

AICP Exam Review: Planning and Land Use Law

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“After all, a policeman must know the Constitution, then why not a planner?” San Diego Gas & Electric v. City of San Diego, 450 U.S. 621, 661 n.26 (1981) (Brennan, J., dissenting).



Purpose of Session

- Help You Pass the AICP Exam!
- Thoughts on Study Process
- Introduction to Key Constitutional Concepts
- General Overview of Several Areas of Planning and Zoning Law
- Study Materials Focused on Planning & Zoning Law



Thoughts on Study Process



Legal Foundations of Planning and Zoning

- United States' Constitution
- State Constitutions

- Federal Laws
- State Statutes
- Local Ordinances

- Case Law - Federal and State



Key Constitutional Concepts: Due Process

Procedural Due Process - Notice and an opportunity to be heard in a fundamentally fair hearing by an impartial tribunal

Substantive Due Process – “Rational relationship” to a “legitimate governmental purpose”



Procedural Due Process Cases

- Eubank v. City of Richmond, 226 U.S. 137 (1912) (ordinance giving one set of property owners ability to impose setbacks through petition deprives other owners of due process)
- Washington ex rel. Seattle Trust Co. v. Roberge, 278 U.S. 116 (1928) (ordinance allowing location of home for aged and poor only with consent of neighbors was unlawful delegation of authority – violates due process)



Procedural Due Process Cases – II

- Lordship Park Ass'n v. Board of Zoning Appeals, 137 Conn. 84 (1950) (reliance on draft plan never formally adopted and lacking public review or determination of public interest in denying appeal violates due process)
- Welton v. Hamilton, 344 Ill. 82 (1931) (statute giving unbridled discretion to board of appeals and lacking rules or criteria for decision-making unlawfully delegated legislative authority of City Council)



Substantive Due Process

- ***Legitimate Governmental Purpose*** – Protection of health, safety, welfare, morals, property values, quiet enjoyment, etc.
- ***Rational Relationship*** – A conceivable, believable, reasonable relationship



Substantive Due Process Cases

- Cusack v. City of Chicago, 242 U.S. 526 (1917) (ordinance requiring consent of homeowners for billboards in residential areas did not violate due process – protects against fires, “unsanitary accumulations,” “immoral practices,” “loiterers and criminals”)
- Village of Belle Terre v. Boraas, 416 U.S. 1 (1974) (ordinance strictly defining “family” for purposes of restricting land uses to “single-family dwellings” did not violate due process)



Key Constitutional Concepts: Equal Protection

- ***Equal Protection*** - Treating those that are similarly situated the same, or making distinctions only on legitimate grounds
- Distinctions based on “fundamental right” or “protected class” status are unconstitutional unless compelling reason for differing treatment exists – usually fail.



Equal Protection Cases

- Eubank v. City of Richmond, 226 U.S. 137 (1912) (setbacks imposed by petition of neighbors violated equal protection)
- Moore v. City of East Cleveland, 431 U.S. 494 (1977) (ordinance strictly defining “family” for purpose of limiting household size to avoid traffic congestion, overcrowding, and undue financial burdens on school system violated equal protection because it impacted fundamental right of families to live together.)



Presumption of Validity

- Legislative actions are presumed valid and constitutional, and the burden is on the person challenging the action to prove otherwise.

Munn v. Illinois, 94 U.S. 113 (1876)
(business licenses)

Lionshead Lake, Inc. v. Township of Wayne, 10 N.J. 165 (1952) (minimum house size)



Validity of Zoning

- Village of Euclid v. Ambler Realty, 272 U.S. 365 (1926) (holding that the mere enactment and threatened enforcement of a general zoning ordinance that creates various geographic districts and excludes certain uses from such districts is a valid exercise of the police power and does not violate due process or equal protection)



Police Power

- Sovereign power of the state to regulate and control private behavior in order to protect and promote greater public welfare
- Police power must be delegated by state to counties and municipalities
- “Protection of health, safety, morals, convenience, and general welfare”



Local Government Powers

- *Dillon's Rule* – Local governments have only three types of powers:
 1. Those expressly granted;
 2. Those necessarily or fairly implied in or incident to powers expressly granted; or
 3. Those essential to the purpose of the corporation – not simply convenient.If there is any reasonable doubt whether a specific power has been granted – it has not.
- *Home Rule* – Local governments have broad authority and powers related to matters of local concern.



Validity of Zoning Conditions

- Ayres v. City of Los Angeles, 34 Cal. 2d 31 (1949) (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, such as between burden on roads and conditions requiring the developer to make road improvements and dedicate land for street usage)



Exclusionary Zoning

- Southern Burlington County NAACP v. Township of Mount Laurel, 119 N.J. Super. 164 (1972) (holding that under the N.J. Constitution, a community must provide its “fair share” of low and moderate income housing - pattern and practice of township in excluding multi-family dwellings was discriminatory)
- Village of Arlington Heights v. Metro Devel. Corp., 429 U.S. 252 (1977) (Racially discriminatory intent or purpose, rather than disproportionate impact, required to prove equal protection violation in zoning action)



Non-Conforming Uses

- Jones v. City of Los Angeles, 211 Cal. 304 (1930) (retroactive ordinance which causes substantial injury and prohibits operation of business which is not a nuisance (e.g., mental health facility) is invalid exercise of police power as it takes away right to operate legitimate business)
- Austin v. Older, 283 Mich. 667 (1938) (allows limitation on expanding non-conforming use)



First Amendment Issues

- Freedom of Speech. Especially important for sign regulations and adult entertainment.
- Freedom of Religion. Often based on Religious Land Use and Institutionalized Persons Act (RLUIPA) (prohibits “substantial burden” on religious exercise unless regulation is least restrictive means furthering a compelling government interest). Ordinary zoning is not (usually) a substantial burden.
- Can regulate religious facilities, signs, and adult entertainment, but carefully.



Sex and the City (Planner)

- Coleman Young Mayor of Detroit v. American Mini Theaters, Inc., 427 U.S. 50 (1976) (holding that local ordinance placing distance requirements between adult theaters and other “regulated uses” or residential areas did not violate Equal Protection Clause or serve as a prior restraint on First Amendment rights of free expression)



Takings

- Arises out of 5th and 14th Amendments to U.S. Constitution
- Regulations effect a taking of property without compensation if they “go too far”
Pennsylvania Coal v. Mahon, 260 U.S. 393 (1922)
- How far is “too far?”



Takings Cases

- Penn Central Transport. Corp. v. City of New York, 438 U.S. 104 (1978) (rejection of plans for modern office tower atop Grand Central Station not a taking because of among other things, rejection was consistent with comprehensive historic preservation plan and allowed for air rights' transfer)
- Penn Central Factors:
 - Economic impact on plaintiff.
 - Extent regulation interferes with “distinct investment-backed expectations.”
 - Character of government action.



Takings Cases - II

- Regulation that mandates permanent physical invasion of property violates 5th Amendment, even if it's just a thin television cable. Loretto v. Teleprompter Manhattan, 458 U.S. 419 (1982).
- Must look at entire parcel's value impact, not just the part that was "taken." Keystone Bituminous Coal v. De Benedictis, 480 U.S. 470 (1987).
 - Regulations that merely lower value are not takings.
 - Focus on what remains, not what was taken.



Takings Cases - III

- First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304 (1987) (holding that monetary damages must be paid where regulation results in a taking of all use of property – but, Court remanded to lower court to make the determination of whether taking had occurred here – it had not)



Takings Cases - IV

- Nollan v. California Coastal Commission, 483 U.S. 825 (1987) (established “rational nexus” test for exactions)
- Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992) (compensation required where regulation takes all economic use of land)
- Dolan v. City of Tigard, 512 U.S. 374 (1994) (extends Nollan “rational nexus” test through rule of “rough proportionality” to ensure extent of exaction is proportional to project impacts)



Moratoria and Takings

- Tahoe Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 122 S.Ct. 1465 (2002). (“Mere enactment” of moratorium does not effect a taking of property. Moratorium imposed during preparation of comprehensive land-use plan is not “categorical” taking of property requiring compensation under Federal Takings Clause.)



Recent Development in Federal Takings Analysis

- Agins rule that law impacting property rights must “substantially advance” legitimate state interest is essentially irrelevant to 5th Amendment takings analysis. Lingle v. Chevron, U.S.A., Inc., 125 S.Ct. 2074 (2005). Plaintiffs must allege:
 - Physical taking (Loretto);
 - Lucas-type total regulatory taking;
 - A Penn Central regulatory taking; or
 - Exactions violating Nollan or Dolan standards.



Judicial Taking?

- Stop the Beach Renourishment, Inc. v. Florida Dep't of Environmental Protection, et al. – 130 S. Ct. 2592 (2010)
- Supreme Court upheld state law provisions governing “renourishment” of eroded beaches and giving State ownership of renourished portion of beach.
- Four Justices agreed with “novel theory” that judicial ruling on a question of state property law can constitute a compensable taking





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Koontz v. St. Johns River Water Management District, 133 S. Ct. 2592 (2013)

- **Held:**

(1) The government may be held liable for a taking when it refuses to issue a land-use permit on the sole basis that the permit applicant did not accept a permit condition that, if applied, would violate the essential nexus and rough proportionality tests set out in *Nollan and Dolan*; and

(2) The nexus and proportionality tests set out in *Nollan and Dolan* apply to a land-use exaction that takes the form of a government demand that a permit applicant dedicate money, services, labor, or any other type of personal property to a public use.



Eminent Domain

- Berman v. Parker, 348 U.S. 26 (1954)

Concept of public welfare is broad and inclusive, includes “spiritual values as well as physical, and aesthetic values as well as monetary.”

Once question of public purpose is settled, legislature has discretion to take all parcels needed to avoid “piecemeal approach” to implementing redevelopment plan.



Eminent Domain - II

- Susette Kelo v. City of New London, 125 S.Ct. 2655 (2005).

City's exercise of eminent domain power in furtherance of economic development plan satisfies the "public purpose" interpretation of the "public use" requirement of the Takings Clause of the Fifth Amendment even though city does not intend to open land for use by general public. Affirms Berman v. Parker.



Telecommunications Law

- Federal Telecommunications Act of 1996
- 2009 FCC Declaratory Ruling
- City of Arlington, TX v. FCC, 133 S. Ct. 1863 (2013).
- Section 6406 (a) of the Middle Class Tax Relief and Job Creation Act of 2012
- 2014 FCC Broadband Deployment Order





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FCC Declaratory Ruling

November 18, 2009

- Clarified “one provider” rule – can’t deny application because one provider already has adequate service in jurisdiction because doing so is “unreasonable discrimination”
- Also set limits on “reasonable time” for local review and action (“Shot Clock”):
 - 90 days for collocation
 - 150 days for new structures
 - Initial 30-day completeness review



Challenge to FCC Ruling

- Several cities challenged FCC “Shot Clock” ruling, arguing FCC had no authority to determine what “unreasonable discrimination” and “reasonable time” meant in TCA.
- U.S. Supreme Court disagreed and held that FCC has the authority to interpret these ambiguous terms. City of Arlington, Texas v. FCC , 133 S. Ct. 1863 (2013).



Middle Class Tax Relief and Job Creation Act of 2012

“Notwithstanding Section 704 of the Telecommunications Act of 1996 . . . a state or local government may not deny and shall approve, any eligible facilities request for a modification of an existing wireless tower or base station that does not substantially change the physical dimensions of such tower or base station.” §6409(a).



2014 FCC Report & Order

- “Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies,” Published in Federal Register on January 8, 2015.
- Adopts exclusions from NEPA and Section 106 historic review for certain collocations on towers, utility structures, and buildings. Now in effect.
- Provides guidance on implementation of Section 6409(a) to become effective April 8, 2015.



2014 FCC Report & Order - II

- Defines “substantial change”:
 - Increase in tower height by more than 10% or 20 feet, whichever is *greater*
 - Extends outward more than 20 feet from existing tower, including existing modifications
 - Installation of more than standard number of cabinets, not to exceed four
 - Excavation outside current lease area
 - Defeats existing facility concealment elements
 - Does not comply with conditions of approval, provided such conditions do not contradict “substantial change” thresholds



“Eligible Facilities Request”



2014 FCC Report & Order - III

- Allows local governments to require applications
- “Reasonably related to determining whether request meets the requirements of [Section 6409(a)]”.
- 60-day time period (“shot clock”) for review and approval, with initial 30-day completeness review.
- Incompleteness determination must be in writing and specifically state deficiencies; tolls time period.
- Timeframe for review continues to run regardless of any local moratorium.
- **“Deemed granted”** remedy after 60 days.



TCA – “In Writing” Requirement

- Federal Telecommunications Act requires localities to provide written notice of denial and written reasons for denial of applications to build cell towers. Reasons need not be in the denial notice itself but must be stated with clarity in some other written record “issued essentially contemporaneously” with notice of denial. T-Mobile South, LLC v. City of Roswell, Georgia, ___ S. Ct. ___ (January 14, 2015).



References

- “AICP Exam Prep 3.0”
- *Planning* magazine
- APA’s online resources (Exam Prep Page)
- “Law of the Land” Blog:
<http://lawoftheland.wordpress.com>
- APA Planning & Law Division
- AICP Code of Ethics & Professional Conduct



Study Hard - Good Luck!

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