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Constitutional Issues in Land Use Regulation-- Introduction

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Introduction

By RICHARD B. CUNNINGHAM*

Constitutional issues pervade the law of land use regulation, yet it is only in the last decade that they have begun to receive recognition by the United States Supreme Court. The first of the "modern" cases, *Village of Belle Terre v. Boraas*,¹ was announced in 1974, a year that coincidentally was marked by the first volume of the *Hastings Constitutional Law Quarterly*.² In the intervening years the Court, and the *Quarterly*, have dealt with several aspects of land use controls, including state growth management,³ suburban exclusionary zoning,⁴ equal protection in rezoning,⁵ municipal regulation of private housing arrangements⁶ and commercial adult entertainment,⁷ historic preservation,⁸ municipal liabilities under the Civil Rights⁹ and Sherman Antitrust Acts,¹⁰ and troublesome

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1. 416 U.S. 1 (1974).

2. The first issue contained an analysis of growth limitation techniques. Note, *Battle Of The Heavyweights: In This Corner Environmental Rights And In The Far Corner Free Travel Rights*, 1 HASTINGS CONST. L.Q. 153 (1974).

3. Selinger, Van Dyke, Amano, Takenaka & Young, *Selected Constitutional Issues Related to Growth Management in the State of Hawaii*, 5 HASTINGS CONST. L.Q. 639 (1978).

4. Burns, *Class Struggle In The Suburbs: Exclusionary Zoning Against The Poor*, 2 HASTINGS CONST. L.Q. 179 (1975); Fox & Davis, *Density Bonus Zoning to Provide Low and Moderate Cost Housing*, 3 HASTINGS CONST. L.Q. 1015 (1976); Note, *So You Want To Move To The Suburbs: Policy Formulation And The Constitutionality Of Municipal Growth-Restricting Plans*, 3 HASTINGS CONST. L.Q. 803 (1976); Note, *Warth v. Seldin: The Substantial Probability Test*, 3 HASTINGS CONST. L.Q. 485 (1976).

5. *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252 (1977).

6. *Moore v. City of E. Cleveland*, 431 U.S. 494 (1977); Frame & Scorza, *Village of Belle Terre v. Boraas: Property Rights, Personal Rights and The Liberal Regime*, 2 HASTINGS CONST. L.Q. 935 (1975).

7. *Young v. American Mini Theatres*, 427 U.S. 50 (1976).

8. *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104 (1978).

9. *Monell v. Department of Social Servs.*, 436 U.S. 658 (1978).

10. *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389 (1978).

issues of procedural due process in local land use regulation.¹¹ Throughout that period, however, the paramount constitutional issue in the minds of the public and land use professionals has been the taking issue: the application of Fifth Amendment prohibitions against the "taking" of property without compensation.

As this Symposium was conceived, it was widely expected (and in some quarters, feared) that the case of *Agins v. City of Tiburon*¹²—the Court's first direct confrontation with compensatory taking in land regulatory matters—would produce significant advancement in this little understood but much-discussed area of our law. Those hopes (or fears) were dashed by the inconclusive result of *Agins*, and the *Quarterly* moved instead to place *Agins*, its heir apparent, *San Diego Gas & Electric Co. v. City of San Diego*,¹³ and the taking issue into the broader context of the scope of review and the modes of relief available to the judiciary when dealing with land use regulation litigation.

As local governments adopt increasingly sophisticated methods of land use control the judiciary has been forced to employ new methods of review, and where necessary, to design new forms of relief to deal with newly emergent issues. The breadth of local regulations is now so extensive that with only slight variations the same form of local regulation variously might be characterized as boldly innovative, discretely exclusionary or a blatantly invalid "taking" of property rights, giving rise to laudatory holdings of validity, cautious skepticism, prohibitory injunction, invalidation, or award of monetary damages based on state or federal constitutional or statutory grounds!

The range of factors that is involved is reflected by the articles herein; each addresses a related aspect of the problem. Many of the articles reflect the implicit belief that there will be no single answer fashioned in either the state or federal court systems, because of historic and pragmatic policies that will continue to be respected by our judiciary.

Fred Bosselman and Joel Bonder initiate the discussion of

11. *City of Eastlake v. Forest City Enterprises, Inc.*, 426 U.S. 668 (1976); Kahn, *In Accordance with a Constitutional Plan: Procedural Due Process and Zoning Decisions*, 6 HASTINGS CONST. L.Q. 1011 (1979).

12. 447 U.S. 255 (1980).

13. 146 Cal. Rptr. 103 (App. 1978), *appeal dismissed for lack of jurisdiction*, 49 U.S.L.W. 4317 (1981).

remedies with their contemporary examination of local government liability under developing civil rights and antitrust theories. The substantial potential for increased liability, despite many of the policies discussed elsewhere in this issue, leads to an examination of those aspects of a land use control system that can enable a local government to enjoy some of the immunity from liability that is accorded to the states.

Professor Daniel Mandelker incisively examines the "inversion" that land use case law has effected in the remedies typically available in private litigation; instead of the monetary damages that are the norm, land use cases regularly employ remedial injunctive relief against the government. That pattern is threatened by the recent interest in compensatory relief for inverse condemnation that has been popularized by the *Agins* and *San Diego* cases. Professor Mandelker asserts that sound policies dictate against inverse condemnation as a remedy for excesses of local regulation, and suggests instead that modifications in the judicial application of injunctive relief are a preferable alternative.

The policies and considerations suggested by Professor Mandelker are further developed by Professor Roger Cunningham who, after examining the problem of remedies as it developed in the California case law, was able to compare those results to the new rule suggested in Justice Brennan's important dissent in *San Diego*. Professor Cunningham suggests that Justice Brennan's forceful interpretation of the regulatory taking rule may indeed command wide support *if* it can be modified to include judicial invalidation among the legitimate means of reversing or halting those governmental actions that constitute a regulatory taking. Such a modification would be supported by the policies previously argued, and would be much more consistent with Supreme Court precedent. The undoubted difficulty that state and federal courts will encounter in attempting to apply the apparant teachings of *San Diego* will not be easily overcome, but Professor Cunningham proceeds to demonstrate that monetary damages for "temporary" takings may be a desirable partial solution, in a manner similar to that which is potentially available under the emerging section 1983 Civil Rights Act actions.

Professor Robert Wright demonstrates that traditional zoning, and the newer forms of land use control that it has spawned, are inherently exclusionary and must inevitably remain so. With spe-

cific reference to the taking issue, he argues that innovative implementation of the police power in furtherance of the public interest ought not be weakened by the necessity of "making retribution in damages for a resultant mistake." Other aspects of exclusionary zoning employed by some governments—"Citadels of Privilege"—are discussed by Annette Kolis, who argues that the exclusionary tendency of municipal regulation inevitably contributes to our present national housing supply dilemma. She demonstrates that many innovative courts have found that exclusionary ordinances can be selectively reviewed, often with an intensive examination of the resulting impact on regional public welfare. The difficulty raised by both articles concerns the means by which the judiciary must perform its unenviable task; where judicial review, either traditional or innovative, determines that local regulations violate applicable legal standards, what effective remedies are available to resolve the interests of the local governments, private landowners, and the larger concerns of the region?

The law of regulatory takings is finally moving beyond the simplistic approach represented by the first sixty years of its development, but it has only begun to engage the extensive questions of social and fiscal policy raised by the articles in this issue. We have yet to define adequately a taking, and we are only beginning to develop the techniques by which a taking is to be remedied. The process promises to be a lengthy one, in which this Symposium continues the *Quarterly's* tradition of encouraging constitutional analysis. It should be a welcome addition to the literature of land use law.