CHAPTER 1

Municipal Power to Regulate Land Use

Forms of Land Use Regulation

Public regulation of the use and development of land comes in a variety of forms and generally focuses on four aspects of land use:

1. the type of use, such as agricultural, commercial, industrial, or residential;
2. the density of use, manifested in concerns over the height, width, bulk, or environmental impact of the physical structures on the land;
3. the aesthetic impact of the use, which may include the design and placement of structures on the land; and
4. the effect of the use of the land on the cultural and social values of the community, illustrated by community conflicts over adult entertainment, housing for service-dependent groups (*e.g.*, low-income families and developmentally disabled persons), and whether the term "family" should be defined in land use regulations to include persons who are not related by blood or marriage.

The basic forms of modern land use regulation were established in the 1920s when the U.S. Supreme Court approved the concept of comprehensive zoning. Under comprehensive zoning, states authorize cities and counties to divide their land into zones or districts, and impose uniform regulations within those districts for land use, and building height, area, and setback.[1] Earlier, the Court had approved land use regulations prohibiting specific uses from particular areas when those uses were deemed harmful to people and land in the immediate vicinity.[2]

Zoning as a concept was tied to the notion of comprehensive planning. In theory, communities were supposed to prepare a comprehensive plan as a basis for land use regulation, and zoning was the device for implementing that plan. In practice, many communities dispensed with the formal planning process, at least in written form, and went straight to a zoning ordinance. The courts acceded to this approach by concluding that adoption

of a formal plan was not a condition precedent to a valid zoning scheme, so long as the zoning ordinance contained evidence that the community had engaged in a rational process of deliberation about the future of the community.[3]

Comprehensive zoning approach tended to impose a grid pattern on development, partly because of the uniformity-of-treatment-within-districts requirement, which was based on the premise that homogeneity of use was desirable and that different categories of land use should be segregated from one another. Comprehensive zoning was prospective in nature and thus was best suited for the regulation of new uses of previously undeveloped land. When cities imposed on developed areas of major cities, an extensive nonconforming use component was added in response to the reality of heterogeneous, market-focused development already in place in the cities.[4]

In the 1950s, a new generation of regulatory forms, popularized under the term *wait-and-see regulations*, took shape.[5] Flexibility was the goal. The basic planned unit development concept, in which the unit of regulation was shifted from an individual lot under traditional zoning to a relatively large parcel of land, became the norm for suburban development. Additional devices, including special district zoning, floating zones, overlay zones, floor area ratio, density transfer, and transfer of development rights also became popular. In the latter decades of the twentieth century and early years of the twenty-first century, additional regulatory techniques emphasizing flexibility and accommodation—rather than separation—of uses emerged, including performance zoning (regulating the impact of a particular use on air, light, noise, odors, and smoke, rather than the use itself), incentive zoning (*e.g.*, transit oriented development regulations offering more flexible regulations near transit stops and roadway intersections), and form-based codes and smart codes (regulating the location, size, and type of building, rather than its use, on a particular site).[6] These new forms of zoning discarded the restrictive and passive approach of traditional zoning in favor of an active approach that used zoning "as an incentive to further growth and development of the community rather than as a restraint."[7]

Development of land use regulation grew alongside subdivision regulations. These regulations began as means to ease the process of subdividing land for development, and the regulations grew into a system for ensuring that public facilities such as streets, roads, sewers, and parks would be in place for the predicted growth. In some cases, the regulations placed the costs of those public facilities on the persons responsible for the new development.[8]

The 1980s saw another refinement to the basic land use scheme in exaction as a form of land use regulation. Exactions come in two essential forms: required dedications of land or property interests in land and required payment of money through impact fees, in lieu fees, linkage fees, and the like. The purpose of exactions is to impose some or all public costs associated with a particular facet of land use on the persons putting the land to use, that is, to exact some form of compensatory land use or payment to offset the

impact of a particular use for the land.[9] Local governments also regulate land use through the authority granted by state urban redevelopment laws. Land use regulation pursuant to these statutes is not limited to the use of zoning authority.[10]

From the late 1980s through the 1990s, the power to use exactions as a form of regulation was curtailed somewhat by judicial decisions restricting the situations in which an exaction was considered fair exercise of police power. The Supreme Court established essential nexus and rough proportionality standards that require municipalities to show by individualized determinations that the public impact of proposed use and the impact of exaction on the landowner proposing the use are related.[11] The Supreme Court in 2013 extended these standards, popularly known as the *Nollan/Dolan* standards, to impact fees and to cases in which a land use permit request is denied because the landowner refused to accept certain conditions attached to the permit.[12]

In 1995, the American Planning Association embarked on a major effort, the Growing Smart project, to persuade states and local governments to modernize land use planning and development laws. Major themes of Growing Smart include more effectively linking development regulations to formal planning, encouraging more cooperative approaches through regional and neighborhood collaborative planning, and responding to siting difficulties for locally undesired land uses (LULUs) such as adult businesses, group homes, landfills, and multifamily housing. The effort culminated in the two-volume set *Growing Smart Legislative Guidebook*.[13] In advocating reform of land use planning and regulation statutes, the authors of the book identified four main reasons why, in their view, the 1920s legislation that formed the basis of state and local enabling legislation was no longer effective: "(1) the growth of a more significant intergovernmental dimension for planning . . . (2) a marked shift in society's view of land . . . (3) a more active citizenry . . . (4) a more challenging legal environment."[14] Specific Growing Smart legislative recommendations will be discussed throughout this book.

The Police Power

The authority to regulate the use and development of land is derived from the police power of the state.[15] Police power is the term for general governmental power to protect the health, safety, morals, and general welfare of the citizenry. Perhaps the most articulate description of the police power concept is contained in the opinion of Justice Douglas upholding an urban renewal plan for the District of Columbia:

> We deal, in other words, with what traditionally has been known as the police power. An attempt to define its reach or trace its outer limits is fruitless, for each case must turn on its own facts. The definition is essentially the product of legislative

> determinations addressed to the purposes of government, purposes neither abstractly nor historically capable of complete definition. . . . Public safety, public health, morality, peace and quiet, law and order—these are some of the more conspicuous examples of the traditional application of the police power to municipal affairs. Yet they merely illustrate the scope of the power and do not delimit it. . . . The concept of the public welfare is broad and inclusive. The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled.[16]

While the power to protect the citizenry is extremely broad, specific provisions of the Fifth and Fourteenth Amendments to the Constitution—prohibiting the taking of private property for public use without just compensation;[17] proscribing the deprivation of life, liberty, or property without due process;[18] and guaranteeing all persons the equal protection of the laws—[19]place important limits on governmental use of the police power. The Supreme Court in 1894 provided a classic statement on the limitations of the police power:

> It must appear, first, that the interests of the public . . . require [governmental] interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals.[20]

Land use regulation then, as an exercise of the police power, may be imposed only (1) for valid public purposes, (2) through means reasonably tailored to those purposes, and (3) in a manner that does not impose excessive costs on individuals. Courts traditionally have deferred to the legislature on the reasonableness of a particular form of land use regulation, refusing to second guess the legislature if the question is "fairly debatable."[21]

The Supreme Court set the tone for a deferential approach in 1926 in *Village of Euclid v. Ambler Realty Co.*:

> The ordinance, now under review, and all similar laws and regulations, must find their justification in some aspect of the police power, asserted for the public welfare. The line which in this field separates the legitimate from the illegitimate assumption of power is not capable of precise delimitation. It varies with circumstances and conditions. A regulatory zoning ordinance, which would be clearly valid as applied to the great cities, might be clearly invalid as applied to rural communities. In solving doubts, the maxim "sic utere tuo ut alienum non laedas," which lies at the foundation of so much of the common law of nuisances, ordinarily will furnish a fairly helpful clue. . . . A nuisance may be merely a right thing in the wrong place, like a pig in the parlor instead of the barnyard. If the validity of the legislative

> classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control.[22]

A question is said to be fairly debatable when "its determination involved testimony from which a reasonable [person] could come to different conclusions." A decision is fairly debatable if it is "supported by substantial evidence on the record taken as a whole."[23]

The Supreme Court's willingness to set aside a zoning ordinance as it was applied to a particular tract of land in *Nectow v. City of Cambridge*,[24] only two years after *Euclid* was decided, suggested that the Court was prepared to supervise the application of local land use regulations. For the next forty-six years, however, the Court refused to review land use regulatory decisions except for the 1962 case of *Goldblatt v. Town of Hempstead,* in which it sustained an ordinance prohibiting excavations for sand and gravel below the water table.[25] The ordinance was enacted under general police powers rather than zoning powers.

In 1974, the Supreme Court returned to regulating local land use controversies in *Belle Terre v. Boraas*.[26] Over a strong dissent that presaged one of the continuing controversies in local land use decisions, the Court upheld a definition of family that effectively prevented a landowner from renting a single-family house to six unrelated college students. The Court held that the village's regulation was a reasonable exercise of its police power. Justice Marshall, in dissent, saw the regulation as an example of exclusionary zoning that unconstitutionally deprived college students of their personal freedom to associate with whomever they chose.[27]

Four years later, in *Penn Central Transportation Company v. New York City*,[28] the Court upheld New York City's landmark preservation ordinance against a challenge that the ordinance amounted to an unconstitutional taking of property. In doing so, the Court articulated a three-factor test for making ad hoc, fact specific decisions regarding regulatory takings challenges. Courts were directed to consider (1) the character of the government action being challenged; (2) the economic impact of the challenge on the landowner, in particular; and (3) "the extent to which the regulation has interfered with distinct investment-backed expectations."[29]

In the years following *Penn Central*, the Supreme Court has considered local land use issues regularly but has struggled to articulate clear rules for determining when land use regulations become takings. In *Agins v. City of Tiburon*, the Court established an alternative two-part test under which public land use regulations must (1) substantially advance legitimate state interests and (2) not deny economically viable use of land,[30] but the Court later abandoned the "substantially advances" path in *Lingle v. Chevron USA, Inc*., as an unsuitable "test for determining whether a regulation effects a Fifth Amendment taking."[31] The Court also concluded, in *First English Evangelical Lutheran Church v. County of Los Angeles*, that compensation is the appropriate remedy when regulation affects a taking,[32]

and held in *City of Cleburne v. Cleburne Living Center* that regulations imposing stricter usage standards geared to particular classes of people (*e.g.*, the developmentally disabled) may not be based on irrational fear of such people.[33] Landowners seeking to challenge the application of land use regulations to their property in federal court must meet a strict ripeness test by establishing that they have (1) obtained a final decision from local authorities and (2) exhausted their remedies under state law.[34] In *Loretto v. Manhattan CATV Corp.*, the Court held that compensation must be paid when regulations deprive landowners of the power to exclude,[35] and in *Lucas v. South Carolina Coastal Council,* compensation must be paid when such regulations deny landowners all economically viable use of their property.[36] The Court established, in two cases seven years apart (*Nollan v. California Coastal Commission* and *Dolan v. City of Tigard*) the Nollan/Dolan rule requiring landowners to contribute property interests to the public as conditions for development approval bearing an "essential nexus" to the desired planning goal that is in "rough proportionality" to the expected impact of the proposed use.[37] Approximately twenty years later, the Court, in a 2013 decision *Koontz v. St. Johns River Water Management District*, extended *Nollan* and *Dolan* scrutiny to denials of otherwise qualified permits because the landowner refused to accept conditions attached to the permit, such as payment for offsite mitigation as a condition to development of wetlands.[38] Landowners may challenge land use restrictions even though the restrictions were in effect when they acquired their property,[39] but in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Commission,* the Court held that moratoria on land development are not subject to a per se takings test. Instead moratoria must be analyzed under the *Penn Central* three-factor test.[40] These cases are discussed in chapter 3.

Delegation by the State

Police power belongs to state governments, but all states, except Hawaii, have delegated the power to impose land use regulations to cities and counties.[41] Hawaii has retained zoning power over most of its land.[42] This delegation has been accomplished in two ways: (1) general delegation of police power through constitutional or legislative authority to enact home rule charters[43] and (2) broad enabling statutes authorizing zoning, subdivision regulations, and other forms of land use control.[44] The Standard State Zoning Enabling Act, first published in mimeographed form in 1922, adopted the concept of local control over land use regulation.[45] Most first-generation state zoning statutes were based on this act, although building zone laws had been in existence in the United States since the turn of the twentieth century (comprehensive zoning began in New York City in 1916).[46] One year before the Supreme Court's approval of comprehensive zoning in *Village of Euclid v. Ambler Realty Co.*,[47] records maintained by the U.S. Department of Commerce indicated

that thirty-five states and the District of Columbia authorized zoning, and 221 municipalities containing approximately forty percent of the urban population had adopted the zoning technique.[48]

The stamp of approval the Supreme Court gave to comprehensive zoning removed most of the constitutional questions concerning the validity of the comprehensive zoning concept. The Supreme Court failed, however, to articulate a coherent national law regarding the extent to which police power can be used to regulate land use through zoning. As a result, state courts were thrust into the role of overseers of a complex, inefficient, and highly emotional legislative-administrative system that can trap the inexperienced and frustrate the experienced person.[49]

For the most part, courts have not questioned the propensity of local governments to zone in response to perception of problems in their communities, even though zoning decisions may show little or no regard for the effects of those decisions on people and land outside their boundaries. However, social issues, such as the lack of affordable housing in reasonable proximity to jobs, have increasingly caused state courts to remind local governments that delegated land use regulatory power is a state power meant to foster the general welfare of the citizens of the state and not just those residing within the local government's environs.[50]

The Supreme Court's renewed interest in reviewing zoning or land use legislation has resolved several issues, such as payment of compensation for regulatory takings,[51] as well as compensatory per se takings resulting from government-sanctioned permanent physical occupations[52] and from regulations that deny landowners all economically viable use of their land.[53] The Court's continued reliance on ad hoc, fact-based application of analytical factors, however, has prompted state and federal lawmakers to propose, and in some cases to enact, legislation that defines the point at which a particular exercise of police power goes too far.[54] Prompted in part by the takings controversy, a group of land use experts has drafted new model laws to assist states and municipalities seeking to update outmoded statutes.[55]

Unlawful delegation of the power to zone may invalidate a zoning ordinance enacted pursuant to such delegation. In *County of Fairfax v. Fleet Industrial Park Limited Partnership*, the Virginia court struck down a zoning ordinance on the grounds that the state statute authorizing creation of a highway transportation improvement district unlawfully required unanimous consent of affected landowners before the enactment of a zoning change within the district.[56] State zoning laws commonly require a higher level of legislative approval in the municipality to enact a zoning ordinance in the event of a certain level of protests by adjacent landowners.[57] Under the nondelegation analysis of *Fairfax*, one can argue that the statutes impermissibly grant private landowners excessive control over zoning legislation, although *Fairfax* is distinguishable in that the statute created a veritable veto/consent power in the private landowners.

A corollary to the delegation issue is the question of local authority to adopt legislation by initiative and referendum. For example, in *La Ray Realty v. Town Counsel of Cumberland*,[58] the Rhode Island court struck down a local zoning ordinance adopted by initiative and referendum: the process did not include a public hearing as required by state enabling legislation,[59] essentially holding that municipal referendum authority was superseded by state notice and hearing requirements. Thus, while police power to zone and regulate subdivision of land may be delegated by the state, such delegation is not absolute and must be exercised in accordance with the statutory conditions on the delegation.

Challenges to Local Land Use Decisions

Challenges to a particular land use regulation as an invalid exercise of police power are generally brought in one of two ways: (1) a direct or facial challenge to the ordinance in its entirety on the grounds that "the existence and maintenance of the ordinance, in effect, constitutes a present invasion of . . . property rights and a threat to continue it," in violation of the Fifth and Fourteenth Amendments of the U.S. Constitution[60] or (2) a challenge that the ordinance, as applied in a particular manner to a particular tract of land, is an arbitrary exercise of police power because it does not bear a substantial relation to the public health, safety, morals, or general welfare, operates to deny the equal protection of the law otherwise amounting to a confiscation of private property.[61]

Because most state constitutions contain similar provisions regarding due process, equal protection, and taking of property, challenges may be brought under either the federal Constitution or applicable state constitutions. An alternative method of obtaining federal jurisdiction has been to allege that the land use regulation in question amounts to a deprivation of property in violation of the federal civil rights statutes.[62]

Landowners understandably may be concerned about the cost and delays associated with an as-applied challenge to a land use regulation. Appropriate groundwork must be laid by applying for the requisite planning permission or permit, having that application rejected, and then appealing the rejection through the applicable administrative machinery. The process may take months or even years and can produce an almost irresistible temptation to mount a facial challenge to the regulation instead. The Supreme Court's extreme reluctance to reach the merits of a dispute before the case is ripe for decision,[63] however, coupled with the tradition of judicial deference to legislative determination of the reasons for and the means to accomplish land use regulation suggest that counsel should weigh very carefully the costs associated with the as-applied challenge against the significant probability that facial challenges to land use regulations will fail.[64]

Presumption of Legislative Validity

Because states have chosen to delegate police power to regulate land use for local governments through enabling legislation,[65] courts have treated the decision to engage in land use regulation (and, for the most part, the decisions implementing specific land use regulatory techniques) as legislative in character.[66] For that reason, courts have generally exercised restraint in reviewing land use regulatory decisions by applying the presumption of legislative validity principle.[67]

When the presumption of legislative validity is coupled with the courts' recognition that "the line which in this field separates the legitimate from the illegitimate assumption of power is not capable of precise delimitation,"[68] the result is the well-known "fairly debatable" rule.[69]

The judicial deference that flows from these concepts has been reaffirmed on numerous occasions by the Supreme Court, with the strongest reaffirmations coming at approximately thirty-year intervals:

> Subject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive. . . . The role of the judiciary in determining whether . . . [police] power is being exercised for a public purpose is an extremely narrow one.[70]

In 1984, citing the 1954 *Berman v. Parker* opinion quoted above, Justice O'Connor concluded that

> the [constitutional requirement] is satisfied if the . . . [state] Legislature rationally could have believed that the [Act] would promote its objective. . . .

Judicial deference is required because, in our system of government, legislatures are better able to assess what public purposes should be advanced by an exercise of the taking power.[71]

Some state courts do not apply the presumption of legislative validity to local land use regulatory decisions, which appear to be legislative in character because they are made by the local legislative body but really are quasi-judicial or administrative in nature because they either resolve a conflict over proper use of a particular tract of land or implement a land use regulatory policy by, for example, granting or refusing to grant a special-use permit.[72]

Proper Governmental Interest

One of the fundamental limitations on public regulation of land use is that the regulation must foster a proper governmental interest or public purpose. The starting point for determining whether a land use regulation serves a proper public purpose is in the legislation itself. As noted previously, courts in general, and the Supreme Court in particular, have been extremely reluctant to second-guess the legislature on this point. The Supreme Court's attitude may be summed up in the following statement:

> The public use clause is thus "coterminous with the scope of a sovereign's police powers." . . . Courts will not substitute their judgment for the legislature's judgment as to what constitutes a public use "unless the use be palpably without reasonable foundation."[73]

Since the 1880s, the Supreme Court has considered land use regulation cases and their relationship to police power.[74] During that time, land use regulation has wavered from an emphasis on preventing harm[75] to a desire to confer a benefit on the public.[76] Courts have generally accepted these changes, at least as long as the regulation in question is rationally related to legitimate state interests.[77]

The fact that the judiciary branch is willing to defer, in general, to legislative determinations of public purpose does not mean that the courts will serve solely as a rubber stamp for any legislative pronouncement on the matter. Land use regulations that serve essentially private interests will not be sustained,[78] nor will those seeking to avoid some municipal obligation.

For example, while courts have had little difficulty in concluding that the common legislative goal of discouraging "premature and unnecessary conversion of open-space land to urban uses" is a legitimate public purpose,[79] courts have repeatedly struck down zoning regulations enacted "for the sole purpose of depressing the value of property that the municipality seeks to acquire through condemnation."[80] The New Jersey Supreme Court applied an objective test in consideration of the terms of an ordinance, its operation and effect, and the context in which it was enacted to conclude that the purpose of a downzoning ordinance was invalid while at the same time declining to second-guess the motives of the persons who enacted it.[81]

Reasonable Means

In addition to serving proper governmental interest, land use regulation must have a reasonable connection to the particular governmental interest being advanced.[82] The requirement

that a municipality choose a reasonable means for accomplishing its regulatory purpose has been stated in a number of ways: the regulation must bear a rational relation to the health and safety of the community,[83] the regulation must be reasonably necessary to the effectuation of a substantial public purpose,[84] the means of regulation must not be irrational,[85] the regulation must substantially advance legitimate state interests,[86] and the regulation must be roughly proportional to the impact of the regulated use on the public.[87]

As with the proper governmental-interest standard, the traditional judicial attitude toward the reasonable-means requirement has been one of great deference to legislative pronouncements on the subject. The strongest expression of judicial deference with respect to the means chosen to accomplish land use regulation is found in the words of Justice Douglas in *Berman v. Parker*:

> Once the object is within the authority of Congress, the means by which it will be attained is also for Congress to determine. . . . Once the question of the public purpose has been decided, the amount and character of land to be taken for the project and the need for a particular tract to complete the integrated plan rests in the discretion of the legislative branch.[88]

The traditional attitude of judicial deference stems from a desire not to second-guess the wisdom of a particular legislative program or technique.[89] If, however, a regulation is applied to a parcel of land (*e.g.*, a small land tract sitting on the boundary between zoning districts) in such a way as to deny the owner reasonable use of that tract, courts have been willing to evaluate the purpose of the regulation and the means chosen and strike the regulation (means) if they are not persuaded that the regulation will affirmatively promote the purpose.[90]

The Court has moved away from its traditional deference for certain types of land use regulations. In *City of Cleburne v. Cleburne Living Center*, the Court struck down a regulation requiring the owners of group homes for the developmentally disabled to obtain special permits to operate in multifamily districts even though other types of institutions and multifamily housing were not required to obtain the special permits.[91] After declining to impose a standard of judicial scrutiny higher than the rational basis standard because the mentally retarded did not constitute a class requiring special protection, the Court nevertheless examined closely the means chosen (special-permit requirement) to effectuate land use regulation of group homes and concluded that it was not rationally related to a permissible public purpose but instead "appears . . . to rest on an irrational prejudice against the mentally retarded."[92]

In *Nollan v. California Coastal Commission*, the Court invalidated a requirement of the California Coastal Commission that landowners dedicate an easement of lateral access along their beachfront property to preserve a public right of access to the beach

guaranteed by the California constitution as a condition to receipt of a permit to demolish and replace a beachfront cottage.[93] In so doing, the Court concluded that the regulation "utterly fails to further the end advanced as the justification (for the regulation)."[94] Justice Scalia, writing for the majority, argued that when regulations are challenged as amounting to takings of property in violation of the Fifth Amendment,[95] the standard is not one of total deference to legislative pronouncements but rather one of scrutinizing whether the means chosen constitute a

> *substantial* advancing of a legitimate State interest. We are inclined to be particularly careful about the adjective where the actual conveyance of property is made a condition to the lifting of a land use restriction, since in that context there is heightened risk that the purpose is avoidance of the compensation requirement, rather than the stated police power objective.[96]

In *Dolan v. City of Tigard,* the Court created another hurdle for municipalities attempting to exact a benefit from the landowner in exchange for allowing a desired use.[97] In *Dolan,* the zoning board required a dedication of ten percent of the owner's parcel in exchange for the right to expand an existing store and to pave a gravel parking lot. Dolan objected, claiming that the board was essentially taking her property without compensation. The Supreme Court agreed with her. Though the Court noted that the required exactions arguably could be said to have an essential nexus to the public purpose of preventing overcrowding, the exactions were still unconstitutional because, in the Court's view, they were not "roughly proportional" to the impact of the proposed use on the purported public interest.[98] In *City of Monterey v. Del Monte Dunes*, the Court confined the *Dolan* rough-proportionality rule to exactions: a particular type of land use regulation "conditioning approval of development on the dedication of property to public use."[99] In *Koontz v. St. Johns River Water Management District*, the Court extended the *Nollan/Dolan* "essential nexus/roughly proportional" standards to monetary exactions such as a requirement to pay a loss mitigation fee as a condition to receipt of a special use permit to develop land within a wetlands area.[100]

Impact on Individuals

An important element in any analysis of land use regulation validity is an evaluation of the impact of the regulation on individual landowners and other interested parties. Evaluation is important because of the restrictions imposed by the Fifth and Fourteenth Amendments on the power of government to interfere with the lives of individuals. In the classic words of Justice Holmes,

> a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change.[101]

One of the essential underpinnings of the American system of government is that individuals will not be asked to shoulder more than a reasonable share of the cost of public goods. In the context of property law, this means that the impact of land use regulations must not deprive landowners of all reasonable use of their property without compensation.[102] The impact of a land use regulation assessment raises two questions: What reasonable economic use can be made of the land? What property rights does the landowner have?

When landowners enjoy "an average reciprocity of advantages"[103] as a result of a land use regulation, such as an increase in personal safety or a healthier environment, the land use regulation causes a decrease in the market value of the property that will not, by itself, have such an impact as to lead to the conclusion that police power cannot be exercised in the manner proposed or that, if it is to be exercised in such manner, compensation must be paid.[104] The key question is whether, despite a substantial diminution in value, any economically viable use remains, based on the owner's reasonable expectations.[105]

Likewise, if a landowner does not have a property right to act in a certain manner (*e.g.* using his or her land in a way that causes harm to his or her neighbors) or making full use of adjoining navigable waterways), a regulation that prevents such use is not proscribed by the Constitution, even though the impact on the landowner may be so great as to deprive him or her of all use of the property.[106]

When evaluating the impact of land use regulation on individual landowners, courts will also consider the character of the government action. Thus, if the government action constitutes a direct physical invasion or direct interference with the power to transfer the property interest in question, the courts are likely to conclude that the regulation amounts to a taking of property requiring compensation, even though the effect on the value or use of the property may be slight.[107]

Conversely, when the regulation in question does not amount to a physical occupation nor an interference with the power to transfer property, the determination of whether the regulation permits any reasonable economic use be made of the land will be based on the impact of the regulation on the entire property interest held by the landowner rather than on any segment or "strand of the property bundle," even though the impact on a particular segment or strand may be great.[108] Challenges to land use regulations as regulatory takings are not limited to persons who owned affected property when the challenged regulation was enacted but may also be brought by landowners who acquired the affected property after the regulations were adopted.[109]

The Land Use Triangle[110]

Although land use litigation is often framed as a contest between a landowner and a land use regulator,[111] scholars and practitioners have recognized a third party in most land use conflicts.[112] an owner's proposed use of a particular tract often impacts two different groups of people. Adjacent landowners and residents experience the physical and aesthetic impacts of the size, shape, and density of specific land use. A larger group of people, including residents and nonresidents of the governmental entity in which the land is located may also experience a direct or indirect financial impact in the form of increased or decreased taxes. The degree of the impact on taxes depends on whether the particular land development increases the need for public services without a corresponding increase in the tax base or whether the project increases the tax base without a corresponding increase in the demand for public services.[113] It is also possible for this larger group to experience variations in choice of housing or employment, depending on the nature of the particular development.[114] These groups will also experience the environmental effects of the development.

These groups and the owner/developer may expect the governmental entity responsible for regulating land use to represent their best interests when making land use regulatory decisions. When subgroups emerge either to support or oppose a land development project, the land use regulator entity may find itself caught in the middle of a struggle between competing values. The resulting relationship resembles a triangle with the owner/developer on one side, the neighbors on another, and the community at large on the third.[115] All three groups are locked into this relationship because of the external effects of a land development project, which varies with the nature and size of the development.[116]

As with other relationships in which competing and common interests exist, owner/developers, neighbors, and the community at large need to support one another for land use relationships to succeed. Although land does not depreciate in the way a building does, it is a finite resource that can be wasted by unnecessary or harmful development. When poorly executed development plans waste land, it may be lost for the current generation because of the enormous cost and difficulty of reclaiming such land. Although landowners and developers make the decisions that produce land waste, they are also members of the community at large. As such, they too will benefit from land use regulations that effectively prevent land waste, and thus the community should urge developers to support such regulations.[117]

Likewise, land use regulators need property users and developers. With the exception of land set aside for public parks and wilderness areas, legislators generally aim their regulations at balancing desirable and undesirable uses of privately owned land to benefit society. If regulations are so onerous that they discourage even desirable development, the

regulations do not benefit the community. Thus the reaction of developers to land regulation provides important feedback to legislators concerning the utility of their regulations.

The availability of compensation as a remedy for taking cases is a significant addition to land use law. The compensation remedy supports those traditional arguments that accept no difference in principle between "taking by dispossession and taking by excessive regulation."[118] In addition, compensation can serve as a necessary check on government and as a means of retaining (or perhaps restoring) the confidence of the people in their governments.[119] Finally, compensation can be viewed as the price for public willingness to accept the "innovative," "flexible," and "comprehensive" land use regulations that legislators today believe are necessary.[120]

The American system of property law, with its emphasis on private ownership of land, has two basic goals: (1) to maximize and protect individual freedoms and (2) to effectively utilize land. To achieve these goals, the chief actors in the American property law system—landowners, developers, users, neighbors, and regulators—must respect one another's interests. Additionally, state and local governments must provide the community with appropriate vehicles for asserting these competing interests. Ideally, these interests should exist in equilibrium. If one is perceived to have an unfair advantage, the cooperation necessary for the system's functioning breaks down.[121]

Practitioner Perspectives

The Supreme Court has resolved some but not all of the constitutional questions raised by modern land use regulations. It is now clear that compensation is an available remedy when the application of a land use regulation violates the constitutional proscription against taking of private property.[122] No set formula to determine what constitutes a regulatory taking has been established, nor is one likely to be established.[123] Most land use regulatory takings cases are extremely fact sensitive. When one analyzes the effect of a particular regulation, the general rule remains that the entire parcel is the correct denominator rather than a mere portion of the land, a segment of the property bundle, or a period of time.[124] Each case should be meticulously examined on its own facts, and the setting for the regulatory application should be given proper consideration.[125]

Even though a regulation or restriction may unquestionably provide widespread public benefit, the government may still have to compensate a property owner if the beneficial law has too severe an effect on his or her interests.[126] To do so, landowners must establish loss of all economic viability, rather than loss of the best economic use, to establish a compensable regulatory taking.[127] The application of a particular type of land use regulation to a specific parcel or area must be based on carefully drawn land use plans that identify specific governmental objectives and indicate that the land use techniques chosen have

a rational connection to the objectives of the plans.[128] Although the fairly debatable rule has not been abolished, courts have been instructed to pay closer attention to the nexus between ends and means of land use regulations.[129]

Local governments seeking dedications of land for public use or payments of money (*e.g.*, wetlands loss mitigation fees) as conditions for approval of particular development proposals must establish that not only does an "essential nexus" exist between the proposed regulation and the perceived public benefit but also a "rough proportionality" exists between any infringement on an owner's rights and the public benefit derived from such an infringement.[130]

Recognition of the compensation remedy has raised the stakes for land use disputes. Although the Court has taken a renewed interest in protecting the rights of property owners, it has by no means eliminated the greatest obstacles a landowner faces when trying to obtain compensation. Owners must still show a denial of all economically viable use, that their claim is ripe, either because the regulating authority has made a final decision[131] or waiting for a final decision would be futile.[132] The Court still demonstrates a willingness to approve most land use regulatory techniques, especially where environmental issues are concerned. The complex nature of modern land use regulation requires practitioners to pay particular attention to the impact of local land use regulations on contract negotiations, relationships with neighboring landowners and residents, and effective resolution of disputes.

An important issue facing practitioners in contract negotiations for developable land is the allocation of risk regarding land use regulation. Absent an acquisition of a vested right in a particular zoning classification, landowners assume the risk that land use regulations may change.[133] The seller may not be too concerned about this possibility, but the developer/buyer should and usually will be quite concerned. Obtaining a final decision from local officials regarding regulatory posture assumed with respect to a particular project can be a difficult, frustrating, and time-consuming process, but it is one that is necessary in any constitutional challenge to an adverse decision.[134] The risk of adverse land use regulations must be considered at the contract negotiations stage because virtually any proposed change in the use of a tract will require regulatory review of some type.

This problem can be handled in several ways:

1. Seller obtains necessary zoning classifications and gives warranties surviving settlement respecting zoning classifications, permitted densities, availability of utilities, moratoria and growth caps, and environmental quality.
2. Buyer's duty to perform under the purchase contract is made conditional upon satisfactory determination of the feasibility of the proposed development, including an analysis of the applicable land use regulations. The length of time for performance of the feasibility study is an important item for negotiation, with the seller seeking an

early determination that the sale will be completed and the buyer seeking to maximize the time before he or she is required to make the decision whether to move forward with the purchase. The more complicated the project, the greater the need for adequate time to evaluate project feasibility. The feasibility study period, however, can be a disguise for an inexpensive option that takes property off the market and effectively places it in the developer's inventory until the right time for development.

3. Buyer purchases an option for a price usually approximating the rental value of the land for the term of the option (for example, 90 days, 180 days, one year) and proceeds through the land use regulatory process. The decision of whether to exercise the option is made after the buyer obtains necessary land use classifications and permits or when the buyer is in a position to evaluate his or her prospects of obtaining such permits.

Relationships with neighbors and resolution of disputes are discussed in later chapters.[135]

Notes

1. Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926); Gorieb v. Fox, 274 U.S. 603 (1927). Traditional forms of land use regulation are limited to actual uses on the land. Virtual uses, such as Internet transmission of video images from a residence, have been held to be outside the purview of a local zoning regulation. Voyeur Dorm, L.C. v. City of Tampa, 265 F.3d 1232 (11th Cir. 2001).

2. Hadacheck v. Sebastian, 239 U.S. 394 (1915) (prohibition of brickmaking in the city of Los Angeles); Reinman v. Little Rock, 237 U.S. 171 (1915) (prohibition of livery stables in certain areas of the city).

3. *See, e.g.,* Town of Bedford v. Village of Mt. Kisco, 33 N.Y.2d 178, 188–189, 306 N.E.2d 155, 160, 351 N.Y.S.2d 129, 138 (1973) ("None of the authorities cited to us stands for the proposition that formal amendment of a comprehensive plan must precede its adaptation to current conditions and planning considerations. . . . It is apparent from the record that the Board of Trustees considered the welfare and economic stability of Mount Kisco as its first concern") (1973); Mott's Realty Corp. v. Town Plan & Zoning Comm'n, 152 Conn. 535, 539, 209 A.2d 179, 181 (1965); Ward v. Montgomery Township, 28 N.J. 529, 147 A.2d 248 (1959). *See generally,* Charles M. Haar, *In Accordance with a Comprehensive Plan,* 68 Harv. L. Rev. 1154 (1955).

4. *See, e.g.,* State *ex rel.* Manhein v. Harrison, 164 La. 564, 114 So. 159 (1927) (upholding Shreveport ordinance containing nonconforming use regulations); City of Aurora v. Burns, 319 Ill. 84, 149 N.E. 784 (1925) (upholding Illinois zoning-enabling act containing nonconforming use regulations); Building Inspector v. Stoklosa, 250 Mass. 52, 145 N.E. 262 (1924); *In re* Opinion of the Justices, 23 Mass. 597, 127 N.E. 525 (1920) (upholding Massachusetts zoning-enabling act and Middlesex ordinance containing nonconforming use regulations). *See generally* chapter 4.

5. *See* chapter 4.

6. *See* chapters 4 and 5.

7. Asian Ams. for Equality v. Koch, 72 N.Y.2d 121, 129, 527 N.E.2d 265, 269, 531 N.Y.S.2d 782, 786 (1988) (upholding use of special district-incentive zoning in Chinatown area of New York City).

8. *See* chapter 8.

9. *Id.*

10. In KLN Assocs. v. Metro Dev. & Hous. Agency, 797 S.W.2d 898, 902 (Tenn. Ct. App. 1990), the Tennessee Court approved the regulation of land use pursuant to a public housing authority's urban renewal plan. This authority was supported by the power the statutes granted to the municipality to redevelop blighted areas and undertake urban renewal projects.

11. Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987); Dolan v. City of Tigard, 512 U.S. 374 (1994); City of Monterey v. Del Monte Dunes, 526 U.S. 687 (1999). *See* chapter 3.

12. Koontz v. St. Johns River Water Mgmt. Dist., 133 S.Ct. 2586 (2013).

13. American Planning Association, Growing Smart Legislative Guidebook: Model Statutes for Planning and the Management of Change (Stuart Meck ed., 2002).

14. *Id.* at xxix.

15. Nollan v. California Coastal Comm'n, 483 U.S. 825, 843 (1987) (Brennan, J., dissenting) (citing Agins v. Tiburon, 447 U.S. 255 (1980) (scenic zoning)); Penn Cen. Transp. Co. v. New York City, 438 U.S. 104 (1978) (landmark preservation); Gorieb v. Fox, 274 U.S. 603 (1927) (building line setbacks); Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 387 (1926) (comprehensive zoning).

16. Berman v. Parker, 348 U.S. 26, 32–33 (1954).

17. U.S. Const. amend. V, ch. 4, made applicable to the states by the due process clause of the Fourteenth Amendment. B. & Q. R. Co. v. Chicago, 166 U.S. 226 (1897).

18. U.S. Const. amend. V, ch. 3; *id.* amend. XIV, §1.

19. U.S. Const. amend. XIV, §1.

20. Lawton v. Steele, 152 U.S. 133, 137 (1894) (quoted in Nollan v. California Coastal Comm'n, 483 U.S. 825, 843–44 n.1 (1987)) (Brennan, J., dissenting).

21. *See, e.g.,* Nollan v. California Coastal Comm'n, 483 U.S. 825, 844 n.1 (1987) (Brennan, J., dissenting) (citing Goldblatt v. Town of Hempstead, 369 U.S. 590, 594–95 (1962); Sproles v. Binford, 286 U.S. 374, 388 (1932). *See also* Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926); Stone v. City of Wilton, 331 N.W.2d 398, 403 (Iowa 1983); Ranch 57 v. City of Yuma, 152 Ariz. 218, 731 P.2d 113, 119 (Ariz. Ct. App. 1987)).

22. 272 U.S. 365, 387–88 (1926) (citing Radice v. New York, 264 U.S. 292, 294 (1924)).

23. Howard County v. Dorsey, 45 Md. App. 692, 416 A.2d 23, 28 (1980); *rev'd on other grounds,* 292 Howard County v. Dorsey, 292 Md. 351, 438 A.2d 1339 (1982).

24. 277 U.S. 183 (1928).

25. 369 U.S. 590 (1962).

26. 416 U.S. 1 (1974).

27. 416 U.S. at 16 (Marshall, J., dissenting).

28. 438 U.S. 104 (1978).

29. *Penn Central*, 438 U.S. at 124.

30. 447 U.S. 255, 260 (1980), *applied in* Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470 (1987).

31. 544 U.S. 528, 532 (2005).

32. 482 U.S. 304 (1987).

33. 473 U.S. 432 (1985).

34. MacDonald, Sommer & Frates v. Yolo County, 477 U.S. 340 (1986); Williamson County Reg'l Planning Comm'n v. Hamilton Bank, 473 U.S. 172 (1985).

35. 458 U.S. 419 (1982) (power to exclude).

36. 505 U.S. 1003 (1992) (economically viable use).

37. City of Monterey v. Del Monte Dunes, 526 U.S. 687 (1999); Dolan v. City of Tigard, 512 U.S. 374 (1994); Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987).

38. 133 S. Ct. 2586, 2599 (2013);

39. Palazzolo v. Rhode Island, 533 U.S. 606, 121 S. Ct. 2448 (2001).

40. Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 122 S. Ct. 1465 (2002).

41. Ala. Code §§ 11-52-1 to -2 (2014); Alaska Stat. Ann. § 29.40.010 (2013); Ariz. Rev. Stat. § 9-461.01 (2014); Ark. Stat. Ann. § 14-56-201 (2014); Cal. Gov't Code § 65100 (West 2014 & Supp. 2015); Colo. Rev. Stat. § 24-65.1-101 (2014); Conn. Gen. Stat. Ann. § 8-1 (2014); Del. Code Ann. tit. 22 § 301 (2013); D.C. Code Ann. § 5-401 (2014); Fla. Stat. Ann. §§ 163.3161–.3162 (2014); Ga. Code Ann. §§ 36-66-1 to -5 (2014); Idaho Code §§ 67-6501 to 6505 (2014); 65 Ill. Comp. Stat. § 5/11-13-1 (2014); Ind. Stat. Ann. § 36-7-4-100 (2014); Iowa Code Ann. §§ 414.1–.4 (2013); Ky. Rev. Stat. Ann. §§ 100.111, .113, .117 (West 2014) (effective January 1, 2015); La. Rev. Stat. Ann. § 33-4721 (2013); Me. Rev. Stat. Ann. tit. 30-A § 4352 (2014); Md. Ann. Code tit. 66B, § 1.00 (LexisNexis 2014); Mass. Ann. Laws ch. 40-A, § 1 (LexisNexis 2014); Minn. Stat. Ann. §§ 462.351–375 (West 2013); Miss. Code Ann. § 17-1-1 (2014); Mo. Rev. Stat. § 89.010 (2013); Mont. Code Ann. § 76-1-101 (2013); Neb. Rev. Stat. § 19-901 (2014); Nev. Rev. Stat. Ann. §§ 278.010–.0231 (2013); N.H. Rev. Stat. Ann. § 672:1 (2014); N.J. Stat. Ann. § 40:55-D1 (West 2014); N.M. Stat. Ann. § 3-21-1 (2014); N.Y. Gen. Mun. Law §§ 234–239A (McKinney 2014); N.C. Gen. Stat. §§ 153A-340 (2013); N.D. Cent. Code § 40-47-01 (2013); Ohio Rev. Code Ann. §§ 713.01 (LexisNexis 2013); Okla. Stat. Ann. tit. 11, §§ 43-101 to -102 (2013); Or. Rev. Stat. § 227.010 (2013); Pa. Stat. Ann. tit. 53, §§ 10601–10602 (West 2014); R.I. Gen. Laws §§ 45-24-27 to -72 (2014); S.D. Codified Laws § 11-4-1 (2014); Tenn. Code Ann. § 13-7-101 (2014); Tex. Loc. Gov't Code Ann. §§ 211.001–.007 (2014); Vt. Stat. Ann. tit. 24, §§ 4301–4303 (2013); Va. Code Ann. §§ 15.2-2280 to -2281 (2014); Wash. Rev. Code Ann. §§ 36.70.010–020 (2014); Wis. Stat. Ann. §§ 62.230–.237 (West 2014); Wyo. Stat. §§ 15-1-601 to -603 (2014).

42. Haw. Rev. Stat. § 205-1 *et seq.* (2007) (state land commission).

43. *See, e.g.,* Brougher v. Bd. of Pub. Works, 205 Cal. 426, 271 P. 487, 493 (1928) (deriving San Francisco zoning power from home rule charter).

44. City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 436 (1985) (local ordinance required special use permit for group home).

45. Standard State Zoning Enabling Act (U.S. Dept. of Commerce rev. ed. 1926). *See generally* ALI, A Model Land Development Code (Tent. Draft No. 1, xvii 1968).

46. 1914 N.Y. Laws; 1916 N.Y. Laws 497, *cited in* E. Bassett, F. Williams, A. Bettman & R. Whitten, Model Laws for Planning Cities, Counties and States 10 n.7 (1935), *upheld in* Lincoln Trust Co. v. Williams Bldg. Corps., 229 N.Y. 313, 128 N.E. 209 (1920). *See also* Welch v. Swasey, 214 U.S. 91 (1909) (upholding building height restrictions in Boston); *Ex parte* Quong Wo, 161 Cal. 220, 118 P. 714 (1911) (upholding prohibition of public laundries from residential districts in Los Angeles).

47. 272 U.S. 365 (1926).

48. Miller v. Bd. of Pub. Works, 195 Cal. 477, 234 P. 381, 384 (1925) (reviewing history of zoning and upholding a California zoning enabling statute enacted in 1917).

49. Sir Desmond Heap, former president of the Law Society in England, marveled at the difference between the land use regulating systems of the two countries in his Foreword to R. Babcock & C. Siemon, *The Zoning Game Revisited* (1985).

50. *See, e.g.,* Southern Burlington County NAACP v. Township of Mount Laurel, 67 N.J. 151, 336 A.2d 713, 727–28, *appeal dismissed & cert. denied,* 423 U.S. 808 (1975), *discussed in* chapter 9.

51. *See* discussion of *First English*, *Lucas,* and *Nollan/Dolan* in chapter 3.

52. Loretto v. *Teleprompter* Manhattan CATV Corp., 458 U.S. 419 (1982).

53. *See generally Lucas, supra n.*36, in which the Court held that an ordinance enacted subsequent to the owner's purchase that disallowed the construction of any habitable structures on the property was a taking. *See Dolan, supra n.*11, where the required dedication of a part of the owner's property in exchange for a permit to allow a new use also was considered a taking by the Court.

54. *See, e.g., Bert J. Harris, Jr., Private Property Rights Protection Act,* Fla. Stat. Ann. § 70.001 (West 1990), *discussed in* Sylvia Lazos Vargas, *Florida's Property Rights Act: A Political Quick Fix Results in a Mixed Bag of Tricks,* 23 Fla. St. U. L. Rev. 315 (1995); and Ellen Avery, Comment, *The Terminology of Florida's New Property Rights Law: Will It Allow Equity to Prevail or Government to Be "Taken" to the Cleaners?* 11 J. Land Use & Env'tl L. 181 (1995). *See also* V.A.M.S. § 536.017 (1994) (September 1, 1997, sunset provisions removed, HB 88 (6/12/97)); *Texas Private Real Property Rights Preservation Act of 1995*, Tex. Gov't Code Ann. § 2007.001 *et seq.* (Vernon 2000 & Supp. 2002).

55. Growing Smart Directorate. The Directorate was formed to draft model legislation for states in all areas of land use planning. *See* American Planning Association, Growing Smart Legislative Guidebook: Model Statutes for Planning and the Management of Change, (Stuart Meck ed.) Phase I (1996), Phase II (2002).

56. 242 Va. 426, 410 S.E.2d 669 (1991).

57. *See* chapters 4 and 5.

58. 603 A.2d 311 (R.I. 1992).

59. *See* chapter 4.

60. Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 386 (1926). *See also* Pennell v. City of San Jose, 485 U.S. 1 (1988) (facial challenge to rent control ordinance as a taking rejected as premature); Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470 (1987); First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304 (1987).

61. Nectow v. City of Cambridge, 277 U.S. 183, 188 (1928). *See also* Nollan v. California Coastal Comm'n, 483 U.S. 825, 852 (1987).

62. 42 U.S.C. § 1983 (2002). *See, e.g.,* Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 122 S. Ct. 1465 (2002).

63. *See, e.g.,* MacDonald, Sommer & Frates v. Yolo County, 477 U.S. 340, 349 (1986); Williamson County Reg'l Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 199–200 (1985) ("the effect [of] the Commission's application of the zoning ordinance . . . on the value of respondent's property . . . cannot be measured until a final decision is made as to how the regulations will be applied to [the developer's] property"); Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 297 (1981) ("[t]here is no indication in the record that appellees have availed themselves of the opportunities provided by the Act to obtain administrative relief by requesting . . . a variance"); Agins v. City of Tiburon, 447 U.S. 255, 260 (1980) (because the owners "have not submitted a plan for development of their property as the ordinances permit, there is as yet no concrete controversy regarding the application of the specific zoning provisions"). *See also* Palazzolo v. Rhode Island, 533 U.S. 606, 630 (2001) (challenge to wetlands restriction was ripe for review); Suitum v. Tahoe Reg'l Planning Agency, 520 U.S. 725, 738–40 (1997) (denial of permission to construct house on lot was "final" decision even though location of receiving site for permissible transfer of development rights was not yet established).

64. In Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 122 S. Ct. 1465 (2002), the Supreme Court concluded that landowners who brought a facial challenge to a 32-month moratorium had not established that the moratorium was a compensable taking. The Court declined to adopt a per se rule, opting instead for review of moratoria under the three-factor *Penn Central* test.

65. *See, e.g.,* Standard State Zoning Enabling Act § 1 (U.S. Dept. of Commerce rev. ed. 1926); N.Y. Town Law § 261 (McKinney 2014); Cal. Gov't Code § 65800 (West 2014); Tex. Local Code Ann. § 231.011 (Vernon 2013); Pa. Muny Planning Code § 601 *et seq*.

66. *See* chapter 6.

67. *See, e.g.,* Nollan v. California Coastal Comm'n, 483 U.S. 825, 843 n.1 (1987) (Brennan, J., dissenting, citing Goldblatt v. Town of Hempstead, 369 U.S. 590, 594–95 (1962); Sproles v. Binford, 286 U.S. 374, 388 (1932)). *See also* Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926);

Stone v. City of Wilton, 331 N.W.2d 398, 403 (Iowa 1983); Ranch 57 v. City of Yuma, 152 Ariz. 218, 731 P.2d 113, 119 (Ariz. Ct. App. 1987).

68. Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 387 (1926).

69. *Id.* at 388, citing Radice v. New York, 264 U.S. 292, 294 (1924).

70. Berman v. Parker, 348 U.S. 26, 32 (1954) (Douglas, J.).

71. Hawaii Hous. Auth. v. Midkiff, 467 U.S. 229, 242 (1984) (quoting Western & Southern Life Ins. Co. v. State Bd. of Equalization, 451 U.S. 648, 671–72 (1981)). *See also* Nelson v. City of Selma, 881 F.2d 836, 839 (9th Cir. 1989) (*fairly debatable* rule applied to uphold denial of rezoning after neighborhood opposition surfaced); Cheyenne Airport Bd. v. Rogers, 707 P.2d 717, 727 (Wyo. 1985) (facial challenges to economic and social legislation upheld if "debatable reasonableness" established); Stone v. City of Wilton, 331 N.W.2d 398, 405 (Iowa 1983) (*fairly debatable* rule applied to downzoning); Allright Mo., Inc. v. Civic Plaza Redev. Corp., 538 S.W.2d 320, 324 (Mo.), *cert. denied,* 429 U.S. 941 (1976) (*fairly debatable* rule applied to blighted areas); City of Del Mar v. City of San Diego, 133 Cal. App. 3d 401, 183 Cal. Rptr. 898, 903 (1982) (*fairly debatable* rule applied to legislative findings regarding regional effect of zoning ordinance).

72. The leading case is Fasano v. Bd. of County Comm'rs, 264 Or. 574, 507 P.2d 23 (1973), *overruled in part,* Neuberger v. City of Portland, 288 Or. 585, 607 P.2d 722 (1980) (decision by legislative body to anchor a floating zone permitting mobile home parks was administrative rather than legislative in character). *Contra,* Arnel Dev. Co. v. City of Costa Mesa, 28 Cal. 3d. 511, 169 Cal. Rptr. 904, 620 P.2d 565 (1980) (generic classifications applied: zoning decisions, legislative; variances and subdivision map approvals, adjudicative). *See* chapter 6.

73. Hawaii Hous. Auth. v. Midkiff, 467 U.S. 229, 241 (1984) (quoting United States v. Gettysburg Elec. Ry., 160 U.S. 668, 680 (1896)). The city of Philadelphia, for example, derives its power to govern itself and enact zoning regulations from the Pennsylvania home rule statute. Because zoning was not one of the limitations the statute imposed on home rule powers, courts have upheld a city's exercise of zoning power under a home rule charter. Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 489–90 (1987); Mugler v. Kansas, 123 U.S. 623, 665 (1887); Hodel v. Irving, 481 U.S. 704, 714–17 (1987).

74. Mugler v. Kansas, 123 U.S. 623 (1887).

75. "[A]ll property in this country is held under the implied obligation that the owner's use of it shall not be injurious to the community." *Id.* at 665.

76. "[The police power] is ample to lay out zones where family values and the blessings of quiet seclusion and clear air make the area a sanctuary for people." Village of Belle Terre v. Boraas, 416 U.S. 1, 9 (1974).

77. Hawaii Hous. Auth. v. Midkiff, 467 U.S. 229, 241 (1984). *See also* Steinbergh v. City of Cambridge, 413 Mass. 736, 604 N.E.2d 1269 (1992), *cert. denied,* 508 U.S. 909 (1993), where a subsection of a municipal rent-control ordinance, restricting the sale of individual condominium units by an owner owning more than one unit in the same building, was held not a compensable taking by the Supreme Judicial Court of Massachusetts. The plaintiff-owner of multiple condo units

in a single building challenged the provision as a temporary regulatory taking because it denied the owner the right to sell individual units unless the Cambridge Rent Control Board granted a removal permit or the tenant had an exemption certificate. The Supreme Judicial Court of Massachusetts upheld the provision because it substantially advanced the Cambridge Rent Control Law by reducing illegal occupation of rent-controlled units by individuals buying such units.

78. *See, e.g.,* Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413 (1922) (striking down a statute regulating the mining of coal because, among other reasons, it affected "a single private house" and "ordinary private affairs"). *See also* Keystone Bituminous Coal Ass'n. v. DeBenedictis, 480 U.S. 470, 487 (1987) (distinguishing the "private benefit" statute in *Pennsylvania Coal* from the public purposes of the statute in question). These cases are discussed in chapter 3.

79. *See, e.g.,* Agins v. Tiburon, 447 U.S. 255, 261 (1980).

80. Riggs v. Long Beach Township, 109 N.J. 601, 538 A.2d 808, 813 (1988). *See also* Sanderson v. Willmar, 282 Minn. 1, 162 N.W.2d 494, 497 (1968); Long v. City of Highland Park, 329 Mich. 146, 45 N.W.2d 10, 13 (1950); State v. Gurda, 209 Wis. 63, 243 N.W. 317 (1932); City of Miami v. Silver, 257 So.2d 563, 569 (Fla. Dist. Ct. App. 1972).

81. Riggs v. Long Beach Township, 109 N.J. 601, 538 A.2d 808, 813–14 (1988) (invalidating downzoning of waterfront property because purpose was to depress fair-market value prior to condemnation).

82. Nollan v. California Coastal Comm'n, 483 U.S. 825, 861 (1987); Agins v. Tiburon, 447 U.S. 255 (1980); Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 148 (1978); Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 392 (1926).

83. Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 391 (1926).

84. Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 127 (1978).

85. Hawaii Hous. Auth. v. Midkiff, 467 U.S. 229, 243 (1984).

86. Nollan v. California Coastal Comm'n, 483 U.S. 825, 834 (1987) (quoting Agins v. Tiburon, 447 U.S. 225, 260 (1980)). The "substantially advances" takings test later was abrogated by the Supreme Court in Lingle v. Chevron, U.S.A. Inc., *supra n.*31.

87. Dolan v. City of Tigard, 512 U.S. 374, 398 (1994).

88. 348 U.S. 26, 33, 35–36 (1954).

89. Hawaii Hous. Auth. v. Midkiff, 467 U.S. 229, 243 (1984) ("empirical debates about the wisdom of takings . . . are not to be carried out in the federal courts.").

90. *See, e.g.,* Nectow v. City of Cambridge, 277 U.S. 183, 188 (1928); Arverne Bay Constr. Co. v. Thatcher, 15 N.E.2d 587, 592 (N.Y. 1938).

91. 473 U.S. 432, 450 (1985).

92. *Id.* at 450. For a discussion of the case, *see* Gerald Korngold, *Single Family Use Covenants; For Achieving a Balance Between Traditional Family Life and Individual Autonomy,* 22 U.C. Davis L. Rev. 951, 983 (1989); Martha Minow, *When Difference Has Its Home: Group Homes for the Mentally Retarded, Equal Protection and Legal Treatment of Difference,* 22 Harv. C.R.-C.L. L.

Rev. 111 (1987); Peter W. Salsich, Jr., *Group Homes, Shelters and Congregate Housing: Deinstitutionalization and the NIMBY Syndrome,* 21 Real Prop., Prob. & Tr. J. 413, 419–21 (1986).

93. 483 U.S. 825, 841–42 (1987).

94. *Id.* at 837.

95. *See* chapter 3.

96. Nollan v. California Coastal Comm'n, 483 U.S. 825, 841 n.3 (1987).

97. Dolan v. City of Tigard, 512 U.S. 374 (1994).

98. 512 U.S. at 391–95.

99. 526 U.S. 687, 702 (1999).

100. 133 S. Ct. 2586, 2599 ("so-called 'monetary exactions' must satisfy the nexus and rough proportionality requirements of *Nollan* and *Dolan*").

101. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 416 (1922).

102. First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304 (1987).

103. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922).

104. Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 131 (1978) (citing Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926) (75 percent diminution in value caused by zoning law); Hadacheck v. Sebastian, 239 U.S. 394 (1915) (87.5 percent diminution in value)).

105. Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1019 (1992) (where land was purchased with an interest to build a residence and subsequent regulations disallowed such use, the mere right to other, unprofitable uses did not render the property economically viable under the new regulation). *See* Woodbury Place Partners v. City of Woodbury, 492 N.W.2d 258, 261 (Minn. Ct. App. 1992), *cert. denied,* 508 U.S. 960 (1993). One month after a developer submitted a site proposal adjacent to an interstate highway, the city council imposed a two-year moratorium on consideration of any development proposals for property adjacent to the highway. Despite the developer's challenge, the static period was held not a compensable taking because "Woodbury property's economic viability was delayed, rather than destroyed . . . economic viability exists at the moratorium's end." *See also* Jafay v. Bd. of County Comm'rs, 848 P.2d 892 (Colo.), *reh'g denied,* 1993 Colo. LEXIS 389 (1993) (en banc), where the Colorado Supreme Court held that determination of whether downzoning of property constitutes a taking depends on whether the owner is left with reasonable use of the property. Summary judgment was held inappropriate because reasonable individuals can disagree on what constitutes reasonable use of the property. In Iowa Coal Mining Co. v. Bd. of Supervisors, 494 N.W.2d 664 (Iowa 1992), *cert. denied,* 508 U.S. 940 (1993), a county's refusal to rezone a mining company's property to permit its proposed landfill operation was held not a compensable taking even though such refusal effectively prevented the mining company's venture.

106. Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 489–90 (1987); Mugler v. Kansas, 123 U.S. 623, 665 (1887) ("All property in this country is held under the implied obligation that the owner's use of it shall not be injurious to the community."); United States v. Cherokee Nation, 480 U.S. 700, 704–08 (1987) (regulation of navigable waters does not constitute a taking

of property from riparian owners who use the stream bed because the property rights of such owners are subject to the "dominant servitude" of the government).

107. Hodel v. Irving, 481 U.S. 704, 714–17 (1987) (statute requiring small, unproductive land interests owned by individual American Indians to escheat to the owners' tribe rather than descend by intestacy or devise constituted a taking of property without just compensation); Loretto v. *Teleprompter* Manhattan CATV Corp., 458 U.S. 419, 435–38 (1982) (statute requiring landlord to permit wires for cable television to be attached to outside of building constituted a taking because of permanent physical occupation).

108. Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency, 535 U.S. at 332, 122 S. Ct. 1465, 1484 (2002) ("logically, a fee simple estate cannot be rendered valueless by a temporary prohibition on economic use, because the property will recover value as soon as the prohibition is lifted"); Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470 (1987); Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 130–31 (1978).

109. Palazzolo v. Rhode Island, 533 U.S. 606, 628 (2001).

110. An earlier version of this section appeared in Peter W. Salsich, Jr., *Keystone Bituminous Coal, First English and Nollan: A Framework for Accommodation?* 34 J. Urb. & Contemp. L. 173, 187–90 (1988). Reprinted with permission.

111. The landowner may be the developer or a user of neighboring land who objects to the proposed use by the developer.

112. *See generally* Daniel R. Mandelker, et al, Planning and Control of Land Development 235–243 (8th Ed., 2011); Peter W. Salsich, Jr., *Displacement and Urban Reinvestment: A Mount Laurel Perspective,* 53 U. Cinn. L. Rev. 333, 367 (1984).

113. This phenomenon is referred to as the "tax ratables" of a land development. The ratables are said to be positive if tax revenues generated by the project outweigh the cost of requiring public services and negative if the reverse is true. *See* Advisory Commission on Intergovernmental Relations, Fiscal Balance in the Federal System I, 93–101, 265–66 (Oct. 1967), *reprinted in* Daniel R. Mandelker, Managing Our Urban Environment 44–47 (2d ed. 1971).

114. Perhaps the most dramatic example of this effect is the public controversy over exclusionary zoning. *See, e.g.,* Southern Burlington County NAACP v. Township of Mount Laurel, 92 N.J. 158, 456 A.2d 390 (1983) (upheld municipal requirement that land use regulations provide realistic opportunities for low- and moderate-income housing); Southern Burlington County NAACP v. Township of Mount Laurel, 67 N.J. 151, 336 A.2d 713 (1975), *appeal dismissed and cert. denied,* 423 U.S. 808 (1975) (a municipality may not use land use regulations to make it physically and economically impossible to provide low- and moderate-income housing); Blitz v. Town of New Castle, 94 A.D.2d 92, 463 N.Y.S.2d 832 (App. Div. 1983) (ordinance allowing multi-family housing construction providing a properly balanced and well-ordered community plan adequately considering regional needs presumptively valid); Robert E. Kurzius, Inc. v. Incorporated Village of Upper Bronxville, 51 N.Y.2d 338, 414 N.E.2d 680 (1980), *cert. denied,* 450 U.S. 1042 (1981) (upheld minimum lot requirements of five acres as valid exercise of village's

police power, and bearing a substantial relation to the health, safety, and welfare of the community); *Appeal of Elocin, Inc.,* 501 Pa. 348, 461 A.2d 771 (1983) (residential zoning district upheld since municipality had provided for a reasonable share of multi-family dwellings); Surrick v. Zoning Hearing Bd. of Upper Providence Township, 476 Pa. 182, 382 A.2d 105 (1977) (court used fair-share test and determined that residential ordinance requiring one-acre minimum lot sizes unconstitutionally excluded multi-family dwellings); Township of Williston v. Chesterdale Farms, Inc., 462 Pa. 445, 341 A.2d 466 (1975) (ordinance providing for apartment construction in only 80 of 11,589 acres held unconstitutional); *Appeal of Girsh,* 437 Pa. 237, 263 A.2d 395 (1970) (zoning scheme's failure to provide for apartments unconstitutional, even though apartments were not explicitly prohibited by ordinance); National Land & Investment Co. v. Kohn, 419 Pa. 504, 215 A.2d 597 (1965) (four-acre-minimum-lot requirement held unconstitutional as impermissible means to create a greenbelt).

See generally Peter W. Salsich, Jr., *Displacement and Urban Reinvestment: A Mount Laurel Perspective,* 53 U. Cinn. L. Rev. 333, 361–70 (1984); McDougall, *The Judicial Struggle Against Exclusionary Zoning: The New Jersey Paradigm,* 14 Harv. C.R.-C.L. L. Rev. 625 (1979); After Mount Laurel: The New Suburban Zoning (J. Rose & R. Rothman, eds., 1977). Exclusionary zoning is discussed in chapter 9.

115. While the triangle is a useful symbol of typical land use relationships, it is not totally accurate because the owner/developer will also be a member of the community-at-large and may, under certain circumstances, be a member of the neighborhood. For example, when a resident/owner of adjacent property develops a vacant lot, he or she covers all three sides of the land use triangle.

116. Although size is an important indication of the likely external effects of land development, it is certainly not the only one. Some of the most emotional land use conflicts in recent years have involved buildings of relatively small size. City of Edmonds v. Oxford House, 514 U.S. 725 (1995) (definition of "family"); City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432 (1985) (group homes for the mentally retarded); Village of Belle Terre v. Boraas, 416 U.S. 1 (1984) (unmarried college students sharing single-family residence).

117. Of course, the regulation must be effective in preventing land waste. For an eloquent warning against uncritical reliance on preservation techniques such as transfer of development rights (TDR), *see* David Richards, *Downtown Growth Control Through Development Rights Transfer,* 21 Real Prop., Prob. & Tr. J. 435, 474–83 (1986). In addition, the argument might be made that landowners would benefit more from an open market in land if they use their land wisely and do not waste it because their better-used land would presumably be scarcer and thus more valuable. Even so, effective land use regulations that prevent land waste will increase the overall value of the total available land in the community and thus benefit the owners of that land.

118. *See, e.g.,* San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621, 638 (Brennan, J., dissenting).

119. *See generally* Robert Freilich, *Solving the "Taking" Equation: Making the Whole Equal Sum of the Parts,* 15 Urb. Law. 447, 479–83 (1983) (approving damages rather than compensation for tortious interferences with property rights).

120. *See, e.g.,* Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992); First English Evangelical Lutheran Church of Glendale v. Los Angeles County, 482 U.S. 304, 340 (1987) (Stevens, J., dissenting); Nollan v. California Coastal Comm'n, 483 U.S. 825, 862 (1987) (Brennan, J., dissenting).

121. Morton P. Fisher, Jr., of Baltimore, Maryland, former Chair of the ABA Section of Real Property, Probate and Trust Law, forcefully stated the case for cooperation at a conference of real estate lawyers: "Every lawyer representing a developer has a silent client—the city. You must take time to understand it. A city has been described as an oversized marshmallow. You can knead it, punch it, roll it, shake it; but if you heat it up, it becomes very sticky." Address by Morton P. Fisher, Jr., American College of Real Estate Lawyers, *Land: Its Use, Abuse, Non-Use and Re-Use,* Baltimore, Maryland (Oct. 20, 1986).

122. Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992); First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304 (1987).

123. Koontz v. St. Johns River Water Mgmt. Dist., 133 S. Ct. 2586, 2599 (2013); Lingle v. Chevron, U.S.A., Inc., 544 U. S. 528 (2005); Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. at 327, 339, 122 S. Ct. 1465, 1481, 1489 (2002); Dolan v. City of Tigard, 512 U.S. 374 (1994); Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 485 (1987); Penn Central Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978); Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922). *See generally* Peter W. Salsich, Jr., *Life After the Takings Trilogy—A Hierarchy of Property Interests?* 19 Stetson L. Rev. 795 (1990); W. Falik & A. Shimko, *The Takings Nexus: The Supreme Court Forges a New Direction in Land-Use Jurisprudence,* 23 Real Prop., Prob. & Tr. J. 1 (1988); Daniel R.. Mandelker, *Investment-Backed Expectations: Is There a Taking?* 31 Wash. U. J. Urb. & Contemp. L. 3 (1987).

124. Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. at 327, 122 S. Ct. 1465, 1481 (2002).

125. Doubt about whether the Court will apply its "property-as-a-whole" standard to all future controversies arises from the narrowness of the decision in *Keystone* (5-4), reiterating that standard and the Court's willingness to depart from that standard when considering regulations that affect the power to exclude or the power to transfer rather than the right to use property. *See, e.g.,* Presault v. Interstate Commerce Comm'n, 494 U.S 1, 928 (1990) (O'Connor, J., concurring) (power to exclude); Hodel v. Irving, 481 U.S. 704 (1987) (power to transfer); Loretto v. *Teleprompter* Manhattan CATV Corp., 458 U.S. 419 (1982) (power to exclude); Kaiser Aetna v. United States, 444 U.S. 164 (1979) (power to exclude). *See generally* Peter W. Salsich, Jr., *Life After the Takings Trilogy—A Hierarchy of Property Interests?* 19 Stetson L. Rev. 795 (1990). Justice Stevens' strong opinion emphasizing the "parcel-as-a-whole" approach and the 6-3 majority he gained for that position in *Tahoe-Sierra Preservation Council*, 535 U.S. at 327, 122 S. Ct. 1465, 1481 (2002) appears to put the question to rest, at least for the time being.

126. Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992); Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470 (1987), First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304 (1987).

127. *Lucas*, 505 U.S. 1003, 1019.

128. Dolan v. City of Tigard, 512 U.S. 374 (1994); Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987).

129. *Nollan,* 483 U.S. 825, 838–39, 841 (1987).

130. City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687 (1999); *Dolan,* 512 U.S. 1003 (1994).

131. Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172 (1985).

132. MacDonald, Sommer & Frates v. Yolo County, 477 U.S. 340 (1986). For an example of regulator run-around likely to trigger application of the futility rule, *see* Sherman v. Town of Chester, 752 F.3d 554 (2d Cir. 2014) (town's "decade's worth of red tape," including delays occasioned by staff changes, an 18-month moratorium, repeated zoning amendments coupled with required resubmittal of previously submitted environmental impact statements made further requests for final decision futile).

133. *See* vested rights discussion in chapter 8.

134. *See* the ripeness discussion in chapter 3.

135. *See* chapters 6, 8, and 10.