

Spring 2022 AICP Exam - Legal Review

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Making Great Communities Happen

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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 Prepare for and Pass the AICP Exam!
- Thoughts on Process
- Provide Overview – Not a Substitute for In-Depth Study
- Examine Areas of Focus for Test
- Identify References and Study Resources

Thoughts on Study Process



Areas of Focus

- General Terminology and Practices of Legal Profession
- Foundational Legal Principles and Decisions
- Statutory Basis for Planning
- Legal Context of Plan
- Codes & Regulations for Plan Implementation

General Legal Terminology and Practices

- Plaintiff/Defendant
- Appealable Decision
- Appellant/Appellee
- Constitution/Statute/Ordinance
- Case - Facts/Holding
- De Novo Proceeding
- Review on the Record
- Jury Trial/Bench Trial
- Finder of Fact



Foundational Legal Principles and Decisions

- U.S. Constitution
- State Constitutions
- Federal Laws & Regulations
- State Laws & Regulations
- Local Ordinances
- Case Law
- Due Process
 - Procedural
 - Substantive
- Equal Protection
- Takings
 - Rational Nexus
 - Rough Proportionality
- First Amendment Protections
 - Expression, Religion, Speech

Constitutional Concept – 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



Notable Procedural Due Process Decisions

- 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)

Notable Procedural Due Process Decisions - 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

Notable 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)

Constitutional Concept – 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.

Notable Equal Protection Cases

- Eubank v. City of Richmond, 226 U.S. 137 (1912) (setbacks imposed by petition of neighbors violated equal protection)
- 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)

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?”

Notable 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 transfer of air/development rights)
- Penn Central Factors:
 - Economic impact on plaintiff;
 - Extent regulation interferes with “distinct investment-backed expectations;” and
 - Character of government action.

Notable Takings Cases - II

- 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)

Notable Takings Cases - III

- 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 – “Lucas-type Taking”)
- 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)

Notable Case Regarding Takings & Moratoria

- 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.)

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

- 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
- 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.

Notable Recent Takings Case

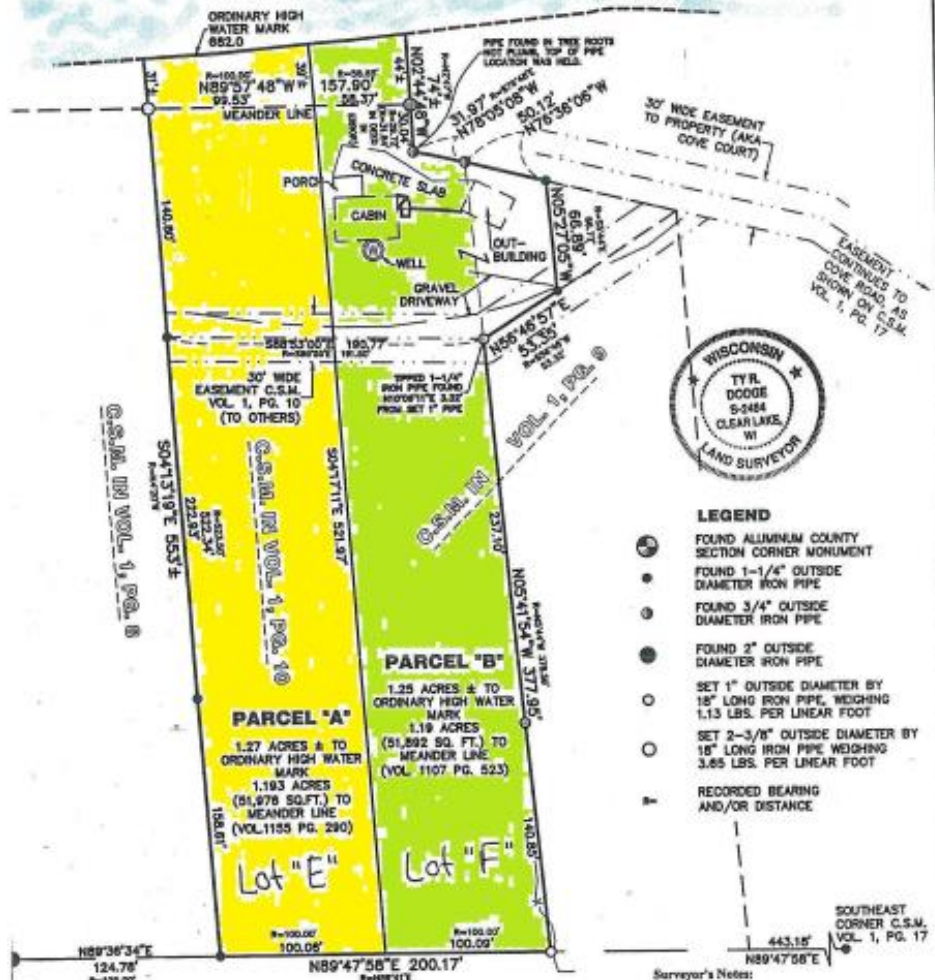
- Horne v. Dep't of Agriculture, 192 L.Ed. 2d 388 (2015)
- Physical takings case
- Takings clause applies equally to the physical appropriation of private property as to real property.
- “The Government has a categorical duty to pay just compensation when it takes your car, just as when it takes your home.”



Another Recent Regulatory Takings Case

- Murr v. Wisconsin, decided June 23, 2017
- Involved adjacent substandard lots (E and F) under common ownership adjacent to St. Croix River/Lake St. Croix
- Family vacation cabin located on Lot F
- State & local regulations prevented separate use or sale of adjacent lots under common ownership unless they had at least one acre suitable for development – “effectively merged” lots E and F
- Owners wanted to move cabin on Lot F and sell Lot E; sought, but were denied, variances from County Board of Adjustment
- Owners filed suit alleging regulatory taking of Lot E and sought compensation

LAKE ST. CROIX



- LEGEND**
- FOUND ALUMINUM COUNTY SECTION CORNER MONUMENT
 - FOUND 1-1/4" OUTSIDE DIAMETER IRON PIPE
 - FOUND 3/4" OUTSIDE DIAMETER IRON PIPE
 - FOUND 2" OUTSIDE DIAMETER IRON PIPE
 - SET 1" OUTSIDE DIAMETER BY 18" LONG IRON PIPE, WEIGHING 1.13 LBS. PER LINEAR FOOT
 - SET 2-3/8" OUTSIDE DIAMETER BY 18" LONG IRON PIPE WEIGHING 3.65 LBS. PER LINEAR FOOT
 - RECORDED BEARING AND/OR DISTANCE

PARCEL "A"
1.27 ACRES & TO ORDINARY HIGH WATER MARK
1.19 ACRES (51,892 SQ. FT.) TO MEANDER LINE (VOL. 1107 PG. 523)

PARCEL "B"
1.25 ACRES & TO ORDINARY HIGH WATER MARK
1.19 ACRES (51,892 SQ. FT.) TO MEANDER LINE (VOL. 1107 PG. 523)

Lot "E"

Lot "F"

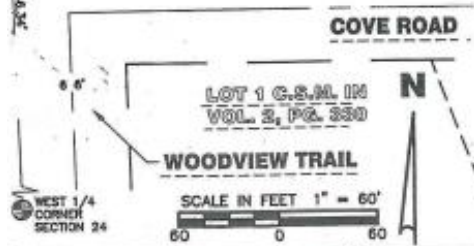
Surveyor's Notes:

1. This is a survey of existing property described in Warranty Deeds in Volume 1107 Page 523 and Volume 1155 Page 293.
2. Easements hereon are as shown on Certified Survey Maps and as described in the current deeds of record for the surveyed property and directly adjoining parcels.

I hereby certify that this survey was prepared by me or under my direct supervision, that it is true and correct to the best of my knowledge and belief, and that I am a registered land surveyor under the laws of the State of Wisconsin.

Tyr. R. Dodge, FLS #2484

PLV 12-28-03
12-1-05
Date



Murr v. Wisconsin - II

- Court considered whether lots E and F should be considered individually or as a single parcel for the purpose of deciding whether the prohibition against separate sale and development resulted in a taking.
- Court determined the ***combined*** parcel was the relevant unit for purposes of the takings analysis and that no taking occurred
- Court set out a “number of factors” to determine relevant parcel:
 - the treatment of the land under state law
 - the physical characteristics of the property
 - the value of the property under the challenged regulations





First Amendment Cases

- 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.
- May regulate religious facilities, signs, and adult entertainment, but must do so 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)

Key Recent Sign Case

- Reed v. Town of Gilbert, 135 S.Ct. 2218 (2015).
- A sign regulation “is content based if [it] applies to particular speech because of the topic discussed or the idea or message expressed.”
- Ordinances with different rules for signs based on topic, content, or subject matter are “content-based” regulations subject to “strict scrutiny” by a reviewing court

DURATION

Display Time Before	Sign Content	Display Time After
← Unlimited	Ideological	Unlimited →
← 4 ½ Months	Election	15 Days →
← 30 Days	HOA Event	→ 48 hrs
16 hrs ←	Real Estate Sale	→ 36 hrs
12 hrs ←	Religious Event	→ 1 hr

Other Notable Cases – Housing/Exclusionary Zoning

- Southern Burlington County NAACP v. Township of Mount Laurel, 119 N.J. Super. 164 (1972) (“Mt. Laurel 1”) (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)

Other Notable Cases – Eminent Domain

- 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, 348 U.S. 26 (1954).

Other Notable Cases – Telecommunications Law

- Federal Telecommunications Act of 1996 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, 135 S. Ct. 808 (2015).

Statutory Basis for Planning & Zoning

- Federal Program Legislation and Rules
 - Transportation
 - Housing
 - Community Development Block Grant Program
- State Enabling Legislation/Constitutional Provisions
 - Georgia Planning Act
 - Zoning Procedures Law
 - Model Codes
- City Charter/Code of Ordinances

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”

Basis for 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.

Legal Context of Plan

- Plan preparation may either be authorized or required under federal, state, and/or local enabling legislation or as part of a programmatic requirement
- Plan does not control land use unless specifically referenced in zoning ordinance



Codes & Regulations for Plan Implementation

- Zoning Ordinances
- Subdivision Ordinances
- Unified Development Code or Ordinance
- Housing Ordinances



References & Resources

- Chapter Presidents Council Study Manual for the AICP Certification Exam – Law Section on pages 18 - 75
- AICP Exam content Outline:
<https://www.planning.org/certification/examprep/subjectmatter/>
- Exam Reading List:
<https://www.planning.org/publications/report/9026883/>
- *Planning* magazine
- APA Planning & Law Division’s “Foundational Land Use Law Cases”
- APA’s PAS Reports and Policy Guides
- AICP Code of Ethics & Professional Conduct

Study Hard - Good Luck!

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