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# Principles of Land Use and Zoning

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## Introduction

- In the United States, City planning takes place within the democratic constitutional system of government.
- This means that City planning is subject to the constitution's limitations on the regulation of certain personal liberties.
- This also means that City planning occurs within the “give and take” of the political process.

## Introduction

- The legal basis for all land use regulation is the police power of the city to protect the public health, safety, and welfare of its residents. (*Berman v. Parker* (1954).)
- A land use regulation lies within the police power if it is reasonably related to the public welfare. (*Associated Home Builders, Inc. v. City of Livermore* (1976).)

## Introduction

- “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.”  
– Justice Douglas, *Berman v. Parker* (1954)

## Introduction

- “A quiet place where yards are wide, people few, and motor vehicles restricted are legitimate guidelines in a land use project addressed to family needs. . . The police power is not confined to elimination of filth, stench, and unhealthy places; it is ample to lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people”
  - Justice Douglas, *Village of Belle Terre v. Boraas* (1974)

## Origins of Zoning Authority

- During the 1920s, the authority of cities to control zoning arose from a need to control the location and proximity of uses.
  - Need to control abuses of uncontrolled private development
  - Faith in scientific planning and administrative control
  - Division of city into districts with regulation within each district

# Origins of Zoning Authority

- *Village of Euclid, Ohio v. Ambler Realty Co.* (1926), was the first case to uphold zoning authority against constitutional challenge.
  - Ambler Realty owned 68 acres in Euclid, a suburb of Cleveland.
  - To prevent industrial Cleveland from growing into and subsuming Euclid, the village developed a zoning ordinance with 6 uses.
  - Ambler Realty sued the village, arguing that the zoning ordinance had substantially reduced the value of their property by limiting its use
- The court upheld the zoning ordinance, finding a valid government interest in maintaining the character of a neighborhood and in regulating where certain land uses should occur.

# Types of Zoning

## Euclidean Zoning

- By far the most prevalent in the United States, used extensively in small towns and large cities alike.
- Also known as "Building Block" zoning; characterized by the segregation of land uses into specified geographic districts and dimensional standards stipulating limitations on the magnitude of development activity that is allowed to take place on lots within each type of district.
- Typical types of land-use districts in Euclidean zoning are: residential (single-family), residential (multi-family), commercial, and industrial.



# Types of Zoning

## Performance Zoning

- Uses performance-based or goal-oriented criteria to establish review parameters for proposed development projects in any area of a municipality.
- Often uses a "points-based" system whereby a property developer can apply credits toward meeting established zoning goals through selecting from a 'menu' of compliance options (some examples include: mitigation of environmental impacts, providing public amenities, building affordable housing units, etc.)

# Types of Zoning

## Incentive Zoning

- First implemented in Chicago and New York City
- Intended to provide a reward-based system to encourage development that meets established urban development goals. Typically, a base level of prescriptive limitations on development will be established and an extensive list of incentive criteria will be established for developers to adopt or not at their discretion.
- A reward scale connected to the incentive criteria provides an enticement for developers to incorporate the desired development criteria into their projects.
- Common examples include FAR (floor-area-ratio) bonuses for affordable housing provided on-site and height limit bonuses for the inclusion of public amenities on-site. Incentive zoning has become more common throughout the United States during the last 20 years.

# Zoning in California

- “A county or city may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws.” (Cal Const. Article 11, Section 7.)
  - *This section provides California cities with the police power, which includes the authority to regulate land use and to impose zoning regulations to benefit the general health and welfare.*

# Zoning in California

- “Under the police power granted by the Constitution, counties and cities have plenary authority to govern, subject only to the limitation that they exercise this power within their territorial limits and subordinate to state law. Apart from this limitation, the police power of a county or a city under this provision . . . is as broad as the police power exercisable by the Legislature itself.”
  - *Candid Enters, Inc. v. Grossmont Union High School District* (1985)

# Zoning in California

## General Plan Requirements:

- Government Code section 65300: “Each planning agency shall prepare and the legislative body of each county and city shall adopt a comprehensive, long-term general plan for the physical development of the county or city, and of any land outside its boundaries which in the planning agency’s judgment bears relation to its planning.”
  - General Plan is the “constitution for all future development.”
  - All subordinate land use actions, such as a zoning ordinance, tentative map, or development agreement must be consistent with a current and legally adequate general plan.

# Zoning in California

## Specific Plans

- Authority: Government Code section 65450 et seq.
- A specific plan is a tool for the systematic implementation of the general plan. It effectively establishes a link between implementing policies of the general plan and the individual development proposals in a defined area.
- A specific plan may be as general as setting forth broad policy concepts, or as detailed as providing direction to every facet of development from the type, location and intensity of uses to the design and capacity of infrastructure; from the resources used to finance public improvements to the design guidelines of a subdivision.
- A specific plan may encompass an area as large or larger than the 2,800 acres affected by the Ahmanson Ranch Specific Plan in Ventura County, or as small as a single acre. A specific plan may be developed in response to a single policy issue, or to address each applicable policy of the general plan. It may also diverge from the issues contained in the general plan into other subjects viewed by the community as being of relevance.

# Zoning in California

- Zoning Ordinances: Governed by Government Code sections 65800 et seq.
  - **Zoning Ordinances typically do the following:**
    - (1) Divide a city into various land use designations;
    - (2) List permitted uses within those designations;
    - (3) Provide for conditional and accessory uses;
    - (4) Establish development standards such as building height, setbacks, lot coverage, parking, signage and landscaping; and
    - (5) Provide for administrative procedures for variances, conditional use permits, design review and zone changes or text amendments.

# Constitutional Issues

- TAKINGS
  - Legislative
  - Quasi-Judicial/ Exactions
- DUE PROCESS/ EQUAL PROTECTION
- FIRST AMENDMENT
  - Free Speech
  - Freedom of Religion



# Constitutional Issues

- The 5<sup>th</sup> Amendment provides: “No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.”
- Direct takings (Eminent Domain)
  - Government takes private property for public use upon the payment of just compensation.
- Indirect taking (Inverse Condemnation)
  - Governmental regulation or action “goes too far” and results in a “taking” without compensation.
    - *Pennsylvania Coal v. Mahon* (1922)

## Constitutional Issues: Legislative Takings

Lingle v. Chevron (2005): A generally applicable government regulation of private property is a per se taking:

1. “Where government requires an owner to suffer a permanent physical invasion of her property”

-*Loretto v. Teleprompter Manhattan CATV Corp.* (1982) (involving the attachment of cable boxes to a building)

OR . . .

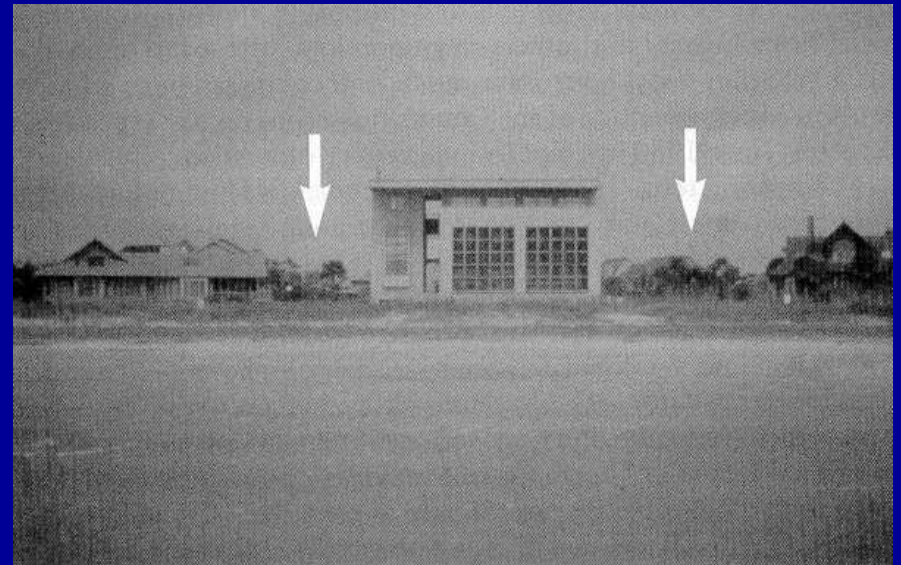


*Building involved  
in Loretto*

## Constitutional Issues: Legislative Takings

2. “Where regulations deprive a landowner of ‘*all* economically beneficial use’ of her property” (sometimes called “total takings”)

-*Lucas v. South Carolina Coastal Council* (1992)  
(involving legislation prohibiting development on beachfront property)



*Site Involved in Lucas*

# Constitutional Issues: Legislative Takings

- Outside these two categories, courts must use the Penn Central factors to determine whether a regulation has effected a taking (e.g., is “functionally equivalent to a direct appropriation of private property”).
- The Penn Central factors include:
  - The regulation’s economic impact on the claimant,
  - The extent to which the regulation interferes with distinct investment-backed expectations, and
  - The “character” of the government action.
- *Penn Central Transportation Co. v. New York City* (1978): No taking when the government designated the Grand Central Terminal building in New York City as a historical landmark, thereby stopping an expansion of the building.

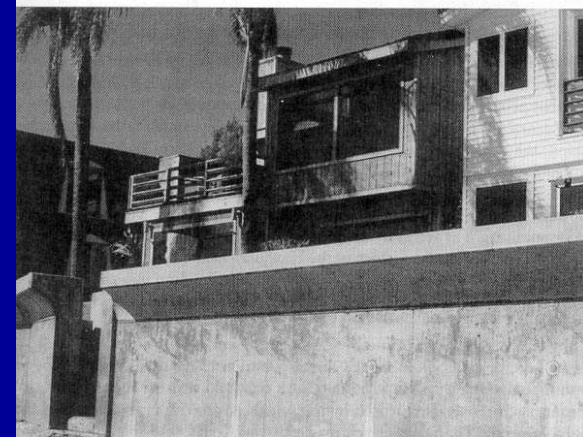


*Penn Central Terminal Building*

# Constitutional Issues: Ad Hoc Takings/ Exactions

## Exactions

- Beginning in the late 1980s, several United States Supreme Court cases ruled against land use regulations as takings requiring just compensation pursuant to the 5<sup>th</sup> Amendment.
- *Nollan v. California Coastal Commission* (1987) ruled that permit conditions that fail to substantially advance the agency's authorized purposes require compensation (the "Nexus" requirement)



*Improvements in Nollan*

# Constitutional Issues: Ad Hoc Takings/ Exactions

- *Dolan v. City of Tigard* (1994) ruled that conditions of a permit must be roughly proportional to the impacts of the proposed new development (the “Rough Proportionality” requirement)



*Improvements in Dolan*

# Constitutional Issues: Ad Hoc Takings/ Exactions

Topanga Findings (*Topanga Association for a Scenic Community v. County of Los Angeles* (1974) )

- “Finding”: Legally relevant subconclusions which expose the agency's mode of analysis of facts, regulations, and policies, and which bridge the analytical gap between raw data and ultimate decision. In other words, findings are the legal footprints local administrators and officials leave to explain how they progressed from the facts through established policies to the decision.
- Findings should:
  1. Provide a framework for making principled decisions, enhancing the integrity of the administrative process;
  2. Help make analysis orderly and reduce the likelihood that the agency will randomly leap from evidence to conclusions;
  3. Enable the parties to determine whether and on what basis they should seek judicial review and remedy;
  4. Apprise a reviewing court of the basis for the agency's action; and,
  5. Serve a public relations function by helping to persuade the parties that administrative decision making is careful, reasoned, and equitable.

# Constitutional Issues: Miscellaneous Issues

- *City of Monterey v. Del Monte Dunes* (1999):
  - The City continuously denied Del Monte Dunes' proposals to develop the property; each rejection was followed by stricter and more rigorous demands for a smaller, less intrusive development. The Supreme Court found that under certain circumstances, a jury may determine that a governmental rejection of a land use application may constitute a taking.
- *Ehrlich v. City of Culver City* (1994):
  - City imposed development fees as a condition of reuse of a former private club; Supreme Court remanded the case “for further consideration in light of *Dolan*.” (Rough Proportionality)
- *First English Evangelical Lutheran Church v. L.A. County* (1987):
  - County ordinance prohibited construction or reconstruction on land which had been devastated by a flood one year earlier. The Church owned a campground which was affected by this ordinance and it was not allowed to reconstruct buildings on this land which the flood had destroyed; Supreme Court found it was a taking.



# Constitutional Issues: Miscellaneous Issues

## *Landgate v. California Coastal Comm'n (1998):*

- Coastal Commission delayed issuance of certain development permits for property; court later found that the Commission had no jurisdiction over the property. CA Supreme Court found that the delay caused by the Commission's mistaken assertion of jurisdiction was not a taking.

## *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency (2002):*

- City imposed two moratoria, totaling 32 months, on development in the Lake Tahoe Basin while formulating a comprehensive land-use plan for the area. Supreme Court held that that the temporary moratoria did not constitute a per se taking: the adoption of a categorical rule that any deprivation of all economic use, no matter how brief, is a taking would impose unreasonable financial obligations upon governments.

## *Palazzolo v. Rhode Island (2001):*

- Palazzolo bought property designated as protected "coastal wetlands," sued after multiple development proposals were denied. Supreme Court found that Palazzolo could still sue for takings: "Future generations, too, have a right to challenge unreasonable limitations on the use and value of land."

## Constitutional Issues: Miscellaneous Issues

- *Williamson Planning Comm'n. v. Hamilton Bank of Johnson City* (1984):
  - Owner must submit/ resubmit development plans or applications for variances before the takings claim is ripe for adjudication, unless the request would be futile.

# Constitutional Issues: Due Process/ Equal Protection

- Due Process and Equal Protection claims are distinct from takings claims
  - *Do not require proof that all economically beneficial use of land has been denied.*
- Due Process: 5<sup>th</sup> Amendment requirement that “No person shall be . . . deprived of life, liberty, or property, without due process of law.”
  - Procedural Due Process – City must give affected parties notice and opportunity to be heard
  - Substantive Due Process – “rational basis” test: no “arbitrary” or “confiscatory” government conduct

# Constitutional Issues: Due Process

- *RRI Realty Corp. Inc. v. Village of Southampton* (2<sup>nd</sup> Cir. 1989)
  - Involved renovation of a 63-room waterfront property approved in three stages. When the community began opposing the project after the first stage, the city issued a stop order, alleging that the project was not authorized past the first stage; the city also ignored a 30-day “deemed approved” provision in its code for the permit, claiming it still had discretionary authority.
  - The 2<sup>nd</sup> Circuit federal court found that the City had violated the principles of substantive due process by arbitrarily revoking a permit that had already been issued.

## Constitutional Issues: Equal Protection

- Land Use regulations may not deprive a person of equal protection of the laws:
  - Most classifications will be upheld if there is a reasonable basis for the classification. (“Rational Basis” test)
  - For certain classifications that affect specific “classes” (“protected classes,” e.g., race, religion) or “fundamental rights,” a “Strict Scrutiny” test is applied: the classification is narrowly tailored to serve a compelling governmental interest .

## Constitutional Issues: Equal Protection

- *City of Cleburne v. Cleburne Living Center* (1985)
  - City's zoning ordinance prevented the construction of a group home for the mentally retarded in a residential zone.
  - Even though the Court expressly refused to declare mental retardation a suspect classification, using the “Rational Basis” test, the Court struck down the statute as based on “irrational” prejudice.

# Constitutional Issues: First Amendment

- The First Amendment protects both freedom of speech and freedom of religion.
  - How does land use regulation affect First Amendment rights?
- Free Speech/ Expression:
  - Regulation of Adult Businesses must be “Content-Neutral”: “reasonable time, place or manner restrictions.”
  - However, cities can regulate the “Secondary Effects” of such expression, e.g., increased crime, prostitution, and decreased property values

# Constitutional Issues: First Amendment

## Regulation of Speech/ Secondary Effects Doctrine

- *City of Renton v. Playtime Theaters* (1986)
  - City passed an adult-business zoning law in 1981 that prevented adult businesses from locating within 1,000 feet of any residential area, school, park or church.
  - City argued that the purpose of the law was to prevent the “secondary effects” of the expression; the Supreme Court upheld the law.
  - Court ruled that a seemingly content-based law can be considered a content-neutral law for constitutional purposes if the aim of the law was to address harmful secondary effects.

“To be sure, the ordinance treats theaters that specialize in adult films differently from other kinds of theaters. Nevertheless . . . the Renton ordinance is aimed not at the content of the films shown at ‘adult motion picture theaters,’ but rather at the secondary effects of such theaters in the surrounding community.”
  - The Court determined the regulation to be content-neutral, even though the zoning law regulated theaters based on the content of their films.



# Constitutional Issues: First Amendment

## Regulation of Religious Land Uses

- First Amendment Freedom of Religion:
  - *Church of Lukumi Babalu Aye v. City of Hialeah (1993)*:
    - Ordinance forbade killing of "an animal in a public or private ritual or ceremony not for the primary purpose of food consumption."
    - The law was enacted soon after the city council of Hialeah learned that the Church, which practiced a religion involving ritual animal sacrifice was planning on locating in the city.
    - The Supreme Court struck down the ordinance, finding it failed the strict scrutiny test.
- Statutory limits on city's power to zone religious uses (RLUIPA):
  - Cannot exclude all religious uses
  - Cannot unreasonably limit religious use
  - Cannot discriminate against religious uses

# Conclusion: Emerging Trends

*What are the emerging trends and issues in land use?*

- Currently on the horizon: continuing challenge to governmental regulation of property on grounds of private property rights.
- *Kelo v. City of New London (2005)*
  - Involved a condemnation of privately owned real property for use as part of a redevelopment plan.
  - The Court held in a 5-4 decision that the general benefits a community enjoyed from economic growth qualified such redevelopment plans as a permissible "public use" under the Takings Clause.
  - The Kelo decision was widely criticized, and many members of the general public saw the outcome as a gross violation of property rights and as a misinterpretation of the Fifth Amendment.

## Conclusion: Emerging Trends

- Response to Kelo: Restrictions on Eminent Domain Power?
  - Proposed Prop 90 (failed):
    - Would have essentially eliminated land use regulation authority by requiring local governments to pay property owners for “substantial economic loss” resulting from land use regulations, such as:
      - downzoning property
      - height limits
      - eliminating access
    - Unclear when compensation would have been required-- what is “substantial economic loss”?