacked central heating. In the judgment ofthe District's Director of Health, it was necessary to redevelop Area B in the interests of public health. The population of Area B amounted to 5,012 persons, of whom 97.5 percent were African-Americans.

The plan for Redevelopment Area B specified the boundaries and allocated the use of the land for various purposes. It made detailed provisions for types of dwelling units and provided that at least one-third of them were to include low-rent housing with a maximum rental of $17 per room per month.

The appellants owned property in the Redevelopment Area B which was not used as a dwelling or place of habitation. Instead, a department store was located on it. The appellants objected to the appropriation of its property for the purposes ofthe project. They claimed that their property could not be taken constitutionally for this proj ect. It was commercial, not residential property; it was not slum housing; it would be put into the proj ect under the management of a private, not a public, agency and redeveloped for private, not public use. The contention was that appellants' private property was being taken contrary to two mandates of the Fifth Amendment: 1) no person shall be deprived of property, without due process of law;

2) nor shall private property be taken for public use, without just compensation.

Appellants maintained that since their commercial building did not imperil health or safety, nor contribute to the making of a slum or a blighted area, it could not be swept into a redevelopment plan by the mere dictum of the Planning Commission or the Commissioners.

HOLDING

The court examined the scope of the police power and concluded that public safety, public health, morality, peace and quiet, and law and order do not constitute the entire scope of the police power. The concept of public welfare is broad and inclusive, and represents spiritual values as well as physical, and aesthetic values as well as monetary.

In determining the constitutionality of redevelopment legislation, once question of public purpose has been decided, the amount and character ofland to be taken and the need for a particular tract to complete an integrated plan rests in the discretion of legislative branch. The Redevelopment Agency believed that the piecemeal approach, the removal of individual structures that were offensive, would be only a palliative. Instead, the entire area needed redesigning so that a balanced, integrated plan could be developed for the region.

In brief, if the Agency considered it necessary to take full title to the plaintiff s real property involved in carrying out the redevelopment project, it may do so.

***Harbison v. City of Buffalo* 4 N.Y.2d 553 (N.Y. 1958) New York Court of Appeals**

BACKGROUND FACTS

The petitioner purchased property in the City of Buffalo. He erected a 30 by 40 foot frame building thereon, and began operating a cooperage business. The building was not enlarged, and the volume of the petitioner's business remained consistent. The surrounding area changed as reflected by rezonings in 1924 and 1926.

From the time ofthe enactment ofthe first zoning ordinance affecting the premises, the petitioners had an existing nonconforming use; that is, the conduct of a cooperage business in a residential R3 District. In 1953, the ordinances ofthe City of Buffalo were amended to provide,Jn part, "on premises situate in any "R" district, each use which is not a conforming use in the "R3" district and which falls into one of the categories hereinafter enumerated shall cease or shall be changed to a conforming use within 3 years from the effective date of this amended chapter."

In November 1957, the director oflicenses sent a letter to the petitioners stating "... you are hereby notified to discontinue the operation of your junkyard ... at once." A subsequent application by petitioners for a wholesale junk license was refused on the grounds that "said premises lie within an area zoned as "R3" Dwelling District." The petitioners sought an order directing the City to issue a wholesale junk license to them.

HOLDING

The court summed up with the following: first, where the enforcement of a zoning ordinance requiring the termination of a prior nonconforming use after a reasonable period causes relatively slight and insubstantial loss to property owner, the ordinance is constitutional.

Second, where the benefits to the public have been deemed of greater moment than the detriment to a property owner, courts have sustained the prohibition to continuation of prior nonconforming uses. Even where the zoning authorities may not prohibit a prior nonconforming use, they may adopt regulations which restrict the right ofthe property owner to enlarge or extend the use, or to rebuild or to make alterations to the structures on the property.

Third, material triable issues of fact remained. A further hearing was directed to adduce evidence relating to the nature of the surrounding neighborhood; the value and condition of the improvements on the premises; the nearest area to which petitioners might relocate; the cost of such relocation; as well as any other reasonable costs which bear upon the kind and amount of damages which petitioners might sustain; and whether petitioners might be able to continue operation of their business if not allowed to continue storage of barrels or steel drums outside their frame building. Such evidence would help the court ascertain whether the resultant injury to petitioners would be so substantial that the ordinance would be unconstitutional as applied to the particular facts of this case.

***Jenad v. Village of Scarsdale* 18 N.Y.2d 78 (N.Y. 1966) New York Court of Appeals**

BACKGROUND FACTS

The New York Court of Appeals examined the validity of the Village of Scarsdale's actions authorizing its planning board to require, as a condition precedent to the approval of subdivision plats which show new streets or highways, that the subdivider allot some land within the subdivision for park purposes or, at the option of the Village planning board, pay the Village a fee il11ieu of such allotment.

The Village of Scarsdale Planning Commission gave the Commission power to direct that a subdivider either dedicate land or, in lieu of such dedication of land, pay a charge or fee of $250 per lot to the Village and be credited to a separate fund to be used for park, playground and recreational purposes in such manner as may be determined by the Village Board of Trustees from time to time.

The plaintiff contended that the dedication or in lieu fee requirement were unconstitutional and an unauthorized tax.

HOLDING

The court concluded that a required dedication of land for school, park, or recreational sites as a condition for the approval ofthe subdivision plat, should be upheld as a valid exercise of police power ifthe evidence reasonably established that the municipality would be required to provide more land for schools, parks, and playgrounds as a result of the subdivision's approval.

As to the in lieu fee, the court held that it was not a tax at all, but instead a reasonable form of village planning for the general community good.

***Jones v. Mayer* 392 U.S. 409 (1968) United States Supreme Court**

BACKGROUND FACTS

The petitioners filed a complaint in the District Court alleging that the respondents refused to sell them a home in the Paddock Woods community of St. Louis County for the sole reason that the petitioners were African-American. The constitutional question is: Does the authority of Congress to enforce the Thirteenth Amendment by appropriate legislation include the power to eliminate all racial barriers to the acquisition of real and personal property?

HOLDING

Congress passed 42 U.S.C. section 1982, a statute providing that all citizens of the United States shall have the same right, in every state and territory as is enjoyed by white citizens

thereof to inherit, purchase, lease, sell, hold, and convey real and personal property. It bars all racial discrimination, private as well as public, in the sale or rental of property. The Thirteenth Amendment, by its own unaided force and effect, abolished slavery and established universal freedom. Congress has power under the Thirteenth Amendment to rationally determine what are badges and incidents of slavery and the authority to translate that determination into effective legislation.

The court held that section 1982 barred all racial discrimination, private as well as public, in the sale or rental of property, and that the statute is a valid exercise of the power of Congress to enforce the Thirteenth Amendment. In sum, the respondents could not refuse to sell property to the petitioners on the grounds of race.

***Appeal of Kit-Mar Builders* 439 Pa. 466 (Pa. 1970) Pennsylvania Supreme Court**

BACKGROUND FACTS

The appellee, Kit-Mar Builders, Inc., entered into an agreement to purchase a 140acre tract of land in Concord Township, Delaware County. The agreement was contingent on the tract's being rezoned to permit the construction of single-family homes on lots of one acre. At the time, the tract was zoned to require lots of no less than two acres along the existing roads and no less than three acres in the interior. The appellee announced that it would not seek to prove the hardship necessary to secure a variance, but would instead chose to attack the constitutionality ofthe zoning ordinance as applied to the property in question.

HOLDING

Communities must deal with the problem of population growth and may not refuse to confront the issue of future growth by adopting zoning regulations that effectively restrict population to near-present levels. The court confirmed that minimum lots size requirements were not inherently unreasonable. Planning considerations and other interests could justify varying minimum lot sizes in given areas of a community. At some point along the spectrum, however, the size of lots ceases to be a concern requiring public regulation and becomes simply a matter of private preference.

Although the Township contended that lots of smaller size would create a potential sewerage problem, the court explicitly rejected the argument that sewerage problems could excuse exclusionary zoning. The sewerage problem did not compel the conclusion that a four acre minimum was either a necessary or reasonable method by which the Township could protect itself from the menace ofpollution. The difference in size between a three-acre lot and a one-acre lot was irrelevant to the problem of sewage disposal, absent the construction of a house of an unimaginably enormous magnitude. Consequently, the court held that the exclusionary zoning regulation lacked justification and was unconstitutional.

***Serrano v. Priest* 5 Cal.3d 584 (1971) United States Supreme Court**

BACKGROUND FACTS

The Court considered whether the California public school financing system, with its substantial dependence on local property taxes and resultant wide disparities in school revenue available per pupil for the district's educational purposes, violated the Equal Protection Clause of the Fourteenth Amendment.

The plaintiffs, who were Los Angeles County public school children and their parents, brought this class action suit for declaratory and injunctive relief against certain state and County officials charged with administering the financing ofthe California public school system.

The complaint set forth three causes of action. First, because the California public school system relied heavily on local property taxes, there were substantial disparities among individual school districts in the revenues available per pupil for the district's educational programs. This disparity violated the equal protection clauses ofthe State Constitution and the Fourteenth Amendment to the United States Constitution. Second, plaintiffs alleged that due to this financing scheme, they were required to pay a higher tax rate than other taxpayers in order to obtain for their children the same or lower level of educational opportunities afforded children in those other districts. Third, an actual controversy had arisen and existed between the parties as to the validity and constitutionality ofthe financing scheme under both the State and United States Constitutions.

HOLDING

The court held that the funding scheme invidiously discriminated against the poor because it made the quality of a child's education a function ofthe wealth of his parents and neighbors. There was no compelling state purpose necessitating the present method of financing. The system, however, remained operable until an appropriate new system, which is not violative of equal protection of the laws, could be put into effect.

NOTE: Currently, California public schools are granted a specified amount (Base Revenue Limit) for each child attending school in a school district. Although these Base Revenue Limits vary between school districts, they equalize over time.

Golden v. Town of Ramapo 37 A.D.2d 236 (N.Y. 1971) New York Court of Appeals

BACKGROUND FACTS

On October 7, 1969, the petitioners submitted a preliminary subdivision plat to the Town's Planning Board for approval. On October 13, 1969, the Town Board amended the Town's Zoning Ordinance to require "residential developers" or their agents to obtain a special permit from the Town Board prior to the issuance of any subdivision approval for "residential development use" by the Planning Board. The challenged amendment set forth explicit standards for the issuance of a special permit.

On December 9, 1969, the Planning Board denied the petitioners' plat approval on the basis of the Community Design Review Committee Report and opinion of the Town counsel that the ordinance prohibited the Planning Board from approving the subdivision of a "residential developer" unless a special permit pursuant to the amended provisions of the Zoning Ordinance had first been secured.

HOLDING

The amendment required a residential development to comply with an explicit set of standards based upon the availability of essential municipal facilities and services, before being permitted to subdivide and develop residentially zoned lands. The court held that the amendment was invalid because it was not provided for in the statutes authorizing Town boards to enact zoning regulations designed to encourage the most appropriate use of land and the regulation and restriction of population density.

The requirement ofthe special permit in the challenged ordinance, when viewed with the prerequisites which must be satisfied before such a permit can be obtained and in the context ofthe zoning powers in the Town ordinance, led the court to conclude that the Town of Ramapo usurped ig'power by regulating population growth in a manner which had not been delegated to it.

***Southern Burlington County NAACP v. Township of Mount Laurel* 119 N.J. Super. 164 (N.J. Super. Ct. Law Div. 1972) New Jersey Supreme Court**

BACKGROUND FACTS

Corporate entities and certain individuals, residents and nonresidents, sought declaratory and injunctive relief against a municipality's zoning ordinance. In the Township of Mount Laurel, multi-family dwellings were only permitted on a farm for a farmer, a member of the farmer's family, or persons employed by the farmer, provided the multiplefamily dwelling was not closer than 200 feet from the property boundary line.

Minutes of various Township committee meetings expressing the attitudes of the members of the governing body were introduced into evidence. For example, early in 1968, the Mayor stated it was the intention of the Township committee to take care of the people of Mount Laurel Township but not make any area of Mount Laurel a "home for the county". A committeeman added that it was the intent of the Township to clear out substandard housing in the area and thereby get better citizens, and that the Township would approve only those development plans which would provide direct and substantial benefits to our taxpayers. Every proposal made was biased toward providing homes for those with high incomes. Moreover, the lack of permissible multi-family provisions in the zoning ordinance was further evidence that low-income families were not being provided for.

HOLDING

The court conceded that it generally will not inquire into the exercise of police power by a legislative body. Courts can only meet each specific situation as it is presented, and while one community may have facts which justify court intervention, the relief will not necessarily be the same in all areas unless the factual content justifies intervention, as this court believed in the case at hand.

The patterns and practice clearly indicate that the Township, through its zoning ordinances exhibitbd economic discrimination. The poor were deprived of adequate housing and the opportunity to secure the construction of subsidized housing, and the Township used federal, state, county and local finances and resources solely for the betterment of middle and upper-income persons. The zoning ordinance was therefore declared invalid.

The court ordered as follows: the Township was immediately required to undertake a study to identify the existing sub-standard dwelling units in the Township; and the housing needs for persons of low and moderate income. Upon completion of the investigation the Township was required to establish an estimated number of both low and moderate income units which should be constructed in the township each year to provide for the needs as identified. The Township was also ordered to develop a plan of implementation and analysis of the ways in which it could act affirmatively to enable and encourage the satisfaction ofthe indicated needs and include a plan of action.

Furthermore, iffor any reason the Township found that circumstances interfered with or barred the implementation of the plan chosen, it must set forth in explicit detail:

a. Each and every factor;
b. The way in which each factor interfered with or bars implementation of the plan;
c. Possible alternative plans or municipal action which temporarily or permanently, wholly or in part, eliminate the indicated factor or factors; and
d. The reason why the alternative plans were not adopted.

Finally, the aforementioned analyses, studies, development of plans and other action were to be completed within 90 days from the date of judgment. The Township was required to serve copies of the analyses, studies and plans on the plaintiffs' attorney and the court within 90 days to enact new and proper regulations for the Township.

***Fasano v. County Commissioners of Washington Co.* 264 Or. 574 (Or. 1973) Oregon Supreme Court**

BACKGROUND FACTS

The plaintiffs, homeowners in Washington County, unsuccessfully opposed a zone change before the Board of County Commissioners of Washington County. The defendants were the Board of County Commissioners and the A.G.S. Development Company. A.G.S. was the owner of 32 acres zoned R-7 (Single-Family Residential), and it applied for a zone change to PR (Planned Residential) which allowed for the construction of a mobile home park. The Board of County Commissioners approved the zone change and found that the change allowed for increased densities and different types of housing to meet the needs of urbanization over that allowed by the existing R- 7 zoning.

The Supreme Court review was granted to consider three issues: 1) by what standards does a County Commission exercise its authority in zoning matters; 2) who has the burden of meeting those standards when a request for a change of zone is made; and 3) what is the scope of a court's review in such actions.

HOLDING

First, the staff report of the County Planning Department was too conclusory and superficial to support the zoning change. The court opined that a determination must go beyond the question of whether the changes are arbitrary and capricious; it must be proved that the change is in conformance with the comprehensive plan. At a minimum, it should be shown that: 1) there is a public need for a change ofthe kind in question; and 2) that the need will be best served by changing the classification of the particular piece of property in question as compared with other available property.

Second, because the action of the commission in this instance was an exercise of judicial authority, the burden of proof should be, as is usual injudicial proceedings, upon the party seeking the change. The more drastic the change, the greater the burden of showing that it is in conformance with the comprehensive plan as implemented by the ordinance, that there is a public need for the kind of change in question, and that the need is best met by the proposal under consideration. As the degree of change increases, the burden of showing the potential impact upon the area in question will also increase.

Third, the record before the court was insufficient to ascertain whether there was a justifiable basis for the decision.

Based on the foregoing, the court held that the County Commissioners did not demonstrate that the zoning change was in accordance with the County's comprehensive plan or relevant statute. Therefore, the court affirmed that the zoning change was invalid.

***Board of Supervisors of Fairfax Co. v. Snell Construction Corp.* 214 Va. 655 (Va. 1974) Virginia Supreme Court**

BACKGROUND FACTS

In this case, the Virginia Supreme Court considered the standard to be applied to judicial review of the validity of a zoning ordinance enacted on motion of the zoning authority, resulting in a piecemeal reduction of permissible residential density (downzoning).

In 1970, at the express urging of the County land use staff, landowners filed an amended application requesting high density zoning in the northern portion of a 26-acre tract, and medium density in the southern portion in accordance with the new County Master Plan.

The Planning Commission disapproved the amended application, but recommended that the entire 26 acres be zoned to the density requested in a prior application. On May 26, 1971, the Board declined the recommendation and adopted an ordinance granting landowners' amended application

On April 17, 1972, a newly-elected Board of Supervisors proceeding on its own motion, adopted an ordinance reducing the high density authorized by the former Board on May 26, 1971, to medium density. The landowners filed a motion for declaratory judgment praying that the trial court declare the April 1 7, 1972, ordinance void and the May 26, 1971, ordinance valid.

HOLDING

When an aggrieved landowner makes a prima facie showing that since enactment of a prior ordinance there has been no change in circumstances substantially affecting the public health, safety or welfare, the burden of going forward with evidence of such mistake, fraud or changed circumstances shifts to the governing body. If the governing body produces evidence sufficient to make reasonableness fairly debatable, the ordinance must be sustained. If not, the ordinance is umeasonable and void.

In this case, the evidence did not support a finding of substantial change in circumstances in the 11 month interval between adoption of the May 26, 1971, ordinance (which complied with the guidelines of the County's new Master Plan) and adoption of the April 1 7, 1972 piecemeal downzoning ordinance. To justify piecemeal downzoning, it must be demonstrated by the County that a changed circumstance substantially affecting the public health, safety or welfare has occurred. Such a change should be objectively verifiable from evidence. A newly elected governing body with different political objectives, is not such a change.

In sum, the court held that the ordinance downzoning the property was umeasonable and arbitrary, and therefore void.

Village of Belle Terre v. Boraas 416 U.S. 1(1974) United States Supreme Court

BACKGROUND FACTS

Belle Terre is a village on Long Island's north shore of about 220 homes inhabited by 700 people. Its total land area is less than one square mile. The Village restricted land uses to single-family dwellings, thereby excluding lodging houses, boarding houses, fraternity houses, or multiple-dwelling houses. The word "family" as used in the ordinance meant one or more persons related by blood, adoption, or marriage, living and cooking together as a single housekeeping unit, exclusive of household servants. A number of persons not exceeding two, living and cooking together as a single housekeeping unit, though not related by blood, adoption, or marriage, shall be deemed to constitute a family.

The appellees, the Dickmans, were owners of a house in the Village which they leased to six students attending the nearby State University at Stony Brook, and none was related to the other by blood, adoption, or marriage. When the Village served the Dickmans with an Order

to Remedy Violations of the ordinance, the owners, plus three tenants, thereupon brought this action under 42 U.S.c. §1983 for an injunction and a judgment declaring the ordinance unconstitutional.

HOLDING

The Village zoning ordinance limiting, with certain exceptions, the occupancy of single-family dwellings to traditional families or to groups of not more than two umelated persons was a valid exercise of the Village's police power because it: I) is not aimed at transients; 2) involved no procedural disparity inflicted on some but not on others; 3) involved no deprivation of any "fundamental" right; 4) bore a rational relationship to a permissible state objective; and 5) constituted valid land use legislation addressed to family needs. The claims that the ordinance was unconstitutional as violative of equal protection and rights of association, travel and privacy were without merit.

In upholding the zoning ordinance, the court stated: "A quiet place where yards are wide, people few, and motor vehicles restricted are legitimate guidelines in a land use proj ect addressed to family needs." This goal is a permissible one within Berman v. Parker. In Berman, the Supreme Court refused to limit the concept of public welfare that may be enhanced by zoning regulations. "The police power is not confined to elimination of filth, stench, and unhealthy places. It is ample to layout zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people."

B*aker v. City of Milwaukie* 271 Or. 500 (Or. 1975) Oregon Supreme Court

BACKGROUND FACTS

The plaintiff was a landowner in the City of Milwaukie, Oregon. On October 17, 1968, the City ofMilwaukie adopted a zoning ordinance which designated the plaintiffs land and the surrounding area as residential apartment-business office. This category allowed 39 units per acre. On November 11, 1969, however, a comprehensive plan for the City of Milwaukie was adopted by the Planning Commission. This comprehensive plan designated plaintiff s land and the surrounding area as high density residential, allowing 17 units per acre. Subsequently, a resolution was passed adopting the above plan as the comprehensive plan for the City ofMilwaukie.

The plaintiff sued to resolve the conflict between the zoning ordinance and the subsequently adopted comprehensive plan as they applied to her property. The plaintiff sought to have the City compelled to conform its zoning ordinance to its comprehensive plan.

HOLDING

The court found that the City ofMilwaukie, upon adopting a comprehensive plan, had a duty to implement that plan through the enactment ofzoning ordinances in accordance with that plan. The court stated that the comprehensive plan must be viewed as legislative and permanent in nature. Therefore, if the comprehensive plan was to have any efficacy as the basic planning tool for the City ofMilwaukie, it must be given preference over conflicting prior zoning ordinances.

In summary, the court held that a comprehensive plan was the controlling land use planning instrument for the City. Upon passage of a comprehensive plan, the City assumed a responsibility to effectuate that plan and conform prior conflicting zoning ordinances to it. Therefore, once a city has adopted a comprehensive plan, it has a duty to zone in accord with that plan and a zoning ordinance which allowed a more intensive use than that prescribed for in the plan was invalid.

***Construction Indust. Assn. of Sonoma Co. v. City of Petaluma* 522 F.2d 897 (9th Cir. 1975) United States District Court of Appeals for the Ninth Circuit**

BACKGROUND FACTS

This is the leading California case upholding a planned growth regulation. To correct the imbalance between single-family and multi - family dwellings, curb the sprawl of the City of Pet alum a on the east, and retard the overall accelerating growth ofthe City, the City Council in 1972 adopted several resolutions, which collectively were called the Petaluma Plan (the "Plan"). The Plan on its face was limited to a five-year period. It fixed housing development at a growth rate not to exceed 500 dwelling units per year. The 500-.unit figure did not reflect any housing and population growth due to construction of single- family homes or even four-unit apartment buildings not part of any larger proj ect. The controversial 500-unit limitation on residential development units was adopted by the City in order to protect its small town character and surrounding open space.

The Construction Industry Association (appellees) claimed that the Plan was arbitrary and unreasonable and, thus, violated the Due Process Clause ofthe Fourteenth Amendment to the United States Constitution. According to the appellees, the Plan was nothing more than an exclusionary zoning device, designed solely to insulate Petaluma from the urban complex in which it found itself. "Exclusionary zoning" typically describes suburban zoning regulations which have the effect, if not also the purpose, of preventing the migration oflow and middle-income persons.

The Federal District Court held that certain components of the Plan were unconstitutional. The City of Pet alum a then appealed the district court decision voiding as unconstitutional certain aspects of the plan.

HOLDING

The court reiterated that zoning regulations must find their justification in some aspect of police power asserted for the public welfare. Further, the court's inquiry can not terminate with a finding that a zoning regulation may be for an exclusionary purpose. It must determine further whether the exclusion bears any rational relationship to a legitimate state interest. If it does not, then the zoning regulation is invalid. If, on the other hand, a legitimate state interest is furthered by the zoning regulation, the court must defer to the legislative act.

The Petaluma Plan did not freeze the population at present or near-present levels, nor did it have the undesirable effect of walling out any particular income class or any racial minority group. Although the court assumed that some persons desirous of living in Petaluma would be excluded under the housing permit limitation and the Plan may have frustrated some legitimate regional housing needs, the Plan was not arbitrary or unreasonable.

The court concluded that the concept of the public welfare is sufficiently broad to uphold Petaluma's desire to preserve its small town character, its open spaces and low density of population, aJ;ld to grow at an orderly and deliberate pace.

***Warth v. Seldin* 422 U.S. 490 (1975) United States Supreme Court**

BACKGROUND FACTS

The petitioners, various organizations and individuals residing in the Rochester, New York metropolitan area, brought this action against the Town of Penfield, an incorporated municipality adj acent to Rochester, and against members of Penfield' s Zoning, Planning and Town Boards. Petitioners claimed that the Town's zoning ordinance, by its terms and as

enforced by the Town's board members, effectively excluded persons oflow and moderate income from living in the town, in contravention of the petitioners' First, Ninth, and Fourteenth Amendment rights and in violation of 42 U.S.C. §§1981, 1982 and 1983.

The petitioners argued that the ordinance allocated 98 percent of the Town's vacant land to single-family detached housing, and allegedly imposed unreasonable requirements relating to lot size, setback, floor area, and habitable space. These requirements increased the cost of sing1e- family detached housing beyond the means of persons oflow and moderate income. Moreover, by precluding low and moderate-cost housing, the Town's zoning practices had a disproportionate effect on excluding persons of minority racial and ethnic groups.

The case was dismissed by the lower courts on the grounds that the petitioners lacked standing, and the petitioners took the case up to the United States Supreme Court.

HOLDING

By alleging only generalized grievances, or third parties' legal rights or interest, none of the petitioners met the threshold requirements for standing. To have standing, a complainant must clearly allege facts demonstrating that the plaintiff is a proper party to invoke judicial resolution of the dispute and the exercise of the court's remedial powers. Standing often turns on the nature and source of the claim asserted and as actual or threatened injury as required under Article 3 of the United States Constitution. Essentially, the standing exists where the Constitutional or statutory provision on which the claim rests properly can be understood as granting persons in the plaintiff s position a right to judicial relief.

Petitioners who seek to challenge exclusionary zoning policies must allege specific concrete facts demonstrating that the challenged practice harms each ofthem, and that each would benefit in a tangible way from the court's intervention.

Carla Hills v. Dorothy Gautreaux 425 U.S. 284 (1976) United States Supreme Court

BACKGROUND FACTS

African-American tenants and applicants for public housing in Chicago brought separate class actions against the Chicago Housing Authority (CHA) and the United States Department of Housing and Urban Development (HUD), alleging that CHA had deliberately selected family public housing sites in Chicago to "avoid the placement of African-American families in white neighborhoods" in violation of federal statutes and the Fourteenth Amendment, and that HUD assisted in that policy by providing financial assistance and other support for CHA's discriminatory housing projects.

The lower court found that HUD violated the Fifth Amendment ofthe United States Constitution and the Civil Rights Act of 1964 in connection with the selection of sites for public housing in the City of Chicago. The lower Federal court ordered the parties to formulate "a comprehensive plan to remedy the past effects of unconstitutional site selection procedures." The order directed the parties to "provide the court with as broad a range of alternatives as seem.. .feasible" including "alternatives which were not confined in their scope to the geographic boundary of the City of Chicago."

The court's determination that a remedy extending beyond the City limits was both "necessary and equitable" rested in part on the agreement of the parties and the expert witnesses that "the metropolitan area was a single relevant locality for low rent housing purposes and that a city-only remedy would not work."

HOLDING

The issue before the Supreme Court was whether the remedial order of the federal trial court could extend beyond Chicago's territorial boundaries.

The court rejected the contention that, since HUD's constitutional and statutory violations were committed in Chicago, the court was precluded from ordering HUD to consider alternatives in the greater metropolitan area.

The court ordered CHA and HUD to create housing alternatives for the respondents in the Chicago suburbs. Tile court further concluded that a metropolitan area remedy in this case was not impermissible as a matter oflaw. The nature and scope of the remedial decree to be entered on remand was a matter for the lower court to decide in the exercise of its equitable discretion, after affording the parties an opportunity to present their views.

***City of Eastlake v. Forest City Ent.* 426 U.S. 668 (1976) United States Supreme Court**

BACKGROUND FACTS

A real estate developer who had applied for a zoning change to pennit the construction of a high-rise apartment building brought suit challenging a City charter provision requiring that any changes in land use agreed to by the City Council be approved by a 55 percent vote in a referendum. The Ohio Constitution reserved to the people of each municipality in the State the power of referendum with respect to all questions that the municipality was authorized to control by legislation.

The developer filed suit in state court seeking a judgment declaring the City charter amendment invalid as an unconstitutional delegation of legislative power to the people. While the action was pending, the proposed zoning change was defeated in a referendum.

The City Council approved the Planning Commission's recommendation for reclassification of the developer's property to pennit the proposed project. The developer then applied to the Planning Commission for "parking and yard" approval for the proposed building. The Commission rejected the application on the ground that the City Council's rezoning action had not yet been submitted to the voters for ratification in a referendum.

The developer then filed an action in state court, seeking a judgment declaring the charter provision invalid as an unconstitutional delegation oflegislative power to the people. While the case was pending, the City Council's action was submitted to a referendum, but the proposed zoning change was not approved by the requisite 55 percent margin.

HOLDING

The conclusion that Eastlake's procedure violated federal constitutional guarantees rests upon the proposition that a zoning referendum involves a delegation of legislative power. A referendum, however, cannot be characterized as a delegation of legislative power, and the doctrine that legislative delegation of power to regulatory bodies must be accompanied by discernible standards is inapplicable where the power exercised is one reserved by the people to themselves. Accordingly, the City's charter amendment pennitting voters to decide whether a zoned use of property could be altered is not invalid on federal constitutional grounds.

The court further opined that the reservation of such power is the basis for the town meeting, at tradition which continues to this day in some states as both a practical and symbolic part of our democratic processes. The referendum, similarly, is a means for direct political participation, allowing the people the final decision, amounting to a veto power over enactments of representative bodies. The practice is designed to "give citizens a voice on questions of public policy," and is valid

***Coleman Young Mayor of Detroit v. American Mini Theatres* 427 U.S. 50 (1976) United States Supreme Court**

BACKGROUND FACTS

The operators oftwo adult motion picture theaters brought this action against the City of Detroit officials for injunctive relief and a declaratory judgment of unconstitutionality regarding two 1972 Detroit zoning ordinances that amended an "Anti -Skid Row Ordinance" adopted 10 years earlier. The 1972 ordinances provided that an adult theater may not (apart from a special waiver) be located within 1,000 feet of any two other "regulated uses," or within five hundred (500) feet of a residential area. The term "regulated uses" applied to 10 different kinds of establishments in addition to adult theaters, including adult book stores, cabarets, bars, taxi dance halls, and hotels. If the theater was used to present "material distinguished or characterized by an emphasis on matter depicting... "specified sexual activities" or "specified anatomical areas," it was considered an adult establishment.

Enactment of an Anti-Skid Row Ordinance usually results from a municipality finding that some uses of property are especially injurious to a neighborhood when they are concentrated in limited areas. The decision to add adult motion picture theaters and adult book stores to the list of businesses which could not be located within 1,000 feet oftwo other "regulated uses" was, in part, a response to the significant growth in the number of such establishments.

HOLDING

A municipality may control the location of all types of motion picture theaters, as well as location of other commercial establishments, either by confining them to certain specified commercial zones or by requiring that they be dispersed throughout the City. The ordinances, as applied to these operators, did not violate the Due Process Clause of the Fourteenth Amendment of the United States Constitution on the ground of vagueness. Neither ofthe asserted elements of vagueness affected the operators, both ofwhich proposed to offer adult fare on a regular basis, and they alleged no ground for claiming or anticipating any waiver of the 1,000-foot restriction.

The court further found that the ordinances had no demonstrably significant effect on the exhibition of films protected by the First Amendment. To the extent that any area of doubt exists as to the amount of sexually explicit activity that may be portrayed before material can be said to be "characterized by an emphasis" on such matter, there was no reason why the ordinances were not "readily subj ect to a narrowing construction by the state courts." Additionally, the ordinances were not invalid under the First Amendment as prior restraints on protected communication because of the licensing or zoning requirements. Though adult films may be exhibited commercially only in licensed theaters, that is also true of all films. The fact that the place where films may be exhibited was regulated did not violate free expression.

In sum, the City's interest in planning and regulating the use of property for commercial purposes was clearly adequate to support the location restriction.

***Associated Homes v. Livermore* (1976) 18 Cal.3d 582 California Supreme Court**

BACKGROUND FACTS

The plaintiff in this case questioned the validity of an initiative ordinance enacted by the voters of the City of Livermore which prohibited the issuance of further residential building permits until local educational, sewage disposal, and water supply facilities complied with specified standards. The plaintiff, an association of contractors, subdividers, and other persons

interested in residential construction in Livermore, brought this suit to enjoin the enforcement of the ordinance.

HOLDING

Although the procedures for the exercise of the initiative right are spelled out in California initiative law, the right itself is guaranteed by the State Constitution.

The court held that the notice and hearing provisions of the Zoning Act of 1917 did not apply to zoning ordinances enacted by initiative. A municipal zoning ordinance enacted by initiative prohibiting the issuance of further residential building permits until local educational facilities eliminated double sessions and "overcrowded classrooms as determined by the California Education Code," and until sewage disposal and water supply facilities complied with specified standards, was not unconstitutionally vague. It was not deemed vague, even though the Education Code contained no definition of "overcrowded classrooms," because the ordinance could be interpreted to incorporate standards adopted by the local joint school district pursuant to the authority granted it by the Education Code, for determining whether schools are overcrowded.

The local zoning ordinance carried the presumption of constitutionality. Such presumption could not be overcome on grounds that the ordinance fell beyond the proper scope of the police power because the record was devoid of evidence concerning probable impact and duration of the ordinance's restrictions. On the limited record, the court could not determine whether the ordinance reasonably related to the general welfare of the region it affected. Therefore, it was presumed constitutional.

In determining whether a challenged restriction reasonably relates to regional welfare, the court should: 1) forecast probable effect and duration of restriction; 2) identify competing interests affected by the restriction; and 3) determine whether the ordinance, in light of its probable impact, represents the reasonable accommodation of competing interests. Municipalities are not isolated islands remote from the needs and problems of the area in which they are located; thus an ordinance, superficially reasonable from the limited viewpoint ofthe municipality, may be disclosed as unreasonable when viewed from a larger perspective. In sum, the proper constitutional test is one which inquires whether the ordinance reasonably relates to the welfare of those whom it significantly affects. If its impact is limited to the City boundaries, the inquiry may be limited accordingly. If, as alleged here, the ordinance may strongly influence the supply and distribution of housing for an entire metropolitan region, judicial inquiry must consider the welfare of that region.

The court concluded that the Livermore ordinance was neither invalid on the ground that it was enacted by initiative, nor unconstitutional by reason of vagueness. The more difficult question of whether the measure was one which reasonably related to the welfare of the region affected by its exclusionary impact, and thus fell within the police power of the City, and could not be decided on the limited record. That issue could only be resolved by a trial at which evidence was presented to document the probable impact of the ordinance upon the municipality and the surrounding region.

***Village of Arlington Heights v. Metro. Development Corp.* 429 U.S. 252 (1977) United States Supreme Court**

BACKGROUND FACTS

Metropolitan Housing Development Corp., ("MHDC") was a nonprofit real estate developer which had contracted to purchase a tract of land in order to build racially integrated low

and moderate income housing. The contract to purchase the land was contingent upon securing rezoning as well as federal housing assistance. MHDC applied to the Village for the necessary rezoning from a single-family to a multiple-family (R-5) classification. The rezoning was denied. MHDC and individual minority respondents filed this suit for injunctive and declaratory relief, alleging that the denial was racially discriminatory and violated, inter alia, the Equal Protection Clause of the Fourteenth Amendment and the Fair Housing Act. The District Court held that the rezoning denial was motivated not by racial discrimination but by a desire to protect property values and to maintain the prevailing zoning plan. The Court of Appeals reversed, finding that the ultimate effect of the rezoning denial was racially discriminatory.

HOLDING

The Supreme Court held that the developer and an individual plaintiff had standing to bring the action, but that they failed to carry their burden of proving that a racially discriminatory intent or purpose was a motivating factor in the rezoning decision.

Clearly, MHDC met the constitutional requirements, and it therefore had standing to assert its own rights. Foremost among them was MHDC's right to be :tYee of arbitrary or irrational zoning. Nevertheless, the lynchpin of MHDC's case was the claim that the Village's refusal to rezone the property discriminated against racial minorities in violation of the Fourteenth Amendment. The court succinctly noted that an official action, however, will not be held unconstitutional solely because it results in racially disproportionate impact. Proof of racially discriminatory intent or purpose is required to show violation of the Equal Protection Clause. In this case, MHDC was unable to demonstrate any discriminatory intent, and the Villages decision was upheld.

***Oakwood at Madison v. Township of Madison* 72 N.J. 481 (N.J. 1977) New Jersey Supreme Court**

BACKGROUND FACTS

The plaintiffs in this case challenged the validity of a local zoning ordinance.

The plaintiffs comprised two groups. The first group, Oakwood at Madison, Inc., and Beren Corporation (hereinafter "corporate plaintiffs"), both New Jersey corporations, were developers owning a tract of vacant, developable land of some 400 acres known as the Oakwood-Beren tract. The second group was comprised of six individuals who were lowincome persons acknowledged by the trialjudge as "representing as a class those who reside outside the township and have sought housing there unsuccessfully."

During the past 25 years, the Township had experienced explosive growth. Madison Township relied heavily on provisions in the 1973 ordinance for PUDs (planned unit developments) and clustering to satisfy its obligation with respect to low and moderate income housing. The plaintiffs argued that even under the clustering provisions, costs would be prohibitive to most lower income families, and the ordinance was exclusionary and invalid.

HOLDING

The Supreme Court held: 1) the Township was a developing community and thus subject to the nonexclusionary zoning requirements of the Mount Laurel decision; 2) it was not necessary for the municipality or for the court to devise specific formula for estimating the precise fair-share of lower income housing needs of the municipality's region; 3) the municipality's ordinances were impermissibly exclusionary; 4) the court should have given consideration

to certain environmental factors; 5) corporate landowner/plaintiffs were entitled to a permit to build their planned development, with 20 percent of the residential units being made available to persons oflower income; and 6) the municipality should, on remand, present a revised ordinance meeting certain requirements within 90 days after the trial court made certain findings of fact.

***Penn Central Transport Co. v. City of New York* 438 U.S. 104 (1978) United States Supreme Court**

BACKGROUND FACTS

Under New York City's Landmarks Preservation Law, the Grand Central Terminal ("Terminal"), which is owned by the Penn Central Transportation Company ("Penn Central"), was designated a "landmark" and the block it occupied, was designated a "landmark site:" After this designation took effect, Penn Central entered into a lease with UPG Properties, whereby UPG was to construct a multi-story office building over the Terminal. The Landmarks Preservation Commission rejected the plans for the building as being destructive of the Terminal's historic and aesthetic features. The appellants sued, claiming that the application of the Landmarks Law had "taken" their property without just compensation in violation ofthe Fifth and Fourteenth Amendments, and arbitrarily deprived them oftheir property without due process oflaw in violation ofthe Fourteenth Amendment.

HOLDING

The Supreme Court held as follows:

1) The owners could not establish a "taking" merely by showing that they had been denied the right to exploit the "super-adjacent" airspace, irrespective ofthe remainder of the parcel;
2) Landmark laws which embody a comprehensive plan to preserve structures of historic or aesthetic interest are not discriminatory;
3) The fact that the law affected some owners more severely than others did not itself result in a "taking"; and
4) The law did not interfere with the owners' present use or prevent it from realizing a reasonable rate ofretum on its investment, especially since preexisting air rights were transferable to other parcels in the vicinity.

In sum, the application ofN ew York City's Landmarks Preservation Law to the parcel ofland occupied by the Terminal did not "take" the owners' property in violation of the Fifth and Fourteenth Amendments.

***First English Evangelical Lutheran Church v. County of Los Angeles* 482 U.S. 304 (1987) United States Supreme Court**

BACKGROUND FACTS

Los Angeles County enacted an interim ordinance that prohibited a church from reconstructing church camp buildings damaged by extensive flooding, but permitted the church to conduct camping and teaching activities on the campgrounds. The ordinance remained in effect until a study could be performed to determine permanent flood protection zones.

The church alleged a regulatory taking, seeking monetary damages as an initial remedy for inverse condemnation.

HOLDING

The Supreme Court held that monetary damages could be sought as an initial remedy for inverse condemnation claims based on unconstitutional regulatory takings. This decision overruled the court's prior holding that a property owner was not entitled to monetary damages for a -land use regulatory restriction that was found to be a taking, unless the government nevertheless chose to continue the restriction. Agins v. Tiburon (1979) 24 Ca1.3d 266. The Supreme Court limited its holding to the remedy issue.

It then remanded the case back to the Appellate Court to decide whether the County's interim ordinance, which prohibited construction of any buildings within the flood protection area, actually denied the church all use of its property, thereby constituting a compensable taking.

On remand, the Court of Appeal held that the County's regulatory action did not amount to a taking because: 1) the interim ordinance substalltially advanced a legitimate governmental interest in public safety; 2) the ordinance did not deny the church all economically viable use of its property: and 3} the interim ordinance imposed only a reasonable moratorium for a reasonable period of time while the church conducted a study and determined what uses, if any, were compatible with public safety.

***Nollan v. California Coastal Commission* 483 U.S. 825 (1987) United States Supreme Court**

BACKGROUND FACTS

The owners of a small bungalow along a beach in Ventura County sought to replace it with a larger three-bedroom house. One of several lots in an area located between two public beaches, the Nollan property had private beach access on the coastal side. As a condition of approval for a coastal permit, the Coastal Commission required a lateral easement between the two public beaches north and south of the lot. In support of this easement requirement, the Commission cited the fact that the new house would decrease visual accessibility, increase private use, create a "psychological barrier" and keep the public from realizing that the beaches were nearby. The Nollans challenged the condition of approval before the United States Supreme Court.

HOLDING

On appeal, the United States Supreme Court assumed that the protection of the public's ability to view the beach (i.e., the visual accessibility, was a legitimate state interest). Notwithstanding, the court did not specifically analyze the standards that would support this interest.

The court then went on to find that the condition imposed was nevertheless invalid as an unconstitutional taking, because it did not reasonably serve the stated public purpose of preserving the beach visibility. The lateral easement across the beach did not directly affect the public's ability to view the ocean from the street. In sum, there was no nexus between the legitimate interest and the condition imposed.

Notably, the court indicated that other conditions furthering the public's ability to see the beach, notwithstanding the impact of building a new house (such as a height limitation, a width restriction, or a ban on fences) might have been upheld. The fact that the easement did not further the same governmental interest advanced as justification for the condition made it an invalid taking, or as the court characterized it, "an out-and-out plan of extortion."

Although the easement served a valid governmental goal of increasing coastal access, the condition could not be linked to the building permit without raising the specter of eminent domain.

Consequently, the condition was held invalid because there was no nexus between the condition or exaction and any problem caused by the development. The court found that there was simply no nexus or relationship between the stated purpose of beach visibility and the condition requiring a lateral public access easement across the beach.

***Lucas v. South Carolina Coastal Council* 505 U.S. 1003 (1992) United States Supreme Court**

BACKGROUND FACTS

Lucas, a property owner in South Carolina, brought a takings challenge based on the application of a state law which barred him from erecting any permanent habitable structures on his beachfront lots. At the time Lucas purchased his two lots, the existing zoning allowed single-family homes, and most of the neighboring beachfront lots were developed with residences.

After the passage of the Beachfront Management Act, Lucas could no longer construct homes on the property, and he contended that the effect ofthe statute was to render his lots valueless. The trial court held that his lots had been "taken" by the state's action, and Lucas was awarded $1 million. The South Carolina Supreme Court overturned the trial court on the basis that the statute was properly and validly designed to preserve South Carolina's beaches, because the legislature had found that new construction in the coastal zone threatened the beachfront due to erosion and other ecological concerns. The South Carolina Supreme Court held that the threat to the public harm cited by the legislature in enacting the statute brought Lucas within the line of cases where the. government is not required to compensate owners of public nuisances if a regulation is designed to prohibit a "noxious" use of the property.

HOLDING

In finding that a taking occurred, the court held that a regulation whose purpose is to prevent public harm is not sufficient to bring it within the "noxious use" exception to a takings claim. Furth_r, where a regulation prevents all economically beneficial use ofland, the government is generally required to compensate the owner unless it falls within a few narrow exceptions. One exception is where the government has a preexisting easement or some other right to limit the use of the property. The second is where the regulations' true purpose is nuisance prevention, and the type of nuisance prevented is one which would be protected under existing principles of property law.

Note that a key factor in the court's decision was that the regulation denied Lucas of all economical use ofthe land. Consequently, under the test to determine whether an invalid taking occurred, the court was not required to examine one prong of the two prong takings: test whether the regulation advanced a legitimate state interest.

***Dolan v. City of Tigard* 512 U.S. 374 (1994) United States Supreme Court**

BACKGROUND FACTS

Florence Dolan owned a plumbing and electrical supply store located in the business district of Tigard, Oregon, along Fanno Creek, which flowed all through the southwestern comer of the lot and along its western boundary. Dolan applied to the City for a building permit to develop the site. Her proposed plans called for nearly doubling the size ofthe store and paving a 39-space parking lot.

The Planning Commission granted the permit application, subject to conditions imposed by the Tigard Community Development Code which contained the City's Comprehensive

Plan. The Commission required that Dolan dedicate the portion of her property lying within the IOO-year floodplain for improvement of a storm drainage system along Fauno Creek, and that she dedicate an additional15-foot strip ofland adjacent to the floodplain as a pedestrian and bicycle pathway.

Dolan alleged that the City's dedication requirements were not related to the proposed development and constituted an uncompensated taking in violation ofthe Fifth Amendment to the United States Constitution.

The United States Supreme Court granted Certiorari to resolve a question left open by its decision in Nollan v. California Coastal Comm'n 483 U.S. 825 (1987) of what is the required' degree of connection between an exaction imposed by a city and the projected impacts of a proposed development

HOLDING

The court first acknowledged the standard rule that a land use regulation does not effect a taking if it: 1) substantially advances a legitimate state interest; and 2) does not deny an owner all economically viable use of his land. The court further noted that the conditions imposed were not simply a limitation on the use that Dolan might make of her parcel, but rather a requirement that she deed a portion of the property to the City.

In evaluating the takings claim, the court stated that it must first determine whether an essential nexus exists between the legitimate state interest and the permit condition exacted by the City. If a nexus exists, the court must then decide the required degree of connection between the exactions and the proj ected impact of the proposed development. Stated otherwise, the court must ascertain whether the extent ofthe exactions demanded by the City bear the required relationship to the proj ected impact of the proposed development. (This was not examined in Nollan because the required nexus did not exist.)

The court found that the City did not meet its burden in demonstrating the required relationship between the floodplain easement and the petitioner's proposed new building. Although the expansion would have increased impervious surfaces and runoff, the City should have simply required that Dolan keep the area open. By requiring a dedication, the City limited Dolan's ability to exclude other individuals which is "one of the most essential sticks in the bundle of rights that are commonly characterized as property rights." As to the bicycle and pedestrian easement dedication, the City also failed to meet its burden of demonstrating that the additional number of vehicle and bicycle trips generated by petitioner's development were reasonably related to the City's requirement for the dedication of the pathway easement.

Dolan establishes a two part inquiry to determine the nexus: I) is there a connection or nexus between the legitimate state interest and the condition imposed; and 2) does the degree of the condition imposed bear a reasonable relationship to the proj ected impact of the development?

The City's dedication requirements for: I) storm drainage system improvements; and 2) bicycle and pedestrian path, constituted an uncompensated taking of property, as there was no impact caused by the development sufficient to warrant the dedication.

San Jose Christian College v. City of Morgan Hill (2002) U.S. Dist. LEXIS 4517 United States District Court Northern District of California

BACKGROUND FACTS

San Jose Christian College ("SJCC") purchased a former hospital property in the City of Morgan Hill intending to use the site for its college campus. SJCC was unsuccessful in re-zon-

ing the property for educational uses. When the City denied the re-zoning application, it asserted several bases for its decision, including both the City's preference to retain the existing hospital zoning and the applicant's failure to comply with the City's re-zoning application requirements.

SJCC filed an action in the District court contending that the City's re-zoning process violated the First Amendment ofthe United States Constitution and the Religious Land Use and Institutionalized Persons, Act of2000 ("RLUIPA"), 42 U.S.C. § 2000.

HOLDING

The court found that the City's zoning ordinance and decision to deny the re-zoning passed constitutional muster. Churches were not treated any differently than other assemblies and church schools were treated no differently than any other school. Under a constitutional analysis, a law that is neutral and of general applicability need not be justified by a compelling government interest, even if there is an incidental burden on a particular religion or particular practice. A law is "neutral" if it does not discriminate on its face and is "generally applicable" if it does not impose burdens only upon conduct motived by religious belief. Zoning laws are generally applicable laws and are subject to rational basis review when challenged under the First Amendment's Free Exercise Clause. See City of Boerne v. Flores 521 U.S. 507 (1997).

Furthermore, the court held that SJCC's claim under the Religious Land Use and Institutionalized Persons Act of2000 (42 U.S.C. §2000cc, et seq.), (hereinafter, "RLUIPA") failed as well. Under RLUIPA, "no government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the government demonstrates that the imposition of the burden on that person, assembly or institution - (A) is in furtherance of a compelling government interest; and (B) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000 (a)(l). In order to establish a prima facie case that RLUIPA had been violated, SJCC had to present evidence that the City's denial of the re-zoning application imposed a substantial burden on the religious exercise of a person, institution or assembly. SJCC presented no such evidence. Moreover, SJCC offered no evidence that the City's zoning ordinance, on its face or in application, treated religious institutions unequally, discriminated against religious institutions, excluded religious assemblies, or placed undue limitations on religious structures within its jurisdiction.

Equally important, the court noted that RLUIPA does not grant religious institutions immunity from land use regulations. As noted in the legislative history, "This Act does not provide religious institutions with immunity from land use regulation, nor does it relieve religious institutions from applying for variances, special permits or exceptions, hardship approval, or other relief provisions in land use regulations, where available without discrimination or unfair delay."

In sum, both SJCC's constitutional claim and the RLUIPA claim failed, and the City was entitled to summary judgment dismissing SJCC's action.

ADDITIONAL DISCUSSION ON RLUIPA

By way of background, RLUIPA was enacted as part of an ongoing legal battle over what legal standard of review should apply when government takes action that substantially burdens a religious practice. Prior to 1990, under then existing case law[1] government was required to show a "compelling governmental interest" if it took such action. However, that rule was abrogated in 1992 by the case of Employment I?ivision v. Smith, 494 U.S. 872 (1990). In response to Smith, Congress enacted the Religious Freedom Restoration Act of 1993 (RFRA), which explicitly reinstated the "compelling interest" standard.

However, in 1997, in the case of City ofBoerne v. Flores,[2] the United States Supreme Court held that RFRA was unconstitutional because Congress lacked the power under the Enforcement Clause of the Fourteenth Amendment to change the meaning of the First Amendment. The Supreme Court held that the RFRA lacked a congruence between the means adopted and the legitimate end to be achieved. Lacking a widespread pattern of religious discrimination that would justify RFRA's diminution of local governments authority to regulate land use, the Supreme Court held that Congress had exceeded its authority to enact laws that prevent unconstitutional behavior. In response to the Supreme Court's ruling in Flores, in 2000 Congress passed RLUIPA, reinstating the "compelling governmental interest: standard, and imposing a broader scope of governmental regulation than RFRA.

Another notable RLUIPA case includes CLUB v. City of Chicago 157 F.Supp.2d 903 (N.D. III, 2001). In CLUB, a civil rights organization and several churches sued the City of Chicago because the City's zoning code required churches to obtain a use permit in order to exist in a particular zone, but did not require similar entities to obtain a use permit.

In response to this lawsuit, Chicago amended its zoning code to require all similar uses to obtain a use permit in the zone in question. The court held that the zoning code as amended did not violate Equal Protection provisions. (Id. at p. 912) Moreover, since those zoning code amendments eliminated potential substantial burdens, the court concluded that it was not necessary to review the zoning code under RLUIPA. (Id. at p. 917)

FOOTNOTES

1 Sherbert v. Verner, 374 U.S. 398 (1963)
2 City ofBoerne v. Flores, 521 U.S. 507 (1997)

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Planning Practice Special Feature

Kelo and *Lingle*:Two Landmark Takings Decisions Courtesy of the U.S. Supreme Court

by Daniel A. Friedlander, AICP

The U.S. Supreme Court's 2004-2005 session produced several important decisions concerning the taking of private property for public use under the Takings Clause of the Fifth Amendment to the U.S. Constitution. Two decisions in particular, *Kelo v. City of New London*, 125 S.Ct. 2655 (2005), and *Lingle v. Chevron U.S.A., Inc.*, 125 S.Ct. 2074 (2005), appear to have broadened the constitutional powers of cities and municipalities to regulate and acquire privately owned land. Government entities certainly will look to these two new cases for guidance when making important decisions that will create economic benefits for the public and/or economic burdens for landowners.

The planning community considers itself lucky if the U.S. Supreme Court hands down one important land-use decision in a single term. The Supreme Court's 2004-2005 session, however, produced several significant decisions that will undoubtedly be the subject of much discussion by planners, consultants, lawyers, and legislators during the next few months and even years. Two of these important decisions involve challenges to a government entity's exercise of power for the purpose of creating an economic benefit to the public, to the detriment of private landowners. Whether the purpose of the government's action is to curtail escalating gasoline prices or to rejuvenate a declining local economy, the Supreme Court appears to have broadened the power of government to benefit the general public economically to the detriment of private landowners.

The case of *Kelo v. City of New London*, 125 S.Ct. 2655 (2005), answered the highly debated question of whether a government entity may exercise its constitutional powers of eminent domain and condemn private property for the sole purpose of revitalizing an ailing local economy. To that question, a divided Supreme Court answered yes. In the other case, *Lingle v. Chevron U.S.A, Inc.*, 125 S.Ct. 2074 (2005), a unanimous Supreme Court overturned a historic and frequently cited takings case that had previously limited the government's ability to regulate property interests where the regulation did not substantially serve a legitimate government interest. The Supreme Court eliminated this due process standard and spelled out, in detail, the current view of modern takings jurisprudence. Both decisions are considered wins for cities and municipalities looking to regulate property interests. Conversely, landowners see the decisions as further dilution of their property rights and protections under the Takings Clause of the Fifth Amendment to the U.S. Constitution.

Lingle v. Chevron U.S.A, Inc.

Lingle v. Chevron U.S.A., Inc. did not get the same amount of attention in the press as did *Kelo v. City of New London*. This is understandable, considering that the *Kelo* case involved the taking of family homes to build shopping malls and pharmaceutical research facilities. The *Lingle* case, in that it concerned restrictions on the amount of rent oil companies could charge for gasoline station leases, was not nearly as sexy as government confiscating grandma's home to make room for big business. Yet, don't let the amount of media attention given to the *Lingle* case downplay its significance. *Lingle* essentially redefines and restates a basic element of constitutional takings jurisprudence. And since the Supreme Court was gracious enough to include a primer on takings law in its lengthy opinion, *Lingle* serves as an excellent place to begin any discussion on takings.

Here are the basic facts of the case. The State of Hawaii, in an attempt to soften the impact of escalating

gasoline prices on the public, enacted a statute that limited the amount of rent that oil companies could charge dealers leasing company-owned gasoline stations. The oil companies challenged the statute, claiming that the state, by squelching their profits, was infringing upon their property rights and, thus, effecting a taking of property for public use without just compensation in violation of the Fifth Amendment to the U.S. Constitution. In support of their challenge, the oil companies relied on the landmark Supreme Court takings case of *Agins v. City of Tiburon*, 447 U.S. 255 (1980). Among other things, the *Agins* case stood for the proposition that a law or regulation impacting property rights would effect a regulatory taking and thus require the payment of just compensation by the government if the law or regulation did not substantially advance a legitimate state governmental interest. The appropriateness of applying this heightened due process standard of judicial review in takings cases was brought into question in the *Lingle* case. In reaching the answer to this question, the Supreme Court first clarified the rules for determining when government activity has resulted in a taking under the Fifth Amendment.

Retiring Justice Sandra Day O'Connor, writing for the Court, stated that there are four categories of government activity that constitute a taking of private land for public use which requires the payment of just compensation to the property owner. The first and most obvious circumstance comes about when the government entity directly appropriates or physically invades private property. This classic example of a taking, commonly referred to as a "physical taking," always requires the payment of just compensation.

There are, however, circumstances where a taking results from government action even though land is not appropriated or physically invaded. These circumstances are referred to as "regulatory takings" and make up the second and third categories commonly referred to as " *Lucas* takings" and " *Penn Central* takings." *Lucas* takings are analyzed under the standards set forth in the 1992 Supreme Court case of *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), and arise when a governmental regulation or action completely deprives a landowner of all economically beneficial use of the property. *Lucas* takings are distinct from physical takings because, as mentioned above, the government has not appropriated or physically invaded the land. Despite that distinction, there is no practical difference between the two, because in a *Lucas* taking, the government's regulatory action has similarly resulted in a complete deprivation of the landowner's viable use of the property. The landowner is essentially left with worthless land and therefore must be compensated by the government.

However, even if the government's action does not completely deprive the landowner of all beneficial use of the property, the action may fall within the third takings category — *Penn Central* takings. Unlike *Lucas*, the case of *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978), did not establish a bright-line rule for determining when a taking occurs. Instead, the court established several factors under which regulatory takings claims should be evaluated. These factors include the character of the government action, the economic impact of the action on the landowner, and the extent to which the government's action has interfered with the landowner's investment-backed expectations. The courts will balance these factors to determine whether the government has effected a taking. The important thing to note is that *Penn Central* factors address the impact of the regulation on the property owner and not the purpose or intent behind the regulation.

The fourth and final category of takings is often lumped together with the regulatory takings group, but really falls into a category of its own. These are situations where a government entity requires an exaction from a landowner as a condition of receiving some benefit, such as a development permit or entitlement. Exaction takings are evaluated under the rules stated in the landmark cases of *Nolan v. California Coastal Commission*, 483 U.S. 825 (1987), and *Dollan v. City of Tigard*, 512 U.S. 374 (1994). Generally stated, the basic rules in exaction cases are that:

(1) there must be a nexus between the government-imposed exaction and the impacts created by the proposed development and (2) the exaction must be roughly proportionate, in both nature and extent, to the impacts of the proposed development. If the exaction fails either of these two requirements, the government has effected an unconstitutional taking.

After clarifying these rules, the Supreme Court turned to the facts in the case. The statute passed by the State of Hawaii and challenged by the oil companies falls under the rules for regulatory takings. Because the statute did not completely deprive the oil companies of beneficial use of their land — it simply limited the amount of rent they could charge their lessees — the regulation fell within the *Penn Central* takings

category. However, the oil companies argued that the court should strike down the law under a different legal theory — the standard established by the Supreme Court in the 1980 case of *Agins v. City of Tiburon*. The *Agins* case created a rule of law that deems a regulation an unconstitutional taking of property if the regulation does not substantially advance a legitimate government interest. Unlike the *Penn Central* factors, this standard looks at the purpose of the regulation rather than its impact. For more than 25 years, courts around the country have relied upon the *Agins* case in their evaluations of regulatory takings cases.

The Supreme Court, to the surprise of many, held that the *Agins* standard for reviewing the legitimacy of a law or regulation that impacts property rights is no longer applicable and is essentially irrelevant to regulatory takings analysis. The Court reasoned that a standard that looks at the purpose of a regulation has no place in takings jurisprudence, which traditionally focuses on the impact of a regulation. Regulatory takings, therefore, will be reviewed solely under the fundamental rules set forth in *Penn Central* and *Lucas*.

The practical effect of the *Lingle* holding is that land owners have lost valuable ammunition for challenging laws or regulations that deprive them of some use of their land. Consequently, cities now have somewhat broader discretion to enact regulations that impact property rights. Whether a government entity's regulatory actions are taken for a legitimate purpose is of no import. The test will focus merely on the regulation's "impact" on the property owner, regardless of the regulation's underlying purpose.

Throughout the years, the now-defunct *Agins* case has been cited by many state and federal courts in takings cases and has served as the foundation for numerous precedential holdings. Undoubtedly, the validity of many of these holdings will now be questioned as a result of the Supreme Court's ruling in *Lingle* and, therefore, it is reasonable to expect more regulatory takings cases will find their way to the Supreme Court in the near future. It also will be interesting to see what comes of these future cases in light of *Lingle* author Justice Sandra Day O'Connor's retirement from the bench.

Kelo v. City of New London

The highly publicized case of *Kelo v. City of New London* concerns a different aspect of takings law than that raised by *Lingle*. *Kelo* deals not with whether the government regulation constitutes a taking of property that requires just compensation. Rather, it involves a determination of whether the purpose behind the exercise of eminent domain power was appropriate. The distinction arises because, in *Kelo*, there was no question that the city sought to physically take land from private landowners — the city was exercising its powers of eminent domain to condemn several homes within a redevelopment area. The fundamental issue presented in the *Kelo* case is whether the city's decision to condemn private property to revitalize an economically depressed portion of the city satisfied the U.S. Constitution's Fifth Amendment requirement that private property be taken only for "public use." Specifically, the Court was asked to decide whether condemnation of private property for economic development purposes alone fell within the definition of "public use."

This issue has been the subject of debate for many years, and the thinking was that the facts of the *Kelo* case presented the perfect opportunity for the Court to finally resolve the issue. In the late 1980s and early 1990s, New London, Connecticut, had fallen victim to economic decline. This was particularly true with regard to its lakefront community of Fort Trumbull. In an attempt to revitalize the area, the city prepared a plan to redevelop the area with retail, commercial, office, and recreational uses, including a $300 million Pfizer research facility. The revitalization plan was expected to bring more than 1,000 new jobs to the city and substantially increase tax revenues.

To implement the redevelopment plan, the city had to acquire private land within the redevelopment area, either through outright purchase or through its use of eminent domain powers. The majority of the affected private landowners voluntarily sold their land to the city; however, two landowners refused to sell their land and the city was forced to initiate condemnation proceedings. The landowners challenged the validity of the city's use of its eminent domain powers to acquire their land for the purpose of revitalizing the economically depressed community.

One of the most important facts of the *Kelo* case is that none of the properties purchased or slated for

condemnation by the city was in blighted condition. Also, none of those properties was being acquired to provide for the construction of public facilities, such as roads, utilities, schools, or airports. This is somewhat of an anomaly in eminent domain cases, since most involve, to one extent or another, the construction of public facilities or the elimination of blight to justify the government's exercise of its eminent domain powers. However, in this case the sole justification given by the city for condemning the private property was the revitalization of an economically depressed area. For this reason, the Supreme Court had the rare opportunity to decide whether economic development alone satisfied the "public use" requirement of the Takings Clause of the Fifth Amendment.

The Supreme Court again sided with the government and held that economic development fits within the definition of public use and, thus, justified the condemnation of private property. Justice John Paul Stevens, writing for the majority of a sharply divided Court, delivered an opinion that broadened the powers of government and, at the same time, astonished the general public.

The Court relied on several factors in reaching its decision. First, the court emphasized its longstanding policy of deferring to the judgment of those who are best suited to making decisions about local land-use policy and the needs of the community, which in this case were the New London City Council and Planning Commission. The court recognized that each jurisdiction's needs are unique and, therefore, local legislators are in the best position to determine what public needs justify the use of the takings power.

Second, the court stressed that the city's use of eminent domain was executed pursuant to a carefully considered, carefully formulated, comprehensive plan for economic development. The redevelopment plan was not premised on the conferring of economic benefits to a particular developer or private party, nor was it focused on impacting a particular landowner. There was no evidence that the plan was founded on an illegitimate purpose, such as condemnation of land for the sole purpose of conferring a private benefit on a particular private party.

Justice Stevens stated that challenges to the legitimacy of the government's actions must be evaluated "not on a piecemeal basis, but rather in light of the entire plan." In the eyes of the Court, the city's comprehensive plan to revitalize an economically depressed area with a variety of commercial, residential and recreational uses, in the eyes of the court "unquestionably serves a public purpose."

The Court's ruling was intentionally open ended, as it refused to establish a bright-line rule for delineating public use or public purpose in the context of economic development. However, the Court did state that promoting economic development is a traditional and long-accepted function of government, and therefore it is indistinguishable from other public purposes recognized by the court in takings jurisprudence.

The *Kelo* case is unquestionably a victory for cities and counties that seek to cure economic decline with redevelopment. And although the decision has been characterized by the press as affording government the unfettered ability to seize the corner store whenever it resolves to bring the corporate superstars of the world within its boundaries, the words of at least one Supreme Court justice may limit the breadth of the majority's decision.

Justice Kennedy, who was considered the swing-vote in this 5 to 4 decision, cautioned in a separate concurring opinion that, if a city's exercise of its eminent domain power is clearly intended to favor a particular party, with only "incidental or pretextual" benefits to the public, then the city's action must be stricken down by the courts. Justice Kennedy's concurring opinion also appears to qualify the majority's rule somewhat by limiting its application to cases where the city is "sorely in need" of economic revitalization. If so, we may see courts applying higher levels of scrutiny in future eminent domain challenges where the city is not in a dire economic situation and the anticipated level of economic gain is not as substantial.

In the eight states where the legislature has not yet passed laws requiring the presence of blight before property can be condemned within a redevelopment area, Justice Kennedy's concurring opinion should serve as guidance for government entities wishing to exercising their powers of eminent domain to revitalize economically depressed areas. To minimize the potential for challenges by affected landowners, cities will want to tailor their findings to show: (1) that the redevelopment area is in substantial need of

economic revitalization; (2) that the anticipated economic benefits to the redevelopment area are more than de minimis in nature; and (3) that, although private entities will likely benefit from the action, the economic benefits to the community are not merely incidental or pretextual to the private benefits that will be enjoyed by private parties, i.e., the economic benefit to the public is the motivating factor behind the government's action.

Again, the unexpected departure of Justice O'Connor from the court may be an indication of future debates in this area of the law. This time, Justice O'Connor wrote a lengthy dissenting opinion, joined by three other justices, criticizing the majority's ruling in the case. Because Justice Kennedy's concurring opinion opened the door to future high court cases limiting the use of eminent domain for economic development, whoever ends up as Justice O'Connor's replacement on the bench will be presented with the unique opportunity to bolster the majority's position, solidifying the resolve of the court, or to serve as a check on the exercise of government power under the Fifth Amendment.

Outside of the judiciary, the public's reaction to the *Kelo* decision already has prompted some state legislatures to seek limitations on use of eminent domain. For example, in California where the use of eminent domain is already substantially limited by statute, legislators have proposed a constitutional amendment to further limit its use for a "stated" public purpose, and only then, upon an independent judicial determination that no reasonable alternatives exist to the exercise of eminent domain. Then, if the public entity ceases to use the property for the stated use, the original owner could reacquire the property for the lesser of the compensation paid by the government or fair market value. The *Kelo* decision undoubtedly will prompt other states to take similar action, especially those where blight is not required as a prerequisite to condemning private property.

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U.S. Supreme Court Split Over Wetlands Protection

In a plurality decision authored by Justice Scalia, the U.S. Supreme Court refused to adopt the extreme position advocated by the Pacific Legal Foundation and others that federal authority under the Clean Water Act should be limited to large lakes and rivers that are actually navigable, and the wetlands adjacent to those waters. Without a majority, the ruling is difficult to untangle. No clear test was enunciated.

Click here to read the U.S. Supreme Court's ruling

Click here to read APA's amicus brief

The Two Cases

Rapanos v. United States (No. 04-1034) and *Carabell v. Army Corps of Engineers* (No. 04-1384)

The Clean Water Act

The Clean Water Act (CWA) was passed by Congress in 1972 to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters" 33 U.S.C. §1251 *et seq*. The CWA prohibits "the discharge of any pollutant" into *navigable waters* without a permit from the Army Corps of Engineers (Corps) or the Environmental Protection Agency (EPA). New developments and other land-use activities that might discharge pollutants into *navigable waters* require a review and §404 permit. Some argue the permitting process is time-consuming and expensive; others believe the process is essential to mitigate the harmful impacts from development.

The Corps reviews developments and land use activities that might impact *navigable waters*. Congress defined "navigable waters" to mean "the waters of the United States" §1362(7). The Corps broadly interprets "waters of the United States" to cover all traditionally navigable waters, tributaries of these waters, and wetlands adjacent to traditionally navigable waters or their tributaries 33 CFR §§ 328.3(a)(1), (5) and (7)(2005); §§ 323.2(a)(1), (5), and (7) (1985).

Where does land end and water begin? That conundrum has been at the heart of several cases before the U.S. Supreme Court:

1985: *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 at 131. The Court held unanimously that the Corps was correct to assert jurisdiction over "wetlands adjacent to but not regularly flooded by rivers, streams, and other hydrographic features more conventionally identifiable as 'waters.'"

2001: *Solid Waste Agency of Northern Cook County v. Army Corps of Engineers,* 531 U.S. 159 at 167 (SWANCC). The Court held that the Corps did not have jurisdiction over nonnavigable, isolated waters because there was no "significant nexus" to traditionally navigable waters.

Case Facts

In the two consolidated cases originating from Michigan before the U.S. Supreme Court this term, the issue is whether *navigable waters* extends to wetlands adjacent to tributaries of traditionally *navigable waters* (Rapanos case) and whether a man-made berm separating a wetland from the adjacent tributary makes a difference (Carabell). (Stevens dissent, pp.1-2)

Rapanos

Rapanos wanted to build a shopping center. He was informed by the Michigan Department of Natural Resources about the likelihood that wetlands were on the site and a §404 permit would be necessary to continue. Rapanos hired an expert who confirmed the presence of wetlands, but then ordered him to

destroy the report. Rapanos began clearing the land without a permit. He also performed extensive clearing and filling activities on two other sites without seeking or obtaining §404 permits.

Rapanos was charged and convicted of criminally violating the CWA. On the civil charges, the District Court concluded that all three sites contained wetlands with surface water connections to tributaries leading into larger bodies of water and that Rapanos had violated the CWA by destroying them without permits. The Sixth Circuit Court of Appeals unanimously agreed.

Carabell

The Carabells wanted to build 130 condominiums on a 20-acre site, of which 16-acres were wetlands. Adjacent to the Carabells' wetlands is a ditch that eventually flows into Lake St. Clair. A four-foot-wide man-made berm separates the wetlands from the ditch so water rarely if ever passes from the wetlands to the ditch. The Corps denied a §404 permit because, among other reasons, the forested wetlands provides valuable seasonal habitat for aquatic organisms and year round habitat for terrestrial organisms. And if the wetlands were destroyed it could result in an increased risk of erosion and degradation of water quality in the drain, creek, and ultimately Lake St. Clair. The District Court and Court of Appeals also ruled in the Corps's favor.

APA, the Community Rights Counsel, 33 states, and many others filed amicus briefs urging the Court to preserve federal protections under the Clean Water Act. The opposing view led by the Pacific Legal Foundation, asked the Court to limit the Corps's jurisdiction to large lakes and rivers that are actually navigable, and the wetlands adjacent to those waters. This viewpoint would have removed many important wetlands from protection of the Clean Water Act. Not a single Justice supported this extreme position.

The Fractured Opinion of the U.S. Supreme Court

The decision issued by the U.S. Supreme Court on June 19, 2006 will undoubtedly create considerable confusion in the lower courts as they grapple with the definition of *navigable waters* under the CWA. The plurality opinion authored by Justice Scalia (joined by the Chief Justice, and Justices Thomas and Alito), ruled that the phrase *navigable waters* permits the Corps and EPA jurisdiction only over "relatively permanent, standing or flowing bodies of water, which might include 'seasonal' rivers that carry water continuously except during 'dry months' but not intermittent or ephemeral streams."

The plurality opinion established a two-part test to determine whether adjacent wetlands are covered by the CWA:

1. the adjacent channel contains a a relatively permanent body of water connected to traditional interstate navigable waters); and
2. the wetland has a continuous surface connection with that water, making it difficult to determine where the "water" ends and the "wetland" begins.

Four justices dissented. In an opinion authored by Justice Stevens (joined by Justices Souter, Ginsburg and Breyer), the dissenters ruled that the Court's earlier unanimous ruling in *Riverside Bayview* squarely controls these two cases and they voted to uphold all of the existing federal protections for tributaries and wetlands. The dissenters disagreed with the plurality opinion that "adjacent to" means there must be a "continuous surface connection to" other water in order for the wetland to fall under the Corps's jurisdiction. The dissenters would have affirmed the unanimous decisions from the Sixth Circuit Court of Appeals. Perhaps the clearest direction from the High Court can be found on the last page of the 105-page opinion where Justice Stevens concluded "that today's opinions, taken together, call for the Army Corps of Engineers to write new regulations, and speedily so."

The swing vote by Justice Kennedy, although sounding closer to the dissent in many respects, actually concurred with Justice Scalia in vacating the decisions from the Sixth Circuit Court of Appeals and remanding both cases back for review. Justice Kennedy decided he couldn't join the plurality or the dissent because neither looked at the requirement that there be a "significant nexus" between the wetlands and the *navigable waters*, which he felt was important. Justice Kennedy took issue with almost every point made by Justice Scalia. He didn't agree with the plurality's two-part test and he didn't believe

the *SWANCC* decision supports the requirement for a continuous surface-water connection. Unlike the plurality, Justice Kennedy believed the Corps's definition of adjacency was reasonable. But unlike the dissent, Justice Kennedy didn't believe the Court should give deference to the Corps's interpretation of the CWA that would permit federal regulation whenever wetlands lie alongside a ditch or drain, however remote and insubstantial, that eventually flow into traditional *navigable waters*. Justice Kennedy would remand for consideration whether the Rapanos' and Carabells' wetlands possess a significant nexus with *navigable waters*. He noted that the wetlands in both cases might very well fall within the Corps's jurisdiction. Justice Kennedy's nexus test will probably be the key to how the lower courts interpret the Clean Water Act in the future because his test has at least the implicit support of the four dissenting Justices.

Important for Planners

Although several Justices suggested the Corps should consider writing new regulations to clarify the scope of its jurisdiction under the CWA, the *Rapanos-Carabell* decision does not change the landscape for planners. It remains critically important for planners to identify, inventory, and map wetland resources so that the location, type, and intensity of future development can be appropriately managed in conjunction with protecting these natural resources.

APA Wetlands Policy Guide

In 2002, the APA Board of Directors adopted a wetlands policy guide which remains particularly relevant for planners to review today to see what actions might be feasible at the state and local levels. Read the policy guide at: www.planning.org/policyguides/wetlands.htm

Environmental Planning Handbook for Sustainable Communities and Regions

The authors, Tom Daniels and Katherine Daniels, AICP, wrote, "A land suitability analysis will indicate limitations for development in areas with wetlands or hydric soils. Wetlands can be evaluated and rated for significance by size and by the environmental services they provide, such as wildlife habitat or aquifer recharge. Potential for wetlands mitigation and banking should also be assessed." Click here to get the handbook.

Review

Planners also should review their comprehensive plans and regulatory tools (such as the zoning ordinance and subdivision regulations and capital improvement programs) to ensure that wetlands protection is comprehensively addressed. The Daniels include a checklist of wetlands issues in their book for a development review process:

1. Are there wetlands on or adjacent to the site proposed for development?
2. Is the proposed development allowed in the particular zone?
3. Are the minimum distances of proposed buildings, on-site septic systems, and wells from wetlands met?
4. Should the applicant be required to conduct an environmental impact assessment, including impacts on wetlands?
5. Is filling, dredging, or drainage of part or all of a wetland proposed?
6. Is there a wetlands mitigation plan?
7. Will stormwater runoff from the proposed project affect nearby wetlands? How will this be mitigated?
8. If a wetland is proposed for treating wastewater, has the design of the wetland been reviewed by the municipal or county engineer?
9. Has the developer obtained any necessary state or federal wetlands permits?

Source: *The Environmental Planning Handbook for Sustainable Communities and Regions* by Tom Daniels and Katherine Daniels, AICP (Planners Press 2003)