

# PLANNING CASE LAW NOTES<sup>1</sup>

Lee C. Slusser, AICP

## THE LEGAL BASES FOR LAND USE CONTROLS

### I. NUISANCE LAW:

#### A. PRIVATE NUISANCES:

**BOVE v. DONNER-HANNA COKE CORP. (1932, New York State Court of Appeals):** “An owner will not be permitted to make an unreasonable use of his premises to the material annoyance of his neighbor if the latter’s enjoyment of life or property is materially lessened thereby... Whether the particular use to which one puts his property constitutes a nuisance or not is generally a question of fact, and depends upon whether such use is reasonable under all the surrounding circumstances.” The physical nature, social value, extent, and duration of the nuisance are considerations, as well whether the plaintiff “came to the nuisance.”<sup>2</sup> Injunctive relief is usually appropriate here, although not always (**Spur Industries v. Del Webb Development Co. [1972, Arizona Supreme Court]**).<sup>3</sup>

#### B. PUBLIC NUISANCES: These are defined by statute.

### II. THE POLICE POWER:

A. **MUGLER v. KANSAS (1887, US Supreme Court):** To federal courts, the 14<sup>th</sup> Amendment to the U.S. Constitution merely imposes a duty to strike down legislative acts that have “no real or substantial relation” to the proper objects of the police power: “protection of the public health, the public morals, or the public safety.”<sup>4</sup> In saying this, the Court validated state and local government actions that properly protect “the public health, the public morals, or the public safety.”

## HOW TO CHALLENGE A LAND USE REGULATION

- I. PROVE THAT THE REGULATION DOESN’T HAVE A VALID PUBLIC PURPOSE: **NECTOW v. CITY OF CAMBRIDGE (1928, US Supreme Court):** A zoning ordinance was struck down because it had no valid public purpose: i.e., it did not promote the health, safety, morals, or welfare of the people of Cambridge. The rational basis test (i.e., lower level scrutiny) is used here.
- II. PROVE THAT THE REGULATION’S MEANS AREN’T RELATED TO ITS ENDS: The rational basis test is used here too.
- III. PROVE THAT THE REGULATION IS NOT CONSISTENT WITH THE STATE’S CONSTITUTION, ZONING ENABLING LEGISLATION, OR CASE LAW:

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<sup>1</sup> Unless noted otherwise, the information in this section was taken from my personal notes and pages 123-127 of the *Study Manual for the Comprehensive AICP Exam of the American Institute of Certified Planners* (Chapter Presidents Council, the American Planning Association, November 1999).

<sup>2</sup> Mandelker, Daniel R., and Roger A. Cunningham. *Planning and Control of Land Development: Cases and Materials*. Charlottesville, VA: The Michie Company, 1990. Pages 33-37.

<sup>3</sup> Mandelker et al. Pages 42-47.

<sup>4</sup> Mandelker et al. Page 51.

- A. **FASANO v. BOARD OF COUNTY COMMISSIONERS OF WASHINGTON CO. (1973, Oregon Supreme Court):** This case shifted the burden of proof to the municipality in rezoning cases in Oregon, thus making rezonings a quasi-judicial action. This case practically required all zoning in Oregon to be consistent with comprehensive planning, although the state’s planning enabling statute finalized this requirement.
  - B. **SOUTHERN BURLINGTON COUNTY NAACP v. TOWNSHIP OF MT. LAUREL I (1975, New Jersey Supreme Court) AND SOUTHERN BURLINGTON COUNTY NAACP v. TOWNSHIP OF MT. LAUREL II (1983, New Jersey Supreme Court):** In these two cases, the New Jersey Supreme Court overturned a township’s zoning ordinance because it was inconsistent with the fair housing clauses of the New Jersey State Constitution. The second case detailed the rulings of the first, and forced a specific fair housing scheme on the township.
- IV. PROVE THAT THE REGULATION CONSTITUTES A TAKING (5<sup>TH</sup> AMENDMENT, U.S. CONSTITUTION):
- A. If the regulation causes a physical invasion of property, then it is a taking (**LORETTO v. TELEPROMPTER MANHATTAN CATV CORP. [1982, US Supreme Court]**).
  - B. If the regulation is not based on a public nuisance statute, and the regulation causes the property to lose all economic value, then it is a taking (**LUCAS v. SOUTH CAROLINA COASTAL COUNCIL [1992, US Supreme Court]** and **AGINS v. CITY OF TIBURON [1980, US Supreme Court]**).
  - C. If the regulation does not “substantially advance a legitimate state interest,” then it is a taking (“Footnote 3” of **NOLLAN v. CALIFORNIA COASTAL COMMISSION [1987, US Supreme Court]**).<sup>5</sup> Note that this appears to raise the public purpose test – apparently in takings cases only – from the rational basis test (i.e., lower level scrutiny) to the legitimate state interest test (i.e., intermediate scrutiny).
  - D. If the regulation does not involve an exaction, then it will be found to constitute a taking unless it passes the “ad hoc factual inquiry” imposed by **PENN CENTRAL TRANSPORTATION CO. v. THE CITY OF NEW YORK (1978, US Supreme Court)**. This inquiry consists of (1) weighing the economic impact of the regulation on the claimant, and especially on his investment backed expectations; (2) weighing the character of the regulation; and (3) determining whether or not the regulation sufficiently deprives one of property or rights.<sup>6</sup>
  - E. If the regulation does involve an exaction, then it will be found to constitute a taking unless it passes both the “rational nexus” test (**NOLLAN v. CALIFORNIA COASTAL COMMISSION [1987, US Supreme Court]**) and the “rough proportionality” test (**DOLAN v. TIGARD [1994, US Supreme Court]**). That is, is there a logical connection between the governmental action and its goal, and is the property owner’s burden roughly proportional to the public benefit? Note that *Dolan v. Tigard* required

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<sup>5</sup> Mandelker et al. Pages 112-123.

<sup>6</sup> Mandelker et al. Pages 77-87.

municipalities to make precise and specific findings before imposing an exaction on a proposed development's impact.

- V. PROVE THAT THE REGULATION VIOLATES THE EQUAL PROTECTION CLAUSE OF THE 14<sup>TH</sup> AMENDMENT (U.S. CONSTITUTION): Note that there must be unequal treatment among groups for such a challenge to arise in the first place.
- A. Does the unequal treatment of groups deny a fundamental right? If so, the regulation will be subject to the “strict scrutiny” test (i.e., the involved government will be forced to prove that a “compelling state interest” was at stake). **VILLAGE OF BELLE TERRE v. BORAAS (1974, US Supreme Court)** found that zoning may allow only families in a zoning district -- and thus bar households of no more than two unrelated persons from that district -- without interfering with the rights to travel or migrate.<sup>7</sup> This eliminated many fundamental rights challenges.
  - B. Does the unequal treatment of groups involve a “suspect classification?” If so, the regulation will once again be subject to the “strict scrutiny” test. “Suspect classifications” are currently defined as those involving race, alienage, or national origin. However, an intent to discriminate must be found (**VILLAGE OF ARLINGTON HEIGHTS v. METROPOLITAN HOUSING DEVELOPMENT CORP. [1977, US Supreme Court]**).
  - C. Does the unequal treatment of groups involve a “quasi-suspect classification?” If so, the regulation will be subject to the “intermediate scrutiny” test (i.e., does the regulation “substantially advance a legitimate state interest?”). “Quasi-suspect classifications” are currently defined as those involving gender or illegitimacy. However, an intent to discriminate must be found (**VILLAGE OF ARLINGTON HEIGHTS v. METROPOLITAN HOUSING DEVELOPMENT CORP. [1977, US Supreme Court]**).
  - D. If the involved regulation does treat different groups unequally, and if it does not involve a fundamental right, a suspect classification, or a quasi-suspect classification, then the regulation will be subject to the lower level scrutiny “rational basis” test. In **CITY OF CLEBURNE v. CLEBURNE LIVING CENTER (1985, US Supreme Court)**, the Court determined that the mentally challenged are neither a suspect nor a quasi-suspect classification. However, a provision of Cleburne’s zoning ordinance that banned group homes for the mentally challenged was struck down using the “rational basis” test.<sup>8</sup>
- VI. PROVE THAT THE REGULATION VIOLATES THE FIRST AMENDMENT OF THE U.S. CONSTITUTION:
- A. If the regulation is not content-neutral, then it will be subject to the “strict scrutiny” test (i.e., does the regulation further a “compelling state interest?”).
  - B. If the regulation is content-neutral, then it will be subject to the “intermediate scrutiny” test (i.e., does the regulation “substantially advance a legitimate state interest?”). Furthermore, the courts will strike down the regulation unless it (1) allows a reasonable alternative means of communication, (2) is as

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<sup>7</sup> Mandelker et al. Pages 225-229.

<sup>8</sup> Mandelker et al. Pages 241-250.

narrowly defined as possible, and (3) is a reasonable time, place, and manner restriction. Parts of this test (i.e., “A” and “B”) were substantiated by **CENTRAL HUDSON v. PUBLIC SERVICE COMMISSION (1980, US Supreme Court)**.

C. Here are some important 1<sup>st</sup> Amendment cases:

1. **CITY OF RENTON v. PLAYTIME THEATRES, INC. (1986, US Supreme Court)**: In this case, a zoning ordinance that limited sexually oriented businesses to a single zoning district (constituting 5% of the City’s total area) was subjected to the above test.<sup>9</sup> Note that the Court allowed Renton to use a study that had been done in Seattle, and didn’t require Renton to guarantee that there was a reasonable alternative place to set up shop. (This may suggest that a different “intermediate scrutiny” test was used here than in *Dolan v. Tigard*.)
2. **METROMEDIA, INC. v. CITY OF SAN DIEGO (1981, US Supreme Court)**: In this case, an ordinance that banned all off-premises signs was subjected to the above test. The ordinance was overturned because it effectively banned non-commercial signs, which rarely have “premises” to be located on. The case put forward the rule that neither commercial nor non-commercial speech can be favored over the other.<sup>10</sup>
3. **MEMBERS OF CITY COUNCIL v. TAXPAYERS FOR VINCENT (1984, US Supreme Court)**: Here, the Court upheld a Los Angeles ordinance that banned attaching signs to utility poles. The ordinance passed the above test, and in doing so, proved that aesthetics can satisfy the requirement of substantially advancing “a legitimate state interest.”<sup>11</sup>

## TAKINGS RELIEF AND INVERSE CONDEMNATION

Until **FIRST ENGLISH EVANGELICAL LUTHERAN CHURCH OF GLENDALE v. COUNTY OF LOS ANGELES (1987, US Supreme Court)**, the only relief for a landowner who had suffered a taking at the hands of a land use regulation was a writ of mandamus, which simply struck down the regulation. However, the Court decided in *First English* that the Just Compensation Clause of the 5<sup>th</sup> Amendment (U.S. Constitution) requires that governments pay for the “temporary” taking in the time between the loss of property and the writ of mandamus.<sup>12</sup>

## EMINENT DOMAIN

Eminent domain actions must have a valid public purpose (rational basis test). In **BURMAN v. PARKER (1954, US Supreme Court)**, the court decided that aesthetics were a valid public purpose for an eminent domain action.

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<sup>9</sup> Mandelker et al. Pages 297-304.

<sup>10</sup> Mandelker et al. Pages 655-665.

<sup>11</sup> Mandelker et al. Pages 666-676.

<sup>12</sup> Mandelker et al. Pages 135-146.

## ZONING

- I. **HADACHECK v. SEBASTIAN (1915, US Supreme Court):** The court first approved regulating the location of land uses.
- II. **WELCH v. SWASEY (1909, US Supreme Court):** The court first approved building height controls.
- III. **EUBANK v. CITY OF RICHMOND (1912: US Supreme Court):** The court first approved setback regulations, although it overturned the particular setback scheme in this case.
- IV. **VILLAGE OF EUCLID v. AMBLER REALTY CO. (1926, US Supreme Court):** Based on an “Average Reciprocity of Advantage,” a “Public Nuisance Analogy,” a “Market Allocation Analogy” (zoning corrects a market failure), and the purposes of “Aesthetics and Plan Implementation,” the U.S. Supreme Court stated that modern zoning is a proper use of the police power. In doing so, the court brought together cases “I” through “III” above. Alfred Bettman filed a brief with the court that largely changed its mind over *Euclid*.

## OTHER IMPORTANT CASES

- **PENNSYLVANIA COAL CO. v. MAHON (1922, US Supreme Court):** “The general rule is that while property may be regulated to a certain extent, if a regulation goes too far, it will be recognized as a taking.”<sup>13</sup> This case is the basis for the modern definition of a “taking” under the 5<sup>th</sup> Amendment to the U.S. Constitution.
- **JONES v. MAYER (1968, U.S. Court of Appeals for the Eight Circuit):** This was a housing discrimination case, in which it was ruled that racial barriers cannot affect the acquisition of property.
- **JAMES v. VALTIERRA (1971, US Supreme Court):** An amendment to the California State Constitution mandating a referendum on all local housing projects was upheld, as an intent to racially discriminate could not be found.
- **CITY OF EASTLAKE v. FOREST CITY ENTERPRISES, INC. (1976, US Supreme Court):** Mandating referendums on rezonings was upheld on similar grounds as *James v. Valtierra*.
- **YOUNG v. AMERICAN MINI THEATRES, INC. (1976, US Supreme Court):** A zoning scheme that decentralized sexually oriented businesses in Detroit was upheld.

## CASES INVOLVING GROWTH MANAGEMENT TECHNIQUES:

- I. **GOLDEN v. PLANNING BOARD OF THE TOWN OF RAMAPO (1972, New York State Court of Appeals):** A growth management system that awarded points to development proposals based on the availability of public utilities, drainage facilities, parks, road access, and firehouses was approved by the New York Court of Appeals. Developers could increase their point total by providing the involved facilities themselves. Only after a proposal reached a certain point total could it be approved by the Town of Ramapo. This growth management system has since been copied.

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<sup>13</sup> Mandelker et al. Pages 57-61.

- II. **SONOMA v. PETALUMA (1975, US Court of Appeals for the 4<sup>th</sup> Circuit):** Quotas on the annual number of building permits were upheld.
- III. **ASSOCIATED HOME BUILDERS OF GREATER EAST BAY v. CITY OF LIVERMORE (1976, California Supreme Court):** Temporary moratoriums on building permits were upheld in California.
- IV. **RESTIGOUCHE v. JUNIPER (US Court of Appeals):** An ordinance requiring neo-traditional design elements was approved as an appropriate use of the police power.

**THE NATIONAL ENVIRONMENTAL POLICY ACT of 1970 (NEPA)**  
**CALVERT CLIFFS COORDINATING COMMITTEE v. U.S. ATOMIC ENERGY COMMISSION (1971, US Supreme Court):** An approval for a nuclear power plant from the AEC was overturned because the AEC did not follow the requirements of NEPA. This case gave the requirements of NEPA teeth.

## RELIGION

- I. **COHEN v. DES PLAINES (1990, US Supreme Court):** Zoning cannot be used to give churches an advantage over competing commercial establishments. In this case, an ordinance that allowed a church to operate a day care center in a zoning district where commercial day care centers were banned was overturned.
- II. **OREGON v. SMITH (1990, US Supreme Court):** The facially neutral regulation of religious services is OK, as long as it doesn't hinder the religion itself. This case approved a ban of peyote in Native American religious services.