



Land Use

CHRISTIAN TURNER



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Land Use

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1. Preface

This text explores the laws governing the use of land. Sometimes narrowly focused, often intensely local, land use regulation may give the impression of a highly specialized field with small stakes. City councils and zoning officials wrestling over municipal code to govern second stories, lot size, or sewage connections fails in the abstract to arouse the passions of the legal battles over gay rights, abortion, or even the milder controversies of the law of torts.

First impressions can be misleading. No matter how strongly people may say they feel about the white hot issues of the day, nothing can pack a government building full of angry citizens like a dispute over zoning. From fighting the arrival of a Wal-Mart to the regulation of density in residential neighborhoods to the protection of wetlands and endangered species, it is the use of land that evokes many of our most deeply felt convictions about the line between private rights and public needs.

To appreciate the issues raised by disputes over land use and the administrative and legal choices embedded in our legal system, this casebook is organized in three major parts. A possible fourth part is left for the classroom.

First, we will survey the ordinary, local administrative scheme of land use regulation. The cases in this section are intended to establish what that system is and what its standards are. We begin with zoning and its blessing by the Supreme Court in *Euclid*. The main idea is this: that local communities will establish a heterogenous array of zones, that the map of the community will then be painted with these different zones, and that regulations will be uniform within zones and disparate among them. Nearly all else in the ordinary scheme is a series of footnotes to this structure. And the rest of the section provides many of these: variances, special use permits, and comprehensive planning.

The casebook does not cover directly a number of regulations that typically fall within this scheme. We will see some of them in cases that follow, and your instructor may, as I do, lecture on several of

them, including the regulation of subdivisions, historic preservation, and aesthetic regulation more generally. Once you understand the administrative scheme, none of these is difficult to pick up, and the judicial review implications are hardly different.

In the second part of the course, we will turn our attention to cases illustrating litigation *attacks* on the ordinary administrative scheme. The purpose here is not, as it was in the first part, to understand better the standards the administrators should apply, but to understand the constraints imposed on the contents of local laws, the procedures of enactment and permitting, and the composition of local lawmaking bodies. In other words, we move from administrative description to various kinds of state and federal Constitutional Law (recognizing that some constraints are not described by courts applying them as emanating from a written constitution - the point here is a more general one).

These attacks come in a number of flavors, and our problem with respect to each is to discover the proper deference, if any, a court should show the local bodies and what standard might best be rationalized that. First, a litigant may attack a local regulation or its application for its substance, essentially asserting its stupidity, wickedness, or, less dramatically, its inefficiency. A regulation that barred shoe stores but allowed other clothing stores in a zone, where there was no explanation of what purpose this might serve, could be an example of such a regulation.

Second, a litigant may attack the distributional unfairness of a law. Even if a law serves the public interest, it may do so by placing too much burden on a small number of landowners. That poorly allocated burden is an independent reason to consider setting such a law aside.

Third, a law may be efficient and its burdens relatively equally spread, and yet the law might be judged to impact too greatly important aspects of individual autonomy. Regulations of signs, religious uses, adult businesses, and the like tend to raise this sort of concern.

In addition to these three concerns – efficiency, distribution, and autonomy – we must recognize that deference to land use regulators ought to be affected by a number of variables. First is the ordinary impetus to deference to legislative policy judgments that any court should have. But, when the court is federal, we must consider both what deference a court owes a legislator and how much the federal government should interfere in state and local affairs. This doubly layered deference explains why federal courts generally have very high bars to litigation that could be characterized as turning them into boards of zoning appeals.

As if these two dimensions of consideration are not enough, we must also understand that local bodies perform different *kinds* of functions. They legislate. They make permit decisions, a bit like adjudication. They also tend to be composed of nonprofessional community members, members who have jobs and relationships that are very likely to be affected, at least indirectly, by the matters the local government considers.

Keep these three axes of problems in mind as we work through the second Part, covering litigation raising substantive limits, procedural requirements, and principles of delegation.

In the third part of the course, we focus on the distributive concerns raised by land use regulation. The regulatory takings doctrine has gone from, literally, nothing, to wrestling to disentangle distributive concerns from substantive ones, to trying to craft either rules or standards to identify regulations that go “too far” and should be considered “takings” within the meaning of the Fifth Amendment. We will consider what the doctrine’s purposes are, how it should be governed, and how it should be invoked as a procedural matter.

Finally, in a three-credit, one-semester course, I add three weeks of “special topics.” Each week features a different topic, and I use the opportunity to apply the general framework for regulation and litigation to a particular set of disputes, in greater depth. What topics I choose vary with the interests of the class. But in the past, I have spent a week covering religious land uses

and the application of the Religious Land Use and Institutionalized Persons Act. For that topic, the readings comprised a DOJ report,¹ excerpts from *Greater Bible Way Temple v. City of Jackson*, 478 Mich. 373 (2007), *Sts. Constantine and Helen Greek Orthodox Church v. City of New Berlin*, 396 F.3d 895 (7th Cir. 2005), various news articles on disputes involving mosques, the brief of the United States in *Estes v. Rutherford County Regional Planning Comm'n*,² and the complaint in another mosque case.³ I have also spent a special topics week on environmental law, focusing both on federal and state environmental protection acts and the environmental impact statement and on the Endangered Species Act. For the latter, I have enjoyed using Stanford Law School's case study on the Delhi Sands Flower-Loving Fly.⁴

¹http://www.justice.gov/crt/rluipa_report_092210.pdf

²

http://www.justice.gov/crt/spec_topics/religiousdiscrimination/rutherford_amicus_brief.pdf

³

<http://religionclause.blogspot.com/2009/12/mosque-sues-to-challenge-rezoning.html>

⁴ The description of this case study and links for those interested in obtaining access can be found at:

http://www.law.stanford.edu/publications/casestudies/case_abstracts/#SLS9802

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2. The Zoning System

2.1. Introduction

A Sample State Zoning Enabling Act

Section 1. Grant of Power

For the purpose of promoting health, safety, morals, or the general welfare of the community, the legislative body of cities and incorporated villages is hereby empowered to regulate and restrict the height, number of stories and size of buildings and other structures, the percentage of lot that may be occupied, the size of yards, courts, and other open spaces, the density of population and the location and use of buildings, structures and land of trade, industry, residence or other purposes.

Section 2. Districts

For any or all of said purposes the local legislative body may divide the municipality into districts of such number, shape, and area as may be deemed best suited to carry out the purposes of this act; and within such districts it may regulate and restrict the erection, construction, reconstruction, alteration, repair, or use of buildings, structures, or land. All such regulations shall be uniform for each class or kind of building throughout each district, but the regulations in one district may differ from those in other districts.

Section 3. Purposes in View

Such regulations shall be made in accordance with a comprehensive plan and designed to lessen congestion in the streets; to secure safety from fire, panic, and other dangers; to promote health and the general welfare; to provide adequate light and air; to prevent the overcrowding of land; to avoid undue concentration of population; to facilitate the adequate provision of transportation, water, sewerage, schools, parks, and other public requirements, Such regulations shall be made with reasonable

consideration, among other things, to the character of the district and its peculiar suitability for particular uses, and with a view to conserving the value of buildings and encouraging the most appropriate use of land throughout such municipality.

Section 4. Method of Procedure

The legislative body of such municipality shall provide for the manner in which such regulations and restrictions and the boundaries of such districts shall be determined, established, and enforced, and from time to time amended, supplemented, or changed. However, no such regulation, restriction, or boundary shall become effective until after a public hearing in relation thereto, at which parties in interest and citizens shall have an opportunity to be heard. At least 15 days' notice of the time and place of such hearing shall be published in an official paper, or a paper of general circulation, in such municipality.

Section 5. Changes

Such regulations, restrictions, and boundaries may from time to time be amended, supplemented, changed, modified, or repealed. In case, however, of a protest against such change, signed by the owners of 20 per cent or more either of the area of the lots included in such proposed change, or of those immediately adjacent in the rear thereof extending _____ feet there from, or of those directly opposite thereto extending _____ feet from the street frontage of such opposite lots, such amendment shall not become effective except by the favorable vote of three-fourths of all the members of the legislative body of such municipality. The provisions of the previous section relative to public hearings and official notice shall apply equally to all changes or amendments.

Section 6. Zoning Commission

In order to avail itself of the powers conferred by this act, such legislative body shall appoint a commission, to be known as the zoning commission, to recommend the boundaries of the various original districts and appropriate regulations to be enforced therein. Such commission shall make a preliminary report and hold public hearings thereon before submitting its final report, and such legislative body shall not hold its public hearings or take action until it has received the final report of such commission. Where a city plan commission already exists, it may be appointed as the zoning commission.

Section 7. Board of Adjustments

Such local legislative body may provide for the appointment of a board of adjustment, and in the regulations and restrictions adopted pursuant to the authority of this act may provide that the said board of adjustment may, in appropriate cases and subject to appropriate conditions and safeguards, make special exceptions to the terms of the ordinance in harmony with its general purpose and intent and in accordance with general or specific rules therein contained.

The board of adjustment shall consist of five members, each to be appointed for a term of three years and removable for cause by the appointing authority upon written charges and after public hearing. Vacancies shall be filled for the unexpired term of any member whose term becomes vacant.

The board shall adopt rules in accordance with the provisions of any ordinance adopted pursuant to this act. Meetings of the board shall be held at the call of the chairman and at such other times as the board may determine. Such chairman, or in his absence the acting chairman, may administer oaths and compel the attendance

of witnesses. All meetings of the board shall be open to the public. The board shall keep minutes of its proceedings, showing the vote of each member upon each question, or, if absent or failing to vote, indicating such fact, and shall keep records of its examinations and other official actions, all of which shall be immediately filed in the office of the board and shall be a public record.

Appeals to the board of adjustment may be taken by any person aggrieved or by any officer, department, board, or bureau of the municipality affected by any decision of the administrative officer. Such appeal shall be taken within a reasonable time, as provided by the rules of the board, by filing with the officer from whom the appeal is taken and with the board of adjustment a notice of appeal specifying the grounds thereof. The officer from whom the appeal is taken shall forthwith transmit to the board all the papers constituting the record upon which the action appealed from was taken.

An appeal stays all proceedings in furtherance of the action appealed from, unless the officer from whom the appeal is taken certifies to the board of adjustment after the notice of appeal shall have been filed with him that by reason of facts stated in the certificate a stay would, in his opinion, cause imminent peril to life or property. In such case proceedings shall not be stayed otherwise than by a restraining order which may be granted by the board of adjustment or by a court of record on application on notice to the officer from whom the appeal is taken and on due cause shown.

The board of adjustment shall fix a reasonable time for the hearing of the appeal, give public notice thereof, as well as due notice to the parties in interest, and decide the same within a reasonable time. Upon the hearing any party may appear in person or by agent or by attorney. The board of adjustment shall have the following powers:

To hear and decide appeals where it is alleged there is error in any order, requirement, decision, or determination made by an administrative official in the enforcement of this act or of any ordinance adopted pursuant thereto.

To hear and decide special exceptions to the terms of the ordinance upon which such board is required to pass under such ordinance.

To authorize upon appeal in specific cases such variance from the terms of the ordinance as will not be contrary to the public interest, where, owing to special conditions, a literal enforcement of the provisions of the ordinance will result in unnecessary hardship, and so that the spirit of the ordinance shall be observed and substantial justice done.

In exercising the above-mentioned powers such board may, in conformity with the provisions of this act, reverse or affirm, wholly or partly, or may modify the order, requirement, decision, or determination appealed from and may make such order, requirement, decision, or determination as ought to be made, and to that end shall have all the powers of the officer from whom the appeal is taken.

The concurring vote of four members of the board shall be necessary to reverse any order, requirement, decision, or determination of any such administrative official, or to decide in favor of the applicant on any matter upon which it is required to pass under any such ordinance, or to effect any variation in such ordinance.

Any person or persons, jointly or severally, aggrieved by any decision of the board of adjustment, or any taxpayer, or any officer, department, board, or bureau of the municipality, may present to a court of record a petition, duly verified, setting forth that such decision is illegal, in whole or in part, specifying the grounds of the illegality. Such petition shall be presented to the court within 30 days after the filing of the decision in the office of the board.

Upon the presentation of such petition the court may allow a writ of certiorari directed to the board of adjustment to review such decision of the board of adjustment and shall prescribe therein the time within which a return thereto must be made and served upon the realtor's attorney, which shall not be less than 10 days and may be extended by the court. The allowance of the writ shall not stay proceedings upon the decision appealed from, but the court may, on application, on notice to the board and on due cause shown, grant a restraining order.

The board of adjustment shall not be required to return the original papers acted upon by it, but it shall be sufficient to return certified or sworn copies thereof or of such portions thereof as may be called for by such writ. The return shall concisely set forth such other facts as may be pertinent and material to show the grounds of the decision appealed from and shall be verified.

If, upon the hearing, it shall appear to the court that testimony is necessary for the proper disposition of the matter, it may take evidence or appoint a referee to take such evidence as it may direct and report the same to the court with his findings of fact and conclusions of law, which shall constitute apart of the proceedings upon which the determination of the court shall be made. The court may reverse or affirm, wholly or partly, or may modify the decision brought up for review.

Costs shall not be allowed against the board unless it shall appear to the court that it acted with gross negligence, or in bad faith, or with malice in making the decision appealed from.

All issues in any proceeding under this section shall have preference over all other civil actions and proceedings.

Section 8. Enforcement and Remedies

The local legislative body may provide by ordinance for the enforcement of this act and of any ordinance or regulation made there under. A violation of this act or of such ordinance or regulation is hereby declared to be a misdemeanor, and such local legislative body may provide for the punishment thereof by fine or imprisonment or both. It is also empowered to provide civil penalties for such violation.

In case any building or structure is erected, constructed, reconstructed, altered, repaired, converted, or maintained, or any building, structure, or land is used in violation of this act or of any ordinance or other regulation made under authority conferred hereby, the proper local authorities of the municipality, in addition to other remedies, may institute any appropriate action or proceedings to prevent such unlawful erection, construction, reconstruction, alteration, repair, conversion, maintenance, or use, to restrain, correct, or abate such violation, to prevent the occupancy of said building, structure, or land, or to prevent any illegal act, conduct, business, or use in or about such premises.

Section 9. Conflict with other Laws

Wherever the regulations made under authority of this act require a greater width or size of yards, courts, or other open spaces, or require a lower height of building or less number of stories, or require a greater percentage of lot to be left unoccupied, or impose other higher standards than are required in any other statute or local ordinance or regulation, the provisions of the regulations made under authority of this act shall govern. Wherever the provisions of any other statute or local ordinance or regulation require a greater width or size of yards, courts, or other open spaces, or require a lower height of building or a less number of stories, or require a greater

percentage of lot to be left unoccupied, or impose other higher standards than are required by the regulations made under authority of this act, the provisions of such statute or local ordinance or regulation shall govern.

Village of Euclid, Ohio, et al. v. Ambler Realty Co.

272 U.S. 365 (1926).

Mr. James Metzenbaum, of Cleveland, Ohio, for appellants.

Messrs. Newton D. Baker and Robert M. Morgan, both of Cleveland, Ohio, for appellee.

MR. JUSTICE SUTHERLAND delivered the opinion of the Court.

The village of Euclid is an Ohio municipal corporation. It adjoins and practically is a suburb of the city of Cleveland. Its estimated population is between 5,000 and 10,000, and its area from 12 to 14 square miles, the greater part of which is farm lands or unimproved acreage. It lies, roughly, in the form of a parallelogram measuring approximately 3 1/2 miles each way. East and west it is traversed by three principal highways: Euclid avenue, through the southerly border, St. Clair avenue, through the central portion, and Lake Shore boulevard, through the northerly border, in close proximity to the shore of Lake Erie. The Nickel Plate Railroad lies from 1,500 to 1,800 feet north of Euclid avenue, and the Lake Shore Railroad 1,600 feet farther to the north. The three highways and the two railroads are substantially parallel.

Appellee is the owner of a tract of land containing 68 acres, situated in the westerly end of the village, abutting on Euclid avenue to the south and the Nickel Plate Railroad to the north. Adjoining this tract, both on the east and on the west, there have been laid out restricted residential plats upon which residences have been erected.

On November 13, 1922, an ordinance was adopted by the village council, establishing a comprehensive zoning plan

for regulating and restricting the location of trades, industries, apartment houses, two-family houses, single family houses, etc., the lot area to be built upon, the size and height of buildings, etc.

The entire area of the village is divided by the ordinance into six classes of use districts, denominated U-1 to U-6, inclusive; three classes of height districts, denominated H-1 to H-3, inclusive; and four classes of area districts, denominated A-1 to A-4, inclusive. The use districts are classified in respect of the buildings which may be erected within their respective limits, as follows: U-1 is restricted to single family dwellings, public parks, water towers and reservoirs, suburban and interurban electric railway passenger stations and rights of way, and farming, non-commercial greenhouse nurseries, and truck gardening; U-2 is extended to include two-family dwellings; U-3 is further extended to include apartment houses, hotels, churches, schools, public libraries, museums, private clubs, community center buildings, hospitals, sanitariums, public playgrounds, and recreation buildings, and a city hall and courthouse; U-4 is further extended to include banks, offices, studios, ... [etc.] U-6 is further extended to include plants for sewage disposal and for producing gas, garbage and refuse incineration, scrap iron, junk, scrap paper, and rag storage, aviation fields, cemeteries, crematories, penal and correctional institutions, insane and feeble-minded institutions, storage of oil and gasoline (not to exceed 25,000 gallons), and manufacturing and industrial operations of any kind other than, and any public utility not included in, a class U-1, U-2, U-3, U-4, or U-5 use. There is a seventh class of uses which is prohibited altogether.

Class U-1 is the only district in which buildings are restricted to those enumerated. In the other classes the uses are cumulative-that is to say, uses in class U-2 include those enumerated in the preceding class U-1; class U-3 includes uses enumerated in the preceding classes, U-2, and U-1;

and so on. In addition to the enumerated uses, the ordinance provides for accessory uses; that is, for uses customarily incident to the principal use, such as private garages. Many regulations are provided in respect of such accessory uses.

The height districts are classified as follows: In class H-1, buildings are limited to a height of 2 1/2 stories, or 35 feet... . To all of these, certain exceptions are made, as in the case of church spires, water tanks, etc.

The classification of area districts is: In A-1 districts, dwellings or apartment houses to accommodate more than one family must have at least 5,000 square feet for interior lots and at least 4,000 square feet for corner lots; The ordinance contains, in great variety and detail, provisions in respect of width of lots, front, side, and rear yards, and other matters, including restrictions and regulations as to the use of billboards, signboards, and advertising signs.

A single family dwelling consists of a basement and not less than three rooms and a bathroom. A two-family dwelling consists of a basement and not less than four living rooms and a bathroom for each family, and is further described as a detached dwelling for the occupation of two families, one having its principal living rooms on the first floor and the other on the second floor.

Appellee's tract of land comes under U-2, U-3 and U-6. The first strip of 620 feet immediately north of Euclid avenue falls in class U-2, the next 130 feet to the north, in U-3, and the remainder in U-6. The uses of the first 620 feet, therefore, do not include apartment houses, hotels, churches, schools, or other public and semipublic buildings, or other uses enumerated in respect of U-3 to U-6, inclusive. The uses of the next 130 feet include all of these, but exclude industries, theaters, banks, shops, and the

various other uses set forth in respect of U-4 to U-6, inclusive.¹

Annexed to the ordinance, and made a part of it, is a zone map, showing the location and limits of the various use, height, and area districts, from which it appears that the three classes overlap one another; that is to say, for example, both U-5 and U-6 use districts are in A-4 area district, but the former is in H-2 and the latter in H-3 height districts. The plan is a complicated one, and can be better understood by an inspection of the map, though it does not seem necessary to reproduce it for present purposes.

The lands lying between the two railroads for the entire length of the village area and extending some distance on either side to the north and south, having an average width of about 1,600 feet, are left open, with slight exceptions, for industrial and all other uses. This includes the larger part of appellee's tract. Approximately one-sixth of the area of the entire village is included in U-5 and U-6 use districts. That part of the village lying south of Euclid avenue is principally in U-1 districts. The lands lying north of Euclid avenue and bordering on the long strip just described are included in U-1, U-2, U-3, and U-4 districts, principally in U-2.

The enforcement of the ordinance is intrusted to the inspector of buildings, under rules and regulations of the

¹ The court below seemed to think that the frontage of this property on Euclid avenue to a depth of 150 feet came under U-1 district and was available only for single family dwellings. An examination of the ordinance and subsequent amendments, and a comparison of their terms with the maps, shows very clearly, however, that this view was incorrect. Appellee's brief correctly interpreted the ordinance: "The northerly 500 feet thereof immediately adjacent to the right of way of the New York, Chicago & St. Louis Railroad Company under the original ordinance was classed as U-6 territory and the rest thereof as U-2 territory. By amendments to the ordinance a strip 630(620) feet wide north of Euclid avenue is classed as U-2 territory, a strip 130 feet wide next north as U-3 territory and the rest of the parcel to the Nickel Plate right of way as U-6 territory.

board of zoning appeals. Meetings of the board are public, and minutes of its proceedings are kept. It is authorized to adopt rules and regulations to carry into effect provisions of the ordinance. Decisions of the inspector of buildings may be appealed to the board by any person claiming to be adversely affected by any such decision. The board is given power in specific cases of practical difficulty or unnecessary hardship to interpret the ordinance in harmony with its general purpose and intent, so that the public health, safety and general welfare may be secure and substantial justice done. Penalties are prescribed for violations, and it is provided that the various provisions are to be regarded as independent and the holding of any provision to be unconstitutional, void or ineffective shall not affect any of the others.

The ordinance is assailed on the grounds that it is in derogation of section 1 of the Fourteenth Amendment to the federal Constitution in that it deprives appellee of liberty and property without due process of law and denies it the equal protection of the law, and that it offends against certain provisions of the Constitution of the state of Ohio. The prayer of the bill is for an injunction restraining the enforcement of the ordinance and all attempts to impose or maintain as to appellee's property any of the restrictions, limitations or conditions. The court below held the ordinance to be unconstitutional and void, and enjoined its enforcement, 297 F. 307.

Before proceeding to a consideration of the case, it is necessary to determine the scope of the inquiry. The bill alleges that the tract of land in question is vacant and has been held for years for the purpose of selling and developing it for industrial uses, for which it is especially adapted, being immediately in the path or progressive industrial development; that for such uses it has a market value of about \$10,000 per acre, but if the use be limited to residential purposes the market value is not in excess of

\$2,500 per acre; that the first 200 feet of the parcel back from Euclid avenue, if unrestricted in respect of use, has a value of \$150 per front foot, but if limited to residential uses, and ordinary mercantile business be excluded therefrom, its value is not in excess of \$50 per front foot.

It is specifically averred that the ordinance attempts to restrict and control the lawful uses of appellee's land, so as to confiscate and destroy a great part of its value; that it is being enforced in accordance with its terms; that prospective buyers of land for industrial, commercial, and residential uses in the metropolitan district of Cleveland are deterred from buying any part of this land because of the existence of the ordinance and the necessity thereby entailed of conducting burdensome and expensive litigation in order to vindicate the right to use the land for lawful and legitimate purposes; that the ordinance constitutes a cloud upon the land, reduces and destroys its value, and has the effect of diverting the normal industrial, commercial, and residential development thereof to other and less favorable locations.

The record goes no farther than to show, as the lower court found, that the normal and reasonably to be expected use and development of that part of appellee's land adjoining Euclid avenue is for general trade and commercial purposes, particularly retail stores and like establishments, and that the normal and reasonably to be expected use and development of the residue of the land is for industrial and trade purposes. Whatever injury is inflicted by the mere existence and threatened enforcement of the ordinance is due to restrictions in respect of these and similar uses, to which perhaps should be added-if not included in the foregoing-restrictions in respect of apartment houses. Specifically there is nothing in the record to suggest that any damage results from the presence in the ordinance of those restrictions relating to churches, schools, libraries, and other public and semipublic buildings. It is neither

alleged nor proved that there is or may be a demand for any part of appellee's land for any of the last-named uses, and we cannot assume the existence of facts which would justify an injunction upon this record in respect to this class of restrictions. For present purposes the provisions of the ordinance in respect of these uses may therefore be put aside as unnecessary to be considered. It is also unnecessary to consider the effect of the restrictions in respect of U-1 districts, since none of appellee's land falls within that class.

We proceed, then, to a consideration of those provisions of the ordinance to which the case as it is made relates, first disposing of a preliminary matter.

A motion was made in the court below to dismiss the bill on the ground that, because complainant (appellee) had made no effort to obtain a building permit or apply to the zoning board of appeals for relief, as it might have done under the terms of the ordinance, the suit was premature. The motion was properly overruled, the effect of the allegations of the bill is that the ordinance of its own force operates greatly to reduce the value of appellee's lands and destroy their marketability for industrial, commercial and residential uses, and the attack is directed, not against any specific provision or provisions, but against the ordinance as an entirety. Assuming the premises, the existence and maintenance of the ordinance in effect constitutes a present invasion of appellee's property rights and a threat to continue it. . . .

It is not necessary to set forth the provisions of the Ohio Constitution which are thought to be infringed. The question is the same under both Constitutions, namely, as stated by appellee: Is the ordinance invalid, in that it violates the constitutional protection 'to the right of property in the appellee by attempted regulations under the guise of the police power, which are unreasonable and confiscatory'?

Building zone laws are of modern origin. They began in this country about 25 years ago. Until recent years, urban life was comparatively simple; but, with the great increase and concentration of population, problems have developed, and constantly are developing, which require, and will continue to require, additional restrictions in respect of the use and occupation of private lands in urban communities. Regulations, the wisdom, necessity, and validity of which, as applied to existing conditions, are so apparent that they are now uniformly sustained, a century ago, or even half a century ago, probably would have been rejected as arbitrary and oppressive. Such regulations are sustained, under the complex conditions of our day, for reasons analogous to those which justify traffic regulations, which, before the advent of automobiles and rapid transit street railways, would have been condemned as fatally arbitrary and unreasonable. And in this there is no inconsistency, for, while the meaning of constitutional guaranties never varies, the scope of their application must expand or contract to meet the new and different conditions which are constantly coming within the field of their operation. In a changing world it is impossible that it should be otherwise. But although a degree of elasticity is thus imparted, not to the meaning, but to the application of constitutional principles, statutes and ordinances, which, after giving due weight to the new conditions, are found clearly not to conform to the Constitution, of course, must fall.

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 clew. And the law of nuisances, likewise, may be consulted, not for the purpose of controlling, but for the helpful aid of its analogies in the process of ascertaining the scope of, the power. Thus the question whether the power exists to forbid the erection of a building of a particular kind or for a particular use, like the question whether a particular thing is a nuisance, is to be determined, not by an abstract consideration of the building or of the thing considered apart, but by considering it in connection with the circumstances and the locality. *Sturgis v. Bridgeman*, L. R. 11 Ch. 852, 865. 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. *Radice v. New York*, 264 U. S. 292, 294.

There is no serious difference of opinion in respect of the validity of laws and regulations fixing the height of buildings within reasonable limits, the character of materials and methods of construction, and the adjoining area which must be left open, in order to minimize the danger of fire or collapse, the evils of overcrowding and the like, and excluding from residential sections offensive trades, industries and structures likely to create nuisances. [citations omitted]

Here, however, the exclusion is in general terms of all industrial establishments, and it may thereby happen that not only offensive or dangerous industries will be excluded, but those which are neither offensive nor dangerous will share the same fate. But this is no more than happens in respect of many practice-forbidding laws which this court has upheld, although drawn in general terms so as to include individual cases that may turn out to be innocuous in themselves. *Hebe Co. v. Shaw*, 248 U. S. 297, 303; *Pierce Oil*

Corp. v. City of Hope, 248 U. S. 498, 500. The inclusion of a reasonable margin, to insure effective enforcement, will not put upon a law, otherwise valid, the stamp of invalidity. Such laws may also find their justification in the fact that, in some fields, the bad fades into the good by such insensible degrees that the two are not capable of being readily distinguished and separated in terms of legislation. In the light of these considerations, we are not prepared to say that the end in view was not sufficient to justify the general rule of the ordinance, although some industries of an innocent character might fall within the proscribed class. It cannot be said that the ordinance in this respect 'passes the bounds of reason and assumes the character of a merely arbitrary fiat.' *Purity Extract Co. v. Lynch*, 226 U. S. 192, 204. Moreover, the restrictive provisions of the ordinance in this particular may be sustained upon the principles applicable to the broader exclusion from residential districts of all business and trade structures, presently to be discussed.

It is said that the village of Euclid is a mere suburb of the city of Cleveland; that the industrial development of that city has now reached and in some degree extended into the village, and in the obvious course of things will soon absorb the entire area for industrial enterprises; that the effect of the ordinance is to divert this natural development elsewhere, with the consequent loss of increased values to the owners of the lands within the village borders. But the village, though physically a suburb of Cleveland, is politically a separate municipality, with powers of its own and authority to govern itself as it sees fit, within the limits of the organic law of its creation and the state and federal Constitutions. Its governing authorities, presumably representing a majority of its inhabitants and voicing their will, have determined, not that industrial development shall cease at its boundaries, but that the course of such development shall proceed within definitely fixed lines. If it be a proper exercise of the police power to relegate

industrial establishments to localities separated from residential sections, it is not easy to find a sufficient reason for denying the power because the effect of its exercise is to divert an industrial flow from the course which it would follow, to the injury of the residential public, if left alone, to another course where such injury will be obviated. It is not meant by this, however, to exclude the possibility of cases where the general public interest would so far outweigh the interest of the municipality that the municipality would not be allowed to stand in the way.

We find no difficulty in sustaining restrictions of the kind thus far reviewed. The serious question in the case arises over the provisions of the ordinance excluding from residential districts apartment houses, business houses, retail stores and shops, and other like establishments. This question involves the validity of what is really the crux of the more recent zoning legislation, namely, the creation and maintenance of residential districts, from which business and trade of every sort, including hotels and apartment houses, are excluded. Upon that question this court has not thus far spoken. The decisions of the state courts are numerous and conflicting; but those which broadly sustain the power greatly outnumber those which deny it altogether or narrowly limit it, and it is very apparent that there is a constantly increasing tendency in the direction of the broader view....

As evidence of the decided trend toward the broader view, it is significant that in some instances the state courts in later decisions have reversed their former decisions holding the other way. For example, compare *State ex rel. v. Houghton*, *supra*, sustaining the power, with *State ex rel. Lachtman v. Houghton*, 134 Minn. 226, *State ex rel. Roerig v. City of Minneapolis*, 136 Minn. 479, and *Vorlander v. Hokenson*, 145 Minn. 484, denying it, all of which are disapproved in the *Houghton Case* (page 151 (204 N. W. 569)) last decided.

The decisions enumerated in the first group cited above agree that the exclusion of buildings devoted to business, trade, etc., from residential districts, bears a rational relation to the health and safety of the community. Some of the grounds for this conclusion are promotion of the health and security from injury of children and others by separating dwelling houses from territory devoted to trade and industry; suppression and prevention of disorder; facilitating the extinguishment of fires, and the enforcement of street traffic regulations and other general welfare ordinances; aiding the health and safety of the community, by excluding from residential areas the confusion and danger of fire, contagion, and disorder, which in greater or less degree attach to the location of stores, shops, and factories. Another ground is that the construction and repair of streets may be rendered easier and less expensive, by confining the greater part of the heavy traffic to the streets where business is carried on.

The Supreme Court of Illinois, in *City of Aurora v. Burns*, *supra*, pages 93-95 (149 N. E. 788), in sustaining a comprehensive building zone ordinance dividing the city into eight districts, including exclusive residential districts for one and two family dwellings, churches, educational institutions, and schools, said:

The constantly increasing density of our urban populations, the multiplying forms of industry and the growing complexity of our civilization make it necessary for the state, either directly or through some public agency by its sanction, to limit individual activities to a greater extent than formerly. With the growth and development of the state the police power necessarily develops, within reasonable bounds, to meet the changing conditions. ...

... The harmless may sometimes be brought within the regulation or prohibition in order to abate or destroy the harmful. The segregation of industries, commercial pursuits, and dwellings to particular districts in a city, when exercised reasonably, may bear a rational relation to the health, morals, safety, and general welfare of the community. The establishment of such districts or zones may, among other things, prevent congestion of population, secure quiet residence districts, expedite local transportation, and facilitate the suppression of disorder, the extinguishment of fires, and the enforcement of traffic and sanitary regulations. The danger of fire and the of contagion are often lessened by the exclusion of stores and factories from areas devoted to residences, and, in consequence, the safety and health of the community may be promoted. ...

... The exclusion of places of business from residential districts is not a declaration that such places are nuisances or that they are to be suppressed as such, but it is a part of the general plan by which the city's territory is allotted to different uses, in order to prevent, or at least to reduce, the congestion, disorder, and dangers which often inhere in unregulated municipal development.

The Supreme Court of Louisiana, in *State v. City of New Orleans, supra*, pages 282, 283 (97 So. 444), said:

In the first place, the exclusion of business establishments from residence districts might enable the municipal government to give better police protection. Patrolmen's beats are larger, and therefore fewer, in residence neighborhoods than in business neighborhoods. A place of business in a residence neighborhood furnishes an excuse for any criminal to go into the neighborhood, where, otherwise, a stranger would be under the ban of suspicion. Besides, open shops invite loiterers and idlers to congregate; and the places of such congregations need police protection. In the second place, the zoning of a city into residence districts and commercial districts is a matter of economy in street paving. Heavy trucks, hauling freight to and from places of business in residence districts, require the city to maintain the same costly pavement in such districts that is required for business districts; whereas, in the residence districts, where business establishments are excluded, a cheaper pavement serves the purpose.

Aside from considerations of economic administration, in the matter of police and fire protection, street paving, etc., any business establishment is likely to be a genuine nuisance in a neighborhood of residences. Places of business are noisy; they are apt to be disturbing at night; some of them are malodorous; some are unsightly; some are apt to

breed rats, mice, roaches, flies, ants,
etc. ...

If the municipal council deemed any of the reasons which have been suggested, or any other substantial reason, a sufficient reason for adopting the ordinance in question, it is not the province of the courts to take issue with the council. We have nothing to do with the question of the wisdom or good policy of municipal ordinances. If they are not satisfying to a majority of the citizens, their recourse is to the ballot-not the courts.

The matter of zoning has received much attention at the hands of commissions and experts, and the results of their investigations have been set forth in comprehensive reports. These reports which bear every evidence of painstaking consideration, concur in the view that the segregation of residential, business and industrial buildings will make it easier to provide fire apparatus suitable for the character and intensity of the development in each section; that it will increase the safety and security of home life, greatly tend to prevent street accidents, especially to children, by reducing the traffic and resulting confusion in residential sections, decrease noise and other conditions which produce or intensify nervous disorders, preserve a more favorable environment in which to rear children, etc. With particular reference to apartment houses, it is pointed out that the development of detached house sections is greatly retarded by the coming of apartment houses, which has sometimes resulted in destroying the entire section for private house purposes; that in such sections very often the apartment house is a mere parasite, constructed in order to take advantage of the open spaces and attractive surroundings created by the residential character of the

district. Moreover, the coming of one apartment house is followed by others, interfering by their height and bulk with the free circulation of air and monopolizing the rays of the sun which otherwise would fall upon the smaller homes, and bringing, as their necessary accompaniments, the disturbing noises incident to increased traffic and business, and the occupation, by means of moving and parked automobiles, of larger portions of the streets, thus detracting from their safety and depriving children of the privilege of quiet and open spaces for play, enjoyed by those in more favored localities-until, finally, the residential character of the neighborhood and its desirability as a place of detached residences are utterly destroyed. Under these circumstances, apartment houses, which in a different environment would be not only entirely unobjectionable but highly desirable, come very near to being nuisances.

If these reasons, thus summarized, do not demonstrate the wisdom or sound policy in all respects of those restrictions which we have indicated as pertinent to the inquiry, at least, the reasons are sufficiently cogent to preclude us from saying, as it must be said before the ordinance can be declared unconstitutional, that such provisions are clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare. *Cusack Co. v. City of Chicago, supra*, pages 530-531 (37 S. Ct. 190); *Jacobson v. Massachusetts*, 197 U. S. 11, 30-31.

It is true that when, if ever, the provisions set forth in the ordinance in tedious and minute detail, come to be concretely applied to particular premises, including those of the appellee, or to particular conditions, or to be considered in connection with specific complaints, some of them, or even many of them, may be found to be clearly arbitrary and unreasonable. But where the equitable remedy of injunction is sought, as it is here, not upon the ground of a present infringement or denial of a specific right, or of a particular injury in process of actual execution, but upon

the broad ground that the mere existence and threatened enforcement of the ordinance, by materially and adversely affecting values and curtailing the opportunities of the market, constitute a present and irreparable injury, the court will not scrutinize its provisions, sentence by sentence, to ascertain by a process of piecemeal dissection whether there may be, here and there, provisions of a minor character, or relating to matters of administration, or not shown to contribute to the injury complained of, which, if attacked separately, might not withstand the test of constitutionality. In respect of such provisions, of which specific complaint is not made, it cannot be said that the landowner has suffered or is threatened with an injury which entitles him to challenge their constitutionality... .

... . Under these circumstances, therefore, it is enough for us to determine, as we do, that the ordinance in its general scope and dominant features, so far as its provisions are here involved, is a valid exercise of authority, leaving other provisions to be dealt with as cases arise directly involving them.

And this is in accordance with the traditional policy of this court. In the realm of constitutional law, especially, this court has perceived the embarrassment which is likely to result from an attempt to formulate rules or decide questions beyond the necessities of the immediate issue. It has preferred to follow the method of a gradual approach to the general by a systematically guarded application and extension of constitutional principles to particular cases as they arise, rather than by out of hand attempts to establish general rules to which future cases must be fitted. This process applies with peculiar force to the solution of questions arising under the due process clause of the Constitution as applied to the exercise of the flexible powers of police, with which we are here concerned.

Decree reversed.

MR. JUSTICE VAN DEVANTER, MR. JUSTICE
MCREYNOLDS, AND MR. JUSTICE BUTLER dissent.

2.2. Variances

Harrison v. Mayor and Board of Alderman of the City of Batesville

73 So.3d 1145 (Miss. 2011)

Paul B. Watkins, Jr., Pope S. Mallette, Oxford, attorneys for
appellants.

Benjamin E. Griffith, Daniel J. Griffith, Cleveland, Robert
T. Jolly, E. Patrick Lancaster, Olive Branch, Michael S.
Carr, Lauren Webb Carr, attorneys for appellees.

LAMAR, JUSTICE, for the Court:

In this certiorari case, we consider whether the Mayor and the Batesville Board of Aldermen (collectively the “Board”) erred in granting a variance to allow mining in an area zoned single-family residential and community business. The Mississippi Court of Appeals found that it had and reversed and rendered. However, its opinion provided little discussion of the applicable zoning ordinance governing variances. That ordinance allows the Board to grant a variance due to “practical difficulties or unnecessary hardships.” While the Batesville Code does not define these terms, this language originated in the 1920s and is used in other jurisdictions. While the law and judicial interpretations from other jurisdictions do not bind us, they are helpful in cases where we have no precedent of our own. Therefore, we look to those jurisdictions to aid us in deciding whether the Board applied the correct legal standard and whether its decision to grant the variance is supported by substantial evidence.

Facts

Memphis Stone & Gravel Company submitted to the Board a variance request to mine sand and gravel from eighteen acres leased from various property owners. This tract of land is zoned single-family residential (R-1) and community business (C-2) and is contiguous with Memphis Stone's existing plant operation located in the county. Under the Batesville Code, mining only can be a conditional (as opposed to permitted) use in areas zoned agricultural and industrial.

In support of its zoning application, Memphis Stone attached maps of the area, promotional materials for the company, and an operations narrative. The operations narrative provided general information on the project and mining process and also provided the following information:

Based on national and local trends it takes approximately 10 tons of aggregate each year for new construction and to maintain our existing infrastructure. The growth in Tate County [*sic*] demands a good source of local aggregate. Memphis Stone & Gravel Company believes this deposit will be an asset to the local economy and will likely be lost to future residential development if not managed as a resource for construction material.

The variance request was first approved [unanimously] by the City of Batesville Planning Commission... . Next, the Board held a public hearing on the variance request [and approved the variance at the following meeting]. [A]t its next meeting, a Board member moved to rescind the variance grant, but the motion failed. The member then moved to amend the order granting the variance so that it would include various conditions. Before the Board

finalized the conditions, it heard from Paul Watkins, the Harrisons' attorney. Watkins stated that the Board's decision to grant a variance would change the character of the land and constitute spot zoning, and that the record before the Board contained no reason for its approval. He asserted that Memphis Stone wanted the variance for financial gain and convenience, which are insufficient to show practical difficulty or unnecessary hardship. Watkins also placed in the record a copy of a letter that he previously had sent the Board. In his letter, Watkins argued the variance would have a negative effect on surrounding property, cause a nuisance, and fail to provide any additional employment or tax base for the City.

The Board also heard from the president of Memphis Stone, who addressed only the proposed conditions, one of which was reclamation of the land to its original state. The president stated that reclamation to the original state was "impossible" since his company would be "taking out 40 to 60 [feet] of material ... there is no way... to meet the same topography that is there now. I'm going to have to create a lake out there." Ultimately, the Board upheld the variance with the following conditions: (1) a two-and-one-half-year time limit with review every six months; (2) operations confined to weekdays from 7:00 a.m. to 5:00 p.m.; (3) the erection and construction of berms to screen the project from neighboring property and the road; (4) the watering of objectionable dust; and (5) the imposition of fines for any violations of the conditions.

The Harrisons appealed the variance to the circuit court[, which] affirmed the Board's decision to grant the variance. It found the Batesville Code required proof of "practical difficulties or unnecessary hardship" and that Memphis Stone had provided "ample evidence" to justify the variance. It noted that Memphis Stone had presented "evidence of a public need for a good source of local aggregate and the project would be a good asset for the

local community's economy that will likely be lost to future residential development based on the location of the property.”

[T]he Court of Appeals reversed and rendered, finding the variance constituted a “classic case of spot zoning.” And “[n]otwithstanding that finding, [it went on to] determine whether Memphis Stone proved that there was a public need or a compelling reason for the variance.” It concluded that the record lacked substantial evidence to support a finding of public need or that the variance would be an asset to the local economy. It further found that the record “lacks evidence of any ‘practical difficulty or unnecessary hardship’” without any analysis or explanation of those terms. We granted certiorari to clarify the standards that should apply when a zoning ordinance uses the language “practical difficulties or unnecessary hardships” for granting a variance.

Discussion

A variance generally is defined as the “right to use or to build on land in a way prohibited by strict application of a zoning ordinance.” The grant or denial of a variance is adjudicatory, rather than legislative... . This Court will reverse only if the decision “1) is not supported by substantial evidence, 2) is arbitrary or capricious, 3) is beyond the scope or power granted to the agency, or 4) violates one’s constitutional rights.” We review questions of law under a de novo standard. [The court then decided that even an improper grant of a variance does not constitute illegal “spot zoning,” a concept we will study later.]

The Legislature has provided “the governing authority of any municipality” with the power to enact zoning regulations “for the purpose of promoting health, safety, morals, or the general welfare of the community[.]”¹ As

¹ Miss.Code Ann. § 17-1-3(1) (Rev.2003). Section 17-1-3(1) provides:

previously noted, the Board had zoned the land at issue as single-family residential and community commercial. But Memphis Stone requested a variance to change the *use* of this zoned area. A “use” variance is one of two types of variances:

With a ‘use’ variance, the owner is allowed to engage in a use of the land prohibited by the zoning ordinance. With a ‘nonuse,’ or ‘area’ variance, the owner must comply with the zoning ordinance’s limitations on use of the land but is allowed to build or maintain physical improvements that deviate from the zoning ordinance’s nonuse limitations.

And this Court noted the distinction in *Drems*:

Variances were conceived initially as a means for granting relief from height, bulk, and location restrictions in the ordinances which rendered use of the property impossible or impractical. No conceptual problems arise when the variance is granted to authorize minor departures from the terms of the ordinance; e.g. to permit a landowner to place the structure on his lot nearer the lot line than is permitted by the set-back or side-yard requirements.

for the purpose of promoting health, safety, morals, or the general welfare of the community, the governing authority of any municipality... [is] empowered to regulate the height, number of stories and size of building and other structures, the percentage of lot that may be occupied, the size of the yards, courts and other open spaces, the density of population, and the location and use of buildings, structures and land for trade, industry, residence or other purposes....

Id.

Such relief does not authorize a use inconsistent with the ordinance and, consequently, does not constitute rezoning under the guise of a variance....

On the other hand, serious questions arise when a variance is granted to permit a use otherwise prohibited by an ordinance; e.g., a service station or a quick-stop grocery in a residential district. The most obvious danger is that the variance will be utilized to bypass procedural safeguards required for valid amendment.

In reviewing the grant of a variance, we start with the governing zoning ordinances. “A city must follow its ordinance when granting [a] variance to a zoning regulation.” The Batesville Code defines “variance” as “[a] grant of permission... that authorizes the recipient to do that which, according to the strict letter of this appendix, he could not otherwise legally do.” The Batesville Code also provides that the Board may “vary or modify the application of any of the regulations or provisions of the ordinance where there are *practical difficulties or unnecessary hardships* in the way of carrying out the strict letter of this ordinance, so that the spirit of this ordinance shall be observed, public welfare and safety secured and substantial justice done.”

The Batesville Code provides no definition or guidelines for determining the meaning of “practical difficulties or unnecessary hardships.” And neither the record nor the Board’s decision provides any insight into what criteria it used to determine the meaning of these terms. The Board simply stated that the “variance is necessary in order to avoid practical difficulties or unnecessary hardship on the use and development of said property be [*sic*] and it is

hereby approved and said variance is hereby granted in said application.”

While arguably the imposed conditions show the Board’s effort to comply with the “spirit of the ordinance” so that “public welfare and safety secured and substantial justice [be] done[.]” they fail to shed any light upon what “practical difficulties or unnecessary hardships” existed, authorizing the Board to grant the variance. The Board merely provided a conclusion with no findings of fact. As noted by another jurisdiction when reviewing a variance grant, “[f]indings of fact which show the actual grounds of a decision are necessary for an intelligent review of a quasi-judicial or administrative determination.” Similarly, in *Barnes v. Board of Supervisors*, this Court ruled that Boards should make findings of fact when granting or denying conditional use permits, which are also quasi-judicial decisions.

Although in *Barnes* we upheld the Board’s decision despite its failure to make specific findings of fact, we did so because the record clearly supported the Board’s decision. Here, the only “evidence” found in the record before this Court was contained in Memphis Stone’s operations statement: (1) that ten tons of aggregate is needed each year for new construction and to maintain existing infrastructure; (2) that it believes the deposit will be an asset to the local economy; and (3) that the deposit would otherwise be lost to future development.

The Harrisons argue that this does not constitute evidence of hardship, and that nothing in the record shows that the property is unsuitable for the purpose for which it is zoned—residential and light commercial use. They further argue that Memphis Stone failed to show that it would suffer unusual hardship or difficulty greater than any other resident in the city’s R-1 and C-2 districts. Conversely, the Board argues that it found the variance would provide a good source of local aggregate and a benefit to the local economy. It also argues that its decision was based on its

common knowledge of the land and familiarity with the ordinance.

The language “practical difficulties” and “unnecessary hardships,” as well as other aspects of the Batesville zoning ordinance, originated in a 1920 amendment to the General City Law of New York and the Standard Zoning Act prepared by the Department of Commerce in the 1920s. The 1920 amendment provided that:

Where there are *practical difficulties* in the way of *carrying out the strict letter of such ordinance*, the board of zoning appeals shall have the power to vary or modify the application of any of the regulations or provisions of such ordinance relating to the use, construction or alteration of buildings or structures, or the use of land, *so that the spirit of the ordinance shall be observed, public safety and welfare secured and substantial justice done.*

And the Standard Zoning Act provided that:

To authorize upon appeal in specific cases such variance from the terms of the ordinance as will not be contrary to the public interest, where, owing to special conditions, a literal enforcement of the provisions of the ordinance will result in *unnecessary hardship*, and *so that the spirit of the ordinance shall be observed and substantial justice done.*

While some courts view the terms “practical difficulty” and “unnecessary hardship” as interchangeable, other jurisdictions follow New York’s approach and hold that “practical difficulty” applies to a nonuse or area variance

while “unnecessary hardship” applies to a use variance. Jurisdictions that distinguish the two terms among nonuse and use variances do so because “an area variance is a relaxation of one or more incidental limitations to a permitted use and does not alter the character of a district as much as a use not permitted by the ordinance.” Even those jurisdictions that construe “practical difficulties or unnecessary hardships” together apply a more rigorous standard for proving a use variance. Likewise, in *Drems*, we noted the “serious questions” that arise when a Board grants a use variance rather than a nonuse or area variance and insinuated that a higher burden (e.g., unnecessary hardship) applies to a use variance. Therefore, we follow the New York approach and hold that the phrases “practical difficulty” and “unnecessary hardship” apply to nonuse and use variances respectively, as the applicable zoning ordinance closely follows the 1920 New York amendment. We adopt the following definition for “unnecessary hardship”:

[T]he record must show that (1) the land in question cannot yield a reasonable return² if used only for a purpose allowed in that zone; (2) that the plight of the owner is due to unique³ circumstances [of the land for which the variance is sought] and not

² As noted by the Missouri Supreme Court in adopting the New York definition, the landowner must establish “reasonable return” by submitting evidence that “he or she will be deprived of all beneficial use of the property under any of the permitted uses” and this requires “actual proof, often in the form of dollars and cents evidence.” *Matthev*, 707 S.W.2d at 417.

³ “[U]niqueness does not require that only the parcel of land in question and none other be affected by the condition that creates the hardship. What is required ... is that the hardship condition be sufficiently rare that if all similarly situated parcels in the zoning district were granted variances the district would remain materially unchanged.” Gail Gudder, *Rathkopf's the Law of Zoning and Planning*, § 58:11 (Thomson/West Aug. 2006) (citing *Matter of Douglaston Civic Ass'n v. Klein*, 51 N.Y.2d 963, 435 N.Y.S.2d 705, 416 N.E.2d 1040 (N.Y.1980)).

to the general conditions in the neighborhood which may reflect the unreasonableness of the zoning ordinance itself; and (3) that the use to be authorized⁴ by the variance will not alter the essential character of the locality.

Whether the hardship is self-created is also relevant to the determination of granting or denying a use variance. Similarly, while not determinative of hardship, the Board should consider the fact Memphis Stone entered into these leases with actual or constructive knowledge that the land was zoned R-1 and C-2. The Board also must ensure that the variance complies with “the spirit of [the] ordinance” and that “public welfare and safety [be] secured and substantial justice done.” This requirement “limits the authority of the board only with respect to the scope and character of the relief to be granted by way of the variance.”⁵

In reviewing the record in this case, we find no evidence of “unnecessary hardship” as we now define that phrase. We further find the definition for unnecessary hardship does not take into account “public need” as Memphis Stone argues (and the trial court found), but instead focuses on any alleged “public detriment.”⁶ Because this is a case of first impression, we vacate the decision of the Court of Appeals and reverse the trial court, remanding the case to the Board so the parties have the opportunity

⁴ A board should grant a use variance only if it is the “minimum that will afford relief.” *Id.* at § 58.12.

⁵ Gudder, *Rathkopf's the Law of Zoning and Planning* at § 58:9. In other words, the Board does not have to grant the variance as requested; it may impose conditions or otherwise modify the variance so that it is the “minimum that will afford relief.” *See* fn.44 *supra*.

⁶ *See generally id.* at § 58:16 (public detriment is a factor in determining hardship, while public detriment *and* public benefit are considered under practical difficulties).

to present it with evidence in compliance with this opinion. Any evidence presented should be made part of the record, and the Board should provide specific findings of fact and conclusions of law to support any decision in this matter.

Janssen v. Holland Charter Twp. Zoning Board of Appeals

651 N.W.2d 464 (Mich. Ct. App. 2002)

Warner Norcross & Judd, L.L.P. by John H. Logie, Mark K. Harder, and Christopher R. Uzpen, Holland, for John W. Janssen and others.

Scholten and Fant, P.C. by Ronald A. Bultje and Linda S. Howell, Grand Haven, for Holland Charter Township Zoning Board of Appeals.

Cuningham Dalman, P.C. by Andrew J. Mulder and Susan E. Vroegop, Holland, for Barker Brokerage & Development, Inc. and others.

PER CURIAM.

John W. Janssen and others appeal by leave granted from the March 22, 2000, order of the circuit court affirming the decision of defendant Holland Charter Township Zoning Board of Appeals (ZBA) granting a use variance permitting the construction of a 250-unit residential development in an area zoned agricultural. We affirm.

In September 1996, appellees Henry A. and Doris J. Pyle and Baker Brokerage & Development, Inc., filed an application with the Holland Charter Township Board requesting that certain parcels of property consisting of approximately 115 acres be rezoned from the A-Agricultural Zoning District to the R-1 Single Family Residential Zoning District. The township's planning commission voted to recommend that the board deny the rezoning application. Subsequently, these appellees amended their application by removing one fifteen-acre

parcel, which left two contiguous parcels consisting of approximately one hundred acres. Again, the planning commission voted to deny the amended petition. Thereafter, the Pyles and Baker filed a use variance request with the ZBA. They sought to have the density requirements changed so as to allow them to build a 400-unit residential development on the property. After appellee Vistiana Properties, LLC, purchased the property, it and the Pyles filed an amended use variance petition, in which they reduced the number of residential units from 400 to 250. Eventually, after holding public hearings, the ZBA granted the use variance petition. Appellants then contested the ZBA's decision in the circuit court, and the court upheld the ZBA's decision.

Appellants first argue that the circuit court erred in concluding that defendant ZBA's decision to grant the use variance did not constitute impermissible rezoning because a one hundred-acre parcel is too large a parcel of land to be the subject of a use variance. Upon review de novo, we disagree.

The rules that determine when a zoning board of appeals may grant a use variance make no mention of the size of a parcel. A township zoning board of appeals is a municipal administrative body whose duties include, among other functions, the granting of variances. M.C.L. § 125.293 provides, in pertinent part, as follows:

Where there are practical difficulties or unnecessary hardship in the way of carrying out the strict letter of the zoning ordinance, the board of appeals in passing upon appeals may vary or modify any of its rules or provisions so that the spirit of the ordinance is observed, public safety secured, and substantial justice done.

Likewise, Holland Charter Township's zoning ordinance provides as follows:

Sec. 20.2 Jurisdiction and powers.

The board of appeals shall have all powers and jurisdiction granted by the zoning act, all powers and jurisdiction prescribed in other articles of the ordinance and the following specific powers and jurisdiction....

C. The jurisdiction and power to authorize, upon appeal, a variance or modification of this ordinance where there are practical difficulties or unnecessary hardship in the way of carrying out the strict letter of this ordinance so that the spirit of this ordinance shall be observed, public safety secured and substantial justice done.

The plain and ordinary language of both the statute and the ordinance do not set forth any limitations based on the size of the property owner's parcel of land. To conclude, as appellants urge, that the granting of a use variance to a large parcel of land constitutes de facto rezoning, we would have to, in effect, add an exclusion for such parcels to the above statute and ordinance. "This, however, is beyond our authority because courts may not legislate." *Brandon Charter Twp. v. Tippett*, 241 Mich.App. 417, 423, 616 N.W.2d 243 (2000).

Appellants next contend that the ZBA's decision to grant the use variance was not supported by competent, material,

and substantial evidence on the record. We disagree. The decision of a zoning board of appeals should be affirmed unless it is contrary to law, based on improper procedure, not supported by competent, material, and substantial evidence on the record, or an abuse of discretion. *Reenders v. Parker*, 217 Mich.App. 373, 378, 551 N.W.2d 474 (1996).

A township zoning board of appeals has the authority to vary or modify any zoning ordinance to prevent unnecessary hardship if the spirit of the ordinance is observed, the public safety is secured, and substantial justice is done. To conclude that a property owner has established unnecessary hardship, a zoning board of appeals must find on the basis of substantial evidence that (1) the property cannot reasonably be used in a manner consistent with existing zoning, (2) the landowner's plight is due to unique circumstances and not to general conditions in the neighborhood that may reflect the unreasonableness of the zoning, (3) a use authorized by the variance will not alter the essential character of a locality, and (4) the hardship is not the result of the applicant's own actions. *Johnson v. Robinson Twp.*, 420 Mich. 115, 125-126, 359 N.W.2d 526 (1984); *Puritan-Greenfield Improvement Ass'n v. Leo*, 7 Mich.App. 659, 672-673, 677, 153 N.W.2d 162 (1967). We conclude that the Pyle appellees presented sufficient evidence to establish each of these criteria.

“Whether property used in trade or business or held for the production of income can reasonably be used for a purpose consistent with existing zoning will, no doubt, ordinarily turn on whether a reasonable return can be derived from the property as then zoned.” *Puritan-Greenfield* at 673-674, 153 N.W.2d 162.¹¹ Contrary to appellants' argument on

¹ The *Puritan-Greenfield* Court, *supra* at 674, 153 N.W.2d 162, cautioned that there are circumstances where a “reasonable return” analysis would be improper when deciding the “reasonable use” question. The example given was where the property in issue was a single-family residence. While we agree that the reasonable return

appeal, the ZBA's conclusion that appellee Vistiana could not receive a reasonable economic return was not based on some "hypothetical value." Rather, the ZBA's finding was based on an analysis of the rental income received and the taxes assessed on the property as zoned. In concluding that the applicants established by substantial evidence that they could receive no reasonable economic return for the property as zoned, the ZBA noted that the annual rental income for the farm was \$6,000, and the annual rental income for the two residences on the property yielded \$12,900. The ZBA further pointed out that the 1998 taxes on the property amounted to \$7,867.42. Thus, the ZBA concluded that the applicants could not realize a reasonable economic return, given the rental income from leasing the farm and the two houses. We hold that the ZBA's conclusion that the property cannot reasonably be used in a manner consistent with existing zoning was supported by competent, material, and substantial evidence on the record. *Reenders, supra* at 378, 551 N.W.2d 474.

We also believe this evidence supports the finding that the hardship is not the result of the applicants' own actions. The increasing taxable value of the property and the comparatively low rental income derived are not "self-created" burdens.

In addition, we hold that there was competent, material, and substantial evidence to support the ZBA's conclusion that the use authorized by the variance would not alter the essential character of the locality. In considering the essential character of this locality, one cannot, and should not, just look at the immediate neighboring properties. The character of the locality is defined in broader strokes than such a myopic viewpoint would provide.

analysis should not be relied on in certain cases, its application here is proper. *Id.* See also Crawford, *Michigan Zoning and Planning* (3d ed.), § 6.03, pp. 164-165.

The underlying situation presented in the case at bar involves the changing circumstances and character of this community. With the growing consolidation of farming operations throughout the country and the fewer children willing to follow their parents into farming, the family farm, once a mainstay of both the economic and cultural landscape in rural America, has begun to disappear. See Zeigler, *Who will teach our farmers: Learning the value of mentor programs from state and private programs*, 5 Drake J. Agric. L. 279, 280 (2000). Appellants and appellees have found themselves caught in the tide of this rural transformation. In other words, the essential character of this community is not immutable, and is, indeed, in a state of transition.

The use to be made of the subject property not only recognizes this unfolding change in circumstances, but it also takes measured steps to balance the pressures inherent in this course of development. In granting the variance, the ZBA explained that the proposed cluster housing development will provide “a large area of open space around the perimeter of the property, thereby maintaining a buffer area between the proposed residential uses and the surrounding agricultural property,” and further concluded that this factor, as well as the other conditions imposed, will ensure that the variance will not alter the locality’s essential character. Included in the list of conditions is a disclaimer to be included in all deeds conveying an interest in the subject property that informs purchasers of the neighboring farming activity and that further provides that, under certain circumstances, the Michigan Right to Farm Act² protects a farm or farm operation from being considered a public or private nuisance.

This leaves the question whether Vistiana’s plight was unique to the property. The requirement that the landowner’s plight be due to unique circumstances does

² M.C.L. § 286.471 *et seq.*

not mean that the circumstances must exclusively affect only the single landowner.³ Rather, “[t]he courts have repeatedly emphasized that the hardship to be unique is ‘not shared by *all* others,’” *Beatrice Block Club Ass’n v. Facen*, 40 Mich.App. 372, 381, 198 N.W.2d 828 (1972), quoting *Tireman-Joy-Chicago Improvement Ass’n v. Chernick*, 361 Mich. 211, 216, 105 N.W.2d 57 (1960) (emphasis supplied by *Facen* Court).

While the subject property has no defining physical characteristics such as size or topographical peculiarities that make it unique, we do not believe this necessarily ends the inquiry. See, e.g., *Monaco v. Dist. of Columbia Bd. of Zoning Adjustment*, 407 A.2d 1091, 1097 (D.C., 1979) (examining the actions of the zoning authorities and the zoning history of the case). The uniqueness inquiry should not in all cases be limited to an examination of whether there is a uniqueness that inheres in the land itself. See *Capitol Hill Restoration Society, Inc. v. Dist. of Columbia Bd. of Zoning Adjustment*, 534 A.2d 939, 942 (D.C., 1987).

Appellees’ claim of “uniqueness” invites consideration of their plight in light of the situation of other landowners in the surrounding area. In making such a comparison, it quickly becomes evident that it is not the unreasonableness of the zoning ordinance that has led to appellees’ plight. As the circuit court recognized, when the use variance was granted, the township’s then current master plan envisioned that, although zoned agricultural, the subject land should eventually be used for residential purposes. Indeed, before appellees’ request, the township had approved approximately fifty other instances of residential use of land in areas zoned agricultural. Thus, change in the character of the locality has not only been countenanced by the master plan, but the zoning history of the case reveals a steady, incremental movement in that direction. We believe

³ Crawford, *supra* at § 6.03, p. 165.

that this shows that at the time the variance was sought, the hardship alleged was not due to the general conditions then existing in the area. In other words, the remedy does not necessarily lie in amendment of the zoning ordinance itself. Given the master plan's recognition of potential future growth specifically on lands zoned agricultural, we believe that restrained and managed development, in part through the issuance of use variances as the changing conditions create unique hardships for those remaining agricultural lands, is a reasoned approach. It satisfies the goals of upholding the spirit of the ordinance, protects public safety, and assures that substantial justice is done. *Doverke, supra*. Further, when a "landowner has made the requisite showing of financial hardship and compatibility of the proposed use with the character of the neighborhood, the variance should be granted since to deny it [solely] on the ground that 'unique circumstances' have not been shown invites a potentially successful assault on the zoning ordinance as being confiscatory." *In re Family of Woodstock, Inc.*, 225 A.D.2d 854, 856, 638 N.Y.S.2d 825 (1996).

Affirmed.

Simplex Technologies v. Town of Newington

145 N.H. 727 (2001)

Gottesman and Hollis, P.A., of Nashua (*Anna B. Hantz* on the brief), and *Stebbins, Lazos & Van Der Beken*, of Manchester (*Henry B. Stebbins* on the brief and orally), for the plaintiff.

Peter J. Loughlin of Portsmouth, by brief and orally, for defendant Town of Newington.

Boynton, Waldron, Doleac, Woodman & Scott, P.A., of Portsmouth, for defendant The Equitable Life Assurance Society of the United States & The Fox Run Mall Joint Venture, filed no brief.

H. Bernard Waugh, Jr., of Concord, by brief for the New Hampshire Municipal Association, as *amicus curiae*.

NADEUA, J.

The plaintiff, Simplex Technologies, Inc. (Simplex), appeals from an order of the Superior Court (*Galway, J.*), affirming a decision of the Town of Newington Zoning Board of Adjustment (ZBA) denying Simplex's request for a variance to develop a portion of its property that fronts Woodbury Avenue. The defendants are the Town of Newington and The Equitable Life Assurance Society of the United States and the Fox Run Mall Joint Venture. We reverse and remand.

Simplex owns ninety-two acres in Newington between the Piscataqua River and Woodbury Avenue. For more than thirty years Simplex has operated a manufacturing facility on this land. Woodbury Avenue forms a boundary line between industrial and commercial zoning districts in Newington. All the property west of Woodbury Avenue, including two shopping malls, was once in the industrial zone but now lies within the commercial zone, across the street from the Simplex property.

There are three other commercial businesses also located on the east side of Woodbury Avenue, within the commercial zone. North of the Simplex property along Woodbury Avenue is a mini-mall located on a ten-acre lot that was re-zoned for commercial use in 1983. A car dealership and an electronics retail store are located south of the Simplex property near the intersection of Woodbury Avenue and Gosling Road on thirteen acres of commercial property. The Bank of New Hampshire and the Great Bay School operate within the industrial zone, but not with industrial purposes; the bank operates as a nonpermitted use and the school operates as a nonconforming use.

Seeking to develop 6.2 acres of its property abutting Woodbury Avenue with a Barnes & Noble bookstore and a family restaurant, Simplex requested use and area variances for this property. The ZBA, determining that Simplex met

none of the five criteria for a variance, denied its requests. Simplex appealed to the superior court, arguing that: (1) the ZBA's decision was unreasonable; (2) the Town was estopped from enforcing the zoning ordinance against Simplex because it was acting in a discriminatory fashion; and (3) the zoning ordinance was unconstitutional on its face and as applied to Simplex. The superior court ruled that the ZBA's determination was not unreasonable or unlawful because Simplex did not meet the hardship criteria for a variance and rejected Simplex's municipal estoppel argument. The superior court also rejected Simplex's constitutional arguments. This appeal followed.

...

We begin by looking at the present state of land use variance law. To determine the validity of zoning laws, the "police power and the right to private property must be considered together as interdependent, the one qualifying and limiting the other." *Metzger v. Town of Brentwood*, 117 N.H. 497, 502, 374 A.2d 954, 957 (1977) (quotation omitted). The purpose of a variance is to allow for "a waiver of the strict letter of the zoning ordinance without sacrifice to its spirit and purpose." *Husnander v. Town of Barnstead*, 139 N.H. 476, 478, 660 A.2d 477, 478 (1995). By allowing variances "litigation of constitutional questions may be avoided and a speedy and adequate remedy afforded in cases where special conditions" exist. *Bouley v. Nashua*, 106 N.H. 79, 84, 205 A.2d 38, 41 (1964) (quotations omitted).

According to RSA 674:33, I(b), a zoning board of adjustment may authorize a variance if the following conditions are met: (1) the variance will not be contrary to the public interest; (2) special conditions exist such that literal enforcement of the ordinance results in unnecessary hardship; (3) the variance is consistent with the spirit of the ordinance; and (4) substantial justice is done. *See* RSA 674:33 (1996 & Supp. 2000). In addition, the board may

not grant a variance if it diminishes the value of surrounding properties. *See Ryan v. City of Manchester Zoning Board*, 123 N.H. 170, 173, 459 A.2d 244, 245 (1983). The ZBA determined that Simplex failed to meet any of these conditions. The superior court affirmed the ZBA's decision, analyzing only the question of unnecessary hardship.

Our recent case law suggests that in seeking a variance, the hardship requirement is the most difficult to meet. To establish hardship, property owners must show that an ordinance unduly restricts the use of their land. *See Governor's Island Club v. Gilford*, 124 N.H. 126, 130, 467 A.2d 246, 248 (1983). In *Governor's Island*, we overturned the trial court's order affirming the ZBA's grant of a variance, stating: "For hardship to exist under our test, the deprivation resulting from application of the ordinance must be so great as to effectively prevent the owner from making any reasonable use of the land." *Id.*

In overturning the grant of a variance that allowed a landowner to expand his pre-existing nonconforming marina with a boat storage building, we stated: "The uncontroverted fact that the Marina had been operating as a viable commercial entity for several years prior to the variance application is conclusive evidence that a hardship does not exist." *Grey Rocks Land Trust v. Town of Hebron*, 136 N.H. 239, 243, 614 A.2d 1048, 1050 (1992). As in other cases, we emphasized that "[t]he uniqueness of the land, not the plight of the owner, determines whether a hardship exists." *Id.* (quotation and citation omitted).

Dissenting in *Grey Rocks*, Justice Horton was critical of our restrictive definition of hardship. He discussed the similarity between our definition and a "substantial taking" approach. *See id.* at 247, 614 A.2d at 1052 (Horton, J., dissenting). Under this approach, variances are very difficult to obtain unless evidence establishes that the property owner cannot use his or her property in any way.

See id. (Horton, J., dissenting). This approach “rejects any claim of right to use property as one sees fit, no matter how unobtrusive.” *Id.* (Horton, J., dissenting).

Though variances have been granted, their numbers have been few, diminished undoubtedly by our reiterated and restrictive definition of what constitutes an unnecessary hardship. *See, e.g., Husnander*, 139 N.H. at 478-79, 660 A.2d 477 at 478-79.

Our current restrictive approach is inconsistent with our earlier articulations of unnecessary hardship. In *Fortuna v. Zoning Board of Adjustment of Manchester*, a car dealership was granted a variance to expand its nonconforming use by adding a garage within an apartment zoning district. *See Fortuna v. Zoning Board of Manchester*, 95 N.H. 211, 212, 60 A.2d 133, 134 (1948). The record established that this addition would reduce traffic, but would not diminish the value of the surrounding properties. *See id.* at 212-13, 60 A.2d at 135. We found unnecessary hardship existed because the ordinance interfered with the dealership’s right to use its property as it saw fit and that its use did not injure the public or private rights of others. *See id.* at 213-14, 60 A.2d at 135.

Also, our restrictive approach is inconsistent with the notion that zoning ordinances must be consistent with the character of the neighborhoods they regulate. In *Belanger v. City of Nashua*, the zoning board of adjustment denied a land owner a variance to expand a nonconforming commercial use from one room of her house to the whole house. *See Belanger v. City of Nashua*, 121 N.H. 389, 430 A.2d 166 (1981). The surrounding area had changed substantially since it was zoned for single family residential use. *See id.* at 393, 430 A.2d at 169. Emphasizing that municipalities must coordinate their zoning ordinances to reflect the current character of their neighborhoods, we upheld the trial court’s order vacating the board’s decision. *See id.*

Finally, our restrictive approach is inconsistent with our constitutional analysis concerning zoning laws. To safeguard the constitutional rights of landowners, we insist that zoning ordinances “must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the regulation.” *Town of Chesterfield v. Brooks*, 126 N.H. 64, 69, 489 A.2d 600, 604 (1985) (quotation omitted).

Inevitably and necessarily there is a tension between zoning ordinances and property rights, as courts balance the right of citizens to the enjoyment of private property with the right of municipalities to restrict property use. In this balancing process, constitutional property rights must be respected and protected from unreasonable zoning restrictions. The New Hampshire Constitution guarantees to all persons the right to acquire, possess, and protect property. *See* N.H. CONST. pt. I, arts. 2, 12. These guarantees limit all grants of power to the State that deprive individuals of the reasonable use of their land.

We believe our definition of unnecessary hardship has become too restrictive in light of the constitutional protections by which it must be tempered. In consideration of these protections, therefore, we depart today from the restrictive approach that has defined unnecessary hardship and adopt an approach more considerate of the constitutional right to enjoy property. Henceforth, applicants for a variance may establish unnecessary hardship by proof that: (1) a zoning restriction as applied to their property interferes with their reasonable use of the property, considering the unique setting of the property in its environment; (2) no fair and substantial relationship exists between the general purposes of the zoning ordinance and the specific restriction on the property; and (3) the variance would not injure the public or private rights of others.

While the trial court properly applied settled law, because of our departure from the existing definition of hardship, we remand this case to the superior court to determine whether Simplex can establish unnecessary hardship under this new standard.

Simplex also argues that the trial court erred in rejecting its claim of municipal estoppel. Because Simplex did not raise this issue in its notice of appeal or obtain leave of this court to add the question, Simplex has waived the issue of estoppel and we will not consider it. *See* SUP. CT. R. 16(3)(b); *see also State v. Peterson*, 135 N.H. 713, 714-15, 609 A.2d 749, 750-51 (1992).

Finally, Simplex argues that the enforcement of the zoning ordinance was unconstitutional because the restriction against commercial development was not equally applied to other Woodbury Avenue landowners. We decide cases on constitutional grounds only when necessary. *See Olson v. Fitzwilliam*, 142 N.H. 339, 345, 702 A.2d 318, 322 (1997). Because we reverse and remand on other grounds, we decline to address the merits of Simplex's constitutional claims. *See id.*

Note

The standards in Simplex were subsequently superseded by the New Hampshire legislature. Discussing these new standards in *Harborside Associates v. Parade Residence Hotel* (N.H. 2011), the New Hampshire Supreme Court stated:

RSA 674:33, I(b) allows a zoning board to grant a variance if: (1) “[t]he variance will not be contrary to the public interest”; (2) “[t]he spirit of the ordinance is observed”; (3) “[s]ubstantial justice is done”; (4) “[t]he values of surrounding properties are not diminished”; and (5) “[l]iteral enforcement of the provisions of the ordinance would result in unnecessary hardship.”

RSA 674:33, I(b) contains two definitions of unnecessary hardship. *See* RSA 674:33, I(b)(5)(A), (B). Under the first definition:

(A) ... “[U]nnecessary hardship” means that, owing to special conditions of the property that distinguish it from other properties in the area:

(i) No fair and substantial relationship exists between the general public purposes of the ordinance provision and the specific application of that provision to the property; and

(ii) The proposed use is a reasonable one.

RSA 674:33, I(b)(5)(A). The first definition of unnecessary hardship is similar, but not identical, to the test that we adopted in *Simplex Technologies v. Town of Newington*, 145 N.H. 727, 731-32 (2001). See Laws 2009, 307:5 (statement of legislative intent that first definition mirror Simplex test).

The statute provides that if an applicant fails to satisfy the first definition of unnecessary hardship, then it may still obtain a variance if it satisfies the second definition. See RSA 674:33, I(b)(5)(B). Under the second definition:

[A]n unnecessary hardship will be deemed to exist if, and only if, owing to special conditions of the property that distinguish it from other properties in the area, the property cannot be used in strict conformance with the ordinance, and a variance is therefore necessary to enable a reasonable use of it.

Id. This definition of unnecessary hardship is similar, but not identical, to the test for unnecessary hardship that we applied before Simplex. See, e.g., *Governor’s Island Club v. Town of Gilford*, 124 N.H. 126, 130 (1983); see also Laws 2009, 307:5

(statement of legislative intent that second definition mirror pre-Simplex test for unnecessary hardship “as exemplified by cases such as Governor’s Island”).

The statute provides that these definitions apply “whether the provision of the ordinance from which a variance is sought is a restriction on use, a dimensional or other limitation on a permitted use, or any other requirement of the ordinance.” RSA 674:33, I(b). The legislature’s statement of intent indicates that the purpose of this provision was to “eliminate the separate ‘unnecessary hardship’ standard for ‘area’ variances” that we adopted in *Boccia v. City of Portsmouth*, 151 N.H. 85, 92 (2004).
Laws 2009, 307:5.

Krummenacher v. City of Minnetonka

783 N.W.2d 721 (Minn. 2010)

Paul W. Chamberlain, Ryan R. Kuhlmann, Chamberlain Law Firm, Wayzata, MN, for appellant.

George C. Hoff, Shelley M. Ryan, Hoff, Barry & Kozar, P.A., Eden Prairie, MN, for respondent City of Minnetonka.

James M. Susag, Larkin, Hoffman, Daly & Lindgren Ltd., Bloomington, MN, for respondent JoAnne Liebeler.

Susan L. Naughton, St. Paul, MN, for amicus curiae League of Minnesota Cities.

GILDEA, Justice.

This case involves the decision of respondent City of Minnetonka to grant a variance to respondent JoAnne Liebeler so that she could expand her nonconforming garage. Appellant Beat Krummenacher is Liebeler’s neighbor and he challenges the City’s decision. The district court upheld the City’s variance, and the court of appeals affirmed. *See Krummenacher v. City of Minnetonka*, 768 N.W.2d 377, 384 (Minn.App.2009). Because we conclude that the City applied the wrong standard to Liebeler’s variance

request, we reverse and remand to the City for reconsideration under the correct standard.

....

Krummenacher argues that the City's decision was arbitrary and capricious because the City did not apply the proper standard to determine whether Liebeler demonstrated "undue hardship" as defined in Minn.Stat. § 462.357, subd. 6. This provision allows a city to grant a variance "from the literal provisions of the ordinance in instances where their strict enforcement would cause undue hardship because of circumstances unique to the individual property under consideration." Minn.Stat. § 462.357, subd. 6.

Minnesota Statutes § 462.357, subd. 6, provides a definition of "undue hardship," and that definition requires that three factors be met. Specifically, the statute defines "undue hardship" as meaning,

the property in question cannot be put to reasonable use if used under conditions allowed by the official controls, the plight of the landowner is due to circumstances unique to the property not created by the landowner, and the variance, if granted, will not alter the essential character of the locality.

Id. To receive a variance, the applicant must show that he or she meets all of the three statutory requirements of the "undue hardship" test. *Id.* In addition to satisfying the "undue hardship" requirement, the statute allows municipalities to grant variances only "when it is demonstrated that such actions will be in keeping with the spirit and intent of the ordinance." *Id.* Krummenacher argues that Liebeler's application does not meet any of the requirements for "undue hardship."

The first factor a variance applicant must establish to satisfy the statute's definition of "undue hardship" is that "the property in question cannot be put to reasonable use if used under conditions allowed by the official controls." Minn.Stat. § 462.357, subd. 6; *see also* Minnetonka City Code § 300.07.1(a). Krummenacher argues that based on the plain and unambiguous language of the statute, a municipality may grant a variance only when the property cannot be put to any reasonable use without it. According to Krummenacher, Liebeler had a reasonable use for her garage without the addition of a yoga studio and craft room—its current use as a storage space for vehicles. Krummenacher argues therefore that the City did not have the statutory authority to grant the variance.

The court of appeals rejected this argument, relying on its decision in *Rowell v. Board of Adjustment of Moorhead*, 446 N.W.2d 917 (Minn.App.1989), *rev. denied* (Minn. Dec. 15, 1989). The court in that case interpreted the "undue hardship" section of Minn.Stat. § 462.357, subd. 6, as requiring a variance applicant to show that the "property owner would like to use the property in a reasonable manner that is prohibited by the ordinance." *Id.* at 922.

The City urges that we should embrace the interpretation of "undue hardship" from *Rowell*, and it appears from the record that the *Rowell* "reasonable manner" standard is the standard the City used in evaluating Liebeler's request for a variance. The City determined that the expansion of the garage was a reasonable use of the property and that the request met the other requirements of the statute. Specifically, as reflected in the City Council Resolution, the City found that "the proposal is reasonable" and with respect to "undue hardship," that "[t]here is an undue hardship due to the topography of the site, width of the lot, location of the driveway and existing vegetation."

The plain language of the statute and our precedent compel us to reject the City's invitation to adopt *Rowell's*

interpretation of “undue hardship.” The statute provides that to prove “undue hardship,” the variance applicant must show that “the property in question cannot be put to a reasonable use” without the variance. Minn.Stat. § 462.357, subd. 6. Notwithstanding this language, the court of appeals concluded that “[t]his provision does not mean that a property owner must show the land cannot be put to any reasonable use without the variance.” *Rowell*, 446 N.W.2d at 922. The court of appeals essentially rewrote the statute to mean that a municipality may grant a variance when the “property owner would like to use the property in a reasonable manner that is prohibited by the ordinance.” *Id.* at 922. Although the *Rowell* “reasonable manner” standard has been used for over 20 years, we simply cannot reconcile that standard with the plain language of the statute.

The *Rowell* standard is also inconsistent with our precedent. In support of the application of a “reasonable manner” standard for determining “undue hardship,” *Rowell* cites *Curry v. Young*, 285 Minn. 387, 173 N.W.2d 410 (1969), for the proposition that a variance is “required where a setback requirement would force a property owner to build a much smaller structure.” *Id.* at 922. The version of Minn. Stat. § 462.357 in effect when *Curry* was decided did not contain the definition of “undue hardship” that is in the current version of the statute. *See* Minn.Stat. § 462.357 (1969). Moreover, while we discussed in *Curry* the dimensions of a structure that could theoretically be built to comply with the statutory requirements, we based our determination that the variance was properly granted on the municipality’s ordinance. That ordinance required a showing of “particular hardship,” and we concluded that the standard was met because the “plaintiffs’ lot, in the absence of a variance, would be unusable for any purpose.” *Curry*, 285 Minn. at 388-89, 396, 173 N.W.2d at 411, 415. The standard we applied in *Curry*, is more rigorous than the

“reasonable manner” standard adopted in *Rowell*, and appears consistent with the plain language of the first part of the “undue hardship” definition that is in the current statute. *See* Minn. Stat. § 462.357, subd. 6.

In addition, in formulating the “reasonable manner” standard, the court in *Rowell* appears to have relied on the “practical difficulties” standard. *See Rowell*, 446 N.W.2d at 922. But we have made a clear distinction between the “practical difficulties” standard and the “undue hardship” standard. *See Stadsvold*, 754 N.W.2d at 328-31. As we explained in *Stadsvold*, the “practical difficulties” standard applies to review of county decisions to grant area variances, while the “undue hardship” standard applies to all municipal decisions to grant variances. *Id.* at 327-28 & n. 2. *Compare* Minn.Stat. § 462.357, subd. 6, *with* Minn.Stat. § 394.27, subd. 7 (2008).

In *Stadsvold*, we interpreted Minn.Stat. § 394.27, subd. 7, which sets forth the statutory standard for county variances. This statute contains both the “practical difficulties” standard and a “particular hardship” standard. Specifically, section 394.27 authorizes a county to grant variances from “the terms of any official control” but only when the property owner would face “practical difficulties or particular hardship” in meeting “the strict letter of any official control.” Minn.Stat. § 394.27, subd. 7.¹ We

¹ The same dichotomy of language at issue in *Stadsvold* existed in the predecessor to the municipal zoning statute, section 462.357. Until 1965, section 462.22 (enacted in 1929, repealed in 1965) granted municipalities the power to vary or modify the application of a zoning regulation where there were “practical difficulties or unnecessary hardship” in complying with the strict letter of the regulation. Minn.Stat. § 462.22 (1961). In 1965, the legislature replaced Minn.Stat. § 462.22 with Minn.Stat. § 462.357. Act of May 22, 1965, c. 670, § 7, 1965 Minn. Laws 995, 1000-03. The new statute replaced the “practical difficulties or unnecessary hardship” standard with the current single “undue hardship” standard. *Id.* “Undue hardship” was undefined in the statute until 1982, when the legislature, borrowing the definition of “hardship” from the county variance statute, Minn.Stat. § 394.27, added the current definition of “undue hardship” to the statute. Act of Mar. 22, 1982, ch. 507, § 22, 1982 Minn. Laws 592, 593

distinguished the “less rigorous ‘practical difficulties’” standard that applies to area variance applications from the more rigorous “particular hardship” standard that applies to use variance applications. *Stadsvold*, 754 N.W.2d at 330-31.

Adopting the *Rowell* “reasonable manner” standard would be inconsistent with the distinction we made in *Stadsvold* between the “practical difficulties” and “hardship” standards. The legislature defined the “hardship” standard in the county statute the same way it defined the “undue hardship” standard in the municipal statute. Because the legislature used the same language in both the county and city variance statutes when defining “hardship,” our analysis in *Stadsvold* requires us to conclude that the “undue hardship” standard in Minn.Stat. § 462.357, subd. 6, is more demanding than the “practical difficulties” standard the court of appeals appears to have relied on in *Rowell*, 446 N.W.2d at 922.

Moreover, with respect to the “practical difficulties” standard, we identified in *Stadsvold* several factors the county should consider in assessing whether that standard was met:

- (1) how substantial the variation is in relation to the requirement;
- (2) the effect the variance would have on government services;
- (3) whether the variance will effect a substantial change in the character of the neighborhood or will be a substantial detriment to neighboring properties;
- (4) whether the practical difficulty can be alleviated by a feasible method other than a variance;
- (5) how the practical difficulty occurred, including whether the landowner created the need for the variance; and
- (6) whether,

in light of all of the above factors,
allowing the variance will serve the
interests of justice.

754 N.W.2d at 331 (footnote omitted). *Rowell's* interpretation of the “undue hardship” standard, requiring only that the proposed use be “reasonable,” would render the “undue hardship” standard in section 462.357 less stringent than the “practical difficulties” standard and much less stringent than the “particular hardship” standard in the county variance statute, which the “undue hardship” standard appears to parallel. *See Stadvold*, 754 N.W.2d at 331. In short, our analysis in *Stadvold* simply does not leave room for the *Rowell* “reasonable manner” standard.

We recognize that the standard we apply today, while followed elsewhere, is not the universal rule.² For example, in *Simplex Technologies, Inc. v. Town of Newington*, 145 N.H. 727, 766 A.2d 713 (2001), the New Hampshire Supreme Court provided a thorough and insightful review of the development of land use variance law, and its practical construction in modern times. The New Hampshire statute did not contain a specific definition of “unnecessary hardship,” like our statute does, and the court concluded that its prior definition of the statutory term “unnecessary hardship” “ha[d] become too restrictive in light of the constitutional protections by which it must be tempered.” *Id.* at 717. The New Hampshire Supreme Court framed the issue in the following terms:

Inevitably and necessarily there is a
tension between zoning ordinances
and property rights, as courts balance

² While most jurisdictions use the phrase “unnecessary hardship” rather than “undue hardship” as the applicable standard, many jurisdictions appear to require that the variance applicant establish real hardship if the variance is denied rather than simply requiring that the applicant show the reasonableness of the proposed use. [citations omitted]

the right of citizens to the enjoyment of private property with the right of municipalities to restrict property use. In this balancing process, constitutional property rights must be respected and protected from unreasonable zoning restrictions.

Id. at 716-17. In light of these considerations, the New Hampshire Supreme Court said that “unnecessary hardship” would, in the future, be established when a landowner showed that (1) a zoning restriction as applied interferes with a reasonable use of the property, considering the unique setting of the property in its environment; (2) no fair and substantial relationship exists between the general purposes of the zoning ordinance and the specific restriction on the property; and (3) the variance would not injure the public or private rights of others. *Id.* at 717.

Had the Minnesota Legislature not defined “undue hardship” in Minn.Stat. § 462.357, subd. 6, we might consider the approach articulated in *Simplex*. A flexible variance standard allows municipalities to make modest adjustments to the detailed application of a regulatory scheme when a zoning ordinance imposes significant burdens on an individual, and relief can be fashioned without harm to the neighbors, the community, or the overall purposes of the ordinance. See David W. Owens, *The Zoning Variance: Reappraisal and Recommendations for Reform of a Much-Maligned Tool*, 29 Colum. J. Envtl. L. 279, 317 (2004) (“If the variance power is to be used both as a constitutional safeguard and as a tool for flexibility, zoning enabling acts and local ordinances should be amended to delineate these two purposes and set different standards for each. The failure to make such a distinction underlies much of the past controversy regarding variances. Courts and commentators have traditionally viewed the variances as

the former—a very limited tool for avoidance of constitutional infirmity in extraordinary cases. Most variance petitions, and consequently most board of adjustment decision-making, have viewed the variances as the latter—a tool to provide flexible implementation rather than constitutional infirmity.”).

We recognize that the *Rowell* “reasonable manner” standard represents a longstanding interpretation of the undue hardship standard in Minn.Stat. § 462.357, subd. 6, and that Minnesota municipalities have been granting variances under the “reasonable manner” standard for many years. We also recognize that our decision will result in a restriction on a municipality’s authority to grant variances as compared with the “reasonable manner” standard. But whatever value we may find in a more flexible standard, particularly with regard to area variances, we cannot ignore the plain language of the statute. *See State v. Peck*, 773 N.W.2d 768, 773 (Minn. 2009) (“We have no opportunity to ignore part of the legislature’s definition.”). We are unable to interpret the statutory language to mean anything other than what the text clearly says—that to obtain a municipal variance, an applicant must establish that “the property in question cannot be put to a reasonable use if used under conditions allowed by the official controls.” Minn.Stat. § 462.357, subd. 6. Therefore, unless and until the legislature takes action to provide a more flexible variance standard for municipalities, we are constrained by the language of the statute to hold that a municipality does not have the authority to grant a variance unless the applicant can show that her property cannot be put to a reasonable use without the variance.

Based on the plain language of the statute, and our precedent interpreting language similar to “undue hardship” in the context of a local government’s authority to grant variances, we reject the “reasonable manner” standard from *Rowell*. We hold that the City inaccurately

applied the first factor in the “undue hardship” definition of Minn.Stat. § 462.357, subd. 6. Our resolution of this issue makes it unnecessary for us to resolve the other issues Krummenacher raises on appeal.

... . We reverse and remand the matter to the City for renewed consideration of Liebeler’s variance request in light of our rejection of the “reasonable manner” standard from *Rowell*.

2.3. Special Use Permits

Jones v. City of Carbondale

576 N.E.2d 909 (1991)

Paul G. Schoen, Michael F. Dahlen, John S. Rendleman, III, Feirich, Schoen, Mager, Green, Carbondale, for plaintiff-appellant.

Patricia S. McMeen, Gilbert, Kimmel, Huffman & Prosser, Ltd., Carbondale, for defendant-appellee.

JUSTICE CHAPMAN delivered the opinion of the court:

Hill House, Inc., filed an application with the City of Carbondale (City) for a special use permit on May 30, 1989. Thereafter, William Jones filed a petition seeking to invoke the provisions of section 11-13-14 of the Illinois Municipal Code which provides in pertinent part:

“In case of a written protest against any proposed amendment of the regulations or districts, signed and acknowledged by * * * the owners of 20% of the frontage immediately adjoining the frontage proposed to be altered, is [sic] filed with the clerk of the municipality, the amendment shall not be passed except by a favorable vote of two-thirds of the aldermen or trustees of the municipality then

holding office.” (Ill.Rev.Stat.1989, ch. 24, par. 11-13-14.)

The city council took no formal action on Jones’ petition as it determined that section 11-13-14 was inapplicable to the grant of a special use permit. On July 3, 1989, the city council, by a simple majority, adopted a resolution which granted the special use request submitted by Hill House, Inc.

Jones then filed a two-count complaint for declaratory judgment in the circuit court. This appeal concerns the disposition of count I; therefore, we will limit our discussion to that count.

In count I, Jones requested that the court: (1) declare the rights of the plaintiff to invoke the provisions of section 11-13-14 of the Municipal Code; (2) declare the grant of the special use null and void; and (3) enjoin the City of Carbondale from issuing the special use certificate. In its answer to the complaint, the city admitted: (1) that the objection was filed by the requisite percentage of frontage owners; (2) that the city council took no formal action on Jones’ petition invoking the two-thirds majority provision of section 11-13-14; and (3) that the city council approved the special use certificate by a vote of three in favor and two opposed.

Thereafter, Jones filed a motion for summary judgment as to both counts of his complaint. The city responded that the granting of the special use was not a violation of either section 11-13-14 of the Municipal Code or section 15-2-95.E of the Carbondale Revised Code because neither section is applicable to a request for a special use permit. The circuit court denied Jones’ motion for summary judgment as to counts I and II. Jones thereupon requested a finding of appealable interlocutory order as to count I of his complaint, pursuant to Supreme Court Rule 308 (134

Ill.2d R. 308). On May 8, 1990, the circuit court entered an order identifying the issue pursuant to Rule 308 as follows:

“Whether the grant of a special use permit for property uses which are not principal permitted uses is an amendment to the regulations or districts as contemplated by Section 11-13-14 of the Municipal Code providing for the requirement of passage by extra ordinary [sic] majorities of the zoning authority.”

... .

Zoning ordinances typically provide three mechanisms to accommodate circumstances for which the generalized ordinance regulatory scheme is imperfect: the variance, zoning amendment, and special use permit. (Connor, *Zoning*, in Illinois Municipal Law ch. 10, § 10.16 (Ill.Inst. for ContLegal Educ.1978).) While these tools are similar in that they all deviate from the principal permitted uses of a zoning ordinance, they differ in their scope and purpose.

A variance is a grant of relief to an owner from the literal requirements of the ordinance where literal enforcement would cause him undue hardship. (*City of Clinton v. Glasson* (1976), 35 Ill.App.3d 745, 748, 342 N.E.2d 229, 231.) It has been recognized that because the special use may have the same impact upon neighboring property as a variance, procedural safeguards similar to those prescribed for variances might be desirable for special uses as well. (*Kotrich v. County of Du Page* (1960), 19 Ill.2d 181, 187, 166 N.E.2d 601, 605.) However, the supreme court determined that the procedural requirements for variances are not, without legislative directive, imposed upon special uses. See *Kotrich*, 19 Ill.2d at 188,166 N.E.2d at 605.

An amendment to a zoning ordinance changes or alters the original ordinance or some of its provisions. (*Athey v. City of*

Peru (1974), 22 Ill.App.3d 363, 367, 317 N.E.2d 294, 297.)

In the instant case Jones argues that because the special use authorizes use of the property contrary to the ordinance, it is an amendment and the voting requirements attendant to an amendment apply. We disagree.

The ordinance at issue in this case is set forth in section 15-2-24 of the Carbondale Revised Code:

“A. Statement of Intent: This district is created to provide land for purposes devoted primarily to the production of agricultural products such as field crops, livestock, fowl and other conventional agricultural pursuits. Other limited compatible uses are also permitted. This district is also created to assist in the conservation of the natural resources within the jurisdiction of this Article by encouraging practices which will conserve soil, * * *. Uses not related to agriculture are discouraged. When the public interest will be served and only when a contribution will be made to orderly growth, portions of this district may be rezoned for alternative uses.

B. Permitted Principal Uses and Structures:

1. all agricultural uses
2. cemeteries
3. churches[.]

* * * * *

C. Permitted Accessory Uses and Structures: Accessory uses and

structures customarily incidental to permitted principal uses and on the same parcel, including but not limited to:

1. market facilities for sale of products grown on the premises
2. artificial lakes[.]

* * * * *

D. Special Uses: After a public hearing before the Planning Commission, the City Council may permit as special uses the following uses which are subject to: (a) the "Procedures" as prescribed in 15-2-57; (b) the lot area, lot width, yards, and height limitations of this district unless specified otherwise in the special use; (c) the performance standards as prescribed in this district for each special use (if any):

1. commercial agricultural storage operation
2. commercial fishing, hunting lodge, gun club or related operation
3. drive-in theater
4. licensed home or institution which provides for the care or custody or education or welfare of persons, not including hospitals

* * * * *

(Carbondale Revised Code (1990), section 15-2-24.)

We note that while the “statement of intent” recommends that the zoning district be used primarily for agricultural endeavors, the ordinance provides not only for permitted and accessory principal uses, but also provides for specific special uses.

A special use is a permission by the Board to an owner to use his property in a manner contrary to the ordinance provided that the intended use is one of those specifically listed in the ordinance and provided that the public convenience will be served by the use. (*Parkview Colonial Manor Investment Corp. v. Board of Zoning Appeals of O’Fallon* (1979), 70 Ill.App.3d 577, 581, 26 Ill.Dec. 876, 878, 388 N.E.2d 877, 879, citing *Rosenfeld v. Zoning Board of Appeals of Chicago* (1958), 19 Ill.App.2d 447, 450, 154 N.E.2d 323, 325.) As stated in *Parkview*:

“Where *special exception uses* are provided for, they *have their genesis in the ordinance* and the body to which the power of administering them is delegated[] must look to the terms of the ordinance itself for the measure of its power.” (Emphasis added.) (*Parkview*, 70 Ill.App.3d at 581, 26 Ill.Dec. at 878, 388 N.E.2d at 879.)

The very nature of a special use, whose origins come from the ordinance itself, is contrasted sharply with the essence of an amendment’s nature. A permitted special use authorizes a use of the land pursuant to the existing zoning ordinance. No change or alteration in the ordinance itself is required in order to effect a special use. When the special use was granted in this case, section 15-2-24 of the Carbondale Revised Code was neither altered nor repealed. Rather, the only action necessary was the invocation of that

portion of the ordinance which listed the permissible special uses.

Jones points out that the resolution adopted by the city granting the special use requires the applicant to comply with four conditions, none of which are contained within the ordinance. The resolution requires that: (1) the city be given site plan approval; (2) building construction be done in accordance with Illinois and Carbondale building codes; (3) the applicant must connect to city water and sanitary sewer mains; and (4) the applicant must dedicate land to allow for street improvements. Jones argues that the city has clearly amended the zoning regulations by imposing requirements which are not otherwise imposed on other landowners within the zoning district.

The Illinois Municipal Code provides in part that:

“a special use shall be permitted only upon evidence that such use meets standards established for such classification in the ordinances, and the granting of permission therefor may be subject to conditions reasonably necessary to meet such standards. * * *” (Ill.Rev.Stat. 1989, ch. 24, par. 11-13-1.1.)

The ordinance at issue provides that a special use may be permitted subject to:

“(a) the “Procedures” as prescribed in 15-2-57; (b) the lot area, lot width, yards, and height limitations of this district unless specified otherwise in the special use; (c) the performance standards as prescribed in this district for each special use * * *”. (Carbondale Revised Code (1990), section 15-2-24(D).)

We have reviewed the procedures as prescribed in section 15-2-57 of the Carbondale Revised Code and do not find the four conditions imposed upon the special use applicant contrary to the performance standards which are provided in 'section 15-2-57. Because the plaintiff has otherwise failed to demonstrate how the four conditions imposed upon the special use applicant are not reasonably necessary to meet the standards as provided in the ordinance (Ill.Rev.Stat.1989, ch. 24, par. 11-13-1.1), we cannot find that the imposition of the conditions constitute an amendment of the ordinance.

....

In conclusion, we find that the grant of a special use permit for property uses which are not principal permitted uses is not an amendment to the regulations or districts as contemplated by section 11-13-14 of the Municipal Code and does not require passage by extraordinary majorities of the zoning authority.

Affirmed.

FSL Corp. v. Harrington

262 Ga. 725 (1993)

Schreeder, Wheeler & Flint, David H. Flint, Mark W. Forsling,
for appellant.

McVay & Stubbs, Robert S. Stubbs III, for appellees.

CLARKE, CHIEF JUSTICE.

The Superior Court of Forsyth County denied appellant FSL's petition for mandamus to require the Board of Commissioners (the Board) of Forsyth County to approve a special-use permit for a sanitary landfill. Because the zoning ordinance authorizing the permit provides no ascertainable limits on the Board's discretion to grant or deny applications, we reverse the trial court's order.

FSL contracted to purchase property zoned for agricultural use located in Forsyth County next to the county landfill in a sparsely populated area along the Etowah River. The Etowah is a source of drinking water for the county. A county ordinance allows property zoned for agriculture to be used as a sanitary landfill if a special-use permit is obtained from the Board after review by the County Health Officer and the Forsyth County Planning Commission (Commission).

Appellant FSL filed an application with the Forsyth County Department of Planning and Development on December 20, 1991, for a special-use permit for a sanitary landfill. The Commission considered FSL's application at a public hearing on January 28, 1992. After the hearing, in which many citizens expressed their disapproval, the Commission unanimously recommended the denial of the application. The Board unanimously denied the application on February 24, 1992.

In response to the denial of the application, FSL filed a petition for mandamus with the Superior Court of Forsyth County on March 24, 1992. FSL alleged that the Board based its denial on an unconstitutionally vague ordinance that provides no limits on the Board's discretion. The court denied appellant's petition on May 27, 1992. We granted FSL's application for discretionary appeal on June 30, 1992.

Section 14-1.1 (k) by itself lacks any objective criteria for approval of a special-use permit. Appellee argues that the preamble to the Comprehensive Zoning and Land Use Resolution and Ordinance of Forsyth County contains the general goals of the ordinance. The preamble provides as follows:

WHEREAS the Board of Commissioners wishes to lessen congestion in the public thoroughfares, fire and health dangers,

and soil erosion and sedimentation;
and

WHEREAS the Board of Commissioners wishes to assure adequate light and air, and the sound development and use of land which provides adequate transportation, water supply, drainage, sanitation, educational opportunity and recreation; and

WHEREAS the Board of Commissioners wishes to classify land uses and the distribution of and uses;
and

WHEREAS the Board of Commissioners wishes to provide for economically sound and stable land development by assuring the provision in land developments of adequate streets, utilities, services, traffic access and circulation, public open spaces and maintenance continuity; and

WHEREAS the Board of Commissioners wishes to assure compliance with a comprehensive plan

...

The appellee relies on the case of *Phillips v. Mills*, Civil Action No. 86-15,138 (May 29, 1986, Superior Court of Forsyth County), aff'd without opinion, 256 Ga. XXVIII (1987). The trial court in *Phillips* found that this preamble contained sufficient guidelines for the Board and upheld the ordinance against a vagueness challenge. In *Dinsmore Dev. Co. v. Cherokee County*, 260 Ga. 727 (398 SE2d 539) (1990), we found that a purpose statement similar to this preamble contained no objective criteria upon which the

zoning board could base its decision. We therefore reversed the trial court's denial of mandamus. We hold that *Dinsmore* is controlling. The preamble to the ordinance "contains only a statement of general goals and purposes, and provides no criteria to govern the [Board's] determination." *Dinsmore*, supra at 729. Provided all other requirements have been met, appellant is entitled to approval for the special-use permit it seeks.

Note

Some other jurisdictions allow very broad discretion in ordinances providing for special use permits. The Wisconsin Supreme Court, in *Weber v. Town of Saukville* (quotation marks and citations omitted), explained:

[C]onditional use standards often lack specificity, since their purpose is to confer a degree of flexibility in the land use regulations.

If it were possible to find a legislative draftsman capable of performing such a task—of drafting standards to govern the likely as well as all possible contingencies relating to a conditional use—there would be no need to make the use a conditional one. In that case they could be made part of the zoning ordinance proper requiring no exercise of discretion on the part of anyone... . If the purposes of zoning are to be accomplished, the master zoning restrictions or standards must be definite while the provisions pertaining to a conditional use...must of necessity be broad and permit an exercise of discretion.

3 Edward H. Ziegler, Jr., Rathkopf's The Law of Zoning and Planning § 41.11, at 49 (4th ed. 1996).

2.4. Comprehensive Planning

Hector v. City of Fargo

760 N.W.2d 108 (N.D. 2009)

Jonathan T. Garaas, Garaas Law Firm, DeMores Office Park, Fargo, ND, for petitioners and appellants.

Mike Miller (argued) and Stacey Tjon Bossart (appeared), Assistant City Attorneys, Fargo, ND, for respondent and appellee.

VANDE WALLE, CHIEF JUSTICE.

Fred and Earlyne Hector appealed from a district court judgment affirming the decision of the Fargo City Commission to deny their application for zoning map amendments and growth plan modifications regarding their property located in south Fargo. We affirm, holding the City did not act arbitrarily, capriciously or unreasonably when it denied the Hectors' zoning request. Furthermore, we hold the district court did not err when it found the City had adopted a comprehensive plan as required by N.D.C.C. s 40-47-03, and the City did not engage in illegal contract zoning with the Hectors.

... .

The Hectors argue the City of Fargo violated North Dakota statutes by not having a comprehensive plan for its zoning regulations. Specifically, the Hectors assert that, by the absence of such a plan, there exists no properly promulgated set of standards by which to measure the actions of the City when making zoning decisions. The Hectors further argue that no such comprehensive plan was passed under the required statutory procedures.

Section 40-47-01, N.D.C.C., states that the governing body of a city may pass zoning regulations to promote the health,

safety, morals or general welfare of the community. The Code further dictates that such regulations:

[B]e made with reasonable consideration as to the character of each district and its peculiar suitability for particular uses with a view to conserving the value of buildings and encouraging the most appropriate use of land throughout the city. The comprehensive plan shall be a statement in documented text setting forth explicit goals, objectives, policies, and standards of the jurisdiction to guide public and private development within its control.

N.D.C.C. s 40-47-03 (2008). Zoning regulations must also go through several formal procedures to be effective, including: copies of proposed regulations must be filed with the city auditor, a public hearing must be held on the regulations, and notice of passed regulations must be published in the official newspaper of the city. N.D.C.C. s 40-47-04.

Here, the City of Fargo points to a list of over 80 policy statements as containing the goals, objectives, and standards of the City pertaining to zoning regulations. This list, called the “Comprehensive Policy Plan,” provides detailed plans for the Fargo community. However, the City of Fargo adopted the Policy Plan as a resolution rather than as an ordinance. This Court has previously noted the informal nature of resolutions, and the tendency of such acts to fall short of establishing a formal, permanent rule of government. See *Mitchell v. City of Parshall*, 108 N.W.2d 12, 13-14 (N.D.1961) (reviewing the “temporary” nature of resolutions which are generally in the form of the municipality or official body’s opinions rather than binding law). Regardless of the stricture of the Policy Plan’s

passage, the policy statements embodied within the Plan were later codified in Fargo's Land Development Code. The Land Development Code satisfies the procedural guidelines set forth by N.D.C.C. s 40-47-04, and, like the Policy Plan, contains the standards by which the City of Fargo must adhere when making zoning decisions. Included within its provisions, the Land Development Code spells out what Fargo may do when zoning in extra-territorial areas (FMC s 20-0108), and denotes what activities and buildings are permitted in certain zoning areas (FMC s 20-0401). When the Land Development Code requires a land use to conform to specific standards, very strict criteria must be met by any potential user. See FMC s 20-0402 (setting out use-specific standards for several uses, including off-premise advertising signs, day care, religious institutions and adult entertainment centers). Furthermore, it was the Land Development Code which the Planning Department staff relied upon in its analysis recommending denial of the Hectors' proposed amendments, which was then relied upon by the City Commission when it denied the Hectors' application.

Through its detailed standards and restrictions, the Land Development Code formulates a comprehensive plan which informs builders and landowners of their rights and the boundaries within which they must work when planning their land use. The City of Fargo has complied with the requirements of N.D.C.C. ss 40-47-03 and 40-47-04.

...

Wolf v. City of Ely

493 N.W.2d 846 (1992)

Robert S. Hatala of Crawford, Sullivan, Read, Roemerma
& Brady, P.C., Cedar Rapids, for appellant.

Gary J. Shea of Shea Law Offices, Cedar Rapids, for
appellees.

Considered en banc.

ANDREASEN, JUSTICE.

... .

John and Pat Wolf own three connecting parcels of land in or adjacent to the City of Ely that have been identified as parcels A, B and C. The Wolfs operate a salvage or junkyard on their property. Parcel A is located in an area that was zoned manufacturing; parcel B is located in an area zoned commercial; and parcel C is located in an area zoned residential or agricultural.

On May 6, 1987, Ely brought an action to enjoin the Wolfs from operating a salvage yard on parcel A. *City of Ely v. John and Pat Wolf*, Linn County, EQ 10962. On October 23, 1989, district judge Paul J. Kilburg entered a decree invalidating Ely's manufacturing (M-1) zoning classification and denying the City's request for injunctive relief. The court held the M-1 classification was invalid because the 1978 ordinance constituted exclusionary zoning and was not promulgated pursuant to a comprehensive plan as required by Iowa Code section 414.3 (1977). No appeal was taken from the court's judgment.

The Wolfs filed the present action on April 9, 1990, seeking a court judgment declaring the entire zoning ordinance invalid and their use of their property (parcels A, B and C) lawful.¹ The Wolfs allege the entire zoning ordinance is invalid for two reasons. First, it was not adopted in accordance with a comprehensive plan. Second, it is overbroad and exclusionary in violation of their constitutional due process rights.

Following trial, district judge Thomas M. Horan entered a ruling and judgment on June 3, 1991. The court concluded

¹ Because no appeal was taken by the Wolfs from the district court judgment, we need not address their request for issuance of a writ of mandamus contained in count II of their petition.

the “ordinance was not made in accordance with a comprehensive plan as required by Section 414.3, the Code.” Accordingly, the court declared Ely’s entire zoning ordinance invalid.

... .

It is said:

Comprehensive zoning is general zoning throughout a municipality according to a comprehensive plan to control and direct the use and development of property in the area by dividing it into districts according to present and potential uses.

Brackett v. City of Des Moines, 246 Iowa 249, 257-58, 67 N.W.2d 542, 546 (1954). Iowa Code section 414.3 requires that zoning regulations “shall be made in accordance with a comprehensive plan.” The requirement of a comprehensive plan is found in the zoning law of those states that have taken the standard state zoning enabling act as their model. Vestal, *Iowa Land Use and Zoning Law* § 3.01(d) (1979). The act was first drafted in the early 1920s and was adopted in whole or in part by thirty-five states. *Id.* at n. 19. The act did not define the term comprehensive plan.

A majority of courts in states where zoning must be “in accordance with a comprehensive plan” hold a plan external to the zoning ordinance is not required. 2 *The American Law of Real Property, Planning and Zoning* § 12.02 (1991). However, an increasing number of legislatures specifically require that a plan be adopted. *Id.* The “comprehensive plan” requirement was imposed to prevent piecemeal and haphazard zoning. Standard State Zoning Enabling Act (United States Department of Commerce, § 3 n. 22 (1922)). The word “plan” connotes an integrated product of a rational process; the word “comprehensive” requires something beyond a piecemeal approach. *Kozesnik*

v. Township of Montgomery, 24 N.J. 154, 166, 131 A.2d 1, 7 (1957). We have suggested the purpose of a comprehensive plan is “to control and direct the use and development of property in the area by dividing it into districts according to present and potential uses.” *Plaza Recreation Ctr. v. Sioux City*, 253 Iowa 246, 258, 111 N.W.2d 758, 765 (1961); *see also Bell v. City of Elkborn*, 122 Wis.2d 558, 564-65, 364 N.W.2d 144, 147 (1985) (list of objectives sought to be achieved through development of a comprehensive plan).

Iowa Code section 358A.5, relating to county zoning, contains the identical requirement. In discussing this requirement, we stated: “If the Board gave full consideration to the problem presented, including the needs of the public, changing conditions, and the similarity of other land in the same area, then it has zoned in accordance with a comprehensive plan.” *Montgomery v. Bremer County Bd. of Supervisors*, 299 N.W.2d 687, 695 (Iowa 1980). The Iowa Court of Appeals commented, “nothing in Chapter 358A requires a county to reduce a comprehensive plan to written form.” *Webb v. Giltner*, 468 N.W.2d 838, 840 (Iowa App.1991). The comprehensive plan requirement is intended to ensure the county board acts rationally rather than arbitrarily in exercising their delegated zoning authority. *Id.* As suggested by the court of appeals, the generic standard in *Montgomery* would apply when a county either has no individualized comprehensive plan or has not reduced that plan to writing. *Id.*

The Wolfs challenged the 1978 zoning ordinance in both the action brought by the City in 1987 and in their action against the City in 1990. In the 1991 decree, the district court concluded that a separate formal document called a comprehensive plan was not required to validate the City’s zoning ordinance. Nevertheless, the court found “there is no evidence to indicate that the City engaged in any rational planning before the adoption of the 1978 ordinance.”

This declaratory judgment action was tried as an equitable action. Our scope of review is de novo. Iowa R.App.P. 4. In our de novo review of the evidence, we carefully examine the zoning ordinance and zoning map, the testimony of witnesses who were involved in the adoption of the ordinances, and other relevant evidence.

Prior to the adoption of the 1978 zoning ordinance, Ely had established a planning and zoning commission. Under a 1976 ordinance, the Ely planning and zoning commission had authority to make such surveys, studies, maps, or plans which the commission believed bears a relation to the general comprehensive plan. The ordinance provided for the preparation of a comprehensive plan and directed that the commission

make careful and comprehensive studies of present conditions and future growth of the city and with due regard to its relation to neighboring territory. The plan shall be made with the general purpose of guiding and accomplishing a co-ordinated, adjusted, and harmonious development of the city and its environments which will, in accordance with the present and future needs, best promote health, safety, morals, order, convenience, prosperity, and general welfare, as well as efficiency and economy in the process of development.

It further provided that after adoption of a comprehensive plan by the commission an attested copy of the plan shall be certified to the council. The council could then approve the plan, and it would constitute the City's comprehensive plan. The City council could not take action until it had

received the final report from the zoning commission. Iowa Code § 414.6 (1977).

Contrary to the statutory and ordinance requirements, no comprehensive plan was developed by the commission and appropriately presented to the council. At trial, Thomas M. Tjelmeland, the mayor of Ely, admitted he was unaware of any written criteria used in development of the 1978 zoning ordinance. He testified the comprehensive plan consisted of the City's zoning ordinance combined with its zoning map. There were no other documents that he relied upon in interpreting the zoning ordinance.

A councilman of the City testified that no single person had been designated as administrative officer responsible for the administering of the zoning ordinance. The mayor and members of the Ely council would bring zoning matters to the entire council on an ad hoc basis. The councilman further testified that, in making decisions as to whether a specific use is allowed in a specific zone, he just listened, and if he thought it was right, he would go along with it. He had not heard of a comprehensive zoning plan.

The City offered evidence that, in June of 1975, the Linn County Regional Planning Commission (county commission) prepared a housing and community development study and a Linn County regional land use policy plan. The study recommended Ely and other nonmetropolitan cities use the plan as a guide for future growth and development. Although mayor Tjelmeland represented the City of Ely on the county commission, he testified he was unaware of any studies conducted when the 1978 zoning ordinance was drafted. He was unaware of any writing that set forth any proposed or future land use. He testified the 1975 regional housing and land use policy plans were not used in any of Ely's planning or zoning decisions.

The 1978 zoning ordinance was developed by combining different sections and provisions of two or more “model” municipal zoning ordinances. Throughout the ordinance, specific provisions of the model ordinances were deleted, marked “omit” or additional provisions were added in longhand. The ordinance established seven districts for specific use: agricultural (A-1), residential (R-1, R-2, R-3), commercial (C-1), industrial (M-1), and public (P-1). The ordinance generally regulates the districts by identifying the principal permitted uses and special uses for each district. The special uses are allowed only if the board of adjustment issues a special permit. The zoning ordinance refers to a “zoning district map” that is made a part of the ordinance.

At least two, and possibly four, different zoning maps have been identified as the official city zoning map. The City offered a crayola-colored zoning map as the official zoning map. This map was different than the zoning map identified as Ely’s official zoning map in the first trial in 1989. One of the maps indicates the Wolfs’ “tract C” was agricultural; the other indicates it was residential. The City acknowledges the 1978 zoning ordinance and zoning map have not been officially amended, changed, modified, or repealed.

Ely’s zoning ordinance and zoning map do not suggest an integrated product of rational planning. The ordinance contains glaring omissions and serious structural problems. Although a significant portion of the land within the city limits is identified as agricultural land, the zoning ordinance makes no provisions regulating its use. Some words and terms that are defined in the ordinance are not used later in the ordinance. Extensive provisions relating to mobile homes are included in the definition section. Under the ordinance provisions, mobile homes are permitted only in an approved mobile home park. However, a mobile home park is not a permitted use or special use in any of the seven districts. Junkyards are specifically defined, although

they are not a permitted use or special use in any of the districts. In one part of the zoning ordinance, the City prohibits fences of over five feet; in another part it requires a six-foot fence. The ordinance has twenty-eight separate parking classes for off-street parking, although the population of Ely was 275 in 1970 and 425 in 1980.

The structural problems in the zoning ordinance obviously arose from a careless combining of two or more model ordinances. Although such a clip-and-paste ordinance could produce a valid ordinance if carefully and rationally prepared, here the structure and content of the ordinance suggests a careless and irrational process was employed.

Other evidence demonstrates the City's failure to adopt the zoning ordinance in accordance with a comprehensive plan. Studies and plans developed by the county commission in 1975 were not considered by the council. The Ely Planning Commission failed to comply with the City ordinance requirement that a comprehensive plan be certified to the council as an attested copy of the plan. Although city records indicate the commission had presented a proposed zoning ordinance and zoning map in 1977, the records do not identify the proposed ordinance and map. Because the official zoning map was not clearly identified, there was confusion as to the limitation of uses to be applied to certain parcels of land. Amendments or changes to the ordinance and zoning map were reported in the city records, but council approval was made by resolution, contrary to ordinance and statutory requirements.

Judge Kilburg in his 1989 decree found there was no comprehensive plan that would establish a basis for excluding all junk or salvage yards within Ely's city limits. Based upon these deficiencies in the ordinance, the court stated: "It is unfair to state that the City of Ely had at the time of its passage, or has since had, a comprehensive plan in the M-1 district." The court's observations have application to the entire ordinance.

Judge Horan in his 1991 ruling and judgment found the evidence presented at trial indicates “very little planning at best.” We agree with the court’s conclusion that the evidence failed to show any rational planning before the adoption of the 1978 zoning ordinance. We, like the district court, find the City failed to comply with the requirement that zoning regulations be made in accordance with a comprehensive plan. Therefore, we need not address the Wolfs’ argument that the ordinance validity issue was litigated by the parties and decided by the court in its 1989 decree.

... .

AFFIRMED.

All Justices concur except LARSON, J., who dissents and is joined by HARRIS, J.

LARSON, JUSTICE (dissenting).

I dissent from Division III and the result.

Ely is a small town with limited financial resources, trying to maintain the aesthetic quality of a rural Iowa community. This ruling unnecessarily frustrates that effort.

Our cases hold, and the majority concedes, that no formal plan is required to satisfy the requirement of a comprehensive plan as a prerequisite to zoning.

Ely’s zoning ordinance *is* a part of a “comprehensive” plan. Despite the informality of the plan, any reasonable reading of the town’s ordinances, maps, and resolutions (which our cases say may constitute a comprehensive plan) should make it clear: a junkyard in the middle of town was not to be a part of its future development.

I would reverse and remand.

HARRIS, J., joins this dissent.

Pinecrest Lakes, Inc. v. Shidel

795 So.2d 191 (Fla. 2001)

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Michael L. Rosen, Tallahassee, for Amicus Curiae, Florida Legal Foundation, Inc.

Terrell K. Arline, Legal Director, Tallahassee, Thomas G. Pelham, Kenneth J. Goldberg and Douglas W. Ackerman, Tallahassee, for Amici Curiae, The Florida Chapter of the American Planning Association, and 1000 Friends of Florida, Inc.

FARMER, J.

The ultimate issue raised in this case is unprecedented in Florida. The question is whether a trial court has the authority to order the complete demolition and removal of several multi-story buildings because the buildings are inconsistent with the County's comprehensive land use plan. We conclude that the court is so empowered and affirm the decision under review.

Some twenty years ago, a developer¹ purchased a 500-acre parcel of land in Martin County and set out to develop it in

¹ Originally the developer was Pinecrest Lakes, Inc., the entity which planned and built Phases One through Ten. In 1997, when we reversed the first appeal in this case for a trial de novo, the corporation transferred title to Phase Ten to a limited partnership known as The Villas at Pinecrest Lakes. The trial court substituted the limited partnership for the corporation as the developer. Consequently, when we

phases. Development there is governed by the Martin County Comprehensive Plan (the Comprehensive Plan).² Phase One of the property was designated under the Comprehensive Plan as “Residential Estate,” meaning single-family homes on individual lots with a maximum density of 2 units per acre (UPA). The Comprehensive Plan provides that

“[w]here single family structures comprise the dominant structure type within these areas, new development of undeveloped abutting lands *shall be required* to include compatible structure types of land immediately adjacent to existing single family development.”
[e.s.]

Phases One through Nine were developed as single-family homes on individual lots in very low densities.

The subject of this litigation, Phase Ten, is a 21-acre parcel between Phase One and Jensen Beach Boulevard, a divided highway designated both as “major” and “arterial.” Phase Ten was designated by the Comprehensive Plan as “Medium Density Residential” with a maximum of 8 UPA. The developer sought approval of three different site plans before finally erecting the buildings that are the subject of this litigation. In 1988, the developer first sought approval for an initial scheme of 3-story apartment buildings with a density of just under 8 UPA. Karen Shidel, since 1986 an owner of a single-family residence in the adjoining area of Phase One, along with other residents, opposed the project

use the term “developer” in this opinion, we refer either to the corporation or the limited partnership or both as the context requires.

² See § 163.3167(2), Fla. Stat. (2000) (“Each local government shall prepare a comprehensive plan of the type and in the manner set out in this act or shall prepare amendments to its existing comprehensive plan to conform it to the requirements of this part in the manner set out in this part.”).

proposed by the developer. This initial site plan for Phase Ten was approved by the County but never acted upon.

Five years later the developer changed the proposed scheme to single family residences, and the County Commission approved a revised site plan for 29 single-family homes with a density of 1.37 UPA. Two years after that, however, the developer again changed its mind and returned to its original concept of multi-family structures. This time, the developer sought to develop 136 units in two-story buildings, with a density of 6.5 UPA. The County's growth management staff recommended that the County Commission approve this second revised site plan for Phase Ten. Following a hearing at which a number of people objected to the proposal, including Shidel, the County Commission approved the revision and issued a Development Order³ for Phase Ten permitting the construction of 19 two-story buildings.

Claiming statutory authority, Shidel and another Phase One homeowner, one Charles Brooks, along with the Homeowners Associations for Phases One through Nine, then filed a verified complaint with the Martin County Commission challenging the consistency of the Development Order with the Comprehensive Plan, requesting rescission of the Development Order.⁴ In

³ See § 163.3164(7) and (8), Fla. Stat. (2000) (“‘Development permit’ includes any building permit, zoning permit, subdivision approval, rezoning, certification, special exception, variance, or any other official action of local government having the effect of permitting the development of land.... ‘Development order’ means any order granting, denying, or granting with conditions an application for a development permit.”).

⁴ See § 163.3215(4), Fla. Stat. (2000) (“As a condition precedent to the institution of an action pursuant to this section, the complaining party shall first file a verified complaint with the local government whose actions are complained of, setting forth the facts upon which the complaint is based and the relief sought by the complaining party. The verified complaint shall be filed no later than 30 days after the alleged inconsistent action has been taken. The local government receiving the complaint shall respond within 30 days after receipt of the complaint. Thereafter, the complaining party may institute the action authorized in this section. However,

response to the verified complaint, after a hearing the County Commission confirmed its previous decision to issue the Development Order.

Shidel and Brooks then filed a civil action in the Circuit Court against Martin County under the same statutory authority.⁵ They alleged that the Development Order was inconsistent with the Comprehensive Plan. The developer intervened. Shidel and Brooks argued that their statutory challenge was a *de novo* proceeding in which the court should decide in the first instance whether the Development Order was consistent with the Comprehensive Plan. Martin County and the developer argued that the proceeding was in the nature of appellate review in which the County's determination was entitled to deference and the court should consider only whether there was substantial competent evidence supporting the Development Order. Basing its decision solely on a review of the record created before the County Commission, the trial court found that the Development Order was consistent with the Comprehensive Plan and entered final judgment in favor of the developer.

At that point, the developer took stock of its position. It had prevailed before the County Commission and—at least initially—in the trial court. Technically, however, its approval for the project was not final. Developer considered whether to proceed to construct the buildings or instead await appellate review of the trial court's decision. Ultimately the developer decided to commence

the action shall be instituted no later than 30 days after the expiration of the 30-day period which the local government has to take appropriate action.”).

⁵ See § 163.3215(1), Fla. Stat. (1995) (“Any aggrieved or adversely affected party may maintain an action for injunctive or other relief against any local government to prevent such local government from taking any action on a development order ... which materially alters the use or density or intensity of use on a particular piece of property that is not consistent with the comprehensive plan adopted under this part.”).

construction, notwithstanding the pendency of an appeal. Accordingly, it applied for and received building permits for construction of Buildings 8, 9, 10, 11 and 12, and started on each of those buildings while the case was under consideration in court.⁶ When construction was just beginning, Shidel and Brooks sent written notice to the developer of their intention, should they prove successful in court, to seek demolition and removal of any construction undertaken while judicial consideration of the consistency issue was pending.

Appellate review did not produce the outcome for which the developer had hoped. In 1997 we reversed the trial court's decision that the County's consistency determination complied with the Comprehensive Plan. *Poulos v. Martin County*, 700 So.2d 163 (Fla. 4th DCA 1997). Specifically, we concluded that section 163.3215 required de novo consideration in the trial court on the consistency issue. Our opinion explained:

“if section 163.3215 was intended to provide for the circuit court to conduct an appellate review by certiorari, then the statutory language permitting the filing of the action up to 90 days after the granting of the development order is in conflict with the 30 day deadline outlined under the Florida Rules of Appellate Procedure.”

700 So.2d at 165. We further adopted an analysis by Judge Wentworth as to the meaning of section 163.3215:

“the ... language in the statute ... provides only for a suit or action clearly contemplating an evidentiary

⁶ We express no view on the propriety of Martin County issuing building permits while the case was pending in court.

hearing before the court to determine the consistency issue on its merits in the light of the proceedings below but not confined to the matters of record in such proceedings.”

700 So.2d at 166 (quoting from *Gregory v. City of Alachua*, 553 So.2d 206, 211 (Fla. 1st DCA 1989) (Wentworth, J., dissenting)). We remanded the case for a trial de novo and for any appropriate relief.

On remand, the trial judge⁷ proceeded in two stages: the first stage involved a determination whether the Development Order was consistent with the Comprehensive Plan; and the second stage, which became necessary, addressed the remedy. While the case was pending on remand, developer continued with construction. The County conducted final inspections of Building 11 and 12, issuing certificates of occupancy (CO), and residents moved into the buildings. At the end of the consistency phase, the trial court entered a partial judgment finding that the Development Order was not consistent with the Comprehensive Plan. The trial de novo then proceeded to the remedy.

At the conclusion of the remedy phase, the trial court entered a Final Judgment. The court found that the Comprehensive Plan established a hierarchy of land uses, paying deference to lower density residential uses and providing protection to those areas. The “tiering policy” required that, for structures immediately adjacent to each other, any new structures to be added to the area must be both comparable and compatible to those already built and occupied.⁸ The court then found significant differences

⁷ The original judge assigned to the case was rotated into another division, so the case was assigned to a new judge.

⁸ “A project immediately adjacent to lands used or designated for lower intensity use should be given lesser density. (1) For that portion of said project abutting the

between the northern tier of Phase One and the adjacent southern tier of Phase Ten. The structures in Phase One were single level, single family residences, while the structures in Phase Ten were two-story apartment buildings with eight residential units. Therefore, the court found, the 8-residential unit, two-story, apartment buildings in Phase Ten were not compatible or comparable types of dwelling units with the single family, single level residences in Phase One; nor were they of comparable density. Consequently, the court determined, the Development Order was inconsistent with the Comprehensive Plan.

As regards the remedy, the Final Judgment found no evidence indicating that either Brooks or the Homeowners Association were damaged by any diminution in value. The court found that the Homeowners Association was not a person within the meaning of section 163.3215(2) and therefore had no standing to seek relief under section 163.3215. Accordingly, only plaintiff Shidel was entitled to seek injunctive relief under section 163.3215.

In granting such relief, the court found that the developer had acted in bad faith. Specifically, the court found that the developer continued construction during the pendency of the prior appeal and continued to build and lease during the trial— even after losing on the consistency issue. The court found that the developer “acted at [its] own peril in doing precisely what this lawsuit sought to prevent and now [is] subject to the power of the court to compel restoration of the status prior to construction.” The relief awarded was:

- (1) the Court permanently enjoined Martin County from taking any further action on the subject

existing development or area of lesser density, a density transition zone of *comparable density and compatible dwelling unit types shall be established* [e.s.] in the new project for a depth from the shared property line that is equivalent to the depth of the first tier of the adjoining development’s lower density (i.e. the depth of the first block of single-family lots).” Comprehensive Plan, § 4-5(A)(2)(b).

Development Order for Phase Ten, other than to rescind it;

(2) the Court permanently enjoined developer and its successors in interest from any further development of Phase Ten under the subject Development Order; and

(3) the Court ordered developer to remove all apartment buildings from Phase Ten either through demolition or physical relocation by a date certain.

When the Final Judgment was entered, five of the eight-unit buildings had been constructed in Phase Ten (Buildings 8-12). Buildings 11 and 12 had already received their CO's, and fifteen of their sixteen units were actually occupied. Building 10 was fully completed and was awaiting final inspection as of the date the remedies stage of trial began. Buildings 8 and 9 were 50% and 66% completed, respectively, also as of that date.

Following the entry of Final Judgment, the developer filed this timely appeal and moved for a stay pending review.⁹ The trial court granted a stay only as to the demolition order, allowing lessees to continue in possession of those apartments in Buildings 9-12 under actual lease when the trial court entered final judgment, as well as to those leases in Building 8 in existence as of the date of filing of the notice of appeal. The developer was prohibited, however, from entering into any renewals of existing leases upon expiration of the original term or any new leases of any apartments. Upon review, we affirmed the stay order. We now explain our decision on the merits.

I. The Consistency Issue

⁹ Neither Charles Brooks nor Martin County has appealed the final judgment, or filed a brief in this appeal by Karen Shidel.

Initially the developer argues that the trial court erred in the consistency phase by failing to accord any deference to the County Commission’s interpretation of its own Comprehensive Plan when the County approved the second revised site plan and its multi-story, multi-family buildings. Conceding that the proceedings are de novo and that the Development Order is subject to “strict scrutiny” under the Comprehensive Plan as to the consistency issue, the developer nevertheless argues that the courts must bow to the County’s interpretation of its own Comprehensive Plan and the application of its many elements to the site plan. Developer argues that the statutes and cases accord such deference to a local government’s interpretation of its own Comprehensive Plan and that it was reversible error for the trial court in this case to fail to do so. In particular, developer relies on *Southwest Ranches Homeowners Ass’n v. Broward County*, 502 So.2d 931 (Fla. 4th DCA 1987), and *B.B. McCormick & Sons, Inc. v. City of Jacksonville*, 559 So.2d 252 (Fla. 1st DCA 1990). According to developer, these cases authorize the use of the highly deferential “fairly debatable” standard of review—customary with zoning decisions—to land use determinations such as the issue of consistency in this case. We disagree.

As we have already seen in this dispute, the applicable statute provides that:

“[a]ny aggrieved or adversely affected party may maintain an action for injunctive or other relief against any local government to prevent such local government from taking any action on a development order ... which materially alters the use or density or intensity of use on a particular piece of property that is not consistent with the comprehensive plan....”

§ 163.3215(1), Fla. Stat. (2000). This statute obviously creates an action for an injunction against the enforcement of a development order, rather than to carry out such an order. The statute is aimed at development orders—which, by their very nature, must have been approved by a local government—so it is clear that the Legislature did not mean that local governments or developers would be the parties seeking injunctive relief under this provision.

Moreover there is but one basis for issuing the injunction: that the development order is not consistent with the Comprehensive Plan to the detriment of adjoining property owners. Hence the issuance of an injunction under section 163.3215(1) necessarily requires the judge to determine in the first instance whether a development order is consistent with the Comprehensive Plan. When a statute authorizes a citizen to bring an action to enjoin official conduct that is made improper by the statute, and that same statute necessitates a determination by the judge in the action as to whether the official's conduct was improper under the statute, as a general matter the requirement for a determination of the propriety of the official action should not be understood as requiring the court to defer to the official whose conduct is being judged. While the Legislature could nevertheless possibly have some reason to require judges to require some deference to the officials whose conduct was thus put in issue, we would certainly expect to see such a requirement of deference spelled out in the statute with unmistakable clarity. Here it is not a question of any lack of clarity; the statute is utterly silent on the notion of deference. It is thus apparent that the structure and text of the statute do not impliedly involve any deference to the decision of the county officials. So we necessarily presume none was intended.¹⁰

¹⁰ To illustrate the point, we draw an analogy. The action by a county approving a development order could fairly and logically be compared to the actions of administrative agencies generally. Thus we might contrast section 163.3215(1) with

Section 163.3194 requires that all development conform to the approved Comprehensive Plan, and that development orders be consistent with that Plan.¹¹ The statute is framed as a rule, a command to cities and counties that they must comply with their own Comprehensive Plans after they have been approved by the State. The statute does not say that local governments shall have some discretion as to whether a proposed development should be consistent with the Comprehensive Plan. Consistency with a Comprehensive Plan is therefore not a discretionary matter. When the Legislature wants to give an agency discretion and then for the courts to defer to such discretion, it knows

comparable provisions of the Administrative Procedures Act. Section 120.68 generally grants parties in agency proceedings access to a court after the agency has finally acted. Section 120.68(4), however, limits review to the record in agency. There is no similar provision in section 163.3215. Moreover section 120.68(7) spells out in precise detail exactly what the reviewing court can do. Among its provisions is the following:

“The court shall remand a case to the agency for further proceedings consistent with the court’s decision or set aside agency action, as appropriate, when it finds that ...
(b) The agency’s action depends on any finding of fact that is not supported by competent, substantial evidence in the record of a hearing conducted pursuant to ss. 120.569 and 120.57; however, the court shall not substitute its judgment for that of the agency as to the weight of the evidence on any disputed finding of fact ...
(e) the agency’s exercise of discretion was: 1. outside the range of discretion delegated to the agency by law; 2. inconsistent with agency rule; 3. inconsistent with officially stated agency policy or a prior agency practice, if deviation therefrom is not explained by the agency; or 4. otherwise in violation of a constitutional or statutory provision; *but the court shall not substitute its judgment for that of the agency on an issue of discretion.*” [e.s.]

§ 120.68(7), Fla. Stat. (2000). There is nothing even remotely comparable in section 163.3215.

¹¹ See § 163.3194(1)(a), Fla. Stat. (2000) (“After a comprehensive plan...has been adopted in conformity with this act, *all development* undertaken by, and all actions taken in regard to development orders by, governmental agencies in regard to land covered by such plan or element *shall be consistent with such plan* or element as adopted.”). [e.s.]

how to say that. Here it has not. We thus reject the developer's contention that the trial court erred in failing to defer to the County's interpretation of its own comprehensive plan.

Before we proceed to assess the trial court's determination on the consistency issue, we pause to consider the history of the land development statutes. The State of Florida did not assert meaningful formal control over the explosive and unplanned development of land in this state until the passage of the first growth management statute, the Local Government Comprehensive Planning Act of 1975. Chapter 75-257, Laws of Fla. (the 1975 Act). The 1975 Act forced counties and cities to adopt comprehensive plans, but they were left to interpret such plans for themselves, largely free from effective oversight by the state. *See, e.g., City of Jacksonville Beach v. Grubbs*, 461 So.2d 160, 163 (Fla. 1st DCA 1984) (determination of when to conform more restrictive zoning ordinances with Comprehensive Plan is legislative judgment to be made by local governing body, subject only to limited judicial review for patent arbitrariness). The requirement of adopting a Comprehensive Plan was, therefore, only a small step. Moreover nothing in the legislation required local governments to comply with their own Comprehensive Plans or that all development be consistent with the Plan.

By the early 1980's it was widely recognized that the 1975 Act was proving ineffectual in regulating Florida's development. *See* Reid Ewing, *Florida's Growth Management Learning Curve*, 19 VA. ENVTL. L.J. 375 (2000). The lack of state control over interpretation of the Comprehensive Plan was often cited as a serious deficiency. As one such criticism described the situation:

“[f]rustration grew at the state level as well. Lacking the actual power to approve or disapprove local planning

decisions, state and regional planners could not effectively coordinate and oversee local planning and regulation. Local governments changed their plans ‘willynilly virtually every time a city council or county commission met ...’”

John M. DeGrove, *State and Regional Planning and Regulatory Activity: The Florida Experience and Lessons for Other Jurisdictions*, C390 ALI-ABA 397, 428 (1994).

For another thing, the 1975 Act was criticized for failing to give affected property owners and citizen groups standing to challenge the land development decisions of local governments on the grounds that they were inconsistent with the Comprehensive Plan. The standing issue was considered in *Citizens Growth Management Coalition of West Palm Beach Inc. v. City of West Palm Beach*, 450 So.2d 204 (Fla. 1984) (*CGMC*). *CGMC* involved a challenge by a citizens group to a local decision to allow the construction of a large scale residential and commercial complex. The court began by referring to *Renard v. Dade County*, 261 So.2d 832 (Fla.1972), holding that standing to challenge local development decisions was limited to the highly deferential “fairly debatable” standard. Affected property owners in the vicinity of new development had no standing to seek enforcement of local comprehensive plans unless they could “prove special damages different in kind from that suffered by the community as a whole.” 261 So.2d at 834. The *CGMC* court determined that the 1975 Act did not change these rules on standing. 450 So.2d at 208. The court reasoned that because the 1975 Act “did not specifically address the question” of standing, the statute was not meant to alter the common law standing requirements set forth in *Renard*. 450 So.2d at 206-07.

Again, to return to the criticism, this limitation on standing to enforce local planning laws resulted in:

“a failure to conform development decisions to the plan based upon the fact that citizens lacked standing to challenge development orders for lack of consistency with the comprehensive plan.”

James C. Nicholas & Ruth L. Steiner, *Growth Management and Smart Growth in Florida*, 35 WAKE FOREST L.REV. 645, 657 (2000)(quoting Daniel W. O’Connell, *Growth Management in Florida: Will State and Local Governments Get Their Acts Together?*, FLORIDA ENVTL & URBAN ISSUES, 1-5 (June 1984)). If affected property owners in the area of newly permitted development could not challenge a project on the grounds that it would be inconsistent with the Comprehensive Plan, that eliminated the only real check on local government compliance—a challenge by those most directly affected by a proposed development.

The growing pressure for a fundamental change in the growth management law is reflected in the following statement made just prior to the Legislature’s adoption of the current law in 1985:

“In response to this lack of citizen standing, a citizen initiative began last year and thousands of signatures were collected around the state to bring the standing issue to a referendum vote. The petition specifically calls for a referendum on the issues of giving citizens a right in the state constitution to environmental health and welfare and providing them with legal standing to sue if government at the local,

regional, or state level is not doing its job.

“That initiative fell just a few thousand signatures short of the required number for qualifying for a referendum in 1984. However, the initiative is continuing, and I feel confident that the issue will be brought to the voters of the state in 1985 unless the legislature addresses the issue more effectively than it did last year.”

Kathleen Shea Abrams, *An Environmental Word*, 1 J. LAND USE & ENVTL LAW 155, 159 (1985). Clearly the pressure from a “civically militant electorate” was growing, and the elected representatives took notice of it. The result was the Growth Management Act of 1985. Chap. 85-55, Laws of Fla. This is essentially the statute we have today, parts of which have been cited in preceding paragraphs.¹² Its most important provision for our purposes was section 163.3215, the provision used by Shidel to bring this action into court.

In *Southwest Ranches*, we observed that section 163.3215 had liberalized standing requirements and demonstrated “a clear legislative policy in favor of the enforcement of comprehensive plans by persons adversely affected by local action.” 502 So.2d at 935. In *Parker v. Leon County*, 627 So.2d 476, 480 (Fla.1993), the court held that “the legislature enacted section 163.3215 to ensure the standing for any person who ‘will suffer an adverse effect to an interest protected ... by the ... comprehensive plan.’” 627 So.2d at 479. The *Parker* court quoted with approval the above passage from *Southwest Ranches*. 627 So.2d at 479. See also *Putnam County Env’tl Council, Inc. v. Board of County*

¹² See *supra* notes 2, 3, 4 and 5 and accompanying text.

Comm'rs of Putnam County, 757 So.2d 590, 593 (Fla. 5th DCA 2000) (“That standard changed, however, with the 1985 adoption of section 163.3215, which liberalized the standing requirements and ‘demonstrat[ed] a clear legislative policy in favor of the enforcement of comprehensive plans by persons adversely affected by local action.’”). Thus, the criticism described above certainly was of great influence in the 1985 Legislature’s formulation of the new standing provision. Affected citizens have been given a significantly enhanced standing to challenge the consistency of development decisions with the Comprehensive Plan.

... .

Under section 163.3215 citizen enforcement is the primary tool for insuring consistency of development decisions with the Comprehensive Plan. Deference by the courts—especially of the kind argued by the developer in this case—would not only be inconsistent with the text and structure of the statute, but it would ignore the very reasons for adopting the legislation in the first place. When an affected property owner in the area of a newly allowed development brings a consistency challenge to a development order, a cause of action—as it were—for compliance with the Comprehensive Plan is presented to the court, in which the judge is required to pay deference only to the facts in the case and the applicable law. In light of the text of section 163.3215 and the foregoing history, we reject the developer’s contention that the trial court erred in failing to defer to the County’s interpretation of its own Comprehensive Plan.

Having thus decided that the trial court was correct in failing to accord any particular deference to the Martin County Commission in its interpretation of the Comprehensive Plan, we now proceed to consider the court’s determination on the consistency issue. The trial court explained its decision as follows:

“The primary claim by [plaintiffs] is that the juxtaposition of multi-story, multi-family apartments in Phase 10 directly next to the single family homes in Phase 1 violates a number of provisions in the Comprehensive Plan. The provision of the Comprehensive Plan that is central to their argument is section 4-5(A)(2)(b), known as the ‘tiering policy.’ [see n. 6, above]

“The tiering policy was added to the Comprehensive Plan ... to address how development would be added to existing single-family residential communities. There was a concern ... over how existing single-family homes were being impacted by new, adjacent denser developments....

“The tiering policy required ... a transition zone along the southern portion of Phase 10 equal to ‘the depth of the first block of single-family lots’ within the northern portion of Phase 1. The section requires that development in the first tier of Phase 10 be limited to construction ‘of comparable density and compatible dwelling unit types.’ The court finds that the appropriate measure is 225 feet, using the shortest average depth method of computation.

“No transition zone was established for Phase 10. The buildings along the first tier of Phase 10 are multi-family, multi-story, and have balconies. The southern tier of Phase 10 has a density of 6.6[UPA]. The overall density of Phase 10 is 6.5[UPA]. There is no

meaningful difference in density across the entire western portion of Phase 10. The northern tier of Phase 1, on the other hand, is comprised entirely of single-family homes on 0.75 acre to 1.2 acre lots, with a density of 0.94[UPA].¹³

“There was no first tier transition zone established for Phase 10 as mandated by section 4-5(A)(2)(b). That section is not the only provision of the Comprehensive Plan that mandated compatible structures within the first tier of Phase 10. Section 4-4(M)(1)(e)(2) provided:

... Where single family structures comprise the dominant structure type within [residential estate densities (RE-0.5A)], new development on undeveloped abutting lands shall be required to include compatible structure types of lands immediately adjacent to existing family development.

... Phase 1 is designated RE-0.5A

...

“It is impossible ... to examine the photographs of the homes in the northern tier of Phase 1, and the apartment buildings in the southern tier of Phase 10, and find that they are

¹³ At this point in the Final Judgment, the court went on to show in a comparative table that the change in density between the two tiers represented a 560% difference, the change in population a 492% difference, and the number of units a 418% difference.

either ‘compatible dwelling unit types’ or ‘compatible structure types.’ The only residential structure that could be *less* compatible with the northern tier of Phase 1, would be a multi-story condominium building. There is no compatibility between the structures in the southern tier of Phase 10 and the northern tier of Phase 1. Further, an examination of the density of development in the two tiers at issue, precludes this court from finding that they are in any way comparable.

...

“[B]uffering does not grant relief to the [developer] under section 4-4(I)(5). That section deals with buffering between ‘incompatible land uses.’ The more specific Tiering Policy mandates compatibility. More importantly, even to the extent that the Comprehensive Plan might, in some instances, provide a builder with the ability to buffer changes in density, intensity or uses, the language of sections 4-4(M)(1)(e)(2) and 4-5(A)(2)(b) simply do not permit the type of development that is under construction in Phase 10.”

...

“Based on the foregoing, the Court finds that the Development Order is inconsistent with the Comprehensive Plan. It is not compatible with, nor does it further the objective, policies, land uses, densities and intensities in

the Comprehensive Plan. §
163.3194(3)(a).” [e.o.]

We have carefully reviewed the record of the trial and the evidence presented. It is apparent that there is substantial competent evidence to support these findings. Developer argues that the court erred in its interpretation of the “tiering policy,” in deeming it a mandatory requirement rather than a discretionary guide. We conclude that the trial court’s construction is consistent with the plain meaning of the text of the Comprehensive Plan. *See* Comprehensive Plan, § 4-5(A)(2)(b) (“a density transition zone of comparable density and compatible dwelling unit types shall be established in the new project for a depth from the shared property line that is equivalent to the depth of the first tier of the adjoining development’s lower density (i.e. the depth of the first block of single-family lots).”). Moreover, given the evidence as to Martin County’s adoption of the tiering policy, the record clearly supports the finding that the policy was intended to be applied in all instances of projects abutting single-family residential areas. We therefore affirm the finding of inconsistency and proceed to explain our decision on the remedy.

II. Remedy of Demolition

Developer challenges what it terms the “enormity and extremity of the injunctive remedy imposed by the trial court.” It argues that the trial court’s order requiring the demolition of 5 multi-family residential buildings is the most radical remedy ever mandated by a Florida court because of an inconsistency with a Comprehensive Plan. Specifically, the contention is that the trial judge failed to balance the equities between the parties and thus ignored the evidence of a \$3.3 million dollar loss the developer will suffer from the demolition of the buildings. The court failed to consider alternative remedies in damages, it argues, that would have adequately remedied any harm resulting

from the construction of structures inconsistent with the Comprehensive Plan. Developer maintains that the trial court erroneously failed to give meaningful consideration to the traditional elements for the imposition of injunctive relief. It contends that the trial court proceeded on an erroneous conclusion that where an injunction is sought on the basis of a statutory violation, no proof is required as to the traditional elements for an injunction.

Traditionally, as the trial judge noted, it is true that injunctions are usually denied where the party seeking such relief fails to demonstrate a clear legal right, a particular harm for which there is no adequate remedy at law, and that considerations of the public interest would support the injunction. *See, e.g., St Lucie County v. St. Lucie Village*, 603 So.2d 1289, 1292 (Fla. 4th DCA 1992). These are, of course, the necessary ingredients for equitable relief when we labor in the interplay of common law and equity, where ordinary legal remedies are unavailing.

Nonetheless, as between the State legislature and the several counties, the Legislature is the dominant creator of public duties and citizen rights.¹⁴ Recognizing that the Legislature has the sole power to create such public duties and citizen rights, it logically follows that the Legislature is necessarily endowed with the authority to specify precisely what remedies shall be used by judges to enforce a statutory duty—regardless of whether in general usage such a remedy usually requires additional factors before it is traditionally employed.

When the Legislature creates a public duty and a corresponding right in its citizens to enforce the duty it has created, and provides explicitly that the remedy of vindication shall be an injunction, the Legislature has not

¹⁴ *See* Art. VIII, § 1(f) and (g), Fla. Const. (whether charter or non-charter government, Counties are granted power to enact only ordinances that are “not inconsistent with general law”).

thereby encroached on judicial powers, as the courts held in *Harvey v. Wittenberg*, 384 So.2d 940 (Fla. 3rd DCA 1980), and *Times Publishing Co. v. Williams*, 222 So.2d 470 (Fla. 2d DCA 1969). The *Times Publishing* court explained its theory of encroachment thus:

“Injunctive relief is an extraordinary remedy which issues only when justice requires and there is not adequate remedy at law, and when there is a real and imminent danger of irreparable injury. Statutory authority for such writs, as in the act before us, are not uncommon; but it must be remembered that such writs are in the first instance judicial writs. If such statutes purport to give the circuit courts injunctive power they are ineffectual, since those courts are otherwise vested with such powers under the constitution, § 6(3) Art. V Constitution of Florida; and if they purport to dictate to such courts when, how or under what conditions injunctions should issue they would constitute an unlawful legislative infringement on a judicial function.”
[e.s.]

222 So.2d at 476. *Times Publishing* and *Harvey* both held that the Legislature is limited to specifying certain harms as irreparable, but the court alone has the discretion to determine whether the injunction should otherwise issue. We disagree with this analysis.

We think that is too wooden a construction of legislative powers where a statute is concededly valid. In our view when the Legislature provides for an injunction in these circumstances, it has deliberately made the new public duty and its corresponding right of enforcement an integrated

statutory prescription. By specifying that the public interest requires that a certain duty be vindicated in the courts and not primarily within other branches of government, the Legislature is well within its powers. Surely the Legislature's primary role in defining public policy under the constitution is broad enough to enable it to specify a legal remedy in an enactment, regardless of whether the traditional judicial restrictions on that remedy in other, non-statutory contexts would limit its usage. As the author of the primary duty, the Legislature alone shapes the form of its effectuating mechanism.

In section 163.3215, we think the Legislature has constructed such a statute. The statute leads off with a declaration that:

“Any aggrieved or adversely affected party may maintain an action for injunctive or other relief against any local government to prevent such local government from taking any action on a development order, as defined in s. 163.3164, which materially alters the use or density or intensity of use on a particular piece of property that is not consistent with the comprehensive plan adopted under this part.”

From the plain and obvious meaning of this text we discern only two elements to the granting of an injunction against the enforcement of a development order: (a) the party is affected or aggrieved by (b) an approved project that is inconsistent with the Comprehensive Plan. In short, the existence of an affected neighbor is all that is necessary for the issuance of an injunction against a proposed land use that is inconsistent with the Comprehensive Plan.

We note that the statute does not say that the affected/aggrieved party bringing the action “creates a

presumption of irreparable injury” by showing an inconsistency with the Plan. *See, e.g.*, § 542.335(1)(j), Fla. Stat. (2000) (“The violation of an enforceable restrictive covenant creates a presumption of irreparable injury to the person seeking enforcement of a restrictive covenant.”). When the Legislature wants to make a lesser intrusion on traditional equitable jurisdiction, it obviously knows how to do so. Here the statutory text makes the injunction the first and preferred remedy to alleviate the affects of inconsistent land use. Hence, we read the statute to make the injunction the presumed remedy where the conditions prescribed are shown.¹⁵

We disagree with the developer’s contention that this statute was meant to create mere discretion in the court to issue an injunction. If injunctive relief is the specified,

¹⁵ We reject developer’s argument that demolition is improper simply because Shidel failed to seek a temporary injunction against any construction while the case proceeded in court on the consistency issue. In the first place, when the action was filed the trial court originally thought its role limited to a record review of the proceedings before the Martin County Commission and concluded that no error had been shown. Having decided there was no error in the limited review it thought applicable, the trial court was hardly likely to grant a temporary injunction while the case was on appeal.

Even more important, however, we find nothing in the text of the relevant statutes making such a request for a temporary injunction a precondition to effective final relief after a trial de novo when the court finds that the permitted use is inconsistent with the Comprehensive Plan. We note from other statutes that when the Legislature means to place restrictions on third party challenges to agency decisions granting permits, it says so in specific text. *Compare* § 403.412(2)(c), Fla. Stat. (2000), *with* § 163.3215(4), Fla. Stat. (2000), as to preconditions for suit; *see also* § 163.3215(6), Fla. Stat. (2000) (“The signature of an attorney or party constitutes a certificate that he or she has read the pleading, motion, or other paper and that, to the best of his or her knowledge, information, and belief formed after reasonable inquiry, it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or for economic advantage, competitive reasons or frivolous purposes or needless increase in the cost of litigation. If a pleading, motion, or other paper is signed in violation of these requirements, the court, upon motion or its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney’s fee.”).

primary remedy to correct a violation of a public duty and to vindicate the right of a person affected by the violation of that duty, it can properly be deemed a rule that the Legislature has created, not a grant of discretion. Here the Legislature has devised an entire statutory scheme to insure that all counties have a Comprehensive Plan for the development of land within their respective jurisdictions. The scheme creates mandatory duties to have a plan, mandatory duties to have the plan approved by the state, and once approved mandatory duties to limit all developments so that they are consistent with the plan's requirements. At the end of all these mandatory duties—all these *shalls*—comes a new relaxation of the requirements on standing for citizen suits to enforce comprehensive land use plans and providing for the issuance of injunctions when an inconsistency affects another land owner. Judicial construction of that sole remedy as discretionary strikes us as remarkably inconsistent with not only the text of the statute itself but also with the purpose of the entire legislative scheme.

Developer lays great stress on the size of the monetary loss that it claims it will suffer from demolition, as opposed to the much smaller diminution in value that the affected property owner bringing this action may have suffered. It contends that a \$3.3 million loss far outweighs the evidence of diminution in the value of Shidel's property, less than \$26,000. Its primary contention here is that the trial judge erred in failing to weigh these equities in its favor and deny any remedy of demolition. Instead, as developer sees it, the court should have awarded money damages to eliminate the objector's diminution in value. Developer argued that it should be allowed instead of demolition it should also be allowed to build environmental barriers, green areas of trees and shrubbery, between the apartment buildings and the adjoining area of single family homes.

Developer emphasizes that we deal here with an expensive development: “a high quality, upscale project;” “forty units of high-quality garden apartments;” “five upscale multi-family dwellings, housing 40 garden apartments, at a value of approximately \$3 million.” Developer concedes that there is evidence showing that plaintiff Shidel’s property is diminished by \$26,000. It also concedes that the total diminution for all the homes bordering its project is just under \$300,000. Developer contends, however, that the real countervailing harm to all these affected property owners in the vicinity is not any diminution in the value of their homes, but instead is merely “knowing that there is an upscale apartment building approximately a football field away, partially visible through some trees behind the house.”

Section 163.3215 says nothing about weighing these specific equities before granting an injunction. If the Legislature had intended that injunctive enforcement of comprehensive plans in the courts be limited to cases where such imbalances of equities were not present, we assume that it would have said so. As important, such balancing if applied generally would lead to substantial non-compliance with comprehensive plans. We doubt that there will be many instances where the cost of the newly allowed construction will be less than any diminution resulting from an inconsistency. Entire projects of the kind permitted here will frequently far exceed the monetary harms caused to individual neighbors affected by the inconsistency. In other words, if balancing the equities—that is, weighing the loss suffered by the developer against the diminution in value of the objecting party—were required before demolition could be ordered, then demolition will never be ordered.

Moreover it is an argument that would allow those with financial resources to buy their way out of compliance with comprehensive plans. In all cases where the proposed use is for multiple acres and multiple buildings, the expenditures

will be great. The greater will be its cost, and so will be a resulting loss from an after-the-fact demolition order. The more costly and elaborate the project, the greater will be the “imbalance in the equities.” The more a developer is able to gild an inconsistency with nature’s ornaments—trees, plants, flowers and their symbiotic fauna—the more certain under this argument will be the result that no court will enjoin an inconsistency and require its removal if already built.

In this case the alleged inequity could have been entirely avoided if developer had simply awaited the exhaustion of all legal remedies before undertaking construction. It is therefore difficult to perceive from the record any great inequity in requiring demolition. Shidel let the developer know when it was just beginning construction of the first building that she would seek demolition if the court found the project inconsistent. When developer decided to proceed with construction in spite of the absence of a final decision as to the merits of the challenge under section 163.3215, the developer was quite able to foresee that it might lose the action in court. It could not have had a reasonable expectation that its right to build what it had proposed was finally settled. It may have thought the decision to build before the consistency question was settled in court a reasonable “business decision,” but that hardly makes it inequitable to enforce the rule as written.

It also seems quite inappropriate, if balancing of equities were truly required by this statute, to focus on the relatively small financial impacts suffered by those adjoining an inconsistent land use. The real countervailing equity to any monetary loss of the developer is in the flouting of the legal requirements of the Comprehensive Plan. Every citizen in the community is intangibly harmed by a failure to comply with the Comprehensive Plan, even those whose properties may not have been directly diminished in value.

We claim to be a society of laws, not of individual eccentricities in attempting to evade the rule of law. A society of law must respect law, not its evasion. If the rule of law requires land uses to meet specific standards, then allowing those who develop land to escape its requirements by spending a project out of compliance would make the standards of growth management of little real consequence. It would allow developers such as this one to build in defiance of the limits and then escape compliance by making the cost of correction too high. That would render section 163.3215 meaningless and ineffectual.

In this regard we are drawn to the views expressed in *Welton v. 40 Oak Street Building, Corp.*, 70 F.2d 377 (7th Cir. 1934), a case of strikingly analogous facts. There the developer applied for a permit to erect a building, and proceeded to build while its neighbor objected to the edifice and sought to show that the building plans did not comply with the zoning ordinances. When the agency approved the building he sought relief in the courts, finally being victorious in the state supreme court. Ownership of the building meanwhile passed to a federal receiver, and so the objecting neighbor sought to enforce his remedy by injunctive relief in the federal court. The trial judge denied an injunction. On appeal the Court of Appeals disagreed and ordered a mandatory injunction to “rebuild” the edifice in compliance with the zoning law, explaining:

“We have earnestly endeavored to place ourselves in a position to fully appreciate appellees’ argument to the effect that enforcement of a right which arises out of an effort to give light and air to metropolitan areas is an equity that is outweighed by the dollars advanced by builders of twenty story buildings in defiance of zoning ordinances. We have also endeavored

to obtain appellees' viewpoint when they propose a money judgment to one who suffers small financial loss as satisfaction for violation of important ordinances enacted for the benefit of the public. In the fight for better living conditions in large cities, in the contest for more light and air, more health and comfort, the scales are not well balanced if dividends to the individuals outweigh health and happiness to the community. Financial relief to appellants is not the only factor in weighing equities. There is involved that immeasurable but nevertheless vital element of respect for, and compliance with, the health ordinance of the city. The surest way to stop the erection of high buildings in defiance of zoning ordinances is to remove all possibility of gain to those who build illegally. Prevention will never be accomplished by compromise after the building is erected, or through payment of a small money judgment to some individual whose financial loss is an inconsequential item."

70 F.2d at 382-83. We agree with the Seventh Circuit that respect for law, in this case the Comprehensive Plan, trumps any "inequity" of financial loss arising from demolition.

Our understanding of section 163.3215 is thus different from equity's traditional use of its remedies. If, as we have shown, an injunction is the statutory remedy to insure consistency of development of property within the county, it does not seem to us that the kind of balancing advocated here would further that goal. In fact it would very likely lead to even more inconsistent development, particularly as

to the kind of large scale project involved here with multiple buildings for multiple families. As we see it, the purpose of this statute is precisely against this kind of thinking. A clear rule is far more likely to erase the kind of legal unpredictability lamented by developer and amici.

The statute says that an affected or aggrieved party may bring an action to enjoin an inconsistent development allowed by the County under its Comprehensive Plan. The statutory rule is that if you build it, and in court it later proves inconsistent, it will have to come down. The court's injunction enforces the statutory scheme as written. The County has been ordered to comply with its own Comprehensive Plan and restrained from allowing inconsistent development; and the developer has been found to have built an inconsistent land use and has been ordered to remove it. The rule of law has prevailed.

We therefore affirm the final judgment of the trial court in all respects.

GUNTHER AND GROSS, JJ., concur.

Note

As the above cases demonstrate, states vary widely in whether and they require comprehensive planning at all and in the degree of consistency required between plans and later-enacted land use ordinances. Some require comprehensive planning outright. Some do not. And some provide funding incentives.

For example, in Georgia local governments are not required to have a comprehensive plan, but they gain access to various grants if they do. The Department of Community Affairs has been given by authority to develop "Minimum Standards" for qualifying comprehensive plans. Its regulations require three components: a community assessment, a community participation program, and a community agenda. These components are basically as they sound. The first is a local inventory and includes development maps and evaluations of current policies. The second is a plan to engage the community in the planning process. Only after the Department has

approved a local government's first two components may it proceed to the community agenda, which is the "plan" part of the comprehensive plan. It takes the form of a map showing future development and an implementation program. The plan for Athens-Clarke County is available at <http://athensclarkecounty.com/index.aspx?NID=848>.

California requires counties and cities to adopt general plans meeting minimum standards and addressing seven required elements: Land Use, Circulation, Housing, Conservation, Open Space, Noise, and Safety. Courts do not probe the merits of a local government's plan, but they will ensure "substantial compliance." See, e.g., *Twaine Harte Homeowners Association v. County of Tuolumne*, 138 Cal. App. 3d 664 (1982). California, like Florida, invalidates zoning inconsistent with the general plan. Simply skimming the General Plan Guidelines issues by the Governor's Office of Planning and Research (available at http://opr.ca.gov/docs/General_Plan_Guidelines_2003.pdf) will give a good sense of the planning process.

3. Judicial Review

3.1. Substantive Due Process

3.1.1. Federal Courts

Nectow v. City of Cambridge et al.

277 U.S. 183 (1928)

ERROR TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS.

Messrs. Judson Hannigan and John E. Hannigan for plaintiff in error.

Mr. Peter J. Nelligan, with whom *Messrs. J. Edward Nally and Joseph P. Lyons* were on the brief, for defendants in error.

MR. JUSTICE SUTHERLAND delivered the opinion of the Court.

A zoning ordinance of the City of Cambridge divides the city into three kinds of districts: residential, business and unrestricted. Each of these districts is sub-classified in respect of the kind of buildings which may be erected. The ordinance is an elaborate one, and of the same general character as that considered by this Court in *Euclid v. Ambler Co.*, 272 U.S. 365. In its general scope it is conceded to be constitutional within that decision. The land of plaintiff in error was put in district R-3, in which are permitted only dwellings, hotels, clubs, churches, schools, philanthropic institutions, greenhouses and gardening, with customary incidental accessories. The attack upon the ordinance is that, as specifically applied to plaintiff in error, it deprived him of his property without due process of law in contravention of the Fourteenth Amendment.

The suit was for a mandatory injunction directing the city and its inspector of buildings to pass upon an application of the plaintiff in error for a permit to erect any lawful buildings upon a tract of land without regard to the provisions of the ordinance including such tract within a

residential district. The case was referred to a master to make and report findings of fact. After a view of the premises and the surrounding territory, and a hearing, the master made and reported his findings. The case came on to be heard by a justice of the court, who, after confirming the master's report, reported the case for the determination of the full court. Upon consideration, that court sustained the ordinance as applied to plaintiff in error, and dismissed the bill. 260 Mass. 441.

A condensed statement of facts, taken from the master's report, is all that is necessary. When the zoning ordinance was enacted, plaintiff in error was and still is the owner of a tract of land containing 140,000 square feet, of which the locus here in question is a part. The locus contains about 29,000 square feet, with a frontage on Brookline street, lying west, of 304.75 feet, on Henry street, lying north, of 100 feet, on the other land of the plaintiff in error, lying east, of 264 feet, and on land of the Ford Motor Company, lying southerly, of 75 feet. The territory lying east and south is unrestricted. The lands beyond Henry street to the north and beyond Brookline street to the west are within a restricted residential district. The effect of the zoning is to separate from the west end of plaintiff in error's tract a strip 100 feet in width. The Ford Motor Company has a large auto assembling factory south of the locus; and a soap factory and the tracks of the Boston & Albany Railroad lie near. Opposite the locus, on Brookline street, and included in the same district, there are some residences; and opposite the locus, on Henry street, and in the same district, are other residences. The locus is now vacant, although it was once occupied by a mansion house. Before the passage of the ordinance in question, plaintiff in error had outstanding a contract for the sale of the greater part of his entire tract of land for the sum of \$63,000. Because of the zoning restrictions, the purchaser refused to comply with the contract. Under the ordinance, business and

industry of all sorts are excluded from the locus, while the remainder of the tract is unrestricted. It further appears that provision has been made for widening Brookline street, the effect of which, if carried out, will be to reduce the depth of the locus to 65 feet. After a statement at length of further facts, the master finds “that no practical use can be made of the land in question for residential purposes, because among other reasons herein related, there would not be adequate return on the amount of any investment for the development of the property.” The last finding of the master is:

“I am satisfied that the districting of the plaintiff’s land in a residence district would not promote the health, safety, convenience and general welfare of the inhabitants of that part of the defendant City, taking into account the natural development thereof and the character of the district and the resulting benefit to accrue to the whole City and I so find.”

It is made pretty clear that because of the industrial and railroad purposes to which the immediately adjoining lands to the south and east have been devoted and for which they are zoned, the locus is of comparatively little value for the limited uses permitted by the ordinance.

We quite agree with the opinion expressed below that a court should not set aside the determination of public officers in such a matter unless it is clear that their action “has no foundation in reason and is a mere arbitrary or irrational exercise of power having no substantial relation to the public health, the public morals, the public safety or the public welfare in its proper sense.” *Euclid v. Ambler Co.*, *supra*, p. 395.

An inspection of a plat of the city upon which the zoning districts are outlined, taken in connection with the master's findings, shows with reasonable certainty that the inclusion of the locus in question is not indispensable to the general plan. The boundary line of the residential district before reaching the locus runs for some distance along the streets, and to exclude the locus from the residential district requires only that such line shall be continued 100 feet further along Henry street and thence south along Brookline street. There does not appear to be any reason why this should not be done. Nevertheless, if that were all, we should not be warranted in substituting our judgment for that of the zoning authorities primarily charged with the duty and responsibility of determining the question. *Zahn v. Bd. of Public Works*, 274 U.S. 325, 328, and cases cited. But that is not all. The governmental power to interfere by zoning regulations with the general rights of the land owner by restricting the character of his use, is not unlimited, and other questions aside, such restriction cannot be imposed if it does not bear a substantial relation to the public health, safety, morals, or general welfare. *Euclid v. Ambler Co.*, *supra*, p. 395. Here, the express finding of the master, already quoted, confirmed by the court below, is that the health, safety, convenience and general welfare of the inhabitants of the part of the city affected will not be promoted by the disposition made by the ordinance of the locus in question. This finding of the master, after a hearing and an inspection of the entire area affected, supported, as we think it is, by other findings of fact, is determinative of the case. That the invasion of the property of plaintiff in error was serious and highly injurious is clearly established; and, since a necessary basis for the support of that invasion is wanting, the action of the zoning authorities comes within the ban of the Fourteenth Amendment and cannot be sustained.

Judgment reversed.

Coniston Corporation v. Village of Hoffman Estates

844 F.2d 461 (1988)

Francis X. Grossi, Jr., Katten, Muchin & Zavis, Chicago, Ill., for plaintiffs-appellants.

Richard N. Williams, Hoffman Estates, Ill., David L. Ader, Ancel, Glink, Diamond, Murphy & Cope, Chicago, Ill., for defendants-appellees.

Before POSNER, COFFEY, and EASTERBROOK, Circuit Judges.

POSNER, CIRCUIT JUDGE.

The plaintiffs own a tract of several hundred acres of land, originally undeveloped, in the Village of Hoffman Estates, Illinois. Their complaint, laid under the ubiquitous section 1 of the Civil Rights Act of 1871, 42 U.S.C. § 1983, charges that in turning down the site plan for a 17-acre parcel in the tract, the Village Board of Trustees and its members violated the Constitution and state law. The district court dismissed the complaint for failure to state a claim.

The procedure for land development set forth in the Village's ordinances — ordinances incorporated by reference in an agreement that the Village made with the plaintiffs, annexing their land to the Village — requires first of all that there be a general plan for development approved by the Village Board of Trustees. This condition was met; there is an approved plan for the plaintiffs' tract. The next step is that, as development proceeds, the developer must submit site plans setting forth his plans for developing particular parcels. The site plan is first submitted to the Village Plan Commission for its recommendation and is then forwarded to the Board of Trustees for its approval or disapproval. No criteria are set forth in the ordinances or anywhere else to guide the Board.

Over the years the plaintiffs have presented a number of site plans for parcels within their tract, and these plans have been approved by both the Plan Commission and the Board of Trustees. For the 17-acre parcel at issue in this case, the plaintiffs submitted a plan that envisaged the construction of five single-story commercial buildings with a total office space of 181,000 square feet. The Plan Commission recommended approval of the plan, finding that it conformed to the general plan for the development of the plaintiffs' tract and to all applicable legal regulations. The Board of Trustees, however, disapproved the plan. It gave no reasons for its action but one of the trustees indicated that the reason (her reason, at any rate) was that the village has a lot of unused office space. (The Plan Commission had also expressed concern with the amount of vacant office space in the village.) Asked by the plaintiffs to reconsider its decision the Board went into executive session and emerged with an announcement that it was adhering to its original decision. Again there was no statement of reasons.

Before we get to the merits of the plaintiffs' appeal we must decide whether we have jurisdiction. The defendants had filed a motion under Fed.R.Civ.P. 12(b)(6) to dismiss the complaint for failure to state a claim. The district judge granted the motion and ordered the complaint dismissed, but did not order the entry of a judgment dismissing the lawsuit; no one had asked him to. The dismissal of a complaint is not the dismissal of the lawsuit, see *Bieneman v. City of Chicago*, 838 F.2d 962 (7th Cir.1988) (per curiam); *Benjamin v. United States*, 833 F.2d 669 (7th Cir.1987) (per curiam), since the plaintiff may be able to amend his complaint to cure whatever deficiencies had caused it to be dismissed. As long as the suit itself remains pending in the district court, there is no final judgment and we have no jurisdiction under 28 U.S.C. § 1291. This is particularly clear in a case such as the present one, where the plaintiff

had not amended his complaint before it was dismissed and the defendant had not filed a responsive pleading; for then the plaintiff has a right to amend his complaint without leave of court. Fed.R.Civ.P. 15(a); *Car Carriers, Inc. v. Ford Motor Co.*, 745 F.2d 1101, 1111 (7th Cir.1984).

If, however, it is plain that the complaint will not be amended, perhaps because the grounds of the dismissal make clear that no amendment could cure the defects in the plaintiff's case, the order dismissing the complaint is final in fact and we have jurisdiction despite the absence of a formal judgment under Fed.R.Civ.P. 58. See, e.g., *Akins v. Board of Governors*, 840 F.2d 1371, 1375 n. 2 (7th Cir.1988); *Hickey v. Duffy*, 827 F.2d 234, 238 (7th Cir.1987). That is this case, notwithstanding the district judge's mysterious statement that he was dismissing the complaint "in its present state." The complaint sets forth the plaintiffs' case in full; there appear to be no disputed or unclear facts; and the district judge found that the complaint stated no claim under federal law and he then relinquished his jurisdiction of the pendent state law counts in accordance with the usual rule that pendent claims are dismissed when the federal claims drop out before trial. The plaintiffs have no feasible options in the district court; the case is over for them there. Therefore they can appeal — but it would have been a lot simpler if either the plaintiffs or the defendants had asked the district court to enter a Rule 58 judgment order. We hope that, in the future, parties to litigation in this circuit will do that.

The plaintiffs' only federal claims are that they were denied "substantive" and "procedural" due process. They expressly waived any claim they may have had that the defendants, by preventing them from developing the 17-acre parcel in accordance with the site plan, took their property without paying just compensation, in violation of the Fifth and Fourteenth Amendments. In this court they try to withdraw their waiver because of intervening

Supreme Court decisions which they argue have broadened the concept of a regulatory taking, but their effort is futile. The taking is complete when it occurs, and the duty to pay just compensation arises then, see, e.g., *First Evangelical Lutheran Church v. County of Los Angeles*, ___ U.S. ___, 107 S.Ct. 2378, 2389 n. 10, 96 L.Ed.2d 250 (1987), but the suit for just compensation is not ripe until it is apparent that the state does not intend to pay compensation, *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 194, 105 S.Ct. 3108, 3121, 87 L.Ed.2d 126 (1985); *Unity Ventures v. County of Lake*, 841 F.2d 770, 773-74 (7th Cir.1988). These plaintiffs have not explored the possibility of obtaining compensation for an alleged regulatory taking. In fact, they do not want compensation; they want their site plan approved.

One might have thought that the takings clause would occupy the field of constitutional remedies for governmental actions that deprive people of their property, and hence that the plaintiffs' waiver of their takings claim would drag their due process claims down with it. But this is not correct; pushed to its logical extreme, the argument would read "property" out of the due process clause of the Fifth and Fourteenth Amendments. Even limited to claims of denial of substantive due process the argument may fail. Rather than being viewed simply as a limitation on governmental power the takings clause could be viewed as the source of a governmental privilege: to take property for public use upon payment of the market value of that property, since "just compensation" has been held to be satisfied by payment of market value, see, e.g., *United States v. Reynolds*, 397 U.S. 14, 16, 90 S.Ct. 803, 805, 25 L.Ed.2d 12 (1970). Compensation in the constitutional sense is therefore not full compensation, for market value is not the value that every owner of property attaches to his property but merely the value that the marginal owner attaches to *his* property. Many owners are "intramarginal," meaning that

because of relocation costs, sentimental attachments, or the special suitability of the property for their particular (perhaps idiosyncratic) needs, they value their property at more than its market value (i.e., it is not “for sale”). Such owners are hurt when the government takes their property and gives them just its market value in return. The taking in effect confiscates the additional (call it “personal”) value that they obtain from the property, but this limited confiscation is permitted provided the taking is for a public use. It can be argued that if the taking is not for a public use, it is unconstitutional, but perhaps not as a taking; for all the takings clause says is “nor shall private property be taken for public use, without just compensation.” This language specifies a consequence if property is taken for a public use but is silent on the consequences if property is taken for a private one. Perhaps the effect of this silence is to dump the case into the due process clause. The taking would then be a deprivation of property without due process of law. The victim could bring suit under section 1983 against the governmental officials who took or are threatening to take his property, seeking an injunction against the taking (or an order to return the property if, it has been taken already — subject to whatever defense the Eleventh Amendment might afford against such a remedy) or full tort damages, not just market value.

There are two objections to this approach. First, the takings clause may be broad enough to take care of the problem without the help of the due process clause. The Supreme Court may believe that the takings clause, of its own force, forbids any governmental taking not for a public use, even if just compensation is tendered. There is language to this effect in a number of opinions, see, e.g., *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 241, 104 S.Ct. 2321, 2329, 81 L.Ed.2d 186 (1984), though it may be inadvertent, and there is language in some cases that looks the other way — or both ways, compare *First English Evangelical Lutheran*

Church v. County of Los Angeles, ___ U.S. ___, 107 S.Ct. 2378, 2385, 96 L.Ed.2d 250 (1987), with *id.* 107 S.Ct. at 2386 (takings clause requires compensation “in the event of otherwise proper interference amounting to a taking”). In *Midkiff* the Court cited, as an example of a case where it had “invalidated a compensated taking of property for lack of a justifying public purpose,” 467 U.S. at 241, 104 S.Ct. at 2329, a case (*Missouri Pac. Ry. v. Nebraska*, 164 U.S. 403, 417, 17 S.Ct. 130, 135, 41 L.Ed. 489 (1896)) where in fact the Court, after finding there was no public use, had held that the state had denied the owner due process of law. In other words, once the privilege created by the takings clause was stripped away, the state was exposed as having taken a person’s property without due process of law. But this was before the takings clause had been held applicable to the states (via the due process clause of the Fourteenth Amendment) in *Chicago, Burlington & Quincy R.R. v. City of Chicago*, 166 U.S. 226, 236, 17 S.Ct. 581, 584, 41 L.Ed. 979 (1897) — though only a year before.

It seems odd that the takings clause would require just compensation when property was taken for a public use yet grant no remedy when the property was taken for a private use, although the semantics of the clause are consistent with such an interpretation, as we have seen. Yet well after the takings clause was deemed absorbed into the due process clause of the Fourteenth Amendment, the Supreme Court reviewed a zoning ordinance for conformity to substantive due process. See *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 47 S.Ct. 114, 71 L.Ed. 303 (1926). Justice Stevens has said that the Court in *Euclid* “fused the two express constitutional restrictions on any state interference with private property — that property shall not be taken without due process nor for a public purpose without just compensation — into a single standard.” *Moore v. City of East Cleveland*, 431 U.S. 494, 514, 97 S.Ct. 1932, 1943, 52 L.Ed.2d 531 (1977) (concurring opinion).

The other objection to the due process route in a case such as the present one is that it depends on the idea of “substantive” due process. This is the idea that depriving a person of life, liberty, or property can violate the due process clause of the Fifth and Fourteenth Amendments even if there are no procedural irregularities — even if, for example, the state after due deliberation has passed a statute establishing procedures for taking private homes and giving them to major campaign contributors or people with red hair, and in taking the plaintiff’s home has complied scrupulously with the statute’s procedural requirements.

Substantive due process is a tenacious but embattled concept. Text and history, at least ancient history, are against it, though perhaps not decisively. (See generally Jurow, *Untimely Thoughts: A Reconsideration of the Origins of Due Process of Law*, 19 Am.J. Legal Hist. 265 (1975).) A provision which states that life, liberty, or property may not be taken without due process of law implies that life, liberty, or property *can* be taken with due process of law, and hence that the only limitations are procedural ones. The term “due process of law” has been traced back to a fourteenth-century English statute, in which the term plainly referred to procedure rather than substance. See 28 Edw. III, ch. 3 (1354) (“no man ... shall be put out of land ..., nor taken, nor imprisoned, nor disinherited, nor put to death, without being brought into answer by due process of law”). In the seventeenth century Sir Edward Coke confused the picture by equating the term to Magna Carta’s much vaguer expression “by the law of the land.” The Supreme Court adopted Coke’s approach in *Murray’s Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 276, 15 L.Ed. 372 (1856), pointing out that the Northwest Ordinance and several state constitutions had used the Magna Carta language and implying that the terminology was interchangeable in the Fifth Amendment as well. Even so,

the term “law of the land” is scarcely pellucid. Further complications are injected by the much debated legislative history of the Fourteenth Amendment.

The strongest criticisms of substantive due process are institutional ones. The concept invests judges with an uncanalized discretion to invalidate federal and state legislation. See *Illinois Psychological Ass’n v. Falk*, 818 F.2d 1337, 1342 (7th Cir.1987); *Gumz v. Morrisette*, 772 F.2d 1395, 1404-08 (7th Cir.1985) (concurring opinion), overruled (on the grounds urged in the concurrence) in *Lester v. City of Chicago*, 830 F.2d 706 (7th Cir.1987); *Chicago Board of Realtors, Inc. v. City of Chicago*, 819 F.2d 732, 744-45 (7th Cir.1987) (separate majority opinion). It also and by the same token invites the federal courts to sit in judgment on almost all state action — including, to come back to the present case, all zoning decisions. For it is tempting to view every zoning decision that is adverse to the landowner and in violation of state law as a deprivation of property. Property is not a thing, but a bundle of rights, and if the state confers rights with one hand and takes them away with the other, by a zoning decision that by violating state law deprives the owner of a property right and not just a property interest (the owner’s financial interest in being able to employ his land in its most valuable use), why is it not guilty of denying substantive due process?

No one thinks substantive due process should be interpreted so broadly as to protect landowners against erroneous zoning decisions. But it is difficult to come up with limiting concepts that are not completely ad hoc. Justice Stevens tried — though in the context of judicial review of an ordinance, rather than of an individual decision applying an ordinance — in his concurring opinion in *Moore v. City of East Cleveland*, *supra*, 431 U.S. at 520, 97 S.Ct. at 1946, where he suggested that an ordinance that is not “shown to have any ‘substantial relation to the public health, safety, morals or general welfare’” and that

“cuts deeply into a fundamental right associated with the ownership of residential property” violates the Constitution.

The present case is so remote from a plausible violation of substantive due process that we need not decide whether, or to precisely what extent, the concept limits takings by state and local governments; or whether the takings clause does so; or whether both or neither do so and if both whether there is any practical difference except possibly in a case like this where the plaintiff waives any claim based on the takings clause; or, finally, whether the plaintiffs can force us to confront difficult questions of substantive due process by their decision to waive a seemingly more straightforward claim under the takings clause. The Village of Hoffman Estates did not *take* the plaintiffs’ land (or in the language of the due process clause, deprive them of the land) for a *private* (hence presumptively unreasonable) purpose, so even if we assume that if both conditions were fulfilled the taking or deprivation would violate the due process clause, the plaintiffs cannot prevail.

As to whether there was a deprivation: Granted, the rejection of the plaintiffs’ site plan probably reduced the value of their land. The plan must have represented their best guess about how to maximize the value of the property, and almost certainly a better guess than governmental officials would make even if the officials were trying to maximize that value, which of course they were not. But the plaintiffs do not even argue that the rejection of the site plan reduced the value of their parcel much, let alone that the parcel will be worthless unless it can be used to create 181,000 square feet of office space. A taking is actionable under the takings clause even if it is of just a sliver of the owner’s property (e.g., a one-foot strip at the back of a 100-acre estate), see *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 102 S.Ct. 3164, 73 L.Ed.2d 868 (1982), and we can assume that the same thing

is true under the due process clause. But in cases under the takings clause the courts distinguish between taking away all of the owner's rights to a small part of his land and taking away (through regulation) a few of his rights to all of his land, and grant much broader protection in the first case. With *Loretto* compare *City of Eastlake v. Forest City Enterprises, Inc.*, 426 U.S. 668, 674 and n. 8, 96 S.Ct. 2358, 2362 and n. 8, 49 L.Ed.2d 132 (1976); *Barbian v. Panagis*, 694 F.2d 476, 483-85 (7th Cir.1982), and cases cited there. The plaintiffs in this case have been deprived of their "right" to create 181,000 square feet of office space on a 17-acre parcel of a much larger tract, and that deprivation is a limited, perhaps minimal, incursion into their property rights. If so it is not a deprivation at all, in the constitutional sense, and the due process clause is not in play. See *Wells Fargo Armored Service Corp. v. Georgia Public Service Comm'n*, 547 F.2d 938, 941 (5th Cir.1977); cf. *Brown v. Brienen*, 722 F.2d 360, 364 (7th Cir.1983) (dictum); *York v. City of Cedartown*, 648 F.2d 231 (5th Cir.1981) (per curiam).

Considering now the grounds as distinct from the consequences of the defendants' action, it may seem that since the Board of Trustees gave no reason for rejecting the plan we cannot exclude the possibility that the motive for the rejection was private, so that if (but it is a big if, as we have just seen) the rejection amounted to a taking or deprivation of property the plaintiffs' constitutional rights may have been violated. And even if, as seems plausible, the reason given by one trustee was *the* ground for the Board's rejection of the site plan, this reason seems to amount to nothing more than a desire to protect existing owners of office buildings from new competition, and thus makes the rejection look like an effort to transfer wealth from the plaintiffs to the existing owners. But as emphasized in our opinion in the *Chicago Board of Realtors* case, much governmental action is protectionist or anticompetitive, see 819 F.2d at 742, 745; and nothing is

more common in zoning disputes than selfish opposition to zoning changes. The Constitution does not forbid government to yield to such opposition; it does not outlaw the characteristic operations of democratic (perhaps of any) government, operations which are permeated by pressure from special interests. *Rogin v. Bensalem Township*, 616 F.2d 680, 687-88 (3d Cir.1980). There is no suggestion that the defendants acted out of some partisan political motive that might raise questions under the First Amendment or, one of our sister courts has suggested recently, under some notion of substantive due process, see *Bello v. Walker*, 840 F.2d 1124, 1129 (3d Cir.1988).

This case presents a garden-variety zoning dispute dressed up in the trappings of constitutional law — a sure sign of masquerade being that the plaintiffs do not challenge the constitutionality of the zoning ordinances of the Village of Hoffman Estates but argue rather than the Board of Trustees had no authority under those ordinances to reject their site plan once the Village Plan Commission had approved it. If the plaintiffs can get us to review the merits of the Board of Trustees' decision under state law, we cannot imagine what zoning dispute could not be shoehorned into federal court in this way, there to displace or postpone consideration of some worthier object of federal judicial solicitude. Something more is necessary than dissatisfaction with the rejection of a site plan to turn a zoning case into a federal case; and it should go without saying that the something more cannot be merely a violation of state (or local) law. A violation of state law is not a denial of due process of law. See, e.g., *Hebert v. Louisiana*, 272 U.S. 312, 316, 47 S.Ct. 103, 104, 71 L.Ed. 270 (1926); *Kompare v. Stein*, 801 F.2d 883, 888 (7th Cir.1986); *Kasper v. Board of Election Comm'rs*, 814 F.2d 332, 342 (7th Cir.1987).

Thus we agree with the First Circuit's decision in *Creative Environments, Inc. v. Estabrook*, 680 F.2d 822, 833 (1st

Cir.1982), that the fact “that town officials are motivated by parochial views of local interests which work against plaintiffs’ plan and which may contravene state subdivision laws” (or, we add, local ordinances) does not state a claim of denial of substantive due process. We cited *Estabrook* with approval in *Burrell v. City of Kankakee*, 815 F.2d 1127, 1129 (7th Cir.1987). It is true that there we interpreted *Estabrook* to mean that “in order to prevail on a substantive due process claim, plaintiffs must allege and prove that the denial of their proposal is arbitrary and unreasonable bearing no substantial relationship to the public health, safety or welfare,” *id.* This formulation, borrowed from *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395, 47 S.Ct. 114, 121, 71 L.Ed. 303 (1926), which dealt with the validity of zoning ordinances, not of individual zoning decisions where arguably the standard of federal judicial review should be narrower, is broadly worded indeed; but the only example we gave of a zoning decision that might flunk the test was one based on race or color, see 815 F.2d at 1129. Of course if a zoning decision is based on considerations that violate specific constitutional guarantees, it is invalid; but in all other cases the decision can be said to deny substantive due process only if it is irrational. See *Shelton v. City of College Station*, 780 F.2d 475, 479-83 (5th Cir.1986); *Pace Resources, Inc. v. Shrensbury Township*, 808 F.2d 1023, 1034-35 (3d Cir.1987). Thus, by “arbitrary and unreasonable” in *Burrell* we meant invidious or irrational. See also *Unity Ventures v. County of Lake*, *supra*, 841 F.2d at 775 n. 2. The same test would be appropriate if the zoning decision were challenged under the equal protection clause of the Fourteenth Amendment, rather than under the due process clause of the Fifth or Fourteenth Amendments. See *id.*; *Parks v. Watson*, 716 F.2d 646, 654 (9th Cir.1983) (per curiam).

At worst, the decision here was mistaken and protectionist; it was not irrational, so the claim of a denial of substantive

due process fails. But were the plaintiffs denied procedural due process? As often, the line between “procedure” and “substance” is hazy in the setting of the regulation of land uses. The denial of the plaintiffs’ site plan without a full statement of reasons is what gives the denial such arbitrary cast as it may have, and thus lends color to the claim of irrationality, which is the substantive due process claim; but the failure to give reasons is also the cornerstone of the procedural due process claim. It is no good saying that if a person is deprived of property for a bad reason it violates substantive due process and if for no reason it violates procedural due process. Unless the bad reason is invidious or irrational, the deprivation is constitutional; and the no-reason case will sometimes be a case of invidious or irrational deprivation, too, depending on the motives and consequences of the challenged action.

The plaintiffs complain not only about the absence of a statement of reasons but also about the Board of Trustees’ action in going into executive session and about the absence of any language in the Village’s ordinances to indicate that the Board of Trustees is authorized to reject a site plan recommended by the Plan Commission. These complaints might have considerable force if the zoning decision had been adjudicative in nature, but it was not. The very absence of criteria, coupled with the fact that the Village Board of Trustees is the governing body of the Village of Hoffman, suggests that, as is usually true of zoning, the Board’s decision to approve or disapprove a site plan is a legislative rather than adjudicative decision. The difference is critical. See *Bi-Metallic Investment Co. v. State Board of Equalization*, 239 U.S. 441, 36 S.Ct. 141, 60 L.Ed. 372 (1915); *City of Eastlake v. Forest City Enterprises, Inc.*, *supra*, 426 U.S. at 675 n. 10, 96 S.Ct. at 2363 n. 10; *Griffin High School v. Illinois High School Ass’n*, 822 F.2d 671, 676 (7th Cir.1987); *Philly’s v. Byrne*, 732 F.2d 87, 92 (7th Cir.1984). The Constitution does not require legislatures to

use adjudicative-type procedures, to give reasons for their enactments, or to act “reasonably” in the sense in which courts are required to do; as already noted, legislatures can base their actions on considerations — such as the desire of a special-interest group for redistributive legislation in its favor — that would be thought improper in judicial decision-making. It is odd, though, that the plaintiffs should complain about the action of the Board of Trustees in considering their request for reconsideration in executive session; judicial deliberations are typically more private than legislative ones.

It is not labels that determine whether action is legislative or adjudicative. A legislature is not allowed to circumvent the due process clause by the facile expedient of announcing that the state’s courts and administrative agencies are henceforth to be deemed legislative bodies even though nothing in their powers and procedures has changed. But neither is the legislature required to judicialize zoning, and perhaps it would not be well advised to do so. The decision whether and what kind of land uses to permit does not have the form of a judicial decision. The potential criteria and considerations are too open-ended and ill-defined. Granted, much modern adjudication has this character, but the difference is that even modern courts hesitate to treat the decision-making process as a wide-open search for the result that is just in light of all possible considerations of distributive and corrective justice, while legislatures are free to range widely over ethical and political considerations in deciding what regulations to impose on society. The decision to make a judgment legislative is perforce a decision not to use judicial procedures, since they are geared to the making of more circumscribed, more “reasoned” judgments. Moreover, if a state legislature wishes to reserve to itself the type of decision that in other systems might be given to the executive or judicial branches, it can do so without violating

the federal Constitution, which does not require a specific separation and allocation of powers within state government. See *Highland Farms Dairy, Inc. v. Agnew*, 300 U.S. 608, 612, 57 S.Ct. 549, 551, 81 L.Ed. 835 (1937); *United Beverage Co. v. Indiana Alcoholic Beverage Comm'n*, 760 F.2d 155 (7th Cir.1985). It has been argued that the need for separation of powers is even greater at the state than the national level, because a smaller polity is more susceptible to the pressure of factions than a large one. See Comment, *The Guarantee of Republican Government: Proposals for Judicial Review*, 54 U.Chi.L.Rev. 208, 234-35 (1987). The counterargument is that there is more intergovernmental competition the lower the level of government. The debate is foreclosed at our level of the judiciary by higher authority.

The Board of Trustees is the Village's legislature, *LaSalle National Bank v. Village of Bloomingdale*, 154 Ill.App.3d 918, 928-29, 107 Ill.Dec. 604, 611, 507 N.E.2d 517, 524 (1987), and it has reserved to itself the final decision in zoning matters. Naturally it has not sought to tie its hands with criteria for approval of site plans or with a requirement that it give reasons for its action and always act in a fishbowl. The check on its behavior is purely electoral, but, as the Supreme Court stated in the *City of Eastlake* case, in a democratic polity this method of checking official action cannot be dismissed as inadequate per se. See also *Bi-Metallic Investment Co. v. State Board of Equalization*, *supra*, 239 U.S. at 445, 36 S.Ct. at 142; *Philly's v. Byrne*, *supra*, 732 F.2d at 91-93.

A reason stressed in *Philly's* why legislatures are not required to follow trial-type procedures is the across-the-board character of legislation. See *id.* at 92. A statute, unlike a judicial decision, applies directly to a whole class of people, and it is this attribute that makes democratic checking feasible, though it is far from perfect. The smaller the class affected by a nominally legislative act, the weaker

the democratic check; in the limit, where the class has only one member, we have the bill of attainder, which Congress and state legislatures are forbidden to enact. See U.S. Const., art. I, §§ 9, 10; *Philly's v. Byrne*, *supra*, 732 F.2d at 93. The class here is small. This might support an argument that some type of individualized hearing was required. See *Londoner v. City & County of Denver*, 210 U.S. 373, 385-86, 28 S.Ct. 708, 713-14, 52 L.Ed. 1103 (1908). *City of Eastlake*, upholding the decision to submit a single landowner's zoning application to a referendum, cuts the other way. In any event, there was a hearing here — maybe not enough of one to satisfy the requirements of due process in an adjudicative setting but enough to give the plaintiffs all the process that due process in zoning could possibly be thought to require after *City of Eastlake*.

One point remains to be noted briefly. The district court dismissed a pendent state law claim that sought a mandamus directing the defendants to approve the plaintiffs' site plan. The ground for the dismissal was, as we noted, the fact that the federal claims were being dismissed before trial. That is fine, but we think it useful to add for future reference that the court had in any event no jurisdiction to issue a mandamus against state officials for violating their duties under state law. The interference with the operation of state government from such a mandamus would be disproportionate to the need, which can be satisfied perfectly well (if perhaps with some loss of convenience) by proceeding in state court. The interference would be even greater than that caused by the usual injunction — and the Supreme Court has held that the federal courts' pendent jurisdiction may not be used as a basis for enjoining state officials from violating state law. See *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 106, 120-21, 104 S.Ct. 900, 918-19, 79 L.Ed.2d 67 (1984).

AFFIRMED.

3.1.2. State Courts

Twigg v. County of Will, 255 Ill. App.3d 490

627 N.E.2d 742, (1994)

John X. Breslin, Deputy Director, State's Attys. Appellate Prosecutor, Ottawa, James Glasgow, Will County State's Atty., Joliet, Judith Z. Kelly (argued), State's Attys. Appellate Prosecutor, Ottawa, for County of Will.

Thomas R. Wilson (argued), Herschbach, Tracy, Johnson, Bertani & Wilson, Joliet, for John W. Twigg and Anna M. Twigg.

JUSTICE BARRY delivered the opinion of the court.

Defendant County of Will appeals from a judgment of the Circuit Court of Will County declaring defendant's county zoning ordinance void and unconstitutional as applied to the property of plaintiffs John W. and Anna Twigg and granting injunctive relief to restrain defendant from enforcing its A-1 (agricultural) zoning regulation with respect to the subject real estate. The issue in this appeal is whether the trial court's decision is contrary to the manifest weight of the evidence. For reasons that follow, we affirm.

According to the record on appeal, plaintiffs purchased a 35-acre parcel of land in Peotone Township zoned A-1 for \$3750 per acre in 1991. John Twigg testified that he knew the zoning classification at the time of the purchase, but he was not aware that the corresponding county ordinance required a minimum of 10 acres per residential unit. He testified that he had intended to divide the real estate into four parcels to provide separate residential lots for himself and his three adult children and to raise and keep horses. However, because of complaints of an adjoining property-owner, plaintiffs sold off the eastern-most 10 acres for \$50,000. They then proposed to divide the remaining acreage into two 10-acre lots for one son and their daughter, and to split the last 5 acres into two lots of 2 1/2 acres each for themselves and their other son. Because

plaintiffs' plans for the five acres did not conform with the A-1 classification, they petitioned the Will County Board to rezone the five acres from A-1 to E-2, which permits country residential lots of 2 1/2 acres. The Board denied plaintiffs' application, and they brought their complaint for declaratory and injunctive relief in the circuit court.

At trial, plaintiffs presented expert testimony of Thomas Murphy, a land use planner, and Charles Southcomb, a real estate appraiser. Murphy testified that E-2 zoning was a good use of the five-acre parcel and that it would have a positive effect on the future development of the surrounding area in that it would increase tax values while providing attractive residences in the immediate area. He further opined that the current A-1 zoning had no practical application and its 10-acre limitation was "somewhat arbitrary" as applied to plaintiffs' proposed use. As a former director of the Will County Regional Planning Commission, Murphy testified that in his opinion the county had assigned A-1 classification arbitrarily to all tracts in Will County that were not otherwise used for non-agricultural purposes when the county zoning ordinance was adopted in 1978. He testified that the county had a history of turning down all applications for rezoning to develop parcels of less than 10 acres. Finally, Murphy testified that denial of plaintiffs' proposed use of the five-acre parcel for two single-family residences adjacent to their daughter's horse-keeping operation would do nothing to preserve the agricultural character of the surrounding area.

Southcomb testified that the plaintiffs' proposed use of the five-acre parcel as two lots zoned E-2 was the highest and best use. He testified that the market value of the land as currently zoned was \$5000 per acre, and that using a comparable sales analysis it would be \$12,000 per acre if rezoned E-2.

James Shelby, Director of Planning for Will County, and Bruce Clover, a farmer in the immediate area, testified on

defendant's behalf. Shelby testified that there were no parcels zoned E-2 within a 1 1/2-mile radius of the subject property. However, he admitted that there are about five non-conforming parcels with residences on less than 10-acre lots within that 1 1/2-mile radius. These all had been in existence prior to the enactment of the 1978 zoning ordinance. Shelby testified that residential development was generally incompatible with agricultural use because the homeowners complained about farming practices. He also expressed concern about setting a precedent for residential development if the rezoning were allowed in this case.

Clover testified that he had leased the subject real estate from the prior owner and had himself netted about \$150 per acre per year on a crop-share basis. He stated that he bore no animosity toward the plaintiffs, but that agricultural use was incompatible with residential development to the extent that mail boxes and garbage cans along the roadways might hinder the movement of farm machinery, or children playing in the area might damage terraces and downspouts. Clover agreed that the soil was "excellent" for growing crops, including alfalfa, and for pasturing horses.

At the conclusion of all testimony and closing arguments of counsel, the court took the matter under advisement. On February 22, 1993, a written decision was entered granting declaratory and injunctive relief for plaintiffs, as aforesaid.

Zoning is primarily a legislative function, and it is within the province of local governmental bodies to determine the use of land and to establish zoning classifications. Accordingly, a zoning ordinance will be deemed constitutional and its validity upheld if it bears any "substantial relationship to the public health, safety, comfort or welfare." (*La Grange State Bank v. County of Cook* (1979), 75 Ill.2d 301, 26 Ill.Dec. 673, 675-76, 388 N.E.2d 388, 390-91 (quoting *Tomasek v. City of Des Plaines* (1976), 64 Ill.2d 172, 179-80, 354 N.E.2d 899, 903).)

A party challenging the validity of a zoning ordinance must establish both the invalidity of the existing zoning ordinance and the reasonableness of the proposed use of the property. (*Glenview State Bank v. Village of Deerfield* (1991), 213 Ill.App.3d 747, 758, 157 Ill.Dec. 330, 338, 572 N.E.2d 399, 407.) The party challenging the ordinance has the burden of proving by clear and convincing evidence that the application of the ordinance to the property is “unreasonable and arbitrary and bears no substantial relation to public health, safety, morals, or welfare.” (*Cosmopolitan National Bank v. County of Cook* (1984), 103 Ill.2d 302, 310, 82 Ill.Dec. 649, 653, 469 N.E.2d 183, 187.) An appellate court may not reverse the trial court’s findings unless such findings are against the manifest weight of the evidence. (*Glenview State Bank*, 213 Ill.App.3d at 759, 157 Ill.Dec. at 309, 572 N.E.2d at 408.) The trier of fact is in a better position to assess the credibility of the witnesses and their opinions, and the reviewing court may not reverse simply because the reviewing court may have come to a different conclusion. *Glenview State Bank*, 213 Ill.App.3d at 759-60, 157 Ill.Dec. at 309, 572 N.E.2d at 408.

There are eight factors to consider in determining whether a zoning ordinance is valid. The first six factors were listed in *La Salle National Bank v. County of Cook* (1957), 12 Ill.2d 40, 46-47, 145 N.E.2d 65, 69. They are: (1) the existing uses and zoning of nearby property; (2) the extent to which property values are diminished by the particular zoning restrictions; (3) the extent to which the destruction of property values of plaintiff promote the health, safety, morals or welfare of the public; (4) the relative gain to the public as compared to the hardship imposed upon the individual property owner; (5) the suitability of the subject property for the zoned purposes; and (6) the length of time the property has been vacant as zoned considered in the context of land development in the area in the vicinity of

the subject property. The final two factors set forth in *Sinclair Pipeline Co. v. Village of Richton Park* (1960), 19 Ill.2d 370, 378, 167 N.E.2d 406, 411, are: (7) the care that the community has taken to plan its land use development, and (8) the community need for the proposed use.

Although no one factor is controlling, the first factor-existing uses and zoning of nearby property-is “of paramount importance.” (*Glenview State Bank*, 213 Ill.App.3d at 760, 157 Ill.Dec. at 309, 572 N.E.2d at 408.) Defendant argues in this appeal that this factor weighs heavily in its favor. We do not agree. As plaintiffs correctly point out, the quarter section in which the subject property is situate is divided into nine other ownerships, three of which contain less than ten acres. Plaintiffs’ five-acre parcel lies in the northwest corner of the quarter section, and within the 1 1/2-mile radius surrounding it, several residences on parcels of less than ten acres are established. Although none are zoned E-2 and were existing prior to the 1978 ordinance, the uses of nearby property are not inconsistent with the E-2 use plaintiffs propose for the five-acre parcel in question. The trial court specifically noted that the existing, non-conforming uses of the surrounding property did not support the county’s position in this case. We find that the trial court’s conclusion is not contrary to the manifest weight of the evidence.

With regard to the second factor, defendant argues that the trial court mistakenly focused on the property’s increase in market value if rezoned E-2 instead of the diminution of value, if any, as currently zoned A-1. We agree in part that the fact that rezoning would enhance the property’s value is not determinative. However, the evidence presented to the court established that the highest and best use of the property was E-2, and there was no evidence that the value of surrounding property would be diminished by plaintiffs’ proposed use. Thus, to the extent that evidence of property

value was presented, we do not find that the trial court erred in weighing this factor in plaintiffs' favor.

The third and fourth factors, similarly, support the trial court's conclusion. Although there is no question that public morals are not at risk if the rezoning is granted, there was some testimony that farming practices are not compatible with residential use. On the other hand, plaintiffs' expert witnesses testified that the A-1 limitation was not substantially related to issues of public health, safety or general welfare. Plaintiffs propose to build two residences on five acres adjacent to their daughter's horse-keeping operation-one for themselves, and the other for an adult son. Even defendant's expert witness could not deny that the horses were an agricultural enterprise. Defense witnesses' suggestion that rezoning in this case would set an unfavorable precedent for future property owners was purely speculative, self-serving and appropriately discounted by the trial court in weighing the parties' evidence. And, inasmuch as plaintiffs' proposed use of the entire 25-acre parcel was to unite his family and promote animal husbandry, thereby preserving the agricultural character of the area, there is little, if any, public gain to be realized by enforcing the A-1 classification, and great hardship would be imposed on plaintiffs to deny the zoning change.

Factors five and six, as the court noted in its written decision, do not establish the invalidity of the ordinance. There is no dispute that the land is suitable for agricultural use and that it was actively farmed prior to plaintiffs' purchase of it.

With respect to factor seven, the evidence tended to show that the current zoning of the area, including plaintiffs' tract, was assigned in an arbitrary manner without considering the several non-conforming uses existing when the land-use plan was adopted and the zoning ordinance was enacted. The former planning director testified that he

had expressed his disagreement with the across-the-board A-1 classification, but that he was overruled by the time the plan was presented for approval in 1978. A later Land Resource Management Plan adopted in 1990 pursuant to the State Local Land Resource Management Planning Act (50 ILCS 805 (West 1992)) similarly failed to take into consideration the various residences on parcels under ten acres surrounding plaintiffs' property. Thus, despite the county board's consistent denial of petitions for rezoning, the trial court's conclusion that the land use plan was not carefully designed is supported by the evidence of record.

Lastly, although no community need for rezoning was demonstrated (factor eight), a need for rezoning was shown to exist for plaintiffs in order to accommodate their interest in uniting with their adult children in a country environment. Mr. Twigg testified that he had looked at other parcels in other townships, but the size and selling price made this particular 35-acre tract appropriate for his purposes. The promotion of family unity and animal husbandry in this case is consistent with the community interest in preserving A-1 agricultural zoning generally.

Although no one factor definitively established the invalidity of defendant's ordinance in this case, it is clear that the court gave great weight to its finding that plaintiffs' proposed use of the remaining 25 acres of the original 35-acre land purchase was generally in harmony with both the current A-1 agricultural zoning and existing non-conforming uses for smaller residential parcels in the surrounding area. In our opinion, the court acted within its discretion in analyzing the factors and weighting them within the context of the evidence presented here.

In sum, we find that the trial court's conclusion that enforcement of the zoning ordinance prohibiting plaintiffs' proposed development of the five-acre parcel "is arbitrary and bears no substantial or reasonable relation to public health, safety, morals, comfort and general welfare" is not

contrary to the manifest weight of the evidence. Accordingly, we affirm the court's judgment declaring the ordinance void and unconstitutional as applied to plaintiffs' property and enjoining the defendant from prohibiting the building of two residences on the five-acre parcel as proposed.

The judgment of the Circuit Court of Will County is affirmed.

Affirmed.

McCUSKEY and LYTTON, JJ., concur.

Amberwood Development Corporation v. Board of Appeals of Boxford

65 Mass. App. Ct. 205 (2005)

Katharine Goree Doyle for the defendants.

Alan L. Grenier for the plaintiffs.

MILLS, J.

In an action brought by Amberwood Development Corporation (Amberwood) under G. L. c. 240, § 14A, a judge of the Land Court, reversing the zoning board of appeals of Boxford (board), ruled that the application of a provision that prohibits the further subdivision of a lot that has benefited from an exception to a frontage requirement in the zoning by-law, while otherwise valid, was unconstitutional as applied to Amberwood's lot of residentially zoned land.¹ This is the town's appeal. We reverse.

¹ Amberwood had initially sought relief in the Land Court under G. L. c. 40A, § 14A, from the board's denial of its request for a variance. The plaintiffs waived their appeal of that decision in the Land Court and, therefore, that appeal is not before this court. Amberwood also included in its count under G. L. c. 240, § 14A, a claim that the by-law provision was generally invalid. That claim of general invalidity has been abandoned and is, therefore, deemed waived.

1. *Background.*² Amberwood owns an 8.1 acre lot of land on Georgetown Road in Boxford.³ The lot was created in 1997 when Amberwood obtained approval to subdivide a tract containing approximately twenty-two acres into four separate lots, including the locus.⁴ John C. Sanidas, as trustee of the Sanidas Family Trust, is the owner of, and resident at, 7 Amberwood Lane (Sanidas house lot), which abuts the locus to the north.⁵

Both the locus and the Sanidas house lot are in a residential zoning district where the minimum lot area is two acres, and the minimum street frontage is 250 feet. The locus has frontage of only one hundred feet along Georgetown Road, but Amberwood was able to build a single family home on the locus by taking advantage of a “frontage exception for larger lots” (frontage exception) in the Boxford zoning by-law, § 196-24.D(3), which provides as follows:

“(a) Notwithstanding the [otherwise applicable dimensional provisions, including minimum street frontage of 250 feet], a lot in an R-A Residence-Agricultural District need not have the specified amount of street frontage, provided that:

“[1] The area of the lot exceeds by at least four acres the minimum

² Facts are essentially taken from the judge’s succinct and thoughtful decision on cross motions for summary judgment. There appears, as between the parties, no genuine dispute as to any of the material facts.

³ We will call the lot the “locus.” It is a single lot, though shown as parcels C-1 and C-2, collectively, on a sketch plan in the addendum to this opinion.

⁴ The locus evolved and changed slightly from a lot that was created in the 1997 subdivision plan. To the extent relevant, for purposes of this decision, the locus is essentially one of four lots created by Amberwood in its 1997 subdivision.

⁵ At the time of proceedings before the town with respect to this case, Sanidas was the president and treasurer of Amberwood.

area required for such an R-A District;

“[2] The lot has a minimum continuous street frontage of not less than 50 feet and a width of not less than 50 feet at any point between the street and the site of the dwelling;

“[3] There is not more than one other such lot with frontage contiguous to it; and

“[4] It is not, in the opinion of the Planning Board, so located as to block the possible future extension of a dead-end street.

“(b) Notwithstanding any other provisions, no such lot as described in Subsection D(3)(a) above on which a dwelling is located shall be hereafter subdivided, reduced in area”
(emphasis added).

In March of 2000, Amberwood, seeking to convey a two-acre portion of the locus (parcel C-2) to become part of the Sanidas house lot, sought a variance (G. L. c. 40A, § 10) from subsection (b) of the frontage exception provision which otherwise prohibited the two-acre reduction of the area of the 8.1 acre locus, a lot that had been created by Amberwood utilizing subsection (a) of that provision. When the board denied the variance request, Amberwood appealed pursuant to G. L. c. 40A, § 17, adding a second count to its complaint pursuant to G. L. c. 240, § 14A, challenging the frontage exception provision generally and as applied to the locus in these circumstances.

The Land Court judge noted the legitimacy of the purposes for the frontage exception, ruling it a valid zoning by-law

provision. However, upon the precedent of *Barney & Carey Co. v. Milton*, 324 Mass. 440 (1949), and *Pittsfield v. Oleksak*, 313 Mass. 553 (1943), she ruled that the by-law provision could not legitimately be applied to the locus. The judge decided that the principal purposes of that provision of the by-law, preservation of open space and prevention of further development, would remain unoffended and unaffected by the conveyance out of the two-acre parcel. She further noted that Amberwood had announced, in argument before the Land Court, that a restrictive covenant would be in place upon the two-acre parcel when conveyed and that it would remain essentially untouched, as open space not susceptible to development.⁶ The judge essentially ruled that application of the by-law provision in this case was not necessary to effect its purposes.

2. *Discussion.* General Laws c. 240, § 14A,⁷ applies only to the Land Court, and provides for declaratory relief without

⁶ The town challenges reliance by the judge upon such a covenant, asserting that it had never been presented in the proceedings before the local government. We need not further consider the judge's reference, or the town's concern, in view of our disposition of this case.

⁷ General Laws c. 240, § 14A, as amended through St. 1977, c. 829, § 14, provides, in relevant part:

an existing controversy. See *Hansen & Donabue, Inc. v. Norwood*, 61 Mass. App. Ct. 292, 293 (2004). The Land Court has exclusive jurisdiction in such cases, G. L. c. 185, § 1(j), and it has become common for zoning appeals pursuant to G. L. c. 40A, § 17, especially from denial of variance requests, to be accompanied by a count under G. L. c. 240, § 14A, concerning the validity or invalidity of a zoning restriction applicable to a specific lot or use. The Land Court is considered a particular court of competence in such matters. See *Harrison v. Braintree*, 355 Mass. 651, 654 (1969). See also *Kindercare Learning Centers, Inc. v. Westford*, 62 Mass. App. Ct. 924 (2004).

“The primary purpose of proceedings under § 14A is to determine how and with what rights and limitations the land of the person seeking an adjudication may be used under the provisions of a zoning enactment in terms applicable to it, particularly where there is no controversy and hence no basis for other declaratory relief.” *Hansen & Donabue, Inc. v. Norwood*, 61 Mass. App. Ct. at 295, quoting from *Harrison v. Braintree*, 355 Mass. at 654. Section 14A is

“The owner of a freehold estate in possession in land may bring a petition in the land court against a city or town wherein such land is situated, which shall not be open to objection on the ground that a mere judgment, order or decree is sought, for determination as to the validity of a municipal ordinance, by-law or regulation, passed or adopted under the provisions of chapter forty A or under any special law relating to zoning, so called, which purports to restrict or limit the present or future use, enjoyment, improvement or development of such land, or any part thereof, or of present or future structures thereon, including alterations or repairs, or for determination of the extent to which any such municipal ordinance, by-law or regulation affects a proposed use, enjoyment, improvement or development of such land by the erection, alteration or repair of structures thereon or otherwise as set forth in such petition The court may make binding determinations of right interpreting such ordinances, by-laws or regulations whether any consequential judgment or relief is or could be claimed or not.”

to be broadly construed, *Hansen & Donahue, supra*, although the burden is on the landowner to prove that the zoning regulation is unreasonable as applied to its property. See *Kaplan v. Boston*, 330 Mass. 381, 384 (1953). While the availability of the remedy is not restricted to situations in which the purchase and sale of the locus is pending, in *Whitinsville Retirement Soc., Inc. v. Northbridge*, 394 Mass. 757, 763 (1985), the court explained that “[t]he evil to be remedied” by G. L. c. 240, § 14A, is “a situation where someone may be forced to invest in land and then subsequently find[s] out there are restrictions.” See *Clark & Clark Hotel Corp. v. Building Inspector of Falmouth*, 20 Mass. App. Ct. 206, 210 (1985).⁸

The town argues that for a by-law provision to be found invalid as applied, the court must find *both* a failure to promote the purposes of the by-law and significant injury to the property owner, and that neither alone warrants a determination of invalidity. The town then asserts that the judge did not find injury to the landowner, that the landowner made no effort to show any injury, and that none is evident from the record. The landowner argues that (a) the judge’s decision is consistent with public policy because parcel C-2 will remain open space and undeveloped; (b) there is no second branch to the analysis, that is, injury to the property owner; and (c) the plaintiff intends to covenant in perpetuity, nevertheless, to prevent further development of parcel C-2.

We conclude that there is, essentially, a second branch to the analysis, and we are persuaded by the town’s argument. Although the cases have not explicitly articulated a second

⁸ As to application of the statute, the court in *Harrison v. Braintree*, 355 Mass. at 654-655, said, “We deem appropriate a broad construction of c. 240, § 14A. With court dockets greatly overloaded, access to particular courts of competence in the general field should not be restricted on narrow grounds and the need for attention to nonsubstantive issues should be minimized.” As such, we pay particular attention and accord special deference to the Land Court judge in these cases

branch “as such,” in *Barney & Carey Co.* the court ruled that “[w]here the application of the by-law ... has no real or substantial relation to the public safety, public health or public welfare but *would amount to an arbitrary, unreasonable, and oppressive deprivation of the owner’s interest in his private property*, then that application of the regulation has been struck down” (emphasis added). *Barney & Carey Co. v. Milton*, 324 Mass. at 445. The emphasized language requires that Amberwood show significant injury to its interest in the locus, i.e., that the prohibition against conveying out parcel C-2 is arbitrary, unreasonable, and oppressive. See *Opinion of the Justices*, 333 Mass. 773, 781 (1955). The judge did not so find, and the record would not, in any event, support such a finding.

In contrast, the “substantiality” of the injury claimed by the landowner was determined to be significant in the following cases. In *Barney & Carey Co. v. Milton*, *supra* at 445-447, the land was zoned only for residential purposes but was not readily usable for dwellings. It was located some distance from any other dwelling, and bounded by the Neponset River, extensive marshes, and a highway beyond which there were further extensive marshes. *Id.* at 441, 445. After meticulous review of the facts, the court effectively noted that use of the land for the zoned residential purposes was a practical impossibility. “In *Barney & Carey Co.* ... there was, practically speaking, no use left for the locus when zoned for residences and not for business.” *Lexington v. Simeone*, 334 Mass. 127, 131 (1956).

In *Pittsfield v. Oleksak*, 313 Mass. at 554-555, the ordinance prevented the maintenance and use of a portable saw mill, which effectively rendered useless one hundred acres of timberland, with resulting negative consequences to both public and private interests. The court concluded that application of the ordinance “would permanently deprive the defendant, and therefore the community, of a valuable

and otherwise wasting asset” and held that the ordinance was invalid as applied. *Id.* at 555.

The residentially zoned land in *Nectow v. Cambridge*, 277 U.S. 183, 186 (1928), was surrounded by industrial and railroad uses. The United States Supreme Court noted that “no practical use [could] be made of the land in question for residential purposes,” *id.* at 187, and concluded that “the invasion of the property ... was serious and highly injurious.” *Id.* at 189.

We also consider it relevant that Amberwood *elected* to create the locus by taking advantage of the frontage exception that it now seeks to have partially invalidated. We respect, but do not find compelling as matter of law, the judge’s observation that the owner, when earlier creating the subdivision, could have accomplished what he now seeks, i.e., a 6.1 acre lot to the exclusion of the land represented as parcel C-2 from that lot.⁹,¹⁰

Amberwood, in its application to the board, identified the purpose of the conveyance as to “provide buffering for the [Sanidas house lot].” Its application also noted that “[n]o new lots will be or can be created by the conveyance.” However, Amberwood can accomplish these purposes

⁹ We are not unmindful that laches is inapplicable to an as-applied challenge, see *Barney & Carey Co. v. Milton*, 324 Mass. at 444, but this is not a situation where a landowner has acquiesced in a direct invasion of its rights, “a usurpation of power which violates rights protected by constitutional provisions.” *Id.* at 445.

¹⁰ In the design of subdivisions, and in other regulated land matters, the fact that initially different designs and choices were possible does not furnish reason for retroactive design to obviate those earlier choices that have proved to be less desirable. For example, strict time limits within the statutory scheme of the subdivision control law are designed to provide record certainty. See *Craig v. Planning Board of Haverhill*, 64 Mass. App. Ct. 677, 679 (2005); G. L. c. 41, § 81U. Compare *Martin v. Board of Appeals of Yarmouth*, 20 Mass. App. Ct. 972 (1985); *Maurice Callahan & Sons, Inc. v. Board of Appeals of Lenox*, 30 Mass. App. Ct. 36, 40 (1991); *Perez v. Board of Appeals of Norwood*, 54 Mass. App. Ct. 139 (2002) (self-inflicted hardship does not ordinarily constitute “substantial” hardship under G. L. c. 40A, § 10).

within the status quo, and without the invalidation of the by-law provision as applied. For example, the buffering and prohibition of development can be created by the conveyance of an easement to the owner of the Sanidas house lot over parcel C-2, with rights to exclusive occupation, reserving no rights (other than the underlying fee ownership) to the owner of the locus.¹¹

The ability to convey one's land is a recognized property interest, *United States v. General Motors Corp.*, 323 U.S. 373, 378 (1945), and application of the by-law is some impediment to that property right. However, numerous statutes and regulations restrict private property rights. Here, the impediment is minimal compared with the circumstances of those cases where courts have invalidated the application of zoning regulations. See *Nectow v. Cambridge*, 277 U.S. at 189; *Pittsfield v. Oleksak*, 313 Mass. at 555; *Barney & Carey Co. v. Milton*, 324 Mass. at 445.

Additionally, the relief allowed by the judge below undermines the uniform application of otherwise valid local zoning. See G. L. c. 40A, § 4, inserted by St. 1975, c. 808, § 3 (“Any zoning ordinance or by-law which divides cities and towns into districts shall be uniform within the district for each class or kind of structures or uses permitted”); *Everpure Ice Mfg. Co. v. Board of Appeals of Lawrence*, 324 Mass. 433, 439 (1949) (“A zoning ordinance is intended to apply uniformly to all property located in a particular district ... and the properties of all the owners in that district [must be] subjected to the same restrictions for the common benefit of all”); *SCIT, Inc. v. Planning Bd. of Braintree*, 19 Mass. App. Ct. 101, 107 (1984) (“[t]he uniformity requirement is based upon principles of equal treatment: all land in similar circumstances should be treated alike”); *KCI Mgmt., Inc. v. Board of Appeal of Boston*, 54 Mass. App. Ct. 254, 258 (2002), quoting from *Lopes v. Peabody*, 417 Mass.

¹¹ The zoning application stated that the applicant owns both the locus and the abutting residential lot (the Sanidas house lot).

299, 303 (1994) (courts should avoid “a crazy-quilt pattern of the enforceability of a zoning law intended to have uniform applicability”). Many, if not all applications of zoning regulations could be arguably characterized as unnecessary in any particular case. Numerous arguments of that nature are made by citizens to building inspectors and local zoning authorities every year.

The important and difficult balance between the public interest in the integrity of the local land law, with requirements for uniform application of zoning, compared with the relatively minimal restriction upon the landowner’s property rights in the circumstances of this case, does not weigh in favor of determining the frontage exception invalid as applied to the locus. Our conclusion derives additional support here because the owner’s goal can be accomplished without such invalidation.

That portion of the judgment declaring the frontage exception provision in the zoning by-law invalid as applied is vacated, and a new judgment shall enter declaring that provision of the by-law valid as applied. The remainder of the judgment is affirmed.

3.2. Adjudication and Quasi-Adjudication

Louis J. Fasano et al., Respondents, v. The Board of County Commissioners of Washington County and A.G.S. Development Company

507 P.2d 23 (Ore. 1973)

Edward J. Sullivan, Washington County Counsel, Hillsboro, argued and reargued the cause for petitioners. With him on the briefs were William Bradley Duncan, Asst. County Counsel, Carrell F. Bradley, Joe D. Bailey, and Schwenn, Bradley, Batchelor & Bailey, Hillsboro.

Louis J. Fasano, Portland, argued and reargued the cause for respondents. With him on the briefs were Veatch, Lovett & Stiner, Portland.

Donald C. Ashmanskas, Beaverton, argued the cause for amici curiae on reargument. With him on the briefs were James M. Mattis, Eugene, Merle Long, Albany, and Edward C. Harms, Jr., Springfield, on behalf of the League of Oregon Cities. Also on the briefs were Duane R. Ertsgaard, Salem, Roy E. Adkins, Eugene, Richard Crist, West Linn, Paul Mackey, Portland, and Gary Rueter, McMinnville, on behalf of the Association of Oregon Counties; and Frank L. Whitaker, Portland, on behalf of Oregon Chapter, American Institute of Planners.

HOWELL, JUSTICE.

The plaintiffs, homeowners in Washington county, unsuccessfully opposed a zone change before the Board of County Commissioners of Washington County. Plaintiffs applied for and received a writ of review of the action of the commissioners allowing the change. The trial court found in favor of plaintiffs, disallowed the zone change, and reversed the commissioners' order. The Court of Appeals affirmed, 489 P.2d 693 (1971), and this court granted review.

The defendants are the Board of County Commissioners and A.G.S. Development Company. A.G.S., the owner of 32 acres which had been zoned R-7 (Single Family Residential), applied for a zone change to P-R (Planned Residential), which allows for the construction of a mobile home park. The change failed to receive a majority vote of the Planning Commission. The Board of County Commissioners approved the change and found, among other matters, that the change allows for "increased densities and different types of housing to meet the needs of urbanization over that allowed by the existing zoning."

The trial court, relying on its interpretation of *Roseta v. County of Washington*, 254 Or. 161, 458 P.2d 405, 40 A.L.R.3d 364 (1969), reversed the order of the commissioners because the commissioners had not shown

any change in the character of the neighborhood which would justify the rezoning. The Court of Appeals affirmed for the same reason, but added the additional ground that the defendants failed to show that the change was consistent with the comprehensive plan for Washington county.

According to the briefs, the comprehensive plan of development for Washington county was adopted in 1959 and included classifications in the county for residential, neighborhood commercial, retail commercial, general commercial, industrial park and light industry, general and heavy industry, and agricultural areas.

The land in question, which was designated “residential” by the comprehensive plan, was zoned R-7, Single Family Residential.

Subsequent to the time the comprehensive plan was adopted, Washington county established a Planned Residential (P-R) zoning classification in 1963. The P-R classification was adopted by ordinance and provided that a planned residential unit development could be established and should include open space for utilities, access, and recreation; should not be less than 10 acres in size; and should be located in or adjacent to a residential zone. The P-R zone adopted by the 1963 ordinance is of the type known as a “floating zone,” so-called because the ordinance creates a zone classification authorized for future use but not placed on the zoning map until its use at a particular location is approved by the governing body. The R-7 classification for the 32 acres continued until April 1970 when the classification was changed to P-R to permit the defendant A.G.S. to construct the mobile home park on the 32 acres involved.

The defendants argue that (1) the action of the county commissioners approving the change is presumptively valid, requiring plaintiffs to show that the commissioners

acted arbitrarily in approving the zone change; (2) it was not necessary to show a change of conditions in the area before a zone change could be accomplished; and (3) the change from R-7 to P-R was in accordance with the Washington county comprehensive plan.

We granted review in this case to consider the questions — by what standards does a county commission exercise its authority in zoning matters; who has the burden of meeting those standards when a request for change of zone is made; and what is the scope of court review of such actions?

Any meaningful decision as to the proper scope of judicial review of a zoning decision must start with a characterization of the nature of that decision. The majority of jurisdictions state that a zoning ordinance is a legislative act and is thereby entitled to presumptive validity. This court made such a characterization of zoning decisions in *Smith v. County of Washington*, 241 Or. 380, 406 P.2d 545 (1965):

“Inasmuch as ORS 215.110 specifically grants to the governing board of the county the power to amend zoning ordinances, a challenged amendment is a legislative act and is clothed with a presumption in its favor. *Jehovah’s Witnesses v. Mullen et al.*, 214 Or. 281, 292, 330 P.2d 5, 74 A.L.R.2d 347 (1958), appeal dismissed and cert. denied, 359 U.S. 436, 79 S.Ct. 940, 3 L.Ed.2d 932 (1959).” 241 Or. at 383, 406 P.2d at 547.

However, in *Smith* an exception to the presumption was found and the zoning held invalid. Furthermore, the case cited by the *Smith* court, *Jehovah’s Witnesses v. Mullen et al.*, *supra*, at least at one point viewed the contested zoning

in that case as an administrative as opposed to legislative act.

At this juncture we feel we would be ignoring reality to rigidly view all zoning decisions by local governing bodies as legislative acts to be accorded a full presumption of validity and shielded from less than constitutional scrutiny by the theory of separation of powers. Local and small decision groups are simply not the equivalent in all respects of state and national legislatures. There is a growing judicial recognition of this fact of life:

“It is not a part of the legislative function to grant permits, make special exceptions, or decide particular cases. Such activities are not legislative but administrative, quasi-judicial, or judicial in character. To place them in the hands of legislative bodies, whose acts as such are not judicially reviewable, is to open the door completely to arbitrary government.”
Ward v. Village of Skokie, 26 Ill.2d 415, 186 N.E.2d 529, 533 (1962)
(Klingbiel, J., specially concurring).

The Supreme Court of Washington, in reviewing a rezoning decision, recently stated:

“Whatever descriptive characterization may be otherwise attached to the role or function of the planning commission in zoning procedures, e.g., advisory, recommendatory, investigatory, administrative or legislative, it is manifest * * * that it is a public agency, * * * a principle [sic] and statutory duty of which is to conduct public hearings in specified planning and zoning matters, enter

findings of fact — often on the basis of disputed facts — and make recommendations with reasons assigned thereto. Certainly, in its role as a hearing and fact-finding tribunal, the planning commission's function more nearly than not partakes of the nature of an administrative, quasi-judicial proceeding, * * *.” Chrobuck v. Snohomish County, 78 Wash.2d 884, 480 P.2d 489, 495-496 (1971).

Ordinances laying down general policies without regard to a specific piece of property are usually an exercise of legislative authority, are subject to limited review, and may only be attacked upon constitutional grounds for an arbitrary abuse of authority. On the other hand, a determination whether the permissible use of a specific piece of property should be changed is usually an exercise of judicial authority and its propriety is subject to an altogether different test. An illustration of an exercise of legislative authority is the passage of the ordinance by the Washington County Commission in 1963 which provided for the formation of a planned residential classification to be located in or adjacent to any residential zone. An exercise of judicial authority is the county commissioners' determination in this particular matter to change the classification of A.G.S. Development Company's specific piece of property. The distinction is stated, as follows, in Comment, Zoning Amendments — The Product of Judicial or Quasi-Judicial Action, 33 Ohio St.L.J. 130 (1972):

”* * * Basically, this test involves the determination of whether action produces a general rule or policy which is applicable to an open class of individuals, interest, or situations, or whether it entails the application of a

general rule or policy to specific individuals, interests, or situations. If the former determination is satisfied, there is legislative action; if the latter determination is satisfied, the action is judicial.” 33 Ohio St.L.J. at 137.

We reject the proposition that judicial review of the county commissioners’ determination to change the zoning of the particular property in question is limited to a determination whether the change was arbitrary and capricious.

In order to establish a standard of review, it is necessary to delineate certain basic principles relating to land use regulation.

The basic instrument for county or municipal land use planning is the “comprehensive plan.” Haar, *In Accordance with a Comprehensive Plan*, 68 Harv.L.Rev. 1154 (1955); 1 Yokley, *Zoning Law and Practice*, § 3-2 (1965); 1 Rathkopf, *The Law of Zoning and Planning*, § 9-1 (3d ed. 1969). The plan has been described as a general plan to control and direct the use and development of property in a municipality. *Nowicki v. Planning and Zoning Board*, 148 Conn. 492, 172 A.2d 386, 389 (1961).

In Oregon the county planning commission is required by ORS 215.050 to adopt a comprehensive plan for the use of some or all of the land in the county. Under ORS 215.110(1), after the comprehensive plan has been adopted, the planning commission recommends to the governing body of the county the ordinances necessary to “carry out” the comprehensive plan. The purpose of the zoning ordinances, both under our statute and the general law of land use regulation, is to “carry out” or implement the comprehensive plan. 1 Anderson, *American Law of Zoning*, § 1.12 (1968). Although we are aware of the analytical distinction between zoning and planning, it is clear that under our statutes the plan adopted by the

planning commission and the zoning ordinances enacted by the county governing body are closely related; both are intended to be parts of a single integrated procedure for land use control. The plan embodies policy determinations and guiding principles; the zoning ordinances provide the detailed means of giving effect to those principles.

ORS 215.050 states county planning commissions “shall adopt and may from time to time revise a comprehensive plan.” In a hearing of the Senate Committee on Local Government, the proponents of ORS 215.050 described its purpose as follows:

”* * * The intent here is to require a basic document, geared into population, land use, and economic forecasts, which should be the basis of any zoning or other regulations to be adopted by the county. * * *¹

In addition, ORS 215.055 provides:

“215.055 Standards for plan. (1) The plan and all legislation and regulations authorized by ORS 215.010 to 215.233 shall be designed to promote the public health, safety and general welfare and shall be based on the following considerations, among others: The various characteristics of the various areas in the county, the suitability of the areas for particular land uses and improvements, the land uses and improvements in the areas, trends in land improvement, density of development, property values, the needs of economic enterprises in the

¹ Hearing on Senate Bill 129 before the Senate Committee on Local Government, 52nd Legislative Assembly, February 14, 1963.

future development of the areas, needed access to particular sites in the areas, natural resources of the county and prospective needs for development thereof, and the public need for healthful, safe, aesthetic surroundings and conditions.”

We believe that the state legislature has conditioned the county’s power to zone upon the prerequisite that the zoning attempt to further the general welfare of the community through consciousness, in a prospective sense, of the factors mentioned above. In other words, except as noted later in this opinion, it must be proved that the change is in conformance with the comprehensive plan.

In proving that the change is in conformance with the comprehensive plan in this case, the proof, at a minimum, should show (1) there is a public need for a change of the kind in question, and (2) that need will be best served by changing the classification of the particular piece of property in question as compared with other available property.

In the instant case the trial court and the Court of Appeals interpreted prior decisions of this court as requiring the county commissions to show a change of conditions within the immediate neighborhood in which the change was sought since the enactment of the comprehensive plan, or a mistake in the comprehensive plan as a condition precedent to the zone change.

In *Smith v. Washington County*, *supra*, the land in question was designated residential under the comprehensive plan, and the county commissioners enacted an amendatory ordinance changing the classification to manufacturing. This court held that the change constituted spot zoning and was invalid. We stated:

”* * * Once a [zoning scheme] is adopted, changes in it should be made only when such changes are consistent with the over-all objectives of the plan *and* in keeping with changes in the character of the area or neighborhood to be covered thereby. * * *”
(Emphasis added) 241 Or. at 384, 406 P.2d at 547.

In *Roseta v. Washington County*, *supra*, the land in question was classified as residential under the comprehensive plan and had been originally zoned as R-10, Single Family Residential. The county commissioners granted a zone change to A-1, Duplex Residential. We held that the commissioners had not sustained the burden of proving that the change was consistent with the comprehensive plan and reversed the order allowing the zone change. In regard to defendants’ argument that the change was consistent with the comprehensive plan because the plan designated the areas as “residential” and the term included both single family dwellings and duplex residences, we stated:

”* * * However, the ordinance established a distinction between the two types of use by classifying one area as R-10 and another area as A-1. It must be assumed that the Board had some purpose in making a distinction between these two classifications. It was for defendant to prove that this distinction was not valid or that the change in the character of the use of the * * * parcel was not inconsistent with the comprehensive plan.” 254 Or. at 169, 458 P.2d 405, at 409.

The instant case could be distinguished from *Roseta* on the basis that we are involved with a floating zone which was not before the court in *Roseta*.²

However, *Roseta* should not be interpreted as establishing a rule that a physical change of circumstances within the rezoned neighborhood is the only justification for rezoning. The county governing body is directed by ORS 215.055 to consider a number of other factors when enacting zoning ordinances, and the list there does not purport to be exclusive. The important issues, as *Roseta* recognized, are compliance with the statutory directive and consideration of the proposed change in light of the comprehensive plan.

Because the action of the commission in this instance is an exercise of judicial authority, the burden of proof should be placed, as is usual in judicial proceedings, upon the one seeking change. The more drastic the change, the greater will be the burden of showing that it is in conformance with the comprehensive plan as implemented by the ordinance, that there is a public need for the kind of change in question, and that the need is best met by the proposal under consideration. As the degree of change increases, the burden of showing that the potential impact upon the area in question was carefully considered and weighed will also increase. If other areas have previously been designated for the particular type of development, it must be shown why it is necessary to introduce it into an area not previously

² Even in Maryland, the chief exponent of the change or mistake rule, the courts have not required that there be a showing of changed conditions or mistake in the original zoning as a condition precedent to granting a zone change when a floating zone is involved. *Bigenho v. Montgomery County Council*, 248 Md. 386, 237 A.2d 53 (1968); *Bayer v. Siskind*, 247 Md. 116, 230 A.2d 316 (1967); *Board of County Com'rs of Howard County v. Tipton*, 244 Md. 77, 222 A.2d 701 (1966); *Bujno v. Montgomery County Council*, 243 Md. 110, 220 A.2d 126 (1966); *Knudsen v. Montgomery County Council*, 241 Md. 436, 217 A.2d 97 (1966); *Beall v. Montgomery County Council*, 240 Md. 77, 212 A.2d 751 (1965); *Huff v. Board of Zoning Appeals*, 214 Md. 48, 133 A.2d 83 (1957).

contemplated and why the property owners there should bear the burden of the departure.³

Although we have said in *Roseta* that zoning changes may be justified without a showing of a mistake in the original plan or ordinance, or of changes in the physical characteristics of an affected area, any of these factors which are present in a particular case would, of course, be relevant. Their importance would depend upon the nature of the precise change under consideration.

³ For example, if an area is designated by the plan as generally appropriate for residential development, the plan may also indicate that some high-density residential development within the area is to be anticipated, without specifying the exact location at which that development is to take place. The comprehensive plan might provide that its goal for residential development is to assure that residential areas are healthful, pleasant and safe places in which to live. The plan might also list the following policies which, among others, are to be pursued in achieving that goal:

High-density residential areas should be located close to the urban core area.

Residential neighborhoods should be protected from any land use activity involving an excessive level of noise, pollution or traffic volume.

High trip-generating multiple family units should have ready access to arterial or collector streets.

A variety of living areas and housing types should be provided appropriate to the needs of the special and general groups they are to serve.

Residential development at urban densities should be within planned sewer and water service areas and where other utilities can be adequately provided.

Under such a hypothetical plan, property originally zoned for single family dwellings might later be rezoned for duplexes, for garden apartments, or for high-rise apartment buildings. Each of these changes could be shown to be consistent with the plan. Although in addition we would require a showing that the county governing body found a bona fide need for a zone change in order to accommodate new high-density development which at least balanced the disruption shown by the challengers, that requirement would be met in most instances by a record which disclosed that the governing body had considered the facts relevant to this question and exercised its judgment in good faith. However, these changes, while all could be shown to be consistent with the plan, could be expected to have differing impacts on the surrounding area, depending on the nature of that area. As the potential impact on the area in question increases, so will the necessity to show a justification.

By treating the exercise of authority by the commission in this case as the exercise of judicial rather than of legislative authority and thus enlarging the scope of review on appeal, and by placing the burden of the above level of proof upon the one seeking change, we may lay the court open to criticism by legal scholars who think it desirable that planning authorities be vested with the ability to adjust more freely to changed conditions. However, having weighed the dangers of making desirable change more difficult against the dangers of the almost irresistible pressures that can be asserted by private economic interests on local government, we believe that the latter dangers are more to be feared.

What we have said above is necessarily general, as the approach we adopt contains no absolute standards or mechanical tests. We believe, however, that it is adequate to provide meaningful guidance for local governments making zoning decisions and for trial courts called upon to review them. With future cases in mind, it is appropriate to add some brief remarks on questions of procedure. Parties at the hearing before the county governing body are entitled to an opportunity to be heard, to an opportunity to present and rebut evidence, to a tribunal which is impartial in the matter — i.e., having had no pre-hearing or ex parte contacts concerning the question at issue — and to a record made and adequate findings executed. Comment, *Zoning Amendments — The Product of Judicial or Quasi-Judicial Action*, 33 Ohio St.L.J. 130-143 (1972).

When we apply the standards we have adopted to the present case, we find that the burden was not sustained before the commission. The record now before us is insufficient to ascertain whether there was a justifiable basis for the decision. The only evidence in the record, that of the staff report of the Washington County Planning Department, is too conclusory and superficial to support the zoning change. It merely states:

“The staff finds that the requested use does conform to the residential designation of the Plan of Development. It further finds that the proposed use reflects the urbanization of the County and the necessity to provide increased densities and different types of housing to meet the needs of urbanization over that allowed by the existing zoning. * * *”

Such generalizations and conclusions, without any statement of the facts on which they are based, are insufficient to justify a change of use. Moreover, no portions of the comprehensive plan of Washington County are before us, and we feel it would be improper for us to take judicial notice of the plan without at least some reference to its specifics by counsel.

As there has not been an adequate showing that the change was in accord with the plan, or that the factors listed in ORS 215.055 were given proper consideration, the judgment is affirmed.

BRYSON, JUSTICE (specially concurring).

The basic facts in this case exemplify the prohibitive cost and extended uncertainty to a homeowner when a governmental body decides to change or modify a zoning ordinance or comprehensive plan affecting such owner's real property.

This controversy has proceeded through the following steps:

1. The respondent opposed the zone change before the Washington County Planning Department and Planning Commission.
2. The County Commission, after a hearing, allowed the change.

3. The trial court reversed (disallowed the change).
4. The Court of Appeals affirmed the trial court.
5. We ordered reargument and additional briefs.
6. This court affirmed.

The principal respondent in this case, Fasano, happens to be an attorney at law, and his residence is near the proposed mobile home park of the petitioner A.G.S. No average homeowner or small business enterprise can afford a judicial process such as described above nor can a judicial system cope with or endure such a process in achieving justice. The number of such controversies is ascending.

In this case the majority opinion, in which I concur, adopts some sound rules to enable county and municipal planning commissions and governing bodies, as well as trial courts, to reach finality in decision. However, the procedure is no panacea and it is still burdensome.

It is solely within the domain of the legislative branch of government to devise a new and simplified statutory procedure to expedite finality of decision.

Board of County Commissioners of Brevard County

Florida v. Jack R. Snyder, 627 So.2d 469 (1993)

Robert D. Guthrie, County Atty., and Eden Bentley, Asst. County Atty., Melbourne, for petitioner.

Frank J. Griffith, Jr., Cianfrogna, Telfer, Reda & Faherty, P.A., Titusville, for respondents.

Denis Dean and Jonathan A. Glogau, Asst. Attys. Gen., Tallahassee, amicus curiae, for Atty. Gen., State of FL.

Nancy Stuparich, Asst. Gen. Counsel, and Jane C. Hayman, Deputy Gen. Counsel, Tallahassee, amicus curiae, for FL League of Cities, Inc.

Paul R. Gougelman, III, and Maureen M. Matheson, Reinman, Harrell, Graham, Mitchell & Wattwood, P.A.,

Melbourne, amicus curiae, for Space Coast League of Cities, Inc., City of Melbourne, and Town of Indialantic.

Richard E. Gentry, FL Home Builders Ass'n, and Robert M. Rhodes and Cathy M. Sellers, Steel, Hector and Davis, Tallahassee, amicus curiae, for FL Home Builders Ass'n.

David La Croix, Pennington, Wilkinson & Dunlap, P.A., and William J. Roberts, Roberts and Eagan, P.A., Tallahassee, amicus curiae, for FL Ass'n of Counties.

David J. Russ and Karen Brodeen, Asst. Gen. Counsels, Tallahassee, amicus curiae, for FL Dept. of Community Affairs.

Richard Grosso, Legal Director, Tallahassee, and C. Allen Watts, Cobb, Cole and Bell, Daytona Beach, amicus curiae, for 1000 Friends of FL.

Neal D. Bowen, County Atty., Kissimmee, amicus curiae, for Osceola County.

M. Stephen Turner and David K. Miller, Broad and Cassel, Tallahassee, amicus curiae, for Monticello Drug Co.

John J. Copelan, Jr., County Atty., and Barbara S. Monahan, Asst. County Atty. for Broward County, Fort Lauderdale, and Emeline Acton, County Atty. for Hillsborough County, Tampa, amici curiae, for Broward County, Hillsborough County and FL Ass'n of County Attys., Inc.

Thomas G. Pelham, Holland & Knight, Tallahassee, amicus curiae, pro se.

GRIMES, JUSTICE.

We review *Snyder v. Board of County Commissioners*, 595 So.2d 65 (Fla. 5th DCA 1991), because of its conflict with *Schauer v. City of Miami Beach*, 112 So.2d 838 (Fla. 1959); *City of Jacksonville Beach v. Grubbs*, 461 So.2d 160 (Fla. 1st DCA 1984), *review denied*, 469 So.2d 749 (Fla. 1985); and *Palm Beach County v. Tinnerman*, 517 So.2d 699 (Fla. 4th DCA

1987), *review denied*, 528 So.2d 1183 (Fla. 1988). We have jurisdiction under article V, section 3(b)(3) of the Florida Constitution. Jack and Gail Snyder owned a one-half acre parcel of property on Merritt Island in the unincorporated area of Brevard County. The property is zoned GU (general use) which allows construction of a single-family residence. The Snyders filed an application to rezone their property to the RU-2-15 zoning classification which allows the construction of fifteen units per acre. The area is designated for residential use under the 1988 Brevard County Comprehensive Plan Future Land Use Map. Twenty-nine zoning classifications are considered potentially consistent with this land use designation, including both the GU and the RU-2-15 classifications.

After the application for rezoning was filed, the Brevard County Planning and Zoning staff reviewed the application and completed the county's standard "rezoning review worksheet." The worksheet indicated that the proposed multifamily use of the Snyders' property was consistent with all aspects of the comprehensive plan except for the fact that it was located in the one-hundred-year flood plain in which a maximum of only two units per acre was permitted. For this reason, the staff recommended that the request be denied.

At the planning and zoning board meeting, the county planning and zoning director indicated that when the property was developed the land elevation would be raised to the point where the one-hundred-year-flood plain restriction would no longer be applicable. Thus, the director stated that the staff no longer opposed the application. The planning and zoning board voted to approve the Snyders' rezoning request.

When the matter came before the board of county commissioners, Snyder stated that he intended to build only five or six units on the property. However, a number of citizens spoke in opposition to the rezoning request. Their

primary concern was the increase in traffic which would be caused by the development. Ultimately, the commission voted to deny the rezoning request without stating a reason for the denial.

The Snyders filed a petition for certiorari in the circuit court. Three circuit judges, sitting en banc, reviewed the petition and denied it by a two-to-one decision. The Snyders then filed a petition for certiorari in the Fifth District Court of Appeal.

The district court of appeal acknowledged that zoning decisions have traditionally been considered legislative in nature. Therefore, courts were required to uphold them if they could be justified as being “fairly debatable.” Drawing heavily on *Fasano v. Board of County Commissioners*, 264 Or. 574, 507 P.2d 23 (1973), however, the court concluded that, unlike initial zoning enactments and comprehensive rezonings or rezonings affecting a large portion of the public, a rezoning action which entails the application of a general rule or policy to specific individuals, interests, or activities is quasi-judicial in nature. Under the latter circumstances, the court reasoned that a stricter standard of judicial review of the rezoning decision was required. The court went on to hold:

(4) Since a property owner’s right to own and use his property is constitutionally protected, review of any governmental action denying or abridging that right is subject to close judicial scrutiny. Effective judicial review, constitutional due process and other essential requirements of law, all necessitate that the governmental agency (by whatever name it may be characterized) applying legislated land use restrictions to particular parcels of privately owned lands, must state

reasons for action that denies the owner the use of his land and must make findings of fact and a record of its proceedings, sufficient for judicial review of: the legal sufficiency of the evidence to support the findings of fact made, the legal sufficiency of the findings of fact supporting the reasons given and the legal adequacy, under applicable law (*i.e.*, under general comprehensive zoning ordinances, applicable state and case law and state and federal constitutional provisions) of the reasons given for the result of the action taken.

(5) The initial burden is upon the landowner to demonstrate that his petition or application for use of privately owned lands, (rezoning, special exception, conditional use permit, variance, site plan approval, etc.) complies with the reasonable procedural requirements of the ordinance and that the use sought is consistent with the applicable comprehensive zoning plan. Upon such a showing the landowner is presumptively entitled to use his property in the manner he seeks unless the opposing governmental agency asserts and proves by clear and convincing evidence that a specifically stated public necessity requires a specified, more restrictive, use. After such a showing the burden shifts to the landowner to assert and prove that such specified more restrictive land use constitutes a taking of his property for public use for which he is entitled

to compensation under the taking provisions of the state or federal constitutions.

Snyder v. Board of County Commissioners, 595 So.2d at 81 (footnotes omitted).

Applying these principles to the facts of the case, the court found (1) that the Snyders' petition for rezoning was consistent with the comprehensive plan; (2) that there was no assertion or evidence that a more restrictive zoning classification was necessary to protect the health, safety, morals, or welfare of the general public; and (3) that the denial of the requested zoning classification without reasons supported by facts was, as a matter of law, arbitrary and unreasonable. The court granted the petition for certiorari.

Before this Court, the county contends that the standard of review for the county's denial of the Snyders' rezoning application is whether or not the decision was fairly debatable. The county further argues that the opinion below eliminates a local government's ability to operate in a legislative context and impairs its ability to respond to public comment. The county refers to *Jennings v. Dade County*, 589 So.2d 1337 (Fla. 3d DCA 1991), *review denied*, 598 So.2d 75 (Fla. 1992), for the proposition that if its rezoning decision is quasi-judicial, the commissioners will be prohibited from obtaining community input by way of ex parte communications from its citizens. In addition, the county suggests that the requirement to make findings in support of its rezoning decision will place an insurmountable burden on the zoning authorities. The county also asserts that the salutary purpose of the comprehensive plan to provide controlled growth will be thwarted by the court's ruling that the maximum use permitted by the plan must be approved once the rezoning application is determined to be consistent with it.

The Snyders respond that the decision below should be upheld in all of its major premises. They argue that the rationale for the early decisions that rezonings are legislative in nature has been changed by the enactment of the Growth Management Act. Thus, in order to ensure that local governments follow the principles enunciated in their comprehensive plans, it is necessary for the courts to exercise stricter scrutiny than would be provided under the fairly debatable rule. The Snyders contend that their rezoning application was consistent with the comprehensive plan. Because there are no findings of fact or reasons given for the denial by the board of county commissioners, there is no basis upon which the denial could be upheld. Various amici curiae have also submitted briefs in support of their several positions.

Historically, local governments have exercised the zoning power pursuant to a broad delegation of state legislative power subject only to constitutional limitations. Both federal and state courts adopted a highly deferential standard of judicial review early in the history of local zoning. In *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 47 S.Ct. 114, 71 L.Ed. 303 (1926), the United States Supreme Court held that “[i]f the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control.” 272 U.S. at 388, 47 S.Ct. at 118. This Court expressly adopted the fairly debatable principle in *City of Miami Beach v. Ocean & Inland Co.*, 147 Fla. 480, 3 So.2d 364 (1941).

Inhibited only by the loose judicial scrutiny afforded by the fairly debatable rule, local zoning systems developed in a markedly inconsistent manner. Many land use experts and practitioners have been critical of the local zoning system. Richard Babcock deplored the effect of “neighborhoodism” and rank political influence on the local decision-making process. Richard F. Babcock, *The Zoning Game* (1966). Mandelker and Tarlock recently stated

that “zoning decisions are too often ad hoc, sloppy and self-serving decisions with well-defined adverse consequences without off-setting benefits.” Daniel R. Mandelker and A. Dan Tarlock, *Shifting the Presumption of Constitutionality in Land-Use Law*, 24 Urb.Law. 1, 2 (1992).

Professor Charles Harr, a leading proponent of zoning reform, was an early advocate of requiring that local land use regulation be consistent with a legally binding comprehensive plan which would serve long range goals, counteract local pressures for preferential treatment, and provide courts with a meaningful standard of review. Charles M. Harr, “*In Accordance With A Comprehensive Plan*,” 68 Harv.L.Rev. 1154 (1955). In 1975, the American Law Institute adopted the Model Land Development Code, which provided for procedural and planning reforms at the local level and increased state participation in land use decision-making for developments of regional impact and areas of critical state concern.

Reacting to the increasing calls for reform, numerous states have adopted legislation to change the local land use decision-making process. As one of the leaders of this national reform, Florida adopted the Local Government Comprehensive Planning Act of 1975. Ch. 75-257, Laws of Fla. This law was substantially strengthened in 1985 by the Growth Management Act. Ch. 85-55, Laws of Fla.

Pursuant to the Growth Management Act, each county and municipality is required to prepare a comprehensive plan for approval by the Department of Community Affairs. The adopted local plan must include “principles, guidelines, and standards for the orderly and balanced future economic, social, physical, environmental, and fiscal development” of the local government’s jurisdictional area. Section 163.3177(1), Fla. Stat. (1991). At the minimum, the local plan must include elements covering future land use; capital improvements generally; sanitary sewer, solid waste, drainage, potable water, and natural ground water aquifer

protection specifically; conservation; recreation and open space; housing; traffic circulation; intergovernmental coordination; coastal management (for local government in the coastal zone); and mass transit (for local jurisdictions with 50,000 or more people). *Id.*, § 163.3177(6).

Of special relevance to local rezoning actions, the future land use plan element of the local plan must contain both a future land use map and goals, policies, and measurable objectives to guide future land use decisions. This plan element must designate the “proposed future general distribution, location, and extent of the uses of land” for various purposes. *Id.*, § 163.3177(6)(a). It must include standards to be utilized in the control and distribution of densities and intensities of development. In addition, the future land use plan must be based on adequate data and analysis concerning the local jurisdiction, including the projected population, the amount of land needed to accommodate the estimated population, the availability of public services and facilities, and the character of undeveloped land. *Id.*, § 163.3177(6)(a).

The local plan must be implemented through the adoption of land development regulations that are consistent with the plan. *Id.* § 163.3202. In addition, all development, both public and private, and all development orders approved by local governments must be consistent with the adopted local plan. *Id.*, § 163.3194(1)(a). Section 163.3194(3), Florida Statutes (1991), explains consistency as follows:

(a) A development order or land development regulation shall be consistent with the comprehensive plan if the land uses, densities or intensities, and other aspects of development permitted by such order or regulation are compatible with and further the objectives, policies, land uses, and densities or intensities in the

comprehensive plan and if it meets all other criteria enumerated by the local government.

Section 163.3164, Florida Statutes (1991), reads in pertinent part:

(6) “Development order” means any order granting, denying, or granting with conditions an application for a development permit.

(7) “Development permit” includes any building permit, zoning permit, subdivision approval, rezoning, certification, special exception, variance, or any other official action of local government having the effect of permitting the development of land.

Because an order granting or denying rezoning constitutes a development order and development orders must be consistent with the comprehensive plan, it is clear that orders on rezoning applications must be consistent with the comprehensive plan.

The first issue we must decide is whether the Board’s action on Snyder’s rezoning application was legislative or quasi-judicial. A board’s legislative action is subject to attack in circuit court. *Hirt v. Polk County Bd. of County Comm’rs*, 578 So.2d 415 (Fla. 2d DCA 1991). However, in deference to the policy-making function of a board when acting in a legislative capacity, its actions will be sustained as long as they are fairly debatable. *Nance v. Town of Indialantic*, 419 So.2d 1041 (Fla. 1982). On the other hand, the rulings of a board acting in its quasi-judicial capacity are subject to review by certiorari and will be upheld only if they are supported by substantial competent evidence. *De Groot v. Sheffield*, 95 So.2d 912 (Fla. 1957).

Enactments of original zoning ordinances have always been considered legislative. *Gulf & Eastern Dev. Corp. v. City of Fort Lauderdale*, 354 So.2d 57 (Fla. 1978); *County of Pasco v. J. Dico, Inc.*, 343 So.2d 83 (Fla. 2d DCA 1977). In *Schauer v. City of Miami Beach*, this Court held that the passage of an amending zoning ordinance was the exercise of a legislative function. 112 So.2d at 839. However, the amendment in that case was comprehensive in nature in that it effected a change in the zoning of a large area so as to permit it to be used as locations for multiple family buildings and hotels. *Id.* In *City of Jacksonville Beach v. Grubbs* and *Palm Beach County v. Tinnerman*, the district courts of appeal went further and held that board action on specific rezoning applications of individual property owners was also legislative. *Grubbs*, 461 So.2d at 163; *Tinnerman*, 517 So.2d at 700.

It is the character of the hearing that determines whether or not board action is legislative or quasi-judicial. *Coral Reef Nurseries, Inc. v. Babcock Co.*, 410 So.2d 648 (Fla. 3d DCA 1982). Generally speaking, legislative action results in the *formulation* of a general rule of policy, whereas judicial action results in the *application* of a general rule of policy. Carl J. Peckinpugh, Jr., Comment, *Burden of Proof in Land Use Regulations: A Unified Approach and Application to Florida*, 8 Fla.St.U.L.Rev. 499, 504 (1980). In *West Flagler Amusement Co. v. State Racing Commission*, 122 Fla. 222, 225, 165 So. 64, 65 (1935), we explained:

A judicial or quasi-judicial act determines the rules of law applicable, and the rights affected by them, in relation to past transactions. On the other hand, a quasi-legislative or administrative order prescribes what the rule or requirement of administratively determined duty shall be with respect to transactions to be executed in the future, in order that

same shall be considered lawful. But even so, quasi-legislative and quasi-executive orders, after they have already been entered, may have a quasi-judicial attribute if capable of being arrived at and provided by law to be declared by the administrative agency only after express statutory notice, hearing and consideration of evidence to be adduced as a basis for the making thereof.

Applying this criterion, it is evident that comprehensive rezonings affecting a large portion of the public are legislative in nature. However, we agree with the court below when it said:

[R]ezoning actions which have an impact on a limited number of persons or property owners, on identifiable parties and interests, where the decision is contingent on a fact or facts arrived at from distinct alternatives presented at a hearing, and where the decision can be functionally viewed as policy application, rather than policy setting, are in the nature of ... quasi-judicial action... .

Snyder, 595 So.2d at 78. Therefore, the board's action on Snyder's application was in the nature of a quasi-judicial proceeding and properly reviewable by petition for certiorari.¹

¹ One or more of the amicus briefs suggests that Snyder's remedy was to bring a de novo action in circuit court pursuant to section 163.3215, Florida Statutes (1991). However, in *Parker v. Leon County*, 627 So.2d 476 (Fla. 1993), we explained that this statute only provides a remedy for third parties to challenge the consistency of development orders.

We also agree with the court below that the review is subject to strict scrutiny. In practical effect, the review by strict scrutiny in zoning cases appears to be the same as that given in the review of other quasi-judicial decisions. *See Lee County v. Sunbelt Equities, II, Ltd. Partnership*, 619 So.2d 996 (Fla.2d DCA 1993) (The term “strict scrutiny” arises from the necessity of strict compliance with comprehensive plan.). This term as used in the review of land use decisions must be distinguished from the type of strict scrutiny review afforded in some constitutional cases. *Compare Snyder v. Board of County Comm’rs*, 595 So.2d 65, 75-76 (Fla. 5th DCA 1991) (land use), and *Machado v. Musgrove*, 519 So.2d 629, 632 (Fla. 3d DCA 1987), *review denied*, 529 So.2d 693 (Fla. 1988), and *review denied*, 529 So.2d 694 (Fla. 1988) (land use), with *In re Estate of Greenberg*, 390 So.2d 40, 42-43 (Fla. 1980) (general discussion of strict scrutiny review in context of fundamental rights), *appeal dismissed*, 450 U.S. 961, 101 S.Ct. 1475, 67 L.Ed.2d 610 (1981), *Florida High Sch. Activities Ass’n v. Thomas*, 434 So.2d 306 (Fla. 1983) (equal protection), and *Department of Revenue v. Magazine Publishers of America, Inc.*, 604 So.2d 459 (Fla. 1992) (First Amendment).

At this point, we depart from the rationale of the court below. In the first place, the opinion overlooks the premise that the comprehensive plan is intended to provide for the *future* use of land, which contemplates a gradual and ordered growth. *See City of Jacksonville Beach*, 461 So.2d at 163, in which the following statement from *Marracci v. City of Scappoose*, 552 P.2d 552, 553 (Or. Ct. App. 1976), was approved:

[A] comprehensive plan only establishes a long-range maximum limit on the possible intensity of land use; a plan does not simultaneously establish an immediate minimum limit on the possible intensity of land use.

The present use of land may, by zoning ordinance, continue to be more limited than the future use contemplated by the comprehensive plan.

Even where a denial of a zoning application would be inconsistent with the plan, the local government should have the discretion to decide that the maximum development density should not be allowed provided the governmental body approves some development that is consistent with the plan and the government's decision is supported by substantial, competent evidence.

Further, we cannot accept the proposition that once the landowner demonstrates that the proposed use is consistent with the comprehensive plan, he is presumptively entitled to this use unless the opposing governmental agency proves by clear and convincing evidence that specifically stated public necessity requires a more restricted use. We do not believe that a property owner is necessarily entitled to relief by proving consistency when the board action is also consistent with the plan. As noted in *Lee County v. Sunbelt Equities II, Limited Partnership*:

[A]bsent the assertion of some enforceable property right, an application for rezoning appeals at least in part to local officials' discretion to accept or reject the applicant's argument that change is desirable. The *right* of judicial review does not *ipso facto* ease the burden on a party seeking to overturn a decision made by a local government, and certainly does not confer any property-based right upon the owner where none previously existed.

... .

Moreover, when it is the zoning classification that is challenged, the comprehensive plan is relevant only when the suggested use is inconsistent with that plan. Where any of several zoning classifications is consistent with the plan, the applicant seeking a change from one to the other is not entitled to judicial relief absent proof the *status quo* is no longer reasonable. It is not enough simply to be “consistent”; the proposed change cannot be *inconsistent*, and will be subject to the “strict scrutiny” of *Machado* to insure this does not happen.

619 So.2d at 1005-06.

This raises a question of whether the Growth Management Act provides any comfort to the landowner when the denial of the rezoning request is consistent with the comprehensive plan. It could be argued that the only recourse is to pursue the traditional remedy of attempting to prove that the denial of the application was arbitrary, discriminatory, or unreasonable. *Burritt v. Harris*, 172 So.2d 820 (Fla. 1965); *City of Naples v. Central Plaza of Naples, Inc.*, 303 So.2d 423 (Fla. 2d DCA 1974). Yet, the fact that a proposed use is consistent with the plan means that the planners contemplated that that use would be acceptable at some point in the future. We do not believe the Growth Management Act was intended to preclude development but only to insure that it proceed in an orderly manner.

Upon consideration, we hold that a landowner seeking to rezone property has the burden of proving that the proposal is consistent with the comprehensive plan and complies with all procedural requirements of the zoning ordinance. At this point, the burden shifts to the governmental board to demonstrate that maintaining the

existing zoning classification with respect to the property accomplishes a legitimate public purpose. In effect, the landowners' traditional remedies will be subsumed within this rule, and the board will now have the burden of showing that the refusal to rezone the property is not arbitrary, discriminatory, or unreasonable. If the board carries its burden, the application should be denied.

While they may be useful, the board will not be required to make findings of fact. However, in order to sustain the board's action, upon review by certiorari in the circuit court it must be shown that there was competent substantial evidence presented to the board to support its ruling. Further review in the district court of appeal will continue to be governed by the principles of *City of Deerfield Beach v. Vaillant*, 419 So.2d 624 (Fla. 1982).

Based on the foregoing, we quash the decision below and disapprove *City of Jacksonville Beach v. Grubbs* and *Palm Beach County v. Tinnerman*, to the extent they are inconsistent with this opinion. However, in the posture of this case, we are reluctant to preclude the Snyders from any avenue of relief. Because of the possibility that conditions have changed during the extended lapse of time since their original application was filed, we believe that justice would be best served by permitting them to file a new application for rezoning of the property. The application will be without prejudice of the result reached by this decision and will allow the process to begin anew according to the procedure outlined in our opinion.

It is so ordered.

BARCKETT, C.J., and OVERTON, McDONALD,
KOGAN and HARDING, JJ., concur.

SHAW, J., dissents.

3.3. Procedure

Frank S. Griswold v. City of Homer

925 P.2d 1015 (Alaska 1996)

Frank S. Griswold, Homer, pro se.

Gordon J. Tans, Perkins Coie, Anchorage, for Appellee.

Before MOORE, C.J., and RABINOWITZ, MATTHEWS,
COMPTON and EASTAUGH, JJ.

EASTAUGH, JUSTICE.

I. INTRODUCTION

In 1992 the Homer City Council adopted Ordinance 92-18 amending Homer's zoning and planning code to allow motor vehicle sales and services on thirteen lots in Homer's Central Business District. Frank Griswold claims Ordinance 92-18 is invalid because it constitutes spot zoning. We affirm the superior court's rejection of that claim. Griswold also claims the Ordinance is invalid because a council member with a personal interest improperly participated in its adoption. We hold that the council member should not have participated. We consequently remand so the superior court can determine whether that participation invalidates the Ordinance. Finally, we hold that Griswold is a public interest litigant who cannot be assessed the City's attorney's fees and court costs.

...

B. Claim of Conflict of Interest

Homer City Council member Brian Sweiven owned one of the thirteen lots in the reclassified area. He was one of nine owners directly affected by Ordinance 92-18. It appears that it was Sweiven who first recommended to the commission that the rezone apply only to Main Street. An article in the Homer News was titled "Sweiven proposes

commercial zoning for downtown Homer.” The article refers to the idea of rezoning Main Street as “Sweiven’s proposal.” Griswold alleges that Sweiven had a disqualifying conflict of interest under Homer municipal law and that his participation in the adoption of Ordinance 92-18 therefore invalidates the Ordinance, even though Sweiven’s vote was not necessary for passage. The superior court found that Sweiven did not have a disqualifying conflict of interest and that even if he had, his participation in the deliberations and vote would not invalidate Ordinance 92-18.

1. Was there a conflict of interest?

Homer City Code 1.24.040(g) states:

A member of the Council shall declare a substantial financial interest the member has in an official action and ask to be excused from a vote on the matter. The Mayor or other presiding officer shall rule on the request; however, the decision may be overridden by the majority vote of the Council. Should a Council member fail to declare a substantial financial interest, the Council may move to disqualify that member from voting by a majority vote of the body. A Council member with a conflict of interest regardless of whether excused from voting, shall not be allowed to participate in discussion about the matter.¹

¹ In addition, Homer’s City Code mandates that a city official “disclose *any* financial interest in any matter before the board or commission *before* debating or voting upon the matter” and prohibits the official from participating in the debate or vote

The code defines “substantial financial interest” as

1. An interest that will result in immediate financial gain; or
2. An interest that will result in financial gain which will occur in the reasonably foreseeable future. HCC 1.12.010(a). Under common law, “the focus ... [is] on the relationship between the public official’s financial interest and the possible result of the official’s action, regardless of the official’s intent.” *Carney v. State, Bd. of Fisheries*, 785 P.2d 544, 548 (Alaska 1990) (citing *Marsh v. Town of Hanover*, 113 N.H. 667, 313 A.2d 411, 414-15 (1973)).² The plain language of HCC 1.24.040(g) appears to coincide with this principle.

The City Council did not address Sweiven’s alleged conflict of interest until after the Ordinance had been passed. After the council passed the Ordinance, the City Attorney advised the council to address the matter at its next meeting by having Sweiven declare the facts concerning his ownership of the land and ask the council to determine whether his participation in the matter constituted a conflict of interest under the City Code, and to have the Mayor then rule on this question. The City Attorney stated

unless the board or commission determines that a financial interest is not substantial as defined in HCC 1.12.010. HCC 1.12.070 (emphasis added).

² At first glance it may appear that the Executive Branch Ethics Act, AS 39.52.010-.960, which explicitly supersedes the common law on conflicts of interest, *see* AS 39.52.910, requires intent on the part of public officials subject to that Act. *See* AS 39.52.120(b)(4). However, that Act does not apply to municipal officials. *Gates v. City of Tenakee Springs*, 822 P.2d 455, 462 (Alaska 1992). Thus, the common law of conflicts of interest continues to apply to municipal officers. *Carney*, 785 P.2d at 547-48.

that if the City were to determine that Sweiven had a disqualifying conflict of interest, it should declare the Ordinance void. The City Attorney also stated that, in his opinion, Sweiven's ownership did not constitute a disqualifying conflict of interest.

The superior court found that

[t]here has been no showing that passage of the ordinance will result in a financial gain to Council member Sweiven, now or in the future. In fact, it may act as a detriment. Council member Sweiven's interest in Ordinance No. 92-18 is simply too remote and/or speculative to require his disqualification as a legislative official.

This finding is clearly erroneous. The court further stated,

Plaintiff correctly surmises that Council Member Sweiven's purpose and intent at the time he promoted and voted for the ordinance are of crucial importance in determining whether or not he had a conflict of interest.

This holding incorrectly states the law, because the proper focus is on the relationship between the official's financial interest and the result of the official's action, "regardless of the official's intent." *Carney*, 785 P.2d at 548.

Sweiven had a "substantial financial interest" within the meaning of HCC 1.12.010(a)(2) in a reclassification which would increase the permissible uses of his property. Indeed, it seems inconsistent for the City to argue both that the Ordinance will benefit the City by increasing the tax base

and property values, and that it will not benefit Sweiven's lot in a similar fashion.

The City nevertheless asserts that Sweiven's interest in the passage of Ordinance 92-18 is too remote and speculative to constitute a disqualifying interest, and argues that Sweiven's property is affected the same way as other citizens' property. The City attempts to distinguish *Carney* in which we held that fishermen who sat on the Board of Fisheries could vote on matters affecting the fishing industry as a whole but were disqualified from voting on regulations which affected the area in which they actively fished. We reasoned in *Carney* that the members should have abstained from decision-making in areas in which they had a narrow and specific interest. *Id.* at 548. The City argues that Sweiven did not have a narrow and specific interest because "Mr. Sweiven's operations (his home and appliance repair business) are not affected at all by Ordinance 92-18 (automobile sales and services)."

Ordinance 92-18 does not directly affect all of Homer, or even a large part of the City or an entire class of its citizens. Sweiven voted on an amendment which directly affects only thirteen lots, including his own, out of the 500-some lots in the CBD. According to the Alaska Department of Law, the common law requires that a legislator refrain from voting on a bill which will inure to the legislator's financial benefit if the legislator's interest "is peculiarly personal, such as when a bill benefits only a tiny class of which the legislator is a member." 1982 Formal Op. Att'y Gen. 4133.

Furthermore, it is said in the context of zoning:

Most of the cases [of disqualifying conflict of interest] have involved a charge of a more-or-less direct financial interest, and it is clear that such an interest is a proper ground of disqualification, as where the officer

himself holds property which is directly involved in or affected by the proceeding.

....

The clearest situation in which disqualifying bias or prejudice is shown is that where the zoning officer himself owns property the value of which will be directly promoted or reduced by the decision to be made and it is not surprising that upon a showing of such interest the courts have usually held the officer disqualified.

W.E. Shipley, Annotation, *Disqualification for Bias or Interest of Administrative Officer Sitting in Zoning Proceeding*, 10 A.L.R.3d 694, 697 (1966). Sweiven himself apparently believed that the Ordinance would increase the value of his property. In recommending the limited rezone to the planning commission, he stated that “it would increase the tax base and property values” of the area. The record reflects that when Sweiven was advocating rezoning the entire CBD, he was quoted in the Homer News as stating: “Even my own business. I can’t sell my business, but I can sell my building, and someone who wants to put a VW repair shop there — he can’t.... It’s not just me. This gives everybody in town a lot more options as far as selling their business.” Finally, Sweiven initially refrained from voting on Ordinance 94-13, which would have repealed Ordinance 92-18, on the ground that he had a potential conflict of interest. It consequently appears that Sweiven had a “substantial financial interest” as that term is defined in HCC 1.12.010(a).

The superior court’s finding that Sweiven did not have a disqualifying conflict of interest is clearly erroneous.

2. What was the effect of the conflict of interest?

There are six voting members on the Homer City Council. Five voted for Ordinance 92-18 on its first reading. One was absent. Four weeks later, it passed its second and final reading, again by a vote of five in favor and one absent. Thus, without counting Sweiven's vote, Ordinance 92-18 would have passed. The superior court held that even if Sweiven had a disqualifying conflict of interest, his participation and voting would not invalidate the result. In support it cited *Waikiki Resort Hotel v. City of Honolulu*, 63 Haw. 222, 624 P.2d 1353, 1370-71 (1981).

Waikiki followed the rule, also articulated in several other jurisdictions, that where the required majority exists without the vote of the disqualified member, the member's participation in deliberation and voting will not invalidate the result. 624 P.2d at 1371 (citing *Singewald v. Minneapolis Gas Co.*, 274 Minn. 556, 142 N.W.2d 739 (1966); *Anderson v. City of Parsons*, 209 Kan. 337, 496 P.2d 1333 (1972); *Eways v. Reading Parking Auth.*, 385 Pa. 592, 124 A.2d 92 (1956)). The *Waikiki* court also cited *Marshall v. Ellwood City Borough*, 189 Pa. 348, 41 A. 994 (1899), where the court reasoned that because the other four members voted in favor of the disputed ordinance, the invalid vote of one city councilman had no legal efficacy; thus, the court would not invalidate the ordinance. *Waikiki*, 624 P.2d at 1371.

Waikiki cited decisions from three other jurisdictions holding that a vote cast by a disqualified member vitiates the decision in which the member participated, even if the vote does not change the outcome of the decision. 624 P.2d at 1370 (citing *Piggott v. Borough of Hopewell*, 22 N.J. Super. 106, 91 A.2d 667 (1952); *Baker v. Marley*, 8 N.Y.2d 365, 208 N.Y.S.2d 449, 170 N.E.2d 900 (1960); *Buell v. City of Bremerton*, 80 Wash.2d 518, 495 P.2d 1358 (1972)). In *Buell*, the court stated:

The self-interest of one member of the planning commission infects the action of the other members of the commission regardless of their disinterestedness. The recommendation of the planning commission to the city council could not be assumed to be without impact on the council. More importantly, it would not appear to the affected public that it was without impact, and [the disqualified member's] actual financial gain is sufficient to invalidate the entire proceeding.

495 P.2d at 1362-63 (citations omitted).

These lines of authorities offer a choice between vote-counting (*Waikiki*) and automatic invalidation (*Buell*). We have not had occasion to consider this exact issue. In *Carney*, we found that four of seven fisheries board members had a disqualifying conflict. We then held the board's regulation invalid: "Because a majority of the votes cast to pass the regulation are invalid, so is the regulation." 785 P.2d at 549. *Carney* did not raise the issue now before us because there the measure would have been invalidated under either doctrine.

We decline to follow the vote-counting approach adopted in *Waikiki*, notwithstanding its appealing ease of application. A council member's role in the adoption or rejection of an ordinance cannot necessarily be measured solely by that member's vote. A conflicted member's participation in discussion and debate culminating in the final vote may influence the votes of the member's colleagues. Moreover, the integrity required of public officeholders demands that the appearance of impropriety be avoided; the approach adopted in *Waikiki* will not always do so. See *Falcon v. Alaska Pub. Offices Comm'n*, 570

P.2d 469, 477 (Alaska 1977) (holding financial disclosure laws preserve the integrity and fairness of the political process both in fact and appearance); *Warwick v. State ex rel. Chance*, 548 P.2d 384, 388 (Alaska 1976) (“[I]t is important that the legislature not only avoid impropriety, but also the appearance of impropriety.”). *Cf.* AS 39.50.010(b)(1) (public office is a public trust which should be free from the danger of conflict of interest). The superior court erred in holding that Ordinance 92-18 is valid simply because Sweiven did not cast the decisive vote in its adoption.

We also decline, however, to adopt the rule of automatic invalidation endorsed in cases such as *Buell*, 495 P.2d at 1362-63. The vote and participation of a conflicted member will not invariably alter the votes of other members or affect the merits of the council’s decision. This is especially true if the conflict is disclosed or well-known, allowing other members to assess the merits of the conflicted member’s comments in light of his or her interest. Automatic invalidation could needlessly overturn well-considered measures which would have been adopted even if the disqualified member had refrained from participating. Automatic invalidation has the potential for thwarting legislative enactments which are not in fact the result of improper influence.

The dissenting opinion cites HCC 1.12.030 as justification for its conclusion that participation by a disqualified member requires invalidation of the council’s action.³

³ The portion of HCC 1.12.030 cited by the dissent states:

A City Councilmember or Mayor with a conflict of interest under section 1.12.020 shall so declare to the body as a whole and ask to be excused from voting on the matter. However, a City Councilmember or Mayor with a conflict of interest, regardless of whether excused from voting, shall not be allowed to participate in discussion about the matter. (Ord.92-49(A) § 4, 1992; Ord. 86-22(S) § 1(part), 1986).

HCC 1.12.030 and 1.24.040(g), however, determine whether a member may vote or participate. They deal with disqualification, and do not address the consequences of participation by a conflicted member. The drafters of the code must have contemplated that violations might occur notwithstanding the prohibition. They nonetheless specified no remedy. Had they intended that particular consequences would follow from violation of the prohibition, such as the clear-cut remedies of automatic invalidation or vote-counting, they could have easily so provided. Their failure to specify a remedy for violation implies that the drafters intended that the courts fashion the remedy.

In determining whether the vote of a conflicted member demands invalidation of an ordinance, courts should keep in mind the two basic public policy interests served by impartial decision-making: accuracy of decisions, and the avoidance of the appearance of impropriety. *See generally* Mark W. Cordes, *Policing Bias and Conflicts of Interest in Zoning Decisionmaking*, 65 N.D.L.Rev. 161 (1989).

Guided by these basic policy concerns, we conclude that the following analysis should be applied in determining the effect of a conflicted vote. Initially the court must determine whether a member with a disqualifying interest cast the decisive vote. If so, the ordinance must be invalidated. *Carney*, 785 P.2d at 549. If the ordinance would have passed without the vote of the conflicted member, the court should examine the following three factors: (1) whether the member disclosed the interest or the other council members were fully aware of it; (2) the extent of the member's participation in the decision; and (3) the magnitude of the member's interest. The first two factors squarely bear on the accuracy of the council's decision. All

This language is nearly identical to the similar prohibition in HCC 1.24.040(g), but also applies to the mayor.

three factors directly relate to any appearance of impropriety.

If the interest is undisclosed, the ordinance will generally be invalid; it can stand only if the magnitude of the member's interest, and the extent of his or her participation, are minimal. If the interest is disclosed, the ordinance will be valid unless the member's interest and participation are so great as to create an intolerable appearance of impropriety. The party challenging the ordinance bears the burden of proving its invalidity. We recognize that this analysis is more difficult to apply than the vote-counting and automatic invalidation rules. Simple to apply, those rules are unacceptably rigid.

The factual record before us is not so clear that we can decide as a matter of law whether invalidation is appropriate. The record does not reveal whether the other council members had actual knowledge of Sweiven's interest. While Sweiven's interest in his lot, where he lived and worked, was open and obvious, this is a matter of potential factual dispute to be explored on remand. Likewise, we cannot weigh the extent of Sweiven's participation or say whether it may have affected the outcome of the measure. Nor does the record establish whether Sweiven was likely in the foreseeable future to realize any significant appreciation from the reclassification by selling or servicing motor vehicles or by selling his lot to someone who intended to do so. We therefore remand so that the superior court, applying the analysis discussed above, can determine whether Ordinance 92-18 must be invalidated.

... .

RABINOWITZ, JUSTICE, dissenting in part.

I believe it is of particular significance that Sweiven participated in the discussion of and voted for Ordinance 92-18. As the court observes, this ordinance does not

directly affect all of Homer, or even a large segment of the City or an entire class of its citizens. More particularly, the ordinance directly affects only thirteen lots, including Sweiven's own, out of approximately 500 lots located within the Central Business District. The record further reveals Sweiven's belief that Ordinance 92-18 would increase the value of his property. Indeed Sweiven explicitly stated that "[the proposal] would increase the tax base and property values" of the area when recommending the Limited Rezone to the planning commission.⁴

Based on the foregoing, the court correctly concludes that "Sweiven had a 'substantial financial interest' within the meaning of HCC 1.12.010(a)⁵ in a reclassification which would increase the permissible uses of his property.... The

⁴ The court notes:

The record reflects that when Sweiven was advocating rezoning the entire CBD, he was quoted in the Homer News as stating: "Even my own business. I can't sell my business, but I can sell my building, and someone who wants to put a VW repair shop there — he can't... It's not just me. This gives everybody in town a lot more options as far as selling their business." Finally, Sweiven refrained from voting on Ordinance 94-13, which would have repealed Ordinance 92-18, on the ground that he had a potential conflict of interest.

Op. at 27.

⁵ At all times relevant to the case at bar, HCC 1.12.010(a) defined "substantial financial interest" as follows:

1. An interest that will result in immediate financial gain;
or
2. An interest that will result in financial gain which will occur in the reasonably foreseeable future.

(HCC 1.12.010 has subsequently been amended.)

HCC 1.12.020 provides:

A City Councilmember or Mayor with a substantial financial interest in an official action to be taken by the Council has a conflict of interest. (Ord.92-49(A) § 3, 1992; Ord. 86-22(S) § 1(part), 1986).

superior court's finding that Sweiven did not have a disqualifying conflict of interest is clearly erroneous." Op. at 25, 28.

My disagreement with the court's opinion goes to its discussion of the effect of Sweiven's conflict of interest and the appropriate remedy given the factual context of this case. Central to my differing analysis are the provisions of the Homer City ordinances which address the subject of conflict of interest. In my view, the court's analysis ignores that part of the Homer Municipal Code 1.12.030, which states:

A City Councilmember or Mayor with a conflict of interest under section 1.12.020 shall so declare to the body as a whole and ask to be excused from voting on the matter. However, a City Councilmember or Mayor with a conflict of interest, regardless of whether excused from voting, shall not be allowed to participate in discussion about the matter. (Ord.92-49(A) § 4, 1992; Ord. 86-22(S) § 1(part), 1986).⁶

⁶ HCC 1.12.040 provides:

The Mayor or, in his absence, the Mayor Pro-Tem or other presiding officer, shall rule on a request by a City Councilmember to be excused from voting on a matter because of a declared conflict of interest. The Mayor Pro-tem or other presiding officer shall rule on a request by the Mayor to be excused from participating in a matter because of a declared conflict of interest. (Ord.92-49(A) § 5, 1992; Ord. 86-22(S) § 1 (part), 1986).

HCC 1.12.050 further provides:

A decision of the Mayor or other presiding officer under Section 1.12.040 may be overridden by a majority vote of the City Council. (Ord.86-22(S) § 1 (part), 1986).

The City of Homer, as expressed in section 1.12.030 of its Code, has adopted a policy which flatly contradicts the court's statement that

[t]he vote and participation of a conflicted member will not invariably alter the votes of other members or affect the merits of the council's decision. This is especially true if the conflict is disclosed or well known, allowing other members to assess the merits of the conflicted member's comments in light of his or her interest.

Regardless of the wisdom of the City of Homer's legislative enactment barring conflicted council members' participation in decisions,⁷ the fact remains that the City of Homer has expressly adopted a rule specifically prohibiting conflicted council members from taking part in discussion or voting on the matter of interest. In fact, the prohibition on discussion is more stringent than the rule on voting — even when the “Mayor or other presiding officer” decides that the member need not be excused from voting, and even when the council chooses not to override that decision by a simple majority vote, the member is nonetheless forbidden to participate in the discussion.

The rule adopted by the court pays no heed to this participation ban contained in the City of Homer's municipal code. The portions of the court's rule which conflict with the express non-participation policy of HCC 1.12.030 are the following:

⁷ This court has consistently held that it is not our function to question the wisdom of legislation. *University of Alaska v. Geistants*, 666 P.2d 424, 428 (Alaska 1983); *Alaska Interstate v. Houston*, 586 P.2d 618, 621 (Alaska 1978).

If the interest is undisclosed, the ordinance will generally be invalid; *it can stand only if* the magnitude of the member's interest, and *the extent of his or her participation, are minimal.* If the interest is disclosed, the ordinance will be valid unless the *member's interest and participation are so great as to create an intolerable appearance of impropriety.*

(Emphasis added.) In short, the court's rule would permit a conflicted council member to participate in the discussion of a matter before the body responsible for official action in cases where the conflicting interest has been disclosed, or where the conflicting interest is undisclosed and the conflicted member's participation does not create an intolerable appearance of impropriety.

Although the court's formulation might well be adopted as a general rule, I think it inappropriate to do so in the face of an ordinance completely prohibiting participation by any city council member with a substantial conflicting interest in the subject matter of a proposed ordinance. In this regard, it is noteworthy that HCC 1.12.030 is not couched in terms of *de minimis* levels of participation. On the contrary, it imposes a complete ban on the conflicted member's participation.

Given the participation ban imposed by HCC 1.12.030, Sweiven's conflict generating significant financial interest, and Sweiven's participation in the discussion of Ordinance 92-18, I conclude that the appropriate remedy is invalidation of the ordinance.

As the court recognizes, a council member's role in the adoption or rejection of an ordinance cannot necessarily be measured solely by that member's vote. A conflicted member's participation in discussion and debate culminating in the final vote may influence the votes of the member's colleagues. The court also appropriately

recognizes that the integrity required of public office holders demands that even the appearance of impropriety be avoided.⁸

⁸ See generally Mark W. Cordes, *Policing Bias and Conflict of Interest in Zoning Decisionmaking*, 65 N.D.L.Rev. 161 (1989). Here the author writes in part:

The second and more common provision is to prohibit participation when a conflict of interest exists. The rationales behind this are obvious. Although disclosure has some restraining effect, a significant conflict might still affect the substantive outcome of a decision. More importantly, perceptions of fairness and legitimacy are only partly addressed by disclosure.

For these reasons disqualification rather than disclosure is the preferable approach. Although in some instances disclosure might adequately address the need for impartiality, in many instances it will only be partially effective. The inconvenience of adjusting to the disqualification of a decisionmaker is not so great as to justify the threat to accuracy and legitimacy posed by the requirement of mere disclosure.

Beyond determining what effect a conflict of interest should have on a particular decisionmaker is what judicial remedies should be available when a zoning decision in fact involved an improper conflict of interest. In those instances in which the biased decisionmaker casts a dispositive vote, courts have consistently invalidated the decision. This seems appropriate in that both accuracy and legitimacy concerns are clearly threatened when a decision appears to turn on the vote of a self-interested decisionmaker.

Guided by these principles and the City of Homer's explicit ban on a conflicted member's participation, I respectfully dissent from the court's remedy. Rather than remand this issue, I would hold Ordinance 92-18 invalid because of council member Sweiven's participation.⁹

A more difficult issue is whether the participation of a conflicting member whose vote was not determinative to a decision should also result in invalidation. This might occur in two general situations. First is where the tainted vote was numerically unnecessary for the decision. Courts have evenly split on this issue, with a slight majority favoring invalidation. Courts refusing to invalidate such decisions have primarily reasoned that even without the tainted vote the decision would have occurred anyway and therefore invalidation is improper. In this sense the threat to accuracy and legitimacy concerns is arguably *de minimis* when the particular vote is apparently not crucial to a decision. In particular, legitimacy concerns are less threatened when a decision appears inevitable. As a result, the administrative burden of invalidating and remanding a decision outweighs any threat to substantive results and perceptions of fairness.

Despite these distinctions, several strong reasons exist for invalidating decisions even when a tainted decisionmaker's vote was numerically unnecessary for the decision. First, courts invalidating such decisions have noted that collegial decisionmaking ideally involves the exchange of ideas and views, often with the intent of persuading toward a particular position. The actual contribution of any particular decisionmaker cannot be measured with precision, but frequently extends significantly beyond the actual vote cast. For this reason, a significant threat to accuracy can exist even when a particular vote was numerically unnecessary for the decision.

For similar reasons legitimacy concerns also exist even when a vote is numerically unnecessary. Although legitimacy concerns are less substantial in such circumstances, the perception of collegial decisionmaking and the potential influence of a tainted decisionmaker on others would violate "appearance of fairness" standards. Thus, for both accuracy and legitimacy reasons the better view is that even when a vote is numerically unnecessary for a decision courts should still invalidate it.

Id. at 214-216 (footnotes omitted).

⁹ I note my agreement with the court's other holdings.

In re McGlynn
974 A.2d 525 (2009)

H. Peter Nelson, Perkasio, for appellants.

Matthew J. Goodrich, Bangor, for appellee, L.U.R.R.S.

Opinion by JUDGE SIMPSON.

An important issue in this appeal is whether the failure to strictly comply with the public notice provisions of the Pennsylvania Municipalities Planning Code (Code) resulted in a denial of procedural due process so as to render a decision on a conditional use application void *ab initio*.

The Board of Supervisors (Board) of Lehigh Township (Township) granted a conditional use application (Use Application) filed by L.U.R.R.S. (Applicant). The Use Application sought approval for development of a mobile/manufactured home park. Objectors, who actively participated in multiple hearings on the Use Application, appealed the Board's decision to the Court of Common Pleas of Northampton County (trial court). In addition to challenging the Township's notice procedures, Objectors asserted Applicant does not own all the property subject to the Use Application, the Application is moot, and the Application failed to meet the standards of the Lehigh Township Zoning Ordinance (Ordinance) for the grant of a conditional use application and for a mobile/manufactured home park. The trial court affirmed the Board's decision, and Objectors appeal. We affirm.

... .

In June 2004, Applicant filed the Use Application with the Township seeking to construct a mobile/manufactured home park on property located along Mountainview Drive (Property). The 103-acre Property is located in a Village Residential District (VR), which permits a mobile/manufactured home park as a conditional use. Applicant proposed to construct 245 single-family homes

designated as North Woods Manufactured Home Community.

The Township Planning Commission recommended approval of the Use Application. Accordingly, the Township advertised that the Board would hold a public hearing on the Use Application at its January 31, 2006 meeting. The public notice appeared in the January 19, 2006 edition of a local newspaper of general circulation. The Township also published a second notice of the public hearing in the January 23, 2006 edition of the same newspaper. These publications occurred four days apart.

The Board held the conditional use hearing as scheduled. Applicant submitted evidence in support of its Use Application and Objectors, representing themselves, cross-examined Applicant's witnesses. The Board's hearing did not conclude on January 31; rather, the Board held additional hearings on February 28 and March 27, 2006. Objectors again actively participated in the hearings by cross-examining Applicant's witnesses and offering evidence.

In a comprehensive decision, the Board set forth findings of fact and conclusions of law, and examined each conditional use requirement of the Ordinance as well as the specific requirements of a mobile/manufactured home park. It concluded Applicant showed compliance with all zoning requirements and, therefore, granted the Use Application with conditions.

Retaining counsel, Objectors appealed the Board's decision to the trial court. Among a variety of motions, Objectors sought to reopen the record. Certified Record (C.R.) Item 9. Objectors also asserted Applicant engaged in unauthorized tree clearing on the Property. The trial court ordered that "*the entire matter will be remanded to the [Board] for purposes of presentation of any additional testimony and evidence.*" *Id.* (emphasis added).

The Board held remand hearings in April, May and June 2007. Objectors through Counsel actively participated in the remand hearings. In October 2007, the Board issued a second decision confirming its May 2006 decision as modified by an interim stipulation between the Township and Applicant. Addressing the matters subject to remand, the Board noted the wetlands issue arose during the first round of conditional use hearings and, as a result, it imposed Conditions 7, 8 and 10, noted below. Concerning the utility easement, the Board observed that relocation of homes, roads, and water retention basins impacted by the easement would be addressed in the subdivision and land development process. Finally, the Board explained the Township previously issued and withdrew a violation notice regarding tree removal on the Property. In short, the Board found the testimony on remand did not affect its decision on the Use Application.

Objectors filed a second appeal to common pleas court. A different trial judge heard Objectors' appeal. The trial court affirmed.

...

The first issue Objectors raise involves the concept of procedural due process. The fundamental components of procedural due process are notice and opportunity to be heard. *Pessolano v. Zoning Bd. of Adjustment of City of Pittsburgh*, 159 Pa.Cmwlth. 313, 632 A.2d 1090 (1993).

Regarding *only* the conditional use hearing held January 31, 2006, the Township advertised the Board's hearing on January 19 and then again on January 23. The publications occurred four days apart and, according to Objectors, constituted insufficient public notice under the MPC. There are no assertions that the Board failed to publish notice of the remaining five conditional use hearings held in 2006 and 2007. It is also important to note Objectors do not assert any harm resulting from the Township's failure to

twice advertise the first conditional use hearing at least five days apart.

Section 908(1) of the MPC requires public notice of Board hearings. 53 P.S. § 10908(1). Section 107 of the MPC defines “public notice” as

notice published once each week for two successive weeks in a newspaper of general circulation in the municipality. Such notice shall state the time and place of the hearing and the particular nature of the matter to be considered at the hearing. The first publication shall not be more than 30 days and the second publication shall not be less than seven days from the date of the hearing.

53 P.S. § 10107.

The MPC does not define the term “successive weeks.” We therefore look to the Statutory Construction Act of 1972, 1 Pa. C.S. §§ 1501-1991, to construe the term’s meaning. It provides that whenever any statute uses the phrase “successive weeks” in reference to publishing of notices, the weeks “shall be construed as calendar weeks [and the] publication upon any day of such weeks shall be sufficient publication for that week, but at least five days shall elapse between each publication.” 1 Pa.C.S. § 1909.

At this juncture, the parties agree the Township’s two notices of the Board’s January 31 hearing were published four days apart instead of five days, as required by Section 1909.¹ The question then is the result of the defect on the Use Application.

¹ Section 1908 of the Statutory Construction Act provides for the computation of time when referenced in a statute. 1 Pa.C.S. § 1908. However, Section 1908 does not apply to Section 1909, above. *Id.* The trial court therefore looked to the Rules of Civil Procedure to determine the number of days between publications of the

At the outset, we observe Objectors failed to raise their public notice concerns at *anytime* before the Board and, therefore, deprived it of an opportunity to discontinue the proceedings and start anew. Nevertheless, Objectors cite several appellate decisions for the proposition that strict compliance with the MPC's notice provisions is mandatory and any deviation renders the local agency's decision void *ab initio*. See *Luke v. Cataldi*, 593 Pa. 461, 932 A.2d 45 (2007) (alleged failure to provide public notice or public hearing before granting conditional use application would render board's decision void *ab initio*; remanded for further proceedings); *Glen-Gery Corp. v. Zoning Hearing Bd. of Dover Twp.*, 589 Pa. 135, 907 A.2d 1033 (2006) (a claim alleging a procedural defect affecting notice or due process rights in the enactment of an ordinance may be brought beyond statutory appeal period because, if proven, ordinance is void *ab initio*); *Schadler v. Zoning Hearing Bd. of Weisenberg Twp.*, 578 Pa. 177, 850 A.2d 619 (2004) (failure to make full text of proposed amendment to zoning ordinance available for public comment rendered subsequent enactment of the amendment void *ab initio*); *Lower Gwynedd Twp. v. Gwynedd Props., Inc.*, 527 Pa. 324, 591 A.2d 285 (1991) (failure to publish entire text of ordinance as required by The Second Class Township Code rendered ordinance void).

After careful consideration, we do not believe reversal of the Board's decision is compelled here where Objectors received all process due and asserted no claim of prejudice or harm.

hearing notices. Specifically, Rule 106 provides that when any period of time is referenced in the rules, the period shall be computed by excluding the first day and including the last day of any such period. Pa. R.C.P. No. 106. In this case, the first day of the five-day period was January 20 and the last day was January 23; thus, only four days lapsed between publications. Nevertheless, the trial court recognized liberal construction of the rules of civil procedure is required so long as the error does not affect the substantial rights of the parties. See Pa. R.C.P. No. 126. As more fully explained, the publication error did not affect the parties' substantive rights.

The statutory notice and publication requirements are to ensure the public's right to participate in the consideration and enactment of municipal land use decisions. *Lower Gwynedd Twp.* In other words, the notice provisions protect procedural due process. The concept of due process, however, is a flexible one and imposes only such procedural safeguards as the situation warrants. *LaFarge Corp. v. Ins. Dep't*, 557 Pa. 544, 735 A.2d 74 (1999); *Fountain Capital Fund, Inc. v. Pa. Secs. Comm'n*, 948 A.2d 208 (Pa. Cmwlth.2008), *appeal denied*, ___ Pa. ___, 967 A.2d 961 (2009). Demonstrable prejudice is a key factor in assessing whether procedural due process was denied. *State Dental Council & Examining Bd. v. Pollock*, 457 Pa. 264, 318 A.2d 910 (1974).

The seminal case addressing due process is *Mathews v. Eldridge*, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976). Factually, *Mathews* concerned the Social Security Administration's decision to discontinue cash benefits without affording the recipient a pre-decisional hearing. The United States Supreme Court rejected the recipient's claim that due process required the agency to hold a hearing prior to terminating benefits. In doing so, the Court considered what process is due an individual before a property interest may be affected by government action. It identified three factors that must be considered in formulating the process due: the private interest affected by the government action; the risk of erroneous deprivation of such interest through the procedures used and the probable value, if any, of additional or substitute procedural safeguards; and finally, the government's interest, including the function involved and the administrative burdens that additional or substitute procedural requirements would entail. *Id.* at 335, 96 S.Ct. 893. We address each of these considerations.

First, we recognize Objectors have an interest in the quiet use and enjoyment of their properties near the proposed

use, as well as the right to participate in the Board's hearings. Here, however, we discern no deprivation of Objectors' interests. In *Pessolano*, neighboring property owners appeared at a zoning hearing to oppose a landowner's application for a special exception. The zoning board denied the application, and the landowner appealed to common pleas court. The landowner did not serve the neighboring property owners with a notice of appeal. On appeal, the court reversed the zoning board's decision, granted the special exception, and imposed conditions on the property's use.

After the appeal period lapsed, the neighboring property owners petitioned to vacate the court's order on the basis they were denied the opportunity to intervene in the landowner's appeal. They cited a city zoning ordinance requiring an appealing party to notify all persons appearing before the zoning hearing board of an appeal. Sustaining the landowner's preliminary objections, the common pleas court dismissed the petition to vacate. Of import, the court concluded the landowner's failure to strictly comply with the city ordinance did not warrant reversal of its decision because the property owners did not claim lack of actual knowledge of the landowner's appeal.

We affirmed. Cognizant of the procedural safeguards that notice provisions are to provide, we stated the value and necessity of strict compliance with the notice requirements is diminished where the interested parties have actual notice of the legal proceedings. "[A]ctual notice serves to accomplish the same purposes that legal notice is intended to accomplish. Both forms of notice serve to make interested parties aware of the opportunity to exercise their legal rights." *Id.* at 317, 632 A.2d 1090.

Applying the above principle here, Objectors had actual notice of the Board's first conditional use hearing and actively participated at that time. At no time during the six Use Applications hearings did Objectors assert to the

Board lack of actual notice of the first hearing or defective publication of the required notices. *Cf. Citimortgage, Inc. v. KDR Inns., LLP*, 954 A.2d 755 (Pa.Cmwlth.2008) (the formal requirements of statutory notice for sale of property for nonpayment of taxes need not be strictly met where actual notice is established); *Aldhelm, Inc., v. Schuylkill County Tax Claim Bureau*, 879 A.2d 400 (Pa.Cmwlth.2005)(same).

Second, the ongoing proceedings here did not risk depriving Objectors of their interests. At the conclusion of the first hearing, the Board announced its intention to hold a second hearing. Likewise, the Board announced a third hearing at the conclusion of the second hearing. It also indicated it would publish notice of the upcoming hearings in a local newspaper and post the Township building. *See* C.R., Notes of Testimony (N.T.), Vol. I at 147-48; Vol. II at 147.

Most significantly, Objectors and their counsel fully participated in the remand proceedings. The scope of the remand was not limited; rather, Objectors were able to call any witness and offer any appropriate document. Thus, their interests were fully protected.² Objectors' participation

² Our recent decision in *Southeastern Chester County Refuse Authority v. Board of Supervisors of London Grove Township*, 954 A.2d 732 (Pa.Cmwlth.2008), is also instructive on this point. There, the Southeastern Chester County Refuse Authority (SECCRA) filed an application to expand its landfill. The township board of supervisors held hearings on the application over an 18-month period. After denial of its application, SECCRA claimed the board failed to schedule the hearings in compliance with the MPC and, thus, it was entitled to a deemed approval. We affirmed the denial of SECCRA's application. Important to our decision was the fact that SECCRA actively participated in the board's decisions and challenged the evidence opposing its application over the 18-month period. It never asserted its right to a deemed approval during that time. In sum, we concluded SECCRA's active participation in hearing subsequent to the date it could have asserted a deemed approval under the MPC manifested its agreement to an extension of time for a board determination.

Southeastern Chester County Refuse Authority confirms that a party's actions which are contrary to the rights it seeks to assert may result in waiver of the claimed right. Here, Objectors should have asserted the Township's publication of the first Use Application hearing was defective at the start of the first hearing. They

with counsel during the unrestricted remand hearings acted to cure any deficiency in notice of the original set of hearings. Indeed, Objectors do not assert prejudice by the manner of publishing notice of the first of the original set of hearings.

Third, we consider the Township's interests and burden in curing the defective notices of the first hearing. It is conceivable that the entire application process would start anew. The Township would again incur advertising costs and counsel fees to cover the same material already offered in the previous six hearings. Objectors do not suggest any different information would be offered at new proceedings. Under these circumstances, a similar result is expected, and Objectors' challenge to the proposed use would likely result in appeals again. The financial and administrative burdens on the Township are obvious.

In summary, Objectors do not claim harm resulting from the Township's failure to twice advertise the first conditional use hearing in strict compliance with the MPC. Objectors' interests were protected by their active participation during the initial set of hearings and by their active participation with counsel during unrestricted remand hearings. Absent a showing of discernible harm, a denial of due process claim must fail.

... .

compounded the issue by failing to raise it before the Board at any of the other five hearings.

Maxwell v. Carney

273 Ga. 864 (2001)

Sherwood & Sherwood, J. Carol Sherwood, Jr., Valdosta,
for appellants.

Long Denton & Parrott, Allen Denton, Vann K. Parrott,
Quitman, for appellees.

THOMPSON, JUSTICE.

The Brooks County Board of Commissioners held a regularly scheduled monthly meeting on November 16, 1999, in the Brooks County Commission's meeting room. A number of people, over and above the room's seating and standing capacity, showed up for the meeting but they were unable to get in. Although a larger room in the building had been used for county meetings, the commission refused a request to move the meeting to the larger room. The stated reason for that refusal was that the public notice specified that the meeting would take place in the smaller room.

Thereafter, plaintiffs brought this suit seeking injunctive relief on the ground that the commission violated the Open Meetings Act, OCGA § 50-14-1 et seq. Following a hearing, the superior court enjoined the commission "from conducting public meetings... in the Brooks County Office Building unless both meeting rooms in the building are available to the board." Furthermore, the superior court ordered that, "if a new site is selected for public meetings the room shall provide adequate seating and space so that all members of the public who desire to attend may be accommodated." Finally, the superior court held "that a public notice of a meeting to the effect that all county commissioner's meetings in the Brooks County Office Building at [address] shall be legally sufficient regardless of which room in the building is utilized." The commission appeals asserting the superior court abused its discretion in

shaping injunctive relief. We affirm in part and reverse in part.

1. The public notice did not specify in which room the meeting was to be held. The notice only gave the location of the building, and a sign with an arrow was placed at the entrance of the building to indicate which room was to be used. Moreover, the commission moved a previous meeting from the regular meeting room to the larger room in the building without advance notice. Accordingly, we find no error in that portion of the superior court's order which requires the commission to conduct meetings in the larger meeting room if the usual meeting room is insufficient to accommodate the public.

Harms v. Adams, 238 Ga. 186, 232 S.E.2d 61 (1977), upon which the commission relies, is inapposite. In that case, the meeting was held in the mayor's office because the regular meeting room was occupied. Moreover, there was no evidence that another room was available.

2. The superior court's injunction is too broad insofar as it requires the commission to provide adequate seating to enable *all* members of the public to attend the meeting. The superior court would have the commission provide seating for everyone in the county if they all decided to attend a meeting. This was not the intent of the Open Meetings Act. The Open Meetings Act requires adequate, advance notice of a meeting – not physical access to all members of the public. See *Harms v. Adams*, *supra*.

Judgment affirmed in part and reversed in part.

**Kearns-Tribune Corporation v. Salt Lake County
Commission**

28 P.3d 686 (Utah 2001)

Michael Patrick O'Brien, Deno G. Himonas, Jeremy M. Hoffman, Salt Lake City, Charles A. Brown, Lewiston, Idaho, for plaintiff.

David E. Yocom, Gavin J. Anderson, Salt Lake City, for defendant.

Jeffrey J. Hunt, Diana Hagen, David C. Reymann, Salt Lake City, for amici.

WILKINS, JUSTICE.

¶ 1 This appeal presents the question of whether the Utah Open and Public Meetings Act, Utah Code Ann. §§ 52-4-1 to -10 (1998), permits the Salt Lake County Commission to close a meeting to the public in order to consider, with legal counsel, possible courses of action with respect to an annexation petition pending before the Salt Lake County Boundary Commission. The parties filed cross motions for summary judgment, and the district court ruled in favor of plaintiff Kearns-Tribune Corporation concluding that by closing the meeting, the Salt Lake County Commission violated the Open and Public Meetings Act. We reverse and remand.

BACKGROUND

¶ 2 In this case, no material differences in the facts were raised by the parties, only questions about the legal implications of those facts. We recite the facts accordingly.

¶ 3 The Salt Lake County Commission (“County Commission”) held a staff meeting on March 30, 1998. The County Commission customarily treated staff meetings as subject to the Utah Open and Public Meetings Act, and therefore the March 30, 1998 meeting was open to the public. At one point, however, the county attorney’s office suggested to the County Commission that part of the meeting be closed. The county attorney’s office wanted to discuss in private whether to oppose Riverton City’s petition to annex unincorporated county land that was pending before the Salt Lake County Boundary Commission (“Boundary Commission”). The county

commissioners voted unanimously to close the meeting, and the public, including the press, was asked to leave.

¶ 4 The county commissioners and their attorneys then met privately and discussed matters pertaining to Riverton City's annexation proposal. The minutes of this closed meeting reflect that legal counsel first explained to the Commissioners the factual and procedural circumstances surrounding the annexation proceeding and the possible results of the annexation petition, namely that islands of unincorporated county land would result. Next, counsel indicated that South Jordan City had protested Riverton City's petition. Finally, counsel outlined three possible courses of action: (1) the County Commission could send a letter to Riverton City listing technical problems with the petition, but refrain from appearing before the Boundary Commission; (2) the County Commission could appear, through counsel, before the Boundary Commission and address only technical problems with the petition; or (3) the County Commission could file a formal protest with the Boundary Commission opposing the annexation. Counsel recommended that the county not protest technicalities. The County Commission voted to appear before the Boundary Commission and to send a letter to Riverton City identifying technical problems. The meeting was then reopened to the public, and adjourned.

¶ 5 The complaint filed by plaintiff Kearns-Tribune Corporation ("Kearns-Tribune"), a newspaper publishing company, insists that the Salt Lake County Commission violated the Utah Open and Public Meetings Act (the "Act"), arguing that the exception to the Act permitting closed meetings for "strategy sessions to discuss pending or reasonably imminent litigation," Utah Code Ann. § 52-4-5(1)(a)(iii) (1998), is inapplicable to annexation or boundary protest proceedings. The County Commission answered the complaint and filed a motion for summary judgment, arguing that it appropriately closed the March 30, 1998

meeting to discuss the county's legal alternatives to Riverton City's annexation petition as pending or reasonably imminent litigation. Plaintiff responded by filing a response and a cross-motion for summary judgment.

¶ 6 The district court ruled in favor of Kearns-Tribune, indicating that the portion of the meeting that was closed by the County Commission should have been open to the public. The district court concluded that the County Commission did not conduct a strategy session, but instead discussed the underlying policy issues, which the court stated should be debated publicly. The Salt Lake County Commission appeals.

...

ANALYSIS

¶ 8 This case requires the interpretation and application of the Utah Open and Public Meetings Act. Section 52-4-3 of the Act specifies, "Every meeting is open to the public unless closed pursuant to Sections 52-4-4 and 52-4-5." Section 52-4-4 provides the procedure through which a meeting may be closed. It reads, in relevant part: "No closed meeting is allowed except as to matters exempted under Section 52-4-5... ." The provision under consideration in this case, section 52-4-5, sets forth seven purposes for which a meeting may be closed. Four of those purposes or circumstances permitting closure to the public of a meeting involve "strategy sessions," and all four require that a record of the closed proceedings be kept. Utah Code Ann. § 52-4-5(1)(a) (1998).

¶ 9 The types of strategy sessions allowing for lawful closure of an otherwise public meeting include those to discuss "collective bargaining," § 52-4-5(1)(a)(ii), "pending or reasonably imminent litigation," § 52-4-5(1)(a)(iii), "the purchase, exchange, or lease of real property where public discussion ... would disclose the ... value of the

property... or prevent the public body from completing the transaction on the best possible terms,” § 52-4-5(1)(a)(iv), and “the sale of real property where public discussion ... would disclose the ... value of the property... or prevent ... completing the transaction on the best possible terms; the public body had previously given public notice that the property would be offered for sale; and the terms of the sale are publicly disclosed before the public body approves the sale,” § 52-4-5(1)(a)(v).

¶ 10 We have not had occasion to review and distinguish the individual categories of closable meetings. The general nature and tone of the seven exceptions in section 52-4-5(1), however, suggest a clear legislative intent to ensure that the public’s business is done in full view of the public except in those specific instances where either the public, or a specific individual who is the subject of the meeting, may be significantly disadvantaged by premature public disclosure of sensitive information. The ultimate consequence of closed discussions about the price of real property, collective bargaining, and a public body’s approach to pending or reasonably imminent litigation eventually becomes public. Nevertheless, in each of these limited circumstances, the public’s general interest was thought by our legislature to be best served by allowing confidential discussions to precede the actions that would disclose the strategy.

¶ 11 In the case before us, the Salt Lake County Commission relies upon the exception for strategy sessions to discuss pending or reasonably imminent litigation. *See* § 52-4-5(1)(a)(iii). The Commission argues that it properly closed the meeting to the public because it discussed Riverton City’s petition before the Boundary Commission, and matters before the Boundary Commission are quasi-judicial and therefore qualify as “litigation” for purposes of the statute. Kearns-Tribune, to the contrary, argues that the Salt Lake County Commission improperly closed the

meeting because the topic discussed by the county commissioners, an annexation dispute, is a legislative or policy matter, and not pending or reasonably imminent litigation. The amici, the Society of Professional Journalists and several news organizations, also argue that the County Commission improperly closed the meeting because the county commissioners discussed policy, not litigation strategy. The amici further contend that the litigation exception must be strictly construed. The plain meaning of the term “litigation” implies court proceedings, they argue, and defining “litigation” to include agency proceedings, like an annexation proceeding, would result in the litigation exception eviscerating the general rule of openness intended by the Act.

¶ 12 Both parties and the amici refer us to our decision in *Common Cause of Utah v. Public Service Commission*, 598 P.2d 1312 (Utah 1979). *Common Cause* is not like this case, however. In *Common Cause*, we said that the legislatively-created Utah Public Service Commission performs a variety of duties, including those that fall distinctly within legislative, administrative, and adjudicative categories. *Id.* at 1314. In order to perform the adjudicative function of hearing and resolving disputes between competing and protesting utilities, the Public Service Commission must be able to deliberate and arrive at decisions in private. *Id.* We therefore concluded that the Public Service Commission’s adjudicative function was quasi-judicial, and that as a result the Open and Public Meetings Act did not apply when the Public Service Commission acts in its adjudicative role. *Id.* In concluding that the Public Service Commission’s deliberative sessions need not be open to the public, we balanced two competing interests:

[T]he obviously desirable objective of giving the public, ... the fullest possible degree of knowledge of the matter under consideration, and of

affording the opportunity to supply information and to engage in dialogue and the exchange of ideas]; against the interest that] after all of the evidence and information has been furnished to the Commission, the process of analysis, deliberation, and arriving at a decision, should be permitted to take place in an atmosphere of peace and privacy, ... so that the commissioners have the opportunity for a frank and unrestricted discussion and exchange of ideas in order that they can arrive at the best possible decision... .

Id. at 1313-14.

¶ 13 This case, however, is different from *Common Cause* because here we are not presented with the question of whether the Salt Lake County Commission closed the meeting to conduct a quasi-judicial deliberative function, but whether the County Commission's meeting could be closed under the Act to discuss strategy with respect to an entire adversarial process, the process of protesting an annexation petition before the county Boundary Commission. In other words, the question is whether the entire process before a county boundary commission, a process that involves both legislative and judicial aspects, constitutes litigation for purposes of the Open and Public Meetings Act, *from the perspective of the County Commission*. Moreover, we are not balancing interests as we did in *Common Cause*. We are interpreting legislation which, on the one hand expresses clear legislative intent that the deliberations of state agencies and political subdivisions be conducted openly, against an exception to that mandate that permits meetings to be closed for "strategy sessions to discuss pending or reasonably imminent litigation." § 52-4-5.

I. INTERPRETATION OF EXCEPTIONS TO THE UTAH OPEN AND PUBLIC MEETINGS ACT

¶ 14 When we interpret statutes, we “give effect to the legislative intent, as evidenced by the plain language, in light of the purpose the statute was meant to achieve.” [citations omitted]

¶ 15 The legislature expressly declared its purpose in enacting the Utah Open and Public Meetings Act in section 52-4-1, which reads, “It is the intent of the law that [the] actions [of the state, its agencies and political subdivisions,] be taken openly and that their deliberations be conducted openly.” Utah Code Ann. § 52-4-1 (1998). As a result, we interpret the Utah Open and Public Meetings Act broadly to further the declared statutory purpose of openness. Because we construe the Act broadly, it therefore follows that the exceptions be strictly construed. In this case we construe the litigation exception narrowly so as to give effect to the legislative intent. We further note the intent of the legislature to permit some meetings to be closed under certain circumstances. In carrying out the purpose of openness, the legislature could have chosen to make the open meetings requirement absolute. It chose, however, to exclude some meetings from the openness requirement.

¶ 16 The statutory provision in question permits an otherwise public meeting to be closed by a public body for “strategy sessions to discuss pending or reasonably imminent litigation.” Utah Code Ann. § 52-4-5(1)(a)(iii). In order for the Salt Lake County Commission not to have violated the Act by closing the March 30, 1998 meeting, the closed portion of the meeting (1) must have been a strategy session, (2) the strategy session must have been with respect to litigation, and (3) the litigation must have been pending or reasonably imminent.

A. Whether the Closed Portion of the Meeting was a Strategy Session

¶ 17 The trial court, after reviewing the minutes of the March 30, 1998 meeting in camera, concluded that the County Commission “did not conduct a strategy session, rather it discussed the underlying policy question of whether to take any action at all.” The district court stated that in order to close a meeting under section 52-4-5(1)(a)(iii), the focus of the public body’s discussion must be on litigation strategy, which could include a discussion of claims or defenses, strengths and weaknesses of the public body’s position, whether to hire outside counsel, settlement posture, etc.

¶ 18 We conclude that the closed portion of the meeting was a strategy session. In generally accepted terms, to strategize means to devise plans or means to achieve an end. The Salt Lake County Commission devised a plan or course of action and put it in motion during the private portion of the March 30, 1998 meeting. It is uncontested that counsel for the County Commission explained the factual and procedural circumstances leading to, and the possible results of, Riverton City’s annexation petition. Next, counsel informed the County Commission that South Jordan City had already protested Riverton City’s petition and offered three possible courses of action for the County Commission to take with respect to the petition: (1) send a letter to Riverton City listing technical problems with the petition, but refrain from appearing before the Boundary Commission; (2) appear, through counsel, before the Boundary Commission and address only technical problems with the petition; or (3) file a formal protest opposing the annexation. Moreover, counsel also suggested that one option regarding the protest of technicalities not be pursued; and at the end of the private session, the County Commission selected a course of action, agreeing to appear before the Boundary Commission and to send a

letter to Riverton City identifying technical problems. This closed session during which the County Commission was informed of the background of the Riverton City annexation petition, was advised on how to respond to the petition, was given a recommended course of action, and decided on a course of action, constitutes a strategy session.

B. Whether Disputes Before the Boundary Commission Constitute Litigation

¶ 19 Having concluded the closed portion of the meeting was a strategy session, the question becomes whether the meeting was a discussion of *litigation* strategy, or whether it was strategy with respect to a non-litigation process. Essentially, we must decide whether an annexation matter before the Boundary Commission is litigation.

¶ 20 The County Commission reasons that county boundary commission proceedings are pending or reasonably imminent litigation because annexation proceedings before a boundary commission include adverse parties, representation, notice, witnesses, evidence, exhibits, transcripts, appeals to the district court, etc., and are therefore quasi-judicial proceedings that qualify as litigation. Kearns-Tribune, on the other hand, argues that boundary commission proceedings are legislative proceedings, not litigation. The amici also assert that annexation proceedings are not litigation. They say that the plain meaning of the term “litigation” implies court proceedings, and defining “litigation” to include agency proceedings would result in the litigation exception swallowing the general rule of openness intended by the Open and Public Meetings Act. Furthermore, the amici cite *Bradshaw v. Beaver City*, 27 Utah 2d 135, 493 P.2d 643 (Utah 1972), and *Child v. City of Spanish Fork*, 538 P.2d 184 (Utah 1975), for the proposition that annexation proceedings are legislative functions and are therefore not litigation. They argue that even though boundary commission proceedings

may be similar to litigation procedurally, the substance of boundary commission decisions is a matter of public policy that should be debated publicly.

¶ 21 This court has clearly indicated that the determination of municipal boundaries is a legislative function, *see Sweetwater Props. v. Town of Alta*, 622 P.2d 1178, 1180 (Utah 1981); *Freeman v. Centerville City*, 600 P.2d 1003, 1005 (Utah 1979); *Child*, 538 P.2d at 186; *Bradshaw*, 27 Utah 2d at 137, 493 P.2d at 645, and we do not depart from this conclusion. More accurately, the determination of municipal boundaries is a function of the state legislature, as opposed to a local legislative body. This is because local governmental bodies, as political subdivisions of the state, have no inherent control over their own boundaries as they derive their powers from the State. *See, e.g., Wisconsin Pub. Intervenor v. Mortier*, 501 U.S. 597, 607-08, 111 S.Ct. 2476, 115 L.Ed.2d 532 (1991) (stating that it is well settled that local governmental units are created as agencies for exercising the State's governmental powers and that the governmental powers that may be entrusted to local governments are granted in the absolute discretion of the State); *see also 1 Antieau on Local Government Law* § 3.01 (2d ed.2000). Accordingly, we maintain that the determination of municipal boundaries, including land annexation, is a legislative function within the control of the state legislature.

¶ 22 Our legislature has delegated, to a certain extent, this authority over annexation and has enacted a statutory system that controls the annexation process. *See Utah Code Ann.* § 10-2-401 to -426 (1999 & Supp.2000). Because of this statutory scheme, local governments in our state are authorized to annex land, provided they follow the statutory guidelines. Moreover, as part of the statutory framework, the legislature also created a mechanism for the resolution of annexation disputes. This method of dispute resolution involves county boundary commissions.

¶ 23 The process of annexing an unincorporated area to a municipality generally begins with the filing of an annexation petition. *Compare* Utah Code Ann. § 10-2-402(2) (1999) (“Except as provided in Section 10-2-418, a municipality may not annex an unincorporated area unless a petition under Section 10-2-403 is filed requesting annexation”), *and* Utah Code Ann. § 10-2-403(1) (1999) (“Except as provided in Section 10-2-418, the process to annex an unincorporated area to a municipality is initiated by a petition as provided in this section”), *with* Utah Code Ann. § 10-2-418 (1999) (explaining how, notwithstanding subsection 10-2-402(2), a municipality may annex an area without an annexation petition if, for example, the area to be annexed consists of islands within or peninsulas contiguous to the municipality). The annexation petition is filed with the city recorder or town clerk of the proposed annexing municipality. § 10-2-403(2)(a). The legislative body of the proposed annexing municipality may either deny or accept the petition. § 10-2-405(1)(a). If the legislative body of the proposed municipality accepts the petition, the city recorder or town clerk for that municipality then determines if the petition is valid by deciding whether the petition meets the necessary requirements of subsections 10-2-403(2), (3), and (4). § 10-2-405(2)(a). If the petition passes muster, the city recorder or town clerk then certifies the petition and provides written notice of the certification to various persons and entities, including the county legislative body. § 10-2-405(2)(b)(i).

¶ 24 The legislative annexation scheme then permits the county legislative body to oppose an annexation petition by filing a protest to the petition, Utah Code Ann. § 10-2-407(1)(a)(i) (Supp.2000), thereby creating an adversarial process. The protest is filed with either the county boundary commission, § 10-2-407(2)(a)(i)(B)(I), or with the clerk of the county in which the area proposed for

annexation is located if the county has not yet created a boundary commission, § 10-2-407(2)(a)(i)(B)(II). Regardless of with whom the protest is filed, an existing boundary commission must review the annexation petition and protest, or one must be formed to do so. *See* Utah Code Ann. § 10-2-409 (1999) (explaining that at the time a protest is filed, a boundary commission may already exist because a county legislative body may create a boundary commission at any time, and that if a boundary commission does not exist at the time a protest is filed under section 10-2-407, the county legislative body must form a boundary commission within thirty days of the filing of the protest). In other words, the legislature provided that where an annexation petition is protested, each county must create, at some point, a boundary commission to resolve the dispute.

¶ 25 Once created, the role of a county boundary commission is to “hear and decide, according to the provisions of this part,¹ each protest filed under Section 10-2-407, with respect to any area within that county.” § 10-2-412. In essence the boundary commission is required to apply the rules promulgated by the legislature regarding annexation to factual circumstances before it. The boundary commission is instructed to issue a written decision on the proposed annexation. § 10-2-416(2). In this sense, the mandate to resolve disputes between adverse parties by applying rules of law to a particular set of facts is judicial in nature, meaning the boundary commission performs a judicial function.

¶ 26 However, in performing its role of deciding protests, the boundary commission generally retains a “feasibility consultant” to conduct a “feasibility study,” *see* § 10-2-413, and then holds a public hearing, *see* § 10-2-415. A feasibility

¹ Part 4 of title 10, chapter 2, of the Utah Code includes sections 401 to 426, the statutory provisions pertaining to annexation.

consultant is required to analyze and report on different factors pertaining to the area proposed for annexation including, among other things, population and population density, natural boundaries, current and five-year projections of demographics and economic base, projected growth over the next five years, projected revenues and costs of governmental services for the next five years, cultural and social aspects of the surrounding area, and the potential effect on school districts. § 10-2-413(3)(a). At the hearing, the feasibility consultant presents the results of the feasibility study, and the boundary commission takes public comment. As such, the boundary commission considers whether a proposed annexation is good policy. In this sense, the boundary commission acts in a legislative capacity. In sum, the boundary commission functions as both a legislative body and an adjudicative body.

¶ 27 Nevertheless, the role of a county boundary commission is, on the whole, essentially one of resolving disputes between competing parties, the petitioner and the protesting party. Thus, even though the boundary commission engages a consultant to gather information and present recommendations on matters of policy, the county boundary commission is mandated by the legislature to apply the law to the facts and information presented to it by the feasibility consultant, petitioner, and protester. *See* §§ 10-2-402, 403. For these reasons, we conclude that boundary commissions act as quasi-judicial bodies when considering annexation petitions and protests.

¶ 28 In addition, we are further persuaded that the process of considering annexation petitions and protests is litigation. First, decisions of a county boundary commission are subject to judicial review. “Review of a boundary commission decision may be sought in the district court...” § 10-2-417(1). Even though the district court reviews the decision of the boundary commission under an arbitrary and capricious standard, *see* § 10-2-417(2) & (3), the district

court is authorized to review whether the decision of the commission was contrary to the annexation laws set forth by the state legislature.

¶ 29 Plaintiff Kearns-Tribune also acknowledged before the district court that “a proceeding before a tribunal like the Utah State Tax Commission would qualify as ‘litigation’ for the purposes of the litigation exception.” Plaintiff argued before the district court, however, that proceedings before the Tax Commission were different from proceedings before the Salt Lake County Boundary Commission because, according to plaintiff, the Boundary Commission lacked rules of procedure like the Tax Commission. We are persuaded, however, that county boundary commission proceedings are analogous to contested proceedings before the State Tax Commission² and constitute litigation under the litigation exception to the Open and Public Meetings Act. The Salt Lake County Boundary Commission conducts its proceedings pursuant to rules of procedure and the proceedings before the Boundary Commission bear all of the necessary accouterments of litigation.

¶ 30 We conclude that while county boundary commissions perform both legislative and adjudicative functions, the method of resolving annexation disputes through county boundary commissions is quasi-judicial, and it constitutes litigation for purposes of the Utah Public and Open Meetings Act.

C. Whether the Dispute before the Boundary Commission was Pending or Reasonably Imminent

¶ 31 In the instant case, it is undisputed that the annexation proceeding discussed by the County Commission was

² We have previously indicated that the Tax Commission is a quasi-judicial body, *Salt Lake County v. Tax Comm’n*, 532 P.2d 680, 682 (Utah 1975), that is also subject to judicial review, *see* Utah Code Ann. §§ 59-1-601 to -610 (outlining the method of judicial review of tax commission decisions).

already pending before the Boundary Commission. As a result, the County Commission did not violate the Open and Public Meetings Act by closing the March 30, 1998 meeting to discuss whether to protest Riverton City's annexation petition before the Salt Lake County Boundary Commission. As a matter of law, the closed portion of the meeting constituted a strategy session to discuss pending or reasonably imminent litigation.

....

CONCLUSION

¶ 35 The district court erred in concluding that the Salt Lake County Commission violated the Utah Open and Public Meetings Act when it closed part of the March 30, 1998 meeting to discuss how to address an annexation petition filed by Riverton City with the Boundary Commission. The Act permits closed meetings for “strategy sessions to discuss pending or reasonably imminent litigation,” § 52-4-5(1)(a)(iii), and the County Commission conducted a strategy session in which it discussed courses of action to take regarding Riverton City's annexation petition then pending before the Salt Lake County Boundary Commission, proceedings that constitute litigation under the Act.

¶ 36 Accordingly, the trial court's order granting plaintiff's motion for summary judgment is reversed, and the award of attorney fees to plaintiff is vacated.

¶ 37 Chief Justice HOWE, Associate Chief Justice RUSSON, Justice DURHAM, and Judge TAYLOR concur in Justice WILKINS' opinion.

¶ 38 Having disqualified himself, Justice DURRANT does not participate herein; District Judge TAYLOR sat.

Shanks v. Dressel

540 F.3d 1082 (2008)

Charles A. Cleveland, Spokane, WA, for the plaintiffs-appellants.

James S. Craven, City Attorney, Milton G. Rowland (argued), Assistant City Attorney, Spokane, WA, for the Spokane and Spokane employee defendants-appellees.

Steven Schneider, Murphy, Bantz & Bury P.S., Spokane, WA, for the Dressel defendants-appellees.

FISHER, CIRCUIT JUDGE:

... .

The Mission Avenue Historic District (“District”) lies just north of Gonzaga University in the city of Spokane, Washington (“Spokane”). The District is listed on the National Register of Historic Places, a designation conferred by the Secretary of the Interior pursuant to the National Historic Preservation Act of 1966 (“NHPA”). *See* 16 U.S.C. § 470a(a). It is architecturally noteworthy because it includes a “significant collection of late 19th and early 20th century houses located on one of the city’s oldest landscaped boulevards.” On both sides of Mission Avenue are a “variety of Queen Anne, Four Square, Craftsman, and bungalow style houses that reflect the substantial architecture of the period and the original suburban character of the area.”

In March 2005, Spokane granted the Dressels a building permit to construct a duplex addition to 428 East Mission, a clapboard-sided, Four Square house located within the District and inventoried on the District’s nomination for the National Register of Historic Places. The Dressels demolished an existing garage on the property and erected a “box-like dormitory building[] ... attached” to the original house.

We summarize the municipal ordinances that Logan Neighborhood alleges have been violated. In 1981, the city amended the Spokane Municipal Code (“SMC”) to provide “criteria and procedures for the... management of historic landmarks.” A newly created Historic Landmarks Commission was charged with the “stewardship of historic and architecturally-significant properties ... to effect the recognition and preservation of such properties.” Two of its responsibilities are relevant here: reviewing applications for “certificates of appropriateness,” as provided by SMC 17D.040.200, and reviewing requests for “administrative special permits,” as provided by SMC 11.19.270. *See* SMC 17D.040.080(C)(1)(d), (f).

SMC 17D.040.200 requires owners to obtain a certificate of appropriateness for “work that affects the exterior ... of ... property within an historic district” or for “development or new construction within an historic district.” In evaluating an application for a certificate of appropriateness, the Historic Landmarks Commission “uses the Secretary of the Interior’s Standards for Rehabilitation and other general guidelines established and adopted by the commission.” SMC 17D.040.210(B). The owner of a property and the Commission may negotiate “different management standards for a specific piece of property,” subject to the approval of the Spokane City Council. *See* SMC 17D.040.270-.280.

SMC 11.19.270 provides for special “development standards” that apply “only to those historic districts for which ‘defining characteristics’ have been prepared by the landmarks commission, and those structures or properties listed in the National Register of Historic Places.” When these standards apply, proposed construction requires an “administrative special permit” from the director of planning services. The Historic Landmarks Commission “make[s] recommendations concerning the approval or denial of the special permit.” SMC 17D.040.080(C)(1)(f). It

“issues a certificate of appropriateness in support of approval” only if the construction is “of a character which is consistent with the defining characteristics of the historic district, or the U.S. Department of Interior standards in the case of structures or properties listed in the National Register but not located within an historic district.” SMC 11.19.270(D)(3)(b). If no action is taken within 35 days, the application is “deemed approved.” SMC 11.19.270(D)(3)(c). In any event, the Commission’s recommendation “will not otherwise preclude” the director of planning services from reaching a “contrary decision” upon “consideration of other factors of public interest.” *Id.*

The Dressels did not seek a certificate of appropriateness or an administrative special permit for their development of the 428 East Mission property, nor has Spokane taken any steps to require them to do so. Logan Neighborhood alleges that the Dressels’ construction has compromised the historic character of the Mission Avenue Historic District, resulting in harm to its “cultural, architectural, educational, recreational, aesthetic, historic, and economic interests.” Its complaint asserts three claims: (1) that Spokane violated 42 U.S.C. § 1983 and the Due Process Clause of the Fourteenth Amendment by not enforcing the Spokane Municipal Code; (2) that Spokane and the Dressels violated the National Historic Preservation Act; and (3) that Spokane and Spokane employees violated the Spokane Municipal Code. The district court granted Spokane’s motion for summary judgment and the Dressels’ motion to dismiss.

... .

We are ... not convinced by Logan Neighborhood’s argument that it has been deprived of procedural due process because it did not have fair notice and an opportunity to be heard before Spokane issued the Dressels a building permit. Logan Neighborhood claims a constitutionally protected property interest in the denial of

the permit unless the city “compl[ie]d with the Spokane Municipal Code applicable to historic districts.” It contends that the historic preservation provisions obliged Spokane to hold a public “design review taking into account the Mission Avenue Historic District” and complying with the certificate of appropriateness and administrative special permit requirements.¹ Even if Logan Neighborhood’s interpretation of the Spokane Municipal Code is correct – the parties dispute whether construction in the District is subject to those additional requirements – it has not stated a viable claim.

The claim is an unusual one; more typically, the plaintiff asserts that it personally was denied a permit without due process of law, not that someone else was granted a permit without the decisionmaker following the procedure established by state law. *See Gagliardi*, 18 F.3d at 191 (describing argument as “rather unique”); *see generally Dumas v. Kipp*, 90 F.3d 386, 392 (9th Cir.1996) (citing *O’Bannon v. Town Court Nursing Ctr.*, 447 U.S. 773, 100 S.Ct. 2467, 65 L.Ed.2d 506 (1980), and noting distinction between direct and indirect beneficiaries of government regulation). Assuming without deciding that a property owner *ever* could have a constitutionally protected interest in the proper application of zoning restrictions to neighboring properties, *see id.* at 192, we conclude that Logan Neighborhood’s procedural due process claim fails because Spokane’s historic preservation provisions do not “contain[] mandatory language” that significantly constrains the decisionmaker’s discretion. *Jacobson v. Hannifin*, 627 F.2d 177, 180 (9th Cir. 1980).

¹ The Spokane Municipal Code directs the “official responsible for processing the application” for “action which may require a certificate of appropriateness” – for example, a building permit – to request review by the Historic Landmarks Commission. *See* SMC 17D.040.240. The ordinance then provides for a public comment period, as well as a noticed public hearing. *See* SMC 17D.040.260(C)(1)(3).

We apply our conventional analytic framework. *See Crown Point I, LLC v. Intermountain Rural Elec. Ass'n*, 319 F.3d 1211, 1217 & n.4 (10th Cir.2003) (rejecting distinction between inquiry for “due process claims brought by a landowner who received an unfavorable decision on its *own* application for a particular land use” and inquiry for claim brought “challeng[ing] the decision ... to *grant* [a third-party’s] proposed land use”) (emphasis added); *see also Gagliardi*, 18 F.3d at 192-93. To obtain relief on a procedural due process claim, the plaintiff must establish the existence of “(1) a liberty or property interest protected by the Constitution; (2) a deprivation of the interest by the government; [and] (3) lack of process.” *Portman v. County of Santa Clara*, 995 F.2d 898, 904 (9th Cir.1993). The Due Process Clause forbids the governmental deprivation of substantive rights without constitutionally adequate procedure. *See Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 541, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985). Not every procedural requirement ordained by state law, however, creates a substantive property interest entitled to constitutional protection. *See Dorr v. County of Butte*, 795 F.2d 875, 877(9th Cir.1986); *see also Town of Castle Rock v. Gonzales*, 545 U.S. 748, 764, 125 S.Ct. 2796, 162 L.Ed.2d 658 (2005); *Hayward v. Henderson*, 623 F.2d 596, 597 (9th Cir. 1980). Rather, only those “rules or understandings” that support legitimate claims of entitlement give rise to protected property interests. *Bd. of Regents v. Roth*, 408 U.S. 564, 577, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972).

Logan Neighborhood does not have a legitimate claim of entitlement to the denial of the Dressels’ permit in accordance with the historic preservation provisions. Only if the governing statute compels a result “upon compliance with certain criteria, none of which involve the exercise of discretion by the reviewing body,” does it create a constitutionally protected property interest. *Thornton v. City of St. Helens*, 425 F.3d 1158, 1164-65 (9th Cir.2005); *see also*

Foss v. Nat'l Marine Fisheries Serv., 161 F.3d 584, 588 (9th Cir.1998) (holding that “specific, mandatory” and “carefully circumscribed” requirements constrained discretion enough to give rise to property interest). Conversely, “a statute that grants the reviewing body unfettered discretion to approve or deny an application does not create a property right.” *Thornton*, 425 F.3d at 1164. There is no protected property interest if “the reviewing body has discretion ... to impose licensing criteria of its own creation.” *Id.* at 1165.

We have not been directed to any statutory language that “impose[s] particularized standards ... that significantly constrain” Spokane’s discretion to issue the permits in question and would create a protected property interest in the permits’ denial. See *Fidelity Fin. Corp. v. Fed. Home Loan Bank of San Francisco*, 792 F.2d 1432, 1436 (9th Cir.1986). The Historic Landmarks Commission is to apply “defining characteristics ... prepared” and “general guidelines established and adopted” by that very same body. The Commission also has the freedom to negotiate “different management standards” for any particular piece of property. In deciding whether to approve an administrative special permit, the director of planning services is to apply “other factors of public interest” in an unspecified way. Moreover, the ordinance requires only that the ultimate decisionmaker “use[]” or “consider[]” those open-ended criteria; it does not *mandate* any outcome. Finally, we are mindful that, as a matter of Washington law, building codes are not generally construed to impose an affirmative duty upon local governments to initiate compliance actions, and Logan Neighborhood has not directed us to any special features of Spokane’s historic preservation ordinance. See *Atherton Condo. Apartment-Owners Ass’n Bd. of Dirs. v. Blume Dev. Co.*, 115 Wash.2d 506, 799 P.2d 250, 264-65 (1990); *Taylor v. Stevens County*, 111 Wash.2d 159, 759 P.2d 447, 450

(1988).² We conclude that the historic preservation provisions of the Spokane Municipal Code do not create a constitutionally cognizable property interest in the denial of a third-party's building permit.

From this it follows that Logan Neighborhood's procedural due process claim fails. Absent a substantive property interest in the outcome of procedure, Logan Neighborhood is not constitutionally entitled to insist on compliance with the procedure itself. "To hold otherwise would immediately incorporate virtually every regulation into the Constitution." *Clemente v. United States*, 766 F.2d 1358, 1364 (9th Cir.1985). The Tenth and Second Circuits rejected very similar claims in *Crown Point I* and *Gagliardi*, respectively. See *Crown Point I*, 319 F.3d at 1216 (plaintiffs alleged property interest in expectation that city would "follow its own mandatory notice and public hearing procedures as set forth in a city code, before depriving a [neighboring] landowner of the use and enjoyment of its property"); *Gagliardi*, 18 F.3d at 193 (plaintiffs "complain[ed] of a lack of notice and contend[ed] that certain affirmative actions were taken without compliance with the procedures established for municipal approval"). As is the case here, the ordinances in question did not significantly limit the municipal defendants' discretion, so no substantive property interest with respect to permitting decisions was thereby created. See *Crown Point I*, 319 F.3d at 1217; *Gagliardi*, 18 F.3d at 192-93. Given this, both courts concluded the plaintiffs could not state a claim for a violation of the Due Process Clause: "The deprivation of a procedural right to be heard, however, is not actionable when there is no protected right at stake." *Gagliardi*, 18 F.3d at 193; see also *Crown Point I*, 319 F.3d at 1217. We agree

² Cf. *Asche v. Bloomquist*, 132 Wash.App. 784, 133 P.3d 475, 479-82 (2006) (reasoning that plaintiffs "had a property right, created by the ... [view protection] zoning ordinance, in preventing [their neighbors] from building a structure over" a certain height without their approval).

with the Second and Tenth Circuits’ reasoning and hold that Logan Neighborhood does not have a legitimate claim of entitlement to the “design review” allegedly required by the Spokane Municipal Code.

Nothing we say here condones unlawful official action, and we express no view about the legality of Spokane’s permitting decision as a matter of state law. *See, e.g.*, Wash. Rev.Code § 36.70C.040 (Washington Land Use Petition Act); *Clemente*, 766 F.2d at 1365 (explaining that even when a plaintiff cannot “successfully claim a constitutionally cognizable property interest,” it is “well-settled ... that regulations validly prescribed by an agency are binding upon it”). But we cannot agree with Logan Neighborhood that it has established a violation of the federal Due Process Clause. *Cf. Carpinteria Valley Farms, Ltd. v. County of Santa Barbara*, 344 F.3d 822, 832 n. 5 (9th Cir.2003) (remarking that the courts of appeals do not sit as “super zoning boards or zoning boards of appeals”) (internal quotation marks omitted).

... .

AFFIRMED.

3.4. Discriminatory Zoning

Village of Willowbrook v. Olech, 528 U.S. 562

120 S.Ct. 1073 (2000).

PER CURIAM.

Respondent Grace Olech and her late husband Thaddeus asked petitioner Village of Willowbrook (Village) to connect their property to the municipal water supply. The Village at first conditioned the connection on the Olechs granting the Village a 33-foot easement. The Olechs objected, claiming that the Village only required a 15-foot easement from other property owners seeking access to the water supply. After a 3-month delay, the Village relented

and agreed to provide water service with only a 15-foot easement.

Olech sued the Village, claiming that the Village's demand of an additional 18-foot easement violated the Equal Protection Clause of the Fourteenth Amendment. Olech asserted that the 33-foot easement demand was "irrational and wholly arbitrary"; that the Village's demand was actually motivated by ill will resulting from the Olechs' previous filing of an unrelated, successful lawsuit against the Village; and that the Village acted either with the intent to deprive Olech of her rights or in reckless disregard of her rights. App. 10, 12.

The District Court dismissed the lawsuit pursuant to Federal Rule of Civil Procedure 12(b)(6) for failure to state a cognizable claim under the Equal Protection Clause. Relying on Circuit precedent, the Court of Appeals for the Seventh Circuit reversed, holding that a plaintiff can allege an equal protection violation by asserting that state action was motivated solely by a "spiteful effort to 'get' him for reasons wholly unrelated to any legitimate state objective." 160 F.3d 386, 387 (1998) (quoting *Esmail v. Macrane*, 53 F.3d 176, 180 (C.A.7 1995)). It determined that Olech's complaint sufficiently alleged such a claim. 160 F.3d, at 388. We granted certiorari to determine whether the Equal Protection Clause gives rise to a cause of action on behalf of a "class of one" where the plaintiff did not allege membership in a class or group.¹ 527 U.S. 1067, 120 S.Ct. 10, 144 L.Ed.2d 841 (1999).

¹ We note that the complaint in this case could be read to allege a class of five. In addition to Grace and Thaddeus Olech, their neighbors Rodney and Phyllis Zimmer and Howard Brinkman requested to be connected to the municipal water supply, and the Village initially demanded the 33-foot easement from all of them. The Zimmers and Mr. Brinkman were also involved in the previous, successful lawsuit against the Village, which allegedly created the ill will motivating the excessive easement demand. Whether the complaint alleges a class of one or of five is of no consequence because we conclude that the number of individuals in a class is immaterial for equal protection analysis.

Our cases have recognized successful equal protection claims brought by a “class of one,” where the plaintiff alleges that she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment. See *Sioux City Bridge Co. v. Dakota County*, 260 U.S. 441, 43 S.Ct. 190, 67 L.Ed. 340 (1923); *Allegheny Pittsburgh Coal Co. v. Commission of Webster Cty.*, 488 U.S. 336, 109 S.Ct. 633, 102 L.Ed.2d 688 (1989). In so doing, we have explained that “ ‘the purpose of the equal protection clause of the Fourteenth Amendment is to secure every person within the State’s jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents.’ ” *Sioux City Bridge Co.*, *supra*, at 445, 43 S.Ct. 190 (quoting *Sunday Lake Iron Co. v. Township of Wakefield*, 247 U.S. 350, 352, 38 S.Ct. 495, 62 L.Ed. 1154 (1918)).

That reasoning is applicable to this case. Olech’s complaint can fairly be construed as alleging that the Village intentionally demanded a 33-foot easement as a condition of connecting her property to the municipal water supply where the Village required only a 15-foot easement from other similarly situated property owners. See *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957). The complaint also alleged that the Village’s demand was “irrational and wholly arbitrary” and that the Village ultimately connected her property after receiving a clearly adequate 15-foot easement. These allegations, quite apart from the Village’s subjective motivation, are sufficient to state a claim for relief under traditional equal protection analysis. We therefore affirm the judgment of the Court of Appeals, but do not reach the alternative theory of “subjective ill will” relied on by that court.

It is so ordered.

JUSTICE BREYER, concurring in the result.

The Solicitor General and the village of Willowbrook have expressed concern lest we interpret the Equal Protection Clause in this case in a way that would transform many ordinary violations of city or state law into violations of the Constitution. It might be thought that a rule that looks only to an intentional difference in treatment and a lack of a rational basis for that different treatment would work such a transformation. Zoning decisions, for example, will often, perhaps almost always, treat one landowner differently from another, and one might claim that, when a city's zoning authority takes an action that fails to conform to a city zoning regulation, it lacks a "rational basis" for its action (at least if the regulation in question is reasonably clear).

This case, however, does not directly raise the question whether the simple and common instance of a faulty zoning decision would violate the Equal Protection Clause. That is because the Court of Appeals found that in this case respondent had alleged an extra factor as well—a factor that the Court of Appeals called "vindictive action," "illegitimate animus," or "ill will." 160 F.3d 386, 388 (C.A.7 1998). And, in that respect, the court said this case resembled *Esmail v. Macrane*, 53 F.3d 176 (C.A.7 1995), because the Esmail plaintiff had alleged that the municipality's differential treatment "was the result not of prosecutorial discretion honestly (even if ineptly—even if arbitrarily) exercised but of an illegitimate desire to 'get' him." 160 F.3d, at 388.

In my view, the presence of that added factor in this case is sufficient to minimize any concern about transforming run-of-the-mill zoning cases into cases of constitutional right. For this reason, along with the others mentioned by the Court, I concur in the result.

Anup Enquist v. Oregon Department of Agriculture

553 U.S. 591 (2008)

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

ROBERTS, C. J., delivered the opinion of the Court, in which SCALIA, KENNEDY, THOMAS, BREYER, and ALITO, JJ., joined. STEVENS, J., filed a dissenting opinion, in which SOUTER and GINSBURG, JJ., joined.

CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

The question in this case is whether a public employee can state a claim under the Equal Protection Clause by alleging that she was arbitrarily treated differently from other similarly situated employees, with no assertion that the different treatment was based on the employee’s membership in any particular class. We hold that such a “class-of-one” theory of equal protection has no place in the public employment context.

... .

Our equal protection jurisprudence has typically been concerned with governmental classifications that “affect some groups of citizens differently than others.” *McGowan v. Maryland*, 366 U. S. 420, 425 (1961). See, e.g., *Ross v. Moffitt*, 417 U. S. 600, 609 (1974) “‘Equal Protection’ ... emphasizes disparity in treatment by a State between classes of individuals whose situations are arguably indistinguishable”); *San Antonio Independent School Dist. v. Rodriguez*, 411 U. S. 1, 60 (1973) (Stewart, J., concurring) (“[T]he basic concern of the Equal Protection Clause is with state legislation whose purpose or effect is to create discrete and objectively identifiable classes”). Plaintiffs in such cases generally allege that they have been arbitrarily

classified as members of an “identifiable group.” *Personnel Administrator of Mass. v. Feeney*, 442 U. S. 256, 279 (1979).

Engquist correctly argues, however, that we recognized in *Olech* that an equal protection claim can in some circumstances be sustained even if the plaintiff has not alleged class-based discrimination, but instead claims that she has been irrationally singled out as a so-called “class of one.” In *Olech*, a property owner had asked the village of Willowbrook to connect her property to the municipal water supply. Although the village had required only a 15-foot easement from other property owners seeking access to the water supply, the village conditioned Olech’s connection on a grant of a 33-foot easement. Olech sued the village, claiming that the village’s requirement of an easement 18 feet longer than the norm violated the Equal Protection Clause. Although Olech had not alleged that the village had discriminated against her based on membership in an identifiable class, we held that her complaint stated a valid claim under the Equal Protection Clause because it alleged that she had “been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment.” 528 U. S., at 564 (citing *Sioux City Bridge Co. v. Dakota County*, 260 U. S. 441 (1923), and *Allegheny Pittsburgh Coal Co. v. Commission of Webster Cty.*, 488 U. S. 336 (1989)).

Recognition of the class-of-one theory of equal protection on the facts in *Olech* was not so much a departure from the principle that the Equal Protection Clause is concerned with arbitrary government classification, as it was an application of that principle. That case involved the government’s regulation of property. Similarly, the cases upon which the Court in *Olech* relied concerned property assessment and taxation schemes. See *Allegheny Pittsburgh*, *supra*; *Sioux City Bridge*, *supra*. We expect such legislative or regulatory classifications to apply “without respect to persons,” to borrow a phrase from the judicial oath. See 28

U. S. C. §453. As we explained long ago, the Fourteenth Amendment “requires that all persons subjected to ... legislation shall be treated alike, under like circumstances and conditions, both in the privileges conferred and in the liabilities imposed.” *Hayes v. Missouri*, 120 U. S. 68, 71-72 (1887). When those who appear similarly situated are nevertheless treated differently, the Equal Protection Clause requires at least a rational reason for the difference, to assure that all persons subject to legislation or regulation are indeed being “treated alike, under like circumstances and conditions.” Thus, when it appears that an individual is being singled out by the government, the specter of arbitrary classification is fairly raised, and the Equal Protection Clause requires a “rational basis for the difference in treatment.” *Olech*, 528 U. S., at 564.

What seems to have been significant in *Olech* and the cases on which it relied was the existence of a clear standard against which departures, even for a single plaintiff, could be readily assessed. There was no indication in *Olech* that the zoning board was exercising discretionary authority based on subjective, individualized determinations—at least not with regard to easement length, however typical such determinations may be as a general zoning matter. See *id.*, at 565 (BREYER, J., concurring in result). Rather, the complaint alleged that the board consistently required only a 15-foot easement, but subjected Olech to a 33-foot easement. This differential treatment raised a concern of arbitrary classification, and we therefore required that the State provide a rational basis for it.

In *Allegheny Pittsburgh*, cited by the *Olech* Court, the applicable standard was market value, but the county departed from that standard in basing some assessments on quite dated purchase prices. Again, there was no suggestion that the “dramatic differences in valuation” for similar property parcels, 488 U. S., at 341, were based on subjective considerations of the sort on which appraisers

often rely, see *id.*, at 338-342, 345. *Sioux City Bridge*, also cited in *Olech*, was the same sort of case, recognizing an equal protection claim when one taxpayer's property was assessed at 100 percent of its value, while all other property was assessed at 55 percent, without regard to articulated differences in the properties. See 260 U. S., at 445-447.

There are some forms of state action, however, which by their nature involve discretionary decisionmaking based on a vast array of subjective, individualized assessments. In such cases the rule that people should be "treated alike, under like circumstances and conditions" is not violated when one person is treated differently from others, because treating like individuals differently is an accepted consequence of the discretion granted. In such situations, allowing a challenge based on the arbitrary singling out of a particular person would undermine the very discretion that such state officials are entrusted to exercise.

Suppose, for example, that a traffic officer is stationed on a busy highway where people often drive above the speed limit, and there is no basis upon which to distinguish them. If the officer gives only one of those people a ticket, it may be good English to say that the officer has created a class of people that did not get speeding tickets, and a "class of one" that did. But assuming that it is in the nature of the particular government activity that not all speeders can be stopped and ticketed, complaining that one has been singled out for no reason does not invoke the fear of improper government classification. Such a complaint, rather, challenges the legitimacy of the underlying action itself—the decision to ticket speeders under such circumstances. Of course, an allegation that speeding tickets are given out on the basis of race or sex would state an equal protection claim, because such discriminatory classifications implicate basic equal protection concerns. But allowing an equal protection claim on the ground that a ticket was given to one person and not others, even if for

no discernible or articulable reason, would be incompatible with the discretion inherent in the challenged action. It is no proper challenge to what in its nature is a subjective, individualized decision that it was subjective and individualized.

This principle applies most clearly in the employment context, for employment decisions are quite often subjective and individualized, resting on a wide array of factors that are difficult to articulate and quantify... .

The judgment of the Court of Appeals is affirmed.

It is so ordered.

JUSTICE STEVENS, with whom JUSTICE SOUTER and JUSTICE GINSBURG join, dissenting.

... .

Our decision in *Village of Willowbrook v. Olech*, 528 U. S. 562 (2000) (per curiam), applied a rule that had been an accepted part of our equal protection jurisprudence for decades: Unless state action that intentionally singles out an individual, or a class of individuals, for adverse treatment is supported by some rational justification, it violates the Fourteenth Amendment's command that no State shall "deny to any person within its jurisdiction the equal protection of the laws."

Our opinion in *Olech* emphasized that the legal issue would have been the same whether the class consisted of one or five members, because "the number of individuals in a class is immaterial for equal protection analysis." *Id.*, at 564, n. The outcome of that case was not determined by the size of the disadvantaged class, and the majority does not—indeed cannot—dispute the settled principle that the Equal Protection Clause protects persons, not groups. See *ante*, at 4-5.

Nor did the outcome in *Olech* turn on the fact that the Village was discriminating against a property owner rather

than an employee. The majority does not dispute that the strictures of the Equal Protection Clause apply to the States in their role as employers as well as regulators. See *ante*, at 5. And indeed, we have made clear that “the Equal Protection and Due Process Clauses of the Fourteenth Amendment, and other provisions of the Federal Constitution afford protection to employees who serve the government as well as to those who are served by them, and §1983 provides a cause of action for all citizens injured by an abridgment of those protections.” *Collins v. Harker Heights*, 503 U. S. 115, 119-120 (1992).

Rather, the outcome of *Olech* was dictated solely by the absence of a rational basis for the discrimination. As we explained:

“Our cases have recognized successful equal protection claims brought by a ‘class of one,’ where the plaintiff alleges that she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment. In so doing, we have explained that ‘[t]he purpose of the equal protection clause of the Fourteenth Amendment is to secure every person within the State’s jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents.’

“[Olech’s] complaint also alleged that the Village’s demand was ‘irrational and wholly arbitrary’ These allegations, quite apart from the Village’s subjective motivation, are sufficient to state a claim for relief

under traditional equal protection analysis.”

528 U. S., at 564, 565 (some internal quotation marks and citations omitted).

Here, as in *Olech*, Engquist alleged that the State’s actions were arbitrary and irrational. In response, the State offered no explanation whatsoever for its decisions; it did not claim that Engquist was a subpar worker, or even that her personality made her a poor fit in the work-place or that her colleagues simply did not enjoy working with her. In fact, the State explicitly *disclaimed* the existence of any workplace or performance-based rationale.¹¹

In sum, there is no compelling reason to carve arbitrary public-employment decisions out of the well-established category of equal protection violations when the familiar rational review standard can sufficiently limit these claims to only wholly unjustified employment actions. Accordingly, I respectfully dissent.

¹¹ But for this disclaimer, the lower court could have dismissed the claim if it discerned “any reasonably conceivable state of facts that could provide a rational basis for the [State’s actions],” even one not put forth by the State. *FCC v. Beach Communications, Inc.*, 508 U. S. 307, 313 (1993). The disclaimer, however, negated that possibility.

3.5. Anticompetitive Zoning

City of Columbia et al. v. Omni Outdoor Advertising

Inc. 499 U.S. 365 (1991)

No. 89-1671.

Supreme Court of the United States.

Argued November 28, 1990.

Decided April 1, 1991.

CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE FOURTH CIRCUIT.

Joel I. Klein argued the cause for petitioners. With him on the briefs were *Paul M. Smith*, *Roy D. Bates*, *James S. Meggs*, *David W. Robinson II*, and *Heyward E. McDonald*.

A. Camden Lewis argued the cause for respondent. With him on the brief was *Randall M. Chastain*.¹

JUSTICE SCALIA delivered the opinion of the Court.

This case requires us to clarify the application of the Sherman Act to municipal governments and to the citizens who seek action from them.

I

Petitioner Columbia Outdoor Advertising, Inc. (COA), a South Carolina corporation, entered the billboard business in the city of Columbia, South Carolina (also a petitioner here), in the 1940's. By 1981 it controlled more than 95% of what has been conceded to be the relevant market. COA

¹ *Charles Rothfeld*, *Benna Ruth Solomon*, and *Peter J. Kalis* filed a brief for the National League of Cities et al. as *amici curiae* urging reversal.

Steven C. McCracken, *Maurice Baskin*, and *John R. Crews* filed a brief for Associated Builders and Contractors, Inc., as *amicus curiae* urging affirmance.

Eric M. Rubin and *Walter E. Diercks* filed a brief for the Outdoor Advertising Association of America, Inc., as *amicus curiae*.

was a local business owned by a family with deep roots in the community, and enjoyed close relations with the city's political leaders. The mayor and other members of the city council were personal friends of COA's majority owner, and the company and its officers occasionally contributed funds and free billboard space to their campaigns. According to respondent Omni Outdoor Advertising, Inc., these beneficences were part of a "longstanding" "secret anticompetitive agreement" whereby "the City and COA would each use their [*sic*] respective power and resources to protect ... COA's monopoly position," in return for which "City Council members received advantages made possible by COA's monopoly." Brief for Respondent 12, 16.

In 1981, Omni, a Georgia corporation, began erecting billboards in and around the city. COA responded to this competition in several ways. First, it redoubled its own billboard construction efforts and modernized its existing stock. Second—according to Omni—it took a number of anticompetitive private actions, such as offering artificially low rates, spreading untrue and malicious rumors about Omni, and attempting to induce Omni's customers to break their contracts. Finally (and this is what gives rise to the issue we address today), COA executives met with city officials to seek the enactment of zoning ordinances that would restrict billboard construction. COA was not alone in urging this course; concerned about the city's recent explosion of billboards, a number of citizens, including writers of articles and editorials in local newspapers, advocated restrictions.

In the spring of 1982, the city council passed an ordinance requiring the council's approval for every billboard constructed in downtown Columbia. This was later amended to impose a 180-day moratorium on the construction of billboards throughout the city, except as specifically authorized by the council. A state court invalidated this ordinance on the ground that its conferral

of unconstrained discretion upon the city council violated both the South Carolina and Federal Constitutions. The city then requested the State's regional planning authority to conduct a comprehensive analysis of the local billboard situation as a basis for developing a final, constitutionally valid, ordinance. In September 1982, after a series of public hearings and numerous meetings involving city officials, Omni, and COA (in all of which, according to Omni, positions contrary to COA's were not genuinely considered), the city council passed a new ordinance restricting the size, location, and spacing of billboards. These restrictions, particularly those on spacing, obviously benefited COA, which already had its billboards in place; they severely hindered Omni's ability to compete.

In November 1982, Omni filed suit against COA and the city in Federal District Court, charging that they had violated §§ 1 and 2 of the Sherman Act, 26 Stat. 209, as amended, 15 U. S. C. §§ 1, 2,² as well as South Carolina's Unfair Trade Practices Act, S. C. Code Ann. § 39-5-140 (1976). Omni contended, in particular, that the city's billboard ordinances were the result of an anticompetitive conspiracy between city officials and COA that stripped both parties of any immunity they might otherwise enjoy from the federal antitrust laws. In January 1986, after more than two weeks of trial, a jury returned general verdicts against the city and COA on both the federal and state claims. It awarded damages, before trebling, of \$600,000 on the § 1 Sherman Act claim, and \$400,000 on the § 2 claim.³

² Section 1 provides in pertinent part: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." 15 U. S. C. § 1.

Section 2 provides in pertinent part: "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony." 15 U. S. C. § 2.

³ The monetary damages in this case were assessed entirely against COA, the District Court having ruled that the city was immunized by the Local Government

The jury also answered two special interrogatories, finding specifically that the city and COA had conspired both to restrain trade and to monopolize the market. Petitioners moved for judgment notwithstanding the verdict, contending among other things that their activities were outside the scope of the federal antitrust laws. In November 1988, the District Court granted the motion.

A divided panel of the United States Court of Appeals for the Fourth Circuit reversed the judgment of the District Court and reinstated the jury verdict on all counts. 891 F. 2d 1127 (1989). We granted certiorari, 496 U. S. 935 (1990).

II

In the landmark case of *Parker v. Brown*, 317 U. S. 341 (1943), we rejected the contention that a program restricting the marketing of privately produced raisins, adopted pursuant to California’s Agricultural Prorate Act, violated the Sherman Act. Relying on principles of federalism and state sovereignty, we held that the Sherman Act did not apply to anticompetitive restraints imposed by the States “as an act of government.” *Id.*, at 352.

Since *Parker* emphasized the role of sovereign *States* in a federal system, it was initially unclear whether the governmental actions of political subdivisions enjoyed similar protection. In recent years, we have held that *Parker* immunity does not apply directly to local governments, see *Hallie v. Eau Claire*, 471 U. S. 34, 38 (1985); *Community*

Antitrust Act of 1984, 98 Stat. 2750, as amended, 15 U. S. C. §§ 34-36, which exempts local governments from paying damages for violations of the federal antitrust laws. Although enacted in 1984, after the events at issue in this case, the Act specifically provides that it may be applied retroactively if “the defendant establishes and the court determines, in light of all the circumstances ... that it would be inequitable not to apply this subsection to a pending case.” 15 U. S. C. § 35(b). The District Court determined that it would be, and the Court of Appeals refused to disturb that judgment. Respondent has not challenged that determination in this Court, and we express no view on the matter.

Communications Co. v. Boulder, 455 U. S. 40, 50-51 (1982); *Lafayette v. Louisiana Power & Light Co.*, 435 U. S. 389, 412-413 (1978) (plurality opinion). We have recognized, however, that a municipality's restriction of competition may sometimes be an authorized implementation of state policy, and have accorded *Parker* immunity where that is the case.

The South Carolina statutes under which the city acted in the present case authorize municipalities to regulate the use of land and the construction of buildings and other structures within their boundaries.⁴ It is undisputed that, as a matter of state law, these statutes authorize the city to regulate the size, location, and spacing of billboards. It could be argued, however, that a municipality acts beyond its delegated authority, for *Parker* purposes, whenever the nature of its regulation is substantively or even procedurally defective. On such an analysis it could be contended, for

⁴ S. C. Code Ann. § 5-23-10 (1976) ("Building and zoning regulations authorized") provides that "[f]or the purpose of promoting health, safety, morals or the general welfare of the community, the legislative body of cities and incorporated towns may by ordinance regulate and restrict the height, number of stories and size of buildings and other structures."

Section 5-23-20 ("Division of municipality into districts") provides that "[f]or any or all of such purposes the local legislative body may divide the municipality into districts of such number, shape and area as may be deemed best suited to carry out the purposes of this article. Within such districts it may regulate and restrict the erection, construction, reconstruction, alteration, repair or use of buildings, structures or land."

Section 6-7-710 ("Grant of power for zoning") provides that "[f]or the purposes of guiding development in accordance with existing and future needs and in order to protect, promote and improve the public health, safety, morals, convenience, order, appearance, prosperity, and general welfare, the governing authorities of municipalities and counties may, in accordance with the conditions and procedures specified in this chapter, regulate the location, height, bulk, number of stories and size of buildings and other structures... . The regulations shall ... be designed to lessen congestion in the streets; to secure safety from fire, panic, and other dangers, to promote the public health and the general welfare, to provide adequate light and air; to prevent the overcrowding of land; to avoid undue concentration of population; to protect scenic areas; to facilitate the adequate provision of transportation, water, sewage, schools, parks, and other public requirements."

example, that the city's regulation in the present case was not "authorized" by S. C. Code Ann. § 5-23-10 (1976), see n. 3, *supra*, if it was not, as that statute requires, adopted "for the purpose of promoting health, safety, morals or the general welfare of the community." As scholarly commentary has noted, such an expansive interpretation of the *Parker*-defense authorization requirement would have unacceptable consequences.

"To be sure, state law 'authorizes' only agency decisions that are substantively and procedurally correct. Errors of fact, law, or judgment by the agency are not 'authorized.' Erroneous acts or decisions are subject to reversal by superior tribunals because unauthorized. If the antitrust court demands unqualified 'authority' in this sense, it inevitably becomes the standard reviewer not only of federal agency activity but also of state and local activity whenever it is alleged that the governmental body, though possessing the power to engage in the challenged conduct, has actually exercised its power in a manner not authorized by state law. We should not lightly assume that *Lafayette's* authorization requirement dictates transformation of state administrative review into a federal antitrust job. Yet that would be the consequence of making antitrust liability depend on an indiscriminating and mechanical demand for 'authority' in the full administrative law sense." P. Areeda & H. Hovenkamp, *Antitrust Law* ¶ 212.3b, p. 145 (Supp. 1989).

We agree with that assessment, and believe that in order to prevent *Parker* from undermining the very interests of federalism it is designed to protect, it is necessary to adopt a concept of authority broader than what is applied to determine the legality of the municipality's action under state law. We have adopted an approach that is similar in principle, though not necessarily in precise application, elsewhere. See *Stump v. Sparkman*, 435 U. S. 349 (1978). It suffices for the present to conclude that here no more is needed to establish, for *Parker* purposes, the city's authority to regulate than its unquestioned zoning power over the size, location, and spacing of billboards.

Besides authority to regulate, however, the *Parker* defense also requires authority to suppress competition—more specifically, “clear articulation of a state policy to authorize anticompetitive conduct” by the municipality in connection with its regulation. *Hallie*, 471 U. S., at 40 (internal quotation omitted). We have rejected the contention that this requirement can be met only if the delegating statute explicitly permits the displacement of competition, see *id.*, at 41-42. It is enough, we have held, if suppression of competition is the “foreseeable result” of what the statute authorizes, *id.*, at 42. That condition is amply met here. The very purpose of zoning regulation is to displace unfettered business freedom in a manner that regularly has the effect of preventing normal acts of competition, particularly on the part of new entrants. A municipal ordinance restricting the size, location, and spacing of billboards (surely a common form of zoning) necessarily protects existing billboards against some competition from newcomers.⁵

⁵ The dissent contends that, in order successfully to delegate its *Parker* immunity to a municipality, a State must expressly authorize the municipality to engage (1) in specifically “economic regulation,” *post*, at 388, (2) of a specific industry, *post*, at 391. These dual specificities are without support in our precedents, for the good reason that they defy rational implementation.

The Court of Appeals was therefore correct in its conclusion that the city's restriction of billboard construction was prima facie entitled to *Parker* immunity. The Court of Appeals upheld the jury verdict, however, by invoking a "conspiracy" exception to *Parker* that has been recognized by several Courts of Appeals. See, e. g., *Whitworth v. Perkins*, 559 F.2d 378 (CA5 1977), vacated, 435 U. S. 992, aff'd on rehearing, 576 F.2d 696 (1978), cert. denied, 440 U. S. 911 (1979). That exception is thought to be supported by two of our statements in *Parker*: "[W]e have no question of the state or its municipality becoming a *participant in a private agreement* or combination by others for restraint of trade, cf. *Union Pacific R. Co. v. United States*, 313 U. S. 450." *Parker*, 317 U. S., at 351-352 (emphasis added). "The state in adopting and enforcing the prorate program made no contract or agreement *and entered into no conspiracy in restraint of trade or to establish monopoly* but, as sovereign,

If, by authority to engage in specifically "economic" regulation, the dissent means authority specifically to regulate competition, we squarely rejected that in *Hallie v. Eau Claire*, 471 U. S. 34 (1985), as discussed in text. Seemingly, however, the dissent means only that the state authorization must specify that sort of regulation whereunder "decisions about prices and output are made not by individual firms, but rather by a public body." *Post*, at 387. But why is not the restriction of billboards in a city a restriction on the "output" of the local billboard industry? It assuredly *is*—and that is indeed the very gravamen of Omni's complaint. It seems to us that the dissent's concession that "it is often difficult to differentiate economic regulation from municipal regulation of health, safety, and welfare," *post*, at 393, is a gross understatement. Loose talk about a "regulated industry" may suffice for what the dissent calls "antitrust parlance," *post*, at 387, but it is not a definition upon which the criminal liability of public officials ought to depend.

Under the dissent's second requirement for a valid delegation of *Parker* immunity—that the authorization to regulate pertain to a specific industry—the problem with the South Carolina statute is that it used the generic term "structures," instead of conferring its regulatory authority industry-by-industry (presumably "billboards," "movie houses," "mobile homes," "TV antennas," and every other conceivable object of zoning regulation that can be the subject of a relevant "market" for purposes of antitrust analysis). To describe this is to refute it. Our precedents not only fail to suggest, but positively reject, such an approach. "[T]he municipality need not 'be able to point to a specific, detailed legislative authorization' in order to assert a successful *Parker* defense to an antitrust suit." *Hallie, supra*, at 39 (quoting *Lafayette v. Louisiana Power & Light Co.*, 435 U. S. 389, 415 (1978)).

imposed the restraint as an act of government which the Sherman Act did not undertake to prohibit.” *Id.*, at 352 (emphasis added). *Parker* does not apply, according to the Fourth Circuit, “where politicians or political entities are involved as conspirators” with private actors in the restraint of trade. 891 F. 2d, at 1134.

There is no such conspiracy exception. The rationale of *Parker* was that, in light of our national commitment to federalism, the general language of the Sherman Act should not be interpreted to prohibit anticompetitive actions by the States in their governmental capacities as sovereign regulators. The sentences from the opinion quoted above simply clarify that this immunity does not necessarily obtain where the State acts not in a regulatory capacity but as a commercial participant in a given market. That is evident from the citation of *Union Pacific R. Co. v. United States*, 313 U. S. 450 (1941), which held unlawful under the Elkins Act certain rebates and concessions made by Kansas City, Kansas, in its capacity as the owner and operator of a wholesale produce market that was integrated with railroad facilities. These sentences should not be read to suggest the general proposition that even governmental *regulatory* action may be deemed private—and therefore subject to antitrust liability—when it is taken pursuant to a conspiracy with private parties. The impracticality of such a principle is evident if, for purposes of the exception, “conspiracy” means nothing more than an agreement to impose the regulation in question. Since it is both inevitable and desirable that public officials often agree to do what one or another group of private citizens urges upon them, such an exception would virtually swallow up the *Parker* rule: All anticompetitive regulation would be vulnerable to a “conspiracy” charge. See Areeda & Hovenkamp, *supra*, ¶

203.3b, at 34, and n. 1; Elhauge, *The Scope of Antitrust Process*, 104 Harv. L. Rev. 667, 704-705 (1991).⁶

Omni suggests, however, that “conspiracy” might be limited to instances of governmental “corruption,” defined variously as “abandonment of public responsibilities to private interests,” Brief for Respondent 42, “corrupt or bad faith decisions,” *id.*, at 44, and “selfish or corrupt motives,”

⁶ The dissent is confident that a jury composed of citizens of the vicinage will be able to tell the difference between “independent municipal action and action taken for the sole purpose of carrying out an anticompetitive agreement for the private party.” *Post*, at 395-396. No doubt. But those are merely the polar extremes, which like the geographic poles will rarely be seen by jurors of the vicinage. Ordinarily the allegation will merely be (and the dissent says this is enough) that the municipal action was not prompted “*exclusively* by a concern for the general public interest,” *post*, at 387 (emphasis added). Thus, the real question is whether a jury can tell the difference—whether *Solomon* can tell the difference—between municipal-action-not-entirely-independent-because-based-partly-on-agreement-with-private-parties that is *lawful* and municipal-action-not-entirely-independent-because-based-partly-on-agreement-with-private-parties that is *unlawful*. The dissent does not tell us how to put this question coherently, much less how to answer it intelligently. “*Independent municipal action*” is unobjectionable, “action taken for the *sole* purpose of carrying out an anticompetitive agreement for the private party” is unlawful, and everything else (that is, the known world between the two poles) is unaddressed.

The dissent contends, moreover, that “[t]he instructions in this case, fairly read, told the jury that the plaintiff should not prevail *unless* the ordinance was enacted for the sole purpose of interfering with access to the market.” *Post*, at 396, n. 9 (emphasis added). That is not so. The sum and substance of the jury’s instructions here were that anticompetitive municipal action is not lawful when taken as part of a conspiracy, and that a conspiracy is “an agreement between two or more persons to violate the law, or to accomplish an otherwise lawful result in an unlawful manner.” App. 79. Although the District Court explained that “[i]t is perfectly lawful for any and all persons to petition their government,” the court immediately added, “but they may not do so as a part or as the object of a conspiracy.” *Ibid.* These instructions, then, are entirely circular: An anticompetitive agreement becomes unlawful if it is part of a conspiracy, and a conspiracy is an agreement to do something unlawful. The District Court’s observation, upon which the dissent places so much weight, that “if by the evidence you find that [COA] procured and brought about the passage of ordinances solely for the purpose of hindering, delaying or otherwise interfering with the access of [Omni] to the marketing area involved in this case ... and thereby conspired, then, of course, their conduct would not be excused under the antitrust laws,” *id.*, at 81, see *post*, at 387, n. 2, is in no way tantamount to an instruction that this was the *only* theory upon which the jury could find an immunity-destroying “conspiracy.”

ibid. Ultimately, Omni asks us not to define “corruption” at all, but simply to leave that task to the jury: “[a]t bottom, however, it was within the jury’s province to determine what constituted corruption of the governmental process in their community.” *Id.*, at 43. Omni’s *amicus* eschews this emphasis on “corruption,” instead urging us to define the conspiracy exception as encompassing any governmental act “not in the public interest.” Brief for Associated Builders and Contractors, Inc., as *Amicus Curiae* 5.

A conspiracy exception narrowed along such vague lines is similarly impractical. Few governmental actions are immune from the charge that they are “not in the public interest” or in some sense “corrupt.” The California marketing scheme at issue in *Parker* itself, for example, can readily be viewed as the result of a “conspiracy” to put the “private” interest of the State’s raisin growers above the “public” interest of the State’s consumers. The fact is that virtually all regulation benefits some segments of the society and harms others; and that it is not universally considered contrary to the public good if the net economic loss to the losers exceeds the net economic gain to the winners. *Parker* was not written in ignorance of the reality that determination of “the public interest” in the manifold areas of government regulation entails not merely economic and mathematical analysis but value judgment, and it was not meant to shift that judgment from elected officials to judges and juries. If the city of Columbia’s decision to regulate what one local newspaper called “billboard jungles,” *Columbia Record*, May 21, 1982, p. 14-A, col. 1; App. in No. 88-1388 (CA4), p. 3743, is made subject to *ex post facto* judicial assessment of “the public interest,” with personal liability of city officials a possible consequence, we will have gone far to “compromise the States’ ability to regulate their domestic commerce,” *Southern Motor Carriers Rate Conference, Inc. v. United States*, 471 U. S. 48, 56 (1985). The situation would not be better, but

arguably even worse, if the courts were to apply a subjective test: not whether the action was in the public interest, but whether the officials involved thought it to be so. This would require the sort of deconstruction of the governmental process and probing of the official “intent” that we have consistently sought to avoid.⁷ “[W]here the action complained of ... was that of the State itself, the action is exempt from antitrust liability regardless of the State’s motives in taking the action.” *Hoover v. Ronwin*, 466 U. S. 558, 579-580 (1984). See also *Llewellyn v. Crothers*, 765 F. 2d 769, 774 (CA9 1985) (Kennedy, J.).

The foregoing approach to establishing a “conspiracy” exception at least seeks (however impractically) to draw the line of impermissible action in a manner relevant to the purposes of the Sherman Act and of *Parker*: prohibiting the restriction of competition for private gain but permitting the restriction of competition in the public interest. Another approach is possible, which has the virtue of practicality but the vice of being unrelated to those purposes. That is the approach which would consider *Parker* inapplicable only if, in connection with the governmental action in question, bribery or some other violation of state or federal law has been established. Such unlawful activity has no necessary relationship to whether the governmental action is in the public interest. A mayor is guilty of accepting a bribe even if he would and should have taken, in the public interest, the same action for which the bribe was paid. (That is frequently the defense asserted to a criminal bribery charge—and though it is never valid in law, see, e. g., *United States v. Jannotti*, 673 F. 2d 578, 601 (CA3) (en banc), cert. denied, 457 U. S. 1106 (1982), it is

⁷ We have proceeded otherwise only in the “very limited and well-defined class of cases where the very nature of the constitutional question requires [this] inquiry.” *United States v. O’Brien*, 391 U. S. 367, 383, n. 30 (1968) (bill of attainder). See also *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U. S. 252, 268, n. 18 (1977) (race-based motivation).

often plausible in fact.) When, moreover, the regulatory body is not a single individual but a state legislature or city council, there is even less reason to believe that violation of the law (by bribing a minority of the decisionmakers) establishes that the regulation has no valid public purpose. Cf. *Fletcher v. Peck*, 6 Cranch 87, 130 (1810). To use unlawful political influence as the test of legality of state regulation undoubtedly vindicates (in a rather blunt way) principles of good government. But the statute we are construing is not directed to that end. Congress has passed other laws aimed at combating corruption in state and local governments. See, e. g., 18 U. S. C. § 1951 (Hobbs Act). “Insofar as [the Sherman Act] sets up a code of ethics at all, it is a code that condemns trade restraints, not political activity.” *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U. S. 127, 140 (1961).

For these reasons, we reaffirm our rejection of any interpretation of the Sherman Act that would allow plaintiffs to look behind the actions of state sovereigns to base their claims on “perceived conspiracies to restrain trade,” *Hoover*, 466 U. S., at 580. We reiterate that, with the possible market participant exception, *any* action that qualifies as state action is “*ipso facto* ... exempt from the operation of the antitrust laws,” *id.*, at 568. This does not mean, of course, that the States may exempt *private* action from the scope of the Sherman Act; we in no way qualify the well-established principle that “a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful.” *Parker*, 317 U. S., at 351 (citing *Northern Securities Co. v. United States*, 193 U. S. 197, 332, 344-347 (1904)). See also *Schwegmann Brothers v. Calvert Distillers Corp.*, 341 U. S. 384 (1951).

III

While *Parker* recognized the States' freedom to engage in anticompetitive regulation, it did not purport to immunize from antitrust liability the private parties who urge them to engage in anticompetitive regulation. However, it is obviously peculiar in a democracy, and perhaps in derogation of the constitutional right "to petition the Government for a redress of grievances," U. S. Const., Amdt. 1, to establish a category of lawful state action that citizens are not permitted to urge. Thus, beginning with *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, *supra*, we have developed a corollary to *Parker*: The federal antitrust laws also do not regulate the conduct of private individuals in seeking anticompetitive action from the government. This doctrine, like *Parker*, rests ultimately upon a recognition that the antitrust laws, "tailored as they are for the business world, are not at all appropriate for application in the political arena." *Noerr, supra*, at 141. That a private party's political motives are selfish is irrelevant: "Noerr shields from the Sherman Act a concerted effort to influence public officials regardless of intent or purpose." *Mine Workers v. Pennington*, 381 U. S. 657, 670 (1965).

Noerr recognized, however, what has come to be known as the "sham" exception to its rule: "There may be situations in which a publicity campaign, ostensibly directed toward influencing governmental action, is a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor and the application of the Sherman Act would be justified." 365 U. S., at 144. The Court of Appeals concluded that the jury in this case could have found that COA's activities on behalf of the restrictive billboard ordinances fell within this exception. In our view that was error.

The "sham" exception to *Noerr* encompasses situations in which persons use the governmental *process*—as opposed to the *outcome* of that process—as an anticompetitive weapon. A classic example is the filing of frivolous objections to the

license application of a competitor, with no expectation of achieving denial of the license but simply in order to impose expense and delay. See *California Motor Transport Co. v. Trucking Unlimited*, 404 U. S. 508 (1972). A “sham” situation involves a defendant whose activities are “not genuinely aimed at procuring favorable government action” at all, *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U. S. 496, 500, n. 4 (1988), not one “who ‘genuinely seeks to achieve his governmental result, but does so *through improper means*,’” *id.*, at 508, n. 10 (quoting *Sessions Tank Liners, Inc. v. Joor Mfg., Inc.*, 827 F. 2d 458, 465, n. 5 (CA9 1987)).

Neither of the Court of Appeals’ theories for application of the “sham” exception to the facts of the present case is sound. The court reasoned, first, that the jury could have concluded that COA’s interaction with city officials “was actually nothing more than an attempt to interfere directly with the business relations [*sic*] of a competitor.” 891 F. 2d, at 1139 (quoting *Noerr, supra*, at 144). This analysis relies upon language from *Noerr*, but ignores the import of the critical word “directly.” Although COA indisputably set out to disrupt Omni’s business relationships, it sought to do so not through the very process of lobbying, or of causing the city council to consider zoning measures, but rather through the ultimate *product* of that lobbying and consideration, viz., the zoning ordinances. The Court of Appeals’ second theory was that the jury could have found “that COA’s purposes were to delay Omni’s entry into the market and even to deny it a meaningful access to the appropriate city administrative and legislative fora.” 891 F. 2d, at 1139. But the purpose of delaying a competitor’s entry into the market does not render lobbying activity a “sham,” unless (as no evidence suggested was true here) the delay is sought to be achieved only by the lobbying process itself, and not by the governmental action that the lobbying seeks. “If *Noerr* teaches anything it is that an intent to restrain trade as a *result* of the government action sought ...

does not foreclose protection.” Sullivan, Developments in the Noerr Doctrine, 56 Antitrust L. J. 361, 362 (1987). As for “deny[ing] ... meaningful access to the appropriate city administrative and legislative fora,” that may render the manner of lobbying improper or even unlawful, but does not necessarily render it a “sham.” We did hold in *California Motor Transport, supra*, that a conspiracy among private parties to monopolize trade by excluding a competitor from participation in the regulatory process did not enjoy *Noerr* protection. But *California Motor Transport* involved a context in which the conspirators’ participation in the governmental process was itself claimed to be a “sham,” employed as a means of imposing cost and delay. (“It is alleged that petitioners ‘instituted the proceedings and actions ... with or without probable cause, and regardless of the merits of the cases.’” 404 U. S., at 512.) The holding of the case is limited to that situation. To extend it to a context in which the regulatory process is being invoked genuinely, and not in a “sham” fashion, would produce precisely that conversion of antitrust law into regulation of the political process that we have sought to avoid. Any lobbyist or applicant, in addition to getting himself heard, seeks by procedural and other means to get his opponent ignored. Policing the legitimate boundaries of such defensive strategies, when they are conducted in the context of a genuine attempt to influence governmental action, is not the role of the Sherman Act. In the present case, of course, any denial to Omni of “meaningful access to the appropriate city administrative and legislative fora” was achieved by COA in the course of an attempt to influence governmental action that, far from being a “sham,” was if anything more in earnest than it should have been. If the denial was wrongful there may be other remedies, but as for the Sherman Act, the *Noerr* exemption applies.

Omni urges that if, as we have concluded, the “sham” exception is inapplicable, we should use this case to recognize another exception to *Noerr* immunity—a “conspiracy” exception, which would apply when government officials conspire with a private party to employ government action as a means of stifling competition. We have left open the possibility of such an exception, see, e. g., *Allied Tube, supra*, at 502, n. 7, as have a number of Courts of Appeals. See, e. g., *Oberndorf v. Denver*, 900 F. 2d 1434, 1440 (CA10 1990); *First American Title Co. of South Dakota v. South Dakota Land Title Assn.*, 714 F. 2d 1439, 1446, n. 6 (CA8 1983), cert. denied, 464 U. S. 1042 (1984). At least one Court of Appeals has affirmed the existence of such an exception in dicta, see *Duke & Co. v. Foerster*, 521 F. 2d 1277, 1282 (CA3 1975), and the Fifth Circuit has adopted it as holding, see *Affiliated Capital Corp. v. Houston*, 735 F. 2d 1555, 1566-1568 (1984) (en banc).

Giving full consideration to this matter for the first time, we conclude that a “conspiracy” exception to *Noerr* must be rejected. We need not describe our reasons at length, since they are largely the same as those set forth in Part II above for rejecting a “conspiracy” exception to *Parker*. As we have described, *Parker* and *Noerr* are complementary expressions of the principle that the antitrust laws regulate business, not politics; the former decision protects the States’ acts of governing, and the latter the citizens’ participation in government. Insofar as the identification of an immunity-destroying “conspiracy” is concerned, *Parker* and *Noerr* generally present two faces of the same coin. The *Noerr*-invalidating conspiracy alleged here is just the *Parker*-invalidating conspiracy viewed from the standpoint of the private-sector participants rather than the governmental participants. The same factors which, as we have described above, make it impracticable or beyond the purpose of the antitrust laws to identify and invalidate lawmaking that has been infected by selfishly motivated agreement with private

interests likewise make it impracticable or beyond that scope to identify and invalidate lobbying that has produced selfishly motivated agreement with public officials. “It would be unlikely that any effort to influence legislative action could succeed unless one or more members of the legislative body became ... ‘co-conspirators’” in *some* sense with the private party urging such action, *Metro Cable Co. v. CATV of Rockford, Inc.*, 516 F. 2d 220, 230 (CA7 1975). And if the invalidating “conspiracy” is limited to one that involves some element of unlawfulness (beyond mere anticompetitive motivation), the invalidation would have nothing to do with the policies of the antitrust laws. In *Noerr* itself, where the private party “deliberately deceived the public and public officials” in its successful lobbying campaign, we said that “deception, reprehensible as it is, can be of no consequence so far as the Sherman Act is concerned.” 365 U. S., at 145.

IV

Under *Parker* and *Noerr*, therefore, both the city and COA are entitled to immunity from the federal antitrust laws for their activities relating to enactment of the ordinances. This determination does not entirely resolve the dispute before us, since other activities are at issue in the case with respect to COA. Omni asserts that COA engaged in private anticompetitive actions such as trade libel, the setting of artificially low rates, and inducement to breach of contract. Thus, although the jury’s general verdict against COA cannot be permitted to stand (since it was based on instructions that erroneously permitted liability for seeking the ordinances, see *Sunkist Growers, Inc. v. Winckler & Smith Citrus Products Co.*, 370 U. S. 19, 29-30 (1962)), if the evidence was sufficient to sustain a verdict on the basis of these other actions alone, and if this theory of liability has been properly preserved, Omni would be entitled to a new trial.

There also remains to be considered the effect of our judgment upon Omni's claim against COA under the South Carolina Unfair Trade Practices Act. The District Court granted judgment notwithstanding the verdict on this claim as well as the Sherman Act claims; the Court of Appeals reversed on the ground that "a finding of conspiracy to restrain competition is tantamount to a finding" that the South Carolina law had been violated, 891 F. 2d, at 1143. Given our reversal of the "conspiracy" holding, that reasoning is no longer applicable.

We leave these remaining questions for determination by the Court of Appeals on remand. The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE STEVENS, with whom JUSTICE WHITE and JUSTICE MARSHALL join, dissenting.

Section 1 of the Sherman Act provides in part: "*Every* contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." 15 U. S. C. § 1 (emphasis added). Although we have previously recognized that a completely literal interpretation of the word "every" cannot have been intended by Congress,⁸ the Court today carries this

⁸ Construing the statute in the light of the common law concerning contracts in restraint of trade, we have concluded that only unreasonable restraints are prohibited.

recognition to an extreme by deciding that agreements between municipalities, or their officials, and private parties to use the zoning power to confer exclusive privileges in a particular line of commerce are beyond the reach of § 1. History, tradition, and the facts of this case all demonstrate that the Court’s attempt to create a “better” and less inclusive Sherman Act, cf. *West Virginia University Hospitals, Inc. v. Casey*, 499 U. S. 83, 101 (1991), is ill advised.

I

As a preface to a consideration of the “state action” and so-called “*Noerr-Pennington*” exemptions to the Sherman Act, it is appropriate to remind the Court that one of the classic common-law examples of a prohibited contract in restraint of trade involved an agreement between a public official

“One problem presented by the language of § 1 of the Sherman Act is that it cannot mean what it says. The statute says that ‘every’ contract that restrains trade is unlawful. But, as Mr. Justice Brandeis perceptively noted, restraint is the very essence of every contract; read literally, § 1 would outlaw the entire body of private contract law. Yet it is that body of law that establishes the enforceability of commercial agreements and enables competitive markets—indeed, a competitive economy— to function effectively.

“Congress, however, did not intend the text of the Sherman Act to delineate the full meaning of the statute or its application in concrete situations. The legislative history makes it perfectly clear that it expected the courts to give shape to the statute’s broad mandate by drawing on common-law tradition. The Rule of Reason, with its origins in common-law precedents long antedating the Sherman Act, has served that purpose [The Rule of Reason] focuses directly on the challenged restraint’s impact on competitive conditions.”

National Society of Professional Engineers v. United States, 435 U. S. 679, 687-688 (1978) (footnotes omitted).

We have also confined the Sherman Act’s mandate by holding that the independent actions of the sovereign States and their officials are not covered by the language of the Act. *Parker v. Brown*, 317 U. S. 341 (1943).

and a private party. The public official—the Queen of England— had granted one of her subjects a monopoly in the making, importation, and sale of playing cards in order to generate revenues for the crown. A competitor challenged the grant in *The Case of Monopolies*, 11 Co. Rep. 84, 77 Eng. Rep. 1260 (Q. B. 1602), and prevailed. Chief Justice Popham explained on behalf of the bench:

“The Queen was ... deceived in her grant; for the Queen... intended it to be for the weal public, and it will be employed for the private gain of the patentee, and for the prejudice of the weal public; moreover the Queen meant that the abuse should be taken away, which shall never be by this patent, but *potius* the abuse will be increased for the private benefit of the patentee, and therefore ... this grant is void *jure Regio*.” *Id.*, at 87a; 77 Eng. Rep., at 1264.

In the case before us today, respondent alleges that the city of Columbia, S. C., has entered into a comparable agreement to give the private petitioner a monopoly in the sale of billboard advertising. After a 3-week trial, a jury composed of citizens of the vicinage found that, despite the city fathers’ denials, there was indeed such an agreement, presumably motivated in part by past favors in the form of political advertising, in part by friendship, and in part by the expectation of a beneficial future relationship—and in any case, not exclusively by a concern for the general public interest.⁹ Today the Court acknowledges the

⁹ The jury returned its verdict pursuant to the following instructions given by the District Court:

anticompetitive consequences of this and similar agreements but decides that they should be exempted from the coverage of the Sherman Act because it fears that enunciating a rule that allows the motivations of public officials to be probed may mean that innocent municipal officials may be harassed with baseless charges. The holding evidences an unfortunate lack of confidence in our judicial system and will foster the evils the Sherman Act was designed to eradicate.

II

There is a distinction between economic regulation, on the one hand, and regulation designed to protect the public health, safety, and environment. In antitrust parlance a “regulated industry” is one in which decisions about prices and output are made not by individual firms, but rather by a public body or a collective process subject to governmental approval. Economic regulation of the motor carrier and airline industries was imposed by the Federal Government in the 1930’s; the “deregulation” of those industries did not eliminate all the other types of regulation that continue to protect our safety and environmental concerns.

“So if by the evidence you find that that person involved in this case procured and brought about the passage of ordinances solely for the purpose of hindering, delaying or otherwise interfering with the access of the Plaintiff to the marketing area involved in this case ... and thereby conspired, then, of course, their conduct would not be excused under the antitrust laws.

“So once again an entity may engage in ... legitimate lobbying ... to procure legislati[on] even if the motive behind the lobbying is anticompetitive.

“If you find Defendants conspired together with the intent to foreclose the Plaintiff from meaningful access to a legitimate decision making process with regard to the ordinances in question, then your verdict would be for the Plaintiff on that issue.” App. 81.

The antitrust laws reflect a basic national policy favoring free markets over regulated markets.¹⁰ In essence, the Sherman Act prohibits private unsupervised regulation of the prices and output of goods in the marketplace. That prohibition is inapplicable to specific industries which Congress has exempted from the antitrust laws and subjected to regulatory supervision over price and output decisions. Moreover, the so-called “state-action” exemption from the Sherman Act reflects the Court’s understanding that Congress did not intend the statute to pre-empt a State’s economic regulation of commerce within its own borders.

The contours of the state-action exemption are relatively well defined in our cases. Ever since our decision in *Olsen v. Smith*, 195 U. S. 332 (1904), which upheld a Texas statute fixing the rates charged by pilots operating in the Port of Galveston, it has been clear that a State’s decision to displace competition with economic regulation is not prohibited by the Sherman Act. *Parker v. Brown*, 317 U. S. 341 (1943), the case most frequently identified with the state-action exemption, involved a decision by California to substitute sales quotas and price control—the purest form of economic regulation—for competition in the market for California raisins.

In *Olsen*, the State itself had made the relevant pricing decision. In *Parker*, the regulation of the marketing of

¹⁰ “The Sherman Act reflects a legislative judgment that ultimately competition will produce not only lower prices, but also better goods and services. ‘The heart of our national economic policy long has been faith in the value of competition.’ *Standard Oil Co. v. FTC*, 340 U. S. 231, 248 [(1951)]. The assumption that competition is the best method of allocating resources in a free market recognizes that all elements of a bargain—quality, service, safety, and durability—and not just the immediate cost, are favorably affected by the free opportunity to select among alternative offers. Even assuming occasional exceptions to the presumed consequences of competition, the statutory policy precludes inquiry into the question whether competition is good or bad.” *National Society of Professional Engineers*, 435 U. S., at 695.

California's 1940 crop of raisins was administered by state officials. Thus, when a state agency, or the State itself, engages in economic regulation, the Sherman Act is inapplicable. *Hoover v. Ronwin*, 466 U. S. 558, 568-569 (1984); *Bates v. State Bar of Arizona*, 433 U. S. 350, 360 (1977).

Underlying the Court's recognition of this state-action exemption has been respect for the fundamental principle of federalism. As we stated in *Parker*, 317 U. S., at 351: "In a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress."

However, this Court recognized long ago that the deference due States within our federal system does not extend fully to conduct undertaken by municipalities. Rather, all sovereign authority "within the geographical limits of the United States" resides with "the Government of the United States, or [with] the States of the Union. There exist within the broad domain of sovereignty but these two. There may be cities, counties, and other organized bodies with limited legislative functions, but they are all derived from, or exist in, subordination to one or the other of these." *United States v. Kagama*, 118 U. S. 375, 379 (1886).

Unlike States, municipalities do not constitute bedrocks within our system of federalism. And also unlike States, municipalities are more apt to promote their narrow parochial interests "without regard to extraterritorial impact and regional efficiency." *Lafayette v. Louisiana Power & Light Co.*, 435 U. S. 389, 404 (1978); see also *The Federalist* No. 10 (J. Madison) (describing the greater tendency of smaller societies to promote oppressive and narrow interests above the common good). "If municipalities were free to make

economic choices counseled solely by their own parochial interests and without regard to their anticompetitive effects, a serious chink in the armor of antitrust protection would be introduced at odds with the comprehensive national policy Congress established.” *Lafayette v. Louisiana Power & Light Co.*, 435 U. S., at 408. Indeed, “[i]n light of the serious economic dislocation which could result if cities were free to place their own parochial interests above the Nation’s economic goals reflected in the antitrust laws, ... we are especially unwilling to presume that Congress intended to exclude anticompetitive municipal action from their reach.” *Id.*, at 412-413.¹¹

Nevertheless, insofar as municipalities may serve to implement state policies, we have held that economic regulation administered by a municipality may also be exempt from Sherman Act coverage if it is enacted pursuant to a clearly articulated and affirmatively expressed state directive “to replace competition with regulation.” *Hoover*, 466 U. S., at 569. However, the mere fact that a municipality acts within its delegated authority is not sufficient to exclude its anticompetitive behavior from the reach of the Sherman Act.

¹¹ In *Owen v. City of Independence*, 445 U. S. 622 (1980), this Court recognized that “notwithstanding [42 U. S. C.] § 1983’s expansive language and the absence of any express incorporation of common-law immunities, we have, on several occasions, found that a tradition of immunity was so firmly rooted in the common law and was supported by such strong policy reasons that ‘Congress would have specifically so provided had it wished to abolish the doctrine.’ *Pierson v. Ray*, 386 U. S. 547, 555 (1967).” *Id.*, at 637. Nevertheless, the Court refused to find a firmly established immunity enjoyed by municipal corporations at common law for the torts of their agents. “Where the immunity claimed by the defendant was well established at common law at the time [42 U. S. C.] § 1983 was enacted, and where its rationale was compatible with the purposes of the Civil Rights Act, we have construed the statute to incorporate that immunity. But there is no tradition of immunity for municipal corporations, and neither history nor policy supports a construction of § 1983 that would justify” according them such immunity. *Id.*, at 638. See also *Will v. Michigan Dept. of State Police*, 491 U. S. 58, 70 (1989) (“States are protected by the Eleventh Amendment while municipalities are not ...”).

“Acceptance of such a proposition—that the general grant of power to enact ordinances necessarily implies state authorization to enact specific anticompetitive ordinances—would wholly eviscerate the concepts of ‘clear articulation and affirmative expression’ that our precedents require.” *Community Communications Co. v. Boulder*, 455 U. S. 40, 56 (1982).

Accordingly, we have held that the critical decision to substitute economic regulation for competition is one that must be made by the State. That decision must be articulated with sufficient clarity to identify the industry in which the State intends that economic regulation shall replace competition. The terse statement of the reason why the municipality’s actions in *Hallie v. Eau Claire*, 471 U. S. 34 (1985), was exempt from the Sherman Act illustrates the point: “They were taken pursuant to a clearly articulated state policy to replace competition in the provision of sewage services with regulation.” *Id.*, at 47.¹²

¹² Contrary to the Court’s reading of *Hallie*, our opinion in that case emphasized the industry-specific character of the Wisconsin legislation in explaining why the delegation satisfied the “clear articulation” requirement. At issue in *Hallie* was the town’s independent decision to refuse to provide sewage treatment services to nearby towns—a decision that had been expressly authorized by the Wisconsin legislation. 471 U. S., at 41. We wrote:

“Applying the analysis of *Lafayette v. Louisiana Power & Light Co.*, 435 U. S. 389 (1978), it is sufficient that the statutes authorized the City to provide sewage services and also to determine the areas to be served.” *Id.*, at 42.

“Nor do we agree with the Towns’ contention that the statutes at issue here are neutral on state policy. The Towns attempt to liken the Wisconsin statutes to the Home Rule Amendment involved in *Boulder*, arguing that the Wisconsin statutes are neutral because they leave the City free to pursue either anticompetitive conduct or free-market competition in the field of sewage services. The analogy to the Home Rule Amendment involved in *Boulder* is inapposite. That Amendment to the Colorado Constitution allocated only the most general authority to municipalities to govern local affairs. We held that it was neutral and did not satisfy the ‘clear articulation’

III

Today the Court adopts a significant enlargement of the state-action exemption. The South Carolina statutes that confer zoning authority on municipalities in the State do not articulate any state policy to displace competition with economic regulation in any line of commerce or in any specific industry. As the Court notes, the state statutes were expressly adopted to promote the “health, safety, morals or the general welfare of the community,” see *ante*, at 370, n. 3. Like Colorado’s grant of “home rule” powers to the city of Boulder, they are simply neutral on the question whether the municipality should displace competition with economic regulation in any industry. There is not even an arguable basis for concluding that the State authorized the city of Columbia to enter into exclusive agreements with any person, or to use the zoning power to protect favored citizens from competition.¹³ Nevertheless, under the guise

component of the state action test. The Amendment simply did not address the regulation of cable television. Under home rule the municipality was to be free to decide every aspect of policy relating to cable television, as well as policy relating to any other field of regulation of local concern. Here, in contrast, the State has specifically authorized Wisconsin cities to provide sewage services and has delegated to the cities the express authority to take action that foreseeably will result in anticompetitive effects. No reasonable argument can be made that these statutes are neutral in the same way that Colorado’s Home Rule Amendment was.” *Id.*, at 43.

We rejected the argument that the delegation was insufficient because it did not expressly mention the foreseeable anticompetitive consequences of the city of Eau Claire’s conduct, but we surely did not hold that the mere fact that incidental anticompetitive consequences are foreseeable is sufficient to immunize otherwise unauthorized restrictive agreements between cities and private parties.

¹³ The authority to regulate the “location, height, bulk, number of stories and size of buildings and other structures,” see *ante*, at 371, n. 3 (citation omitted), may of course have an indirect effect on the total output in the billboard industry, see *ante*, at 373-374, n. 4, as well as on a number of other industries, but the Court surely misreads our cases when it implies that a general grant of zoning power represents

of acting pursuant to a state legislative grant to regulate health, safety, and welfare, the city of Columbia in this case enacted an ordinance that amounted to economic regulation of the billboard market; as the Court recognizes, the ordinance “obviously benefited COA, which already had its billboards in place ... [and] severely hindered Omni’s ability to compete.” *Ante*, at 368.

Concededly, it is often difficult to differentiate economic regulation from municipal regulation of health, safety, and welfare. “Social and safety regulation have economic impacts, and economic regulation has social and safety effects.” D. Hjelmfelt, *Antitrust and Regulated Industries* 3 (1985). It is nevertheless important to determine when purported general welfare regulation in fact constitutes economic regulation by its purpose and effect of displacing competition. “An example of economic regulation which is disguised by another stated purpose is the limitation of advertising by lawyers for the stated purpose of protecting the public from incompetent lawyers. Also, economic regulation posing as safety regulation is often encountered in the health care industry.” *Id.*, at 3-4.

In this case, the jury found that the city’s ordinance—ostensibly one promoting health, safety, and welfare—was in fact enacted pursuant to an agreement between city officials and a private party to restrict competition. In my opinion such a finding necessarily leads to the conclusion that the city’s ordinance was fundamentally a form of economic regulation of the billboard market rather than a general welfare regulation having incidental anticompetitive effects. Because I believe our cases have wisely held that the decision to embark upon economic regulation is a nondelegable one that must expressly be made by the State in the context of a specific industry in order to qualify for

a clearly articulated decision to authorize municipalities to enter into agreements to displace competition in every industry that is affected by zoning regulation.

state-action immunity, see, e. g., *Olsen v. Smith*, 195 U. S. 332 (1904) (Texas pilotage statutes expressly regulated both entry and rates in the Port of Galveston); *Parker v. Brown*, 317 U. S. 341 (1943) (California statute expressly authorized the raisin market regulatory program), I would hold that the city of Columbia’s economic regulation of the billboard market pursuant to a general state grant of zoning power is not exempt from antitrust scrutiny.¹⁴

Underlying the Court’s reluctance to find the city of Columbia’s enactment of the billboard ordinance pursuant to a private agreement to constitute unauthorized economic regulation is the Court’s fear that subjecting the motivations and effects of municipal action to antitrust scrutiny will result in public decisions being “made subject to *ex post facto* judicial assessment of ‘the public interest.’” *Ante*, at 377. That fear, in turn, rests on the assumption that “it is both inevitable and desirable that public officials often agree to do what one or another group of private citizens urges upon them.” *Ante*, at 375.

The Court’s assumption that an agreement between private parties and public officials is an “inevitable” precondition for official action, however, is simply wrong.¹⁵ Indeed, I am

¹⁴ A number of Courts of Appeals have held that a municipality which exercises its zoning power to further a private agreement to restrain trade is not entitled to state-action immunity. See, e. g., *Westborough Mall, Inc. v. Cape Girardeau*, 693 F. 2d 733, 746 (CA8 1982) (“Even if zoning in general can be characterized as ‘state action,’ ... a conspiracy to thwart normal zoning procedures and to directly injure the plaintiffs by illegally depriving them of their property is not in furtherance of any clearly articulated state policy”); *Whitworth v. Perkins*, 559 F. 2d 378, 379 (CA5 1977) (“The mere presence of the zoning ordinance does not necessarily insulate the defendants from antitrust liability where, as here, the plaintiff asserts that the enactment of the ordinance was itself a part of the alleged conspiracy to restrain trade”).

¹⁵ No such agreement was involved in *Hallie v. Eau Claire*, 471 U. S. 34 (1985). In that case the plaintiffs challenged independent action—the determination of the service area of the city’s sewage system—that had been expressly authorized by Wisconsin legislation. The absence of any such agreement provided the basis for our decision in *Fisher v. Berkeley*, 475 U. S. 260, 266-267 (1986) (“The distinction between unilateral and concerted action is critical here... . Thus, if the Berkeley

persuaded that such agreements are the exception rather than the rule, and that they are, and should be, disfavored. The mere fact that an official body adopts a position that is advocated by a private lobbyist is plainly not sufficient to establish an agreement to do so. See *Fisher v. Berkeley*, 475 U. S. 260, 266-267 (1986); cf. *Theatre Enterprises, Inc. v. Paramount Film Distributing Corp.*, 346 U. S. 537, 541 (1954). Nevertheless, in many circumstances, it would seem reasonable to infer—as the jury did in this case—that the official action is the product of an agreement intended to elevate particular private interests over the general good.

In this case, the city took two separate actions that protected the local monopolist from threatened competition. It first declared a moratorium on any new billboard construction, despite the city attorney's advice that the city had no power to do so. When the moratorium was invalidated in state-court litigation, it was replaced with an apparently valid ordinance that clearly had the effect of creating formidable barriers to entry in the billboard market. Throughout the city's decisionmaking process in enacting the various ordinances, undisputed evidence demonstrated that Columbia Outdoor Advertising, Inc., had met with city officials privately as well as publicly. As the Court of Appeals noted: "Implicit in the jury verdict was a finding that the city was not acting pursuant to the direction or purposes of the South Carolina statutes but conspired solely to further COA's commercial purposes to the detriment of competition in the billboard industry." 891 F. 2d 1127, 1133 (CA4 1989).

Judges who are closer to the trial process than we are do not share the Court's fear that juries are not capable of recognizing the difference between independent municipal action and action taken for the sole purpose of carrying out

Ordinance stabilizes rents without this element of concerted action, the program it establishes cannot run afoul of § 1").

an anticompetitive agreement for the private party.¹⁶ See, e.g., *In re Japanese Electronic Products Antitrust Litigation*, 631 F. 2d 1069, 1079 (CA3 1980) (“The law presumes that a jury will find facts and reach a verdict by rational means. It does not contemplate scientific precision but does contemplate a resolution of each issue on the basis of a fair and reasonable assessment of the evidence and a fair and reasonable application of the relevant legal rules”). Indeed, the problems inherent in determining whether the actions of municipal officials are the product of an illegal agreement are substantially the same as those arising in cases in which the actions of business executives are subjected to antitrust scrutiny.¹⁷

The difficulty of proving whether an agreement motivated a course of conduct should not in itself intimidate this Court into exempting those illegal agreements that are

¹⁶ The instructions in this case, fairly read, told the jury that the plaintiff should not prevail unless the ordinance was enacted for the sole purpose of interfering with access to the market. See n. 2, *supra*. Thus, this case is an example of one of the “polar extremes,” see *ante*, at 375, n. 5, that juries—as well as Solomon—can readily identify. The mixed motive cases that concern the Court should present no problem if juries are given instructions comparable to those given below. When the Court describes my position as assuming that municipal action that was not prompted “exclusively by a concern for the general public interest” is enough to create antitrust liability, *ibid.*, it simply ignores the requirement that the plaintiff must prove that the municipal action is the product of an anticompetitive agreement with private parties. Contrary to our square holding in *Fisher v. Berkeley*, 475 U. S. 260 (1986), today the Court seems to assume that municipal action which is not entirely immune from antitrust scrutiny will automatically violate the antitrust laws.

¹⁷ There are many obstacles to discovering conspiracies, but the most frequent difficulties are three. First, price-fixers and similar miscreants seldom admit their conspiracy or agree in the open. Often, we can infer the agreement only from their behavior. Second, behavior can sometimes be coordinated without any communication or other observable and reprehensible behavior. Third, the causal connection between an observable, controllable act—such as a solicitation or meeting—and subsequent parallel action may be obscure.” 6 P. Areeda, *Antitrust Law* ¶ 1400, at 3-4 (1986). See also Turner, *The Definition of Agreement under the Sherman Act: Conscious Parallelism and Refusals to Deal*, 75 Harv. L. Rev. 655 (1962) (discussing difficulties of condemning parallel anticompetitive action absent explicit agreement among the parties).

proved by convincing evidence. Rather, the Court should, if it must, attempt to deal with these problems of proof as it has in the past—through heightened evidentiary standards rather than through judicial expansion of exemptions from the Sherman Act. See, e. g., *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U. S. 574 (1986) (allowing summary judgment where a predatory pricing conspiracy in violation of the Sherman Act was founded largely upon circumstantial evidence); *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U. S. 752, 768 (1984) (holding that a plaintiff in a vertical price-fixing case must produce evidence which “tends to exclude the possibility of independent action”).

Unfortunately, the Court’s decision today converts what should be nothing more than an anticompetitive agreement undertaken by a municipality that enjoys no special status in our federalist system into a lawful exercise of public decision-making. Although the Court correctly applies principles of federalism in refusing to find a “conspiracy exception” to the *Parker* state-action doctrine when a State acts in a nonproprietary capacity, it errs in extending the state-action exemption to municipalities that enter into private anticompetitive agreements under the guise of acting pursuant to a general state grant of authority to regulate health, safety, and welfare. Unlike the previous limitations this Court has imposed on Congress’ sweeping mandate in § 1, which found support in our common-law traditions or our system of federalism, see n. 1, *supra*, the Court’s wholesale exemption of municipal action from antitrust scrutiny amounts to little more than a bold and disturbing act of judicial legislation which dramatically curtails the statutory prohibition against “every” contract in restraint of trade.¹⁸

¹⁸ As the Court previously has noted:

“In 1972, there were 62,437 different units of local government in this country. Of this number 23,885 were special districts which had a defined goal or goals for the

IV

Just as I am convinced that municipal “lawmaking that has been infected by selfishly motivated agreement with private interests,” *ante*, at 383, is not authorized by a grant of zoning authority, and therefore not within the state-action exemption, so am I persuaded that a private party’s agreement with selfishly motivated public officials is sufficient to remove the antitrust immunity that protects private lobbying under *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U. S. 127 (1961), and *Mine Workers v. Pennington*, 381 U. S. 657 (1965). Although I agree that the “sham” exception to the *Noerr-Pennington* rule exempting lobbying activities from the antitrust laws does not apply to the private petitioner’s conduct in this case for the reasons stated by the Court in Part III of its opinion, I am satisfied that the evidence in the record is sufficient to support the jury’s finding that a conspiracy existed between the private party and the municipal officials in this case so as to remove the private petitioner’s conduct from the scope of *Noerr-Pennington* antitrust immunity. Accordingly, I would affirm the judgment of the Court of Appeals as to both the city of Columbia and Columbia Outdoor Advertising, Inc.

provision of one or several services, while the remaining 38,552 represented the number of counties, municipalities, and townships, most of which have broad authority for general governance subject to limitations in one way or another imposed by the State. These units may, and do, participate in and affect the economic life of this Nation in a great number and variety of ways. When these bodies act as owners and providers of services, they are fully capable of aggrandizing other economic units with which they interrelate, with the potential of serious distortion of the rational and efficient allocation of resources, and the efficiency of free markets which the regime of competition embodied in the antitrust laws is thought to engender.” *Lafayette v. Louisiana Power & Light Co.*, 435 U. S. 389, 407-408 (1978) (footnotes omitted).

I respectfully dissent.

3.6. Spot Zoning

Frank S. Griswold v. City of Homer

925 P.2d 1015 (Alaska 1996)

Frank S. Griswold, Homer, pro se.

Gordon J. Tans, Perkins Coie, Anchorage, for Appellee.

Before MOORE, C.J., and RABINOWITZ, MATTHEWS, COMPTON and EASTAUGH, JJ.

Eastaugh, Justice. I. INTRODUCTION

In 1992 the Homer City Council adopted Ordinance 92-18 amending Homer's zoning and planning code to allow motor vehicle sales and services on thirteen lots in Homer's Central Business District. Frank Griswold claims Ordinance 92-18 is invalid because it constitutes spot zoning. We affirm the superior court's rejection of that claim. Griswold also claims the Ordinance is invalid because a council member with a personal interest improperly participated in its adoption. We hold that the council member should not have participated. We consequently remand so the superior court can determine whether that participation invalidates the Ordinance. Finally, we hold that Griswold is a public interest litigant who cannot be assessed the City's attorney's fees and court costs.II. FACTS AND PROCEEDINGSAlaska Statute 29.40.020 requires that each first class borough establish a planning commission which will prepare, submit, and implement a comprehensive plan.¹ This plan must be

¹ AS 29.40.030 defines a comprehensive plan as follows:

adopted before the local government can adopt a zoning ordinance. AS 29.40.020.040. A borough assembly “[i]n accordance with a comprehensive plan adopted under AS 29.40.030 and in order to implement the plan ... shall adopt or amend provisions governing the use and occupancy of land.” AS 29.40.040. That statute requires the borough to implement the comprehensive plan by adopting provisions governing land use, including zoning regulations. *Id.* A borough may delegate this responsibility and the planning power to a city within the borough, if the city consents. AS 29.40.010(b). The Kenai Peninsula Borough delegated to the City of Homer the zoning authority for areas within the City.

The City adopted a comprehensive land use plan in 1983 and revised it in 1989. The City Council enacted zoning ordinances to implement the plans. Motor vehicle sales and services were not a permissible use within the Central Business District (CBD). Several businesses provided automobile services in the CBD before the City adopted the zoning ordinances. Those businesses were “grandfathered” into the zoning district and allowed to continue to provide those services as nonconforming uses, so long as those uses did not extend beyond the original lot boundaries and the property owners did not discontinue their nonconforming uses for more than one year.

[A] compilation of policy statements, goals, standards, and maps for guiding the physical, social, and economic development, both private and public, of the first or second class borough, and may include, but is not limited to, the following:

- (1) statements of policies, goals, and standards;
- (2) a land use plan;
- (3) a community facilities plan;
- (4) a transportation plan; and
- (5) recommendations for implementation of the comprehensive plan.

Guy Rosi Sr. owns a parcel (Lot 13) in the CBD.² Rosi Sr. has continuously operated an automobile repair service on Lot 13. His repair business remains a valid nonconforming use in the CBD. Rosi Sr. also operated an automobile dealership on Lot 13 until sometime prior to 1990, but lost the right to continue that nonconforming use on that lot by discontinuing the vehicle sales business for more than one year.

Guy Rosi Jr. owns Lot 12, which is adjacent to his father's lot. Lot 12 is also in the CBD; because it had never been used for automobile sales or services, these uses were not grandfathered for Lot 12.

In 1986 the City received complaints that Lot 12 was being used for vehicle sales in violation of the zoning ordinance. In May 1986 Rosi Jr. applied to the Homer Advisory Planning Commission for a conditional use permit for Lot 12. The commission denied the application. It found that public services and facilities were adequate to serve the proposed use. The commission also found that automobile sales were not consistent with the purpose of the CBD; were not in harmony with the Comprehensive Plan; would negatively impact neighborhood character; but might not negatively impact the value of adjoining property more than permitted uses.

Rosi Jr. then applied for a contract rezone under Homer City Code (HCC) 21.63.020(c). The City granted the application in 1986, rezoning Rosi Jr.'s lot to General Commercial 1(GC1) and restricting its use to vehicle sales. Griswold does not challenge the Lot 12 contract rezone in this litigation.

Rosi Sr.'s Lot 13 was not affected by the Lot 12 contract rezone. In September 1990 Rosi Sr. requested that the

² Although the Borough's tax assessment records indicate that Guy Rosi Sr. owns only part of Lot 13, the parties and the trial court have referred to his parcel as "Lot 13." We do the same.

CBD be rezoned to allow vehicle sales and related services. In August 1991 Rosi Sr., stating that he had not received any response to his earlier request, asked that Lot 13 be rezoned to allow vehicle sales and related services. During this period, there were numerous zoning proposals and public hearings regarding automobile-related services in the CBD, but some people spoke in favor of rezoning the area.

In January 1992 a commission memorandum informed the City Manager that the commission had been wrestling with several possible amendments to the zoning code since 1990, and that “[c]entral to the issue is the Commission’s desire to rezone the Guy Rosi property to allow for vehicle sales.” The commission noted that a proposed ordinance would allow automobile-related services in the CBD only on Main Street from Pioneer Avenue to the Homer Bypass, excluding corner lots with frontage on Pioneer Avenue and the Homer Bypass Road. However, the commission staff recommended that the council pass an ordinance which would allow automobile-related services “everywhere in the Central Business District or nowhere.” The memo stated that the City Attorney felt the proposed ordinance would be difficult to enforce and defend.

In April the City Council adopted Ordinance 92-18, which amended HCC 21.48.020 by adding the following section:

hh. Automobile and vehicle repair, vehicle maintenance, public garage, and motor vehicle sales, showrooms and sales lots, but only on Main Street from Pioneer Avenue to the Homer Bypass Road, excluding corner lots with frontage on Pioneer Avenue or the Homer Bypass Road, be allowed as a permitted use.

The Ordinance passed five-to-zero. One council member was absent. Brian Sweiven was one of the council members

voting for the amendment. He owned one of the thirteen lots on which automobile sales and services were to be allowed under Ordinance 92-18. Sweiven both lived on his lot and operated an appliance repair business there. In 1994, stating he had a potential conflict of interest, he refrained from voting on Ordinance 94-13, which would have repealed subsection (hh). A week later he reversed that position and voted not to repeal subsection (hh).

Frank Griswold, the plaintiff in this case, owns an automobile repair shop in the CBD. Its operation was grandfathered in under the zoning code. He also lives in the CBD. Griswold's lot was not one of the thirteen lots directly affected by Ordinance 92-18. Griswold brought suit against the City, alleging under several theories that Ordinance 92-18 is an invalid exercise of the City's zoning power and that Sweiven's participation in the adoption of Ordinance 92-18 invalidates the Ordinance. Following a bench trial, the superior court found against Griswold on all issues. It later ordered him to pay a portion of the City's court costs and attorney's fees. Griswold appeals.

III. DISCUSSION

We have repeatedly held that it is the role of elected representatives rather than the courts to decide whether a particular statute or ordinance is a wise one.³ *Norene v. Municipality of Anchorage*, 704 P.2d 199, 202 (Alaska 1985); *Seward Chapel, Inc. v. City of Seward*, 655 P.2d 1293, 1299 (Alaska 1982). In *Concerned Citizens of S. Kenai Peninsula v.*

³ This appeal concerns the validity of an enactment of a legislative body, rather than a decision of a zoning board. See *Concerned Citizens of S. Kenai Peninsula v. Kenai Peninsula Borough*, 527 P.2d 447, 452 (Alaska 1974) (analyzing a Borough Assembly's ordinance as a legislative enactment). We are here reviewing a superior court judgment rejecting claims that a municipal ordinance is invalid. We give independent consideration to the legal conclusions of the superior court. *Beesley v. Van Doren*, 873 P.2d 1280, 1281 (Alaska 1994). We will uphold the superior court's findings of fact unless they are clearly erroneous. *In re R.K.*, 851 P.2d 62, 66 (Alaska 1993).

Kenai Peninsula Borough, 527 P.2d 447, 452 (Alaska 1974), we stated:

A court's inquiry into arbitrariness begins with the presumption that the action of the legislature is proper. The party claiming a denial of substantive due process has the burden of demonstrating that no rational basis for the challenged legislation exists. This burden is a heavy one, for if any conceivable legitimate public policy for the enactment is apparent on its face or is offered by those defending the enactment, the opponents of the measure must disprove the factual basis for such a justification.

(Footnote omitted.) *See also* 6 Eugene McQuillan, *Municipal Corporations* § 20.05, at 12 (3d ed. 1988) (“The validity of an ordinance will be upheld where there is room for a difference of opinion ‘even though the correctness of the legislative judgment is doubtful.’”) (quoting *Western Springs v. Bernhagen*, 326 Ill. 100, 156 N.E. 753, 754 (1927)).

However, we will invalidate zoning decisions which are the result of prejudice, arbitrary decision-making, or improper motives. *See South Anchorage Concerned Coalition v. Coffey*, 862 P.2d 168, 174 (Alaska 1993) (“In reviewing zoning decisions, courts generally try to guard against prejudice, arbitrary decision-making, and improper motives.”) (citing 3 Edward H. Ziegler Jr., *Rathkoph's The Law of Zoning and Planning* § 41.06, at 41-29, § 41.14(3)(b), at 41-93 (1992)). Similarly, a legislative body's zoning decision violates substantive due process if it has no reasonable relationship to a legitimate government purpose. *Concerned Citizens of S. Kenai Peninsula*, 527 P.2d at 452. Moreover, another court has noted, “The dividing line between ... mere difference in opinion and what is arbitrary is the line between zoning

based on objective factual evidence and zoning without a rational basis.” *Smith v. County of Washington*, 241 Or. 380, 406 P.2d 545, 548 (1965) (citations omitted).⁴ In this case, Griswold argues that the City’s Ordinance does not have a legitimate basis but rather is arbitrary spot zoning.⁵

We have not previously had the opportunity to consider whether a municipality’s planning and zoning enactment is invalid because it constitutes “spot zoning.” The City states that “this is not a case of ‘spot zoning’ at all” because the area in question remains zoned CBD. However, treatise discussions of spot zoning appear to make no distinction between cases where a zoning district has been reclassified and those where a new use without district reclassification is at issue. *See, e.g.*, 1 Robert M. Anderson *American Law of Zoning* 3d § 5.12, at 358 (1986) (“The common [spot zoning] situation is one in which an amendment is initiated at the request of an owner or owners who seek to establish a use prohibited by the existing regulations.”). *See also*, *Ballenger v. Door County*, 131 Wis.2d 422, 388 N.W.2d 624, 627 (App. 1986) (applying spot zoning analysis in a case where the zoning district remained the same but the permitted uses within the district were expanded); *Concerned Citizens of S. Kenai Peninsula*, 527 P.2d at 452 (whether zoning decision violates substantive due process depends on whether it has a reasonable relationship to a legitimate public purpose).

⁴ We have held that, although a planning commission is not required to make specific findings supporting its decisions, it must articulate reasons for its decisions sufficient to assist the parties preparing for review and to restrain agencies within the bounds of their jurisdiction. *South Anchorage Concerned Coalition v. Coffey*, 862 P.2d 168, 175 (Alaska 1993) (citing *City of Nome v. Catholic Bishop of N. Alaska*, 707 P.2d 870, 875 (Alaska 1985); and *Kenai Peninsula Borough v. Ryherd*, 628 P.2d 557, 562 (Alaska 1981)).

⁵ Griswold also argues that the Ordinance is invalid because it is inconsistent with the City’s zoning code and comprehensive plan. We consider this argument in conjunction with our discussion of spot zoning.

A. Claim of Spot Zoning The “classic” definition of spot zoning is “the process of singling out a small parcel of land for a use classification totally different from that of the surrounding area, for the benefit of the owner of such property and to the detriment of other owners....” Anderson, *supra*, § 5.12, at 359 (quoting *Jones v. Zoning Bd. of Adjustment of Long Beach*, 32 N.J. Super. 397, 108 A.2d 498 (1954)). Spot zoning “is the very antithesis of planned zoning.” *Id.*⁶ Courts have developed numerous variations of this definition. *Id.* These variations have but minor differences and describe any zoning amendment which “reclassifies a small parcel in a manner inconsistent with existing zoning patterns, for the benefit of the owner and to the detriment of the community, or without any substantial public purpose.” Anderson, *supra*, § 5.12, at 362. Professor Ziegler states:

Faced with an allegation of spot zoning, courts determine first whether the rezoning is compatible with the comprehensive plan or, where no plan exists, with surrounding uses. Courts then examine the degree of public benefit gained and the characteristics

⁶ The City argues that spot zoning should not be considered per se illegal, but merely descriptive. Thus, whether spot zoning is valid or invalid would depend upon the facts of each case. See *Chrismon v. Guilford County*, 322 N.C. 611, 370 S.E.2d 579, 588 (1988); *Save Our Rural Env't v. Snobomish County*, 99 Wash.2d 363, 662 P.2d 816 (1983); *Tennison v. Shomette*, 38 Md. App. 1, 379 A.2d 187 (1977). However, we will follow the vast majority of jurisdictions which hold that, while not all small-parcel zoning is illegal, spot zoning is per se illegal. See *Chrismon*, 370 S.E.2d at 588 (noting that majority of jurisdictions regard spot zoning as a legal term of art); 3 Edward H. Ziegler Jr., *Rathkopf's The Law of Zoning and Planning* § 28.01 n. 2 (4th ed. 1995) (compiling cases holding same); Anderson, *supra*, § 5.12, at 359 n. 46 (same).

Thus, spot zoning is simply the legal term of art for a zoning decision which affects a small parcel of land and which is found to be an arbitrary exercise of legislative power. Cf. *Concerned Citizens of S. Kenai Peninsula*, 527 P.2d at 452 (“[T]he constitutional guarantee of substantive due process assures only that a legislative body’s decision is not arbitrary but instead based upon some rational policy.”).

of land, including parcel size and other factors indicating that any reclassification should have embraced a larger area containing the subject parcel rather than that parcel alone. No one particular characteristic associated with spot zoning, except a failure to comply with at least the spirit of a comprehensive plan, is necessarily fatal to the amendment. Spot zoning analysis depends primarily on the facts and circumstances of the particular case. Therefore the criteria are flexible and provide guidelines for judicial balancing of interests.

3 Edward H. Ziegler Jr., *Rathkoph's The Law of Zoning and Planning* § 28.01, at 28-3 (4th ed. 1995).

In accord with the guidance offered by Professor Ziegler, in determining whether Ordinance 92-18 constitutes spot zoning, we will consider (1) the consistency of the amendment with the comprehensive plan; (2) the benefits and detriments of the amendment to the owners, adjacent landowners, and community; and (3) the size of the area “rezoned.”¹ Consistency with the comprehensive plan Just as an ordinance which complies with a comprehensive plan may still constitute an arbitrary exercise of a city’s zoning power, *Watson v. Town Council of Bernalillo*, 111 N.M. 374, 805 P.2d 641, 645 (App. 1991), nonconformance with a comprehensive plan does not necessarily render a zoning action illegal. Anderson, *supra*, § 5.06, at 339-40. However, consistency with a comprehensive plan is one indication that the zoning action in question has a rational basis and is not an arbitrary exercise of the City’s zoning power.

Homer’s comprehensive plan divides the city into several zoning areas. By its own terms, Homer’s comprehensive plan is not intended to set specific land use standards and

boundaries; specific standards and boundaries are instead implemented through the City's zoning ordinance. The plan states, "The City shall encourage a mix of business/commercial and public/governmental activities in areas zoned or planned as central business district." The plan states that the CBD is "intended primarily for retail sales and services occurring within enclosed structures." The plan's objectives for the CBD are (1) to guide growth and development to provide a centrally located business and commercial area and focal point for the community; (2) to encourage infilling of the area already designated CBD before expanding the area; (3) to promote a safe, attractive, and easily accessible business and commercial core for pedestrian and vehicular visitors and residents; (4) to attract and accommodate a variety of uses to fill the business and commercial needs of downtown Homer; and (5) to tie into state and federal programs that beautify the business and commercial core.

Griswold does not dispute that the CBD is intended to allow commercial uses. He notes however, that although auto-related services are explicitly permitted in the General Commercial 1 District under HCC 21.49.020(d), the planning commission previously denied a conditional use permit for auto-related services on Main Street, specifically finding, *inter alia*, that automobile sales were not consistent with the purpose of the CBD and were not in harmony with the comprehensive plan. He also notes that the comprehensive plan provides that the CBD was meant primarily for retail sales and services occurring within enclosed structures. Further, the fact that the City began phasing out auto-related services in the CBD when it adopted the comprehensive plan, while simultaneously specifically permitting these services in the General Commercial I District, indicates to Griswold that auto-related sales and services were, at least at one time, considered incompatible with the CBD.

The superior court concluded that the Ordinance was consistent with the comprehensive plan. In so concluding, it considered the policy statement implementing the Ordinance, and found that the Ordinance “encourages private investment and infilling” and “enhances convenient access to other parts of the CBD which are designated for other uses.” It noted that Policy 4.1 provided: “The City shall research the nature of land uses and CBD land use needs and evaluate the need for subzones in the CBD.”

Griswold points to trial evidence that the expansion of auto-related services in the CBD does not further all the goals of the comprehensive plan, but he fails to demonstrate that the superior court’s finding — that the Ordinance is consistent with the plan — is clearly erroneous. Although the evidence presented by Griswold would *permit* a finding that the City Council had believed in 1986 that auto-related uses were incompatible with the CBD and the zoning ordinance as it then read, that evidence does not *compel* a finding that auto-related uses are in fact incompatible with the CBD or comprehensive plan, or that the City Council’s 1992 change of opinion is unsupported and arbitrary.

The superior court did not clearly err in making the findings discussed above. The court permissibly relied on Policy 4.1, which anticipates the type of action at issue here. The comprehensive plan does not expressly prohibit automobile sales or service establishments in the CBD. As the City notes, motor vehicle sales are most appropriately classified as a business and commercial use, for which the CBD was intended under the plan. Homer’s city planner testified at trial that the Ordinance is in accordance with Homer’s comprehensive plan. We conclude that the superior court did not err in holding that Ordinance 92-18 is consistent with the City’s comprehensive plan.

2. Effect of small-parcel zoning on owner and community

Perhaps the most important factor in determining whether a small-parcel zoning amendment will be upheld is whether the amendment provides a benefit to the public, rather than primarily a benefit to a private owner. *See* Anderson, *supra*, §§ 5.13-5.14; Ziegler, *supra*, § 28.03, § 28.04, at 28-19 (calling an amendment intended only to benefit the owner of the rezoned tract the “classic case” of spot zoning). Courts generally do not assume that a zoning amendment is primarily for the benefit of a landowner merely because the amendment was adopted at the request of the landowner. Anderson, *supra*, § 5.13, at 368. If the owner’s benefit is merely incidental to the general community’s benefit, the amendment will be upheld. Ziegler, *supra*, § 28.04, at 28-19 to 28-20. The City argues that Ordinance 92-18 serves the interests of the general community rather than primarily the interests of the Rosis. We agree.

a. Benefits and detriments to the community

Griswold argues that there are many negative aspects of the City’s decision to allow auto-related uses in the CBD. Griswold presented evidence that the neighborhood character would be harmed by the zoning amendment. He presented evidence that a newspaper article quoted Planning Commissioner Cushing as saying that public opinion was overwhelmingly against allowing auto-related services in the CBD and that many Homer citizens expressed the opinion that their homes and businesses would be harmed by introducing auto-related services into the area. A real estate agent testified that property in the CBD has a higher value than property in the GC1 District.

Many jurisdictions, including this one, have held that interests such as the preservation of neighborhood

character, traffic safety, and aesthetics are legitimate concerns. *Barber v. Municipality of Anchorage*, 776 P.2d 1035, 1037 (Alaska) (holding the government’s interest in aesthetics is substantial and should be accorded respect), *cert. denied*, 493 U.S. 922, 110 S.Ct. 287, 107 L.Ed.2d 267 (1989); *Cadoux v. Planning and Zoning Comm’n of Weston*, 162 Conn. 425, 294 A.2d 582, 584 (holding increased traffic a valid reason to deny application for rezone), *cert. denied*, 408 U.S. 924, 92 S.Ct. 2496, 33 L.Ed.2d 335 (1972). Contrary to the implication of the City’s argument,⁷ these are tangible harms. Moreover, the City itself appears to be concerned about the effects of auto-related services on property values and aesthetics, as evidenced by the council’s findings supporting its confinement of the zoning change to Main Street,⁸ and the commission’s earlier finding that use for automobile sales would negatively impact neighborhood character.

However, despite this negative aspect of Ordinance 92-18, it appears that the Ordinance will result in genuine benefits for the City of Homer. The City notes that before adopting Ordinance 92-18, for a year and a half it deliberated proposals which would allow auto-related uses in the CBD and delineated the many benefits which it believed the Ordinance will confer upon the community. These benefits include encouraging filling in vacant places in the CBD; increasing the tax base and employment in the CBD; increasing convenience and accessibility for local and regional customers for vehicle repairs or purchases; and

⁷ The City argues that *Griswold* could not show any “concrete detriment” but instead “could only argue that car lots were not pleasant to look at, they didn’t alleviate traffic, and other similar arguments.”

⁸ At trial the City’s planner testified that the Ordinance was restricted to Main Street to avoid certain negative impacts in more tourist-oriented areas. These negative impacts include traffic congestion, visual blight, detraction from the pleasing aesthetic nature of Pioneer Avenue, and conflict with the comprehensive plan’s goal of promoting sidewalks, pocket parks, and pedestrian amenities in the CBD.

promoting orderly growth and development in the CBD.⁹ Homer's city planner testified that the Ordinance provides a convenience to the public and guides growth and development to a centrally located area, while restricting such uses to areas away from tourists or to areas for visitors and pedestrians.

⁹ Not all of the goals articulated by the City can be considered legitimate *per se*. For example, any zoning change which eases restrictions on property use could be said to further the goal of "filling in vacant places." Similarly, increasing the tax base and the employment of a community is not automatically a legitimate zoning goal. See *Concerned Citizens for McHenry, Inc. v. City of McHenry*, 76 Ill. App.3d 798, 32 Ill.Dec. 563, 568, 395 N.E.2d 944, 950 (1979) (an increase in the tax base of the community as the primary justification for a rezone is "totally violative of all the basic principles of zoning"); *Oakwood at Madison, Inc. v. Township of Madison*, 117 N.J. Super. 11, 283 A.2d 353, 357 (1971) (finding that "fiscal zoning *per se* is irrelevant to the statutory purposes of zoning [although] 'alleviating tax burden is a permissible zoning purpose if done reasonably and in furtherance of a comprehensive plan) (citing *Gruber v. Mayor and Tp. Committee of Raritan Tp.*, 39 N.J. 1, 186 A.2d 489, 493 (1962))"; *Chrobuck v. Snobomish County*, 78 Wash.2d 858, 480 P.2d 489, 497 (1971) (allowing industrial development on only one site would be arbitrary spot zoning despite the potential tax revenue the oil refinery would produce). Thus, the goal of increasing the tax base and employment opportunities is usually legitimate only if the ordinance is otherwise reasonable and in accordance with the comprehensive plan.

Some courts have allowed inconsistent small or single parcel rezoning in order to raise tax revenues or stimulate needed industry if the public receives higher tax revenue or employment industries. Ziegler, *supra*, § 28.04, at 28-20. Generally, the facility being built must be indisputably needed, and the city must have secured assurance as to the existence and amount of increased employment and tax revenue. For example, in *Information Please Inc. v. County Comm'rs of Morgan County*, 42 Colo. App. 392, 600 P.2d 86 (1979), the county rezoned agricultural area to industrial to accommodate an electric utility after determining the plant would add \$46,000,000 to the tax base of the county, and provide approximately 250 jobs after it was completed. *Id.* 600 P.2d at 88. In *Watson v. Town Council of Bernalillo*, 111 N.M. 374, 805 P.2d 641, 647 (App. 1991), the county made findings that the rezone would employ eighty-seven people from the community and would produce tax revenues constituting twenty-five percent of the city's budget. In *Chrismon v. Guilford County*, 322 N.C. 611, 370 S.E.2d 579, 590 (1988), the court approved the rezoning of two contiguous tracts from agricultural to conditional use industrial district to facilitate expansion of an already-operating grain elevator. The court stated that the "[e]vidence clearly shows that [the owner's] operation is beneficial to area farmers." *Id.* It also noted that spot zoning will be allowed even where the adjacent property owners object and the owner receives a greater benefit than others if there is a community-wide need for the rezone. *Id.*

The superior court stated that Ordinance 92-18 advances legitimate legislative goals articulated in HCC 21.28.020 including but not limited to regulating and limiting the density of populations; conserving and stabilizing the value of properties; providing adequate open spaces for light and air; preventing undue concentration of population; lessening congestion on streets and highways; and promoting health, safety and general welfare. The court found “as a matter of fact and law that Ordinance No. 92-18 bears a substantial relationship between legitimate legislative goals and the means chosen to achieve those goals.”

Griswold has demonstrated that there are some negative aspects of allowing auto-related uses in the CBD. Nonetheless, giving proper deference to the City Council as legislative policymaker and to the superior court as finder of fact, we cannot conclude that these detriments so outweigh the benefits of Ordinance 92-18 that we must hold the Ordinance was arbitrarily and capriciously adopted.

b. Benefit to the landowner It appears that initially the City was primarily concerned with Rosi Sr.’s interests.¹⁰ Rosi Sr. initiated the inquiry into rezoning the CBD. Before the City amended the zoning code, the planning commission chair stated that “[c]entral to the issue is the Commission’s desire to rezone the Guy Rosi property to allow for vehicle sales.” In 1991 commissioners “voiced their dislike for spot zoning but felt it important to right a wrong [done to Mr. Rosi].” The City planning staff stated that “‘spot zoning’ is not good planning; however there are extenuating circumstances that support the proposed change in zone.” The commission supported these conclusions with the following findings of fact: (1) the property owner had

¹⁰ Currently, Rosi Jr.’s lot is not affected by Ordinance 92-18 since that lot has been contract rezoned to GC1.

owned and operated a business on the property since the early 1950's; (2) public testimony and response to staff were positive; (3) the City Attorney's response was positive; and (4) the business was an expensive business to establish and maintain. This desire to accommodate the needs of a businessman who had been in the community for decades is understandable. Nevertheless, small-parcel zoning designed merely to benefit one owner constitutes unwarranted discrimination and arbitrary decision-making, unless the ordinance amendment is designed to achieve the statutory objectives of the City's own zoning scheme, even where the purpose of the change is to bring a nonconforming use into conformance or allow it to expand. *See Speakman v. Mayor of N. Plainfield*, 8 N.J. 250, 84 A.2d 715, 718-19 (1951). Otherwise, the City would be forced either to discriminate arbitrarily among landowners seeking relaxed restrictions or to abandon the concept of planned zoning altogether. Thus, if assisting Guy Rosi Sr. was the primary purpose of the Ordinance, we would invalidate it even if it was not the product of discriminatory animus.

However, it appears that the City Council was ultimately motivated to pass the Ordinance because of the community benefits the council perceived rather than because of the benefit the Ordinance would confer upon Rosi Sr. The Ordinance restricted auto-related uses to one street not because its real intent was to benefit Rosi Sr.'s property, but, as Homer's city planner testified, because the City desired to minimize the negative impact of auto-related uses, especially the impact of such uses on more pedestrian and tourist-oriented areas such as Pioneer Avenue. *See also supra* note 7. Similarly, it appears that vacant lots located farther from Pioneer Avenue were excluded not because Rosi did not own these lots, but in an attempt to prevent urban sprawl by filling in vacant places in developed areas before expanding development. These reasons are

legitimate, nondiscriminatory justifications for enacting the Ordinance.³ Size of “rezoned” area Ordinance 92-18 directly affects 7.29 acres.¹¹ The size of the area reclassified has been called “more significant [than all other factors] in determining the presence of spot zoning.” Anderson, *supra*, § 5.15, at 378. The rationale for that statement is that “[i]t is inherently difficult to relate a reclassification of a single lot to the comprehensive plan; it is less troublesome to demonstrate that a change which affects a larger area is in accordance with a plan to control development for the benefit of all.” *Id.* at 379.

We believe that the relationship between the size of reclassification and a finding of spot zoning is properly seen as symptomatic rather than causal, and thus that the size of the area rezoned should not be considered more significant than other factors in determining whether spot zoning has occurred. A parcel cannot be too large per se to preclude a finding of spot zoning, nor can it be so small that it mandates a finding of spot zoning. Although Anderson notes that reclassifications of parcels under three acres are nearly always found invalid, while reclassifications of parcels over thirteen acres are nearly always found valid, *id.*, as Ziegler notes, the *relative* size of the parcel is invariably considered by courts. Ziegler, *supra*, § 28.04, at 28-14. One court found spot zoning where the reclassified parcel was 635 acres in an affected area of 7,680 acres. *Chrobuck v. Snohomish County*, 78 Wash.2d 858, 480 P.2d 489, 497 (1971).

Nor does the reclassification of more than one parcel negate the possibility of finding spot zoning. Ziegler, *supra*, § 28.04, at 28-15. In this case, there was some evidence that

¹¹ There may be an immaterial discrepancy about the size of the reclassified area. There was testimony Ordinance 92-18 affected 7.29 acres, but the trial court’s memorandum decision stated the affected lots contained about 7.44 acres. That decision did not state that the exact size of the parcel was significant to its determination that the amendment does not constitute illegal spot zoning.

the reclassified area may have been expanded to avoid a charge of spot zoning. Other courts have invalidated zoning amendments after finding that a multiple-parcel reclassification was a subterfuge to obscure the actual purpose of special treatment for a particular landowner. *Id.* See *Atherton v. Selectmen of Bourne*, 337 Mass. 250, 149 N.E.2d 232, 235 (1958) (holding that the amendment is “no less ‘spot zoning’ by the inclusion of the additional six lots than it would be without them” where proponents of a zoning change apparently anticipated a charge of spot zoning and enlarged the area to include the three lots on either side of the lot in question).

Homer’s CBD is over 400 acres; the reclassified area is 7.29 acres. The CBD appears to contain approximately 500 lots; the reclassified area contains 13 lots. A comparison of the size of the area rezoned and the size of the entire CBD is not in itself sufficient to persuade us that the City’s decision was the product of prejudice, arbitrary decision-making, or improper motives. *South Anchorage Concerned Coalition v. Coffey*, 862 P.2d 168, 174 (Alaska 1993).

Further, it is not necessarily appropriate to compare the area of the affected lots with that of the entire CBD. The comprehensive plan recognized the possibility of subzones. The City considered significant portions of the CBD to be inappropriate for automobile sales and services, particularly Pioneer Avenue and the Bypass. Subtracting those areas from the entire CBD, the reclassified area on Main Street is a relatively larger part of the remaining CBD.

Thus, having considered the relative size of the rezoned area in determining whether Ordinance 92-18 constituted spot zoning, we hold that the size of the area rezoned does not require a finding of spot zoning given other factors supporting a contrary conclusion. We conclude that the superior court did not err in finding that Ordinance 92-18 does not constitute spot zoning. B. Claim of Conflict of Interest Homer City Council member Brian Sweiven owned

one of the thirteen lots in the reclassified area. He was one of nine owners directly affected by Ordinance 92-18. It appears that it was Sweiven who first recommended to the commission that the rezone apply only to Main Street. An article in the Homer News was titled “Sweiven proposes commercial zoning for downtown Homer.” The article refers to the idea of rezoning Main Street as “Sweiven’s proposal.” Griswold alleges that Sweiven had a disqualifying conflict of interest under Homer municipal law and that his participation in the adoption of Ordinance 92-18 therefore invalidates the Ordinance, even though Sweiven’s vote was not necessary for passage. The superior court found that Sweiven did not have a disqualifying conflict of interest and that even if he had, his participation in the deliberations and vote would not invalidate Ordinance 92-18.

[The court concluded there was a disqualifying conflict of interest under the ordinance but that whether the vote should be invalidated required analysis of facts not yet found.]

We therefore remand so that the superior court, applying the analysis discussed above, can determine whether Ordinance 92-18 must be invalidated. C. Public Interest Litigant Status The superior court found that Griswold was not a public interest litigant. That finding was clearly erroneous because Griswold met all four criteria of a public interest litigant in this case: (1) his lawsuit was designed to effectuate strong public policies; (2) if Griswold succeeded, numerous people would have benefited from the lawsuit; (3) only a private party could be expected to bring the action; and (4) Griswold lacked sufficient economic incentive to bring the lawsuit if it did not also involve issues of general importance....

IV. CONCLUSION

We hold that Ordinance 92-18 does not constitute spot zoning, and consequently AFFIRM that aspect of the judgment below. We hold, however, that council member Sweiven had a conflict of interest which should have disqualified him from participating in consideration of the Ordinance. We consequently REVERSE the court's finding that there was no conflict of interest and REMAND so the superior court can determine whether the Ordinance must be invalidated. We also REVERSE that portion of the judgment imposing costs and fees on Griswold.

RABINOWITZ, JUSTICE, dissenting in part. I believe it is of particular significance that Sweiven participated in the discussion of and voted for Ordinance 92-18.

...

Rather than remand this issue, I would hold Ordinance 92-18 invalid because of council member Sweiven's participation.¹²

¹² I note my agreement with the court's other holdings.

Covington v. The Town of Apex

108 N.C. App. 231 (N.C. Ct. App. 1992)

Grimes and Teich by S. Janson Grimes, Asheville, for plaintiffs-appellees.

Holleman and Stam by Henry C. Fordham, Jr., Apex, for defendants-appellants.

Johnson, Judge.

On 26 March 1990, C & D Investment Company, Inc. (hereinafter C & D) petitioned the Town of Apex to rezone the property located at 212 S. Salem Street, Apex, N.C. from Office & Institutional-1 to Conditional Use Business-2. The rezoning was sought to permit electronic assembly by a prospective tenant, A & E Electronic, Inc. (hereinafter A & E), within the former post office building located on the subject property.

The subject property is bordered by property zoned as follows: to its immediate north by property zoned Office to its immediate east by property zoned Business-1; to its immediate southeast by property zoned Business-2; to its immediate south by property zoned Office & Institutional-1; and to its immediate west by property zoned Residential-6.

On 7 May 1990, the Apex Planning Board held a public hearing on the rezoning application. The Apex Planning Director, David Rowland, recommended approval of the rezoning petition in his memorandum given to the Planning Board and Board of Commissioners. On 4 June 1990, the Planning Board voted 5-2 to recommend approval of the rezoning.

On 10 May 1990, several persons, including Donald W. Grimes who resides next to the subject property, submitted a valid protest petition to the Town of Apex. The Apex Board of Commissioners held public hearings on 15 May 1990 and 5 June 1990. After hearing the testimony, the

board voted 4-1 to amend the zoning ordinance to rezone the subject property to a Conditional Use Business-2 district with the condition that use of the tract be restricted to the uses permitted in Office and Institutional-1 plus the use of electronic assembly. The mayor executed the ordinance effecting the rezoning on 19 June 1990. Plaintiffs instituted this action.

Plaintiffs filed suit in the Superior Court of Wake County. After defendants answered denying plaintiffs' allegations, plaintiffs filed a motion for summary judgment. Defendants also filed a motion for summary judgment. The Honorable Donald W. Stephens, Superior Court Judge, granted plaintiffs' motion and denied defendants' motion. Defendants, the Town of Apex and the named commissioners, gave timely notice of appeal.

... .

“Zoning, as a definitional matter, is the regulation by a local governmental entity of the use of land within a given community, and of the buildings and structures which may be located thereon.” *Chrismon v. Guilford County*, 322 N.C. 611, 617, 370 S.E.2d 579, 583 (1988). “A county’s legislative body has authority to rezone when reasonably necessary to do so in the interests of the public health, safety, morals or general welfare; ordinarily the only limitation upon this authority is that it may not be exercised arbitrarily or capriciously.” *Nelson v. Burlington*, 80 N.C.App. 285, 287, 341 S.E.2d 739, 740-741 (1986). “A duly adopted zoning ordinance is presumed to be valid, and the burden is upon the plaintiff to establish its invalidity.” *Id.*

... .

“In this case and indeed in any spot zoning case in North Carolina courts, two questions must be addressed by the fact finder: (1) did the zoning activity in the case constitute spot zoning as our courts have defined that term; and (2) if so, did the zoning authority make a clear showing of a

reasonable basis for the zoning.” *Chrismon*, 322 N.C. at 625, 370 S.E.2d at 588.

The North Carolina Supreme Court has defined spot zoning as

A zoning ordinance, or amendment which singles out and reclassifies a relatively small tract owned by a single person and surrounded by a much larger area uniformly zoned ... so as to relieve the small tract from restrictions to which the rest of the area is subjected is called spot zoning.

Dale v. Town of Columbus, 101 N.C.App. 335, 338, 399 S.E.2d 350, 352 (1991); see *Blades v. City of Raleigh*, 280 N.C. 531, 187 S.E.2d 35 (1972).

An essential element of spot zoning is a small tract of land owned by a single person and surrounded by a much larger area uniformly zoned. Plaintiffs’ supporting materials showed that the parcel of land was a small rectangular lot, 100’ × 275’ in size, and owned by a single owner, C & D. They also presented materials which showed that the vast majority of the land surrounding the subject tract is uniformly zoned.

The Court of Appeals, in *Mabaffey v. Forsyth County*, 99 N.C.App. 676, 394 S.E.2d 203 (1990), *aff’d.*, 328 N.C. 323, 401 S.E.2d 365 (1991), stated that a tract must be examined relative to the vast majority of the land immediately surrounding it, not just a small isolated pocket of property. The vast majority of the land in *Mabaffey* was zoned Residential-5 and Residential-6 while property 700 feet down the highway was zoned Business-1. The Court found that the property zoned Business-1 was an isolated pocket of spot zoning and held that the vast majority of the property surrounding the subject tract, absent the isolated

pocket of spot zoning, was uniformly zoned. *Mahaffey*, 99 N.C.App. at 681, 394 S.E.2d at 206.

In the case *sub judice*, plaintiffs used zoning maps to show that the subject tract is surrounded by a vast majority of property zoned either Residential-6 or Office & Institutional. Property adjacent to the subject tract is zoned Business-1 and Business-2. The two isolated pockets of property zoned Business-1 and Business-2, at the time they were implemented, were both surrounded by Residential-6 and Office & Institutional zoning. The properties zoned Business-1 and Business-2 are themselves examples of spot zoning. On the basis that the property is surrounded by property uniformly zoned Residential-6 and Office & Institutional, the zoning ordinance enacted by the Town of Apex is spot zoning as defined by the North Carolina Courts.

The North Carolina Supreme Court, however, has established that spot zoning is not invalid per se. *Chrismon*, 322 N.C. at 627, 370 S.E.2d at 589. If there is a reasonable basis for the spot zoning in question, then the spot zoning is legal and therefore valid. “The practice [of spot zoning] is not invalid per se but is beyond the authority of the municipality or county and therefore void only in the absence of a reasonable basis.” *Id.*

The North Carolina Supreme Court has enumerated several factors that are relevant to a showing of the existence of a sufficient reasonable basis for spot zoning.

1. The size of the tract in question.
2. The compatibility of the disputed action with an existing comprehensive zoning plan.
3. The benefits and detriments for the owner, his neighbors and the surrounding community.

4. The relationship of the uses envisioned under the new zoning and the uses currently present in adjacent tracts.

Chrismon, 322 N.C. at 628, 370 S.E.2d at 589.

The first factor is the size of the tract in question. Plaintiffs provided evidence that the tract is a single rectangular lot, 100' × 275' in size, with a one-story masonry building containing 3,780 square feet of net interior floor space. The lot is surrounded by residences on three sides and is uniformly zoned Residential-6 and Office & Institutional.

The second factor is the compatibility of the disputed action with an existing comprehensive zoning plan. “Zoning generally must be accomplished in accordance with a comprehensive plan in order to promote the general welfare and serve the purpose of the enabling statute.” *Alderman v. Chatham County*, 89 N.C.App. 610, 615-616, 366 S.E.2d 885, 889, *disc. review denied*, 323 N.C. 171, 373 S.E.2d 103 (1988). The North Carolina General Statutes § 153A-341 (1983) addresses this issue:

Zoning regulations shall be made in accordance with a comprehensive plan[.] The regulations shall be made with reasonable consideration as to, among other things, the character of the district and its peculiar suitability for particular uses, and with a view to conserving the value of buildings and encouraging the most appropriate use of land through the county....

In the present case, a comprehensive zoning plan entitled 2010 Land Use Plan was adopted on 5 December 1989. The plan list several guidelines for future development in the Town of Apex. The two that are relevant to this appeal are the following: (1) Use buffer areas and transitional zoning to protect adjacent existing residential development

and (2) Industrial uses should be located adjacent to or near the major railroad corridors and away from residential areas. The 2010 land Use Map also provides that South Salem Street should continue to be zoned and developed for Office & Institutional uses to provide a transition between residential and more intensive uses. Although the property is zoned Conditional Use Business-2 with the same features as Office & Institutional, the uses to be employed are industrial in nature. The Town of Apex enacted a zoning ordinance in direct contravention of its comprehensive zoning plan.

The third relevant factor is the benefits and detriments to the owner, his neighbors and the surrounding community.

The standard is not the advantage or detriment to particular neighboring landowners, but rather the effect upon the entire community as a social, economic and political unit. That which makes for the exclusive and preferential benefit of such particular landowner, with no relation to the community as a whole, is not a valid exercise of this sovereign power.

Chrismon, 322 N.C. at 629, 370 S.E.2d at 590, citing *Mansfield & Swett, Inc. v. West Orange*, 120 N.J.L. 145, 150, 198 A. 225, 233 (1938). The benefits to the owner are monetary in nature. When C & D leased the premises to the postal service in December 1989, the rent was \$8,000.00 per year. The lease between C & D and A & E, dated 1 June 1990, fixed the rent at \$18,000.00 per year. By leasing the premises to A & E, C & D will receive a \$10,000.00 increase in rental profits. C & D will also benefit from the special conditions of the permit which required additional streetscaping to be performed by the tenant around the subject property. The zoning change presents no detriment to C & D.

The only benefit to the community provided by the zoning change is one of an aesthetic nature. Again, the prospective tenant, in accordance with the conditions listed in the zoning ordinance, is obligated to perform streetscaping around the premises. No jobs will be created by the zoning change nor services provided which would specifically benefit the community. The main detriment to the community would be the placement of an industrial use in an area where the property is used for residential and professional purposes.

In *Chrismon*, the Court considered the community's support of the rezoning ordinance in order to assess the benefit of the zoning change to the community. In the case *sub judice*, there was no support for the purported zoning change. In fact, sixty Apex residents signed a protest petition in opposition to the proposed zoning change.

The final factor listed by the *Chrismon* Court in determining whether or not a reasonable basis exists for spot zoning focuses on the compatibility of the uses envisioned in the rezoned tract with the uses already present in adjacent tracts. The use envisioned under the new zoning change is electronic assembly. Present uses of property surrounding the subject tract include: residential dwellings on three sides, medical offices, a bank, a pharmacy and a jewelry store.

Plaintiffs correctly contend that the use envisioned by A & E is a drastic change from the uses already present in the surrounding area. Electronic assembly is manufacturing which is totally different from the various uses that are already present in the surrounding areas. Ann Sears, president of A & E, stated in her deposition that at various times automobiles, vans and tractor trailer trucks would create a flow of traffic in and out of the premises. This type of activity would totally destroy the tenor of the basically residential and professional area. In *Chrismon*, the Court declared that "rezoning of a parcel in an old and well

established residential district to a commercial or industrial district would be clearly objectionable.” 322 N.C. at 631, 370 S.E.2d at 591.

For the foregoing reasons, the trial court correctly granted the plaintiffs’ motion for summary judgment and denied defendants’ motion for summary judgment. Accordingly, we affirm

Chrismon v. Guilford County

322 N.C. 611 (1988)

Gunn & Messick by Paul S. Messick, Jr., Pittsboro, for plaintiffs-appellees.

Samuel Moore, Deputy Co. Atty., Greensboro, for defendants-appellants Guilford County and Members of the Bd. of Com’rs of Guilford County.

Ralph A. Walker and Osteen, Adams & Tilley by William L. Osteen, Greensboro, for defendant-appellant Bruce Clapp.

Thomas A. McCormick, Jr., City Atty., City of Raleigh by Ira J. Botvinick, Deputy City Atty., Raleigh, and Jesse L. Warren, City Atty., Greensboro, and Henry W. Underhill, Jr., City Atty., Charlotte, amici curiae. MEYER, JUSTICE. This was an action by plaintiffs for a declaratory judgment with regard to an amendment to the Guilford County, North Carolina, zoning ordinance. Specifically, plaintiffs sought a judgment declaring that the amendment to the ordinance adopted 20 December 1982 rezoning defendant Bruce Clapp’s 8.57 acres of land was unlawful and therefore void. The principal issue presented on this appeal is whether the trial court committed reversible error in affirming the validity of the rezoning in question. The Court of Appeals reversed, holding, first, that the rezoning in question constituted illegal “spot zoning” and, second, that it also constituted illegal “contract zoning.” We hold that the Court of Appeals erred in both of these conclusions, and accordingly, we reverse.

The facts underlying the case are undisputed. Defendant Bruce Clapp (who is not related to defendant Paul Clapp, a member of the Guilford County Board of Commissioners) had been operating a business on a 3.18-acre tract of property adjacent to his residence in Rock Creek Township, Guilford County, since 1948. Mr. Clapp's business consisted, first, of buying, drying, storing, and selling grain and, second, of selling and distributing lime, fertilizer, pesticides, and other agricultural chemicals. The distinction between these two principal elements of Mr. Clapp's business is important to the disposition of this case.

In 1964, Guilford County adopted a comprehensive zoning ordinance. The ordinance zoned Mr. Clapp's 3.18-acre tract, as well as an extensive area surrounding his tract, as "A-1 Agricultural" (hereinafter "A-1"). Under this particular zoning classification, one element of the business— namely, the grain drying and storing operation—constituted a permitted use. Significantly, however, the sale and distribution of the lime, fertilizer, pesticides, and other agricultural chemicals were not uses permitted by the A-1 classification. However, because this latter activity pre-existed the ordinance, Mr. Clapp was allowed to continue to sell agricultural chemicals on the 3.18-acre tract adjacent to his own home. Under the ordinance, though such sales constituted a nonconforming use, the sales could be carried on, so long as they were not expanded.

In 1969, plaintiffs William and Evelyn Chrismon bought a tract of land from Mr. Clapp and built a home there. Plaintiffs' lot is located at the south side of the intersection of North Carolina Highway 61 and Gun Shop Road. Highway 61 runs north and south, while Gun Shop Road, a small, unpaved road, begins at Highway 61 and runs east. Mr. Clapp's residence is located on the north side of the intersection, directly across Gun Shop Road from plaintiffs' residence. Adjacent to plaintiffs' lot is an additional 5.06-

acre tract, also owned by Mr. Clapp. Prior to 1980, that tract had been used by its owner for the growing of tobacco.

Beginning in 1980, however, Mr. Clapp moved some portion of his business operation from the 3.18-acre tract north of Gun Shop Road to the 5.06-acre tract south of Gun Shop Road, directly adjacent to plaintiffs' lot. Subsequently, Mr. Clapp constructed some new buildings on this larger tract, erected several grain bins, and generally enlarged his operation. Concerned by the increased noise, dust, and traffic caused by Mr. Clapp's expansion, plaintiffs filed a complaint with the Guilford County Inspections Department. The Inspections Department subsequently notified Mr. Clapp, by letter dated 22 July 1982, that the expansion of the *agricultural chemical operation* to the larger tract adjacent to plaintiffs' lot constituted an impermissible expansion of a nonconforming use. The same letter informed Mr. Clapp further that, though his activity was impermissible under the ordinance, should he so desire, he could request a rezoning of the property.

Shortly thereafter, Mr. Clapp applied to have both of the tracts in question, the 3.18-acre tract north of Gun Shop Road and the 5.06-acre tract south of Gun Shop Road, rezoned from A-1 to "Conditional Use Industrial District" (hereinafter CU-M-2).¹ He also applied for a conditional use permit, specifying in the application that he would use the property as it was then being used and listing those improvements he would like to make in the next five years. Under the CU-M-2 classification, Clapp's agricultural chemical operation would become a permitted use upon

¹ The 3.18-acre tract and the 5.06-acre tract, taken together, do not correspond precisely to the 8.57-acre total indicated in Mr. Clapp's rezoning request. The record reveals that the additional .33 acre in question corresponds to land adjacent to one of the tracts for which Mr. Clapp had an option to buy. We make this explanation for the sake of clarity only; it is not relevant to the disposition of the case.

the issuance of the conditional use permit. The Guilford County Planning Board met on 8 September 1982 and voted to approve the recommendation of the Planning Division that the property be rezoned consistent with Mr. Clapp's request.

On 20 December 1982, pursuant to appropriate notice, the Guilford County Board of Commissioners held a public hearing concerning Mr. Clapp's rezoning application. Members of the Board heard statements from Mr. Clapp, from plaintiffs, and, also, from plaintiffs' attorney. Several additional persons had previously spoken in favor of Mr. Clapp's rezoning request at earlier Board meetings, stating that Mr. Clapp's business provided a service to the farmers in the immediate vicinity. The Board had also been presented with a petition signed by eighty-eight persons favoring the rezoning. Having considered the matter, the Board members voted to rezone the tracts in question from A-1 to CU-M-2, and as a part of the same resolution, they also voted to approve the conditional use permit application.

Pursuant to this decision by the County to rezone the property in question, plaintiffs brought this action seeking to have both the zoning amendment and the conditional use permit declared invalid. After a trial without a jury, the trial court found, among other things, that the sale and distribution of the agricultural chemicals were uses compatible with the agricultural needs of the surrounding area. The trial court concluded further that the rezoning was neither "spot zoning" nor "contract zoning" and also that the County had not acted arbitrarily in making its decision. The trial court made neither findings of fact nor conclusions of law with regard to the issuance of the conditional use permit.

As indicated above, the Court of Appeals reversed the decision of the trial court. It held, first, that the rezoning at issue in this case—namely, the rezoning of Mr. Clapp's 8.57

acres from A-1 to CU-M-2—constituted an illegal form of “spot zoning” and was therefore void. It so held for three principal reasons: (1) the rezoning was not called for by any change of conditions on the land; (2) the rezoning was not called for by the character of the district and the particular characteristics of the area being rezoned; and (3) the rezoning was not called for by the classification and use of nearby land. The Court of Appeals further held that the mere fact that the uses actually authorized were not, in and of themselves, incompatible with the general area was not sufficient to support the trial court’s finding of no illegal spot zoning on these facts.

The Court of Appeals held, second, that the rezoning in question also constituted illegal “contract zoning” and was therefore also void for that alternative reason. Here, stated the Court of Appeals, the rezoning was accomplished upon the assurance that Mr. Clapp would submit an application for a conditional use permit specifying that he would use the property only in a certain manner. The Court of Appeals concluded that, in essence, the rezoning here was accomplished through a bargain between the applicant and the Board rather than through a proper and valid exercise of Guilford County’s legislative discretion. According to the Court of Appeals, this activity constituted illegal “contract zoning” and was therefore void.

Pursuant to N.C.G.S. § 7A-31, and because this Court was convinced that this cause involves legal principles of major significance to the jurisprudence of this State, we allowed defendants’ petition for discretionary review of the Court of Appeals’ decision. The questions plainly before us are these: first, did the rezoning of defendant Clapp’s tract from A-1 to CU-M-2 by the Guilford County Board of Commissioners constitute illegal spot zoning; and second, did the same rezoning constitute illegal contract zoning. The Court of Appeals answered each question in the

affirmative. We conclude that the correct answer to both questions is “no.”

... .

We turn now to the question of spot zoning. As we noted above, in its opinion below, the Court of Appeals held that the rezoning at issue here—namely, the rezoning of Mr. Clapp’s two tracts from A-1 to CU-M-2—constituted an illegal form of “spot zoning” and was therefore void. In arriving at its holding, the Court of Appeals concluded that Guilford County had “failed to show a reasonable basis” for the rezoning in question and cited three principal reasons for its conclusion: (1) the rezoning was not called for by any change of conditions on the land; (2) the rezoning was not called for by the character of the district and the particular characteristics of the area being rezoned; and (3) the rezoning was not called for by the classification and use of nearby land.

While this Court agrees with some portions of the analysis employed by the Court of Appeals, we must disagree with that court’s final conclusion. In our firmly held view, the rezoning accomplished in this case, while admittedly constituting a form of spot zoning, constituted a legal, and *not* an illegal form of spot zoning. Notwithstanding the Court of Appeals’ conclusion to the contrary, we find that, on the facts of this case, the county did show a reasonable basis for the rezoning at issue. Moreover, while this is a case of first impression in that it involves the practice of conditional use zoning, we find our result to be consistent with related zoning cases from other jurisdictions. Accordingly, the Court of Appeals is reversed on this question.

We note as an initial matter that there is substantial disagreement amongst jurisdictions across the nation as to both the proper definition of and the legal significance of the term “spot zoning.” Jurisdictions have essentially

divided into two distinct camps. One group, the majority of jurisdictions, regards the term “spot zoning” as a legal term of art referring to a practice which is per se invalid. *See* 2 A. Rathkopf & D. Rathkopf, *The Law of Zoning and Planning* § 28.01 (4th ed. 1987); 1 R. Anderson, *American Law of Zoning* § 5.12 (3d ed. 1986); 2 E. Yokley, *Zoning Law and Practice* § 13-3 (4th ed. 1978). In such jurisdictions, a judicial determination that a given rezoning action constitutes spot zoning is, ipso facto, a determination that the rezoning action is void.

The position of this first group has been described by one commentator as follows:

Spot zoning amendments are those which by their terms single out a particular lot or parcel of land, usually small in relative size, and place it in an area the land use pattern of which is inconsistent with the small lot or parcel so placed, thus projecting an inharmonious land use pattern. Such amendments are usually triggered by efforts to secure special benefits for particular property owners, without proper regard for the rights of adjacent landowners. These are the real spot zoning situations. *Under no circumstances could the tag of validity be attached thereto.*

2 E. Yokley, *Zoning Law and Practice* § 13-3 at 207 (4th ed. 1978) (emphasis added).

A somewhat smaller group of jurisdictions, including our own, has taken a different approach. In these jurisdictions, it has been stated that “spot zoning” is a descriptive term merely, rather than a legal term of art, and that spot zoning practices may be valid or invalid depending upon the facts of the specific case. *See* 2 E. Yokley, *Zoning Law and Practice* § 13-5 (4th ed. 1978); 2 A. Rathkopf & D. Rathkopf, *The*

Law of Zoning and Planning § 28.01 n. 1 (4th ed. 1987). See also *Tennison v. Shomette*, 38 Md.App. 1, 379 A.2d 187 (1977); *Save Our Rural Environment v. Snobomish County*, 99 Wash.2d 363, 662 P.2d 816 (1983) (holding that the practice of spot zoning is not invalid per se). Unlike in the majority of jurisdictions, in these jurisdictions, a spot zoning case poses, not merely the lone question of whether what occurred on the facts constituted spot zoning. It also poses the additional question of whether the zoning action, if spot zoning, was of the legal or illegal variety.

We are firmly amongst this latter group of jurisdictions which has held that spot zoning is not invalid per se. For example, in this Court's opinion in *Blades v. City of Raleigh*, 280 N.C. 531, 187 S.E.2d 35 (1972), we defined "spot zoning" as follows:

A zoning ordinance, or amendment, which singles out and reclassifies a relatively small tract owned by a single person and surrounded by a much larger area uniformly zoned, so as to impose upon the small tract greater restrictions than those imposed upon the larger area, or so as to relieve the small tract from restrictions to which the rest of the area is subjected, is called "spot zoning."

Id. at 549, 187 S.E.2d at 45. However, having so defined the practice, we hastened to add that the practice is not invalid per se but, rather, that it is beyond the authority of the municipality or county and therefore void *only* "in the absence of a clear showing of a reasonable basis" therefor. *Id.*

Accordingly, in this case, and indeed in any spot zoning case in North Carolina courts, two questions must be addressed by the finder of fact: (1) did the zoning activity in

the case constitute spot zoning as our courts have defined that term; and (2) if so, did the zoning authority make a clear showing of a reasonable basis for the zoning. In the case at bar, since the action by the Board was so clearly spot zoning under the *Blades* definition, this two-part inquiry can quickly be narrowed to the lone question of whether there is a clear showing of a reasonable basis. As the Court of Appeals quite correctly stated in its opinion below in this case:

The rezoning amendment here clearly constitutes spot zoning. The rezoned area was only 8.57 acres and was uniformly surrounded by property zoned A-1. *The remaining question then is whether there was a reasonable basis for the county's action in spot zoning the 8.57 acre tract.*

Chrismon v. Guilford County, 85 N.C. App. 211, 215, 354 S.E.2d 309, 312 (emphasis added).

It is at this point, however, that we differ with the decision of the Court of Appeals. As we stated above, in its opinion, the Court of Appeals concluded, after considering several different factors, that the Board of County Commissioners had failed to clearly demonstrate a reasonable basis for its zoning action and, further, that the action was therefore void. With due respect, we find the analysis employed by the Court of Appeals to be flawed. In the view of this Court, the Board did in fact clearly show a reasonable basis for its rezoning of Mr. Clapp's two tracts from A-1 to CU-M-2. We are particularly persuaded, first, by the degree of public benefit created by the zoning action here and, second, by the similarity of the proposed use of the tracts under the new conditional use zone to the uses in the surrounding A-1 areas.

At the outset, we note that a judicial determination as to the existence or nonexistence of a sufficient reasonable basis in the context of spot zoning is, and must be, the “product of a complex of factors.” 1 R. Anderson, *American Law of Zoning* § 5.13 at 364 (3d ed. 1986). The possible “factors” are numerous and flexible, and they exist to provide guidelines for a judicial balancing of interests. 2 A. Rathkopf & D. Rathkopf, *The Law of Zoning and Planning* § 28.01 (4th ed. 1987). Among the factors relevant to this judicial balancing are the size of the tract in question; the compatibility of the disputed zoning action with an existing comprehensive zoning plan; the benefits and detriments resulting from the zoning action for the owner of the newly zoned property, his neighbors, and the surrounding community; and the relationship between the uses envisioned under the new zoning and the uses currently present in adjacent tracts. *See id.*; 1 R. Anderson, *American Law of Zoning* § 5.13 (3d ed. 1986). Once again, the criteria are flexible, and the specific analysis used depends on the facts and circumstances of a particular case. 2 A. Rathkopf & D. Rathkopf, *The Law of Planning and Zoning* § 28.01 (4th ed. 1987).

Turning our attention to the case before us, we find the latter two of the above-mentioned factors to argue forcefully for the proposition that the rezoning activity here was supported by a reasonable basis. First, the relative benefits and detriments accruing to Mr. Clapp, Mr. Chrismon, and the surrounding area as a result of the rezoning are instructive. It has been stated that the true vice of illegal spot zoning is in its inevitable effect of granting a discriminatory benefit to one landowner and a corresponding detriment to the neighbors or the community without adequate public advantage or justification. 2 E. Yokley, *Zoning Law and Practice* § 13-3 (4th ed. 1978); *see Smith v. Skagit County*, 75 Wash.2d 715, 453 P.2d 832 (1969). Accordingly, while spot zoning which

creates a great benefit for the owner of the rezoned property with only an accompanying detriment and no accompanying benefit to the community or to the public interest may well be illegal, spot zoning which provides a service needed in the community in addition to benefitting the landowner may be proper. See 2 E. Yokley, *Zoning Law and Practice* § 13-3 (4th ed. 1978).

Courts from other jurisdictions have held, for example, that the mere fact that an area is rezoned at the request of a single owner and is of greater benefit to him than to others does not make out a case of illegal spot zoning *if there is a public need for it*. See, e.g., *Jaffe v. City of Davenport*, 179 N.W.2d 554 (Iowa 1970); *Sweeney v. City of Dover*, 108 N.H. 307, 234 A.2d 521 (1967). The Supreme Court of New Jersey long ago announced a standard for properly weighing the various benefits and detriments created by disputed zoning activity. In a statement with which this Court agrees, that court stated as follows:

The standard is not the advantage or detriment to particular neighboring landowners, but rather the effect upon the entire community as a social, economic and political unit. *That which makes for the exclusive and preferential benefit of such particular landowner, with no relation to the community as a whole, is not a valid exercise of this sovereign power.*

Mansfield & Swett, Inc. v. West Orange, 120 N.J.L. 145, 150, 198 A. 225, 233 (1938) (emphasis added).

Turning to the facts of the case at bar, it is manifest that Mr. Clapp, the owner of the tracts rezoned in this case, has reaped a benefit by the Board's action. Specifically, by virtue of the Board's decision to rezone the tracts from A-1 to CU-M-2, Mr. Clapp will be able to carry on the otherwise illegal storage and sale of agricultural chemicals

on both of his two tracts along Gun Shop Road in rural Guilford County. It is also beyond question that the plaintiffs in this case, the Chrismons, have simultaneously sustained a detriment. They, of course, would prefer that Mr. Clapp carry on his agricultural chemical operation somewhere other than next door to their home. Notwithstanding this, and consistent with the authority excerpted above, it is important, in our view, to consider this in the added context of both the benefits of the rezoning for the surrounding community and for the public interest.

As the Court of Appeals quite correctly conceded in its opinion below, “[t]he evidence clearly shows that Mr. Clapp’s operation is beneficial to area farmers.” *Chrismon v. Guilford County*, 85 N.C.App. 211, 218, 354 S.E.2d 309, 313-14. The record reveals that members of the farming community surrounding the disputed land spoke in favor of the rezoning action during a meeting of the Guilford County Board of Commissioners prior to the ultimate meeting of 20 December 1982. Moreover, the record also reveals that, at one of the Board’s meetings concerning the proposed rezoning, the Board was presented with a petition signed by some eighty-eight area residents favoring the action. While this Court understands that it was the Chrismons alone who lived next door to the operation, we do note that it was the Chrismons, *and no one else*, who spoke up against the rezoning.

In addition to this record evidence of substantial community support for Mr. Clapp’s proposed use, there is additional and more objective evidence that the operation constitutes a use valuable to the surrounding community. The area in the vicinity of Mr. Clapp’s operation is zoned for some miles as exclusively A-1 and is used by many for farming activities. Quite independent of the indications from members of the community that they have a subjective need for Mr. Clapp’s services, it cannot be

gainsaid that services of this type— namely, the storage and sale of pesticides, lime, and fertilizer—are valuable in a farming community such as that here. It has been held elsewhere that community-wide need for commercial or industrial facilities usually takes precedence over the objections of several adjacent property owners. *See Citizens Ass'n of Georgetown, Inc. v. D.C. Zoning Comm'n*, 402 A.2d 36 (D.C. App.1979). We believe that to be the case here.

A second factor that we find important in the determination of a reasonable basis for the spot zoning here is the similarity between the proposed use of the tracts under the new conditional use zone and the uses already present in surrounding areas. In its opinion in this case, the Court of Appeals stated as follows:

The only finding of fact which would arguably allow the trial court to conclude that the rezoning was supported by a reasonable basis is that *the uses actually authorized were not incompatible with the general area....* We cannot agree.

Chrismon v. Guilford County, 85 N.C. App. 211, 218, 354 S.E.2d 309, 313-14 (emphasis added). We disagree strongly with the Court of Appeals on this point. In our view, even in the wake of the rezoning of Mr. Clapp's tracts to CU-M-2, the uses present in the rezoned area and the surrounding A-1 area will remain, by virtue of the restrictions inherent in conditional use zoning, quite similar. At the very least, the differences in the uses will certainly not be vast, as is often the situation in a case of illegal spot zoning.

The compatibility of the uses envisioned in the rezoned tract with the uses already present in surrounding areas is considered an important factor in determining the validity of a spot zoning action. 2 A. Rathkopf & D. Rathkopf, *The Law of Zoning and Planning* § 28.04 (4th ed. 1987); 1 R.

Anderson, *American Law of Zoning* § 5.16 (3d ed. 1986). One commentator addressed this factor as follows:

In determining whether a zoning amendment constitutes spot zoning, the courts will consider the character of the area which surrounds the parcel reclassified by the amendment. *Most likely to be found invalid is an amendment which reclassifies land in a manner inconsistent with the surrounding neighborhood.*

1 R. Anderson, *American Law of Zoning* § 5.16 at 383 (3d ed. 1986) (emphasis added). One court has described the evil to be avoided as “an attempt to *wrench* a single small lot from its environment and give it a new rating *which disturbs the tenor of the neighborhood.*” *Magnin v. Zoning Commission*, 145 Conn. 26, 28, 138 A.2d 522, 523 (1958) (emphasis added). We see no such disturbance on the facts before us.

While significant disturbances such as the rezoning of a parcel in an old and well-established residential district to a commercial or industrial district would clearly be objectionable, *see, e.g., Mraz v. County Comm’rs of Cecil County*, 291 Md. 81, 433 A.2d 771 (1981), this is clearly not such a case. We note first that, in actuality, the rezoning of the tracts in question from A-1 to CU-M-2, with all of the attendant restrictions and conditions, really represents very little change. The A-1 classification, as we stated earlier in our review of the facts of this case, allows all of Mr. Clapp’s current operation except for the storage and sale of *agricultural chemicals*. The most noticeable activity, and the activity we suspect the plaintiffs would most like to be rid of—namely, the storage and sale of grain—is a conforming use under the A-1 classification and can legally continue irrespective of any zoning change. In addition, the conditions accompanying the disputed rezoning in the form of the conditional use permit essentially restrict Mr.

Clapp to the very activities in which he is currently engaging—the storage and sale of agricultural chemicals—and nothing more.

Second, this is simply not a situation like that alluded to above in which a radically different land use, by virtue of a zoning action, appears in the midst of a uniform and drastically distinct area. No parcel has been “wrenched” out of the Guilford County landscape and rezoned in a manner that “disturbs the tenor of the neighborhood.” As we have noted on several occasions, the area surrounding the tracts in question is uniformly zoned as A-1 agricultural. The A-1 district, a general use district in the Guilford County comprehensive zoning scheme, provides for a wide variety of uses. Conforming uses under the A-1 district include such disparate uses as single family dwellings, sawmills, fish or fowl hatcheries, farms, hospitals, and grain mills like the one Mr. Clapp was in fact operating here. In our view, the use of the newly rezoned tracts, pursuant to a CU-M-2 assignment, to store and sell agricultural chemicals is simply not the sort of drastic change from possible surrounding uses which constitutes illegal spot zoning.

Our research has revealed a case from another jurisdiction, *Earle v. McCarthy*, 28 Or.App. 539, 560 P.2d 665 (1977), which is strikingly similar on the facts to that before us today. While the court was not specifically called upon there to address a spot zoning challenge, it upheld the issuance of a conditional use permit.

In *Earle*, the Marion County Board of Commissioners granted defendant a conditional use permit for the construction of a hop warehouse. The warehouse was to store a rather large volume of crops from many local hop growers and was, in addition, to store and sell string and burlap used in hop production. The proposed site of the warehouse was in an area of land designated pursuant to the local zoning ordinance as an EFU (Exclusive Farm Use) zone, the purpose of which was as follows:

“The purpose and intent of the Exclusive Farm Use zone is to provide areas for the continued practice of agriculture and permit the establishment of *only those new uses which are compatible to agricultural activities.*”

Earle v. McCarthy, 28 Or.App. 539, 542, 560 P.2d 665, 666 (quoting local ordinance) (emphasis added).

Owners of land near the proposed site of the warehouse challenged the action of the local board. In the view of the court, the warehouse constituted, pursuant to the relevant ordinance, a commercial activity in conjunction with farm use and was therefore a proper use even within an exclusive farm use zone. In our opinion, the parallels between the Oregon case and that before us are striking. The relationship between the hop warehouse and the surrounding EFU zone in the Oregon case, in our view, mirrors the relationship between Mr. Clapp’s agricultural chemical operation and the adjacent A-1 district in this case. Here, as there, the local authority’s activity was proper.

As we noted earlier in this section, cases involving a challenge to a rezoning action on the basis of possible illegal spot zoning are very fact specific; their resolution turns very heavily on the particular facts and circumstances of the case. This spot zoning case, in which the disputed action changed a general district zone to a *conditional use zone*, is, for that reason, a case of first impression. While this Court has addressed the issue of spot zoning in North Carolina cases involving rezoning from one general district to another, the facts of these cases are not analogous to this case and are therefore not helpful.

In sum then, while we agree with the Court of Appeals that the rezoning of Mr. Clapps’ two tracts constituted a form of spot zoning under the *Blades* definition, we find, contrary

to its conclusion, that this activity was of the legal and not illegal variety. More precisely, we find that, because of the quite substantial benefits created for the surrounding community by the rezoning and because of the close relationship between the likely uses of the rezoned property and the uses already present in the surrounding tracts, there was a clear showing of a reasonable basis for the spot zoning in this instance. It is therefore not void, and the Court of Appeals is reversed as to this point.

....

3.7. Contract Zoning

Chrismon v. Guilford County

322 N.C. 611 (1988)

Gunn & Messick by Paul S. Messick, Jr., Pittsboro, for plaintiffs-appellees.

Samuel Moore, Deputy Co. Atty., Greensboro, for defendants-appellants Guilford County and Members of the Bd. of Com'rs of Guilford County.

Ralph A. Walker and Osteen, Adams & Tilley by William L. Osteen, Greensboro, for defendant-appellant Bruce Clapp.

Thomas A. McCormick, Jr., City Atty., City of Raleigh by Ira J. Botvinick, Deputy City Atty., Raleigh, and Jesse L. Warren, City Atty., Greensboro, and Henry W. Underhill, Jr., City Atty., Charlotte, amici curiae. MEYER, JUSTICE. [For the facts of this case, see the prior section.]

We turn finally to the question of contract zoning. As we stated above, in its opinion below, the Court of Appeals also held that the rezoning in question constituted illegal “contract zoning” and was therefore invalid and void for that alternative reason. Relying for support primarily on this Court’s decision in *Allred v. City of Raleigh*, 277 N.C. 530, 178 S.E.2d 432, the Court of Appeals stated, in relevant part, as follows:

[T]he county's action here also constitutes "contract zoning." Rezoning lacks a permissible basis where it is done "on consideration of assurances that a particular tract or parcel will be developed in accordance with restricted approval plans." [*>Allred*, 277 N.C.] at 545, 178 S.E.2d at 441.

... In effect, the rezoning was done on the assurance that Mr. Clapp would submit an application for a conditional use permit specifying that he would use the property only in that manner. The rezoning here was accomplished as a direct consequence of the conditions agreed to by the applicant rather than as a valid exercise of the county's legislative discretion.

Chrismon v. Guilford County, 85 N.C. App. 211, 219, 354 S.E.2d 309, 314 (citations omitted).

We must disagree with the Court of Appeals. In the view of this Court, the Court of Appeals, in its approach to the question of whether the rezoning at issue in this case constituted illegal contract zoning, improperly considered as equals two very different concepts—namely, valid conditional use zoning and illegal contract zoning. By virtue of this treatment of the two quite distinguishable concepts, the Court of Appeals has, for all intents and purposes, outlawed conditional use zoning in North Carolina by equating this beneficial land planning tool with a practice universally considered illegal. In fact, for the reasons we will develop below, the two concepts are not to be considered synonymous. Moreover, we hold that the rezoning at issue in this case—namely, the rezoning of Mr. Clapp's two tracts of land from A-1 to CU-M-2—was, in

truth, valid conditional use zoning and *not* illegal contract zoning.

Illegal contract zoning properly connotes a transaction wherein both the landowner who is seeking a certain zoning action and the zoning authority itself undertake reciprocal obligations in the context of a *bilateral* contract. Shapiro, *The Case for Conditional Zoning*, 41 Temp.L.Q. 267 (1968); D. Mandelker, *Land Use Law* § 6.59 (1982). One commentator provides as illustration the following example:

A Council enters into an agreement with the landowner and then enacts a zoning amendment. *The agreement, however, includes not merely the promise of the owner to subject his property to deed restrictions; the Council also binds itself to enact the amendment and not to alter the zoning change for a specified period of time.* Most courts will conclude that by agreeing to curtail its legislative power, the Council acted ultra vires. Such contract zoning is illegal and the rezoning is therefore a nullity.

Shapiro, *The Case for Conditional Zoning*, 41 Temp. L.Q. 267, 269 (1968) (emphasis added). As the excerpted illustration suggests, contract zoning of this type is objectionable primarily because it represents an abandonment on the part of the zoning authority of its duty to exercise independent judgment in making zoning decisions. *See id.*; *see generally* Wegner, *Moving Toward the Bargaining Table: Contract Zoning, Development Agreements, and the Theoretical Foundations of Governmental Land Use Deals*, 65 N.C.L.Rev. 957 (1987).

As we indicated in Part I above, valid conditional use zoning, on the other hand, is an entirely different matter. Conditional use zoning, to repeat, is an outgrowth of the need for a compromise between the interests of the

developer who is seeking appropriate rezoning for his tract and the community on the one hand and the interests of the neighboring landowners who will suffer if the most intensive use permitted by the new classification is instituted. One commentator has described its mechanics as follows:

An orthodox conditional zoning situation occurs when a zoning authority, *without committing its own power*, secures a property owner's agreement to subject his tract to certain restrictions as a prerequisite to rezoning. These restrictions may require that the rezoned property be limited to just one of the uses permitted in the new classification; or particular physical improvements and maintenance requirements may be imposed. Shapiro, *The Case For Conditional Zoning*, 41 Temp. L.Q. 267, 270-71 (1968) (emphasis added).

In our view, therefore, the principal differences between valid conditional use zoning and illegal contract zoning are related and are essentially two in number. First, valid conditional use zoning features merely a unilateral promise from the landowner to the local zoning authority as to the landowner's intended use of the land in question, while illegal contract zoning anticipates a bilateral contract in which the landowner and the zoning authority make reciprocal promises. Second, in the context of conditional use zoning, the local zoning authority maintains its independent decision-making authority, while in the contract zoning scenario, it abandons that authority by binding itself contractually with the landowner seeking a zoning amendment.

The Court of Appeals, in its opinion in this case, determined that “[t]he rezoning here was accomplished as a direct consequence of the conditions agreed to by the applicant rather than as a valid exercise of the county’s legislative discretion.” *Chrismon v. Guilford County*, 85 N.C.App. 211, 219, 354 S.E.2d 309, 314. In so doing, it concluded, in essence, that the zoning authority here—namely, the Guilford County Board of Commissioners—entered into a bilateral agreement, thereby abandoning its proper role as an independent decision-maker and rendering this rezoning action void as illegal contract zoning. This Court disagrees. We conclude that the zoning authority neither entered into a bilateral contract nor abandoned its position as an independent decision-maker. Therefore, we find what occurred in the case before us to constitute valid conditional use zoning and *not* illegal contract zoning.

First, having carefully reviewed the record in the case, we find no evidence that the local zoning authority—here, the Guilford County Board of Commissioners— entered into anything approaching a bilateral contract with the landowner—here, Mr. Clapp. The facts of the case reveal that, pursuant to a filed complaint from the Chrismons, the Guilford County Inspections Department, by a letter dated 22 July 1982, notified Mr. Clapp that his expansion of the agricultural chemical operation to the tract adjacent to plaintiffs’ lot constituted an impermissible expansion of a nonconforming use. More important for purposes of this issue, the letter informed Mr. Clapp of his various options in the following manner:

Mr. Clapp, there are several courses of action available to you in an effort to resolve your Zoning Ordinance violations:

....

2. You may request rezoning of that portion of your land involved in the violations. *This is not a guaranteed option.*

Shortly after receiving this letter, Mr. Clapp applied to have both of his tracts of land—the 3.18-acre tract north of Gun Shop Road and the 5.06-acre tract south of Gun Shop Road—rezoned from A-1 to CU-M-2. He also filed written application for a conditional use permit, specifying in the application that he would continue to use the property as it was then being used and, in addition, listing those changes he would like to make in the succeeding five years. While these applications were ultimately approved by the Guilford County Board of Commissioners after a substantial period of deliberation which we highlight below, we are quite satisfied that the only promises made in this case were unilateral—specifically, those from Mr. Clapp to the Board in the form of the substance of his conditional use permit application. As the letter excerpted above makes clear, no promises whatever were made by the Board in exchange, and this rezoning does not therefore fall into the category of illegal contract zoning.

Second, and perhaps more important, the Board did not, by virtue of its actions in this case, abandon its position as an independent decision-maker. The Court of Appeals concluded that, rather than from a “valid exercise of the county’s legislative discretion,” the Board’s decision in this zoning matter in fact resulted from an illegal bargain between the Board and the landowner, Mr. Clapp. This conclusion by the Court of Appeals is, in our view, at odds with the facts developed in the record. On the contrary, we find that the Board made its decision in this matter only after a lengthy deliberation completely consistent with both the procedure called for by the relevant zoning ordinance and the rules prohibiting illegal contract zoning.

The Guilford County Zoning Ordinance provides appropriate procedures to be used by landowners wishing to apply for rezonings to a conditional use district and for conditional use permits. Pursuant to the ordinance, a landowner must apply separately for rezoning to the appropriate conditional use district and for the conditional use permit. This second petition—that for the conditional use permit—must provide specific details of the applicant’s proposed use of the land affected by the potential permit. Petitions are directed to the Guilford County Board of Commissioners and are filed initially in the office of the Planning Department. The Planning Director submits the petition and the Planning Department’s recommendation to the Planning Board. The Planning Board subsequently makes advisory recommendations to the Board of County Commissioners, which, following a public hearing held pursuant to proper notice, makes the final decision as to whether the rezoning application and the permit will be approved or disapproved.

It is undisputed, and plaintiffs conceded as much upon oral argument before this Court, that all procedural requirements were observed in this case. As we indicated above, shortly after the Guilford County Inspections Department notified Mr. Clapp of his violation, he submitted an application for a rezoning of the tracts in question. Simultaneously, he applied for a conditional use permit, specifying how the property was then being used and, in addition, listing those improvements he would like to make in the future. The Planning Division recommended that the property be rezoned accordingly, and the Guilford County Planning Board voted to approve that recommendation at their meeting of 8 September 1982.

Pursuant to proper notice, the Guilford County Board of Commissioners held a public meeting on 20 December 1982 regarding both applications and heard numerous

statements from all of the concerned parties. During at least one previous meeting, members of the community had spoken in favor of Mr. Clapp's rezoning request, numerous ideas had been introduced concerning use of the property, and the Board was presented with a petition signed by eighty-eight persons favoring the rezoning request. While the Court of Appeals' opinion seems to suggest that the ultimate result of the 20 December 1982 meeting was a foregone conclusion, the record simply does not reveal as much. Instead, the record reveals that the Board made its final decision only after what appears to have been a thorough consideration of the merits of Mr. Clapp's applications for rezoning and for a conditional use permit, as well as of the various alternatives to granting those applications.¹

While the Court of Appeals concluded that the decision at issue here by the Guilford County Board of Commissioners was not the result of "a valid exercise of the county's legislative discretion," we find just the opposite. The record in the case, in our view, while it reveals a unilateral promise from Mr. Clapp to the Board concerning his proposed use of the tracts, does not demonstrate the reciprocity featured in cases of illegal contract zoning. Moreover, the record also demonstrates, we think quite clearly, that the Board did not abandon its role as an independent decision-maker. Rather, after deliberating over information gathered from a large number of sources and after weighing both the desired rezoning and permit as well as various alternatives, the Board rendered a decision. In short, then, we find that the Board engaged here, *not* in illegal contract zoning, but in

¹ The official minutes of the 20 December 1982 Board of Commissioners meeting reveal discussion of "attempts [that] had been made to resolve differences between the owner and his neighbors." These attempts to resolve the problem short of rezoning the property apparently included the removal of one grain dryer from the property, the planting of trees along the property line, the placement of canvas covers over the grain bins, and discussions with the Environmental Protection Agency concerning other ways of reducing dust and noise.

valid conditional use zoning. Accordingly, the Court of Appeals is reversed as to this issue as well.

IV. In conclusion, this Court has carefully reviewed the record in its entirety and all of the contentions of the parties to this action. Consistent with the above, we hold as follows: (1) the practice of conditional use zoning, insofar as it is reasonable, neither arbitrary nor unduly discriminatory, and in the public interest and, subject to our discussions of spot zoning and contract zoning above, is an approved practice in this state; (2) the rezoning in this case, while clearly spot zoning, was not *illegal* spot zoning in that it was done pursuant to a clear showing of a reasonable basis; and (3) the rezoning in this case, because the Board neither entered into a bilateral agreement nor abandoned its place as the independent decision-maker, was not illegal contract zoning. Accordingly, the decision of Court of Appeals is hereby reversed. The case is remanded to that court for further remand to the Superior Court, Guilford County, for reinstatement of the original judgment denying plaintiffs' action for a declaratory judgment and affirming the zoning action of the Guilford County Board of Commissioners.

REVERSED.

MITCHELL, Justice, dissenting. The zoning amendment and conditional use permit in this case amounted to written *acceptance* by Guilford County of Clapp's *offer*—by written application—to use his property only in certain ways. Thus, for reasons fully discussed in the opinion of the Court of Appeals, 85 N.C.App. 211, 354 S.E.2d 309 (1987), Guilford County's actions in the present case also amounted to illegal "contract zoning." See *Blades v. City of Raleigh*, 280 N.C. 531, 187 S.E.2d 35 (1972); *Allred v. City of Raleigh*, 277 N.C. 530, 178 S.E.2d 432 (1971).

I believe that Guilford County was without authority to engage in any conditional use zoning whatsoever in 1982,

the time it did so in the present case. Effective 4 July 1985, the General Assembly amended N.C. G.S. § 153A-342 and N.C.G.S. § 160A-382 to allow cities and counties to establish conditional use districts. 1985 N.C.Sess. Laws ch. 607. Although the act was entitled an act to “make clear” the authority of local governments to establish such districts, I do not believe that the title controls in this case. Courts need refer to the title in construing an act only when the meaning of the act is in doubt. *Finance Corp. v. Scheidt, Comr. of Motor Vehicles*, 249 N.C. 334, 106 S.E.2d 555 (1959). Here, the 1985 act expressly authorizes units of local government to establish conditional use districts upon a petition by the owners of all the property to be included. Prior to that enactment, units of local government did not have such authority. See generally *Blades v. City of Raleigh*, 280 N.C. 531, 187 S.E.2d 35; *Allred v. City of Raleigh*, 277 N.C. 530, 178 S.E.2d 432. Therefore, the action of the General Assembly is fully consistent with the ordinary presumption that, by amending an existing statute, the legislature intended a departure from the old law. See *Childers v. Parker’s, Inc.*, 274 N.C. 256, 162 S.E.2d 481 (1968).

The majority cites numerous scholarly authorities in support of its very thorough discussion of social policy arguments in favor of conditional use zoning. Boiled down to their essence, these arguments simply amount to an expression of the majority’s view that the authority to engage in conditional use zoning will give planners and local governing authorities greater flexibility and that such flexibility is very valuable. Beyond question, conditional use zoning authority will give them greater flexibility. Because I believe that the General Assembly had not authorized conditional use zoning at the time in question here, I find it unnecessary to consider whether conditional use zoning gives so much “flexibility” to local planners and governing bodies that they are left free to allow or disapprove specific

uses of property in an unconstitutionally arbitrary and unpredictable manner.

For the foregoing reasons, I dissent.

WEBB, J., joins in this dissenting opinion.

WEBB, JUSTICE, dissenting. I join in the dissent of Justice Mitchell and I add a few comments.

... .

I believe that prior to today the rule was that if a person requested a zoning change and submitted plans of the type building he would construct if the change were granted, and the zoning authority made the change based on the promise to construct such a building, that would be contract zoning. We have held contrary to this and in doing so have overruled *Blades* and *Allred*.

I vote to affirm the Court of Appeals.

MITCHELL, J., joins in this dissenting opinion

3.8. Nonconforming Uses

City of Red Bank v. Phillips

2007 WL 4460223 (Tenn. Ct. App. 2007).

Arvin H. Reingold, Chattanooga, Tennessee, for the appellant, Peter H. Phillips.

Arnold A. Stulce, Jr. and Angela C. Larkins, Chattanooga, Tennessee, for the appellee, City of Red Bank, Tennessee.

CHARLES D. SUSANO, JR.

The City of Red Bank (“City”) filed this declaratory judgment action against Peter H. Phillips (“Owner”) alleging that his property at 217 W. Newberry Street was being utilized for multi-family purposes in violation of its single family zoning. Owner admitted to the use of the premises as a three-apartment rental property. He asserted, however, that the non-conforming use of the property was

permitted as a “grandfathered” use. Following a bench trial, the court found in favor of the City. Owner appeals. We affirm.

I.

As early as 1951, the structure at 217 W. Newberry Street was used by the Roberts family as a multi-family dwelling. The Roberts family maintained a residence in the upstairs unit. Two downstairs units were rented out. Each unit had a separate kitchen and bath. This multi-family use continued until December 2002, when one of the tenants moved out. Shortly thereafter, Mrs. Mamie Roberts, the owner of the property, died, leaving only one tenant utilizing the premises. The final tenant departed in July 2003, and the property remained vacant until March 2004, when the house was sold by Mrs. Roberts’ estate to Wallis Properties, LLC. Approximately twenty months passed during which the property was completely vacant until one tenant moved in on April 1, 2005.

Prior to purchasing the property in July 2005, Owner and his mother, Audeline Phillips, inspected the premises. Mrs. Phillips, a realtor, testified at trial that she had located the property on the Multiple Listing Service. Mrs. Phillips noted that when she and her son toured the property, one unit was occupied. She recalled that all the units were furnished and the utilities were on. Over the objection of the City’s attorney, Mrs. Phillips discussed contacting a City employee who indicated to her that the non-conforming multi-family use was grandfathered in. She admitted, however, that she did not request written verification of this statement. Owner testified that he also had been advised by someone with the City that the non-conforming use was subject to grandfather protection. Additionally, Owner indicated that the property was advertised for sale during this time as a three-unit rental and was taxed by the county as commercial property.

After the City became aware of Owner's non-conforming use, it filed a petition for declaratory judgment.¹ The petition alleges, in part, as follows:

The property located at 217 W. Newberry Street, owned by the plaintiff has, for many years, been located in an R-1 Residential Zone....

The permitted uses section of the Red Bank Zoning Ordinance applicable to the R-1 Residential Zone does not permit multi-family residential uses, i.e. for more than one family to occupy a dwelling unit in that R-1 Zone. Accordingly, any use of the premises ... as a multi-family dwelling is in violation of the Red Bank Zoning Ordinance and is a "non-conforming use" pursuant to said Ordinance.

The house and lot ... is configured for three (3) separate apartments/dwelling units and the respondent has leased or is offering to lease three (3) separate dwelling units/apartments located in that structure. Utilization of the premises for multi-family occupancy and/or for more than one dwelling unit is in violation of the Red Bank Zoning Ordinance.

Upon information and belief, the premises ... may have been, in times past, utilized as a multi-family dwelling. Use of the property as a multi-family dwelling in times past may

¹ The City sought the imposition of a civil penalty of up to \$50 per day against Owner. Because the provisions of the City's ordinances introduced at trial did not contain a civil penalty provision, the trial court denied this relief.

or may not have been lawful pursuant to “the grandfather clause”....

The petitioner would show that the premises were owned or occupied until approximately December 15, 2002 when a former owner died. Since on or about June of 2003, the premises have been totally unoccupied until approximately April 1, 2005, a time period of 22 months, ... On or about April 1, 2005, a single individual began, apparently, to live in and occupy one of the separate apartments....

The Red Bank Zoning Ordinance, subsection (205.01), provides, in pertinent part with respect to “non-conforming uses”, as follows:

The lawful use of a building existing at the time of the passage of this Ordinance shall not be affected by this Ordinance, although such use does not conform to the provisions of this Ordinance; and such use may be extended throughout the building ... If such non-conforming building *is removed or the non-conforming use of such building is discontinued for 100 consecutive days*, ... every future use of such premises shall be in conformity with the provisions of this Ordinance.

The Petitioner has refused demands and requests from the City of Red Bank not to utilize the property ... except as a single family residence. During the course of a City Commission meeting on or about September 13, 2005, the respondent

made clear his intention to remodel the separate apartment units and utilize the property as a multi-family dwelling and to not conform and adhere to the requirements of the R-1 Residential Zone regulations of the Red Bank Zoning Ordinance.

(Paragraph numbering omitted; emphasis in original).

In Owner's answer, he stated that at the time he purchased the property "and at all times prior to said date the property was maintained and used as a three unit dwelling containing three separate and distinct apartment units," the "apartment units were used as a three unit apartment structure prior to the enactment of the present R-1 Residential Zone designation and was and is at present a lawful use as a multi-family dwelling," and "at the time of his purchase the property was used as a multi-family apartment structure." Owner contended that his non-conforming use of the property should be permitted as a "grandfathered" use.

After the matter was heard on August 24, 2006, the trial court, sitting without a jury, determined that (1) the City's complaint for declaratory relief and to enforce the zoning ordinance was sustained and (2) that Owner was enjoined from using the real estate in a manner not in conformity with the single-family provisions of the City's zoning ordinance. Owner timely appealed.

II.

Owner raises the following issues:

1. The Chancellor's ruling that the statute does not apply to protect the non-conforming use of the property was in error because, even without subsection (g) of Tenn.Code Ann. s 13-7-208, the statute still applies to protect non-conforming uses.

2. The Chancellor's ruling that a "discontinuance" of the non-conforming use occurred under the ordinance is erroneous because there was no intent to abandon the premises and because the property was always held out as a multiple rental property.

III.

In a non-jury case, our review is de novo upon the record before us, accompanied by a presumption of correctness as to the trial court's findings of fact, unless the evidence preponderates against those findings. *Tenn. R.App. P. 13(d)*; *Bogan v. Bogan*, 60 S.W.3d 721, 727 (Tenn.2001). We accord no such deference to the trial court's conclusions of law. *S. Constructors, Inc. v. Loudon County Bd. of Educ.*, 58 S.W.3d 706, 710 (Tenn.2001); *Ganzevoort v. Russell*, 949 S.W.2d 293, 296 (Tenn.1997).

The issues raised on this appeal involve the interpretation of state statutes and local ordinances. The primary rule of statutory construction is "to ascertain and give effect to the intention and purpose of the legislature." *LensCrafters, Inc. v. Sundquist*, 33 S.W.3d 772, 777 (Tenn.2000); *Carson Creek Vacation Resorts, Inc. v. Dep't of Revenue*, 865 S.W.2d 1, 2 (Tenn.1993). To determine legislative intent, one must look to the natural and ordinary meaning of the language used in the statute itself. We must examine any provision within the context of the entire statute and in light of its over-arching purpose and the goals it serves. *State v. Flemming*, 19 S.W.3d 195, 197 (Tenn.2000). The statute should be read "without any forced or subtle construction which would extend or limit its meaning." *Nat'l Gas Distribs., Inc. v. State*, 804 S.W.2d 66, 67 (Tenn.1991).

Courts are instructed to "give effect to every word, phrase, clause and sentence of the act in order to carry out the legislative intent." *Tidwell v. Collins*, 522 S.W.2d 674, 677 (Tenn.1975). Courts must presume that the General

Assembly selected these words deliberately, *Tenn. Manufactured Hous. Ass'n v. Metro. Gov't*, 798 S.W.2d 254, 257 (Tenn.Ct.App.1990), and that the use of these words conveys some intent and carries meaning and purpose. *Tenn. Growers, Inc. v. King*, 682 S.W.2d 203, 205 (Tenn.1984). The same rules and principles are applied when construing zoning ordinances. *Lions Head Homeowners' Ass'n v. Metro. Bd. of Zoning Appeals*, 968 S.W.2d 296, 301 (Tenn.Ct.App.1997).

The applicable “grandfather” provision is codified at *Tenn.Code Ann. s 13-7-208* (Supp.2006). The owner contends that the statute permits him to continue his non-conforming use. The statute provides, in relevant part, as follows:

In the event that a zoning change occurs in any land area where such land area was not previously covered by any zoning restrictions of any governmental agency of this state or its political subdivisions, or where such land area is covered by zoning restrictions of a governmental agency of this state or its political subdivisions, and such zoning restrictions differ from zoning restrictions imposed after the zoning change, then any industrial, *commercial or business establishment* in operation, permitted to operate under zoning regulations or exceptions thereto prior to the zoning change shall be allowed to continue in operation and be permitted; provided, that no change in the use of the land is undertaken by such industry or business.

Tenn.Code Ann. s 13-7-208(b)(1) (emphasis added). Subsection (g) of the statute adds the following:

The provisions of subsections (b)-(d) shall not apply if an industrial, commercial, or other business establishment ceases to operate for a period of thirty (30) continuous months and the industrial, commercial, or other business use of the property did not conform with the land use classification as denoted in the existing zoning regulations for the zoning district in which it is located. Anytime after the thirty (30) month cessation, any use proposed to be established on the site, including any existing or proposed on-site sign, must conform to the provisions of the existing zoning regulations....

Subsection (g) was added in 2004 and became effective on May 28, 2004. The trial court found, however, that this amendment to the statute cannot have retrospective effect to invalidate a lawful zoning ordinance. Further, the court determined that the property had already been vacant over 100 days prior to this subsection becoming effective. The trial court therefore concluded that “this case is controlled by the law in existence before the 2004 amendments to Tenn.Code Ann. s 13-7-208, *which would be the Red Bank ordinance.*” (Emphasis added).

The City’s ordinance at issue contains the following:

(A) Single-family dwelling.

2. SECTION 11-205.

Non-conforming Uses:

The lawful use of a building existing at the time of the passage of this

Ordinance shall not be affected by this Ordinance, although such use does not conform to the provisions of this Ordinance; and such use may be extended throughout the building.... If such non-conforming building is removed or the non-conforming use of such building is discontinued for 100 consecutive days, every future use of such premises shall be in conformity with the provisions of this Ordinance.

IV.

A.

The trial court determined that Tenn.Code Ann. s 13-7-208 and its subsections did not apply to supersede the ordinances relied upon by the City. As indicated above, the trial court specifically found that subsection (g), which introduces the discontinuance period of 30 months for non-conforming uses, was not in effect at the time the events at issue took place.

Owner argues that even without subsection (g), the trial court erred in assuming that Tenn.Code Ann. s 13-7-208 no longer afforded any protection to the non-conforming use. He asserts that the statute, without subsection (g), was in effect at all times pertinent to this litigation. Thus, Owner contends that while subsection (g) may not apply to the case at hand, the rest of the statute, including subsection (b)(1), is applicable. If subsection (g) is applicable, Owner contends that the property was not completely unoccupied for thirty months or longer, as required by law. Tenn.Code Ann. s 13-7-208(g). Therefore, Owner argues that the trial court committed reversible error in the manner in which it applied the City's ordinance.

In *Bramblett v. Coffee County Planning Comm'n*, No. M2005-01517-COA-R3-CV, 2007 WL 187894, at * 9 (Tenn. Ct.App. M.S., filed January 24, 2007), a panel of this court indicated as follows:

By its plain language, the statute [Tenn.Code Ann. s 13-7-208] protects only “industrial, commercial or business establishment[s].” Tenn.Code Ann. s 13-7-208(b)(1); *Custom Land Dev., Inc. v. Town of Coopertown*, 168 S.W.3d 764, 775 (Tenn.Ct.App .2004) (noting that purpose of statute was “to protect ongoing business operations”). In zoning parlance, use of real property for human habitation is generally classified as “residential,” regardless of whether someone profits from it. Zoning laws typically employ terms such as “commercial,” “industrial,” and “business” in contradistinction to the term “residential.” 6 ZONING LAW AND PRACTICE s 35-2, at pp. 35-3 to 35-7; s 38-1, at pp. 38-1 to 38-2; s 39-1, at pp. 39-1 to 39-5; s 44-1, at p. 44-1. 3 AMERICAN LAW OF ZONING s 18.15, at 304. Tennessee’s zoning statutes are no exception.

(Capitalization in original; footnotes omitted).

Owner seeks to use the property in an indisputably residential manner. He desires to lease out the three units of the premises to individuals and families for human habitation. Tenn.Code Ann. s 13-7-208 confers no grandfathering protection for this use. Accordingly, only the City’s ordinance applies in this matter.

B.

The power of local governments to enact ordinances regulating the use of private property is derived from the state and is delegated to them by the legislature. *Henry v. White*, 250 S.W.2d 70, 71 (Tenn.1952); *Anderson County v. Remote Landfill Servs., Inc.*, 833 S.W.2d 903, 909 (Tenn.Ct.App.1991). Local governments' statutory power to employ zoning measures to control the use of land within their boundaries is firmly established. *Draper v. Haynes*, 567 S.W.2d 462, 465 (Tenn.1978). The City's zoning ordinance, subsection 205.01, states, in part, that "[i]f such non-conforming building is removed or the non-conforming use of such building is discontinued for 100 consecutive days, every future use of such premises shall be in conformity with the provisions of this Ordinance."

In interpreting a zoning ordinance, a court must strictly construe the relevant ordinance in favor of the property owner. *Boles v. City of Chattanooga*, 892 S.W.2d 416, 420 (Tenn.Ct.App.1994) (citing *State ex rel. Wright v. City of Oak Hill*, 321 S.W.2d 557, 559 (Tenn.1959)). A zoning ordinance is in derogation of the common law because it operates to deprive an owner of a use of land which might otherwise be lawful. *Oak Hill*, 321 S.W.2d at 559.

Under the facts of this case, Owner contends that the trial court erred in ruling that a lack of tenants constituted a discontinuance of the non-conforming use for 100 consecutive days. He quotes from 83 Am.Jur.2d *Zoning and Planning* s 619 at 534-35 (2003) as follows:

Discontinuance of a nonconforming use may sometimes be caused by the loss of a tenant, but this generally does not result in an abandonment, so long as the owner makes a diligent effort to locate a new tenant.

(Citations omitted). Owner further asserts that a lack of multiple lodgers has been held not to constitute

discontinuance where the apartments were still available for rent. He cites us to James L. Isham, Annotation, Zoning: Occupation Of Less Than All Dwelling Units As Discontinuance Or Abandonment Of Multifamily Dwelling Nonconforming Use, 40 A.L.R. 4th 1012 (1985).

Relying on Boles, Owner asserts that the voluntary and affirmative actions of the prior owners did not manifest an intention to abandon the non-conforming multi-family use of the property. In Boles, an injunction had been issued which required the closure of an adult-oriented establishment which wanted to lease its premises to another lessee of adult products. More than 100 days had passed since the premises were used for an adult-oriented establishment, however, the court found that the failure to maintain its non-conforming use was due to the injunction and not due to the intent of the owner. This court held as follows:

The word “discontinued” as used in a zoning ordinance is generally construed to be synonymous with the term “abandoned.” The meaning of the word “abandoned,” in the zoning context, generally includes an intention by the landowner to abandon as well as an overt act of abandonment.

Boles, 892 S.W.2d at 420 (citing Douglas Hale Gross, Annotation, Zoning: Right to Resume Nonconforming Use of Premises After Involuntary Break in the Continuity of Nonconforming Use Caused by Governmental Activity, 56 A.L.R.3d 138, 151, 152 (1974)). The Boles court noted that

the term “discontinued” or words of similar import, as utilized in zoning ordinances with specific time limitations, should be construed to include an element of intent,

combined with some act-or failure to
act-indicative of abandonment....

Id., 892 S.W.2d at 422. This court added that such an ordinance will not apply “if the discontinuance of the non-conforming use is purely involuntary in nature.” Id.

Owner further argues that there was no consolidation of any of the units into one unit and that repairs and renovations were undertaken without any intent to combine units. The separate kitchen and bath fixtures and appliances were maintained, ready for new tenants. According to Owner, except for the time when they were being renovated, the units were always available to let. He also contends that electricity was supplied to all the units throughout the relevant period and asserts that “[y]ou don’t keep power on in some of your rental property ... if you are abandoning that use.”

As argued by the City, the circumstances in *Toles v. City of Dyersburg*, 39 S.W.3d 138 (Tenn.Ct.App.2000), are very similar to those in the present matter, namely that the discontinuance of the non-conforming use was due to the owners voluntarily not using the property for the non-conforming use and therefore the “grandfather” protection was lost. In *Toles*, this court indicated that

[w]e read *Boles* to support the proposition that “intent” is only important where some force outside the control of the property owner prevents the continued use of the land in a particular manner.

39 S.W.3d at 141. Unlike the injunction in *Boles*, nothing prevented the prior owners of this property from renting out the units. As found by the trial court, there was no extrinsic force which prevented the leasing of the property.

There was nothing involuntary about the cessation of the non-conforming use.

The trial court properly determined that “the protection of the grandfather clause had been lost long before Owner bought the property on July 21, 2005” and “the lack of any tenant for approximately twenty (20) months resulted in the loss of the grandfather clause’s protection for 217 W. Newberry Street.” The failure of the Roberts’ Estate and/or Wallis Properties, LLC to lease the property as a triplex, or rent to at least two tenants, was a discontinuance of the non-conforming use.

V.

We do not find that the evidence preponderates against the trial court’s resolution of this matter. Accordingly, the judgment of the trial court is affirmed. This case is remanded to the trial court for enforcement of the trial court’s judgment and for collection of costs assessed below, all pursuant to applicable law. Costs on appeal are taxed to the appellant, Peter H. Phillips.

Suffolk Asphalt Supply v. Board of Trustees of Village of Westhampton Beach

59 A.D.3d 429 (N.Y. App. Div. 2009)

MASTRO, J.P., FLORIO, COVELLO AND BELEN, JJ., concur.

The plaintiff owns real property within the Village of Westhampton Beach that has been improved with an asphalt plant since 1945. In 1985 the Board of Trustees of the Village of Westhampton Beach (hereinafter the Board of Trustees) amended the Village’s zoning code so that the use of the property as an asphalt plant became nonconforming. The plaintiff acquired the property, including the asphalt plant, in 1994.

In June 2000 the Board of Trustees adopted Local Law No. 10 (2000) of Village of Westhampton Beach (hereinafter the local law), which provided that the right to operate and

maintain the nonconforming asphalt plant was to terminate within one year unless the plaintiff applied to the Zoning Board of Appeals of the Village of Westhampton Beach (hereinafter the ZBA) for an extension of the termination date, not to exceed five years from the date that the local law was adopted. The plaintiff applied to the ZBA for such an extension almost immediately after the enactment of the local law, and, in a determination dated May 19, 2005, the ZBA granted the maximum extension permitted by the local law and directed the plaintiff to terminate its asphalt operation effective July 2, 2005.

Meanwhile, the plaintiff commenced this action, inter alia, for a judgment declaring that the local law is invalid and unconstitutional since, among other things, the amortization period provided in the statute is unreasonably short. After the ZBA made its determination, the plaintiff moved for summary judgment declaring that the local law is invalid and unconstitutional.

“The validity of an amortization period depends on its reasonableness. We have avoided any fixed formula for determining what constitutes a reasonable period. Instead, we have held that an amortization period is presumed valid, and the owner must carry the heavy burden of overcoming that presumption by demonstrating that the loss suffered is so substantial that it outweighs the public benefit to be gained by the exercise of the police power” (*Village of Valatie v Smith*, 83 NY2d 396, 400-401 [1994] [citations omitted]).

“Whether an amortization period is reasonable is a question which must be answered in light of the facts of each particular case” (*Modjeska Sign Studios v Berle*, 43 NY2d 468, 479-480 [1977], *appeal dismissed* 439 US 809 [1978]). “Reasonableness is determined by examining all the facts, including the length of the amortization period in relation to the investment and the nature of the use. The period of amortization will normally increase as the amount invested

increases or if the amortization applies to a structure rather than a use” (*Matter of Town of Islip v Caviglia*, 73 NY2d 544, 561 [1989]). Factors to be considered in determining reasonableness include “the nature of the business of the property owner, the improvements erected on the land, the character of the neighborhood, and the detriment caused the property owner” (*Matter of Harbison v City of Buffalo*, 4 NY2d 553, 562-563 [1958]).

“Typically, the period of time allowed has been measured for reasonableness by considering whether the owners had adequate time to recoup their investment in the use” (*Village of Valatie v Smith*, 83 NY2d at 401). “While an owner need not be given that period of time necessary to permit him to recoup his investment entirely, the amortization period should not be so short as to result in a substantial loss of his investment” (*Modjeska Sign Studios v Berle*, 43 NY2d at 480 [citation omitted]).

Inasmuch as the plaintiff failed to submit any evidence as to the amount that it actually invested in the business, there remains a question of fact regarding whether the amortization period provided in the local law was reasonable and thus constitutional as applied to the plaintiff (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Chekenian v Town Bd. of Town of Smithtown*, 202 AD2d 542, 543 [1994]). With respect to the plaintiff’s contention that the brevity of the amortization period rendered the local law unconstitutional on its face, “a litigant cannot sustain a facial challenge to a law when that law is constitutional in its application to that litigant” (*Village of Valatie v Smith*, 83 NY2d at 403). Accordingly, the Supreme Court properly denied the plaintiff’s motion for summary judgment.

**Trip Associates v. Mayor and City Council of
Baltimore**

898 A.2d 449 (2006)

John A. Austin, Towson, for Petitioners.

Sandra R. Gutman, Chief Sol. (Thurman W. Zollicoffer, Jr.,
City Sol., on brief), Baltimore, for Respondent.

BELL, CHIEF JUDGE. The question this case presents is whether the Board of Municipal and Zoning Appeals (“the Board”) erred when it restricted the number of days per week the appellants could operate a valid nonconforming use. The appellants’ property, located in the B-5-1 Zoning District in Baltimore City, is being used for the operation of “Club Choices,” a nightclub and after-hours establishment that sometimes features adult entertainment. The Club is owned by the appellant, Anthony Dwight Triplin (“Triplin”), who also is the owner of Triplin Associates, Inc. (“Trip”), the other appellant.

Triplin purchased 1815-17 North Charles Street, the property at issue, in 1983. Prior to his purchase, the property had been a nightclub featuring adult entertainment, including male and female exotic dancing. The adult entertainment had been presented up to five nights a week since 1979. When Triplin purchased the property, the applicable zoning ordinance did not prohibit the use of the property as an adult entertainment facility. Nevertheless, Triplin reduced the number of nights of nude or exotic dancing from five to two nights per week, featuring music and comedy on the other nights. The Board approved his use of the premise as an “after hours establishment” in 1992. With this approval, the adult entertainment was presented after hours, exclusively.

On December 15, 1994, Ordinance No. 443 was enacted. That ordinance, codified at Baltimore City Code, Art. 30, § 8.0-61, regulated adult entertainment businesses, “where persons appear in a state of total or partial nudity.” It also

provided that “[a]ny adult entertainment business existing on September 10, 1993 is considered a nonconforming use, subject to all Class III regulations.”¹ Baltimore City Zoning Code § 13-609. After this Ordinance was passed, Triplin continued to use the facility as a club that provided adult entertainment after hours. That use was unchallenged until April 14, 2000, when a Baltimore City zoning inspector issued a “Code Violation Notice and Order” to the Club. The violation notice charged:

“ZONING VIOLATION

“1. Using portion of premises for adult entertainment without first obtaining proper Adult Entertainment Ordinance and Adult Entertainment License. DISCONTINUE SAID USE. REMOVE ALL STOCK, MATERIAL, EQUIPMENT, AND ANY ADVERTISING SIGNS ASSOCIATED WITH SAID USE. OBTAIN CERTIFICATE OF OCCUPANCY BEFORE RE-ESTABLISHING ANY USE.”

Triplin appealed to the Board. On appeal, Triplin testified that Club Choices featured exotic dancing and adult

¹ Class III” is defined in the Baltimore City Zoning Code, § 13-401. In describing what is regulated by the subtitle, it states:

”§ 13-401. Scope of subtitle.

“This subtitle applies to Class III nonconforming uses, which comprise:

“(1) any nonconforming use of all or part of a structure that was designated and erected primarily for a use that is no longer allowed in the district in which it was located;

“(2) any nonconforming use of the lot on which that structure is located; and

“(3) any nonconforming use of land or structures not regulated as Class I or Class II.”

entertainment two times a week, Wednesdays and Fridays, for two hours each night. That testimony was confirmed by employees, who offered further that such dancing with partial nudity has been presented two nights per week since 1983.

The Board ruled:

“1 [A]dult entertainment may be continued two nights during the week. “The Board finds that a non-conforming use of the premises for adult entertainment had been established prior to Ordinance 443 (adult entertainment business approved December 15, 1994) and may be continued under Subsection 13-402 of the Zoning Code. The Board finds that with the above condition that the request would not be detrimental to or endanger the public health, security, general welfare, or morals or be injurious to the use and enjoyment of other property in the immediate vicinity, nor substantially diminish and impair property values in the neighborhood. Further, and as agreed by the appellant that this is specifically for the appellant Mr. Triplin, the owner and operator of the subject site and a copy of the resolution/decision is to be recorded in the land records of Baltimore City and the appellant is to provide to the Board a court certified copy to be placed in the file ... as part of the record. The purpose of the recording requirement is to give the Charles North Community Association legal standing to enjoin any uses as adult

entertainment to a subsequent purchaser, owner, lessee or operator....

“In accordance with the above facts and findings and subject to the aforementioned condition, (adult entertainment two nights a week only) the Board approves the application.”

Board of Municipal and Zoning Appeals, Appeal No. 327-00X, October 12, 2000. Thus, the Board, despite finding that Club Choices was a valid nonconforming use, limited that use, based on the testimony, to two nights per week.

Triplin petitioned the Circuit Court for Baltimore City for judicial review of the Board’s decision. That court affirmed the Board’s decision

A. Title 13 of the Baltimore City Zoning Code establishes the zoning districts in Baltimore, and “provides for the regulation of nonconforming uses and noncomplying structures existing in the various districts.” Baltimore City Zoning Code § 13-102. Under the Baltimore City Zoning Code, a “nonconforming use” is defined as “any lawfully existing use of a structure or of land that does not conform to the applicable use regulations of the district in which it is located.” Baltimore City Zoning Code § 13-101(c). A valid and lawful nonconforming use is established if a property owner can demonstrate that before, and at the time of, the adoption of a new zoning ordinance, the property was being used in a then-lawful manner for a use that, by later legislation, became non-permitted.

As the Court of Special Appeals recognized, nonconforming uses are not favored. *County Council v. Gardner, Inc.*, 293 Md. at 268, 443 A.2d at 119 (“These local ordinances must be strictly construed in order to effectuate the purpose of eliminating nonconforming uses.”); *Grant v. Mayor and City Council of Baltimore*, 212 Md. 301, 308, 129

A.2d 363, 365 (1957) (“Indeed, there is general agreement that the fundamental problem facing zoning is the inability to eliminate the nonconforming use”); *Colati v. Jirout*, 186 Md. 652, 657, 47 A.2d 613, 615 (1946) (noting that the spirit of the Baltimore City Zoning Ordinance is against the extension of nonconforming uses). Indeed, in *Grant*, this Court stated, “[T]he earnest aim and ultimate purpose of zoning was and is to reduce nonconformance to conformance as speedily as possible with due regard to the legitimate interests of all concerned.” 212 Md. at 307, 129 A.2d at 365. The context for this conclusion was the historical development of the nonconforming use, which the Court also detailed:

“Nonconforming uses have been a problem since the inception of zoning. Originally they were not regarded as serious handicaps to its effective operation; it was felt they would be few and likely to be eliminated by the passage of time and restrictions on their expansion. For these reasons and because it was thought that to require immediate cessation would be harsh and unreasonable, a deprivation of rights in property out of proportion to the public benefits to be obtained and, so, unconstitutional, and finally a red flag to property owners at a time when strong opposition might have jeopardized the chance of any zoning, most, if not all, zoning ordinances provided that lawful uses existing on the effective date of the law could continue although such uses could not thereafter be begun.”

Id.

Nevertheless, a “nonconforming use is a vested right entitled to constitutional protection.” *Amerieihn v. Kotras*, 194 Md. 591, 601, 71 A.2d 865, 869 (1950). The Court in *Amerieihn* made that point forcefully. There, after the area in which a light manufacturing plant was located was zoned as residential, the neighbors brought a complaint, praying that the new owners of the plant be restrained from using the property for manufacturing purposes. This Court, in ruling against the neighbors, pointed out:

“If a property is used for a factory, and thereafter the neighborhood in which it is located is zoned residential, if such regulations applied to the factory it would cease to exist, and the zoning regulation would have the effect of confiscating such property and destroying a vested right therein of the owner. Manifestly this cannot be done, because it would amount to a confiscation of the property.”

194 Md. at 601, 71 A.2d at 869 (citations omitted). *See also Board of Zoning Appeals of Howard County v. Meyer*, 207 Md. 389, 114 A.2d 626 (1955), in which the Court of Appeals held that an owner of a truck manufacturing plant on land that had been rezoned as residential had a valid nonconforming use, observing, “[t]he law is established that the zoning of an area as residential cannot apply to a previously established factory in that area, which is entitled under the circumstances to constitutional protection.” 207 Md. at 394, 114 A.2d at 628.

A nonconforming use may be reduced to conformance or eliminated in two ways: by “amortization,” that is, requiring its termination over a reasonable period of time, and by “abandonment,” *i.e.* non-use for a specific of time. Thus, in *Grant*, the Court held that an amortization period of five years to remove nonconforming billboards was valid, and

that a five-year period was not an arbitrary time period. 212 Md. at 316, 129 A.2d at 370.

The Baltimore City ordinance takes the “abandonment” approach. Section 13-406, as we have seen, prohibits the expansion of any nonconforming use, except as authorized by the Board. Under § 13-407, “Discontinuance or abandonment,” the failure actively and continuously to operate the nonconforming use results in its abandonment. That section provides:

“(a) *Discontinuance or abandonment*

“(1) Except as specified in this section, whenever the active and continuous operation of any Class III nonconforming use, or any part of that use, has been discontinued for 12 consecutive months:

“(i) the discontinuance constitutes an abandonment of the discontinued nonconforming use, or discontinued part of that use, regardless of any reservation of an intent to resume active operations or otherwise not abandon the use; and

“(ii) the discontinued nonconforming use, or discontinued part of that use:

“(A) may not be reestablished; and

“(B) any subsequent use of any part of the land or structure previously used for the discontinued use, or discontinued part of that use, must conform to the

regulations of the district in which the land or structure is located.

“(2) In accordance with Subtitle 7 {“Modifications and Continuances by Board”} of this title, the Board may extend the time limit for discontinuance for 1 or more additional periods. In no case, however, may the total of the additional time exceed 12 months.”

Abandonment, as the foregoing ordinance confirms, focuses not on the owner’s intent, but rather, on whether the owner failed to use the property as a nonconforming use in the time period specified in the zoning ordinance. *See Catonsville Nursing Home, Inc. v. Loveman*, 349 Md. 560, 581, 709 A.2d 749, 759 (1998) (“There is no hard and fast rule in nonconforming use abandonments that intent to abandon must be actually shown when the zoning ordinance or statute utilizes the word ‘abandonment’”).

On the other hand, the abandonment or discontinuance must be active and actual. In *Mayor and City Council of Baltimore v. Dembo, Inc.*, 123 Md.App. 527, 719 A.2d 1007 (1998), the Court of Special Appeals discussed whether the failure of a property owner to apply for a license to operate an adult entertainment business after the passage of an ordinance, in that case, Ordinance 443, the same one as involved in this case, which prohibited such business in the district in which it was located, constituted “abandonment” of the nonconforming use, notwithstanding that he had actually used the property in that nonconforming manner throughout the subject period. There, Donald Dembo owned an adult entertainment establishment called the “Gentleman’s Gold Club” (“the Gold Club”) which, like Triplin’s club, was located in a zoning district in which it

was not permitted. Like Club Choices, however, the Gold Club's use was a valid nonconforming use, having pre-existed the ordinance that excluded that use. The city argued that, by using the property without the required license for two years, Dembo had essentially terminated his once lawful nonconforming use. Addressing for the first time whether or not a failure to apply for a license constituted an abandonment of a lawful nonconforming use, the Court of Special Appeals, after analyzing how other jurisdictions approached the issue, concluded:

“We shall follow the majority of jurisdictions and apply the rule that a valid nonconforming use will not be forfeited by the failure of the business owner to secure a license to operate his business. We consider that this rule accords reasonable protection to the property right that has been long recognized under Maryland law as a vested right subject to constitutional protection.”

123 Md.App. at 541, 719 A.2d at 1015. Furthermore, the Court of Special Appeals held that, even without the license, “Dembo retain[ed] its vested nonconforming use status to operate a business with adult entertainment. ..”.

There is no issue with regard to Club Choices' status; it is a valid Class III nonconforming use property under § 13-609 of the Zoning Code. It is an adult-entertainment business, presently existing, that was also operating as such on September 10, 1993, as § 13-609 specifies. As to that status, there is no contention that Triplin has abandoned or discontinued it, at least in whole. The issue is, as the Court of Special Appeals has framed it, whether using the valid nonconforming use more frequently than it was being used when the use became nonconforming—presenting adult entertainment more than two nights per week—would be a

prohibited expansion of the use or a mere intensification of the use.

B. Despite Maryland's well settled policy against nonconforming use and the Baltimore City Zoning Code's explicit prohibition against expansion of those uses, Baltimore City Zoning Code § 13-406, Maryland recognizes, and our cases have held, that an intensification of a nonconforming use is permissible, so long as the nature and character of that use is unchanged and is substantially the same.

In *Green, supra*, 192 Md. 52, 63 A.2d 326, citizens of Baltimore City sought to enjoin the Department of Recreation and Parks of Baltimore City and the Baltimore Baseball and Exhibition Company from allowing professional baseball to be played at Baltimore Stadium, and further to enjoin the use of the loud speaker system, the flood lights, and the parking facilities nearby. Baltimore Stadium was constructed prior to 1931, when the district in which it was located was rezoned residential, 192 Md. at 63, 63 A.2d at 330, after which it was used infrequently for football games, track meets and civic events. It was used more frequently after 1939, when lights were installed, a speaker system having been installed earlier. 192 Md. at 57, 63 A.2d at 327-328. That increased use consisted mainly of football games and other events, not baseball games. In 1944, however, a fire destroyed the baseball stadium, then known as Oriole Park. This resulted in more baseball games being played at Baltimore Stadium. 192 Md. at 57-58, 63 A.2d at 328.

When that occurred, neighboring citizens contended that the use of the Stadium for baseball games for a considerable portion of the year was an enlargement of the valid nonconforming use of the Stadium and, therefore, contravened the zoning ordinance. 192 Md. at 63, 63 A.2d at 330. They pointed out that, when the zoning ordinance was enacted, the nonconforming use consisted of

professional football games and the infrequent, at best, baseball game. This Court disagreed. *Id.* Acknowledging that the “spirit of the zoning ordinance is against the extension of nonconforming uses and that such uses should not be perpetuated any longer than necessary,” we observed:

“We have never held that the more frequent use of a property for a purpose which does not conform to the ordinary restrictions of the neighborhood is an extension of an infrequent use of the same building for a similar purpose. We do not think such a contention is tenable. Nor does it seem to us that a different use is made of the Stadium when the players of games there are paid. The use of the property remains the same.”

192 Md. at 63, 63 A.2d at 330. This Court concluded, “we find that the Department had and has power to lease the Stadium... for the purposes of professional baseball, and that such use is not an extension of the non-conforming use heretofore existing....” 192 Md. at 63-64, 63 A.2d at 330-331.

In *Nyburg v. Solmson*, 205 Md. 150, 106 A.2d 483 (1954), this Court addressed the question of whether increased usage of nonconforming property constituted an unlawful extension of that use or was simply an intensification of the use. At issue was property on which a garage had been built in 1920, on which cars of nearby residents were parked. In front of the garage was an open area, “some 164 feet by 129 feet.” 205 Md. at 153, 106 A.2d at 484. In 1931, after the neighborhood where the garage was located had been classified as a residential use district, the garage operation continued without change. 205 Md. at 153, 106 A.2d at 484. In 1950, the owners of the garage contracted with a new

car company to use the open space for the storage of new cars. 205 Md. at 154, 106 A.2d at 484. In 1953, a complaint was made by neighbors that the property was being used in violation of the zoning ordinance. 205 Md. at 154, 106 A.2d at 484. The Board of Municipal and Zoning Appeals held that, while the garage owner had a valid nonconforming use for parking, storage and washing motor vehicles and the sale of gasoline and accessories, that use was restricted by the nature and extent of the use to which the open area in front of the garage was put in 1931, the result of which was that no more than ten vehicles could be stored on the lot at any one time. 205 Md. at 154, 106 A.2d at 484-485. The Baltimore City Court reversed, striking down the restriction “since it amounted to an attempted prohibition of a legally valid intensification of use.” 205 Md. at 156, 106 A.2d at 485. On appeal, this Court rejected the appellant’s argument that, without the restriction the zoning board placed on the number of cars that could be stored in the open space, there would be a prohibited extension of a non-conforming use. 205 Md. at 161, 106 A.2d at 488. Explaining our decision, this Court held:

“[H]ere there is not an extension but merely an intensification of a long continued non-conforming use. In *Green v. Garrett*, ... [t]his Court held that ... ‘more frequent use of a property for a purpose which does not conform to the ordinary restrictions of the neighborhood is an extension of an infrequent use of the same building for a similar purpose. We do not think such a contention is tenable.’ ... It was held that although there was no doubt that the games played at the stadium had produced a use greatly in excess of the former use, that intensification was

not an extension within the meaning of the Zoning Ordinance.

“We think that the present case is controlled by the principle of the Green case and that the court below was right in striking down the restriction which the Board had placed on the use of the open space in front of the garage, and in affirming otherwise the findings of the Board.”

205 Md. at 161-162, 106 A.2d at 488, *citing* and *quoting* Green, 192 Md. at 63, 63 A.2d at 330.

Jahnigen v. Staley, 245 Md. 130, 225 A.2d 277 (1967), is similarly instructive. There, a decree by the Circuit Court for Anne Arundel County, in addition to restrictions related to and involving expansions of physical facilities, including the extension of a pier, occurring after the zoning which prohibited any non-conforming use to those uses in effect prior to the date of its adoption, 245 Md. at 133, 225 A.2d at 279, restricted the nonconforming use of marina property to the rental of seven rowboats. The waterfront property had been used by its previous owners as a boat rental property dating from 1946, when a pier was attached to the land, and continuing after 1949, when a comprehensive zoning ordinance rezoned the land and placed the property into an agricultural classification.

On appeal, this Court reaffirmed the principle that although the purpose of zoning regulations is to restrict rather than to expand nonconforming uses, *Phillips v. Zoning Commissioner*, 225 Md. 102, 169 A.2d 410 (1961), an intensification of a non-conforming use is permissible so long as the nature and character of the use is unchanged and substantially the same facilities are used. 245 Md. at 137, 225 A.2d at 281, *see also* *Nyburg*, 205 Md. 150, 106 A.2d 483. While physical expansions like constructing a new pier

and use of the land for services other than what was already present prior to the effective date of the ordinance were held to be invalid extensions of the nonconforming use, 245 Md. at 138, 225 A.2d at 282, this Court decided that “[a]ny increase in the number of rowboats rented would be an intensification of [the] non-conforming use and would not be an extension.” 245 Md. at 138, 225 A.2d at 282. The intensification of a non-conforming use, in short, is permissible so long as the nature and character of the use is unchanged and substantially the same facilities are used. 245 Md. at 137, 225 A.2d at 281.

To like effect is *Feldstein v. LaVale Zoning Board*, 246 Md. 204, 227 A.2d 731 (1967). In that case, the issue involved whether the expansion of a high rise junkyard owned by the appellant was an extension of a nonconforming use or an intensification of a nonconforming use. The junkyard, operating since 1939, was surrounded by property that was later rezoned for residential use. The junkyard was recognized as a nonconforming use; however, the zoning ordinance provided that “all presently existing junkyards must be screened within a year by the erection of a fence or wall or by the planting of trees, shrubbery or other planting.” 246 Md. at 207-208, 227 A.2d at 732. The appellant had stacked scrap metal higher than it was able to be concealed. The zoning board alleged, on that basis, that the owner had unlawfully expanded the nonconforming use, and sought an order permanently enjoining the extension of the junkyard beyond the area occupied at the time the zoning ordinance was adopted. 246 Md. at 208, 227 A.2d at 732.

The chancellors who heard the cases² found that the stacking of junk was not an extension of the nonconforming use, in violation of the zoning ordinance;

² Two judges, Harold E. Naughton and James S. Getty, sat for this zoning case in the Circuit Court for Allegany County.

rather, it was, they concluded, an intensification of that use. 246 Md. at 209, 227 A.2d at 733. This Court agreed:

“The zoning ordinance ... provides that a nonconforming use shall not be extended, but that does not mean that the vested nonconforming use of the junkyard owner could not be lawfully intensified. The chancellors held that the increase in the quantity and height of the stored scrap metal was an intensification and not an extension under the law. We agree While a nonconforming use should not be extended or perpetrated longer than necessary, the more frequent present use of property for the same or a similar use than that for which it had been used less frequently theretofore was held to be an intensification and not an extension.”

246 Md. at 211, 227 A.2d at 734, *citing Green*, 192 Md. 52, 63 A.2d 326; *Nyburg*, 205 Md. 150, 106 A.2d 483. *Jahnigen*, 245 Md. 130, 225 A.2d 277. *See also County Commissioners of Carroll County v. Zent*, 86 Md.App. 745, 587 A.2d 1205 (1991), in which the Court of Special Appeals, addressing a parcel of land in Carroll County, Maryland, that was zoned for agricultural use in 1965, but had had a milk delivery trucking business on its land since 1923, opined that an increase in the number of decommissioned delivery trucks stored for parts on property owned by the business would be an intensification of the nonconforming use for which it was using the property, not an illegal extension. 86 Md.App. at 757, 587 A.2d at 1211.

In these cases, we have consistently held that merely increasing the frequency of a nonconforming use did not constitute an unlawful extension; rather, it was but an

intensification of the use. The Court of Special Appeals distinguishes these cases on the basis that none of them, with the exception of *Green*, dealt with the situation presented in this case:

“But none of these cases involved an expansion of the temporal limits of operation. Each concerned, at most, increasing the amount of business performed within an existing temporal framework—in other words, intensifying the use of the premises during existing business hours.”

151 Md.App. at 179-80, 824 A.2d at 984-85.

To be sure, as the intermediate appellate court noted, the cases, with the exception of *Green*, do not address the situation *sub judice*. On the other hand, *Green* did not draw, expressly or otherwise, the distinction that the Court of Special Appeals draws; we did not, in *Green*, say, or signal in any way, that any increase in the nonconforming use, except temporally, by adding days or hours of operation, would be an intensification, but that the temporal modification would be an unlawful expansion of the use. We do not read the cases so narrowly. In each of the cases, the frequency of the use of the subject property in the nonconforming manner was increased, often significantly so, without regard to the hours of operation. Their focus was, as it should be, on the actual use made of the property, not the times when that use occurs.

If the intermediate appellate court is correct, *Green* is no longer good law and our definition of “intensification” is misleading, if not largely meaningless. Indeed, the concept of intensification would have no meaning at all in the nightclub context, or in any other where there are discrete hours of operation, such as retail. In *Feldstein*, we distinguished an “intensification” of a nonconforming use

from an “extension” of such use, noting that the former is “the more frequent present use of property for the same or a similar use than that for which it had been used less frequently theretofore.” 246 Md. at 211, 227 A.2d at 734. Increasing the number of nights on which adult entertainment is presented at Club Choices from two to five, for example, would fit within the definition of “intensification”—it would be a “more frequent present use of property for the same or a similar use than that for which it had been used less frequently theretofore.” In fact, that was the rationale for *Green*; going from infrequent baseball games to their presentation for much of the year seems a similar, if not identical, scenario.

As we have seen, the Court of Special Appeals views *Green* as being “of little precedential value,” 151 Md.App. at 180, 824 A.2d at 985, if not inapplicable. We have not overruled *Green*, we do not now do so. Moreover, we are not at all sure of the accuracy of the intermediate appellate court’s observation with respect to the timing of the *Green* decision, “before the zoning administrative process was created,” 151 Md.App. at 180, 824 A.2d at 983, with the result that “the deference owed an administrative body’s interpretation of its governing statute and the substantial evidence rule played no role in the Court’s decision.” *Id.* The zoning ordinance was enacted in 1931 and we can assume that its implementation was entrusted to an administrative agency. The case did not proceed through the administrative process, however. It was an action for injunctive and declaratory relief. Therefore, the administrative agency was not called upon to, and, thus, did not opine on the subject. Had it done so, the deference due it would not have carried the day. The Court, in any event, would have been required to decide whether that conclusion of law, to which deference was due, was correct.

Nor are we persuaded by the out-of-state cases upon which the appellees and the Court of Special Appeals relied. *Garb-*

Ko v. Carrollton Township, 86 Mich. App. 350, 272 N.W.2d 654 supports the proposition for which it is offered, the Court of Appeals of Michigan having answered in the affirmative the question, “whether the extension of hours of a grocery store operating as a nonconforming use constitutes an expansion of the nonconforming use which can be lawfully restricted by the defendant township.” 86 Mich.App. at 352-353, 272 N.W.2d at 655. It did so, however, on the basis of the following Michigan policies: “that the continuation of a nonconforming use must be substantially of the same size and same essential nature as the use existing at the time of passage of a valid zoning ordinance” and that “[t]he policy of the law is against the extension or enlargement of nonconforming uses, and zoning regulations should be strictly construed with respect to expansion.” *Id.* at 353, 272 N.W.2d at 655, quoting *Norton Shores v. Carr*, 81 Mich.App. 715, 720, 265 N.W.2d 802, 805 (1978); *Dearden v. Detroit*, 70 Mich.App. 163, 169, 245 N.W.2d 700, 703 (1976); *White Lake Township v. Lustig*, 10 Mich.App. 665, 674, 160 N.W.2d 353, 357 (1968). These policies would prohibit the distinction between intensification and expansion that is, and long has been, recognized in Maryland.

Time-Low Corp. v. City of LaPorte Bd. of Zoning Appeals, 547 N.E.2d 877 (Ind. Ct.App.1989) also is distinguishable from the case *sub judice*. Time-Low purchased a plot of land on which there was a filling station and then applied for a building permit to convert the filling station to a convenience store and gas station. The LaPorte Board of Zoning Appeals issued the building permit, but limited the hours of operation of the convenience store. As relevant, LaPorte’s Zoning Ordinance Code provided:

”18.57.030 Change to other nonconforming use.

“A. A nonconforming use may not be changed to any other nonconforming use without the permission of the board of zoning appeals regardless of whether or not structural changes are made or required to be made in the building or premises.

“B. A nonconforming use changed to a conforming use may not thereafter be changed back to any nonconforming use without the permission of the board of zoning appeals. (Prior code § 29-96)

”18.57.060 Remodeling, addition to or alteration of existing use.

“A lawful nonconforming use existing at the time of the passage of the ordinance codified in this title shall not be remodeled, added to or structurally altered without the permission of the board of zoning appeals. (Prior code § 29-99)”

The Court of Appeals of Indiana, Third District, agreed that the change in nonconforming use that the applicant sought required approval by the Board, and, thus, was subject to Board regulation. 547 N.E.2d at 879. In support of its conclusion, the court identified a list of physical changes, which it characterized as extensive and which it determined required Board approval. 547 N.E.2d at 879. Accordingly, it was in this context that the court stated:

“The Board of Zoning Appeals may use its judgment and discretion in making such modification of the [building commissioner’s] order and attach such conditions and restrictions to the granting of a variance as in its opinion should be made, so that the spirit of the ordinance shall be observed and substantial justice done.”

547 N.E.2d at 880, *citing City of E. Chicago v. Sinclair Ref. Co.*, 232 Ind. 295, 313-314, 111 N.E.2d 459, 467 (1953).

The other two cases, *Incorporated Village v. Hillside Ave. Restaurant Corp.*, 55 A.D.2d 927, 390 N.Y.S.2d 637 (1977), and *Cornell Uniforms, Inc. v. Township of Abington*, 8 Pa.Cmwlth. 317, 301 A.2d 113, 116 (1973), are both distinguishable and unpersuasive. *Cornell Uniforms*, like *Time-Low*, involved temporal restrictions imposed in the wake of the substantial physical changes to the property that the applicant sought when changing its nonconforming use. In *Incorporated Village*, while the court upheld restrictions placed on the operating hours of an adult entertainment club, its rationale for doing so is, to say the least, sparse; the court provides little in the way of reasoning as to why it possessed the authority to temporally restrict the hours of the nonconforming use.

[Reversed.]

3.9. Vested Rights

Metro. Dev. Comm’n v. Pinnacle Media

836 N.E.2d 422 (Ind. 2005)

Anthony W. Overholt, Jeffrey S. McQuary, Office of Corporation Counsel, Indianapolis, for Appellant.

Alan S. Townsend, George T. Patton, Jr., Paul D. Vink, Indianapolis, for Appellee. SULLIVAN, JUSTICE.

Pinnacle Media, LLC, seeks a declaration that a change in the zoning ordinance of the City of Indianapolis concerning billboard location permits is not applicable to its plan to erect 10 billboards in Indianapolis. Because no construction or other work that gave Pinnacle a vested interest in the billboard project had begun on the billboards at the time of the ordinance change, the ordinance change did apply to the 10 billboards.

Background Pinnacle Media, LLC, erects and leases advertising billboards. In July, 1999, after some period of discussion, the City of Indianapolis advised Pinnacle in writing that the City's billboard location permit regulation did not apply with respect to billboards proposed to be erected in interstate highway rights-of-way because those rights-of-way were not covered by the City's zoning ordinance.

Pinnacle thereupon embarked on a plan to erect billboards without applying to the City for a permit. Its plan consisted of three steps. First, it would lease land for this purpose from Hoosier Heritage Port Authority, an entity that owned abandoned railroad rights-of-way at points where the abandoned railroad rights-of-way intersected with or were otherwise coextensive with interstate highway rights-of-way. Second, it would seek permits from State government, specifically, the Indiana Department of Transportation ("INDOT"), which is responsible for interstate highways. Third, it would erect the billboards without seeking any approval from the City. Following this plan, Pinnacle erected two billboards in 1999, after leasing rights-of-way and obtaining INDOT permits.

Shortly thereafter, Pinnacle initiated efforts to erect 15 additional billboards by securing additional leases and submitting additional applications to INDOT. The last of these applications was submitted on April 19, 2000. A period of negotiation with the State followed during which INDOT initially denied all 15 of the applications. Pinnacle

appealed the denials and ultimately entered into a settlement with the State. Well over a year later, on June 18, 2001, INDOT approved 10 of the applications and Pinnacle abandoned its request for the other five in accordance with the settlement.

Meanwhile, following the erection of the two initial billboards, the City re-examined its policy in respect of excluding interstate highway rights-of-way from the coverage of its zoning ordinance. On April 26, 2000, the City officially proposed an amendment to this effect to its zoning ordinance. Pinnacle and other interested parties received notice of the proposed amendment on April 28, and were given the opportunity to appear at a public hearing on the matter on May 17. On July 10, 2000, the City-County Council enacted into law an amendment to the zoning ordinance, assigning zoning classifications to the previously un-zoned land occupied by interstate highways. Indianapolis/Marion County Rev.Code §§ 730-100 through -103. This had the effect of making the City's billboard location permit applicable to billboards proposed to be erected in interstate highway rights-of-way.

Following receipt of the INDOT approvals in 2001, Pinnacle began erecting one of the billboards. The City issued a stop work order on grounds that Pinnacle had not obtained the permit for the billboard required by the amended zoning ordinance.¹ Pinnacle ceased construction and subsequently filed suit against the City, seeking a declaration that the amendment to the zoning ordinance was inapplicable to the 10 permits and that the stop work order was void and unenforceable. The City filed a motion to dismiss,

¹ After this lawsuit was filed, the City took the position that Pinnacle needed the City's approval to erect billboards even before the zoning ordinance was amended. Because we hold that the amended ordinance governs the 10 billboards at issue here, we need not address this contention.

which the trial court denied,² and both parties subsequently filed for summary judgment. The trial court granted summary judgment in favor of Pinnacle and also concluded that Pinnacle was entitled to attorney fees because the City engaged in “frivolous, unreasonable, or groundless litigation.” Appellant’s App. at 9-10. The Court of Appeals affirmed the determination of the trial court that the amendment to the zoning ordinance was inapplicable to the 10 permits but reversed the trial court on the attorney fees issue. *Metro. Dev. Comm’n v. Pinnacle Media, LLC*, 811 N.E.2d 404, 414 (Ind.Ct.App.2004). We now grant transfer and reverse the judgment of the trial court.

The question of whether Pinnacle’s 10 billboards are subject to the 2000 zoning ordinance amendment implicates two disparate lines of Indiana cases. Both lines employ the term “vested rights” and generally stand for the proposition that a person’s “vested rights” are protected against retroactive application of a change in law. But each line takes a quite different approach to defining or determining when a “vested right” exists, and these approaches can lead to different results.

The first line of cases arises under a zoning law principle called “nonconforming use.” A nonconforming use is a use

² In denying the City’s motion, the trial court found that the City was estopped from arguing that the doctrine of vested rights did not apply because Pinnacle detrimentally relied on the City’s representations that it did not have jurisdiction to issue the improvement location permits. Order on Defendant’s Motion to Dismiss (Pappas, J., pro tempore), Appellant’s App. at 39. The court relied on our decision in *Equicor Dev. v. Westfield-Washington Twp.*, 758 N.E.2d 34 (Ind.2001). In *Equicor*, this Court made an exception to the general rule that “government entities are not subject to equitable estoppel.” *Id.* at 39 (citing *State ex rel. Agan v. Hendricks Superior Court*, 250 Ind. 675, 678, 235 N.E.2d 458, 460 (1968)). In *Fulton County Advisory Plan Comm’n v. Groninger*, 810 N.E.2d 704 (Ind.2004), we made it clear that we found the facts in *Equicor* to be “highly unusual.” *Id.* at 710. The trial court’s ruling here preceded *Groninger*.

of property that lawfully existed prior to the enactment of a zoning ordinance that continues after the ordinance's effective date even though it does not comply with the ordinance's restrictions. *Metro. Dev. Comm'n. v. Marianos*, 274 Ind. 67, 408 N.E.2d 1267, 1269 (1980). The general rule is that a nonconforming use may not be terminated by a new zoning enactment. See *Jacobs v. Mishawaka Bd. of Zoning Appeals*, 182 Ind.App. 500, 501-02, 395 N.E.2d 834, 836 (1979) (“An ordinance prohibiting any continuation of an existing lawful use within a zoned area is unconstitutional as a taking of property without due process of law and as an unreasonable exercise of police power.”). In these situations, it is often said that the landowner had a “vested right” in the use of the property before the use became nonconforming, and because the right was vested, the government could not terminate it without implicating the Due Process or Takings Clauses of the Fifth Amendment of the federal constitution, applicable to the states through the Fourteenth Amendment.³ U.S. Const., amends V & XIV. See generally, John J. Delaney and Emily J. Vaias, *Recognizing Vested Development Rights as Protected Property in Fifth Amendment Due Process and Takings Claims*, 49 Wash. U.J. Urb. & Contemp. L. 27, 31-35 (1996).

A relatively frequent subject of land use litigation is whether a developer can have a “vested interest” in a nonconforming use that is only intended – construction has not yet begun at the time of the new enactment – such that the government cannot terminate it. See Linda S. Tucker, Annotation, *Activities in Preparation for Building as Establishing Valid Nonconforming Use or Vested Right to Engage in Construction for Intended Use*, 38 A.L.R.5th 737, 752 (1996 & Supp.2005).

³ See *Bd. of Zoning Appeals v. Leisz*, 702 N.E.2d 1026, 1031 (Ind.1998), where we held that a zoning ordinance that provided for the forfeiture of a prior nonconforming use if it was not registered did not violate the Fifth and Fourteenth Amendments.

This Annotation reflects the fact that many courts, including ours, have been presented with cases where a developer encounters a zoning change after embarking on a project but before beginning construction. The leading Indiana case on this subject – discussed in the Annotation – is *Lutz v. New Albany City Plan Comm'n*, 230 Ind. 74, 101 N.E.2d 187 (1951).

As a general proposition, the courts have been willing to hold that the developer acquires a “vested right” such that a new ordinance does not apply retroactively if, but only if, the developer “(1) relying in good faith, (2) upon some act or omission of the government, (3) ... has made substantial changes or otherwise committed himself to his substantial disadvantage prior to a zoning change.” *Delaney & Vaias, supra*, at 31-35 (citing *Sgro v. Howarth*, 54 Ill.App.2d 1, 203 N.E.2d 173, 177 (1964)).

Indiana law, as enunciated in *Lutz*, is consistent with these principles. In that case, the developer acquired real estate pursuant to an option agreement that required the seller to demolish a house on the property and clear the lots for construction of a gasoline service station. The developer secured a mortgage commitment to finance the construction and entered into an agreement by which a petroleum concern would lease and operate the service station when built. After all of these actions had been taken but before construction of the service station itself began, the city enacted a zoning ordinance that did not permit the erection of gasoline service stations on the real estate in question. *Lutz*, 230 Ind. at 78-79, 101 N.E.2d at 189.

When the developer’s application for a zoning variance was denied by the Board of Zoning Appeals, the developer appealed, contending that by entering into the lease and proceeding to convert the real estate to a service station prior to the passage of the zoning ordinance, his rights to use of the property in that way had become vested and that the application of the zoning ordinance to him was

unconstitutional. *Id.* at 77, 101 N.E.2d at 188. The trial court affirmed the decision of the Board of Zoning Appeals, as did this Court:

The zoning ordinance herein is, of course, subject to any vested rights in the property of appellants acquired prior to the enactment of the zoning law. But where no work has been commenced, or where only preliminary work has been done without going ahead with the construction of the proposed building, there can be no vested rights. The fact that ground had been purchased and plans had been made for the erection of the building before the adoption of the zoning ordinance prohibiting the kind of building contemplated, is held not to exempt the property from the operation of the zoning ordinance. Structures in the course of construction at the time of the enactment or the effective date of the zoning law are exempt from the restrictions of the ordinance. The service station was not in the course of construction so as to give to appellants vested rights, and was not a nonconforming use existing at the time of passage of the ordinance.

Id. at 81-82, 101 N.E.2d at 190.

BThe second line of cases traces its origin in Indiana law to zoning law but has over the years been invoked more generally when a person has an application for a government permit pending at the time a law governing the granting of the permit changes.

The lead case in this line illustrates the point. In *Knutson v. State ex rel. Seberger*, 239 Ind. 656, 160 N.E.2d 200 (1959) (on reh'g), this Court held that an application for approval of a subdivision plat was not subject to the provisions of a subdivision control ordinance enacted by a town council after the date on which the application was first filed.⁴

The Court in *Knutson* said that “a municipal council may not, by the enactment of an emergency ordinance, give retroactive effect to a pending zoning ordinance thus depriving a property owner of his right to a building permit in accordance with a zoning ordinance in effect at the time of the application of such permit.” *Id.* at 667, 160 N.E.2d at 201 (citing *State ex rel. Fairmount Center Co. v. Arnold*, 138 Ohio St. 259, 34 N.E.2d 777 (1941)). The *Knutson* Court went on to say that “[t]his rule, we believe, is consistent with the general rule of law that ordinances or statutes which are substantive in their effect are not retroactive.” *Id.* at 668, 160 N.E.2d. at 201. The Court then quoted the *Corpus Juris Secundum*: “[T]he general rule, which is almost universally supported by the authorities, is that retrospective laws are unconstitutional if they disturb or destroy *existing or vested rights*.” *Id.* (quoting 16A C.J.S., Constitutional Law § 417 at 99-103) (emphasis added).

Knutson has been relied upon by the Court of Appeals in a number of cases for the proposition that a change in law cannot be applied retroactively in respect of a permit

⁴ The procedural setting of *Knutson* was somewhat complicated. In unrelated collateral litigation, a trial court had declared the subdivision control ordinance of the Town of Dyer to be unconstitutional and this Court found that ruling to control in *Knutson*. As such, the question presented in *Knutson* was whether the developer was entitled to have its plat approved by the Town Council, whose decision, in the absence of an effective subdivision control ordinance, was controlled only by the state statute governing subdivisions. This Court ordered the Town Council to approve the plat. On rehearing, the Town Council argued that a new subdivision control ordinance had been enacted after the first had been declared unconstitutional and that the developer's application had been properly denied pursuant to the new ordinance's terms.

application on file with a permitting agency at the time of the change. See *Steuben County v. Family Dev., Ltd.*, 753 N.E.2d 693 (Ind.Ct.App.2001), *trans. denied* (concerning a permit for a landfill); *Yater v. Hancock County Bd. of Health*, 677 N.E.2d 526 (Ind.Ct.App.1997) (concerning septic permits); *Ind. Dep't of Env'tl. Mgmt. v. Chem. Waste Mgmt. of Ind., Inc.*, 604 N.E.2d 1199 (Ind.Ct.App.1992), *trans. denied* (concerning a hazardous waste disposal permit); *Bd. of Zoning Appeals of Ft. Wayne v. Shell Oil Co.*, 164 Ind.App. 497, 329 N.E.2d 636 (1975) (concerning a building permit for gas station).

II

In one respect, the *Lutz* and *Knutson* precedents are quite consistent. Both clearly stand for the proposition that changes in zoning ordinances are “subject to any vested rights,” *Lutz*, 230 Ind. at 81, 101 N.E.2d at 190; that such changes “are unconstitutional if they disturb or destroy existing or vested rights,” *Knutson*, 239 Ind. at 667, 160 N.E.2d at 201. But in another respect, *Lutz* and *Knutson* lie in uneasy tension with one another. If the land acquisition, demolition, and site preparation work in *Lutz* is not enough to establish a vested interest, how can it be that the mere filing in *Knutson* of a building permit (when, by definition, no construction has yet begun) is enough to do so? In the words of one commentator, “[i]t is difficult to see how the theoretically distinguishable concept of nonconforming use, protecting owners of developed property from the provisions of subsequently enacted zoning regulations, could logically be applied to protect a landowner who has only reached the stage of applying for a building permit.” Roland F. Chase, Annotation, *Retroactive Effect of Zoning Regulation, in Absence of Saving Clause, on Pending Application for Building Permit*, 50 A.L.R.3d 596, 607 (1973, Supp.2005).

Pinnacle argues adamantly that this is not a nonconforming use case for which *Lutz* is precedent but a permit application case controlled by *Knutson*. While for reasons we

will set forth in a moment we think this is a nonconforming use case, we also think, at least in respect of building permits, the *Knutson* rule should be revisited.

To repeat, the Court in *Lutz* held that “[t]he zoning ordinance herein is, of course, subject to any vested rights in the property of appellants acquired prior to the enactment of the zoning law. But where no work has been commenced, or where only preliminary work has been done without going ahead with the construction of the proposed building, there can be no vested rights.” *Lutz*, 230 Ind. at 81, 101 N.E.2d at 190. We think this is the correct rule for nonconforming uses, one that is the rule of most jurisdictions. *See, e.g., Town of Orangetown v. Magee*, 88 N.Y.2d 41, 643 N.Y.S.2d 21, 665 N.E.2d 1061 (1996); *Finch v. Durham*, 325 N.C. 352, 384 S.E.2d 8 (1989) (reh’g denied); *Snake River Venture v. Bd. of County Comm’rs*, 616 P.2d 744 (Wyo.1980); *Houston v. Bd. of City Comm’rs*, 218 Kan. 323, 543 P.2d 1010 (1975); *Blundell v. West Helena*, 258 Ark. 123, 522 S.W.2d 661 (1975); *Perkins v. Joint City-Council Planning Comm’n*, 480 S.W.2d 166 (Ky.1972).

If “there can be no vested rights” where “no work has been commenced, or where only preliminary work has been done without going ahead with the construction of the proposed building,” then in logic, the filing of a building permit – an act that must be done before any work is commenced – cannot alone give rise to vested rights.

Furthermore, at least as to building permits, *Knutson* is out of the mainstream. “In most jurisdictions it is clear that, as a general rule, ... a zoning regulation may be retroactively applied to deny an application for a building permit, even though the permit could have been lawfully issued at the time of application.” Chase, *supra*, at 607. *See, e.g., Town Pump, Inc. v. Bd. of Adjustment*, 292 Mont. 6, 971 P.2d 349 (1998) (upholding the retroactive application of a zoning change where there was a building permit on file); *Whitehead Oil Co. v. Lincoln*, 234 Neb. 527, 451 N.W.2d 702 (1990)

(noting and applying the “general rule”); *Gay v. Mayor of Lyons*, 212 Ga. 438, 93 S.E.2d 352 (1956) (upholding the retroactive application of a zoning change where there was a building permit on file); *Brougber v. Bd. of Pub. Works*, 205 Cal. 426, 271 P. 487 (1928)(same); *Cayce v. Hopkinsville*, 217 Ky. 135, 289 S.W. 223 (1926) (same).

With respect to building permits, then, *Knutson’s* suggestion that having a building permit on file creates a vested right that cannot be overcome by a change in zoning law is overruled.⁵

III

Regardless of *Knutson’s* viability, we do not believe its rule is available to Pinnacle in this case. While Pinnacle argues vehemently that this is not a nonconforming use case, we believe that it is properly analyzed under *Lutz’s* principles. When Pinnacle set out to erect the 10 (initially 15) billboards, there was no location permit required by the City. This is exactly the position the developer in *Lutz* was in when it started out to develop the gasoline service station. The question there – as we find it to be here – was whether, at the time of the change in the zoning ordinance, construction had proceeded on the project to the point that the developer had a vested interest. As discussed, the Court held that the construction had not. *Lutz*, 230 Ind. at 81, 101 N.E.2d at 190.

⁵ As noted in the text above, the *Knutson* principle has been applied to applications for a number of other types of government permits. See *Stauben County v. Family Dev., Ltd.*, 753 N.E.2d 693 (Ind.Ct.App.2001), *trans. denied* (concerning a permit for a landfill); *Yater v. Hancock County Bd. of Health*, 677 N.E.2d 526 (Ind.Ct.App.1997)(concerning septic permits); *Ind. Dep’t of Env’tl. Mgmt. v. Chem. Waste Mgmt. of Ind., Inc.*, 604 N.E.2d 1199 (Ind.Ct.App.1992), *trans. denied* (concerning a hazardous waste disposal permit). Because the law and facts in each of these cases differs materially from those applicable to building permits, we limit our holding today only to building permits.

In this case, no construction of any kind had proceeded on the 10 billboards as of April 26, 2000, the date the ordinance change was officially proposed, or even July 10, 2000, the date it was enacted. Pinnacle does not present us with any argument that it made construction expenditures before the enactment of the zoning ordinance change.⁶ Nor could it. It was not until 11 months later, June 18, 2001, that Pinnacle received the separate approvals required by the State.

Pinnacle argues that its filing of applications for permits with the State on April 19, 2000, immunized it from the City's zoning change but we see no basis in law or logic for this proposition. While we acknowledge that at times, state law can pre-empt local law, *see, e.g.*, Ind.Code § 36-1-3-5(a) (2005), Pinnacle provides us with no authority that there is state pre-emption here. Local government enjoys wide latitude from the State in land use regulation. Its authority includes "not only all powers granted it by statute, but also all other powers necessary or desirable in the conduct of its affairs." *Ind. Dep't of Natural Res. v. Newton County*, 802 N.E.2d 430, 432 (Ind.2004) (quotations and citations omitted). And while here the City has imposed burdens in addition to those of the State for a party seeking to erect

⁶ Compare with *State ex rel. Great Lakes Pipe Line Co. v. Hendrickson*, 393 S.W.2d 481, 484 (Mo.1965). In *Hendrickson*, a public utility company had acquired land in a village for the purpose of installing a pumping station. After having been advised by the village that it had no zoning regulations, the utility had entered into a contract for the construction of the station. After the utility's contractors began work, the village enacted a zoning ordinance that restricted the erection of pumping stations. Before the ordinance was enacted, the utility had spent or committed itself to a total of over \$64,000 in addition to the amount that it had paid for the land. *Id.* at 482-83. The court found that "[a] structure in the course of construction at the time of the enactment of the ordinance is protected as a nonconforming use, but mere preliminary work which is not of a substantial nature does not constitute a nonconforming use." *Id.* at 484. The court then held that because the utility had completed a portion of the structure and had obligated itself to a great extent of money before the zoning ordinance was passed, the utility had established a non-conforming use of the land for the purpose of a pumping station prior to the enactment of the ordinance and had a vested right thereto. *Id.*

billboards in interstate rights-of-way, state law has not been frustrated by the city zoning ordinance. *See id* at 433. In other words, this is not a case where anything the City has done interferes with State prerogatives. Furthermore, common experience tells us that permits and approvals from different agencies and levels of government are often required for a single project. Compliance with one agency's or level's requirements simply does not constitute compliance with another's.

Most telling in this respect is the fact that regardless of what the City's billboard location regulation was, or even whether it had one, Pinnacle would still have been required to obtain State approval for its project. State approval was in addition to, and not a substitute for, local approval. That being so, Pinnacle cannot use its compliance with State requirements as a substitute for compliance with local requirements.

Conclusion Having granted transfer, Indiana Appellate Rule 58(A), we reverse the judgment of the trial court as to its holding that the zoning ordinance was inapplicable to the 10 permits and remand this matter to the trial court with instructions to grant the City's motion for summary judgment. Because we find that the zoning ordinance was applicable, we also reverse the trial court's award to Pinnacle of attorney fees.

SHEPARD, C.J., and DICKSON, BOEHM, and RUCKER concur

Valley View Industrial Park, Respondent, v. The City of Redmond, Appellant,
733 P.2d 182 (Wash. 1987)

Ogden, Ogden & Murphy, by *Larry C. Martin, James E. Haney*, and *Mark A. Eames*, for appellant.

Bogle & Gates and *Elaine L. Spencer*, for respondent.

CALLOW, J.

... .

Valley View Industrial Park is a general partnership formed in 1978 to develop this specific parcel of land. Following a protracted interchange between the partnership and the City of Redmond, within whose boundaries the property lies, the partnership initiated this action against the City seeking (1) a writ of mandamus ordering the City to proceed with site plan review of its light industrial development in the Sammamish River Valley; (2) a declaration that the City's decision to change the zoning of its property from light industrial to agricultural use was an uncompensated taking that violated federal and state constitutions; and (3) damages and attorney's fees it incurred from the time of the zoning change.

The City denied the complaint and interposed the following defenses: (1) that Valley View had failed to meet procedural prerequisites to suit, including (a) conformance with the applicable statute of limitations, (b) exhaustion of administrative remedies, and (c) laches; (2) that the zoning change represented a valid exercise of police power; (3) that even if an unconstitutional taking had occurred, Valley View was not entitled to interim damages and attorney's fees.

The trial court dismissed Valley View's claim for interim damages but conducted a trial on the remaining issues. Following trial, the court found for Valley View. It held that the zoning change was unconstitutional and ordered the City to proceed with the site plan review. The City appealed the decision on the grounds it had asserted at trial. On Valley View's motion, the case was transferred here from the Court of Appeals pursuant to RAP 4.3.

We affirm the trial court's judgment which holds that Valley View acquired vested rights to have five building permit applications processed under the City of Redmond's

light industrial use zoning classification in effect at the time of filing, we affirm the court's order retaining upon the property the light industrial use zoning classification, and we affirm the denial of damages and deny the request for attorney fees in the cross appeal. FACTS Valley View intends to develop an industrial park on a 26.71-acre parcel of property in the Sammamish River Valley. The valley historically was an agricultural area; the soil is some of the richest in King County. In recent years the agricultural character of the Sammamish River Valley has changed drastically. The population has increased significantly. Commercial and residential development has replaced many of the farms and the accompanying agricultural support services, including feed and fertilizer dealers, farm equipment sellers, and grain elevators. The area around the Valley View parcel reflects this transition. The property immediately to the north remains zoned for agricultural uses. To the northwest, across the road from Valley View, are three large industrial developments. Puget Sound Power and Light holds a 250-foot right of way on Valley View's south border. South of that right of way is another industrial park and property zoned for expected commercial and residential development. The Sammamish River marks the east edge of the Valley View property. Across the river, to the southeast, is the site of a proposed regional shopping center.

The City of Redmond annexed the Valley View parcel from King County in 1964, and changed the zoning of the parcel from agricultural to "light industrial." In 1970, the City adopted a comprehensive land use plan setting forth the City's official policies and goals for future regulation and use of property.

The City began revising and updating its land use regulations to achieve conformity with the 1970 comprehensive plan. Concurrently, the farmlands preservation movement became a force in King County

and applied pressure for agricultural zoning of the parcel. In 1977, a citizens' advisory committee was formed for the purpose of formulating recommendations on the land use plan and regulatory revisions. The committee conducted numerous public hearings and meetings, culminating in an official committee proposal which was forwarded to the city council. Following receipt of the proposal, the city council conducted extensive deliberations, including additional public hearings upon the proposal. On June 5, 1979, the council passed ordinance 875, which adopted the City's revised land use goals, policies, plans, regulations and procedures in a volume entitled *Community Development Guide*.

The *Community Development Guide* included an amended zoning map which adjusted the boundary between the agricultural and industrial zones in the Sammamish Valley. The citizen advisory committee recommended that the council shift the boundary between the agricultural and light industrial uses to the south, in alignment with a 250-foot-wide power transmission line right of way, thereby providing a visible and spatial separation of the agricultural and industrial uses. The city council adopted this recommendation as a part of its comprehensive zoning revisions. With adoption of the revised zoning map, the boundary line was extended to the southern boundary of the Valley View property to adjoin the 250-foot power line right of way. The zoning of the Valley View property thus was revised from light industrial to agricultural use.

Valley View formulated and proceeded with plans to develop an industrial park on the tract. Valley View intended the industrial park to consist of 12 buildings, developed in phases. In the first phase, it intended to build the infrastructure (*i.e.*, the road, utilities, etc.) and the shell of the first building. It then intended to market the project and construct additional buildings as it found tenants for those buildings. The cost of the infrastructure was

projected to be so high that the cost would not be recovered, and the project would not be profitable until several of the buildings were completed.

Valley View first initiated contact with the city planning department on September 3, 1978, by submitting a preliminary site plan for the proposed development. A city planner informed Valley View representatives that the proposed industrial park would be subject to site plan review under Redmond ordinance 733, which provided that no building permit could be issued for a commercial or industrial development without prior site plan approval.

Although the preliminary site plan did not contemplate construction that would require a shoreline development permit, the city planner incorrectly informed Valley View that the proposed industrial park would require a shoreline substantial development permit due to the proximity of the Sammamish River.

During the conversation on September 3, Valley View was requested to file, and as a result on September 7, 1978, Valley View did file, a more detailed site plan, a SEPA environmental checklist, a shoreline substantial development permit application and plans for the first of 12 buildings to be constructed in the industrial park. As a result of the discussion on September 3, in which it was informed that the City would require a shoreline substantial development permit, Valley View amended the site plan to include a building which came within 200 feet of the Sammamish River.

On September 7, 1978, the head of the City's building department refused to proceed on the single building permit application until site plan review had been completed on the project.

In a September 18 letter, city officials wrote Valley View for additional information. In response, Valley View provided some information on sewers and storm drainage,

as well as a revised SEPA checklist, a revised site plan and a proposed protective covenant. These documents were filed on October 18.

The City requested no additional information for 3 months. In the interim, it approved a plan to connect the Valley View property to the storm sewer system in place at the industrial park to the south. The City collected \$2,500 from Valley View to pay for the extension. On January 22, 1979, the City informed Valley View that an environmental impact statement was necessary.

On February 2, Valley View submitted the names of three consultants to prepare the EIS. The City responded on March 6, by selecting a consultant not on the Valley View list. Attempting to avoid further delay, Valley View sought an appeal of the EIS decision on March 7. The City stated that no appeal was possible, but suggested a modification of the project proposal to obviate the need for an EIS. Valley View submitted a new proposal according to the City's suggested modifications.

In early 1979, Redmond officials informed Valley View that it would have to file additional building permit applications in order to vest its rights to construct the entire project if the City downzoned the property. At that time, the City's site plan review process for the project had not been completed. Valley View then filed four additional building permit applications. The five buildings, for which building permit applications were filed, totaled approximately 108,000 square feet of space out of the 466,914 square feet contemplated by the site plan as a whole. Five was the maximum number of buildings which Valley View concluded it was feasible to build prior to obtaining tenants for them.

On May 22, 1979, Valley View submitted an enlarged site plan and revised protective covenants and offered to negotiate with the City concerning dedication to the City of

a buffer zone to the north of the Valley View property. On June 5, 1979, the Redmond City Council enacted the revised zoning code which downzoned the Valley View property from light industrial to agricultural use. By letter dated June 6, 1979, the City rejected Valley View's modification of its proposal. Valley View did not appeal the development plan rezone as allowed by the Redmond ordinance.

The City's 1976 version of the Uniform Building Code called for building permits to lapse after 180 days unless the permits were renewed for another 180 days. The City notified Valley View in a May 20, 1980 letter that the building permit applications were deemed abandoned. City officials, however, later assured Valley View that it still could proceed under the permits.

After the downzoning, the City took the position that if Valley View agreed to limit development to the five filed building permit applications no EIS would be required. Valley View contended it could not proceed without an EIS. The City agreed to proceed with an EIS, but later reversed itself and refused to proceed. Thereafter, in response to the City's change in position, Valley View filed an application to change the city land use plan and zoning for the property from agricultural to light industrial use. The City then began preparation of an EIS for the Valley View project, and on January 23, 1981, issued a final impact statement for the project. After issuance of the final impact statement, the City refused to further process Valley View's five building permit applications until the city council had acted on Valley View's rezone application.

On April 7, 1981, the city council denied the Valley View rezone request. Valley View did not appeal this decision. Thereafter, the parties engaged in further discussion in which Valley View sought to proceed with a modified proposal. When the City refused to allow Valley View to proceed with the modified development, this suit was

commenced on July 10, 1981. We have set forth in the appendix the pertinent trial court findings of fact for two reasons. First, because a number have been challenged, and second, because a reading of those findings is extremely helpful in acquiring an understanding of the factual situation.

... .

III. VESTING

Due process requires governments to treat citizens in a fundamentally fair manner. *West Main Assocs. v. Bellevue*, 106 Wn.2d 47, 51, 720 P.2d 782 (1986). Consequently, citizens must be protected from the fluctuations of legislative policy, *West Main Assocs.*, at 51 (citing *The Federalist No. 44*, at 301 (J. Madison) (J. Cooke ed. 1961)), so that they can plan their conduct with reasonable certainty as to the legal consequences. *West Main Assocs.*, at 51. Property development rights constitute “a valuable property right.” *West Main Assocs.*, at 50 (quoting from *Louthan v. King Cy.*, 94 Wn.2d 422, 428, 617 P.2d 977 (1980)). Thus new land use ordinances must satisfy due process standards by meeting a 2-part test: (1) the new regulation must aim at achieving a legitimate public purpose; and (2) the means used to achieve that purpose must be reasonably necessary and not unduly oppressive upon individuals. *West Main Assocs.*, at 52; *Norco Constr., Inc. v. King Cy.*, 97 Wn.2d 680, 684, 649 P.2d 103 (1982).

These due process considerations require that developers be able to take recognized action under fixed rules governing the development of their land. *West Main Assocs.*, at 51. The right of a property owner to use his property under the terms of the zoning ordinance prevailing at the time that he applies for a building permit has been settled for over half a century. *State ex rel. Hardy v. Superior Court*, 155 Wash. 244, 284 P. 93 (1930). The precept was stated in

State ex rel. Ogden v. Bellevue, 45 Wn.2d 492, 495-96, 275 P.2d 899 (1954), which is often quoted as follows:

A property owner has a vested right to use his property under the terms of the zoning ordinance applicable thereto. A building or use permit must issue as a matter of right upon compliance with the ordinance. The discretion permissible in zoning matters is that which is exercised in *adopting* the zone classifications with the terms, standards, and requirements pertinent thereto, all of which must be by general ordinance applicable to all persons alike. The acts of administering a zoning ordinance do not go back to the questions of policy and discretion which were settled at the time of the adoption of the ordinance. Administrative authorities are properly concerned with questions of compliance with the ordinance, not with its wisdom. To subject individuals to questions of policy of administrative matters would be unconstitutional....

... An owner of property has a vested right to put it to a permissible use as provided for by prevailing zoning ordinances. The right accrues at the time an application for a building permit is made. The moves and countermoves of the parties hereto by way of passing ordinances and bringing actions for injunctions, should and did avail the parties nothing. A zoning ordinance is not retroactive so as to affect rights that have already vested.

(Citations omitted.) We have rejected the rule of many jurisdictions which requires a change of position and a substantial reliance on the building permit before equitable estoppel arises to rescue the by then financially extended landowners. 1 R. Anderson, *Zoning* § 6.24, at 408-09 (2d ed. 1976). See *Hull v. Hunt*, 53 Wn.2d 125, 331 P.2d 856 (1958).

Washington's "date certain vesting rights doctrine" aims at insuring that new land-use ordinances do not unduly oppress development rights, thereby denying a property owner's right to due process under the law. See *West Main Assocs.*, at 50-52. Focusing on the date building permit applications are submitted protects development rights and, at the same time, provides two safeguards against developer speculation: (1) once a permit issues, a time limit is imposed on construction; and (2) preparing the detailed plans and specifications required for the application involves a substantial cost to the developer. *Hull v. Hunt*, at 130. In addition, the permit application date facilitates determining with certainty what the developer has applied for and what specific rights have accrued as a result. See *Hull v. Hunt*, *supra* at 130; see also *Mercer Enters. v. Bremerton*, 93 Wn.2d 624, 633, 611 P.2d 1237 (1980) (Utter, C.J., dissenting).

In the ordinary course of events, a developer's right to develop in accordance with a particular zoning designation vests only if the developer files a building permit application that (1) is sufficiently complete, (2) complies with existing zoning ordinances and building codes, and (3) is filed during the effective period of the zoning ordinances under which the developer seeks to develop. *West Main Assocs.*, at 51; *Allenbach v. Tukwila*, 101 Wn.2d 193, 676 P.2d 473 (1984). Due process considerations of fundamental fairness require this court to look beyond these four requirements to the conduct of the parties only in the rare case where city officials clearly frustrate a developer's diligent, good faith efforts to complete the permit

application process. See *Mercer Enters. v. Bremerton, supra*; *Parkridge v. Seattle*, 89 Wn.2d 454, 573 P.2d 359 (1978).

In *Parkridge*, this court created a limited exception to the requirement of completeness of building permit applications. The issue there was whether a right to develop land could vest despite an incomplete building permit application when the developer's diligent attempts to complete the application prior to the zoning change had been obstructed by the local government. This court held that a development right had vested, notwithstanding the incompleteness of the application, because the developer's good faith conduct merits recognition of the vested right. *Parkridge*, at 465-66.

This court then applied the *Parkridge* rule in *Mercer Enterprises* to hold that a developer's building permit application, including a site plan, can be considered as a whole for the purpose of determining whether a building permit complied with the existing zoning ordinances. *Mercer Enterprises*, at 633-34. Although standing alone the building permit exceeded the density restrictions of the zoning ordinance, when considered together with the site plan for the total development project, the building permit densities were within the density restrictions. The developer's building permit application was held sufficient to establish vested rights in that portion of the project in which building permit applications were filed.

Here, Valley View argues that it has a vested right to build the five buildings covered under the five filed permit applications. In addition, Valley View contends it has a vested right to build the remaining seven buildings designated in the site plan filed with Redmond, but not covered by any permit application. The City argues that the five permit applications were incomplete and therefore insufficient to vest Valley View's rights in those five buildings, much less the seven buildings for which applications were not filed. As to the five buildings covered

by incomplete building permits, we conclude that the *Parkeridge* rule controls. The trial court's findings clearly demonstrate the presence of each of the *Parkeridge* elements: (1) Valley View diligently and in good faith attempted to obtain building permits; (2) Redmond officials explicitly frustrated Valley View's attempts; and (3) as a result, Valley View's building permit applications were incomplete. Thus, Valley View has a vested right to complete the five buildings for which it filed building permit applications under the light industrial zoning classifications.

Whether Valley View's vested right also encompasses the remaining seven buildings is a question of first impression for the court. Like the developer in *Mercer Enterprises*, Valley View proposed a phased construction scenario. Also similar to *Mercer Enterprises*, throughout the negotiations between Valley View and Redmond, the 26.71-acre project was considered as a complete whole. 93 Wn.2d at 628. In *Mercer Enterprises*, however, this court was not asked to determine whether the scope of the vested right encompassed the entire development proposal. As a general principle, we reject any attempt to extend the vested rights doctrine to site plan review. Only where a city's conduct frustrates the permit application process will we consider looking to the entire development proposal contained in a site plan. Because we have held that Valley View has a vested right to build the five permit application buildings, we consider those buildings as having been constructed, and review the validity of Redmond's downzoning of Valley View's property.

To satisfy due process standards, the City's downzoning of Valley View's property decision, like all zoning decisions, must bear a substantial relation to the public welfare. *See Cathcart-Maltby-Clearview Comm'ly Coun. v. Snohomish Cy.*, 96 Wn.2d 201, 211, 634 P.2d 853 (1981). Because Redmond downzoned the property at the specific request of a number of citizens' groups and city officials (finding of fact

50), and because Valley View's property was the only tract downzoned to agricultural zoning (finding of fact 61), Redmond's actions constitute rezoning. *Catbcart*, at 212. Although Redmond's rezoning decision is granted some deference, *Save a Neighborhood Env't v. Seattle*, 101 Wn.2d 280, 285, 676 P.2d 1006 (1984), there is no presumption of validity favoring a rezone. *Parkeridge*, at 462. To survive a challenge, the City must demonstrate that the rezoning of Valley View's property bears a substantial relationship to the general welfare of the affected community. *Save a Neighborhood Env't v. Seattle*, *supra* at 286.

The City argues that rezoning Valley View's property serves two public interests: (1) the preservation of farmland, and (2) the belief that the power line that runs along the south edge of Valley View's property makes a nicer breaking point between land zoned industrial and land zoned agricultural than the north edge of Valley View's property. When viewed in light of the five buildings to be built on the property, the City's rezoning decision bears no relationship to the public interest it seeks to serve, much less a substantial relationship.

Valley View's property is a single tract of land. As the illustrative site map indicates, when Valley View constructs the five buildings covered by permit applications, the buildings would be so located on the 26.71 acres that its preservation and use as farmland is no longer feasible. In addition, with five buildings already built on the property, the power line no longer provides a break between industrial and agricultural land. The following map illustrates the placement on the site of the five buildings for which building permits have been filed.

Five buildings plus necessary access roads, parking and utility ingress and egress will so cut up the property that any agricultural use on the remaining portions of the property could well be uneconomic. Furthermore nothing in the record indicates that the right to build just five buildings

makes financial sense. The practical result of changing the zoning to agricultural could place Valley View in a situation where economic realities dictate that no buildings will be built. This would deny Valley View its rights which vested upon the filing of the five building permit applications.

As the trial court's findings indicate, Valley View chose the number and location of the buildings covered by permit applications in good faith, basing its decision on a number of factors including: (1) the City would accept five building permits as enough to vest the right to build the entire project (finding of fact 34); (2) the location of the buildings would offer space to prospective tenants with varying needs (finding of fact 33); and (3) five buildings was the maximum number of buildings which Valley View concluded it was possible to build prior to obtaining tenants (finding of fact 33). Moreover, the rezoning does not bear a substantial relationship to the public welfare in light of the evidence that changes in the Redmond area made Valley View's property extremely undesirable for agricultural use, land to the south and west has been, or rapidly is being, developed for industrial and commercial purposes, and the Valley View parcel does not qualify for the King County Agricultural Lands Preservation Program.

Had the City not explicitly frustrated the building permit process, Valley View would have constructed five buildings ranging over the complete area of its single tract of land. Consequently, the City's subsequent action to downzone would not have withstood scrutiny. Therefore, the City may no longer preclude development of the Valley View property consistent with the code requirements and restrictions pertaining to the light industrial classification in effect at the time the building permit applications were filed.

We hold that when Valley View filed its five building permit applications on the subject property, it fixed, and firmly imprinted upon the parcel, the zoning classification it

carried at the moment of the filing. The City has lost its chance to change the zoning classification.

However, “a vested right does not guarantee a developer the ability to build. A vested right merely establishes the ordinances to which a building permit and subsequent development must comply.” *West Main Assocs.*, at 53. If the Valley View parcel can contain 12 buildings within its boundaries under the terms of the light industrial classification, the landowner is entitled to construct that number. Valley View is required to file building permit applications for the remaining phases of the project and comply with applicable City ordinances. The City is required to act in good faith in processing Valley View’s application.

....

CONCLUSION

We hold that (1) Valley View has the vested right to have its five building permit applications processed under the light industrial use classification in existence at the time such building permit applications were filed; (2) the entire property must remain zoned as light industrial with the possibility of additional light industrial buildings being constructed on the property subject to compliance with existing city ordinances; (3) no interim taking occurred justifying an award of damages for a temporary taking; and (4) each party shall pay its own attorney fees.

DORE, J. (dissenting)

The separation of powers doctrine is a cornerstone of American jurisprudence. That which has been left to the Legislature should not be usurped by the judiciary. Unfortunately, the majority opinion, by rezoning the parcel of land owned by Valley View from agricultural to light industry use, does precisely that. Rezoning large parcels of property has always been a legislative, rather than a judicial

function, and the majority's refusal to follow this time-honored tradition is incorrect and unconstitutional.

I would hold that Valley View has vested rights in the five buildings for which it has filed building permits, because of the unwarranted interference of the Redmond planning officials in processing such permits. However, Valley View admittedly did not file building permits for the other seven buildings in the site review plan, as it had failed to locate tenants which were essential to obtain financing to justify the preparation and filing of seven additional building permit applications. As the City of Redmond cannot interfere or obstruct the processing of building permits which were never completed or filed, Valley View cannot under our present case law obtain vested rights for these structures. The majority by allowing construction of the seven buildings, which Valley View has yet to file building permits for, overrules the following cases that have previously held that vesting rights can only be established by filing for building permits. *State ex rel. Ogden v. Bellevue*, 45 Wn.2d 492, 275 P.2d 899 (1954); *Hull v. Hunt*, 53 Wn.2d 125, 331 P.2d 856 (1958); *Parkridge v. Seattle*, 89 Wn.2d 454, 573 P.2d 359 (1978); *Mercer Enters. v. Bremerton*, 93 Wn.2d 624, 611 P.2d 1237 (1980); *Norco Constr., Inc. v. King Cy.*, 97 Wn.2d 680, 649 P.2d 103 (1982). I therefore dissent.

VESTING OF THE FIRST FIVE BUILDING PERMITS

The State of Washington presently has one of the most liberal vested rights doctrines in the nation. The requirements of the Washington doctrine are that (1) the applicant file a building permit application (2) which complies with the existing zoning ordinance and building codes and (3) is filed during the effective period of the zoning ordinances under which the applicant seeks to develop, and (4) is sufficiently complete. *West Main Assocs. v. Bellevue*, 106 Wn.2d 47, 50-51, 720 P.2d 782 (1986). The doctrine in Washington thus provides that an applicant for a building permit has a vested right to have the application

processed under the zoning regulations in effect at the time the building permit application is filed.

In contrast to the Washington rule, the majority of jurisdictions hold that even the issuance of a building permit is insufficient to establish a vested right entitling the applicant to a nonconforming use. The applicant, in addition to obtaining a building permit, also must establish a substantial expenditure or change in position in reliance on the issued building permit to effectuate a vested right. See 1 R. Anderson, *Zoning* §§ 6.24, 6.25 (2d ed. 1976); Comment, *Washington's Zoning Vested Rights Doctrine*, 57 Wash. L. Rev. 139 (1981).

An applicant in Washington on the other hand need not show a “change in position”; the applicant need only file a sufficiently complete building permit application to vest his right to have his application processed under the existing zoning regulations. *Allenbach v. Tukwila*, 101 Wn.2d 193, 676 P.2d 473 (1984). The rationale for Washington’s “date of application” vested rights rule is best enunciated in *Hull v. Hunt*, 53 Wn.2d 125, 130, 331 P.2d 856 (1958) as follows:

Notwithstanding the weight of authority, we prefer to have a date certain upon which the right vests to construct in accordance with the building permit. We prefer not to adopt a rule which forces the court to search through (to quote from *State ex rel. Ogden v. Bellevue, supra*) “the moves and countermoves of ... parties ... by way of passing ordinances and bringing actions for injunctions” — to which may be added the stalling or acceleration of administrative action in the issuance of permits — to find that date upon which the substantial change of position is made which finally vests the right. The more

practical rule to administer, we feel, is that the right vests when the party, property owner or not, applies for his building permit, if that permit is thereafter issued. This rule, of course, assumes that the permit applied for and granted be consistent with the zoning ordinances and building codes in force at the time of application for the permit.

The court concluded that the extensive expense incurred in securing building permits justifies a presumption that developers will not speculate in the enhanced values of land for which building permits have been hurriedly obtained prior to a zoning change. *Hull*, at 130. Thus, Washington's bright line vesting rule presumes the developer has acted in good faith by incurring the substantial costs of filing a complete building permit.

The right to have a complete building permit processed under the zoning ordinances in effect at the time of application is chiefly derived from the doctrine of equitable estoppel and due process concerns of fundamental fairness. Although the court will not scrutinize the moves and countermoves of the parties nor inquire into the extent of expenditure of moneys, the doctrine prohibits a municipality from repudiating its prior conduct when a developer has expended the necessary funds to complete a building permit application. At this stage in the development process, notions of fundamental fairness require that the rules which govern the development be "fixed" and not subject to the "fluctuating policy" of the Legislature. *West Main Assocs.*, at 51.

Filing a complete building permit application is the operative act that converts the developer's mere expectation of no zoning change into the vested right to

have the application considered under the existing zoning, despite a subsequent effective zoning change.

[T]he right vests when the party, property owner or not, applies for his building permit, if that permit is thereafter issued. This rule, of course, assumes that the permit applied for and granted be consistent with the zoning ordinances and building codes in force at the time of application for the permit.

Hull, at 130. *See also Mayer Built Homes, Inc. v. Steilacoom*, 17 Wn. App. 558, 564 P.2d 1170, *review denied*, 89 Wn.2d 1009 (1977). However, the holder of vested rights is not thereby entitled to a building permit or to develop the proposed project, but to have the building permit decision made on the basis of regulations in effect at the time of application. *West Main Assocs.*, at 53.

The requirement that a building permit be sufficiently complete serves two purposes. First, the completed application enables a court to determine whether the building permit application complies with the zoning and building ordinances. *Mercer Enters. v. Bremerton*, 93 Wn.2d 624, 631, 633-34, 611 P.2d 1237 (1980) (Utter, C.J., dissenting). If a building permit application is not substantially complete, the municipality must reject the application and no vested right accrues until the omissions or irregularities are rectified. Second, the completeness requirement ensures that the developer has proceeded in good faith, *i.e.*, incurred an investment sufficient enough to deter speculation. *Hull*, at 130. The provisions of the Uniform Building Code and related standards, 1976 edition, published by the International Conference of Building Officials generally set the requirements a building permit application must conform to in order to obtain a permit approval. *See* former RCW 19.27.030. The nature of a

complete building permit application necessarily requires the expenditure of substantial sums of money. *See, e.g., Allenbach v. Tukwila*, 101 Wn.2d 193, 195, 676 P.2d 473 (1984).

Applying the Washington vested rights doctrine, both the majority and I find that (1) Valley View filed five building permit applications (2) which complied with the light industrial zoning ordinance and building code and (3) were filed during the effective period of the light industrial zoning ordinance under which Valley View sought to construct the five buildings.

The City contends that the fourth element (completeness) is lacking due to the need for additional information in the applications prior to processing. Any incompleteness as to these five building permit applications is governed by the rule of *Parkridge v. Seattle*, 89 Wn.2d 454, 573 P.2d 359 (1978). In *Parkridge*, this court created a limited exception to the requirement of completeness of building permit application. The issue there was whether a right to develop land could vest despite an incomplete building permit application when the developer's diligent attempts to complete the application prior to the zoning change had been obstructed by the local government. This court held that the development right had vested, notwithstanding the incompleteness of the application, because of the municipality's attempts to frustrate the project and the developer's good faith conduct merited recognition of the vested right. *See also Mercer Enters. v. Bremerton*, 93 Wn.2d 624, 611 P.2d 1237 (1980).

Valley View took numerous steps to comply with the City's requests for more information. It modified its plans to conform to city officials' ideas, and showed a willingness to meet necessary shortcomings in the applications. The City, on the other hand, continually made new demands on Valley View. If more detailed building plan information was necessary, the building officer had the power under the

ordinance to request it. The trial judge found strict compliance with zoning ordinances. That finding need not be disturbed. Valley View has the right to have its five building permits processed.

THE ADDITIONAL SEVEN BUILDING PERMITS

At this juncture, both the majority and I agree that Valley View has the right to have its five building permits processed under the ordinances in effect prior to the date that the City of Redmond rezoned its land. At this point, however, the majority ignores clear precedent, and formulates new law without any authority. By rezoning the land as light industrial, the majority violates the doctrine of separation of powers and acts as a legislative body. This should not be allowed, and the City of Redmond undoubtedly will seek relief in the United States Supreme Court.

The majority is correct when it states that a rezone must bear a substantial relationship to the general welfare of the affected community. Majority, at 640; *Save a Neighborhood Env't v. Seattle*, 101 Wn.2d 280, 286, 676 P.2d 1006 (1984); *Save Our Rural Env't v. Snohomish Cy.*, 99 Wn.2d 363, 662 P.2d 816 (1983). The majority, however, for no apparent reason, holds that the Redmond City Council possesses the power and authority to rezone thousands of acres of land from light industrial to agricultural — which of course is correct — but does not have the authority to decide whether to end the rezone at the north end of Valley View's property or at the south end. The majority for some incomprehensible reason holds that the city council's legislative decision where to end a rezone (which they decided to end at a 250-foot power line right of way and not at the point the majority countenances approximately 350 feet north of the power line) bears no substantial relationship to the general welfare of the affected public. Not possessing the majority's omniscient powers of what

the general welfare of the affected public is, I would defer to the city council's determination.

The majority creates this situation by looking at Valley View's property as a separate tract of land from the rest of the rezone, and then assuming that the five buildings have been built for which Valley View has filed building permits. Specifically, the majority states: "[w]hen viewed in light of the five buildings to be built on the property, the City's rezoning decision bears no relationship to the public interest it seeks to serve ..." Majority, at 640. I note that the majority has cited no authority that requires a legislative body, when considering a rezone, to adjust its action to the possible developments which may or may not occur on the property. This is because no such authority exists.

To the contrary, although the construction of a number of industrial buildings on the parcel may inhibit any agricultural use of the remaining property, it does not follow that the agricultural zoning is invalid. Securing vested rights under a prior zoning classification does not invalidate the subsequently enacted zoning ordinance; the holder of vested rights is merely entitled to a nonconforming use to the extent of the vested rights. 7 P. Rohan, *Zoning* § 52.08[4] (1986); 1 R. Anderson, *Zoning* §§ 6.24, 6.25 (2d ed. 1976); R. Settle, *Washington Land Use* § 2.7(c)(vi) (1983). The remaining land in the parcel is not considered separate from the nonconforming use in a determination as to whether there is a possibility for profitable use of the property.

The logic for this result is apparent. In this case, for example, neither this court nor the Redmond City Council (nor anyone else for that matter) has any idea whether or not Valley View will eventually construct the five buildings for which it has filed permits. The permit applications may be invalid, Valley View may decide to abandon one or more of the buildings, or any number of other events could prevent the construction of those buildings. This is

especially true as a building permit does not give the developer a vested right in perpetuity to build, but only a right to build for a limited time period which in the City of Redmond does not exceed 12 months.

The majority's solution to this case does not account for the truly speculative nature of the construction of these buildings. It assumes they have been built, and then makes this legislative decision as an excuse to rezone large tracts of land. Furthermore, it creates the following anomalous situation. Had Valley View proceeded without hindrance from the City of Redmond, and had it found tenants for the other 7 buildings it may have filed and received building permits for all 12 buildings. These would have contained time restrictions and Valley View's vested right to construct buildings would not have lasted in perpetuity. Instead, because of the delays, Valley View will be given the right to develop its site with no time restrictions and the City will never be able to rezone the land. This makes no sense, yet it is the result the majority opinion provides.

In the subject case, Valley View did not spend any money at all to prepare building permits for the last seven structures. The majority, however, has created a new standard which allows a developer, by filing a few building permits, to prohibit legislative bodies from rezoning adjacent land. This usurps the local legislative power to rezone land according to its beliefs as to the public welfare, and should not be allowed. I would only allow Valley View to have vested rights in the five buildings for which it has filed building permits.

CONCLUSION

I believe the majority opinion commits a flagrant violation of the separation of powers doctrine. Article 2 of the Washington State Constitution and article 1 of the United States Constitution confine the legislative power to the legislatures of the municipal, state and federal governments,

and not to the judiciary. Rezoning land thus has always been a legislative act prior to this date, and the majority advances no theory to justify our unilateral decision to change this situation. I believe that the City of Redmond possessed and still possesses the power to rezone the subject tract of land which includes Valley View's property, and that any analysis of what rights Valley View has at this point should be based on our prior decisions concerning vested rights, rather than a wholesale denial of the inherent power of a city to zone land within its own legislative boundaries.

I would

- (1) Set aside the trial court's judgment;
- (2) Grant Valley View vested rights to five building permit applications, and order the City of Redmond to process such applications in accordance with the zoning of the City of Redmond in effect at the time the permits were filed;
- (3) Valley View, of course, is free to apply to the Redmond City Council for a rezone of the land to permit construction of the additional seven buildings.

GOODLOE, J., concurs with DORE, J.

3.10. Neighbor Consent Provisions

City of Chicago v. Stratton

44 N.E. 853 (Ill. 1896)

Farson & Greenfield, for appellant.

S. J. Howe, for appellees.

This was a suit brought under a section of the building ordinance, and is to recover the penalty for a violation of the ordinance. The section of the ordinance is as follows:

'Sec. 49. It shall not be lawful for any person to locate, build, construct or keep in any block in which two-thirds of the buildings are devoted to exclusive residence purposes, a livery boarding or sales stable, gas house, gas reservoir, paint, oil or varnish works, within 200 feet of such residence, on either side of the street, unless the owners of a majority of the lots in such block fronting or abutting on the street consent in writing to the location or construction of such livery stable, gas house, gas reservoir, paint, oil, or varnish works therein. Such written consent of the property owners shall be filed with the commissioner of buildings before a permit be granted for the construction or keeping of such livery stable, gas house, gas reservoir, paint, oil or varnish works.' It is conceded by the appellees that they are engaged in keeping a livery, boarding, and sale stable at Nos. 211 and 213 Evanston avenue, in the city of Chicago; that they were so engaged on the 7th day of June, 1894, at said place; and that they did not procure the consent of the owners of a majority of the lots in such block fronting or abutting on the street before the erection of said building. The building which they were occupying on the 7th day of June, 1894, for that purpose, was constructed under a building permit to erect a two-story and basement brick carriage repository and stable in the rear, which was issued July 28, 1893. Instead of building a stable in the rear, it appears that the horses-some 30 or more-were kept in the basement. The building is back about 59 feet from the street, and has a plank driveway running from the entrance of the stable, which is about 6 feet above the ground, down to Evanston avenue. The livery stable and driveway are so near to a residence building on the adjoining lot that carriages driving out and in shake the whole building. On the 7th of June, 1894, there were 31 buildings in the block in which this livery stable is located, 28 of which were devoted to exclusive residence purposes. No petition has ever been signed by a majority of the property owners, as required by the ordinance governing the location and

keeping of livery stables in the city of Chicago. This suit was originally brought before a justice of the peace, where judgment was entered against the defendants, and was, by the defendants, appealed to the circuit court of Cook county. Upon the trial before the court, a jury having been waived, certain propositions of law, in pursuance of the statute, were offered on behalf of the plaintiff, presenting the question of the legality of the ordinance in question, which the court was requested to hold as the law governing the case, but the court held the section of the ordinance to be invalid, and entered a finding for the defendants. Motion for a new trial having been overruled, the court entered judgment upon the finding. The case was taken by appeal to the appellate court, where the judgment of the court below was affirmed. The plaintiff now brings the case to this court by appeal.

The assignment of error chiefly relied upon is that the court below refused to hold as law the following propositions of law submitted on behalf of the plaintiff, the city of Chicago: '(2) The court is requested to hold as a proposition of law that the provisions of section 49 of the building ordinance of the city of Chicago passed March 13, 1893, wherein it is ordained that it shall not be lawful for any person to locate, build, construct, or keep in any block in which two-thirds of the buildings are devoted to exclusive residence purposes a livery, boarding, or sales stable, unless the owners of a majority of the lots in such block fronting or abutting on the street consent in writing to the location of such livery stable, is not, under the laws of the said state of Illinois, a delegation of legislative power by the common council of said city of Chicago to the property owners of such block. (3) The court is requested to hold as a proposition of law that section 49 of the building ordinance of the city of Chicago passed by the common council of said city on the 13th day of March, A. D. 1893, is lawful, valid, and binding upon the defendants

in this case, and that under the evidence the plaintiff is entitled to recover. (4) If the court find from the evidence that on the 6th day of June, 1894, the defendants were engaged in keeping a livery, boarding, and sales stable within the limits of the city of Chicago, and that the said defendants have not at any time procured in writing the consent of the owners of a majority of the lots in the block in which said livery stable is located fronting or abutting on the street upon which the same is located, in pursuance of the requirements of section 49 of the certain building ordinance of the city of Chicago passed by the common council of said city on the 13th day of March, A. D. 1893; and, if the court further finds from the evidence that two-thirds of the buildings in the block in which said livery stable is located are devoted to exclusive residence purposes,-then the court is requested to hold as a proposition of law that the defendants have been guilty of a violation of said section 49 of said ordinance, and the plaintiff is entitled to recover in this suit the penalty provided in said ordinance for the violation thereof.'

MAGRUDER, J. (after stating the facts).

The eighty-second paragraph of section 1 of article 5 of the city and village act, which has been adopted by the city of Chicago, provides that the city council in cities shall have the power 'to direct the location and regulate the use and construction of * * * livery stables * * * within the limits of the city.' 3 Starr & C. Ann. St. p. 191. The power to make laws which the constitution confers upon the legislature cannot be delegated by the legislature to any other body or authority. The constitutional maxim which prohibits such delegation of legislative power is not violated when municipal corporations are vested with certain powers of legislation in view of the recognized propriety of conferring upon such municipal organizations the right to make local regulations, of the need of which they are supposed to be better judges than the legislature of the state. But such

powers as are conferred upon municipality, and, so far as they are legislative, cannot be delegated to any subordinate or to any other authority. The same restriction which rests upon the legislature as to the legislative functions conferred upon it by the constitution, rests upon a municipal corporation as to the powers granted to it by the legislature. Cooley, Const. Lim. (6th Ed.) pp. 137, 138, 248, 249. Accordingly, 'the principle is a plain one that the public powers or trusts devolved by law or charter upon the council or governing body, to be exercised by it when and in such manner as it shall judge best, cannot be delegated to others.' 1 Dill. Mun. Corp. (4th Ed.) § 96. The question, then, in the present case is whether the power to direct the location of livery stables and regulate their use and construction which has been conferred upon the common council of the city of Chicago by the city and village act is delegated by section 49 of the building ordinance to the owners of a majority of the lots in the blocks therein specified. That section provides that 'it shall not be lawful for any person to locate, build, construct or keep in any block in which two-thirds of the buildings are devoted to exclusive residence purposes, a livery, boarding or sales stable * * * within 200 feet of such residence, on either side of the street, unless the owners of a majority of the lots in such block fronting or abutting on the street consent in writing to the location or construction of such livery stable.' It is to be noticed that the ordinance does not prohibit the location or construction or keeping of livery stables in blocks which are vacant, or where the buildings are devoted to business purposes, or where less than two-thirds of the buildings are devoted to exclusive residence purposes. It forbids the location of such stables in blocks where two-thirds of the buildings are devoted to exclusive residence purposes, but provides that they may be located even in such blocks if the owners of a majority of the lots therein consent thereto in writing. There is a general prohibition against the location of livery stables in blocks where two-

thirds of the buildings are devoted to exclusive residence purposes, and then an exception to the prohibition is created in favor of blocks of the class designated where a majority of the lot owners consent in writing to the location of a livery stable there. We are unable to see how this exception amounts to a delegation by the common council of its power to direct the location of livery stables to such lot owners. While it may be true that a livery stable in a city or town is not per se a nuisance, 'yet it becomes so if so kept or used as to destroy the comfort of owners and occupants of adjacent premises, and so as to impair the value of their property.' 13 Am. & Eng. Enc. Law. p. 935. A livery stable in close proximity to an existing residence may be injurious to the comfort, and even health, of the occupants by the permeation of deleterious gases, and by the near deposit of offal removed therefrom. *Shiras v. Olinger*, 50 Iowa, 571, 32 Am. Rep. 138, and note. As cities are constructed, the division of the territory is into blocks bounded by streets. The persons who will be injuriously affected by a livery stable so kept as to be a nuisance are those whose residences are in the same block where the stable is located. The prohibition against the location of a stable in a residence block is for the benefit of those who reside there. If those for whose benefit the prohibition is created make no objection to the location of such a stable in their midst, an enforcement of the prohibition as to that block would seem to be unnecessary. By section 49 the lot owners are not clothed with the power to locate livery stables, but are merely given the privilege of consenting that an existing ordinance against the location of a livery stable in such a block as theirs may not be enforced as against their block. They are simply allowed to waive the right to insist upon the enforcement of a legal prohibition which was adopted for their benefit and comfort. It is competent for the legislature to pass a law the ultimate operation of which may, by its own terms, be made to depend upon a contingency. *People v. Hoffman*, 116 Ill.

587, 5 N. E. 596, and 8 N. E. 788, and cases cited. As was said by the supreme court of Pennsylvania in *Locke's Appeal*, 72 Pa. St. 491: 'The true distinction * * * is this: The legislature cannot delegate its power to make a law, but it can make a law to delegate a power to determine some fact or state of things upon which the law makes or intends to make its own action depend.' In the case at bar the ordinance provides for a contingency, to wit, the consent of a majority of the lot owners in the block upon the happening of which the ordinance will be inoperative in certain localities. The operation of the ordinance is made to depend upon the fact of the consent of a majority of the lot owners, but the ordinance is complete in itself as passed. What are known as 'local option laws' depend for their adoption or enforcement upon the votes of some portion of the people, and yet are not regarded as delegations of legislative power. 13 Am. & Eng. Enc. Law, p. 991. Delegation of power to make the law is forbidden, as necessarily involving a discretion as to what the law shall be; but there can be no valid objection to a law which confers an authority or discretion as to its execution, to be exercised under and in pursuance of the law itself. *Cincinnati, W. & Z. R. Co. v. Commissioners of Clinton Co.*, 1 Ohio St. 77. Here the provision in reference to the consent of the lot owners affects the execution of the ordinance, rather than its enactment. *People v. Salomon*, 51 Ill. 37; *Bull v. Read*, 13 Grat. 78; *Cargo of the Brig Aurora v. United States*, 7 Cranch, 382; *Alcorn v. Hamer*, 38 Miss. 652. The ordinance in question does not delegate to a majority of the lot owners the right to pass, or even approve of, it. On the contrary, their consent is in the nature of a condition subsequent which may defeat the operation of the prohibition against the location of a livery stable in a block where two-thirds of the buildings are devoted to exclusive residence purposes, but which was never intended to confer upon the ordinance validity as an expression of the legislative will. *Alcorn v. Hamer*, *supra*.

The express grant of the power to direct the location of livery stables as made by the legislature to the municipal corporation carries with it all necessary and proper means to make the power effectual. *Huston v. Clark*, 112 Ill. 344. In other words, a grant of legislative power to do a certain thing carries with it the power to use all necessary and proper means to accomplish the end; and the legislature may authorize others to do things which it might properly, but cannot conveniently or advantageously, do itself. *Railroad Co. v. Jones*, 149 Ill. 361, 37 N. E. 247. In determining the question of the location of a livery stable the common council may properly consult the wishes and ascertain the needs of the residents of the block where the stable is to be kept, and to that end make their written consent the basis of the action of the commissioner of buildings in issuing the permit. In matters of purely local concern the parties immediately interested may fairly be supposed to be more competent to judge of their needs than any central authority. *Cooley*, *Const. Lim.* (6th Ed.) p. 138. In *Meyers v. Baker*, 120 Ill. 567, 12 N. E. 79, there was involved the question of the validity of a section of the Criminal Code, which provides that: 'Whoever during the time of holding any camp or field meeting for religious purposes and within one mile of the place of holding such meeting hawks or peddles goods, wares or merchandise or without the permission of the authorities having charge of such meeting establishes any tent, booth or other place for vending provisions or refreshments or sells or gives away, or offers to sell or give away any spirituous liquor, wine, cider or beer or practices or engages in gaming or horse racing, or exhibits or offers to exhibit any show or play shall be fined,' etc. *Rev. St. Ill. c. 38, § 59*. In that case we held that 'the rule which would control an ordinance would also apply to an act of the legislature,' and that the statute did 'not confer the power to licence on the authorities in charge of the meeting,' and we there said: "The fact that the act confers on the authorities the right to consent or refuse

consent cannot be held to authorize such authorities to license. The right to consent or refuse consent is one thing, while the right or power to license a person to conduct a certain business at a certain place is quite a different thing. Had the legislature intended to authorize the authorities to license, language expressing that intention in plain words would no doubt have been used. But, however this may be, we see nothing in the language of the act which can be construed as authorizing the authorities to license.' Where an annexation act of the legislature provided that, when territory was annexed to a city under the provisions of that act, and, prior to such annexation, there were in force ordinances providing that licenses to keep dram shops should not be issued except upon petition of a majority of the voters residing within a certain distance of the location of such proposed dram shop, it was held that such ordinance still remained in force after the annexation, and that it was not unreasonable. *People v. Cregier*, 138 Ill. 401, 28 N. E. 812.

The case of *City of St. Louis v. Russell*, 116 Mo. 248, 22 S. W. 470, is relied upon as announcing a different view of the present question from that which is here expressed, but the ordinance condemned in that case provided that no livery stable should 'be located on any block of ground in St. Louis without the written consent of the owners of one-half the ground of said block.' It will be noticed that in the Missouri case the ordinance requiring the consent of adjacent property owners related to the entire city. Under the operation of such an ordinance livery stables might be totally suppressed and prohibited everywhere within the municipal limits. The ordinance, however, in the case at bar is not thus unreasonable, as it relates only to certain residence districts, which are clearly defined. Within such specified residence districts, the city council undoubtedly has the power to prohibit or forbid the location of livery stables, and, having the power of total prohibition within

those districts, it may impose such conditions and restrictions in relation to their limited area as it may see fit. For the reasons stated, we are of the opinion that the ordinance here in question is not void as being a delegation of legislative power, and that the circuit court erred in not holding as law the propositions submitted to it as the same are set forth in the statement preceding this opinion. Accordingly the judgments of the appellate and circuit courts are reversed, and the cause is remanded to the circuit court for further proceedings in accordance with the views herein expressed. Reversed and remanded.

Eubank v. City of Richmond

226 U.S. 137 (1912)

ERROR TO THE SUPREME COURT OF APPEALS
OF THE STATE OF VIRGINIA.

Mr. S.S.P. Patteson for plaintiff in error.

Mr. H.R. Pollard for defendant in error. MR. JUSTICE
MCKENNA delivered the opinion of the court.

In error to review a judgment of the Hustings Court of the city of Richmond affirming a judgment of the Police Court of the city imposing a fine of \$25.00 on plaintiff in error for alleged violation of an ordinance of the city fixing a building line. The judgment was affirmed by the Supreme Court of the State. 110 Virginia, 749.

Plaintiff in error attacks the validity of the ordinance and the statute under which it was enacted on the ground that they infringe the Constitution of the United States in that they deprive plaintiff in error of his property without due process of law and deny him the equal protection of the laws.

The statute authorized the councils of cities and towns, among other things, "to make regulations concerning the building of houses in the city or town, and in their discretion,... in particular districts, or along particular

streets, to prescribe and establish building lines, or to require property owners in certain localities or districts to leave a certain percentage of lots free from buildings, and to regulate the height of buildings.” Acts of 1908, p. 623, 4.

By virtue of this act the city council passed the following ordinance: “That whenever the owners of two-thirds of the property abutting on any street shall, in writing, request the committee on streets to establish a building line on the side of the square on which their property fronts, the said committee shall establish such line so that the same shall not be less than five feet nor more than thirty feet from the street line.... And no permit for the erection of any building upon such front of the square upon which such building line is so established shall be issued except for the construction of houses within the limits of such line.” A fine of not less than twenty-five nor more than five hundred dollars is prescribed for a violation of the ordinance.

The facts are as follows: Plaintiff in error is the owner of a lot thirty-three feet wide on the south side of Grace street between Twenty-eighth and Twenty-ninth streets. He applied for and received a permit on the nineteenth of December, 1908, to build a detached brick building to be used for a dwelling, according to certain plans and specifications which had been approved by the building inspector, dimensions of the building to be 26x59x28 feet high.

On the ninth of January, 1909, the street committee being in session, two-thirds of the property owners on the side of the square where plaintiff in error’s lot is situated, petitioned for the establishment of a building line, and in accordance with the petition a resolution was passed establishing a building line on the line of a majority of the houses then erected and the building inspector ordered to be notified. This was done, and the plaintiff in error given notice that the line established was “about fourteen (14)

feet from the true line of the street and on a line with the majority of the houses.” He was notified further that all portions of his house “including Octagon Bay, must be set back to conform to” that line. Plaintiff in error appealed to the Board of Public Safety, which sustained the building inspector.

At the time the ordinance was passed the material for the construction of the house had been assembled, but no actual construction work had been done. The building conformed to the line, with the exception of the octagon bay window referred to above, which projected about three feet over the line.

The Supreme Court of the State sustained the statute, saying (p. 752) that it was neither “unreasonable nor unusual” and that the court was “justified in concluding that it was passed by the legislature in good faith, and in the interest of the health, safety, comfort, or convenience of the public, and for the benefit of the property owners generally who are affected by its provisions; and that the enactment tends to accomplish all, or at least some, of these objects.” The court further said that the validity of such legislation is generally recognized and upheld as an exercise of the police power.

Whether it is a valid exercise of the police power is the question in the case, and that power we have defined, as far as it is capable of being defined by general words, a number of times. It is not susceptible of circumstantial precision. It extends, we have said, not only to regulations which promote the public health, morals, and safety, but to those which promote the public convenience or the general prosperity. *C., B. & Q. Ry. Co. v. Drainage Commissioners*, 200 U.S. 561. And further, “It is the most essential of powers, at times the most insistent, and always one of the least limitable of the powers of government.” *District of Columbia v. Brooke*, 214 U.S. 138, 149. But necessarily it has its limits and must stop when it encounters the prohibitions of the

Constitution. A clash will not, however, be lightly inferred. Governmental power must be flexible and adaptive. Exigencies arise, or even conditions less peremptory, which may call for or suggest legislation, and it may be a struggle in judgment to decide whether it must yield to the higher considerations expressed and determined by the provisions of the Constitution. *Noble State Bank v. Haskell*, 219 U.S. 104. The point where particular interests or principles balance “cannot be determined by any general formula in advance.” *Hudson Water Co. v. McCarter*, 209 U.S. 349, 355.

But in all the cases there is the constant admonition both in their rule and examples that when a statute is assailed as offending against the higher guaranties of the Constitution it must clearly do so to justify the courts in declaring it invalid. This condition is urged by defendant in error, and attentive to it we approach the consideration of the ordinance.

It leaves no discretion in the committee on streets as to whether the street line shall or shall not be established in a given case. The action of the committee is determined by two-thirds of the property owners. In other words, part of the property owners fronting on the block determine the extent of use that other owners shall make of their lots, and against the restriction they are impotent. This we emphasize. One set of owners determine not only the extent of use but the kind of use which another set of owners may make of their property. In what way is the public safety, convenience or welfare served by conferring such power? The statute and ordinance, while conferring the power on some property holders to virtually control and dispose of the proper rights of others, creates no standard by which the power thus given is to be exercised; in other words, the property holders who desire and have the authority to establish the line may do so solely for their own interest or even capriciously. Taste (for even so arbitrary a thing as taste may control) or judgment may vary

in localities, indeed in the same locality. There may be one taste or judgment of comfort or convenience on one side of a street and a different one on the other. There may be diversity in other blocks; and viewing them in succession, their building lines may be continuous or staggering (to adopt a word of the mechanical arts) as the interests of certain of the property owners may prompt against the interests of others. The only discretion, we have seen, which exists in the Street Committee or in the Committee of Public Safety, is in the location of the line, between five and thirty feet. It is hard to understand how public comfort or convenience, much less public health, can be promoted by a line which may be so variously disposed.

We are testing the ordinance by its extreme possibilities to show how in its tendency and instances it enables the convenience or purpose of one set of property owners to control the property right of others, and property determined, as the case may be, for business or residence — even, it may be, the kind of business or character of residence. *One* person having a two-thirds ownership of a block may have that power against a *number* having a less collective ownership. If it be said that in the instant case there is no such condition presented, we answer that there is control of the property of plaintiff in error by other owners of property exercised under the ordinance. This, as we have said, is the vice of the ordinance, and makes it, we think, an unreasonable exercise of the police power.

The case requires no further comment. We need not consider the power of a city to establish a building line or regulate the structure or height of buildings. The cases which are cited are not apposite to the present case. The ordinances or statutes which were passed on had more general foundation and a more general purpose, whether exercises of the police power or that of eminent domain. Nor need we consider the cases which distinguish between the esthetic and the material effect of regulations the

consideration of which occupies some space in the argument and in the reasoning of the cases.

Judgment reversed and case remanded for further proceedings not inconsistent with this opinion.

Cary v. City of Rapid City

559 N.W.2d 891 (S.D. 1997)

James S. Nelson and Mark J. Connot of Gunderson, Palmer, Goodsell & Nelson, and Melvin D. Wedmore, Rapid City, for Plaintiff and Appellant.

Tamara M. Pier, Assistant City Attorney, Rapid City, for Defendant and Appellee. MILLER, CHIEF JUSTICE.

Jane Cary petitioned the city of Rapid City, South Dakota, seeking to rezone certain property from a general agricultural classification to a medium density residential classification. The City approved an ordinance granting Cary's request. Prior to the effective date of the ordinance, certain neighboring property owners filed a written protest of the rezoning pursuant to SDCL 11-4-5. Based on the protest, the ordinance rezoning Cary's property was blocked.

Cary brought an action seeking a declaratory judgment and a writ of mandamus declaring the rezoning ordinance to be effective. In addition, she requested that the trial court declare SDCL 11-4-5 inapplicable to her property and unconstitutional. The trial court declared SDCL 11-4-5 constitutional and applicable to Cary's property. Cary appeals. We reverse.

FACTS

This matter was presented to the trial court by stipulation of facts. The trial court entered findings of fact (even though findings are superfluous in a stipulated case, *Muhlenkort v. Union Cty. Land Trust*, 530 N.W.2d 658,

660 (S.D.1995)) and conclusions of law based on the stipulation.

Cary's property, which is located in southwestern Rapid City, was annexed into the City on September 8, 1992. At the time of annexation, it was classified as "no use" property pursuant to Rapid City Municipal Code 17.26.010. Following annexation, City placed a street assessment of approximately \$90,000 on the western portion of the property. Additionally, the property's real estate taxes were increased from \$122.36 in 1990 to \$3,678.48 in 1995. The property, however, continued to be used as a horse pasture and generated rental income of \$150 per year.

On December 6, 1993, City adopted an ordinance rezoning Cary's property as "general agriculture" property. The City Planning Department described this rezoning as follows:

The property was zoned General Agriculture following annexation into the City limits.

* * * * *

The purpose of the General Agriculture zoning of this property was to allow it to be used for agricultural purposes until development was proposed.

As a result of the street assessment and increased property taxes, Cary decided to sell the property. In 1995, she received an offer to purchase which was contingent on the property being rezoned as "medium density residential" to allow construction of apartment buildings. According to the buyers, a medium density residential designation was the lowest zoning classification which would be cost effective and economically viable for the property.

In an attempt to comply with the buyers' condition, Cary filed a petition with City seeking to rezone the property. She complied with all requirements for rezoning. The Rapid City Fire Department, Engineering Department, Building Inspector and City Planning Department recommended approval of the petition. On September 5, 1995, City approved Ordinance 3224 rezoning Cary's property as medium density residential property. In accordance with the law, the ordinance was published on September 11, 1995, and scheduled to take effect October 1, 1995. On September 21, 1995, more than forty percent of the neighboring property owners filed a written protest pursuant to SDCL 11-4-5. The protesters owned less than eighteen percent of the property neighboring Cary's property. Based on the protest, City took the appropriate legal position that the ordinance could not be effectuated because of the provisions of SDCL 11-4-5.

Cary then brought an action in circuit court seeking a declaratory judgment and a writ of mandamus. She asked the trial court to declare Ordinance 3224 effective and require City to rezone the property in compliance with her petition. Additionally, she requested that SDCL 11-4-5 be declared inapplicable to the property or, in the alternative, be declared unconstitutional. The trial court denied her requests. Cary appeals, raising two issues: (1) Whether SDCL 11-4-5 applies to the property; and (2) whether SDCL 11-4-5 is constitutional. Because we find SDCL 11-4-5 to be unconstitutional, we need not address the first issue.

DECISION

Whether SDCL 11-4-5 is Constitutional

SDCL 11-4-5 provides:

If such a proposed zoning ordinance be adopted, the same shall be published and take effect as other

ordinances unless the referendum be invoked, or unless a written protest be filed with the auditor or clerk, signed by at least forty percent of the owners of equity in the lots included in any proposed district and the lands within one hundred fifty feet from any part of such proposed district measured by excluding streets and alleys. A corporation shall be construed to be a sole owner, and when parcels of land are in the name of more than one person, ownership representation shall be in proportion to the number of signers who join in the petition in relation to the number of owners. In the event such a protest be filed, the ordinance shall not become effective as to the proposed district against which the protest has been filed. Such written protest shall not be allowed as to any ordinance regulating or establishing flood plain areas.

Challenges to the constitutionality of a statute must overcome formidable requirements.

There is a strong presumption that the laws enacted by the legislature are constitutional and that presumption is rebutted only when it clearly, palpably and plainly appears that the statute violates a provision of the constitution. Further, the party challenging the constitutionality of a statute bears the burden of proving beyond a reasonable doubt that the statute violates a state or federal constitutional provision. *Sedlacek v. South Dakota Teener Baseball Program*, 437 N.W.2d 866, 868 (S.D.1989) (citations omitted). See also *State v. Hauge*, 1996 SD 48, ¶ 4, 547 N.W.2d 173, 175; *Kyllo v. Panzer*, 535 N.W.2d 896, 898 (S.D.1995); *Specht v. City of Sioux Falls*, 526 N.W.2d 727, 729 (S.D.1995); *In re Certification of a Question of*

Law (Elbe), 372 N.W.2d 113, 116 (SD 1985). If a statute can be construed so as not to violate the constitution, that construction must be adopted. *Simpson v. Tobin*, 367 N.W.2d 757, 766 (S.D.1985). Relying on our prior holding in *State Theatre Co. v. Smith*, 276 N.W.2d 259, 264 (S.D.1979), the trial court determined SDCL 11-4-5 to be constitutional. On appeal, Cary argues the protest provision of the statute is unconstitutional¹ because it does not provide standards and guidelines for the delegation of legislative authority, nor does it contain a legislative bypass provision to remove the ultimate legislative authority and lawmaking power from the protesters. She claims the absence of such provisions is an unlawful delegation of legislative power that results in a small number of property owners being able to prevent a landowner's use of property. Cary also contends the holding in *State Theatre* was in error and is not controlling in the instant case.

The attorney general was provided proper notice of Cary's challenge to the constitutionality of SDCL 11-4-5.

SDCL 11-4-5 has been the subject of previous constitutional review. In *State Theatre*, SDCL 11-4-5 was determined to be a consent statute and held constitutional. 276 N.W.2d at 263-64. In determining SDCL 11-4-5 to be constitutional, the *State Theatre* court stated:

SDCL 11-4-5 is not a typical "protest" statute. Normally enabling acts provide for the filing of protest petitions by a specified number of property owners within a prescribed distance of the

¹ "Ordinarily, we will not rule on the constitutionality of a statute unless the Attorney General has been notified because when an adjudication of unconstitutionality may seriously affect the general public, it is proper for the Attorney General to appear on behalf of the Legislature and the people." *West Two Rivers Ranch v. Pennington Cty.*, 1996 SD 70, ¶ 15, 549 N.W.2d 683, 687 (citing *Sioux Falls Argus Leader v. Young*, 455 N.W.2d 864, 870 (S.D.1990); *Sharp v. Sharp*, 422 N.W.2d 443, 446 (S.D.1988)).

land affected by the amendment under consideration. If sufficient protests are filed, a larger affirmative vote of the municipal legislative body than normally needed to enact an ordinance is required to adopt the protested amendment and render the protest ineffective. R. Anderson, *American Law of Zoning* § 4.33 (2d Ed.1966). These provisions have been held constitutional when challenged as an unlawful delegation of legislative power. *Garrity v. District of Columbia*, 66 U.S.App. D.C. 256, 86 F.2d 207 (1936); *Northwood Properties Co. v. Perkins*, 325 Mich. 419, 39 N.W.2d 25 (1949).

SDCL 11-4-5 does allow protest by neighboring property owners but does not include a provision for subsequent municipal legislative action. The statute is, therefore, analogous to what are referred to as “consent” statutes. These statutes require that the consent of a certain number of affected neighbors be obtained before a zoning ordinance is amended. The legislative body has no power to overrule; the neighbors are given the ultimate power to block the amendment. R. Anderson, *American Law of Zoning* § 4.36.

The validity of consents has long been debated; the absence of standards relating to the giving of consents has been a major ground for the invalidity of consent statutes. There appear to be two categories of consent statutes: those requiring consent to establish a

restriction and those requiring consent to waive a restriction. The former are invalid and the latter valid.

276 N.W.2d at 263. The State Theatre court concluded the result of the protest by other property owners was analogous to requiring the consent of a number of affected property owners. Unlike traditional consent statutes, the consent under SDCL 11-4-5 was required after the adoption of the ordinance instead of before the adoption. *Id.* The court also determined the absence of a statutory provision to provide for a review of the protests by a larger vote of the municipality was indicative of a consent statute rather than a protest statute. *Id.* Therefore, the State Theatre court concluded SDCL 11-4-5 to be a consent statute. *Id.* at 264.

For the reasons set forth below, we expressly overrule the holding in State Theatre and conclude SDCL 11-4-5 is unconstitutional.

Initially, we must determine whether SDCL 11-4-5 is a consent statute or a protest statute. When analyzing a statute to determine legislative intent, we must assume the legislature had in mind all provisions relating to the same subject. In *re Estate of Smith*, 401 N.W.2d 736, 740 (S.D.1987). In SDCL ch 11-4, only SDCL 11-4-9 may require the consent of neighboring landowners as a prerequisite to effectuating a zoning ordinance. Under SDCL 11-4-9, consent of any property owners having a right to protest an ordinance under SDCL 11-4-5 may be required in certain circumstances in the discretion of the governing body. SDCL 11-4-9 provides:

The governing body may by ordinance require as a condition precedent to the introduction of any ordinance proposing changes in the zoning ordinance that there be first filed with

the city auditor or clerk the written consent of the owners not exceeding sixty percent of the aggregate area having the right of protest against such proposed ordinance if adopted, determined as provided by § 11-4-5.

SDCL 11-4-5, however, makes no mention of consent as a prerequisite to effectuating a zoning ordinance but, rather, provides that forty percent of neighboring property owners may file a written protest following the adoption of a zoning ordinance. In the event of such a properly filed written protest, the adopted ordinance “shall not become effective.” SDCL 11-4-5.

The express language of SDCL 11-4-9 indicates the legislature’s inclusion of a consent prerequisite in certain situations. SDCL 11-4-5 does not use language requiring consent prior to the adoption of zoning ordinances. Instead, SDCL 11-4-5 specifically uses language allowing written protests to be filed after the adoption of zoning ordinances. SDCL 11-4-9 is a proactive statute which, if exercised by the appropriate governing body, requires consent to rezoning ordinances be secured prior to the adoption of the ordinance. SDCL 11-4-5, on the other hand, is a reactive statute which allows a written protest to block an ordinance following its adoption. The distinction between the language of SDCL 11-4-9 and SDCL 11-4-5 indicates the legislature’s intent to provide two different and distinct methods by which zoning ordinances may be limited. We now conclude, based on the plain language of SDCL 11-4-5, the legislature’s specific inclusion of a consent provision in SDCL 11-4-9 and the intent of the legislature as expressed through all provisions of SDCL ch 11-4, that SDCL 11-4-5 is a protest statute.

Having determined SDCL 11-4-5 to be a protest statute, we now turn to the constitutionality of the statute.

Legislative power is vested in the legislature and this essential power may not be abdicated or delegated. SD Const Art III, § 1; *Ind. Community Bankers Ass'n v. State*, 346 N.W.2d 737, 743 (S.D.1984); *Schryver v. Schirmer*, 84 S.D. 352, 171 N.W.2d 634, 635 (1969). When a legislative body retains a police power, articulated standards and guidelines to limit the exercise of the police power are unnecessary. *Bashant v. Walter*, 78 Misc.2d 64, 355 N.Y.S.2d 39, 44 (N.Y.Sup.Ct.1974). Police powers which are delegated, however, must include minimum standards and guidelines for their application. *Id.* 355 N.Y.S.2d at 45. The failure to provide standards and guidelines for the application of the police power constitutes a delegation of legislative power repugnant to the due process clause of the Fourteenth Amendment. *Seattle Title Trust Co. v. Roberge*, 278 U.S. 116, 122, 49 S.Ct. 50, 52, 73 L.Ed. 210, 213 (1928); *Bashant*, 355 N.Y.S.2d at 45.

Zoning ordinances find their justification in the legislative police power exerted for the interest and convenience of the public. *Eubank v. Richmond*, 226 U.S. 137, 142, 33 S.Ct. 76, 77, 57 L.Ed. 156, 159 (1912). A delegation of this legislative power requires appropriate standards and guidelines. *Id.* See also *Drovers Trust & Savings Bank v. City of Chicago*, 18 Ill.2d 476, 165 N.E.2d 314, 315 (1960); *Shannon v. City of Forsyth*, 205 Mont. 111, 666 P.2d 750, 752 (1983). Additionally, “ ‘in order for an ordinance to comply with the requirements essential to the exercise of police power ..., it is essential that there should be an appellate body, such as the City, with the power to review exceptional cases.’ ” *Shannon*, 666 P.2d at 752 (quoting *Freeman v. Board of Adjustment*, 97 Mont. 342, 356, 34 P.2d 534, 539 (1934)).

In the instant case, SDCL 11-4-5 does not provide guidelines or standards for protesting an adopted ordinance. So long as a certain number of neighboring property owners file a written petition, those property

owners may impose or create restrictions on neighboring property without reason or justification.

A person's right to use his or her land for any legitimate purpose is constitutionally protected. *Seattle Trust*, 278 U.S. at 121, 49 S.Ct. at 52, 73 L.Ed. at 213. SDCL 11-4-5, however, allows the use of a person's property to be held hostage by the will and whims of neighboring landowners without adherence or application of any standards or guidelines. Under SDCL 11-4-5, "the property holders who desire to have the authority to establish a restriction may do so solely for their own interests or even capriciously. Taste (for even so arbitrary a thing as taste may control) or judgment may vary ." *Eubank*, 226 U.S. at 144, 33 S.Ct. at 77, 57 L.Ed. at 159. Such a standardless protest statute allows for unequal treatment under the law and is in clear contradiction of the protections of the due process clause of the Fourteenth Amendment. See *Id.*

Furthermore, SDCL 11-4-5 provides no legislative bypass to allow for review of a protest. The filing of a written protest requires that the adopted ordinance "shall not become effective." SDCL 11-4-5. By allowing forty percent of the neighboring property owners to block the effectuation of an adopted ordinance approved by City, as being consistent with the best interests of the public, SDCL 11-4-5 allows a potentially small number of neighboring property owners to make the ultimate determination of the public's best interest.² The absence of a review provision or some method by which a protest is reviewed by a legislative body makes the protest filed under SDCL 11-4-5 determinative and final. See *Garrity v. District of Columbia*, 66 U.S.App. D.C. 256, 86 F.2d 207 (1936); *Northwood*

² As presently written, SDCL 11-4-5 would allow the owner of one small parcel of land within one hundred fifty feet of a large parcel of land to effectively block any proposed use of the large parcel of land so long as the small parcel owner constituted forty percent of neighboring property owners and a written protest was filed.

Properties v. Perkins, 325 Mich. 419, 39 N.W.2d 25 (1949). The ultimate determination of the public's best interest is for the legislative body, not a minority of neighboring property owners. See Eubank, 226 U.S. at 143, 33 S.Ct. at 77, 57 L.Ed. at 159. Delegations of legislative authority which allow this ultimate decision to be made by a minority of property owners without an opportunity for review are unlawful. Id.

The protest provision of SDCL 11-4-5 is unconstitutional. We therefore expressly overrule the previous holding of State Theatre to the extent that it conflicts with this ruling.

Reversed.

SABERS, AMUNDSON, KONENKAP and GILBERSTON, JJ., concur.

**Buckeye Community Hope Foundation v. City of
Cuyahoga Falls**

82 Ohio St. 3d 539, 697 N.E.2d 181 (1998).

Syllabus by the Court

The citizens of a municipality may not exercise powers of referendum, by charter or other means, greater than those powers granted by Section 1f, Article II of the Ohio Constitution.

Pursuant to Section 1f, Article II of the Ohio Constitution, actions taken by a municipal legislative body, whether by ordinance, resolution, or other means, that constitute administrative action, are not subject to referendum proceedings.

The passage by a city council of an ordinance approving a site plan for the development of land, pursuant to existing zoning and other applicable regulations, constitutes administrative action and is not subject to referendum proceedings.

ON MOTION FOR RECONSIDERATION

Appellant Buckeye Community Hope Foundation (“Buckeye Hope”), a nonprofit Ohio corporation, develops housing for individuals through the use of state grants and tax credits. Buckeye Hope is affiliated with Cuyahoga Housing Partners, Inc. and Buckeye Community Three L.P. (“Buckeye Three”), also appellants herein.

In 1995, Buckeye Three purchased a tract of land in Cuyahoga Falls for the purpose of building a seventy-two unit apartment complex. The land was zoned for multifamily use. Subsequently, the Cuyahoga Falls Planning Commission unanimously approved a site plan concerning the proposed complex. Pursuant to Section 1.7, Article VIII of the Charter of Cuyahoga Falls, the plan was then submitted to the City Council of Cuyahoga Falls for its approval.

On April 1, 1996, the city council ratified the decision of the planning commission by passing Ordinance No. 48-1996. The ordinance provided, in part, that “City Council approves the plan for development of land situated in an R-17 Medium Density Multiple Family zoning district in accordance with such district and zoning regulations as stipulated in the Codified Ordinances of the City of Cuyahoga Falls and as approved by the Planning Commission * * *.”

Following passage of the ordinance, a group of residents of Cuyahoga Falls filed referendum petitions with the clerk of city council. The petitions sought a referendum to approve or reject Ordinance No. 48-1996, pursuant to Section 2, Article IX of the municipal charter, which provides, in relevant part, that the citizens of Cuyahoga Falls “have the power to approve or reject at the polls *any ordinance or resolution passed by the Council* * * *.” (Emphasis added.) The Summit County Board of Elections then certified that the petitions contained a sufficient number of valid signatures to be placed on the November 1996 ballot.

On May 1, 1996, the appellants filed a complaint against the appellees in the Court of Common Pleas of Summit County, requesting injunctive relief and a declaration that the ordinance could not be challenged by referendum because its passage by the city council was an administrative, rather than legislative, action. Appellants claimed that Section 1f, Article II of the Ohio Constitution did not grant powers of referendum to citizens of municipalities on administrative actions taken by municipal legislative bodies.

The trial court denied the appellants' request for injunctive relief. The court also determined that the Charter of Cuyahoga Falls permitted the residents of the city to exercise powers of referendum on any action taken by the city council, regardless of whether the action taken was legislative or administrative in nature.

Appellants appealed the decision of the trial court to the Court of Appeals for Summit County. The court of appeals affirmed the judgment of the trial court, holding that Section 1f, Article II of the Ohio Constitution does not limit the referendum powers of charter municipalities such as Cuyahoga Falls.

Pursuant to the allowance of a discretionary appeal, this court affirmed the judgment of the court of appeals. *Buckeye Community Hope Found. v. Cuyahoga Falls* (1998), 81 Ohio St.3d 559, 692 N.E.2d 997.

The cause is now before this court upon a motion for reconsideration filed by the appellants.

Zeiger & Carpenter, John W. Zeiger, Jeffrey A. Lipps and Michael N. Beekhuizen, Columbus; McFarland Law Office, and J. Drew McFarland, Granville, for appellants.

MOYER, CHIEF JUSTICE.

This court has invoked the reconsideration procedures set forth in S.Ct.Prac.R. XI to "correct decisions which, upon

reflection, are deemed to have been made in error.” State ex rel. Huebner v. W. Jefferson Village Council (1995), 75 Ohio St.3d 381, 383, 662 N.E.2d 339, 341. For the reasons that follow, we grant the appellants’ motion for reconsideration and reverse the judgment of the court of appeals.

I

Section 3, Article XVIII of the Ohio Constitution grants powers of local self-government to municipalities by providing, “Municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws.” In exercising those powers, municipalities may choose to govern themselves by charter in accordance with Section 7, Article XVIII of the Ohio Constitution: “Any municipality may frame and adopt or amend a charter for its government and may, subject to the provisions of section 3 of this article, exercise thereunder all powers of local self-government.”

It is well settled that although the Ohio Constitution grants broad powers of local self-government to municipalities, the scope of those powers is not without limits. In Canton v. Whitman (1975), 44 Ohio St.2d 62, 73 O.O.2d 285, 337 N.E.2d 766, this court interpreted Section 3, Article XVIII as follows: “This section, adopted in 1912, preserved the supremacy of the state in matters of ‘police, sanitary and other similar regulations,’ while granting municipalities sovereignty in matters of local self-government, *limited only by other constitutional provisions.*” (Emphasis added.) Id. at 65, 73 O.O.2d at 287, 337 N.E.2d at 769. See, also, State ex rel. Bedford v. Cuyahoga Cty. Bd. of Elections (1991), 62 Ohio St.3d 17, 20, 577 N.E.2d 645, 647.

In Bazell v. Cincinnati (1968), 13 Ohio St.2d 63, 42 O.O.2d 137, 233 N.E.2d 864, paragraph one of the syllabus, we

articulated the limits of charter government by stating that “a charter city has all powers of local self-government *except to the extent that those powers are taken from it or limited by other provisions of the Constitution* or by statutory limitations on the powers of the municipality which the Constitution has authorized the General Assembly to impose.” (Emphasis added.) More recently, we stated that “a municipality that chooses to adopt a charter does so in order to manage its own purely local affairs without interference from the state, *with the understanding that these local laws will not conflict with the Constitution and general laws.*” (Emphasis added.) *Rispo Realty & Dev. Co. v. Parma* (1990), 55 Ohio St.3d 101, 102, 564 N.E.2d 425, 426-427.

The City Charter of Cuyahoga Falls provides that voters may exercise powers of referendum on any ordinance or resolution passed by the city council. The appellants contend that this provision conflicts with Section 1f, Article II of the Constitution, which provides, “The initiative and referendum powers are hereby reserved to the people of each municipality on all questions which such municipalities may now or hereafter be authorized by law to control by legislative action; such powers may be exercised in the manner now or hereafter provided by law.”

Words used in the Constitution are construed according to their usual or customary meaning. See *State ex rel. Herman v. Klopfleisch* (1995), 72 Ohio St.3d 581, 584, 651 N.E.2d 995, 998; R.C. 1.42. Section 1f, Article II reserves referendum powers to the people of “each municipality.” Those words are unambiguous. There is no distinction between charter municipalities and municipalities that have no charter. Additionally, Section 1f, Article II is the sole constitutional source of initiative and referendum powers, reserved by the people of the state to the people of each municipality.

Section 1f, Article II provides initiative and referendum powers only on those questions that municipalities “may

now or hereafter be authorized by law to control by legislative action.” We have interpreted this phrase to exclude, from referendum proceedings, administrative actions taken by a city council.¹ In *Myers v. Schiering* (1971), 27 Ohio St.2d 11, 56 O.O.2d 6, 271 N.E.2d 864, we held that “under Section 1f of Article II of the Ohio Constitution, municipal referendum powers are limited to questions which municipalities are ‘authorized by law to control by legislative action.’ ” *Myers* at paragraph one of the syllabus. There, we determined that the passage of a resolution “granting a permit for the operation of a sanitary landfill, pursuant to an existing zoning regulation, constitutes administrative action and is not subject to referendum proceedings.” *Id.* at paragraph two of the syllabus. See, also, *State ex rel. Srovnal v. Linton* (1976), 46 Ohio St.2d 207, 75 O.O.2d 241, 346 N.E.2d 764.

The prior majority opinion in this case determined that both *Myers* and *Srovnal* were inapposite because neither case presented an issue regarding referendum powers granted by charter. That conclusion was not correct.

The prior majority opinion reasoned that because Section 1f, Article II is not a self-executing provision, charter municipalities enacting ancillary legislation to carry out the principles enunciated in Section 1f, Article II were not restricted to following the statutory initiative and referendum procedures enacted by the General Assembly for non-charter municipalities. *Buckeye Hope*, 81 Ohio St.3d at 565-566, 692 N.E.2d at 1001-1002. The prior majority opinion then concluded that by virtue of Section 7, Article XVIII, charter municipalities were not limited by Section 1f, Article II to providing referendum powers only

¹ As a municipal legislative body, city councils may act in an administrative capacity. *Donnelly v. Fairview Park* (1968), 13 Ohio St.2d 1, 42 O.O.2d 1, 233 N.E.2d 500, paragraph one of the syllabus.

for actions legislative in nature. *Id.* at 566, 692 N.E.2d at 1002.

It is true that charter municipalities, in providing for referendum and initiative powers, are not restricted to the statutory mechanisms for initiative and referendum proceedings that govern non-charter municipalities. Charter provisions may be more restrictive, or less restrictive than those statutory procedures pursuant to the power of local self-government granted by the people under Sections 3 and 7 of Article XVIII, as the prior majority opinion noted. *Id.* at 565-566, 692 N.E.2d at 1001-1002. However, both the statutory procedures enacted by the General Assembly to carry into effect Section 1f, Article II, and provisions enacted by charter municipalities to do the same, must be consistent with the specific powers granted by Section 1f, Article II, since it is the sole constitutional source for referendum and initiative powers. Otherwise, the meaning of any constitutional provision that is not self-executing, and therefore requires ancillary legislation, could be altered by the words of the legislation carrying the provision into effect.

Accordingly, there is no persuasive reason to deviate from our well-established case law as stated in *Myers* and *Srovnal*. Section 1f, Article II clearly limits referendum and initiative powers to questions that are legislative in nature. Charter municipalities are subject to this limitation, as the powers of local self-government granted pursuant to Sections 3 and 7 of Article XVIII are subject to the limitations of other provisions of the Constitution. See *Bzell*, at paragraph one of the syllabus, and *Whitman*, 44 Ohio St.2d at 65, 73 O.O.2d at 287, 337 N.E.2d at 769.

The section of the Charter of Cuyahoga Falls providing that voters may exercise powers of referendum on any ordinance or resolution passed by the city council is constitutionally invalid. Voters of Cuyahoga Falls may exercise powers of referendum on any ordinance or

resolution that constitutes legislative action. Section 1f, Article II does not authorize the residents of Cuyahoga Falls to initiate referendum proceedings on an action taken by the city council that is not legislative in nature. Section 1f, Article II permits initiative and referendum powers only on those matters that constitute legislative action.

Therefore, we hold that the citizens of a municipality may not exercise powers of referendum, by charter or other means, greater than those powers granted by Section 1f, Article II of the Ohio Constitution.

II

The remaining question for our determination is whether the approval of the site plan by the city council constituted administrative or legislative action.

The city argued that the approval of the site plan was a legislative action because the action was taken by adopting an ordinance. In support of its position, the city cited *Donnelly v. Fairview Park* (1968), 13 Ohio St.2d 1, 42 O.O.2d 1, 233 N.E.2d 500, paragraph two of the syllabus, which states that “the test for determining whether the action of a legislative body is legislative or administrative is whether the action taken is one enacting a law, ordinance or regulation, or executing or administering a law, ordinance or regulation already in existence.”

The question presented to this court in *Donnelly* was whether the action of a city council in failing to approve the recommendation of the city’s planning commission for a resubdivision of a parcel of real estate constituted legislative or administrative action. *Id.* at 3, 42 O.O.2d at 2, 233 N.E.2d at 501. This court determined that the action was administrative. *Id.* at 4, 42 O.O.2d at 3, 233 N.E.2d at 502. In arriving at that conclusion, the court stated, “The crucial test for determining that which is legislative from that which is administrative or executive is whether the action taken was one already making a law, or executing or

administering a law already in existence.’ * * * If, then, the action of a legislative body *creates a law, that action is legislative, but if the action of that body consists of executing an existing law, the action is administrative.*” (Emphasis added.) Id. at 4, 42 O.O.2d at 2-3, 233 N.E.2d at 502, citing *Kelley v. John* (1956), 162 Neb. 319, 321, 75 N.W.2d 713, 715. Therefore, paragraph two of the syllabus in *Donnelly* established that the test requires an examination of the nature of the action taken, rather than the mere form in which it is taken.² Accordingly, the city’s position that the approval of the site plan was a legislative action because the council took action via an ordinance (rather than by resolution or other means) is in error.

Additionally, the city argued that the ordinance approving the site plan constituted legislative action because city law stated that decisions made by the city council relating to approvals of site plans “shall be considered as legislative rather than administrative actions.” *Cuyahoga Falls Zoning Ordinance No. 1171.03(c)*. This argument also is without merit. The city council cannot designate an action as legislative simply because it desires the action to be legislative. *Donnelly* requires that the nature of the action taken determines whether it is legislative or administrative, i.e., whether the action creates or establishes law, or whether the action merely applies existing law to a given situation. *Donnelly* at 4, 42 O.O.2d at 2, 233 N.E.2d at 502. Additionally, it is our constitutional duty, in interpreting the words of Section 1f, Article II, to independently analyze whether the action by the city is a legislative action.

The action taken by the city council here was clearly administrative in nature. Ordinance No. 48-1996 passed by the city council approved a plan for the “development of

² The quoted language in the text of *Donnelly* is instructive in determining the meaning of paragraph two of the syllabus because paragraph two itself is not stated within the text.

land * * * in accordance with such district and zoning regulations as stipulated in the Codified Ordinances of the City of Cuyahoga Falls and as approved by the Planning Commission * * *.” The ordinance merely approves the planning commission’s application of existing zoning regulations to the plan submitted by the appellants. The ordinance has no general, prospective application such that the action taken would fit within the usual and customary meaning of the phrase “legislative action” contained in Section 1f, Article II. See Black’s Law Dictionary (6 Ed.1990) 899 (defining “legislative act” as “law * * * passed by legislature in contrast to court-made law. One which prescribes what the law shall be in future cases arising under its provisions.”). Rather, the city council determined the rights of the appellants by applying existing law to the site plan submitted by the appellants. Accordingly, adoption of Ordinance No. 48-1996 was an administrative act, and therefore was not a legislative action that could be subjected to referendum proceedings pursuant to Section 1f, Article II.

Therefore, we hold that pursuant to Section 1f, Article II of the Ohio Constitution, actions taken by a municipal legislative body, whether by ordinance, resolution, or other means, that constitute administrative action, are not subject to referendum proceedings. The passage by a city council of an ordinance approving a site plan for the development of land, pursuant to existing zoning and other applicable regulations, constitutes administrative action and is not subject to referendum proceedings.

Pursuant to S.Ct.Prac.R. XI, the timely filing of a motion for reconsideration temporarily prevents the issuance of a mandate in accordance with the court’s judgment. A timely motion was filed in this cause. Thus, this court has not yet issued a mandate in this action to implement our opinion rendered on May 6, 1998, and reported at 81 Ohio St.3d 559, 692 N.E.2d 997. Under S.Ct.Prac.R. XI(3)(A)(2),

where a timely filed motion for reconsideration is granted, a mandate shall issue at the time the Supreme Court's judgment entry on reconsideration is entered. In accordance with our grant of the motion for reconsideration today, a mandate implementing this opinion shall also issue today.

For the foregoing reasons, we grant the motion for reconsideration and reverse the judgment of the court of appeals.³

Reconsideration granted and judgment reversed.

PFEIFER, COOK and LUNDBERG STRATTON, JJ.,
concur.

LUNDBERG STRATTON, J., concurs separately.

DOUGLAS, RESNICK and FRANCIS E. SWEENEY,
Sr., JJ., dissent.

LUNDBERG STRATTON, JUSTICE, concurring.

As the justice who changed her vote on an opinion that has already been published, I feel obliged to explain my decision to reconsider and to join the former dissenters in issuing a new majority opinion.

As a trial judge, issues before me were frequently clear, easy to resolve, and more black and white (though certainly not always). However, when a case reaches the Supreme Court, the black and white issues have often been resolved by settlement, fallen by the wayside, or have been resolved by the lower courts by established precedent, case law, or statute. More frequently, the issues we accept for full consideration upon the allowance of a discretionary appeal are now gray-what did the drafters of the United States or the Ohio Constitutions mean by this broad language we

³ Our earlier opinion, including paragraphs one and two of the syllabus, as reported at 81 Ohio St.3d 559, 692 N.E.2d 997, is hereby nullified in all respects by virtue of our decision today, and thus has no controlling authority.

must apply to this narrow fact pattern or to this twentieth century technology issue? What did the legislature intend by this confusing statute? Did the legislature even think that the statute would ever be applied as the parties now contend it should be? Who is right-the three very experienced appellate court districts who believe this new law is constitutional or the four other equally learned and respected appellate districts who strongly disagree? Does the court or the General Assembly decide public policy? What if public policy is overriding the constitutional rights of a minority? These are tough issues we struggle with daily, seeking that correct interpretation, that fine balancing of rights. I constantly challenge myself as to whether this is the “right” decision or whether I have reached it because my own judicial philosophy colors my outlook. Am I being an activist or deferring too much to the legislature? There are no simple answers.

Into this difficult mix comes Buckeye Community Hope Found. v. Cuyahoga Falls-that all-too-complex clash between two groups-the developer seeking to move forward on an unpopular but worthy project opposed by the homeowners who do not want that project “in their backyard.” Both sides have valid, strong legal and emotional arguments; both firmly believe in their cause; both look to us to finally resolve the conflict.

I voted with the majority in Buckeye Community Hope Found. v. Cuyahoga Falls (1998), 81 Ohio St.3d 559, 692 N.E.2d 997, because I passionately believe in the rights of the voter. It is the cornerstone of our system of justice.

I grew up in three foreign countries as a daughter of American missionaries. I was born in Thailand and attended boarding schools in South Viet Nam and Malaysia. I saw countries governed by military dictators, by monarchs, by anarchy, and by communists. I came from the outside to this country, where the right to vote, though not always exercised, is one of its most cherished

foundations, the basis of its representative form of government. The openness of our government, and the power of our vote to determine who represents us in our government, cannot be fully appreciated until one has lived in countries that do not have those privileges.

Therefore, when I considered the first majority opinion, it seemed the right decision. The people should have the ultimate right to decide their own fate, to be the final arbiters of their community's course. The majority's argument was powerful that Home Rule allowed a chartered municipality to grant its voters the final say. That is the strength of our system.

But I forgot in my zeal to affirm the power of the vote that our forefathers carefully fashioned some checks and balances that are equally a cornerstone to our system. Our system of three equal branches, which balance and check each other, does not exist in many other countries, where the legislature or the courts are merely puppets of the executive branch. Yet, to allow any of the three branches to become more powerful than the other two is to create instability in our system. Underlying the three branches is the right to vote, sometimes direct and sometimes representative. The crafters of our Constitution recognized that sometimes our representatives need some distance from the voting so that they can make a decision that may not be popular at the moment, but may be best or right in the long haul. Thus, state representatives have close accountability with two-year terms, senators are more insulated by four-year terms, and the judiciary by six-year terms-still accountable but with greater freedom to act as necessary though it may not be popular.

But predictability and stability are also important to the survival of our system. A mere change of our President cannot wipe out decades of law and statutes, as happens in many countries. The legislature acts as the check against the arbitrary changes of the administrative branch; the courts as

a check against both. Homeowners must be secure in the knowledge that their deed to their home will survive the election; businesses must be able to rely on the stability of contracts, zoning laws, tax laws, and laws governing relationships, whether their business is to build factories or to operate a beauty salon. The loss of stability can result in chaos.

In reconsidering Buckeye Community Hope Found., and in weighing all of those heavy thoughts and constitutional issues, about which volumes have been written, I now join the new majority because I believe it has arrived at the right analysis; I now believe my former view was wrong. I see now that the framers of the Ohio Constitution had a good reason for Section 1f, Article II, in limiting the referendum to legislative decisions only. But to apply the referendum to everyday administrative decisions, even if the charter of the municipality so allows (and I am no longer convinced this is what the drafters of the charter intended), is to submit the minutiae of everyday administrative decision-making to the whim of the voter at the moment. The unpopular development, the disfavored contract with a school principal, the neighbor's new garage approval, or any other decision could be subject to voter disapproval if an angered voter was organized or well-funded enough. Chaos and instability could result. The decisions made by homeowners, developers, schools, or anyone else could no longer depend on established zoning approvals or contracts made—all could be thrown out at whim.

The law of unintended consequences is “the idea that whenever society takes action to change something, there will be unanticipated or unintended effects.” Fortune, Aug., 1996. Sometimes legislative action results in unintentional consequences. Sometimes our actions do also. We make a decision that seems right, constitutional, and just at the time, but cannot always foresee how it can apply in ways we never intended. I now see the danger of my original

vote and the wisdom of the original framers of our Constitution in limiting referendums to legislative actions and in not allowing municipalities to exercise powers greater than the Constitution grants. In this case, Section 1f, Article II trumps the Home Rule Amendment. I believe this is what the Constitution intends. I now so vote accordingly.

DOUGLAS, Justice, dissenting.

I dissent from the judgment and opinion of the majority. Subsequent to our May 6, 1998 decision in *Buckeye Community Hope Found. v. Cuyahoga Falls* (1998), 81 Ohio St.3d 559, 692 N.E.2d 997, appellants filed a motion for reconsideration. However, in granting appellants' motion, the majority has clearly disregarded the requirements of S.Ct.Prac.R. XI. Section 2 of S.Ct.Prac.R. XI provides that a motion for reconsideration shall be confined strictly to the grounds urged for reconsideration and that the motion "shall not constitute a reargument of the case." Appellants' motion is premised upon essentially the same arguments that were initially presented to this court. In fact, the motion contains absolutely nothing that warrants a change from our original decision. The majority, however, in rehearing the cause for whatever undisclosed reasons, has conveniently ignored the requirements of S.Ct.Prac.R. XI. Oh well, so much for the rules!

In any event, I also dissent from the judgment and the opinion of the majority because I cannot agree with the majority's severe restriction of the sacrosanct right of referendum. What is particularly disturbing is that the majority completely ignores the clear wording of the drafters of Section 1f, Article II and turns the enabling provision into an affirmative limitation on the right of referendum. I continue to believe that our original decision in *Buckeye* is correct, is supported by law, and, most importantly, reflects the fundamental precepts upon which our state and country are based. In that regard it is

interesting to recall, during this time of the year, July 4, when we celebrate the founding of our country and our Declaration of Independence, that that sacred document contains the words “that to secure these rights, Governments are instituted among Men, *deriving their just powers from the consent of the governed.*” (Emphasis added.) Today, the majority tells the citizens of Cuyahoga Falls, and all other communities and citizens likely situated, that what they have voted into their charters means nothing because if the charter provision in question here can be negated by the waving of the four-vote magic wand, then no charter provision is truly sacred. So much for “just powers” being derived “from the consent of the governed.” Given today’s holding, Section 2, Article I of the Ohio Constitution should now read that “all political power is no longer inherent in the people.”

Finally, this case is not about missionaries, separation of powers, length of terms of office, the President, or a “disfavored contract with a school principal.” This case is about Home Rule Charters voted into existence by electors in municipalities all across this state having nothing to do, of course, with the parade of horrors assembled in the concurring opinion. The citizens of a municipality have the authority to establish the means and methods to govern their own affairs.

Accordingly, I dissent. I would deny the motion for reconsideration and follow our decision reported in 81 Ohio St.3d 559, 692 N.E.2d 997, which affirmed the well-reasoned judgment of the court of appeals.

RESNICK and FRANCIS E. SWEENEY, Sr., JJ., concur in the foregoing dissenting opinion.

**City of Cuyahoga Falls, Ohio v. Buckeye Community
Hope Foundation**

538 U.S. 188 (2003)

CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE SIXTH CIRCUIT.

O'CONNOR, J., delivered the opinion for a unanimous Court. SCALIA, J., filed a concurring opinion, in which THOMAS, J., joined, *post*, p. 200.

Glen D. Nager argued the cause for petitioners. With him on the briefs were *Virgil Arrington, Jr.*, *Michael A. Carvin*, and *Michael S. Fried*.

David B. Salmons argued the cause *pro hac vice* for the United States as *amicus curiae* urging reversal. With him on the brief were *Solicitor General Olson*, *Assistant Attorney General Boyd*, *Deputy Solicitor General Clement*, *Mark L. Gross*, and *Teresa Kwong*.

Edward G. Kramer argued the cause for respondents. With him on the brief were *Diane E. Citrino*, *Kenneth Kowalski*, and *Michael P. Seng*.¹

JUSTICE O'CONNOR delivered the opinion of the Court.

In 1995, the city of Cuyahoga Falls, Ohio (hereinafter City), submitted to voters a facially neutral referendum petition

¹Briefs of *amici curiae* urging reversal were filed for the City of Athens, Ohio, et al. by *Barry M. Byron*, *John E. Gotherman*, and *Garry E. Hunter*; and for the International Municipal Lawyers Association et al. by *Henry W. Underhill, Jr.*, *Charles M. Hinton, Jr.*, and *Brad Neighbor*.

Briefs of *amici curiae* urging affirmance were filed for the Lawyers' Committee for Civil Rights Under Law et al. by *Barbara Arnwine*, *Thomas J. Henderson*, *Cheryl L. Ziegler*, *Eva Jefferson Paterson*, *Javier N. Maldonado*, and *Michael Churchill*; for the National Association of Home Builders by *Thomas Jon Ward*; for the National Fair Housing Alliance et al. by *Joseph R. Guerra*, *Thomas Healy*, *John P. Relman*, *Meera Trehan*, and *Robert G. Schwemm*; and for the National Multi Housing Council et al. by *Leo G. Rydzewski* and *Clarine Nardi Riddle*.

John H. Findley and *Meriem L. Hubbard* filed a brief for the Pacific Legal Foundation et al. as *amici curiae*.

that called for the repeal of a municipal housing ordinance authorizing construction of a low-income housing complex. The United States Court of Appeals for the Sixth Circuit found genuine issues of material fact with regard to whether the City violated the Equal Protection Clause, the Due Process Clause, and the Fair Housing Act, 82 Stat. 81, as amended, 42 U. S. C. § 3601 *et seq.*, by placing the petition on the ballot. We granted certiorari to determine whether the Sixth Circuit erred in ruling that respondents' suit against the City could proceed to trial.

I

A

In June 1995, respondents Buckeye Community Hope Foundation, a nonprofit corporation dedicated to developing affordable housing through the use of low-income tax credits, and others (hereinafter Buckeye or respondents), purchased land zoned for apartments in Cuyahoga Falls, Ohio. In February 1996, Buckeye submitted a site plan for Pleasant Meadows, a multifamily, low-income housing complex, to the city planning commission. Residents of Cuyahoga Falls immediately expressed opposition to the proposal. See 263 F. 3d 627, 630 (CA6 2001). After respondents agreed to various conditions, including that respondents build an earthen wall surrounded by a fence on one side of the complex, the commission unanimously approved the site plan and submitted it to the city council for final authorization.

As the final approval process unfolded, public opposition to the plan resurfaced and eventually coalesced into a referendum petition drive. See Cuyahoga Falls City Charter, Art. 9, § 2, App. 14 (giving voters “the power to approve or reject at the polls any ordinance or resolution passed by the Council” within 30 days of the ordinance’s passage). At city council meetings and independent gatherings, some of which the mayor attended to express his personal

opposition to the site plan, citizens of Cuyahoga Falls voiced various concerns: that the development would cause crime and drug activity to escalate, that families with children would move in, and that the complex would attract a population similar to the one on Prange Drive, the City's only African-American neighborhood. See, *e. g.*, 263 F. 3d, at 636-637; App. 98, 139, 191; Tr. 182-185, 270, 316. Nevertheless, because the plan met all municipal zoning requirements, the city council approved the project on April 1, 1996, through City Ordinance No. 48-1996.

On April 29, a group of citizens filed a formal petition with the City requesting that the ordinance be repealed or submitted to a popular vote. Pursuant to the charter, which provides that an ordinance challenged by a petition "shall [not] go into effect until approved by a majority" of voters, the filing stayed the implementation of the site plan. Art. 9, § 2, App. 15. On April 30, respondents sought an injunction against the petition in state court, arguing that the Ohio Constitution does not authorize popular referendums on administrative matters. On May 31, the Court of Common Pleas denied the injunction. Civ. No. 96-05-1701 (Summit County), App. to Pet. for Cert. 255a. A month later, respondents nonetheless requested building permits from the City in order to begin construction. On June 26, the city engineer rejected the request after being advised by the city law director that the permits "could not be issued because the site plan ordinance 'does not take effect' due to the petitions." 263 F. 3d, at 633.

In November 1996, the voters of Cuyahoga Falls passed the referendum, thus repealing Ordinance No. 48-1996. In a joint stipulation, however, the parties agreed that the results of the election would not be certified until the litigation over the referendum was resolved. See Stipulation and Jointly Agreed upon Preliminary Injunction Order in No. 5:96 CV 1458 (ND Ohio, Nov. 25, 1996). In July 1998, the Ohio Supreme Court, having initially concluded that

the referendum was proper, reversed itself and declared the referendum unconstitutional. 82 Ohio St. 3d 539, 697 N. E. 2d 181 (holding that the Ohio State Constitution authorizes referendums only in relation to legislative acts, not administrative acts, such as the site-plan ordinance). The City subsequently issued the building permits, and Buckeye commenced construction of Pleasant Meadows.

B

In July 1996, with the state-court litigation still pending, respondents filed suit in federal court against the City and several city officials, seeking an injunction ordering the City to issue the building permits, as well as declaratory and monetary relief. Buckeye alleged that “in allowing a site plan approval ordinance to be submitted to the electors of Cuyahoga Falls through a referendum and in rejecting [its] application for building permits,” the City and its officials violated the Equal Protection and Due Process Clauses of the Fourteenth Amendment, as well as the Fair Housing Act, 42 U. S. C. § 3601. Complaint in No. 5:96 CV 1458 ¶ 1 (ND Ohio, July 5, 1996) (hereinafter Complaint). In June 1997, the District Court dismissed the case against the mayor in his individual capacity but denied the City’s motion for summary judgment on the equal protection and due process claims, concluding that genuine issues of material fact existed as to both claims. 970 F. Supp. 1289, 1308 (ND Ohio 1997). After the Ohio Supreme Court declared the referendum invalid in 1998, thus reducing respondents’ action to a claim for damages for the delay in construction, the City and its officials again moved for summary judgment. On November 19, 1999, the District Court granted the motion on all counts. Civ. No. 5:96 CV 1458, App. to Pet. for Cert. 35a.

The Court of Appeals for the Sixth Circuit reversed. As to respondents’ equal protection claim, the court concluded that they had produced sufficient evidence to go to trial on the allegation that the City, by allowing the referendum

petition to stay the implementation of the site plan, gave effect to the racial bias reflected in the public's opposition to the project. See 263 F. 3d, at 639. The court then held that even if respondents failed to prove intentional discrimination, they stated a valid claim under the Fair Housing Act on the theory that the City's actions had a disparate impact based on race and family status. See *id.*, at 640. Finally, the court concluded that a genuine issue of material fact existed as to whether the City, by denying respondents the benefit of the lawfully approved site plan, engaged in arbitrary and irrational government conduct in violation of substantive due process. *Id.*, at 644. We granted certiorari, 536 U. S. 938 (2002), and now reverse the constitutional holdings and vacate the Fair Housing Act holding.

II

Respondents allege that by submitting the petition to the voters and refusing to issue building permits while the petition was pending, the City and its officials violated the Equal Protection Clause. See Complaint ¶ 41. Petitioners claim that the Sixth Circuit went astray by ascribing the motivations of a handful of citizens supportive of the referendum to the City. We agree with petitioners that respondents have failed to present sufficient evidence of an equal protection violation to survive summary judgment.

We have made clear that “[p]roof of racially discriminatory intent or purpose is required” to show a violation of the Equal Protection Clause. *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U. S. 252, 265 (1977) (citing *Washington v. Davis*, 426 U. S. 229 (1976)). In deciding the equal protection question, the Sixth Circuit erred in relying on cases in which we have subjected enacted, discretionary measures to equal protection scrutiny and treated decisionmakers' statements as evidence of such intent. See 263 F. 3d, at 634-635 (citing *Cleburne v. Cleburne Living Center, Inc.*, 473 U. S. 432, 448 (1985); *Arlington Heights v.*

Metropolitan Housing Development Corp., *supra*, at 268; and *Hunter v. Erickson*, 393 U. S. 385, 392 (1969)). Because respondents claim injury from the referendum petitioning *process* and not from the referendum itself — which never went into effect — these cases are inapposite. Ultimately, neither of the official acts respondents challenge reflects the intent required to support equal protection liability.

First, in submitting the referendum petition to the voters, the City acted pursuant to the requirements of its charter, which sets out a facially neutral petitioning procedure. See Art. 9, § 2. By placing the referendum on the ballot, the City did not enact the referendum and therefore cannot be said to have given effect to voters' allegedly discriminatory motives for supporting the petition. Similarly, the city engineer, in refusing to issue the building permits while the referendum was still pending, performed a nondiscretionary, ministerial act. He acted in response to the city law director's instruction that the building permits "could not ... issue" because the charter prohibited a challenged site-plan ordinance from going into effect until "approved by a majority of those voting thereon," App. 16. See 263 F. 3d, at 633. Respondents point to no evidence suggesting that these official acts were themselves motivated by racial animus. Respondents do not, for example, offer evidence that the City followed the obligations set forth in its charter *because of* the referendum's discriminatory purpose, or that city officials would have selectively refused to follow standard charter procedures in a different case.

Instead, to establish discriminatory intent, respondents and the Sixth Circuit both rely heavily on evidence of allegedly discriminatory voter sentiment. See *id.*, at 635-637. But statements made by private individuals in the course of a citizen-driven petition drive, while sometimes relevant to equal protection analysis, see *supra*, at 194, do not, in and of themselves, constitute state action for the purposes of the

Fourteenth Amendment. Cf. *Blum v. Yaretsky*, 457 U. S. 991, 1002-1003 (1982) (“[T]he principle has become firmly embedded in our constitutional law that the action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States” (quoting *Shelley v. Kraemer*, 334 U. S. 1, 13 (1948))). Moreover, respondents put forth no evidence that the “private motives [that] triggered” the referendum drive “can fairly be attributed to the State.” *Blum v. Yaretsky*, *supra*, at 1004.

In fact, by adhering to charter procedures, city officials enabled public debate on the referendum to take place, thus advancing significant First Amendment interests. In assessing the referendum as a “basic instrument of democratic government,” *Eastlake v. Forest City Enterprises, Inc.*, 426 U. S. 668, 679 (1976), we have observed that “[p]rovisions for referendums demonstrate devotion to democracy, not to bias, discrimination, or prejudice,” *James v. Valtierra*, 402 U. S. 137, 141 (1971). And our well established First Amendment admonition that “government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable,” *Texas v. Johnson*, 491 U. S. 397, 414 (1989), dovetails with the notion that all citizens, regardless of the content of their ideas, have the right to petition their government. Cf. *Meyer v. Grant*, 486 U. S. 414, 421-422 (1988) (describing the circulation of an initiative petition as “core political speech”); *Police Dept. of Chicago v. Mosley*, 408 U. S. 92, 96 (1972) (“[G]overnment may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views”). Again, statements made by decisionmakers or referendum sponsors during deliberation over a referendum may constitute relevant evidence of discriminatory intent in a challenge to an ultimately enacted initiative. See, e. g., *Washington v. Seattle School Dist. No. 1*, 458

U. S. 457, 471 (1982) (considering statements of initiative sponsors in subjecting enacted referendum to equal protection scrutiny); *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U. S., at 268. But respondents do not challenge an enacted referendum.

In their brief to this Court, respondents offer an alternative theory of equal protection liability: that city officials, including the mayor, acted in concert with private citizens to prevent Pleasant Meadows from being built because of the race and family status of its likely residents. See Brief for Respondents 12-26; Tr. of Oral Arg. 33-34, 36-40, 43. Respondents allege, among other things, that the city law director prompted disgruntled voters to file the petition, that the city council intentionally delayed its deliberations to thwart the development, and that the mayor stoked the public opposition. See Brief for Respondents 17. Not only did the courts below not directly address this theory of liability, but respondents also appear to have disavowed this claim at oral argument, focusing instead on the denial of the permits. See Tr. of Oral Arg. 37-38.

What is more, respondents never articulated a cognizable legal claim on these grounds. Respondents fail to show that city officials exercised any power over voters' decisionmaking during the drive, much less the kind of "coercive power" either "overt or covert" that would render the voters' actions and statements, for all intents and purposes, state action. *Blum v. Yaretsky*, 457 U. S., at 1004. Nor, as noted above, do respondents show that the voters' sentiments can be attributed in any way to the state actors against which it has brought suit. See *ibid.* Indeed, in finding a genuine issue of material fact with regard to intent, the Sixth Circuit relied almost entirely on apparently independent statements by private citizens. See 263 F. 3d, at 635-637. And in dismissing the claim against the mayor in his individual capacity, the District Court found no evidence that he orchestrated the referendum. See 970 F.

Supp., at 1321. Respondents thus fail to present an equal protection claim sufficient to survive summary judgment.

III

In evaluating respondents' substantive due process claim, the Sixth Circuit found, as a threshold matter, that respondents had a legitimate claim of entitlement to the building permits, and therefore a property interest in those permits, in light of the city council's approval of the site plan. See 263 F. 3d, at 642. The court then held that respondents had presented sufficient evidence to survive summary judgment on their claim that the City engaged in arbitrary conduct by denying respondents the benefit of the plan. *Id.*, at 644. Both in their complaint and before this Court, respondents contend that the City violated substantive due process, not only for the reason articulated by the Sixth Circuit, but also on the grounds that the City's submission of an administrative land-use determination to the charter's referendum procedures constituted *per se* arbitrary conduct. See Complaint ¶¶ 39, 43; Brief for Respondents 32-49. We find no merit in either claim.

We need not decide whether respondents possessed a property interest in the building permits, because the city engineer's refusal to issue the permits while the petition was pending in no sense constituted egregious or arbitrary government conduct. See *County of Sacramento v. Lewis*, 523 U. S. 833, 846 (1998) (noting that in our evaluations of "abusive executive action," we have held that "only the most egregious official conduct can be said to be 'arbitrary in the constitutional sense'"). In light of the charter's provision that "[n]o such ordinance [challenged by a petition] shall go into effect until approved by a majority of those voting thereon," Art. 9, § 2, App. 15, the law director's instruction to the engineer to not issue the permits represented an eminently rational directive. Indeed, the site plan, by law, could not be implemented until the voters passed on the referendum.

Respondents' second theory of liability has no basis in our precedent. As a matter of federal constitutional law, we have rejected the distinction that respondents ask us to draw, and that the Ohio Supreme Court drew as a matter of state law, between legislative and administrative referendums. In *Eastlake v. Forest City Enterprises, Inc.*, 426 U. S., at 672, 675, we made clear that because all power stems from the people, "[a] referendum cannot ... be characterized as a delegation of power," unlawful unless accompanied by "discernible standards." The people retain the power to govern through referendum "with respect to any matter, legislative or administrative, within the realm of local affairs." *Id.*, at 674, n. 9. Cf. *James v. Valtierra*, 402 U. S. 137. Though the "substantive result" of a referendum may be invalid if it is "arbitrary and capricious," *Eastlake v. Forest City Enterprises, supra*, at 676, respondents do not challenge the referendum itself. The subjection of the site-plan ordinance to the City's referendum process, regardless of whether that ordinance reflected an administrative or legislative decision, did not constitute *per se* arbitrary government conduct in violation of due process.

IV

For the reasons detailed above, we reverse the Sixth Circuit's judgment with regard to respondents' equal protection and substantive due process claims. The Sixth Circuit also held that respondents' disparate impact claim under the Fair Housing Act could proceed to trial, 263 F. 3d, at 641, but respondents have now abandoned the claim. See Brief for Respondents 31. We therefore vacate the Sixth Circuit's disparate impact holding and remand with instructions to dismiss, with prejudice, the relevant portion of the complaint. See *Deakins v. Monaghan*, 484 U. S. 193, 200 (1988).

The judgment of the United States Court of Appeals for the Sixth Circuit is, accordingly, reversed in part and

vacated in part, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE SCALIA, with whom JUSTICE THOMAS joins, concurring.

I join the Court's opinion, including Part III, which concludes that respondents' assertions of arbitrary government conduct must be rejected. I write separately to observe that, *even if* there had been arbitrary government conduct, that would not have established the substantive-due-process violation that respondents claim.

It would be absurd to think that all "arbitrary and capricious" government action violates substantive due process — even, for example, the arbitrary and capricious cancellation of a public employee's parking privileges. The judicially created substantive component of the Due Process Clause protects, we have said, certain "fundamental liberty interest[s]" from deprivation by the government, unless the infringement is narrowly tailored to serve a compelling state interest. *Washington v. Glucksberg*, 521 U. S. 702, 721 (1997). Freedom from delay in receiving a building permit is not among these "fundamental liberty interests." To the contrary, the Takings Clause allows government *confiscation* of private property so long as it is taken for a public use and just compensation is paid; mere *regulation* of land use need not be "narrowly tailored" to effectuate a "compelling state interest." Those who claim "arbitrary" deprivations of nonfundamental liberty interests must look to the Equal Protection Clause, and *Graham v. Connor*, 490 U. S. 386, 395 (1989), precludes the use of "substantive due process" analysis when a more specific constitutional provision governs.

As for respondents' assertion that referendums may not be used to decide whether low-income housing may be built on their land: that is not a substantive-due-process claim,

but rather a challenge to the *procedures* by which respondents were deprived of their alleged liberty interest in building on their land. There is nothing procedurally defective about conditioning the right to build low-income housing on the outcome of a popular referendum, cf. *James v. Valierra*, 402 U.S. 137 (1971), and the delay in issuing the permit was prescribed by a duly enacted provision of the Cuyahoga Falls City Charter (Art. 9, § 2), which surely constitutes “due process of law,” see *Connecticut Dept. of Public Safety v. Doe*, *ante*, p. 8 (SCALIA, J., concurring).

With these observations, I join the Court’s opinion.

4. Regulatory Takings

4.1. Origins

Mugler v. Kansas

123 U.S. 623 (1887)

ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS. APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS.

Mr. George G. Vest, for plaintiff in error.

Mr. B.S. Bradford, Attorney General of the State of Kansas, *Mr. George R. Peck*, *Mr. J.B. Johnson*, and *Mr. George J. Barker* for defendant in error, submitted on their brief.

Mr. S.B. Bradford, Attorney General of the State of Kansas, *Mr. Edwin A. Austin*, Assistant Attorney General of that State, and *Mr. J.F. Tufts*, Assistant Attorney General for Atchison County, Kansas, for appellant submitted on their brief. October 25, 1887, *Mr. Bradford* moved the court to reopen the cause and reassign it for argument. October 26, 1887, the court denied the motion.

Mr. Joseph H. Choate for appellee. *Mr. Robert M. Eaton* and *Mr. John C. Tomlinson* were with him on his brief.

MR. JUSTICE HARLAN delivered the opinion of the court.

These cases involve an inquiry into the validity of certain statutes of Kansas relating to the manufacture and sale of intoxicating liquors. [A series of Kansas statutes worked to prohibit the manufacture or sale of alcoholic beverages.]

The first two are indictments, charging Mugler, the plaintiff in error, in one case, with having sold, and in the other, with having manufactured, spirituous, vinous, malt, fermented, and other intoxicating liquors, in Saline County, Kansas, without having the license or permit required by the statute. The defendant, having been found guilty, was fined, in each case, one hundred dollars, and ordered to be

committed to the county jail until the fine was paid. Each judgment was affirmed by the Supreme Court of Kansas, and thereby, it is contended, the defendant was denied rights, privileges, and immunities guaranteed by the Constitution of the United States.

The third case – *Kansas v. Ziebold & Hagelin* – was commenced by petition filed in one of the courts of the State. The relief sought is: 1. That the group of buildings in Atchison County, Kansas, constituting the brewery of the defendants, partners as Ziebold & Hagelin, be adjudged a common nuisance, and the sheriff or other proper officer directed to shut up and abate the same. 2. That the defendants be enjoined from using, or permitting to be used, the said premises as a place where intoxicating liquors may be sold, bartered, or given away, or kept for barter, sale, or gift, otherwise than by authority of law.

... .

The facts necessary to a clear understanding of the questions, common to these cases, are the following: Mugler and Ziebold & Hagelin were engaged in manufacturing beer at their respective establishments, (constructed specially for that purpose,) for several years prior to the adoption of the constitutional amendment of 1880. They continued in such business in defiance of the statute of 1881, and without having the required permit. Nor did Mugler have a license or permit to sell beer. The single sale of which he was found guilty occurred in the State, and after May 1, 1881, that is, after the act of February 19, 1881, took effect, and was of beer manufactured before its passage.

The buildings and machinery constituting these breweries are of little value if not used for the purpose of manufacturing beer; that is to say, if the statutes are enforced against the defendants the value of their property will be very materially diminished.

The general question in each case is, whether the foregoing statutes of Kansas are in conflict with that clause of the Fourteenth Amendment, which provides that “no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law.”

[The Court canvasses prior cases and reasons that it is within a state’s police powers to prohibit alcohol sales and manufacture.]

Undoubtedly the State, when providing, by legislation, for the protection of the public health, the public morals, or the public safety, is subject to the paramount authority of the Constitution of the United States, and may not violate rights secured or guaranteed by that instrument, or interfere with the execution of the powers confided to the general government. *Henderson v. Mayor of New York*, 92 U.S. 259; *Railroad Co. v. Husen*, 95 U.S. 465; *New Orleans Gas Co. v. Louisiana Light Co.*, 115 U.S. 650; *Walling v. Michigan*, 116 U.S. 446; *Yick Wo v. Hopkins*, 118 U.S. 356; *Morgan’s Steamship Co. v. Louisiana Board of Health*, 118 U.S. 455.

Upon this ground – if we do not misapprehend the position of defendants – it is contended that, as the primary and principal use of beer is as a beverage; as their respective breweries were erected when it was lawful to engage in the manufacture of beer for every purpose; as such establishments will become of no value as property, or, at least, will be materially diminished in value, if not employed in the manufacture of beer for every purpose; the prohibition upon their being so employed is, in effect, a taking of property for public use without compensation, and depriving the citizen of his property without due process of law. In other words, although the State, in the exercise of her police powers, may lawfully prohibit the manufacture and sale, within her limits, of intoxicating liquors to be used as a beverage, legislation having that

object in view cannot be enforced against those who, at the time, happen to own property, the chief value of which consists in its fitness for such manufacturing purposes, unless compensation is first made for the diminution in the value of their property, resulting from such prohibitory enactments.

This interpretation of the Fourteenth Amendment is inadmissible. It cannot be supposed that the States intended, by adopting that Amendment, to impose restraints upon the exercise of their powers for the protection of the safety, health, or morals of the community. In respect to contracts, the obligations of which are protected against hostile state legislation, this court in *Butchers' Union Co. v. Crescent City Co.*, 111 U.S. 746, 751, said that the State could not, by any contract, limit the exercise of her power to the prejudice of the public health and the public morals. So, in *Stone v. Mississippi*, 101 U.S. 814, 816, where the Constitution was invoked against the repeal by the State of a charter, granted to a private corporation, to conduct a lottery, and for which that corporation paid to the State a valuable consideration in money, the court said: "No legislature can bargain away the public health or the public morals. The people themselves cannot do it, much less their servants... . Government is organized with a view to their preservation, and cannot divest itself of the power to provide for them." Again, in *New Orleans Gas Co. v. Louisiana Light Co.*, 115 U.S. 650, 672: "The constitutional prohibition upon state laws impairing the obligation or contracts does not restrict the power of the State to protect the public health, the public morals, or the public safety, as the one or the other may be involved in the execution of such contracts. Rights and privileges arising from contracts with a State are subject to regulations for the protection of the public health, the public morals, and the public safety, in the same sense, and to the same

extent, as are all contracts and all property, whether owned by natural persons or corporations.”

The principle, that no person shall be deprived of life, liberty, or property, without due process of law, was embodied, in substance, in the constitutions of nearly all, if not all, of the States at the time of the adoption of the Fourteenth Amendment; and it has never been regarded as incompatible with the principle, equally vital, because essential to the peace and safety of society, that 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. *Beer Co.v. Massachusetts*, 97 U.S. 25, 32; *Commonwealth v. Alger*, 7 Cush. 53. An illustration of this doctrine is afforded by *Patterson v. Kentucky*, 97 U.S. 501. The question there was as to the validity of a statute of Kentucky, enacted in 1874, imposing a penalty upon any one selling or offering for sale oils and fluids, the product of coal, petroleum, or other bituminous substances, which would burn or ignite at a temperature below 130° Fahrenheit. Patterson having sold, within that commonwealth, a certain oil, for which letters-patent were issued in 1867, but which did not come up to the standard required by said statute, and having been indicted therefor, disputed the State’s authority to prevent or obstruct the exercise of that right. This court upheld the legislation of Kentucky, upon the ground, that while the State could not impair the exclusive right of the patentee, or of his assignee, in the discovery described in the letters-patent, the tangible property, the fruit of the discovery, was not beyond control in the exercise of her police powers. It was said: “By the settled doctrines of this court the police power extends, at least, to the protection of the lives, the health, and the property of the community against the injurious exercise by any citizen of his own rights. State legislation, strictly and legitimately for police purposes, does not, in the sense of the Constitution, necessarily intrench upon any authority which has been confided,

expressly or by implication, to the national government. The Kentucky statute under examination manifestly belongs to that class of legislation. It is, in the best sense, a mere police regulation, deemed essential to the protection of the lives and property of citizens.” p. 504. Referring to the numerous decisions of this court guarding the power of Congress to regulate commerce against encroachment, under the guise of state regulations, established for the purpose and with the effect of destroying or impairing rights secured by the Constitution, it was further said: “It has, nevertheless, with marked distinctness and uniformity, recognized the necessity, growing out of the fundamental conditions of civil society, of upholding state police regulations which were enacted in good faith, and had appropriate and direct connection with that protection to life, health, and property which each State owes to her citizens.” See also *United States v. Devitt*, 9 Wall. 41; *License Tax Cases*, 5 Wall. 462; *Pervear v. Commonwealth*, 5 Wall. 475.

Another decision, very much in point upon this branch of the case, is *Fertilizing Co. v. Hyde Park*, 97 U.S. 659, 667, also decided after the adoption of the Fourteenth Amendment. The court there sustained the validity of an ordinance of the village of Hyde Park, in Cook County, Illinois, passed under legislative authority, forbidding any person from transporting through that village offal or other offensive or unwholesome matter, or from maintaining or carrying on an offensive or unwholesome business or establishment within its limits. The Fertilizing Company had, at large expense, and under authority expressly conferred by its charter, located its works at a particular point in the county. Besides, the charter of the village, at that time, provided that it should not interfere with parties engaged in transporting animal matter from Chicago, or from manufacturing it into a fertilizer or other chemical product. The enforcement of the ordinance in question operated to destroy the business of the company, and seriously to

impair the value of its property. As, however, its business had become a nuisance to the community in which it was conducted, producing discomfort, and often sickness, among large masses of people, the court maintained the authority of the village, acting under legislative sanction, to protect the public health against such nuisance. It said: "We cannot doubt that the police power of the State was applicable and adequate to give an effectual remedy. That power belonged to the States when the Federal Constitution was adopted. They did not surrender it, and they all have it now. It extends to the entire property and business within their local jurisdiction. Both are subject to it in all proper cases. It rests upon the fundamental principle that every one shall so use his own as not to wrong and injure another. To regulate and abate nuisances is one of its ordinary functions."

It is supposed by the defendants that the doctrine for which they contend is sustained by *Pumpelly v. Green Bay Co.*, 13 Wall. 166. But in that view we do not concur. That was an action for the recovery of damages for the overflowing of the plaintiff's land by water, resulting from the construction of a dam across a river. The defence was that the dam constituted a part of the system adopted by the State for improving the navigation of Fox and Wisconsin rivers; and it was contended that as the damages of which the plaintiff complained were only the result of the improvement, under legislative sanction, of a navigable stream, he was not entitled to compensation from the State or its agents. The case, therefore, involved the question whether the overflowing of the plaintiff's land, to such an extent that it became practically unfit to be used, was a taking of property, within the meaning of the constitution of Wisconsin, providing that "the property of no person shall be taken for public use without just compensation therefor." This court said it would be a very curious and unsatisfactory result, were it held that, "if the government

refrains from the absolute conversion of real property to the uses of the public, it can destroy its value entirely, can inflict irreparable and permanent injury to any extent, can, in effect, subject it to total destruction, without making any compensation, because, in the narrowest sense of that word, it is not *taken* for the public use. Such a construction would pervert the constitutional provision into a restriction upon the rights of the citizen, as those rights stood at the common law, instead of the government, and make it an authority for the invasion of private right under the pretext of the public good, which had no warrant in the laws or practices of our ancestors.” pp. 177, 178.

These principles have no application to the case under consideration. The question in *Pumpelly v. Green Bay Company* arose under the State’s power of eminent domain; while the question now before us arises under what are, strictly, the police powers of the State, exerted for the protection of the health, morals, and safety of the people. That case, as this court said in *Transportation Co. v. Chicago*, 99 U.S. 635, 642, was an extreme qualification of the doctrine, universally held, that “acts done in the proper exercise of governmental powers, and not directly encroaching upon private property, though these consequences may impair its use,” do not constitute a taking within the meaning of the constitutional provision, or entitle the owner of such property to compensation from the State or its agents, or give him any right of action. It was a case in which there was a “permanent flooding of private property,” a “physical invasion of the real estate of the private owner, and a practical ouster of his possession.” His property was, in effect, required to be devoted to the use of the public, and, consequently, he was entitled to compensation.

As already stated, the present case must be governed by principles that do not involve the power of eminent domain, in the exercise of which property may not be taken

for public use without compensation. A prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community, cannot, in any just sense, be deemed a taking or an appropriation of property for the public benefit. Such legislation does not disturb the owner in the control or use of his property for lawful purposes, nor restrict his right to dispose of it, but is only a declaration by the State that its use by any one, for certain forbidden purposes, is prejudicial to the public interests. Nor can legislation of that character come within the Fourteenth Amendment, in any case, unless it is apparent that its real object is not to protect the community, or to promote the general well-being, but, under the guise of police regulation, to deprive the owner of his liberty and property, without due process of law. The power which the States have of prohibiting such use by individuals of their property as will be prejudicial to the health, the morals, or the safety of the public, is not – and, consistently with the existence and safety of organized society, cannot be – burdened with the condition that the State must compensate such individual owners for pecuniary losses they may sustain, by reason of their not being permitted, by a noxious use of their property, to inflict injury upon the community. The exercise of the police power by the destruction of property which is itself a public nuisance, or the prohibition of its use in a particular way, whereby its value becomes depreciated, is very different from taking property for public use, or from depriving a person of his property without due process of law. In the one case, a nuisance only is abated; in the other, unoffending property is taken away from an innocent owner.

It is true, that, when the defendants in these cases purchased or erected their breweries, the laws of the State did not forbid the manufacture of intoxicating liquors. But the State did not thereby give any assurance, or come under

an obligation, that its legislation upon that subject would remain unchanged. Indeed, as was said in *Stone v. Mississippi*, above cited, the supervision of the public health and the public morals is a governmental power, “continuing in its nature,” and “to be dealt with as the special exigencies of the moment may require;” and that, “for this purpose, the largest legislative discretion is allowed, and the discretion cannot be parted with any more than the power itself.” So in *Beer Co. v. Massachusetts*, 97 U.S. 32: “If the public safety or the public morals require the discontinuance of any manufacture or traffic, the hand of the legislature cannot be stayed from providing for its discontinuance by any incidental inconvenience which individuals or corporations may suffer.”

....

MR. JUSTICE FIELD delivered the following separate opinion.

....

These clauses appear to me to deprive one who owns a brewery and manufactures beer for sale, like the defendants, of property without due process of law. The destruction to be ordered is not as a forfeiture upon conviction of any offence, but merely because the legislature has so commanded. Assuming, which is not conceded, that the legislature, in the exercise of that undefined power of the State, called its police power, may, without compensation to the owner, deprive him of the use of his brewery for the purposes for which it was constructed under the sanction of the law, and for which alone it is valuable, I cannot see upon what principle, after closing the brewery, and thus putting an end to its use in the future for manufacturing spirits, it can order the destruction of the liquor already manufactured, which it admits by its legislation may be valuable for some purposes, and allows to be sold for those purposes. Nor can I see

how the protection of the health and morals of the people of the State can require the destruction of property like bottles, glasses, and other utensils, which may be used for many lawful purposes. It has heretofore been supposed to be an established principle, that where there is a power to abate a nuisance, the abatement must be limited by its necessity, and no wanton or unnecessary injury can be committed to the property or rights of individuals. Thus, if the nuisance consists in the use to which a building is put, the remedy is to stop such use, not to tear down or to demolish the building itself, or to destroy property found within it. *Babcock v. City of Buffalo*, 56 N.Y. 268; *Chenango Bridge Co. v. Paige*, 83 N.Y. 178, 189. The decision of the court, as it seems to me, reverses this principle.

It is plain that great wrong will often be done to manufacturers of liquors, if legislation like that embodied in this thirteenth section can be upheld. The Supreme Court of Kansas admits that the legislature of the State, in destroying the values of such kinds of property, may have gone to the utmost verge of constitutional authority. In my opinion it has passed beyond that verge, and crossed the line which separates regulation from confiscation.

Pennsylvania Coal Company v. Mahon, 260 U.S. 393 (1922)

MR. JUSTICE HOLMES delivered the opinion of the Court.

This is a bill in equity brought by the defendants in error to prevent the Pennsylvania Coal Company from mining under their property in such way as to remove the supports and cause a subsidence of the surface and of their house. The bill sets out a deed executed by the Coal Company in 1878, under which the plaintiffs claim. The deed conveys the surface, but in express terms reserves the right to remove all the coal under the same, and the grantee takes the premises with the risk, and waives all claim for damages that may arise from mining out the coal. But the plaintiffs say that whatever may have been the Coal Company's

rights, they were taken away by an Act of Pennsylvania, approved May 27, 1921, P.L. 1198, commonly known there as the Kohler Act. The Court of Common Pleas found that if not restrained the defendant would cause the damage to prevent which the bill was brought, but denied an injunction, holding that the statute if applied to this case would be unconstitutional. On appeal the Supreme Court of the State agreed that the defendant had contract and property rights protected by the Constitution of the United States, but held that the statute was a legitimate exercise of the police power and directed a decree for the plaintiffs. A writ of error was granted bringing the case to this Court.

The statute forbids the mining of anthracite coal in such way as to cause the subsidence of, among other things, any structure used as a human habitation, with certain exceptions, including among them land where the surface is owned by the owner of the underlying coal and is distant more than one hundred and fifty feet from any improved property belonging to any other person. As applied to this case the statute is admitted to destroy previously existing rights of property and contract. The question is whether the police power can be stretched so far.

Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law. As long recognized, some values are enjoyed under an implied limitation and must yield to the police power. But obviously the implied limitation must have its limits, or the contract and due process clauses are gone. One fact for consideration in determining such limits is the extent of the diminution. When it reaches a certain magnitude, in most if not in all cases there must be an exercise of eminent domain and compensation to sustain the act. So the question depends upon the particular facts. The greatest weight is given to the judgment of the legislature, but it

always is open to interested parties to contend that the legislature has gone beyond its constitutional power.

This is the case of a single private house. No doubt there is a public interest even in this, as there is in every purchase and sale and in all that happens within the commonwealth. Some existing rights may be modified even in such a case. *Rideout v. Knox*, 148 Mass. 368. But usually in ordinary private affairs the public interest does not warrant much of this kind of interference. A source of damage to such a house is not a public nuisance even if similar damage is inflicted on others in different places. The damage is not common or public. *Wesson v. Washburn Iron Co.*, 13 Allen, 95, 103. The extent of the public interest is shown by the statute to be limited, since the statute ordinarily does not apply to land when the surface is owned by the owner of the coal. Furthermore, it is not justified as a protection of personal safety. That could be provided for by notice. Indeed the very foundation of this bill is that the defendant gave timely notice of its intent to mine under the house. On the other hand the extent of the taking is great. It purports to abolish what is recognized in Pennsylvania as an estate in land – a very valuable estate – and what is declared by the Court below to be a contract hitherto binding the plaintiffs. If we were called upon to deal with the plaintiffs' position alone, we should think it clear that the statute does not disclose a public interest sufficient to warrant so extensive a destruction of the defendant's constitutionally protected rights.

But the case has been treated as one in which the general validity of the act should be discussed. The Attorney General of the State, the City of Scranton, and the representatives of other extensive interests were allowed to take part in the argument below and have submitted their contentions here. It seems, therefore, to be our duty to go farther in the statement of our opinion, in order that it may

be known at once, and that further suits should not be brought in vain.

It is our opinion that the act cannot be sustained as an exercise of the police power, so far as it affects the mining of coal under streets or cities in places where the right to mine such coal has been reserved. As said in a Pennsylvania case, "For practical purposes, the right to coal consists in the right to mine it." *Commonwealth v. Clearview Coal Co.*, 256 Pa. St. 328, 331. What makes the right to mine coal valuable is that it can be exercised with profit. To make it commercially impracticable to mine certain coal has very nearly the same effect for constitutional purposes as appropriating or destroying it. This we think that we are warranted in assuming that the statute does.

It is true that in *Plymouth Coal Co. v. Pennsylvania*, 232 U.S. 531, it was held competent for the legislature to require a pillar of coal to be left along the line of adjoining property, that, with the pillar on the other side of the line, would be a barrier sufficient for the safety of the employees of either mine in case the other should be abandoned and allowed to fill with water. But that was a requirement for the safety of employees invited into the mine, and secured an average reciprocity of advantage that has been recognized as a justification of various laws.

The rights of the public in a street purchased or laid out by eminent domain are those that it has paid for. If in any case its representatives have been so short sighted as to acquire only surface rights without the right of support, we see no more authority for supplying the latter without compensation than there was for taking the right of way in the first place and refusing to pay for it because the public wanted it very much. The protection of private property in the Fifth Amendment presupposes that it is wanted for public use, but provides that it shall not be taken for such use without compensation. A similar assumption is made in the decisions upon the Fourteenth Amendment. *Hairston v.*

Danville & Western Ry. Co., 208 U.S. 598, 605. When this seemingly absolute protection is found to be qualified by the police power, the natural tendency of human nature is to extend the qualification more and more until at last private property disappears. But that cannot be accomplished in this way under the Constitution of the United States.

The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking. It may be doubted how far exceptional cases, like the blowing up of a house to stop a conflagration, go – and if they go beyond the general rule, whether they do not stand as much upon tradition as upon principle. *Bowditch v. Boston*, 101 U.S. 16. In general it is not plain that a man's misfortunes or necessities will justify his shifting the damages to his neighbor's shoulders. *Spade v. Lynn & Boston R.R. Co.*, 172 Mass. 488, 489. We are in danger of forgetting that 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. As we already have said, this is a question of degree – and therefore cannot be disposed of by general propositions. But we regard this as going beyond any of the cases decided by this Court. The late decisions upon laws dealing with the congestion of Washington and New York, caused by the war, dealt with laws intended to meet a temporary emergency and providing for compensation determined to be reasonable by an impartial board. They went to the verge of the law but fell far short of the present act. *Block v. Hirsh*, 256 U.S. 135. *Marcus Brown Holding Co. v. Feldman*, 256 U.S. 170. *Levy Leasing Co. v. Siegel*, 258 U.S. 242.

We assume, of course, that the statute was passed upon the conviction that an exigency existed that would warrant it, and we assume that an exigency exists that would warrant the exercise of eminent domain. But the question at bottom

is upon whom the loss of the changes desired should fall. So far as private persons or communities have seen fit to take the risk of acquiring only surface rights, we cannot see that the fact that their risk has become a danger warrants the giving to them greater rights than they bought.

Decree reversed.

MR. JUSTICE BRANDEIS, dissenting. (multiple citations omitted)

The Kohler Act prohibits, under certain conditions, the mining of anthracite coal within the limits of a city in such a manner or to such an extent "as to cause the ... subsidence of any dwelling or other structure used as a human habitation, or any factory, store, or other industrial or mercantile establishment in which human labor is employed." Coal in place is land; and the right of the owner to use his land is not absolute. He may not so use it as to create a public nuisance; and uses, once harmless, may, owing to changed conditions, seriously threaten the public welfare. Whenever they do, the legislature has power to prohibit such uses without paying compensation; and the power to prohibit extends alike to the manner, the character and the purpose of the use. Are we justified in declaring that the Legislature of Pennsylvania has, in restricting the right to mine anthracite, exercised this power so arbitrarily as to violate the Fourteenth Amendment?

Every restriction upon the use of property imposed in the exercise of the police power deprives the owner of some right theretofore enjoyed, and is, in that sense, an abridgment by the State of rights in property without making compensation. But restriction imposed to protect the public health, safety or morals from dangers threatened is not a taking. The restriction here in question is merely the prohibition of a noxious use. The property so restricted remains in the possession of its owner. The State does not appropriate it or make any use of it. The State merely

prevents the owner from making a use which interferes with paramount rights of the public. Whenever the use prohibited ceases to be noxious – as it may because of further change in local or social conditions, – the restriction will have to be removed and the owner will again be free to enjoy his property as heretofore.

The restriction upon the use of this property can not, of course, be lawfully imposed, unless its purpose is to protect the public. But the purpose of a restriction does not cease to be public, because incidentally some private persons may thereby receive gratuitously valuable special benefits... . If by mining anthracite coal the owner would necessarily unloose poisonous gasses, I suppose no one would doubt the power of the State to prevent the mining, without buying his coal fields. And why may not the State, likewise, without paying compensation, prohibit one from digging so deep or excavating so near the surface, as to expose the community to like dangers? In the latter case, as in the former, carrying on the business would be a public nuisance.

It is said that one fact for consideration in determining whether the limits of the police power have been exceeded is the extent of the resulting diminution in value; and that here the restriction destroys existing rights of property and contract. But values are relative. If we are to consider the value of the coal kept in place by the restriction, we should compare it with the value of all other parts of the land. That is, with the value not of the coal alone, but with the value of the whole property. The rights of an owner as against the public are not increased by dividing the interests in his property into surface and subsoil. The sum of the rights in the parts can not be greater than the rights in the whole. The estate of an owner in land is grandiloquently described as extending *ab orco usque ad coelum*. But I suppose no one would contend that by selling his interest above one hundred feet from the surface he could prevent the State

from limiting, by the police power, the height of structures in a city. And why should a sale of underground rights bar the State's power? For aught that appears the value of the coal kept in place by the restriction may be negligible as compared with the value of the whole property, or even as compared with that part of it which is represented by the coal remaining in place and which may be extracted despite the statute. Ordinarily a police regulation, general in operation, will not be held void as to a particular property, although proof is offered that owing to conditions peculiar to it the restriction could not reasonably be applied... . . . Where the surface and the coal belong to the same person, self-interest would ordinarily prevent mining to such an extent as to cause a subsidence. It was, doubtless, for this reason that the legislature, estimating the degrees of danger, deemed statutory restriction unnecessary for the public safety under such conditions.

... .

The [majority's] conclusion seems to rest upon the assumption that in order to justify such exercise of the police power there must be "an average reciprocity of advantage" as between the owner of the property restricted and the rest of the community; and that here such reciprocity is absent. Reciprocity of advantage is an important consideration, and may even be an essential, where the State's power is exercised for the purpose of conferring benefits upon the property of a neighborhood, as in drainage projects, or upon adjoining owners, as by party wall provisions. But where the police power is exercised, not to confer benefits upon property owners, but to protect the public from detriment and danger, there is, in my opinion, no room for considering reciprocity of advantage. There was no reciprocal advantage to the owner prohibited from using his oil tanks in 248 U.S. 498; his brickyard, in 239 U.S. 394; his livery stable, in 237 U.S. 171; his billiard hall, in 225 U.S. 623; his oleomargarine factory,

in 127 U.S. 678; his brewery, in 123 U.S. 623; unless it be the advantage of living and doing business in a civilized community. That reciprocal advantage is given by the act to the coal operators.

Miller v. Schoene

276 U.S. 272 (1928)

Messrs. Randolph Harrison, of Lynchburg, Va., and D. O. Dechert, of Harrisonburg, Va., for plaintiffs in error.

Mr. F. S. Tavenner, of Woodstock, Va., for defendant in error.

MR. JUSTICE STONE delivered the opinion of the Court.

Acting under the Cedar Rust Act of Virginia, Acts Va. 1914, c. 36, as amended by Acts Va. 1920, c. 260, now embodied in Va. Code (1924) as sections 885 to 893, defendant in error, the state entomologist, ordered the plaintiffs in error to cut down a large number of ornamental red cedar trees growing on their property, as a means of preventing the communication of a rust or plant disease with which they were infected to the apple orchards in the vicinity. The plaintiffs in error appealed from the order to the circuit court of Shenandoah county which, after a hearing and a consideration of evidence, affirmed the order and allowed to plaintiffs in error \$100 to cover the expense of removal of the cedars. Neither the judgment of the court nor the statute as interpreted allows compensation for the value of the standing cedars or the decrease in the market value of the realty caused by their destruction whether considered as ornamental trees or otherwise. But they save to plaintiffs in error the privilege of using the trees when felled. On appeal the Supreme Court of Appeals of Virginia affirmed the judgment. *Miller v. State Entomologist*, 146 Va. 175, 135 S. E. 813. Both in the circuit court and the Supreme Court of Appeals plaintiffs in error challenged the constitutionality of the statute under the due process clause of the Fourteenth

Amendment and the case is properly here on writ of error. Judicial Code, § 237a (28 USCA § 344).

The Virginia statute presents a comprehensive scheme for the condemnation and destruction of red cedar trees infected by cedar rust. By section 1 it is declared to be unlawful for any person to 'own, plant or keep alive and standing' on his premises any red cedar tree which is or may be the source or 'host plant' of the communicable plant disease known as cedar rust, and any such tree growing within a certain radius of any apple orchard is declared to be a public nuisance, subject to destruction. Section 2 makes it the duty of the state entomologist, 'upon the request in writing of ten or more reputable freeholders of any county or magisterial district, to make a preliminary investigation of the locality * * * to ascertain if any cedar tree or trees * * * are the source of, harbor or constitute the host plant for the said disease * * * and constitute a menace to the health of any apple orchard in said locality, and that said cedar tree or trees exist within a radius of two miles of any apple orchard in said locality.' If affirmative findings are so made, he is required to direct the owner in writing to destroy the trees and, in his notice, to furnish a statement of the 'fact found to exist whereby it is deemed necessary or proper to destroy' the trees and to call attention to the law under which it is proposed to destroy them. Section 5 authorizes the state entomologist to destroy the trees if the owner, after being notified, fails to do so. Section 7 furnishes a mode of appealing from the order of the entomologist to the circuit court of the county, which is authorized to 'hear the objections' and 'pass upon all questions involved,' the procedure followed in the present case.

As shown by the evidence and as recognized in other cases involving the validity of this statute, *Bowman v. Virginia State Entomologist*, 128 Va. 351, 105 S. E. 141, 12 A. L. R. 1121; *Kelleher v. Schoene* (D. C.) 14 F. (2d) 341, cedar rust

is an infectious plant disease in the form of a fungoid organism which is destructive of the fruit and foliage of the apple, but without effect on the value of the cedar. Its life cycle has two phases which are passed alternately as a growth on red cedar and on apple trees. It is communicated by spores from one to the other over a radius of at least two miles. It appears not to be communicable between trees of the same species, but only from one species to the other, and other plants seem not to be appreciably affected by it. The only practicable method of controlling the disease and protecting apple trees from its ravages is the destruction of all red cedar trees, subject to the infection, located within two miles of apple orchards.

The red cedar, aside from its ornamental use, has occasional use and value as lumber. It is indigenous to Virginia, is not cultivated or dealt in commercially on any substantial scale, and its value throughout the state is shown to be small as compared with that of the apple orchards of the state. Apple growing is one of the principal agricultural pursuits in Virginia. The apple is used there and exported in large quantities. Many millions of dollars are invested in the orchards, which furnish employment for a large portion of the population, and have induced the development of attendant railroad and cold storage facilities.

On the evidence we may accept the conclusion of the Supreme Court of Appeals that the state was under the necessity of making a choice between the preservation of one class of property and that of the other wherever both existed in dangerous proximity. It would have been none the less a choice if, instead of enacting the present statute, the state, by doing nothing, had permitted serious injury to the apple orchards within its borders to go on unchecked. When forced to such a choice the state does not exceed its constitutional powers by deciding upon the destruction of one class of property in order to save another which, in the

judgment of the legislature, is of greater value to the public. It will not do to say that the case is merely one of a conflict of two private interests and that the misfortune of apple growers may not be shifted to cedar owners by ordering the destruction of their property; for it is obvious that there may be, and that here there is, a preponderant public concern in the preservation of the one interest over the other. Compare *Bacon v. Walker*, 204 U. S. 311, 27 S. Ct. 289, 51 L. Ed. 499; *Missouri, Kansas & Texas R. Co. v. May*, 194 U. S. 267, 24 S. Ct. 638, 48 L. Ed. 971; *Chicago, Terre Haute & Southeastern R. Co. v. Anderson*, 242 U. S. 283, 37 S. Ct. 124, 61 L. Ed. 302; *Perley v. North Carolina*, 249 U. S. 510, 39 S. Ct. 357, 63 L. Ed. 735. And where the public interest is involved preferment of that interest over the property interest of the individual, to the extent even of its destruction, is one of the distinguishing characteristics of every exercise of the police power which affects property. *Mugler v. Kansas*, 123 U. S. 623, 8 S. Ct. 273, 31 L. Ed. 205; *Hadacheck v. Los Angeles*, 239 U. S. 394, 36 S. Ct. 143, 60 L. Ed. 348, Ann. Cas. 1917B, 927; *Village of Euclid v. Ambler Realty Co.*, 272 U. S. 365, 47 S. Ct. 114, 71 L. Ed. 303; *Northwestern Fertilizer Co. v. Hyde Park*, 97 U. S. 659, 24 L. Ed. 1036; *Northwestern Laundry v. Des Moines*, 239 U. S. 486, 36 S. Ct. 206, 60 L. Ed. 396; *Lawton v. Steele*, 152 U. S. 133, 14 S. Ct. 499, 38 L. Ed. 385; *Sligh v. Kirkwood*, 237 U. S. 52, 35 S. Ct. 501, 59 L. Ed. 835, *Reinman v. Little Rock*, 237 U. S. 171, 35 S. Ct. 511, 59 L. Ed. 900.

We need not weigh with nicety the question whether the infected cedars constitute a nuisance according to the common law; or whether they may be so declared by statute. See *Hadacheck v. Los Angeles*, *supra*, 411 (36 S. Ct. 143). For where, as here, the choice is unavoidable, we cannot say that its exercise, controlled by considerations of social policy which are not unreasonable, involves any denial of due process. The injury to property here is no

more serious, nor the public interest less, than in *Hadacheck v. Los Angeles*, *supra*, *Northwestern Laundry v. Des Moines*, *supra*, *Reinman v. Little Rock*, *supra*, or *Sligh v. Kirkwood*, *supra*.

The statute is not, as plaintiffs in error argue, subject to the vice which invalidated the ordinance considered by this court in *Eubank v. Richmond*, 226 U. S. 137, 33 S. Ct. 76, 57 L. Ed. 156, 42 L. R. A. (N. S.) 1123, Ann. Cas. 1914B, 192. That ordinance directed the committee on streets of the city of Richmond to establish a building line, not less than five nor more than thirty feet from the street line whenever requested to do so by the owners of two-thirds of the property abutting on the street in question. No property owner might build beyond the line so established. Of this the court said (page 143 (33 S. Ct. 77)):

It (the ordinance) leaves no discretion in the committee on streets as to whether the street (building, semple) line shall or shall not be established in a given case. The action of the committee is determined by two-thirds of the property owners. In other words, part of the property owners fronting on the block determine the extent of use that other owners shall make of their lots, and against the restriction they are impotent.

The function of the property owners there is in no way comparable to that of the 'ten or more reputable freeholders' in the Cedar Rust Act. They do not determine the action of the state entomologist. They merely request him to conduct an investigation. In him is vested the discretion to decide, after investigation, whether or not conditions are such that the other provisions of the statute shall be brought into action; and his determination is subject to judicial review. The property of plaintiffs in error

is not subjected to the possibly arbitrary and irresponsible action of a group of private citizens.

The objection of plaintiffs in error to the vagueness of the statute is without weight. The state court has held it to be applicable and that is enough when, by the statute, no penalty can be incurred or disadvantage suffered in advance of the judicial ascertainment of its applicability. Compare *Connally v. General Construction Co.*, 269 U. S. 385, 46 S. Ct. 126, 70 L. Ed. 322.

Affirmed.

4.2. Theory

Economic Analysis of “Takings” of Private Property, available at <http://cyber.law.harvard.edu/bridge/LawEconomics/takings.htm>.

A crucial constitutional question since the founding of the United States has been the extent to which the state and federal legislatures are permitted to impair private property rights. From the beginning, American courts have recognized that governments must be accorded some latitude in setting and modifying the entitlements associated with the ownership of land and other commodities. The courts have refused, however, to acquiesce in all legislative interferences with private property rights.

The constitutional provisions used to shield property from governmental encroachment have changed over the course of American history. Until the end of the nineteenth century, most regulations of private property emanated from the state governments, not the federal government. That fact – combined with the Supreme Court’s ruling that the Bill of Rights was inapplicable to the states – minimized the significance of the Fifth Amendment’s ban on uncompensated “takings” of private property. In the limited number of cases in which the Supreme Court undertook to review challenges to allegedly confiscatory legislation, it based its rulings either on broad principles of natural law or on the contracts clause of Article I, Section 10. In 1897, the Supreme Court held for the first time that the due-process clause

of the Fourteenth Amendment “incorporated” against the states the takings clause of the Fifth Amendment. Since that date the stream of cases invoking the federal Constitution to challenge legislative or judicial impairments of property rights has steadily increased.

Before World War II, legal scholars paid relatively little attention to the so-called “takings” doctrine. Since the 1950s, however, the body of academic writing dealing with the issue has mushroomed. The ambition of the large majority of the authors who have contributed to the discussion has been to define a principled line that would enable the courts to differentiate permissible “regulation” of private property from impermissible (if uncompensated) expropriation thereof. Prominent among those who have attempted this feat have been economists.

Economic analysis of the takings doctrine can be traced to a 1967 Harvard Law Review article in which Frank Michelman argued (among other things) that a judge called on to determine whether the Fifth Amendment had been violated in a particular case might plausibly select as her criterion of judgment the maximization of net social welfare. If that were her ambition, Michelman contended, the judge should begin by estimating and comparing the following economic impacts:

1. the net efficiency gains secured by the government action in question (in other words, “the excess of benefits produced by the measure over losses inflicted by it”);
2. the “settlement costs” – i.e., the costs of measuring the injuries sustained by adversely affected parties and of providing them monetary compensation; and
3. the “demoralization costs” incurred by not indemnifying them. Michelman’s definition of the third of these terms was original and critical; to ascertain the

“demoralization costs” entailed by not paying compensation, the judge should measure “the total of ... the dollar value necessary to offset disutilities which accrue to losers and their sympathizers specifically from the realization that no compensation is offered, and ... the present capitalized dollar value of lost future production (reflecting either impaired incentives or social unrest) caused by demoralization of uncompensated losers, their sympathizers, and other observers disturbed by the thought that they themselves may be subjected to similar treatment on some other occasion.”

Once the judge has calculated these impacts, Michelman contended, her job is straightforward.

- If (1) is the smallest figure, she should contrive some way to enjoin the action – for example, by declaring it to be violative of the constitutional requirement that private property be taken only for a “public use.”
- If (2) is the smallest figure, she should not enjoin the action but should require that the parties hurt by it be compensated.
- If (3) is the smallest figure, she should allow the government to proceed without indemnifying the victims.

Applying this composite test, Michelman suggested that some of the guidelines employed by the Supreme Court when deciding takings cases, though seemingly simplistic or senseless, turn out to have plausible utilitarian justifications. For

example, the rule that “physical invasion” by government of private property is always deemed a taking, though apparently a clumsy device for separating mild from severe encroachments on private rights, turns out to have important redeeming features: it identifies a set of cases in which settlement costs (the costs of both ascertaining liability and measuring the resultant damages) are likely to be modest and in which, because of the “psychological shock, the emotional protest, the symbolic threat to all property and security” commonly associated with bald invasions, “demoralization costs” are likely to be high – precisely the circumstance in which compensation is most appropriate. Similarly, the courts’ sensitivity in takings cases to the ratio between the economic injury sustained by the plaintiff and the overall value of the affected parcel (rather than to the absolute amount of the economic injury) makes some sense on the following plausible assumptions: “(1) that one thinks of himself not just as owning a total amount of wealth or income, but also as owning several discrete things whose destinies he controls; (2) that deprivation of one of these mentally circumscribed things is an event attended by pain of a specially acute or demoralizing kind, as compared with what one experiences in response to the different kind of event consisting of a general decline in one’s net worth; and (3) that events of the specially painful kind can usually be identified by compensation tribunals with relative ease.”

Michelman’s analysis proved highly influential among constitutional scholars, but did not go uncontested. In the 1980s, several younger scholars argued that Michelman had made a crucial

mistake. When measuring “demoralization costs,” they argued, a judge should not include the diminution in investment and “productive activity” caused by not making the victims whole. Indeed, widespread adoption of Michelman’s strategy would send precisely the wrong signal to property owners; assured that they would be indemnified if and when the public needed their land, they would *overinvest* in capital improvements – and, in particular, in capital improvements likely soon to be rendered obsolete by governmental action or regulation. Inducement of efficient kinds and levels of activity, the revisionist economists claimed, requires that economic actors “bear all real costs and benefits of their decisions” including the risk of future changes in pertinent legal rules.

From this point (now widely considered convincing), economic analysis of the takings doctrine has radiated in a variety of directions. Here are a few:

Insurance Schemes. The guideline just mentioned (that efficiency will be enhanced by forcing landowners to bear the risk of future changes in pertinent legal rules) has at least one serious drawback: It may result in a few landowners suffering very large, uncompensated losses – a situation economists generally regard as undesirable. From an efficiency standpoint, the best solution to this problem would be the development and widespread use of a private insurance system. Landowners would buy “takings” insurance, just as they now routinely buy fire insurance. Such a system would not erode the benefits of making landowners bear the costs of regulation, because the rate that an insurer charged for insuring a particular parcel would almost certainly reflect the likelihood that that particular parcel would later be subject to governmental action. For example, developers who bought land in flood plains or on eroding beaches would pay very large premiums, while landowners in lower-risk areas would pay much lower premiums. The resultant incentive to avoid developing parcels likely soon to be regulated is precisely what we would wish to create.

Unfortunately, a private market in “takings” insurance has not yet developed. Various reasons have been suggested for this failure, but the fact remains that landowners cannot currently shield themselves against uncompensated takings. Even if private insurance were available, some landowners undoubtedly would not purchase it – because they systematically underestimated the danger of regulation or because they were simply poor planners. Under these nonideal conditions, some economists have conceded that governmental compensation for severe land-use regulations may be economically defensible as, in effect, a form of compulsory state-supplied insurance.

Reconstructing Demoralization Costs. Perhaps the revisionist critique of “demoralization costs” has gone too far. After all, many people become unhappy when they experience or witness uncompensated severe regulations of private property, and those psychic injuries (measured, as always, by people’s willingness and ability to pay money to avoid them) must be considered when one tries to design a takings doctrine that maximizes net social welfare. Moreover, those costs go further than the (potentially substantial) disutilities caused by the frustration of people’s “political preferences” – the pain they experience when they witness behavior they consider unjust. They include secondary effects that might be called “search costs”:

A judicial decision denying compensation in defiance of a popular perception that it should be forthcoming risks undermining people’s faith that, by the large, the law comports with their sense of justice. Erosion of that faith, in turn, would reduce people’s willingness to make decisions – the rationality of which depends upon the content of the pertinent legal rules – without taking the time to “look up” the rules... . Generally speaking, our willingness to act in this fashion is efficient; as long

as the rules are in fact consistent with our senses of justice, it is desirable, from an economic standpoint, that we trust our intuitions. Any material diminution in that willingness would give rise to deadweight losses that merit the attention of a conscientious economist.

Determining the magnitude of demoralization costs of these various sorts is, however, very difficult. Frequently, one can argue plausibly that the psychic injuries caused by a particular sort of regulation will be huge – or will be insignificant. Consider, for example, the situation in which land-use regulations are suddenly tightened, not by the legislature, but by a change in common-law rules. Will the demoralization costs caused by such putative “judicial takings” be smaller or larger than those associated with comparable “legislative takings”? Barton Thompson points to several circumstances suggesting that they will be smaller: the fact that courts can more easily disguise the extent to which they are changing the pertinent land-use regulations; courts’ ability to fall back on their general reputation for objective and principled decisionmaking; and the tendency of the doctrine of stare decisis to mitigate landowners’ anxieties that judicial modification of one land-use regulation portends more sweeping changes in the future. Barton acknowledges, however, that many of these factors can be “flipped,” suggesting that judicial takings will result in unusually high demoralization costs:

The mysteries and insulation of the judicial process, for example, might actually increase demoralization. Property holders may believe that they at least understand the legislative process, have some electoral control over politicians, and know how to wage a fight on political grounds. They may feel far more distressed about a legal process that affects them without

apparently understanding their concerns, speaks in a foreign and confusing tongue, and is directed by judges over whom they feel they have no effective popular control. Given the existence of stare decisis and people's expectations that courts will generally observe precedent, moreover, property holders may fear disintegration of the social structure far more when a court significantly modifies prior property law than when the legislature engages in traditional political behavior.

Barton's avowedly indeterminate analysis of "judicial takings" is typical of the murk one enters when trying to predict psychic injuries. In short, demoralization costs are plainly relevant to the design of an efficient takings doctrine, but their uncertainty makes economists queasy about relying on them.

"Fiscal Illusions." Several economists have argued that it is mistaken to concentrate exclusively upon the effect of constitutional doctrine on the incentives of landowners to use and improve their possessions; one must also take into account the incentives of government officials to regulate private property. Specifically, these economists have argued that, unless government officials are compelled somehow to bear the costs of the regulations they adopt, they will tend to impose on private property inefficiently tight land-use controls. In this respect, the position of the government vis-à-vis private landowners is similar to the position of a private landowner vis-à-vis her neighbors. The purpose of nuisance law, it is often said, is to force each landowner to internalize the costs of her activities and thus discourage her from acting in ways that impose on her neighbors inefficiently high levels of annoyance (smoke, smells, pollution, excess light, etc.). Similarly, some economists have argued, the purpose of a just-compensation requirement is to compel government officials to internalize the costs of their regulatory activities and thus

discourage them from fettering landowners excessively. This claim has been subjected by other economists to two sorts of critique. First, it is not altogether clear that, unless deterred by a just-compensation requirement, government officials will overregulate. Louis Kaplow points out that, although it is true that (in the absence of such a requirement) government officials will not bear the costs of their regulatory activities, they also will not reap the benefits of those activities. (In this respect, they are different from potentially hyperactive private landowners.) There is thus no reason to assume that, unless leashed by a strict takings doctrine, officials will run amok. A student Note in the Harvard Law Review reinforces this point by suggesting two reasons why government officials might be prone to adopt inefficiently *low* levels of regulation: (a) ordinarily, the beneficiaries of land-use restrictions are more dispersed (and thus less able to make their views known to their elected representatives) than the landowners adversely affected by those regulations; and (b) government officials typically undervalue the interests in regulation of the members of future generations.

Second, even if the “fiscal-illusion” effect is serious, it is not obvious that the enforcement of a constitutional just-compensation requirement is the only – or best – way to offset it. Other strategies might work as well or better. For example, the student Note just mentioned contends that optimal levels of regulation might be achieved equally effectively by assigning to the state the authority to proscribe without compensation any uses of private land that government officials believe are injurious to the public – but then permit adversely affected landowners to buy from the government exemptions from those regulations. The state’s police power, in other words, could be treated as an alienable servitude. Unless transaction costs interfered with the market in such exemptions (concededly a tricky issue), the adoption of such a system should (Coase tells us) result in the same, efficient level of regulation as a regime in which landowners were originally assigned the right not to be regulated and the state had to expropriate (through the payment of “just compensation”) the authority to regulate

them. Has this growing body of scholarship had any impact on the courts? Yes and no. Some of the economists' more basic arguments have indeed influenced judicial resolution of takings cases. For example, the causal nihilism typical of most economic analyses contributed to the partial corrosion of the so-called noxious-use exception to the ban on uncompensated takings. In the early twentieth century the Supreme Court consistently and confidently ruled that when a state forbids the continuation of a use of land or other property that would be harmful to the public or to neighbors, it is not obliged to indemnify the owner. For example, in *Miller v. Schoene*, the Court upheld on this basis a Virginia statute that required the owner of ornamental cedar trees to cut them down because they produced cedar rust that endangered apple trees in the vicinity. As legal scholars became increasingly familiar with the economic analysis of doctrinal problems – and, in particular, with Ronald Coase's assertion that, in all cases of conflicting land uses, it is senseless to characterize one such use as the "cause" of harm to the other – they pointed out that the Court's handling of cases like *Miller* was naive. The activity of keeping cedar trees in the vicinity of apple orchards is no more (and no less) "noxious" than the activity of keeping apple orchards in the vicinity of cedar trees. In the face of this chorus of criticism, the Court retreated. Its renunciation of the "noxious use" test was most complete and overt in Justice Brennan's majority opinion in the case with which we have been concerned:

We observe that the land uses in issue in *Hadacheck*, *Miller*, and *Goldblatt* were perfectly lawful in themselves. They involved no "blameworthiness, ... moral wrongdoing or conscious act of dangerous risk-taking which induced society to shift the cost to a particular individual." These cases are better understood as resting not on any supposed "noxious" quality of the prohibited uses but rather on the ground that the restrictions were

reasonably related to the implementation of a policy – not unlike historic preservation – expected to produce a widespread public benefit and applicable to all similarly situated property.

For better or worse, however, the Court since *Penn Central* has drifted back toward its original view. The justices' invocations of the distinction between “noxious” and “innocent” uses have been more tentative and awkward than in the period before 1960, but nevertheless have been increasing.

The Court's opinion in *Loretto v. Teleprompter Manhattan CATV Corp.* furnishes a more straightforward illustration of the power of the economic argument. At issue in the case was a New York statute empowering a cable television company to install fixtures on the sides and roofs of privately owned buildings. In holding that such a “permanent physical occupation” of private property, no matter how trivial, always constitutes a taking, Justice Marshall relied twice on Michelman's 1967 article – first, for Michelman's analysis of the historical development of the physical-occupation rule; and second for his defense of the rule as effective way of identifying situations involving both low settlement costs and high demoralization costs.

The newer and more refined variations on the economic theme, however, have had little if any impact on judicial decisions in this field. In particular the danger – widely recognized by scholars – that liberal grants of compensation to property owners adversely affected by government action will give rise to a “moral hazard” problem, leading to inefficiently high levels of investment in improvements likely to be rendered valueless by subsequent regulation seems to have fallen on deaf judicial ears.

Equally troublesome is the tendency of judges (or their law clerks) to misuse economic arguments – or at least to deploy them in ways their originators would have found surprising and distressing. Perhaps the clearest illustration of such misuse concerns the fate of

the phrase: “discrete, investment-backed expectations.” Toward the close of his 1967 article Michelman provided a brief, avowedly utilitarian defense of the venerable and much-maligned “diminution in value” test for determining whether a statute had effected a taking. The true justification of the test, he argued, is that, like the physical-invasion test, it mandates compensation in situations in which property owners will experience severe psychological injury. Recognition of this justification, Michelman went on to argue, requires that we reconceive the test slightly:

More sympathetically perceived, however, the test poses not [a] ... loose question of degree; it does not ask “how much,” but rather ... it asks “whether or not”: whether or not the measure in question can easily be seen to have practically deprived the claimant of some distinctly perceived, sharply crystallized, investment-backed expectation.

In his *Penn Central* opinion, Justice Brennan several times invoked the language with which Michelman closed his discussion – without recapitulating, however, the argument on which it was based. Cut loose from its moorings, Michelman’s proposed test has since been put to some surprising uses. For example, in *Kaiser-Aetna v. United States*, the owner of a resort and marina in Hawaii argued that, by granting it permission to convert a shallow, landlocked lagoon into a bay accessible to pleasure boats, the Army Corps of Engineers had forfeited the right subsequently to declare the bay a navigable waterway open to the public – unless, of course, it compensated the marina owner. Emphasizing the large amount of money the petitioner had invested in the project, Justice Rehnquist and a majority of the Court agreed. A well-established factor in assessing takings challenges, Rehnquist held, is the extent to which the challenged government action “interfere[s] with reasonable investment backed expectations.” In the case at bar, the interference plainly had been substantial. Whatever one thinks of

the merits of the ruling, it is considerably removed from Michelman's original point, namely, that total or nearly total devaluation of a distinct property interest (something that plainly did not occur in *Kaiser-Aetna*) should be deemed a taking because of its likely psychic impact on the owner of the property.

Pennell v. City of San Jose

485 U.S. 1, 42 Cal.3d 365, 228 Cal.Rptr. 726, 721 P.2d 1111 (1986), affirmed.

REHNQUIST, C.J., delivered the opinion of the Court, in which BRENNAN, WHITE, MARSHALL, BLACKMUN, and STEVENS, JJ., joined. SCALIA, J., filed an opinion concurring in part and dissenting in part, in which O'CONNOR, J., joined, *post*, p. —. KENNEDY, J., took no part in the consideration or decision of the case.

Harry D. Miller, Oakland, Cal., for appellants.

Joan R. Gallo, San Jose, Cal., for appellees.

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

This case involves a challenge to a rent control ordinance enacted by the city of San Jose, California, that allows a hearing officer to consider, among other factors, the "hardship to a tenant" when determining whether to approve a rent increase proposed by a landlord. Appellants Richard Pennell and the Tri-County Apartment House Owners Association sued in the Superior Court of Santa Clara County seeking a declaration that the ordinance, in particular the "tenant hardship" provisions, are "facially unconstitutional and therefore ... illegal and void." The Superior Court entered judgment on the pleadings in favor of appellants, sustaining their claim that the tenant hardship provisions violated the Takings Clause of the Fifth Amendment, as made applicable to the States by the Fourteenth Amendment. The California Court of Appeal affirmed this judgment, but the Supreme Court of

California reversed, each by a divided vote. The majority of the Supreme Court rejected appellants' arguments under the Takings Clause and the Equal Protection and Due Process Clauses of the Fourteenth Amendment; the dissenters in that court thought that the tenant hardship provisions were a "forced subsidy imposed on the landlord" in violation of the Takings Clause. On appellants' appeal to this Court we postponed consideration of the question of jurisdiction, and now having heard oral argument we affirm the judgment of the Supreme Court of California.

The city of San Jose enacted its rent control ordinance (Ordinance) in 1979 with the stated purpose of

alleviating some of the more immediate needs created by San Jose's housing situation. These needs include but are not limited to the prevention of excessive and unreasonable rent increases, the alleviation of undue hardships upon individual tenants, and the assurance to landlords of a fair and reasonable return on the value of their property.

San Jose Municipal Ordinance 19696, § 5701.2.

At the heart of the Ordinance is a mechanism for determining the amount by which landlords subject to its provisions may increase the annual rent which they charge their tenants. A landlord is automatically entitled to raise the rent of a tenant in possession¹ by as much as eight percent; if a tenant objects to an increase greater than eight percent, a hearing is required before a "Mediation Hearing

¹ Under § 5703.3, the Ordinance does not apply to rent or rent increases for new rental units first rented after the Ordinance takes effect, § 5703.3(a), to the rental of a unit that has been voluntarily vacated, § 5703.3(b)(1), or to the rental of a unit that is vacant as a result of eviction for certain specified acts, § 5703.3(b)(2).

Officer” to determine whether the landlord’s proposed increase is “reasonable under the circumstances.” The Ordinance sets forth a number of factors to be considered by the hearing officer in making this determination, including “the hardship to a tenant.” § 5703.28(c)(7). Because appellants concentrate their attack on the consideration of this factor, we set forth the relevant provision of the Ordinance in full:

5703.29. Hardship to Tenants. In the case of a rent increase or any portion thereof which exceeds the standard set in Section 5703.28(a) or (b), then with respect to such excess and whether or not to allow same to be part of the increase allowed under this Chapter, the Hearing Officer shall consider the economic and financial hardship imposed on the present tenant or tenants of the unit or units to which such increases apply. If, on balance, the Hearing Officer determines that the proposed increase constitutes an unreasonably severe financial or economic hardship on a particular tenant, he may order that the excess of the increase which is subject to consideration under subparagraph (c) of Section 5703.28. or any portion thereof, be disallowed. Any tenant whose household income and monthly housing expense meets certain income requirements shall be deemed to be suffering under financial and economic hardship which must be weighed in the Hearing Officer’s determination. The burden of proof in establishing any other economic hardship shall be on the tenant.

If either a tenant or a landlord is dissatisfied with the decision of the hearing officer, the Ordinance provides for binding arbitration. A landlord who attempts to charge or who receives rent in excess of the maximum rent established as provided in the Ordinance is subject to criminal and civil penalties.

Before we turn to the merits of appellants' contentions we consider the claim of appellees that appellants lack standing to challenge the constitutionality of the Ordinance. [The Court decided there was standing.]

Turning now to the merits, we first address appellants' contention that application of the Ordinance's tenant hardship provisions violates the Fifth and Fourteenth Amendments' prohibition against taking of private property for public use without just compensation. In essence, appellants' claim is as follows: § 5703.28 of the Ordinance establishes the seven factors that a hearing officer is to take into account in determining the reasonable rent increase. The first six of these factors are all objective, and are related either to the landlord's costs of providing an adequate rental unit, or to the condition of the rental market. Application of these six standards results in a rent that is "reasonable" by reference to what appellants contend is the only legitimate purpose of rent control: the elimination of "excessive" rents caused by San Jose's housing shortage. When the hearing officer then takes into account "hardship to a tenant" pursuant to § 5703.28(c)(7) and reduces the rent below the objectively "reasonable" amount established by the first six factors, this additional reduction in the rent increase constitutes a "taking." This taking is impermissible because it does not serve the purpose of eliminating excessive rents – that objective has already been accomplished by considering the first six factors – instead, it serves only the purpose of providing assistance to "hardship tenants." In short, appellants contend, the additional reduction of rent on grounds of

hardship accomplishes a transfer of the landlord's property to individual hardship tenants; the Ordinance forces private individuals to shoulder the "public" burden of subsidizing their poor tenants' housing. As appellants point out, "it is axiomatic that the Fifth Amendment's just compensation provision is 'designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.'" *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 318-319 (1987) (quoting *Armstrong v. United States*, 364 U.S. 40, 49,(1960)).

We think it would be premature to consider this contention on the present record. As things stand, there simply is no evidence that the "tenant hardship clause" has in fact ever been relied upon by a hearing officer to reduce a rent below the figure it would have been set at on the basis of the other factors set forth in the Ordinance. In addition, there is nothing in the Ordinance requiring that a hearing officer in fact reduce a proposed rent increase on grounds of tenant hardship. Section 5703.29 does make it mandatory that hardship be considered – it states that "the Hearing Officer *shall* consider the economic hardship imposed on the present tenant" – but it then goes on to state that if "the proposed increase constitutes an unreasonably severe financial or economic hardship ... he *may* order that the excess of the increase" be disallowed. § 5703.29 (emphasis added). Given the "essentially ad hoc, factual inquiry" involved in the takings analysis, *Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979), we have found it particularly important in takings cases to adhere to our admonition that "the constitutionality of statutes ought not be decided except in an actual factual setting that makes such a decision necessary." *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U.S. 264, 294-295 (1981). In *Virginia Surface Mining*, for example, we found that a challenge to the Surface Mining Control and Reclamation

Act of 1977, 91 Stat. 447, 30 U.S.C. § 1201 *et seq.*, was “premature,” 452 U.S., at 296, n. 37, and “not ripe for judicial resolution,” *id.*, at 297, because the property owners in that case had not identified any property that had allegedly been taken by the Act, nor had they sought administrative relief from the Act’s restrictions on surface mining. Similarly, in this case we find that the mere fact that a hearing officer is enjoined to consider hardship to the tenant in fixing a landlord’s rent, without any showing in a particular case as to the consequences of that injunction in the ultimate determination of the rent, does not present a sufficiently concrete factual setting for the adjudication of the takings claim appellants raise here. *Cf. CIO v. McAdory*, 325 U.S. 472, 475-476 (1945) (declining to consider the validity of a state statute when the record did not show that the statute would ever be applied to any of the petitioner’s members).

Appellants also urge that the mere provision in the Ordinance that a hearing officer may *consider* the hardship of the tenant in finally fixing a reasonable rent renders the Ordinance “facially invalid” under the Due Process and Equal Protection Clauses, even though no landlord ever has its rent diminished by as much as one dollar because of the application of this provision. [The Court decided the Ordinance was not facially unconstitutional on these grounds.]

For the foregoing reasons, we hold that it is premature to consider appellants’ claim under the Takings Clause and we reject their facial challenge to the Ordinance under the Due Process and Equal Protection Clauses of the Fourteenth Amendment. The judgment of the Supreme Court of California is accordingly

Affirmed.

Justice KENNEDY took no part in the consideration or decision of this case.

JUSTICE SCALIA, with whom JUSTICE O'CONNOR joins, concurring in part and dissenting in part.

I agree that the tenant hardship provision of the Ordinance does not, on its face, violate either the Due Process Clause or the Equal Protection Clause of the Fourteenth Amendment. I disagree, however, with the Court's conclusion that appellants' takings claim is premature. I would decide that claim on the merits, and would hold that the tenant hardship provision of the Ordinance effects a taking of private property without just compensation in violation of the Fifth and Fourteenth Amendments.

I

Appellants contend that any application of the tenant hardship provision of the San Jose Ordinance would effect an uncompensated taking of private property because that provision does not substantially advance legitimate state interests and because it improperly imposes a public burden on individual landlords. I can understand how such a claim – that a law applicable to the plaintiffs is, root and branch, invalid – can be readily rejected on the merits, by merely noting that at least some of its applications may be lawful. But I do not understand how such a claim can possibly be avoided by considering it “premature.” Suppose, for example, that the feature of the rental ordinance under attack was a provision allowing a hearing officer to consider the race of the apartment owner in deciding whether to allow a rent increase. It is inconceivable that we would say judicial challenge must await demonstration that this provision has actually been applied to the detriment of one of the plaintiffs. There is no difference, it seems to me, when the facial, root-and-branch challenge rests upon the Takings Clause rather than the Equal Protection Clause.

... .

There is no reason thus to shield alleged constitutional injustice from judicial scrutiny. I would therefore consider appellants' takings claim on the merits.

II

The Fifth Amendment of the United States Constitution, made applicable to the States through the Fourteenth Amendment, *Chicago, B. & Q.R. Co. v. Chicago*, 166 U.S. 226, 239 (1897), provides that "private property shall not be taken for public use, without just compensation." We have repeatedly observed that the purpose of this provision is "to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960); see also *First English Evangelical Lutheran Church of Glendale v. Los Angeles County*, 482 U.S. 304, 318-319 (1987); *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 163 (1980); *Agins v. Tiburon*, *supra*, 447 U.S., at 260; *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 123 (1978); *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 325 (1893).

Traditional land-use regulation (short of that which totally destroys the economic value of property) does not violate this principle because there is a cause-and-effect relationship between the property use restricted by the regulation and the social evil that the regulation seeks to remedy. Since the owner's use of the property is (or, but for the regulation, would be) the source of the social problem, it cannot be said that he has been singled out unfairly. Thus, the common zoning regulations requiring subdividers to observe lot-size and set-back restrictions, and to dedicate certain areas to public streets, are in accord with our constitutional traditions because the proposed property use would otherwise be the cause of excessive congestion. The same cause-and-effect relationship is popularly thought to justify emergency price regulation: When commodities have been priced at a level that produces exorbitant returns, the

owners of those commodities can be viewed as responsible for the economic hardship that occurs. Whether or not that is an accurate perception of the way a free-market economy operates, it is at least true that the owners reap unique benefits from the situation that produces the economic hardship, and in that respect singling them out to relieve it may not be regarded as “unfair.” That justification might apply to the rent regulation in the present case, apart from the single feature under attack here.

Appellants do not contest the validity of rent regulation in general. They acknowledge that the city may constitutionally set a “reasonable rent” according to the statutory minimum and the six other factors that must be considered by the hearing officer (cost of debt servicing, rental history of the unit, physical condition of the unit, changes in housing services, other financial information provided by the landlord, and market value rents for similar units). San Jose Municipal Ordinance 19696, § 5703.28(c) (1979). Appellants’ only claim is that a reduction of a rent increase below what would otherwise be a “reasonable rent” under this scheme may not, consistently with the Constitution, be based on consideration of the seventh factor the hardship to the tenant as defined in § 5703.29. I think they are right.

Once the other six factors of the Ordinance have been applied to a landlord’s property, so that he is receiving only a reasonable return, he can no longer be regarded as a “cause” of exorbitantly priced housing; nor is he any longer reaping distinctively high profits from the housing shortage. The seventh factor, the “hardship” provision, is invoked to meet a quite different social problem: the existence of some renters who are too poor to afford even reasonably priced housing. But *that* problem is no more caused or exploited by landlords than it is by the grocers who sell needy renters their food, or the department stores that sell them their clothes, or the employers who pay them

their wages, or the citizens of San Jose holding the higher paying jobs from which they are excluded. And even if the neediness of renters could be regarded as a problem distinctively attributable to landlords in general, it is not remotely attributable to the *particular* landlords that the Ordinance singles out – namely, those who happen to have a “hardship” tenant at the present time, or who may happen to rent to a “hardship” tenant in the future, or whose current or future affluent tenants may happen to decline into the “hardship” category.

The traditional manner in which American government has met the problem of those who cannot pay reasonable prices for privately sold necessities – a problem caused by the society at large – has been the distribution to such persons of funds raised from the public at large through taxes, either in cash (welfare payments) or in goods (public housing, publicly subsidized housing, and food stamps). Unless we are to abandon the guiding principle of the Takings Clause that “public burdens ... should be borne by the public as a whole,” *Armstrong*, 364 U.S., at 49, this is the only manner that our Constitution permits. The fact that government acts through the landlord-tenant relationship does not magically transform general public welfare, which must be supported by all the public, into mere “economic regulation,” which can disproportionately burden particular individuals. Here the city is not “regulating” rents in the relevant sense of preventing rents that are excessive; rather, it is using the occasion of rent regulation (accomplished by the rest of the Ordinance) to establish a welfare program privately funded by those landlords who happen to have “hardship” tenants.

Of course all economic regulation effects wealth transfer. When excessive rents are forbidden, for example, landlords as a class become poorer and tenants as a class (or at least incumbent tenants as a class) become richer. Singling out landlords to be the transferors may be within our

traditional constitutional notions of fairness, because they can plausibly be regarded as the source or the beneficiary of the high-rent problem. Once such a connection is no longer required, however, there is no end to the social transformations that can be accomplished by so-called “regulation,” at great expense to the democratic process.

The politically attractive feature of regulation is not that it permits wealth transfers to be achieved that could not be achieved otherwise; but rather that it permits them to be achieved “off budget,” with relative invisibility and thus relative immunity from normal democratic processes. San Jose might, for example, have accomplished something like the result here by simply raising the real estate tax upon rental properties and using the additional revenues thus acquired to pay part of the rents of “hardship” tenants. It seems to me doubtful, however, whether the citizens of San Jose would allow funds in the municipal treasury, from wherever derived, to be distributed to a family of four with income as high as \$32,400 a year – the generous maximum necessary to qualify automatically as a “hardship” tenant under the rental Ordinance.² The voters might well see other, more pressing, social priorities. And of course what \$32,400-a-year renters can acquire through spurious “regulation,” other groups can acquire as well. Once the door is opened it is not unreasonable to expect price regulations requiring private businesses to give special discounts to senior citizens (no matter how affluent), or to

² Under the San Jose Ordinance, “hardship” tenants include (though are not limited to) those whose “household income and monthly housing expense meets *sic* the criteria” for assistance under the existing housing provisions of § 8 of the Housing and Community Development Act of 1974, 42 U.S.C. § 1437f (1982 ed. and Supp. III). The United States Department of Housing and Urban Development currently limits assistance under these provisions for families of four in the San Jose area to those who earn \$32,400 or less per year. Memorandum from U.S. Dept. of Housing and Urban Development, Assistant Secretary for Housing-Federal Housing Comm’r, Income Limits for Lower Income and Very Low-Income Families Under the Housing Act of 1937 (Jan. 15, 1988).

students, the handicapped, or war veterans. Subsidies for these groups may well be a good idea, but because of the operation of the Takings Clause our governmental system has required them to be applied, in general, through the process of taxing and spending, where both economic effects and competing priorities are more evident.

That fostering of an intelligent democratic process is one of the happy effects of the constitutional prescription – perhaps accidental, perhaps not. Its essence, however, is simply the unfairness of making one citizen pay, in some fashion other than taxes, to remedy a social problem that is none of his creation. As the Supreme Court of New Jersey said in finding unconstitutional a scheme displaying, among other defects, the same vice I find dispositive here:

A legislative category of economically needy senior citizens is sound, proper and sustainable as a rational classification. But compelled subsidization by landlords or by tenants who happen to live in an apartment building with senior citizens is an improper and unconstitutional method of solving the problem.

Property Owners Assn. v. North Bergen, 74 N.J. 327, 339 (1977).

I would hold that the seventh factor in § 5703.28(c) of the San Jose Ordinance effects a taking of property without just compensation.

4.3. Doctrine

4.3.1. Ad hoc Takings

Penn Central Transportation Co., v. New York City,
438 U.S. 104 (1978)

Daniel M. Gribbon argued the cause for appellants. With him on the briefs were *John R. Bolton* and *Carl Helmetag, Jr.*

Leonard Koerner argued the cause for appellees. With him on the brief were *Allen G. Schwartz*, *L. Kevin Sheridan*, and *Dorothy Miner*.

Assistant Attorney General Wald argued the cause for the United States as *amicus curiae* urging affirmance. On the brief were *Solicitor General McCree*, *Assistant Attorney General Moorman*, *Peter R. Steenland, Jr.*, and *Carl Strass*.¹

Briefs of *amici curiae* were filed by *Evelle J. Younger*, Attorney General, *E. Clement Shute, Jr.*, and *Robert H. Connett*, Assistant Attorneys General, and *Richard C. Jacobs*, Deputy Attorney General, for the State of California; and by *Eugene J. Morris* for the Real Estate Board of New York, Inc.

MR. JUSTICE BRENNAN delivered the opinion of the Court.

The question presented is whether a city may, as part of a comprehensive program to preserve historic landmarks and historic districts, place restrictions on the development of individual historic landmarks—in addition to those imposed by applicable zoning ordinances—without effecting a “taking” requiring the payment of “just compensation.” Specifically, we must decide whether the application of New York City’s Landmarks Preservation Law to the parcel of land occupied by Grand Central Terminal has “taken” its owners’ property in violation of the Fifth and Fourteenth Amendments.

¹ Briefs of *amici curiae* urging affirmance were filed by *David Bonderman* and *Frank B. Gilbert* for the National Trust for Historic Preservation et al.; by *Paul S. Byard*, *Ralph C. Menapace, Jr.*, *Terence H. Benbow*, *William C. Chanler*, *Richard H. Pershan*, *Francis T. P. Plimpton*, *Whitney North Seymour*, and *Bethuel M. Webster* for the Committee to Save Grand Central Station et al.; and by *Louis J. Lefkowitz*, Attorney General, *Samuel A. Hirshowitz*, First Assistant Attorney General, and *Philip Weinberg*, Assistant Attorney General, for the State of New York.

I

A

Over the past 50 years, all 50 States and over 500 municipalities have enacted laws to encourage or require the preservation of buildings and areas with historic or aesthetic importance.² These nationwide legislative efforts have been precipitated by two concerns. The first is recognition that, in recent years, large numbers of historic structures, landmarks, and areas have been destroyed³ without adequate consideration of either the values represented therein or the possibility of preserving the destroyed properties for use in economically productive ways.⁴ The second is a widely shared belief that structures with special historic, cultural, or architectural significance enhance the quality of life for all. Not only do these buildings and their workmanship represent the lessons of the past and embody precious features of our heritage, they serve as examples of quality for today. “[H]istoric conservation is but one aspect of the much larger problem,

² See National Trust for Historic Preservation, *A Guide to State Historic Preservation Programs* (1976); National Trust for Historic Preservation, *Directory of Landmark and Historic District Commissions* (1976). In addition to these state and municipal legislative efforts, Congress has determined that “the historical and cultural foundations of the Nation should be preserved as a living part of our community life and development in order to give a sense of orientation to the American people,” National Historic Preservation Act of 1966, 80 Stat. 915, 16 U. S. C. § 470 (b) (1976 ed.), and has enacted a series of measures designed to encourage preservation of sites and structures of historic, architectural, or cultural significance. See generally Gray, *The Response of Federal Legislation to Historic Preservation*, 36 *Law & Contemp. Prob.* 314 (1971).

³ Over one-half of the buildings listed in the Historic American Buildings Survey, begun by the Federal Government in 1933, have been destroyed. See Costonis, *The Chicago Plan: Incentive Zoning and the Preservation of Urban Landmarks*, 85 *Harv. L. Rev.* 574, 574 n. 1 (1972), citing Huxtable, *Bank’s Building Plan Sets Off Debate on “Progress,”* *N. Y. Times*, Jan. 17, 1971, section 8, p. 1, col. 2.

⁴ See, e. g., N. Y. C. Admin. Code § 205-1.0 (a) (1976).

basically an environmental one, of enhancing—or perhaps developing for the first time—the quality of life for people.”⁵

New York City, responding to similar concerns and acting pursuant to a New York State enabling Act,⁶ adopted its Landmarks Preservation Law in 1965. See N. Y. C. Admin. Code, ch. 8-A, § 205-1.0 *et seq.* (1976). The city acted from the conviction that “the standing of [New York City] as a world-wide tourist center and world capital of business, culture and government” would be threatened if legislation were not enacted to protect historic landmarks and neighborhoods from precipitate decisions to destroy or fundamentally alter their character. § 205-1.0 (a). The city believed that comprehensive measures to safeguard desirable features of the existing urban fabric would benefit its citizens in a variety of ways: *e. g.*, fostering “civic pride in the beauty and noble accomplishments of the past”; protecting and enhancing “the city’s attractions to tourists and visitors”; “support[ing] and stimul[ating] business and industry”; “strengthen[ing] the economy of the city”; and promoting “the use of historic districts, landmarks, interior landmarks and scenic landmarks for the education, pleasure and welfare of the people of the city.” § 205-1.0 (b).

The New York City law is typical of many urban landmark laws in that its primary method of achieving its goals is not by acquisitions of historic properties,⁷ but rather by

⁵ Gilbert, Introduction, *Precedents for the Future*, 36 *Law & Contemp. Prob.* 311, 312 (1971), quoting address by Robert Stipe, 1971 Conference on Preservation Law, Washington, D. C., May 1, 1971 (unpublished text, pp. 6-7).

⁶ See N. Y. Gen. Mun. Law § 96-a (McKinney 1977). It declares that it is the public policy of the State of New York to preserve structures and areas with special historical or aesthetic interest or value and authorizes local governments to impose reasonable restrictions to perpetuate such structures and areas.

⁷ The consensus is that widespread public ownership of historic properties in urban settings is neither feasible nor wise. Public ownership reduces the tax base, burdens the public budget with costs of acquisitions and maintenance, and results in the preservation of public buildings as museums and similar facilities, rather than as economically productive features of the urban scene. See Wilson & Winkler, *The*

involving public entities in land-use decisions affecting these properties and providing services, standards, controls, and incentives that will encourage preservation by private owners and users.⁸ While the law does place special restrictions on landmark properties as a necessary feature to the attainment of its larger objectives, the major theme of the law is to ensure the owners of any such properties both a “reasonable return” on their investments and maximum latitude to use their parcels for purposes not inconsistent with the preservation goals.

... .

B

This case involves the application of New York City’s Landmarks Preservation Law to Grand Central Terminal (Terminal). The Terminal, which is owned by the Penn Central Transportation Co. and its affiliates (Penn Central), is one of New York City’s most famous buildings. Opened in 1913, it is regarded not only as providing an ingenious engineering solution to the problems presented by urban railroad stations, but also as a magnificent example of the French beaux-arts style.

... .

On August 2, 1967, following a public hearing, the Commission designated the Terminal a “landmark” and designated the “city tax block” it occupies a “landmark site.”⁹ The Board of Estimate confirmed this action on

Response of State Legislation to Historic Preservation, 36 Law & Contemp. Prob. 329, 330-331, 339-340 (1971).

⁸ See Costonis, *supra* n. 2, at 580-581; Wilson & Winkler, *supra* n. 6; Rankin, Operation and Interpretation of the New York City Landmark Preservation Law, 36 Law & Contemp. Prob. 366 (1971).

⁹ The Commission’s report stated:

September 21, 1967. Although appellant Penn Central had opposed the designation before the Commission, it did not seek judicial review of the final designation decision.

On January 22, 1968, appellant Penn Central, to increase its income, entered into a renewable 50-year lease and sublease agreement with appellant UGP Properties, Inc. (UGP), a wholly owned subsidiary of Union General Properties, Ltd., a United Kingdom corporation. Under the terms of the agreement, UGP was to construct a multistory office building above the Terminal. UGP promised to pay Penn Central \$1 million annually during construction and at least \$3 million annually thereafter. The rentals would be offset in part by a loss of some \$700,000 to \$1 million in net rentals presently received from concessionaires displaced by the new building.

Appellants UGP and Penn Central then applied to the Commission for permission to construct an office building atop the Terminal. Two separate plans, both designed by architect Marcel Breuer and both apparently satisfying the terms of the applicable zoning ordinance, were submitted to the Commission for approval. The first, Breuer I, provided for the construction of a 55-story office building, to be cantilevered above the existing facade and to rest on the roof of the Terminal. The second, Breuer II Revised,¹⁰ called for tearing down a portion of the Terminal that

“Grand Central Station, one of the great buildings of America, evokes a spirit that is unique in this City. It combines distinguished architecture with a brilliant engineering solution, wedded to one of the most fabulous railroad terminals of our time. Monumental in scale, this great building functions as well today as it did when built. In style, it represents the best of the French Beaux Arts.”
Record 2240.

¹⁰ Appellants also submitted a plan, denominated Breuer II, to the Commission. However, because appellants learned that Breuer II would have violated existing easements, they substituted Breuer II Revised for Breuer II, and the Commission evaluated the appropriateness only of Breuer II Revised.

included the 42d Street facade, stripping off some of the remaining features of the Terminal's facade, and constructing a 53-story office building. The Commission denied a certificate of no exterior effect on September 20, 1968. Appellants then applied for a certificate of "appropriateness" as to both proposals. After four days of hearings at which over 80 witnesses testified, the Commission denied this application as to both proposals.

The Commission's reasons for rejecting certificates respecting Breuer II Revised are summarized in the following statement: "To protect a Landmark, one does not tear it down. To perpetuate its architectural features, one does not strip them off." Record 2255. Breuer I, which would have preserved the existing vertical facades of the present structure, received more sympathetic consideration.... In conclusion, the Commission stated:

"[We have] no fixed rule against making additions to designated buildings—it all depends on how they are done But to balance a 55-story office tower above a flamboyant Beaux-Arts facade seems nothing more than an aesthetic joke. Quite simply, the tower would overwhelm the Terminal by its sheer mass. The 'addition' would be four times as high as the existing structure and would reduce the Landmark itself to the status of a curiosity.

"Landmarks cannot be divorced from their settings— particularly when the setting is a dramatic and integral part of the original concept. The Terminal, in its setting, is a great example of urban design. Such examples are not so plentiful in New York City that we can afford to lose any of the few we

have. And we must preserve them in a meaningful way—with alterations and additions of such character, scale, materials and mass as will protect, enhance and perpetuate the original design rather than overwhelm it.”

Id., at 2251.¹¹

... .

The New York Court of Appeals ... summarily rejected any claim that the Landmarks Law had “taken” property without “just compensation,” *id.*, at 329, 366 N. E. 2d, at 1274, indicating that there could be no “taking” since the law had not transferred control of the property to the city, but only restricted appellants’ exploitation of it... .

II

The issues presented by appellants are (1) whether the restrictions imposed by New York City’s law upon appellants’ exploitation of the Terminal site effect a “taking” of appellants’ property for a public use within the meaning of the Fifth Amendment, which of course is made applicable to the States through the Fourteenth Amendment, see *Chicago, B. & Q. R. Co. v. Chicago*, 166 U. S. 226, 239 (1897), and, (2), if so, whether the transferable development rights afforded appellants constitute “just compensation” within the meaning of the Fifth

¹¹ In discussing Breuer I, the Commission also referred to a number of instances in which it had approved additions to landmarks: “The office and reception wing added to Gracie Mansion and the school and church house added to the 12th Street side of the First Presbyterian Church are examples that harmonize in scale, material and character with the structures they adjoin. The new Watch Tower Bible and Tract Society building on Brooklyn Heights, though completely modern in idiom, respects the qualities of its surroundings and will enhance the Brooklyn Heights Historic District, as Butterfield House enhances West 12th Street, and Breuer’s own Whitney Museum its Madison Avenue locale.” Record 2251.

Amendment.¹² We need only address the question whether a “taking” has occurred.¹³

A

Before considering appellants’ specific contentions, it will be useful to review the factors that have shaped the

¹² Our statement of the issues is a distillation of four questions presented in the jurisdictional statement:

“Does the social and cultural desirability of preserving historical landmarks through government regulation derogate from the constitutional requirement that just compensation be paid for private property taken for public use?”

“Is Penn Central entitled to no compensation for that large but unmeasurable portion of the value of its rights to construct an office building over the Grand Central Terminal that is said to have been created by the efforts of ‘society as an organized entity’?”

“Does a finding that Penn Central has failed to establish that there is no possibility, without exercising its development rights, of earning a reasonable return on all of its remaining properties that benefit in any way from the operations of the Grand Central Terminal warrant the conclusion that no compensation need be paid for the taking of those rights?”

“Does the possibility accorded to Penn Central, under the landmark-preservation regulation, of realizing some value at some time by transferring the Terminal development rights to other buildings, under a procedure that is conceded to be defective, severely limited, procedurally complex and speculative, and that requires ultimate discretionary approval by governmental authorities, meet the constitutional requirements of just compensation as applied to landmarks?”

Jurisdictional Statement 3-4.

The first and fourth questions assume that there has been a taking and raise the problem whether, under the circumstances of this case, the transferable development rights constitute “just compensation.” The second and third questions, on the other hand, are directed to the issue whether a taking has occurred.

¹³ As is implicit in our opinion, we do not embrace the proposition that a “taking” can never occur unless government has transferred physical control over a portion of a parcel.

jurisprudence of the Fifth Amendment injunction “nor shall private property be taken for public use, without just compensation.” The question of what constitutes a “taking” for purposes of the Fifth Amendment has proved to be a problem of considerable difficulty. While this Court has recognized that the “Fifth Amendment’s guarantee ... [is] designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole,” *Armstrong v. United States*, 364 U. S. 40, 49 (1960), this Court, quite simply, has been unable to develop any “set formula” for determining when “justice and fairness” require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons. See *Goldblatt v. Hempstead*, 369 U. S. 590, 594 (1962). Indeed, we have frequently observed that whether a particular restriction will be rendered invalid by the government’s failure to pay for any losses proximately caused by it depends largely “upon the particular circumstances [in that] case.” *United States v. Central Eureka Mining Co.*, 357 U. S. 155, 168 (1958); see *United States v. Caltex, Inc.*, 344 U. S. 149, 156 (1952).

In engaging in these essentially ad hoc, factual inquiries, the Court’s decisions have identified several factors that have particular significance. The economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are, of course, relevant considerations. See *Goldblatt v. Hempstead*, *supra*, at 594. So, too, is the character of the governmental action. A “taking” may more readily be found when the interference with property can be characterized as a physical invasion by government, see, e. g., *United States v. Causby*, 328 U. S. 256 (1946), than when interference arises from some public

program adjusting the benefits and burdens of economic life to promote the common good.

“Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law,” *Pennsylvania Coal Co. v. Mahon*, 260 U. S. 393, 413 (1922), and this Court has accordingly recognized, in a wide variety of contexts, that government may execute laws or programs that adversely affect recognized economic values. Exercises of the taxing power are one obvious example. A second are the decisions in which this Court has dismissed “taking” challenges on the ground that, while the challenged government action caused economic harm, it did not interfere with interests that were sufficiently bound up with the reasonable expectations of the claimant to constitute “property” for Fifth Amendment purposes. See, e. g., *United States v. Willow River Power Co.*, 324 U. S. 499 (1945) (interest in high-water level of river for runoff for tailwaters to maintain power head is not property); *United States v. Chandler-Dunbar Water Power Co.*, 229 U. S. 53 (1913) (no property interest can exist in navigable waters); see also *Demorest v. City Bank Co.*, 321 U. S. 36 (1944); *Muhlker v. Harlem R. Co.*, 197 U. S. 544 (1905); Sax, Takings and the Police Power, 74 Yale L. J. 36, 61-62 (1964).

More importantly for the present case, in instances in which a state tribunal reasonably concluded that “the health, safety, morals, or general welfare” would be promoted by prohibiting particular contemplated uses of land, this Court has upheld land-use regulations that destroyed or adversely affected recognized real property interests. See *Nectow v. Cambridge*, 277 U. S. 183, 188 (1928). Zoning laws are, of course, the classic example, see *Euclid v. Ambler Realty Co.*, 272 U. S. 365 (1926) (prohibition of industrial use); *Gorieb v. Fox*, 274 U. S. 603, 608 (1927) (requirement that portions of parcels be left unbuilt); *Welch v. Swasey*, 214 U. S. 91 (1909) (height restriction), which

have been viewed as permissible governmental action even when prohibiting the most beneficial use of the property. See *Goldblatt v. Hempstead*, *supra*, at 592-593, and cases cited; see also *Eastlake v. Forest City Enterprises, Inc.*, 426 U. S. 668, 674 n. 8 (1976).

Zoning laws generally do not affect existing uses of real property, but “taking” challenges have also been held to be without merit in a wide variety of situations when the challenged governmental actions prohibited a beneficial use to which individual parcels had previously been devoted and thus caused substantial individualized harm. *Miller v. Schoene*, 276 U. S. 272 (1928), is illustrative. In that case, a state entomologist, acting pursuant to a state statute, ordered the claimants to cut down a large number of ornamental red cedar trees because they produced cedar rust fatal to apple trees cultivated nearby. Although the statute provided for recovery of any expense incurred in removing the cedars, and permitted claimants to use the felled trees, it did not provide compensation for the value of the standing trees or for the resulting decrease in market value of the properties as a whole. A unanimous Court held that this latter omission did not render the statute invalid. The Court held that the State might properly make “a choice between the preservation of one class of property and that of the other” and since the apple industry was important in the State involved, concluded that the State had not exceeded “its constitutional powers by deciding upon the destruction of one class of property [without compensation] in order to save another which, in the judgment of the legislature, is of greater value to the public.” *Id.*, at 279.

....

Pennsylvania Coal Co. v. Mahon, 260 U. S. 393 (1922), is the leading case for the proposition that a state statute that substantially furthers important public policies may so frustrate distinct investment-backed expectations as to

amount to a “taking.” There the claimant had sold the surface rights to particular parcels of property, but expressly reserved the right to remove the coal thereunder. A Pennsylvania statute, enacted after the transactions, forbade any mining of coal that caused the subsidence of any house, unless the house was the property of the owner of the underlying coal and was more than 150 feet from the improved property of another. Because the statute made it commercially impracticable to mine the coal, *id.*, at 414, and thus had nearly the same effect as the complete destruction of rights claimant had reserved from the owners of the surface land, see *id.*, at 414-415, the Court held that the statute was invalid as effecting a “taking” without just compensation. See also *Armstrong v. United States*, 364 U. S. 40 (1960) (Government’s complete destruction of a materialman’s lien in certain property held a “taking”); *Hudson Water Co. v. McCarter*, 209 U. S. 349, 355 (1908) (if height restriction makes property wholly useless “the rights of property ... prevail over the other public interest” and compensation is required). See generally Michelman, Property, Utility, and Fairness: Comments on the Ethical Foundations of “Just Compensation” Law, 80 Harv. L. Rev. 1165, 1229-1234 (1967).

Finally, government actions that may be characterized as acquisitions of resources to permit or facilitate uniquely public functions have often been held to constitute “takings.” *United States v. Causby*, 328 U. S. 256 (1946), is illustrative. In holding that direct overflights above the claimant’s land, that destroyed the present use of the land as a chicken farm, constituted a “taking” *Causby* emphasized that Government had not “merely destroyed property [but was] using a part of it for the flight of its planes.” *Id.*, at 262-263, n. 7. See also *Griggs v. Allegheny County*, 369 U. S. 84 (1962) (overflights held a taking); *Portsmouth Co. v. United States*, 260 U. S. 327 (1922) (United States military installations’ repeated firing of guns over

claimant's land is a taking); *United States v. Cress*, 243 U. S. 316 (1917) (repeated floodings of land caused by water project is a taking); but see *YMCA v. United States*, 395 U. S. 85 (1969) (damage caused to building when federal officers who were seeking to protect building were attacked by rioters held not a taking). See generally Michelman, *supra*, at 1226-1229; Sax, Takings and the Police Power, 74 Yale L. J. 36 (1964).

B

In contending that the New York City law has “taken” their property in violation of the Fifth and Fourteenth Amendments, appellants make a series of arguments, which, while tailored to the facts of this case, essentially urge that any substantial restriction imposed pursuant to a landmark law must be accompanied by just compensation if it is to be constitutional. Before considering these, we emphasize what is not in dispute. Because this Court has recognized, in a number of settings, that States and cities may enact land-use restrictions or controls to enhance the quality of life by preserving the character and desirable aesthetic features of a city, see *New Orleans v. Dukes*, 427 U. S. 297 (1976); *Young v. American Mini Theatres, Inc.*, 427 U. S. 50 (1976); *Village of Belle Terre v. Boraas*, 416 U. S. 1, 9-10 (1974); *Berman v. Parker*, 348 U. S. 26, 33 (1954); *Welch v. Swasey*, 214 U. S., at 108, appellants do not contest that New York City's objective of preserving structures and areas with special historic, architectural, or cultural significance is an entirely permissible governmental goal. They also do not dispute that the restrictions imposed on its parcel are appropriate means of securing the purposes of the New York City law. Finally, appellants do not challenge any of the specific factual premises of the decision below. They accept for present purposes both that the parcel of land occupied by Grand Central Terminal must, in its present state, be regarded as capable of earning a

reasonable return,¹⁴ and that the transferable development rights afforded appellants by virtue of the Terminal's designation as a landmark are valuable, even if not as valuable as the rights to construct above the Terminal. In appellants' view none of these factors derogate from their claim that New York City's law has effected a "taking."

They first observe that the airspace above the Terminal is a valuable property interest, citing *United States v. Causby, supra*. They urge that the Landmarks Law has deprived them of any gainful use of their "air rights" above the Terminal and that, irrespective of the value of the remainder of their parcel, the city has "taken" their right to this superjacent airspace, thus entitling them to "just compensation" measured by the fair market value of these air rights.

Apart from our own disagreement with appellants' characterization of the effect of the New York City law, see *infra*, at 134-135, the submission that appellants may establish a "taking" simply by showing that they have been denied the ability to exploit a property interest that they heretofore had believed was available for development is quite simply untenable. Were this the rule, this Court would have erred not only in upholding laws restricting the development of air rights, see *Welch v. Swasey, supra*, but also in approving those prohibiting both the subjacent, see *Goldblatt v. Hempstead*, 369 U. S. 590 (1962), and the lateral, see *Gorieb v. Fox*, 274 U. S. 603 (1927), development of

¹⁴ Both the Jurisdictional Statement 7-8, n. 7, and Brief for Appellants 8 n. 7 state that appellants are not seeking review of the New York courts' determination that Penn Central could earn a "reasonable return" on its investment in the Terminal. Although appellants suggest in their reply brief that the factual conclusions of the New York courts cannot be sustained unless we accept the rationale of the New York Court of Appeals, see Reply Brief for Appellants 12 n. 15, it is apparent that the findings concerning Penn Central's ability to profit from the Terminal depend in no way on the Court of Appeals' rationale.

particular parcels.¹⁵ “Taking” jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, this Court focuses rather both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole—here, the city tax block designated as the “landmark site.”

Secondly, appellants, focusing on the character and impact of the New York City law, argue that it effects a “taking” because its operation has significantly diminished the value of the Terminal site. Appellants concede that the decisions sustaining other land-use regulations, which, like the New York City law, are reasonably related to the promotion of the general welfare, uniformly reject the proposition that diminution in property value, standing alone, can establish a “taking,” see *Euclid v. Ambler Realty Co.*, 272 U. S. 365 (1926) (75% diminution in value caused by zoning law); *Hadacheck v. Sebastian*, 239 U. S. 394 (1915) (87 1/2% diminution in value); cf. *Eastlake v. Forest City Enterprises, Inc.*, 426 U. S., at 674 n. 8, and that the “taking” issue in these contexts is resolved by focusing on the uses the regulations permit. See also *Goldblatt v. Hempstead*, *supra*. Appellants, moreover, also do not dispute that a showing of diminution in property value would not establish a “taking” if the restriction had been imposed as a result of historic-district legislation, see generally *Maher v. New Orleans*, 516 F. 2d 1051 (CA5 1975), but appellants argue

¹⁵ These cases dispose of any contention that might be based on *Pennsylvania Coal Co. v. Mahon*, 260 U. S. 393 (1922), that full use of air rights is so bound up with the investment-backed expectations of appellants that governmental deprivation of these rights invariably—*i. e.*, irrespective of the impact of the restriction on the value of the parcel as a whole—constitutes a “taking.” Similarly, *Welch*, *Goldblatt*, and *Gorieb* illustrate the fallacy of appellants’ related contention that a “taking” must be found to have occurred whenever the land-use restriction may be characterized as imposing a “servitude” on the claimant’s parcel.

that New York City's regulation of individual landmarks is fundamentally different from zoning or from historic-district legislation because the controls imposed by New York City's law apply only to individuals who own selected properties.

Stated baldly, appellants' position appears to be that the only means of ensuring that selected owners are not singled out to endure financial hardship for no reason is to hold that any restriction imposed on individual landmarks pursuant to the New York City scheme is a "taking" requiring the payment of "just compensation." Agreement with this argument would, of course, invalidate not just New York City's law, but all comparable landmark legislation in the Nation. We find no merit in it.

....

Next, appellants observe that New York City's law differs from zoning laws and historic-district ordinances in that the Landmarks Law does not impose identical or similar restrictions on all structures located in particular physical communities. It follows, they argue, that New York City's law is inherently incapable of producing the fair and equitable distribution of benefits and burdens of governmental action which is characteristic of zoning laws and historic-district legislation and which they maintain is a constitutional requirement if "just compensation" is not to be afforded. It is, of course, true that the Landmarks Law has a more severe impact on some landowners than on others, but that in itself does not mean that the law effects a "taking." Legislation designed to promote the general welfare commonly burdens some more than others. The owners of the brickyard in *Hadacheck*, of the cedar trees in *Miller v. Schoene*, and of the gravel and sand mine in *Goldblatt v. Hempstead*, were uniquely burdened by the legislation

sustained in those cases.¹⁶ Similarly, zoning laws often affect some property owners more severely than others but have not been held to be invalid on that account. For example, the property owner in *Euclid* who wished to use its property for industrial purposes was affected far more severely by the ordinance than its neighbors who wished to use their land for residences.

In any event, appellants' repeated suggestions that they are solely burdened and unbenefited is factually inaccurate. This contention overlooks the fact that the New York City law applies to vast numbers of structures in the city in addition to the Terminal—all the structures contained in the 31 historic districts and over 400 individual landmarks, many of which are close to the Terminal.¹⁷ Unless we are to reject the judgment of the New York City Council that the preservation of landmarks benefits all New York citizens and all structures, both economically and by improving the quality of life in the city as a whole—which we are unwilling

¹⁶ Appellants attempt to distinguish these cases on the ground that, in each, government was prohibiting a “noxious” use of land and that in the present case, in contrast, appellants’ proposed construction above the Terminal would be beneficial. We observe that the uses in issue in *Hadacheck*, *Miller*, and *Goldblatt* were perfectly lawful in themselves. They involved no “blameworthiness, ... moral wrongdoing or conscious act of dangerous risk-taking which induce[d society] to shift the cost to a particular individual.” Sax, *Takings and the Police Power*, 74 *Yale L. J.* 36, 50 (1964). These cases are better understood as resting not on any supposed “noxious” quality of the prohibited uses but rather on the ground that the restrictions were reasonably related to the implementation of a policy—not unlike historic preservation—expected to produce a widespread public benefit and applicable to all similarly situated property.

Nor, correlatively, can it be asserted that the destruction or fundamental alteration of a historic landmark is not harmful. The suggestion that the beneficial quality of appellants’ proposed construction is established by the fact that the construction would have been consistent with applicable zoning laws ignores the development in sensibilities and ideals reflected in landmark legislation like New York City’s. Cf. *West Bros. Brick Co. v. Alexandria*, 169 Va. 271, 282-283, 192 S. E. 881, 885-886, appeal dismissed for want of a substantial federal question, 302 U. S. 658 (1937).

¹⁷ There are some 53 designated landmarks and 5 historic districts or scenic landmarks in Manhattan between 14th and 59th Streets. See Landmarks Preservation Commission, *Landmarks and Historic Districts* (1977).

to do—we cannot conclude that the owners of the Terminal have in no sense been benefited by the Landmarks Law. Doubtless appellants believe they are more burdened than benefited by the law, but that must have been true, too, of the property owners in *Miller*, *Hadacheck*, *Euclid*, and *Goldblatt*.¹⁸

Appellants' final broad-based attack would have us treat the law as an instance, like that in *United States v. Causby*, in which government, acting in an enterprise capacity, has appropriated part of their property for some strictly governmental purpose. Apart from the fact that *Causby* was a case of invasion of airspace that destroyed the use of the farm beneath and this New York City law has in nowise impaired the present use of the Terminal, the Landmarks Law neither exploits appellants' parcel for city purposes nor facilitates nor arises from any entrepreneurial operations of the city. The situation is not remotely like that in *Causby* where the airspace above the property was in the flight pattern for military aircraft. The Landmarks Law's effect is simply to prohibit appellants or anyone else from occupying portions of the airspace above the Terminal, while permitting appellants to use the remainder of the parcel in a gainful fashion. This is no more an appropriation of property by government for its own uses than is a zoning law prohibiting, for "aesthetic" reasons, two or more adult theaters within a specified area, see *Young v. American Mini Theatres, Inc.*, 427 U. S. 50 (1976), or a safety regulation prohibiting excavations below a certain level. See *Goldblatt v. Hempstead*.

C

¹⁸ It is, of course, true that the fact the duties imposed by zoning and historic-district legislation apply throughout particular physical communities provides assurances against arbitrariness, but the applicability of the Landmarks Law to a large number of parcels in the city, in our view, provides comparable, if not identical, assurances.

Rejection of appellants' broad arguments is not, however, the end of our inquiry, for all we thus far have established is that the New York City law is not rendered invalid by its failure to provide "just compensation" whenever a landmark owner is restricted in the exploitation of property interests, such as air rights, to a greater extent than provided for under applicable zoning laws. We now must consider whether the interference with appellants' property is of such a magnitude that "there must be an exercise of eminent domain and compensation to sustain [it]." *Pennsylvania Coal Co. v. Mahon*, 260 U. S., at 413. That inquiry may be narrowed to the question of the severity of the impact of the law on appellants' parcel, and its resolution in turn requires a careful assessment of the impact of the regulation on the Terminal site.

Unlike the governmental acts in *Goldblatt*, *Miller*, *Causby*, *Griggs*, and *Hadacheck*, the New York City law does not interfere in any way with the present uses of the Terminal. Its designation as a landmark not only permits but contemplates that appellants may continue to use the property precisely as it has been used for the past 65 years: as a railroad terminal containing office space and concessions. So the law does not interfere with what must be regarded as Penn Central's primary expectation concerning the use of the parcel. More importantly, on this record, we must regard the New York City law as permitting Penn Central not only to profit from the Terminal but also to obtain a "reasonable return" on its investment.

Appellants, moreover, exaggerate the effect of the law on their ability to make use of the air rights above the Terminal in two respects.¹⁹ First, it simply cannot be maintained, on this record, that appellants have been

¹⁹ Appellants, of course, argue at length that the transferable development rights, while valuable, do not constitute "just compensation." Brief for Appellants 36-43.

prohibited from occupying *any* portion of the airspace above the Terminal. While the Commission's actions in denying applications to construct an office building in excess of 50 stories above the Terminal may indicate that it will refuse to issue a certificate of appropriateness for any comparably sized structure, nothing the Commission has said or done suggests an intention to prohibit *any* construction above the Terminal. The Commission's report emphasized that whether any construction would be allowed depended upon whether the proposed addition "would harmonize in scale, material, and character with [the Terminal]." Record 2251. Since appellants have not sought approval for the construction of a smaller structure, we do not know that appellants will be denied any use of any portion of the airspace above the Terminal.²⁰

Second, to the extent appellants have been denied the right to build above the Terminal, it is not literally accurate to say that they have been denied *all* use of even those pre-existing air rights. Their ability to use these rights has not been abrogated; they are made transferable to at least eight parcels in the vicinity of the Terminal, one or two of which have been found suitable for the construction of new office buildings. Although appellants and others have argued that New York City's transferable development-rights program is far from ideal,²¹ the New York courts here supportably found that, at least in the case of the Terminal, the rights afforded are valuable. While these rights may well not have constituted "just compensation" if a "taking" had occurred, the rights nevertheless undoubtedly mitigate whatever financial burdens the law has imposed on appellants and, for that reason, are to be taken into account in considering

²⁰ Counsel for appellants admitted at oral argument that the Commission has not suggested that it would not, for example, approve a 20-story office tower along the lines of that which was part of the original plan for the Terminal. See Tr. of Oral Arg. 19.

²¹ See Costonis, *supra* n. 2, at 585-589.

the impact of regulation. Cf. *Goldblatt v. Hempstead*, 369 U. S., at 594 n. 3.

On this record, we conclude that the application of New York City's Landmarks Law has not effected a "taking" of appellants' property. The restrictions imposed are substantially related to the promotion of the general welfare and not only permit reasonable beneficial use of the landmark site but also afford appellants opportunities further to enhance not only the Terminal site proper but also other properties.²²

Affirmed.

²² We emphasize that our holding today is on the present record, which in turn is based on Penn Central's present ability to use the Terminal for its intended purposes and in a gainful fashion. The city conceded at oral argument that if appellants can demonstrate at some point in the future that circumstances have so changed that the Terminal ceases to be "economically viable," appellants may obtain relief. See Tr. of Oral Arg. 42-43.

4.3.2. Per se Takings

Lucas v. South Carolina Coastal

505 U.S. 1003 (1992)

A. Camden Lewis argued the cause for petitioner. With him on the briefs were *Gerald M. Finkel* and *David J. Bederman*.

C. C. Harness III argued the cause for respondent. With him on the brief were *T. Travis Medlock*, Attorney General of South Carolina, *Kenneth P. Woodington*, Senior Assistant Attorney General, and *Richard J. Lazarus*.

JUSTICE SCALIA, delivered the opinion of the Court.

In 1986, petitioner David H. Lucas paid \$975,000 for two residential lots on the Isle of Palms in Charleston County, South Carolina, on which he intended to build single-family homes. In 1988, however, the South Carolina Legislature enacted the Beachfront Management Act, S. C. Code Ann. § 48-39-250 *et seq.* (Supp. 1990), which had the direct effect of barring petitioner from erecting any permanent habitable structures on his two parcels. See § 48-39-290(A). A state trial court found that this prohibition rendered Lucas's parcels "valueless." App. to Pet. for Cert. 37. This case requires us to decide whether the Act's dramatic effect on the economic value of Lucas's lots accomplished a taking of private property under the Fifth and Fourteenth Amendments requiring the payment of "just compensation." U. S. Const., Amdt. 5.

I

A

South Carolina's expressed interest in intensively managing development activities in the so-called "coastal zone" dates from 1977 when, in the aftermath of Congress's passage of the federal Coastal Zone Management Act of 1972, 86 Stat. 1280, as amended, 16 U. S. C. § 1451 *et seq.*, the legislature enacted a Coastal Zone Management Act of its own. See S. C. Code Ann. § 48-39-10 *et seq.* (1987). In its original form,

the South Carolina Act required owners of coastal zone land that qualified as a “critical area” (defined in the legislation to include beaches and immediately adjacent sand dunes, § 48-39-10(J)) to obtain a permit from the newly created South Carolina Coastal Council (Council) (respondent here) prior to committing the land to a “use other than the use the critical area was devoted to on [September 28, 1977].” § 48-39-130(A).

In the late 1970’s, Lucas and others began extensive residential development of the Isle of Palms, a barrier island situated eastward of the city of Charleston. Toward the close of the development cycle for one residential subdivision known as “Beachwood East,” Lucas in 1986 purchased the two lots at issue in this litigation for his own account. No portion of the lots, which were located approximately 300 feet from the beach, qualified as a “critical area” under the 1977 Act; accordingly, at the time Lucas acquired these parcels, he was not legally obliged to obtain a permit from the Council in advance of any development activity. His intention with respect to the lots was to do what the owners of the immediately adjacent parcels had already done: erect singlefamily residences. He commissioned architectural drawings for this purpose.

The Beachfront Management Act brought Lucas’s plans to an abrupt end. Under that 1988 legislation, the Council was directed to establish a “baseline” connecting the landwardmost “point[s] of erosion ... during the past forty years” in the region of the Isle of Palms that includes Lucas’s lots. S. C. Code Ann. § 48-39-280(A)(2) (Supp. 1988).¹ In action not challenged here, the Council fixed this

¹ This specialized historical method of determining the baseline applied because the Beachwood East subdivision is located adjacent to a so-called “inlet erosion zone” (defined in the Act to mean “a segment of shoreline along or adjacent to tidal inlets which are directly influenced by the inlet and its associated shoals,” S. C. Code Ann. § 48-39-270(7) (Supp.1988)) that is “not stabilized by jetties, terminal groins, or other structures,” § 48-39-280(A)(2). For areas other than these unstabilized inlet erosion

baseline landward of Lucas's parcels. That was significant, for under the Act construction of occupable improvements² was flatly prohibited seaward of a line drawn 20 feet landward of, and parallel to, the baseline. § 48-39-290(A). The Act provided no exceptions.

B

Lucas promptly filed suit in the South Carolina Court of Common Pleas, contending that the Beachfront Management Act's construction bar effected a taking of his property without just compensation. Lucas did not take issue with the validity of the Act as a lawful exercise of South Carolina's police power, but contended that the Act's complete extinguishment of his property's value entitled him to compensation regardless of whether the legislature had acted in furtherance of legitimate police power objectives. Following a bench trial, the court agreed. Among its factual determinations was the finding that "at the time Lucas purchased the two lots, both were zoned for single-family residential construction and ... there were no restrictions imposed upon such use of the property by either the State of South Carolina, the County of Charleston, or the Town of the Isle of Palms." App. to Pet. for Cert. 36. The trial court further found that the Beachfront Management Act decreed a permanent ban on construction insofar as Lucas's lots were concerned, and that this prohibition "deprive[d] Lucas of any reasonable economic use of the lots, ... eliminated the unrestricted right of use, and render[ed] them valueless." *Id.*, at 37. The court thus concluded that Lucas's properties had been "taken" by operation of the Act, and it ordered respondent

zones, the statute directs that the baseline be established along "the crest of an ideal primary oceanfront sand dune." § 48-39-280(A)(1).

² The Act did allow the construction of certain nonhabitable improvements, *e. g.*, "wooden walkways no larger in width than six feet," and "small wooden decks no larger than one hundred forty-four square feet." §§ 48-39-290(A)(1) and (2).

to pay “just compensation” in the amount of \$1,232,387.50. *Id.*, at 40.

The Supreme Court of South Carolina reversed. It found dispositive what it described as Lucas’s concession “that the Beachfront Management Act [was] properly and validly designed to preserve ... South Carolina’s beaches.” 304 S. C. 376, 379, 404 S. E. 2d 895, 896 (1991). Failing an attack on the validity of the statute as such, the court believed itself bound to accept the “uncontested ... findings” of the South Carolina Legislature that new construction in the coastal zone—such as petitioner intended—threatened this public resource. *Id.*, at 383, 404 S. E. 2d, at 898. The court ruled that when a regulation respecting the use of property is designed “to prevent serious public harm,” *id.*, at 383, 404 S. E. 2d, at 899 (citing, *inter alia*, *Mugler v. Kansas*, 123 U. S. 623 (1887)), no compensation is owing under the Takings Clause regardless of the regulation’s effect on the property’s value.

Two justices dissented. They acknowledged that our *Mugler* line of cases recognizes governmental power to prohibit “noxious” uses of property—*i. e.*, uses of property akin to “public nuisances”—without having to pay compensation. But they would not have characterized the Beachfront Management Act’s “primary purpose [as] the prevention of a nuisance.” 304 S. C., at 395, 404 S. E. 2d, at 906 (Harwell, J., dissenting). To the dissenters, the chief purposes of the legislation, among them the promotion of tourism and the creation of a “habitat for indigenous flora and fauna,” could not fairly be compared to nuisance abatement. *Id.*, at 396, 404 S. E. 2d, at 906. As a consequence, they would have affirmed the trial court’s conclusion that the Act’s obliteration of the value of petitioner’s lots accomplished a taking.

We granted certiorari. 502 U. S. 966 (1991).

... .

III

A

Prior to Justice Holmes's exposition in *Pennsylvania Coal Co. v. Mahon*, 260 U. S. 393 (1922), it was generally thought that the Takings Clause reached only a "direct appropriation" of property, *Legal Tender Cases*, 12 Wall. 457, 551 (1871), or the functional equivalent of a "practical ouster of [the owner's] possession," *Transportation Co. v. Chicago*, 99 U. S. 635, 642 (1879). See also *Gibson v. United States*, 166 U. S. 269, 275-276 (1897). Justice Holmes recognized in *Mahon*, however, that if the protection against physical appropriations of private property was to be meaningfully enforced, the government's power to redefine the range of interests included in the ownership of property was necessarily constrained by constitutional limits. 260 U. S., at 414-415. If, instead, the uses of private property were subject to unbridled, uncompensated qualification under the police power, "the natural tendency of human nature [would be] to extend the qualification more and more until at last private property disappear[ed]." *Id.*, at 415. These considerations gave birth in that case to the oft-cited maxim that, "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." *Ibid.*

Nevertheless, our decision in *Mahon* offered little insight into when, and under what circumstances, a given regulation would be seen as going "too far" for purposes of the Fifth Amendment. In 70-odd years of succeeding "regulatory takings" jurisprudence, we have generally eschewed any "'set formula'" for determining how far is too far, preferring to "engag[e] in ... essentially ad hoc, factual inquiries." *Penn Central Transportation Co. v. New York City*, 438 U. S. 104, 124 (1978) (quoting *Goldblatt v. Hempstead*, 369 U. S. 590, 594 (1962)). See Epstein, Takings: Descent and Resurrection, 1987 S. Ct. Rev. 1, 4. We have, however, described at least two discrete categories of

regulatory action as compensable without case-specific inquiry into the public interest advanced in support of the restraint. The first encompasses regulations that compel the property owner to suffer a physical “invasion” of his property. In general (at least with regard to permanent invasions), no matter how minute the intrusion, and no matter how weighty the public purpose behind it, we have required compensation. For example, in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U. S. 419 (1982), we determined that New York’s law requiring landlords to allow television cable companies to emplace cable facilities in their apartment buildings constituted a taking, *id.*, at 435-440, even though the facilities occupied at most only 12 cubic feet of the landlords’ property, see *id.*, at 438, n. 16. See also *United States v. Causby*, 328 U. S. 256, 265, and n. 10 (1946) (physical invasions of airspace); cf. *Kaiser Aetna v. United States*, 444 U. S. 164 (1979) (imposition of navigational servitude upon private marina).

The second situation in which we have found categorical treatment appropriate is where regulation denies all economically beneficial or productive use of land. See *Agins*, 447 U. S., at 260; see also *Nollan v. California Coastal Comm’n*, 483 U. S. 825, 834 (1987); *Keystone Bituminous Coal Assn. v. DeBenedictis*, 480 U. S. 470, 495 (1987); *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U. S. 264, 295-296 (1981).³ As we have said on numerous

³ We will not attempt to respond to all of Justice Blackmun’s mistaken citation of case precedent. Characteristic of its nature is his assertion that the cases we discuss here stand merely for the proposition “that proof that a regulation does *not* deny an owner economic use of his property is sufficient to defeat a facial takings challenge” and not for the point that “denial of such use is sufficient to establish a takings claim regardless of any other consideration.” *Post*, at 1050, n. 11. The cases say, repeatedly and unmistakably, that “[t]he test to be applied in considering [a] facial [takings] challenge is fairly straightforward. A statute regulating the uses that can be made of property *effects a taking if it “denies an owner economically viable use of his land.”*” *Keystone*, 480 U. S., at 495 (quoting *Hodel*, 452 U. S., at 295-296 (quoting *Agins*, 447 U. S., at 260)) (emphasis added).

occasions, the Fifth Amendment is violated when land-use regulation “does not substantially advance legitimate state interests *or denies an owner economically viable use of his land.*” *Agins, supra*, at 260 (citations omitted) (emphasis added).⁴

Justice Blackmun describes that rule (which we do not invent but merely apply today) as “alter[ing] the long-settled rules of review” by foisting on the State “the burden of showing [its] regulation is not a taking.” *Post*, at 1045, 1046. This is of course wrong. Lucas had to do more than simply file a lawsuit to establish his constitutional entitlement; he had to show that the Beachfront Management Act denied him economically beneficial use of his land. Our analysis presumes the unconstitutionality of state land-use regulation only in the sense that *any* rule with exceptions presumes the invalidity of a law that violates it—for example, the rule generally prohibiting content-based restrictions on speech. See, e. g., *Simon & Schuster, Inc. v. Members of N. Y. State Crime Victims Bd.*, 502 U. S. 105, 115 (1991) (“A statute is presumptively inconsistent with the First Amendment if it imposes a financial burden on speakers because of the content of their speech”). Justice Blackmun’s real quarrel is with the substantive standard of liability we apply in this case, a longestablished standard we see no need to repudiate.

⁴ Regrettably, the rhetorical force of our “deprivation of all economically feasible use” rule is greater than its precision, since the rule does not make clear the “property interest” against which the loss of value is to be measured. When, for example, a regulation requires a developer to leave 90% of a rural tract in its natural state, it is unclear whether we would analyze the situation as one in which the owner has been deprived of all economically beneficial use of the burdened portion of the tract, or as one in which the owner has suffered a mere diminution in value of the tract as a whole. (For an extreme—and, we think, unsupportable—view of the relevant calculus, see *Penn Central Transportation Co. v. New York City*, 42 N. Y. 2d 324, 333-334, 366 N. E. 2d 1271, 1276-1277 (1977), *aff’d*, 438 U. S. 104 (1978), where the state court examined the diminution in a particular parcel’s value produced by a municipal ordinance in light of total value of the takings claimant’s other holdings in the vicinity.) Unsurprisingly, this uncertainty regarding the composition of the denominator in our “deprivation” fraction has produced inconsistent pronouncements by the Court. Compare *Pennsylvania Coal Co. v. Mahon*, 260 U. S. 393, 414 (1922) (law restricting subsurface extraction of coal held to effect a taking), with *Keystone Bituminous Coal Assn. v. DeBenedictis*, 480 U. S. 470, 497-502 (1987) (nearly identical law held not to effect a taking); see also *id.*, at 515-520 (Rehnquist, C. J., dissenting); Rose, *Mahon* Reconstructed: Why the Takings Issue is Still a Muddle, 57 S. Cal. L. Rev. 561, 566-569 (1984). The answer to this difficult question may lie in how the owner’s reasonable expectations have been shaped by the State’s law of property—*i. e.*, whether and to what degree the State’s law has accorded legal recognition and protection to the particular interest in land with respect to which the takings claimant alleges a diminution in (or elimination of) value. In any event, we avoid this difficulty in the present case, since the “interest in land” that Lucas has pleaded (a fee simple interest) is an estate with a rich tradition of protection at common law, and since the South Carolina Court of Common

We have never set forth the justification for this rule. Perhaps it is simply, as Justice Brennan suggested, that total deprivation of beneficial use is, from the landowner's point of view, the equivalent of a physical appropriation. See *San Diego Gas & Electric Co. v. San Diego*, 450 U. S., at 652 (dissenting opinion). “[F]or what is the land but the profits thereof[?]” 1 E. Coke, *Institutes*, ch. 1, § 1 (1st Am. ed. 1812). Surely, at least, in the extraordinary circumstance when *no* productive or economically beneficial use of land is permitted, it is less realistic to indulge our usual assumption that the legislature is simply “adjusting the benefits and burdens of economic life,” *Penn Central Transportation Co.*, 438 U. S., at 124, in a manner that secures an “average reciprocity of advantage” to everyone concerned, *Pennsylvania Coal Co. v. Mahon*, 260 U. S., at 415. And the *functional* basis for permitting the government, by regulation, to affect property values without compensation—that “Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law,” *id.*, at 413—does not apply to the relatively rare situations where the government has deprived a landowner of all economically beneficial uses.

On the other side of the balance, affirmatively supporting a compensation requirement, is the fact that regulations that leave the owner of land without economically beneficial or productive options for its use—typically, as here, by requiring land to be left substantially in its natural state—carry with them a heightened risk that private property is being pressed into some form of public service under the guise of mitigating serious public harm. See, e. g., *Annicelli v. South Kingstown*, 463 A. 2d 133, 140-141 (R. I. 1983) (prohibition on construction adjacent to beach justified on twin grounds of safety and “conservation of open space”);

Pleas found that the Beachfront Management Act left each of Lucas's beachfront lots without economic value.

Morris County Land Improvement Co. v. Parsippany-Troy Hills Township, 40 N. J.539, 552-553, 193 A. 2d 232, 240 (1963) (prohibition on filling marshlands imposed in order to preserve region as water detention basin and create wildlife refuge). As Justice Brennan explained: “From the government’s point of view, the benefits flowing to the public from preservation of open space through regulation may be equally great as from creating a wildlife refuge through formal condemnation or increasing electricity production through a dam project that floods private property.” *San Diego Gas & Elec. Co.*, *supra*, at 652 (dissenting opinion). The many statutes on the books, both state and federal, that provide for the use of eminent domain to impose servitudes on private scenic lands preventing developmental uses, or to acquire such lands altogether, suggest the practical equivalence in this setting of negative regulation and appropriation. See, *e. g.*, 16 U. S. C. § 410ff-1(a) (authorizing acquisition of “lands, waters, or interests [within Channel Islands National Park] (including but not limited to scenic easements)”; § 460aa-2(a) (authorizing acquisition of “any lands, or lesser interests therein, including mineral interests and scenic easements” within Sawtooth National Recreation Area); §§ 3921-3923 (authorizing acquisition of wetlands); N. C. Gen. Stat. § 113A-38 (1990) (authorizing acquisition of, *inter alia*, “scenic easements’ ” within the North Carolina natural and scenic rivers system); Tenn. Code Ann. §§ 11-15-101 to XX-XX-XXX (1987) (authorizing acquisition of “protective easements” and other rights in real property adjacent to State’s historic, architectural, archaeological, or cultural resources).

We think, in short, that there are good reasons for our frequently expressed belief that when the owner of real property has been called upon to sacrifice *all* economically beneficial uses in the name of the common good, that is, to

leave his property economically idle, he has suffered a taking.⁵

B

The trial court found Lucas's two beachfront lots to have been rendered valueless by respondent's enforcement of the coastal-zone construction ban.⁶ Under Lucas's theory of the case, which rested upon our "no economically viable use" statements, that finding entitled him to compensation. Lucas believed it unnecessary to take issue with either the purposes behind the Beachfront Management Act, or the

⁵ Justice Stevens criticizes the "deprivation of all economically beneficial use" rule as "wholly arbitrary," in that "[the] landowner whose property is diminished in value 95% recovers nothing," while the landowner who suffers a complete elimination of value "recovers the land's full value." *Post*, at 1064. This analysis errs in its assumption that the landowner whose deprivation is one step short of complete is not entitled to compensation. Such an owner might not be able to claim the benefit of our categorical formulation, but, as we have acknowledged time and again, "[t]he economic impact of the regulation on the claimant and ...the extent to which the regulation has interfered with distinct investment-backed expectations" are keenly relevant to takings analysis generally. *Penn Central Transportation Co. v. New York City*, 438 U. S. 104, 124 (1978). It is true that in at least *some* cases the landowner with 95% loss will get nothing, while the landowner with total loss will recover in full. But that occasional result is no more strange than the gross disparity between the landowner whose premises are taken for a highway (who recovers in full) and the landowner whose property is reduced to 5% of its former value by the highway (who recovers nothing). Takings law is full of these "allor-nothing" situations.

Justice Stevens similarly misinterprets our focus on "developmental" uses of property (the uses proscribed by the Beachfront Management Act) as betraying an "assumption that the only uses of property cognizable under the Constitution are *developmental* uses." *Post*, at 1065, n. 3. We make no such assumption. Though our prior takings cases evince an abiding concern for the productive use of, and economic investment in, land, there are plainly a number of noneconomic interests in land whose impairment will invite exceedingly close scrutiny under the Takings Clause. See, e. g., *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U. S. 419, 436 (1982) (interest in excluding strangers from one's land).

⁶ This finding was the premise of the petition for certiorari, and since it was not challenged in the brief in opposition we decline to entertain the argument in respondent's brief on the merits, see Brief for Respondent 45-50, that the finding was erroneous. Instead, we decide the question presented under the same factual assumptions as did the Supreme Court of South Carolina. See *Oklahoma City v. Tuttle*, 471 U. S. 808, 816 (1985).

means chosen by the South Carolina Legislature to effectuate those purposes. The South Carolina Supreme Court, however, thought otherwise. In its view, the Beachfront Management Act was no ordinary enactment, but involved an exercise of South Carolina’s “police powers” to mitigate the harm to the public interest that petitioner’s use of his land might occasion. 304 S. C., at 384, 404 S. E. 2d, at 899. By neglecting to dispute the findings enumerated in the Act⁷ or otherwise to challenge

⁷ The legislature’s express findings include the following:

“The General Assembly finds that:

“(1) The beach/dune system along the coast of South Carolina is extremely important to the people of this State and serves the following functions:

“(a) protects life and property by serving as a storm barrier which dissipates wave energy and contributes to shoreline stability in an economical and effective manner;

“(b) provides the basis for a tourism industry that generates approximately two-thirds of South Carolina’s annual tourism industry revenue which constitutes a significant portion of the state’s economy. The tourists who come to the South Carolina coast to enjoy the ocean and dry sand beach contribute significantly to state and local tax revenues;

“(c) provides habitat for numerous species of plants and animals, several of which are threatened or endangered. Waters adjacent to the beach/ dune system also provide habitat for many other marine species;

“(d) provides a natural health environment for the citizens of South Carolina to spend leisure time which serves their physical and mental wellbeing.

“(2) Beach/dune system vegetation is unique and extremely important to the vitality and preservation of the system.

“(3) Many miles of South Carolina’s beaches have been identified as critically eroding.

“(4) ... [D]evelopment unwisely has been sited too close to the [beach/ dune] system. This type of development has jeopardized the stability of the beach/dune system, accelerated erosion, and endangered adjacent property. It

the legislature's purposes, petitioner "concede[d] that the beach/dune area of South Carolina's shores is an extremely valuable public resource; that the erection of new construction, *inter alia*, contributes to the erosion and destruction of this public resource; and that discouraging new construction in close proximity to the beach/dune area is necessary to prevent a great public harm." *Id.*, at 382-383, 404 S. E. 2d, at 898. In the court's view, these concessions brought petitioner's challenge within a long line of this Court's cases sustaining against Due Process and Takings Clause challenges the State's use of its "police powers" to enjoin a property owner from activities akin to public nuisances. See *Mugler v. Kansas*, 123 U. S. 623 (1887) (law prohibiting manufacture of alcoholic beverages); *Hadacheck*

is in both the public and private interests to protect the system from this unwise development.

"(5) The use of armoring in the form of hard erosion control devices such as seawalls, bulkheads, and rip-rap to protect erosion-threatened structures adjacent to the beach has not proven effective. These armoring devices have given a false sense of security to beachfront property owners. In reality, these hard structures, in many instances, have increased the vulnerability of beachfront property to damage from wind and waves while contributing to the deterioration and loss of the dry sand beach which is so important to the tourism industry.

"(6) Erosion is a natural process which becomes a significant problem for man only when structures are erected in close proximity to the beach/ dune system. It is in both the public and private interests to afford the beach/dune system space to accrete and erode in its natural cycle. This space can be provided only by discouraging new construction in close proximity to the beach/dune system and encouraging those who have erected structures too close to the system to retreat from it.

....

"(8) It is in the state's best interest to protect and to promote increased public access to South Carolina's beaches for out-of-state tourists and South Carolina residents alike." S. C. Code Ann. § 48-39-250 (Supp. 1991).

v. Sebastian, 239 U. S. 394 (1915) (law barring operation of brick mill in residential area); *Miller v. Schoene*, 276 U. S. 272 (1928) (order to destroy diseased cedar trees to prevent infection of nearby orchards); *Goldblatt v. Hempstead*, 369 U. S. 590 (1962) (law effectively preventing continued operation of quarry in residential area).

It is correct that many of our prior opinions have suggested that “harmful or noxious uses” of property may be proscribed by government regulation without the requirement of compensation. For a number of reasons, however, we think the South Carolina Supreme Court was too quick to conclude that that principle decides the present case. The “harmful or noxious uses” principle was the Court’s early attempt to describe in theoretical terms why government may, consistent with the Takings Clause, affect property values by regulation without incurring an obligation to compensate—a reality we nowadays acknowledge explicitly with respect to the full scope of the State’s police power. See, e. g., *Penn Central Transportation Co.*, 438 U. S., at 125 (where State “reasonably conclude[s] that ‘the health, safety, morals, or general welfare’ would be promoted by prohibiting particular contemplated uses of land,” compensation need not accompany prohibition); see also *Nollan v. California Coastal Comm’n*, 483 U. S., at 834-835 (“Our cases have not elaborated on the standards for determining what constitutes a ‘legitimate state interest[.]’ [but] [t]hey have made clear ... that a broad range of governmental purposes and regulations satisfy these requirements”). We made this very point in *Penn Central Transportation Co.*, where, in the course of sustaining New York City’s landmarks preservation program against a takings challenge, we rejected the petitioner’s suggestion that *Mugler* and the cases following it were premised on, and thus limited by, some objective conception of “noxiousness”:

“[T]he uses in issue in *Hadacheck*, *Miller*, and *Goldblatt* were perfectly lawful in themselves. They involved no ‘blameworthiness, ... moral wrongdoing or conscious act of dangerous risk-taking which induce[d] society] to shift the cost to a pa[rt]icular individual.’ Sax, *Takings and the Police Power*, 74 *Yale L. J.* 36, 50 (1964). These cases are better understood as resting not on any supposed ‘noxious’ quality of the prohibited uses but rather on the ground that the restrictions were reasonably related to the implementation of a policy—not unlike historic preservation—expected to produce a widespread public benefit and applicable to all similarly situated property.” 438 U. S., at 133-134, n. 30.

“Harmful or noxious use” analysis was, in other words, simply the progenitor of our more contemporary statements that “land-use regulation does not effect a taking if it ‘substantially advance[s] legitimate state interests’” *Nollan, supra*, at 834 (quoting *Agins v. Tiburon*, 447 U. S., at 260); see also *Penn Central Transportation Co., supra*, at 127; *Euclid v. Ambler Realty Co.*, 272 U. S. 365, 387-388 (1926).

The transition from our early focus on control of “noxious” uses to our contemporary understanding of the broad realm within which government may regulate without compensation was an easy one, since the distinction between “harm-preventing” and “benefit-conferring” regulation is often in the eye of the beholder. It is quite possible, for example, to describe in *either* fashion the ecological, economic, and esthetic concerns that inspired the South Carolina Legislature in the present case.

One could say that imposing a servitude on Lucas's land is necessary in order to prevent his use of it from "harming" South Carolina's ecological resources; or, instead, in order to achieve the "benefits" of an ecological preserve.⁸ Compare, *e. g.*, *Claridge v. New Hampshire Wetlands Board*, 125 N. H. 745, 752, 485 A. 2d 287, 292 (1984) (owner may, without compensation, be barred from filling wetlands because landfilling would deprive adjacent coastal habitats and marine fisheries of ecological support), with, *e. g.*, *Bartlett v. Zoning Comm'n of Old Lyme*, 161 Conn. 24, 30, 282 A. 2d 907, 910 (1971) (owner barred from filling tidal marshland must be compensated, despite municipality's "laudable" goal of "preserv[ing] marshlands from encroachment or destruction"). Whether one or the other of the competing characterizations will come to one's lips in a particular case depends primarily upon one's evaluation of the worth of competing uses of real estate. See

⁸ In the present case, in fact, some of the "[South Carolina] legislature's 'findings'" to which the South Carolina Supreme Court purported to defer in characterizing the purpose of the Act as "harm-preventing," 304 S. C. 376, 385, 404 S. E. 2d 895, 900 (1991), seem to us phrased in "benefitconferring" language instead. For example, they describe the importance of a construction ban in enhancing "South Carolina's annual tourism industry revenue," S. C. Code Ann. § 48-39-250(1)(b) (Supp. 1991), in "provid[ing] habitat for numerous species of plants and animals, several of which are threatened or endangered," § 48-39-250(1)(c), and in "provid[ing] a natural healthy environment for the citizens of South Carolina to spend leisure time which serves their physical and mental well-being," § 48-39-250(1)(d). It would be pointless to make the outcome of this case hang upon this terminology, since the same interests could readily be described in "harm-preventing" fashion.

Justice Blackmun, however, apparently insists that we *must* make the outcome hinge (exclusively) upon the South Carolina Legislature's other, "harm-preventing" characterizations, focusing on the declaration that "prohibitions on building in front of the setback line are necessary to protect people and property from storms, high tides, and beach erosion." *Post*, at 1040. He says "[n]othing in the record undermines [this] assessment," *ibid.*, apparently seeing no significance in the fact that the statute permits owners of *existing* structures to remain (and even to rebuild if their structures are not "destroyed beyond repair," S. C. Code Ann. § 48-39-290(B) (Supp. 1988)), and in the fact that the 1990 amendment authorizes the Council to issue permits for new construction in violation of the uniform prohibition, see S. C. Code Ann. § 48-39-290(D)(1) (Supp. 1991).

Restatement (Second) of Torts § 822, Comment *g*, p. 112 (1979) (“Practically all human activities unless carried on in a wilderness interfere to some extent with others or involve some risk of interference”). A given restraint will be seen as mitigating “harm” to the adjacent parcels or securing a “benefit” for them, depending upon the observer’s evaluation of the relative importance of the use that the restraint favors. See Sax, Takings and the Police Power, 74 Yale L. J. 36, 49 (1964) (“[T]he problem [in this area] is not one of noxiousness or harm-creating activity at all; rather it is a problem of inconsistency between perfectly innocent and independently desirable uses”). Whether Lucas’s construction of singlefamily residences on his parcels should be described as bringing “harm” to South Carolina’s adjacent ecological resources thus depends principally upon whether the describer believes that the State’s use interest in nurturing those resources is so important that *any* competing adjacent use must yield.⁹

When it is understood that “prevention of harmful use” was merely our early formulation of the police power justification necessary to sustain (without compensation) *any* regulatory diminution in value; and that the distinction between regulation that “prevents harmful use” and that which “confers benefits” is difficult, if not impossible, to discern on an objective, value-free basis; it becomes self-evident that noxious-use logic cannot serve as a touchstone to distinguish regulatory “takings” – which require compensation – from regulatory deprivations that do not require compensation. *A fortiori* the legislature’s recitation of a noxious-use justification cannot be the basis for

⁹ In Justice Blackmun’s view, even with respect to regulations that deprive an owner of all developmental or economically beneficial land uses, the test for required compensation is whether the legislature has recited a harm-preventing justification for its action. See *post*, at 1039, 1040-1041, 1047-1051. Since such a justification can be formulated in practically every case, this amounts to a test of whether the legislature has a stupid staff. We think the Takings Clause requires courts to do more than insist upon artful harm-preventing characterizations.

departing from our categorical rule that total regulatory takings must be compensated. If it were, departure would virtually always be allowed. The South Carolina Supreme Court's approach would essentially nullify *Mabon*'s affirmation of limits to the noncompensable exercise of the police power. Our cases provide no support for this: None of them that employed the logic of "harmful use" prevention to sustain a regulation involved an allegation that the regulation wholly eliminated the value of the claimant's land. See *Keystone Bituminous Coal Assn.*, 480 U. S., at 513-514 (Rehnquist, C. J., dissenting).¹⁰

Where the State seeks to sustain regulation that deprives land of all economically beneficial use, we think it may resist compensation only if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with.¹¹ This accords, we think, with our "takings"

¹⁰ *E. g.*, *Mugler v. Kansas*, 123 U. S. 623 (1887) (prohibition upon use of a building as a brewery; other uses permitted); *Plymouth Coal Co. v. Pennsylvania*, 232 U. S. 531 (1914) (requirement that "pillar" of coal be left in ground to safeguard mine workers; mineral rights could otherwise be exploited); *Reinman v. Little Rock*, 237 U. S. 171 (1915) (declaration that livery stable constituted a public nuisance; other uses of the property permitted); *Hadacheck v. Sebastian*, 239 U. S. 394 (1915) (prohibition of brick manufacturing in residential area; other uses permitted); *Goldblatt v. Hempstead*, 369 U. S. 590 (1962) (prohibition on excavation; other uses permitted).

¹¹ Drawing on our First Amendment jurisprudence, see, *e. g.*, *Employment Div., Dept. of Human Resources of Ore. v. Smith*, 494 U. S. 872, 878-879 (1990), Justice Stevens would "loo[k] to the *generality* of a regulation of property" to determine whether compensation is owing. *Post*, at 1072. The Beach front Management Act is general, in his view, because it "regulates the use of the coastline of the entire State." *Post*, at 1074. There may be some validity to the principle Justice Stevens proposes, but it does not properly apply to the present case. The equivalent of a law of general application that inhibits the practice of religion without being aimed at religion, see *Oregon v. Smith*, *supra*, is a law that destroys the value of land without being aimed at land. Perhaps such a law – the generally applicable criminal prohibition on the manufacturing of alcoholic beverages challenged in *Mugler* comes to mind – cannot constitute a compensable taking. See 123 U. S., at 655-656. But a regulation *specifically directed to land use* no more acquires immunity by plundering landowners generally than does a law specifically directed at religious practice acquire immunity by prohibiting all religions. Justice Stevens's approach renders the Takings Clause little more than a particularized restatement of the Equal Protection Clause.

jurisprudence, which has traditionally been guided by the understandings of our citizens regarding the content of, and the State's power over, the "bundle of rights" that they acquire when they obtain title to property. It seems to us that the property owner necessarily expects the uses of his property to be restricted, from time to time, by various measures newly enacted by the State in legitimate exercise of its police powers; "[a]s long recognized, some values are enjoyed under an implied limitation and must yield to the police power." *Pennsylvania Coal Co. v. Mabon*, 260 U. S., at 413. And in the case of personal property, by reason of the State's traditionally high degree of control over commercial dealings, he ought to be aware of the possibility that new regulation might even render his property economically worthless (at least if the property's only economically productive use is sale or manufacture for sale). See *Andrus v. Allard*, 444 U. S. 51, 66-67 (1979) (prohibition on sale of eagle feathers). In the case of land, however, we think the notion pressed by the Council that title is somehow held subject to the "implied limitation" that the State may subsequently eliminate all economically valuable use is inconsistent with the historical compact recorded in the Takings Clause that has become part of our constitutional culture.¹²

¹² After accusing us of "launch[ing] a missile to kill a mouse," *post*, at 1036, Justice Blackmun expends a good deal of throw-weight of his own upon a noncombatant, arguing that our description of the "understanding" of land ownership that informs the Takings Clause is not supported by early American experience. That is largely true, but entirely irrelevant. The practices of the States *prior* to incorporation of the Takings and Just Compensation Clauses, see *Chicago, B. & Q. R. Co. v. Chicago*, 166 U. S. 226 (1897) – which, as Justice Blackmun acknowledges, occasionally included *outright physical appropriation* of land without compensation, see *post*, at 1056 – were out of accord with *any* plausible interpretation of those provisions. Justice Blackmun is correct that early constitutional theorists did not believe the Takings Clause embraced regulations of property at all, see *post*, at 1057-1058, and n. 23, but even he does not suggest (explicitly, at least) that we renounce the Court's contrary conclusion in *Mabon*. Since the text of the Clause can be read to encompass regulatory as well as physical deprivations (in contrast to the text originally proposed by Madison, see Speech Proposing Bill of Rights (June 8, 1789), in 12 J.

Where “permanent physical occupation” of land is concerned, we have refused to allow the government to decree it anew (without compensation), no matter how weighty the asserted “public interests” involved, *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U. S., at 426 – though we assuredly *would* permit the government to assert a permanent easement that was a pre-existing limitation upon the landowner’s title. Compare *Scranton v. Wheeler*, 179 U. S. 141, 163 (1900) (interests of “riparian owner in the submerged lands ... bordering on a public navigable water” held subject to Government’s navigational servitude), with *Kaiser Aetna v. United States*, 444 U. S., at 178-180 (imposition of navigational servitude on marina created and rendered navigable at private expense held to constitute a taking). We believe similar treatment must be accorded confiscatory regulations, *i. e.*, regulations that prohibit all economically beneficial use of land: Any limitation so severe cannot be newly legislated or decreed (without compensation), but must inhere in the title itself, in the restrictions that background principles of the State’s law of property and nuisance already place upon land ownership. A law or decree with such an effect must, in other words, do no more than duplicate the result that could have been achieved in the courts – by adjacent landowners (or other uniquely affected persons) under the State’s law of private nuisance, or by the State under its complementary power to abate nuisances that affect the public generally, or otherwise.¹³

Madison, *The Papers of James Madison* 201 (C. Hobson, R. Rutland, W. Rachal, & J. Sisson ed. 1979) (“No person shall be ... obliged to relinquish his property, where it may be necessary for public use, without a just compensation”), we decline to do so as well.

¹³ The principal “otherwise” that we have in mind is litigation absolving the State (or private parties) of liability for the destruction of “real and personal property, in cases of actual necessity, to prevent the spreading of a fire” or to forestall other grave threats to the lives and property of others. *Bonditch v. Boston*, 101 U. S. 16, 18-19 (1880); see *United States v. Pacific R. Co.*, 120 U. S. 227, 238-239 (1887).

On this analysis, the owner of a lake bed, for example, would not be entitled to compensation when he is denied the requisite permit to engage in a land filling operation that would have the effect of flooding others' land. Nor the corporate owner of a nuclear generating plant, when it is directed to remove all improvements from its land upon discovery that the plant sits astride an earthquake fault. Such regulatory action may well have the effect of eliminating the land's only economically productive use, but it does not proscribe a productive use that was previously permissible under relevant property and nuisance principles. The use of these properties for what are now expressly prohibited purposes was *always* unlawful, and (subject to other constitutional limitations) it was open to the State at any point to make the implication of those background principles of nuisance and property law explicit. See Michelman, Property, Utility, and Fairness, Comments on the Ethical Foundations of "Just Compensation" Law, 80 Harv. L. Rev. 1165, 1239 – 1241 (1967). In light of our traditional resort to "existing rules or understandings that stem from an independent source such as state law" to define the range of interests that qualify for protection as "property" under the Fifth and Fourteenth Amendments, *Board of Regents of State Colleges v. Roth*, 408 U. S. 564, 577 (1972); see, e. g., *Ruckelshaus v. Monsanto Co.*, 467 U. S. 986, 1011-1012 (1984); *Hughes v. Washington*, 389 U. S. 290, 295 (1967) (Stewart, J., concurring), this recognition that the Takings Clause does not require compensation when an owner is barred from putting land to a use that is proscribed by those "existing rules or understandings" is surely unexceptional. When, however, a regulation that declares "off-limits" all economically productive or beneficial uses of land goes beyond what the relevant background principles would dictate, compensation must be paid to sustain it.¹⁴

¹⁴ Of course, the State may elect to rescind its regulation and thereby avoid having

The “total taking” inquiry we require today will ordinarily entail (as the application of state nuisance law ordinarily entails) analysis of, among other things, the degree of harm to public lands and resources, or adjacent private property, posed by the claimant’s proposed activities, see, *e. g.*, Restatement (Second) of Torts §§ 826, 827, the social value of the claimant’s activities and their suitability to the locality in question, see, *e. g.*, *id.*, §§ 828(a) and (b), 831, and the relative ease with which the alleged harm can be avoided through measures taken by the claimant and the government (or adjacent private landowners) alike, see, *e. g.*, *id.*, §§ 827(e), 828(c), 830. The fact that a particular use has long been engaged in by similarly situated owners ordinarily imports a lack of any common-law prohibition (though changed circumstances or new knowledge may make what was previously permissible no longer so, see *id.*, § 827, Comment *g*. So also does the fact that other landowners, similarly situated, are permitted to continue the use denied to the claimant.

It seems unlikely that common-law principles would have prevented the erection of any habitable or productive improvements on petitioner’s land; they rarely support prohibition of the “essential use” of land, *Curtin v. Benson*, 222 U. S. 78, 86 (1911). The question, however, is one of state law to be dealt with on remand. We emphasize that to win its case South Carolina must do more than proffer the legislature’s declaration that the uses Lucas desires are inconsistent with the public interest, or the conclusory assertion that they violate a common-law maxim such as *sic utere tuo ut alienum non laedas*. As we have said, a “State, by *ipse dixit*, may not transform private property into public

to pay compensation for a permanent deprivation. See *First English Evangelical Lutheran Church*, 482 U. S., at 321. But “where the [regulation has] already worked a taking of all use of property, no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective.” *Ibid.*

property without compensation” *Webb’s Fabulous Pharmacies, Inc. v. Beckwith*, 449 U. S. 155, 164 (1980). Instead, as it would be required to do if it sought to restrain Lucas in a commonlaw action for public nuisance, South Carolina must identify background principles of nuisance and property law that prohibit the uses he now intends in the circumstances in which the property is presently found. Only on this showing can the State fairly claim that, in proscribing all such beneficial uses, the Beach front Management Act is taking nothing.¹⁵

* * *

The judgment is reversed, and the case is remanded for proceedings not inconsistent with this opinion.

So ordered.

JUSTICE KENNEDY, concurring in the judgment.

The case comes to the Court in an unusual posture, as all my colleagues observe. *Ante*, at 1010-1011; *post*, at 1041 (Blackmun, J., dissenting); *post*, at 1061-1062 (Stevens, J., dissenting); *post*, at 1076-1077 (statement of Souter, J.). After the suit was initiated but before it reached us, South Carolina amended its Beach front Management Act to authorize the issuance of special permits at variance with the Act’s general limitations. See S. C. Code Ann. § 48-39-290(D)(1) (Supp. 1991). Petitioner has not applied for a special permit but may still do so. The availability of this alternative, if it can be invoked, may dispose of petitioner’s claim of a permanent taking. As I read the Court’s opinion,

¹⁵ Justice Blackmun decries our reliance on background nuisance principles at least in part because he believes those principles to be as manipulable as we find the “harm prevention”/“benefit conferral” dichotomy, see *post*, at 1054-1055. There is no doubt some leeway in a court’s interpretation of what existing state law permits – but not remotely as much, we think, as in a legislative crafting of the reasons for its confiscatory regulation. We stress that an affirmative decree eliminating all economically beneficial uses may be defended only if an *objectively reasonable application* of relevant precedents would exclude those beneficial uses in the circumstances in which the land is presently found.

it does not decide the permanent taking claim, but neither does it foreclose the Supreme Court of South Carolina from considering the claim or requiring petitioner to pursue an administrative alternative not previously available.

The potential for future relief does not control our disposition, because whatever may occur in the future cannot undo what has occurred in the past. The Beach front Management Act was enacted in 1988. S. C. Code Ann. § 48-39-250 *et seq.* (Supp. 1990). It may have deprived petitioner of the use of his land in an interim period. § 48-39-290(A). If this deprivation amounts to a taking, its limited duration will not bar constitutional relief. It is well established that temporary takings are as protected by the Constitution as are permanent ones. *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U. S. 304, 318 (1987).

The issues presented in the case are ready for our decision. The Supreme Court of South Carolina decided the case on constitutional grounds, and its rulings are now before us. There exists no jurisdictional bar to our disposition, and prudential considerations ought not to militate against it. The State cannot complain of the manner in which the issues arose. Any uncertainty in this regard is attributable to the State, as a consequence of its amendment to the Beach front Management Act. If the Takings Clause is to protect against temporary deprivations, as well as permanent ones, its enforcement must not be frustrated by a shifting background of state law.

Although we establish a framework for remand, moreover, we do not decide the ultimate question whether a temporary taking has occurred in this case. The facts necessary to the determination have not been developed in the record. Among the matters to be considered on remand must be whether petitioner had the intent and capacity to develop the property and failed to do so in the interim period because the State prevented him. Any failure by

petitioner to comply with relevant administrative requirements will be part of that analysis.

The South Carolina Court of Common Pleas found that petitioner's real property has been rendered valueless by the State's regulation. App. to Pet. for Cert. 37. The finding appears to presume that the property has no significant market value or resale potential. This is a curious finding, and I share the reservations of some of my colleagues about a finding that a beach front lot loses all value because of a development restriction. *Post*, at 1043-1045 (Blackmun, J., dissenting); *post*, at 1065, n. 3 (Stevens, J., dissenting); *post*, at 1076 (statement of Souter, J.). While the Supreme Court of South Carolina on remand need not consider the case subject to this constraint, we must accept the finding as entered below. See *Oklahoma City v. Tuttle*, 471 U. S. 808, 816 (1985). Accepting the finding as entered, it follows that petitioner is entitled to invoke the line of cases discussing regulations that deprive real property of all economic value. See *Agins v. City of Tiburon*, 447 U. S. 255, 260 (1980).

The finding of no value must be considered under the Takings Clause by reference to the owner's reasonable, investment-backed expectations. *Kaiser Aetna v. United States*, 444 U. S. 164, 175 (1979); *Penn Central Transportation Co. v. New York City*, 438 U. S. 104, 124 (1978); see also *W. B. Worthen Co. v. Kavanaugh*, 295 U. S. 56 (1935). The Takings Clause, while conferring substantial protection on property owners, does not eliminate the police power of the State to enact limitations on the use of their property. *Mugler v. Kansas*, 123 U. S. 623, 669 (1887). The rights conferred by the Takings Clause and the police power of the State may coexist without conflict. Property is bought and sold, investments are made, subject to the State's power to regulate. Where a taking is alleged from regulations which deprive the property of all value, the test must be whether the deprivation is contrary to reasonable, investmentbacked expectations.

There is an inherent tendency towards circularity in this synthesis, of course; for if the owner's reasonable expectations are shaped by what courts allow as a proper exercise of governmental authority, property tends to become what courts say it is. Some circularity must be tolerated in these matters, however, as it is in other spheres. *E. g., Katz v. United States*, 389 U. S. 347 (1967) (Fourth Amendment protections defined by reasonable expectations of privacy). The definition, moreover, is not circular in its entirety. The expectations protected by the Constitution are based on objective rules and customs that can be understood as reasonable by all parties involved.

In my view, reasonable expectations must be understood in light of the whole of our legal tradition. The common law of nuisance is too narrow a confine for the exercise of regulatory power in a complex and interdependent society. *Goldblatt v. Hempstead*, 369 U. S. 590, 593 (1962). The State should not be prevented from enacting new regulatory initiatives in response to changing conditions, and courts must consider all reasonable expectations whatever their source. The Takings Clause does not require a static body of state property law; it protects private expectations to ensure private investment. I agree with the Court that nuisance prevention accords with the most common expectations of property owners who face regulation, but I do not believe this can be the sole source of state authority to impose severe restrictions. Coastal property may present such unique concerns for a fragile land system that the State can go further in regulating its development and use than the common law of nuisance might otherwise permit.

The Supreme Court of South Carolina erred, in my view, by reciting the general purposes for which the state regulations were enacted without a determination that they were in accord with the owner's reasonable expectations and therefore sufficient to support a severe restriction on specific parcels of property. See 304 S. C. 376, 383, 404 S.

E. 2d 895, 899 (1991). The promotion of tourism, for instance, ought not to suffice to deprive specific property of all value without a corresponding duty to compensate. Furthermore, the means, as well as the ends, of regulation must accord with the owner's reasonable expectations. Here, the State did not act until after the property had been zoned for individual lot development and most other parcels had been improved, throwing the whole burden of the regulation on the remaining lots. This too must be measured in the balance. See *Pennsylvania Coal Co. v. Mahon*, 260 U. S. 393, 416 (1922).

With these observations, I concur in the judgment of the Court.

JUSTICE BLACKMUN, dissenting.

Today the Court launches a missile to kill a mouse.

The State of South Carolina prohibited petitioner Lucas from building a permanent structure on his property from 1988 to 1990. Relying on an unreviewed (and implausible) state trial court finding that this restriction left Lucas' property valueless, this Court granted review to determine whether compensation must be paid in cases where the State prohibits all economic use of real estate. According to the Court, such an occasion never has arisen in any of our prior cases, and the Court imagines that it will arise "relatively rarely" or only in "extraordinary circumstances." Almost certainly it did not happen in this case.

Nonetheless, the Court presses on to decide the issue, and as it does, it ignores its jurisdictional limits, remakes its traditional rules of review, and creates simultaneously a new categorical rule and an exception (neither of which is rooted in our prior case law, common law, or common sense). I protest not only the Court's decision, but each step taken to reach it. More fundamentally, I question the Court's wisdom in issuing sweeping new rules to decide such a narrow case. Surely, as Justice Kennedy

demonstrates, the Court could have reached the result it wanted without inflicting this damage upon our Takings Clause jurisprudence.

My fear is that the Court's new policies will spread beyond the narrow confines of the present case. For that reason, I, like the Court, will give far greater attention to this case than its narrow scope suggests – not because I can intercept the Court's missile, or save the targeted mouse, but because I hope perhaps to limit the collateral damage.

...

Statement of JUSTICE SOUTER.

I would dismiss the writ of certiorari in this case as having been granted improvidently. After briefing and argument it is abundantly clear that an unreviewable assumption on which this case comes to us is both questionable as a conclusion of Fifth Amendment law and sufficient to frustrate the Court's ability to render certain the legal premises on which its holding rests.

The petition for review was granted on the assumption that the State by regulation had deprived the owner of his entire economic interest in the subject property. Such was the state trial court's conclusion, which the State Supreme Court did not review. It is apparent now that in light of our prior cases, see, *e. g.*, *Keystone Bituminous Coal Assn. v. DeBenedictis*, 480 U. S. 470, 493-502 (1987); *Andrus v. Allard*, 444 U. S. 51, 65-66 (1979); *Penn Central Transportation Corp. v. New York City*, 438 U. S. 104, 130-131 (1978), the trial court's conclusion is highly questionable. While the respondent now wishes to contest the point, see Brief for Respondent 45-50, the Court is certainly right to refuse to take up the issue, which is not fairly included within the question presented, and has received only the most superficial and one-sided treatment before us.

Because the questionable conclusion of total deprivation cannot be reviewed, the Court is precluded from attempting to clarify the concept of total (and, in the Court's view, categorically compensable) taking on which it rests, a concept which the Court describes, see *ante*, at 1016-1017, n. 6, as so uncertain under existing law as to have fostered inconsistent pronouncements by the Court itself. Because that concept is left uncertain, so is the significance of the exceptions to the compensation requirement that the Court proceeds to recognize. This alone is enough to show that there is little utility in attempting to deal with this case on the merits.

... .

4.3.3. Per se vs. Ad hoc

Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency 535 U.S. 302 (2002)

Michael M. Berger argued the cause for petitioners. With him on the briefs were *Gideon Kanner* and *Lawrence L. Hoffman*.

John G. Roberts, Jr., argued the cause for respondents. With him on the brief were *Frankie Sue Del Papa*, Attorney General of Nevada, and *William J. Frey*, Deputy Attorney General, *Bill Lockyer*, Attorney General of California, *Richard M. Frank*, Chief Assistant Attorney General, *Matthew Rodriguez*, Senior Assistant Attorney General, and *Daniel L. Siegel*, Supervising Deputy Attorney General, *E. Clement Shute, Jr.*, *Fran M. Layton*, *Ellison Folk*, *John L. Marshall*, and *Richard J. Lazarus*.

Solicitor General Olson argued the cause for the United States as *amicus curiae* urging affirmance. With him on the brief were *Acting Assistant Attorney General Cruden*, *Deputy Solicitor General Kneedler*, and *Malcolm L. Stewart*.

JUSTICE STEVENS delivered the opinion of the Court.

The question presented is whether a moratorium on development imposed during the process of devising a comprehensive land-use plan constitutes a *per se* taking of property requiring compensation under the Takings Clause of the United States Constitution.¹ This case actually involves two moratoria ordered by respondent Tahoe Regional Planning Agency (TRPA) to maintain the status quo while studying the impact of development on Lake Tahoe and designing a strategy for environmentally sound growth. The first, Ordinance 81-5, was effective from August 24, 1981, until August 26, 1983, whereas the second more restrictive Resolution 83-21 was in effect from August 27, 1983, until April 25, 1984. As a result of these two directives, virtually all development on a substantial portion of the property subject to TRPA's jurisdiction was prohibited for a period of 32 months. Although the question we decide relates only to that 32-month period, a brief description of the events leading up to the moratoria and a comment on the two permanent plans that TRPA adopted thereafter will clarify the narrow scope of our holding.

I

The relevant facts are undisputed. The Court of Appeals, while reversing the District Court on a question of law, accepted all of its findings of fact, and no party challenges those findings. All agree that Lake Tahoe is “uniquely beautiful,” 34 F. Supp. 2d 1226, 1230 (Nev. 1999), that President Clinton was right to call it a “national treasure that must be protected and preserved,” *ibid.*, and that Mark Twain aptly described the clarity of its waters as “not *merely* transparent, but dazzlingly, brilliantly so,” *ibid.*

¹ Often referred to as the “Just Compensation Clause,” the final Clause of the Fifth Amendment provides: “... nor shall private property be taken for public use without just compensation.” It applies to the States as well as the Federal Government. *Chicago, B. & Q. R. Co. v. Chicago*, 166 U. S. 226, 239, 241 (1897); *Webb’s Fabulous Pharmacies, Inc. v. Beckwith*, 449 U. S. 155, 160 (1980).

(emphasis added) (quoting M. Twain, *Roughing It* 174-175 (1872)).

Lake Tahoe's exceptional clarity is attributed to the absence of algae that obscures the waters of most other lakes. Historically, the lack of nitrogen and phosphorous, which nourish the growth of algae, has ensured the transparency of its waters.² Unfortunately, the lake's pristine state has deteriorated rapidly over the past 40 years; increased land development in the Lake Tahoe Basin (Basin) has threatened the "noble sheet of blue water" beloved by Twain and countless others. 34 F. Supp. 2d, at 1230. As the District Court found, "[d]ramatic decreases in clarity first began to be noted in the late 1950's/early 1960's, shortly after development at the lake began in earnest." *Id.*, at 1231. The lake's unsurpassed beauty, it seems, is the wellspring of its undoing.

The upsurge of development in the area has caused "increased nutrient loading of the lake largely because of the increase in impervious coverage of land in the Basin resulting from that development." *Ibid.*

[The Court recounts the history of inter-governmental cooperation and land use regulations since the 1960s that have attempted to solve the water quality problems. A three-year moratorium was imposed while TRPA developed a regional water quality plan. When that plan was complete, California sued, alleging the plan was inadequate to protect Lake Tahoe. The federal court entered an injunction that essentially continued the moratorium for another three years, until 1987 when a new regional plan was completed. Around the same time that California filed

² According to a Senate Report: "Only two other sizable lakes in the world are of comparable quality—Crater Lake in Oregon, which is protected as part of the Crater Lake National Park, and Lake Baikal in the [former] Soviet Union. Only Lake Tahoe, however, is so readily accessible from large metropolitan centers and is so adaptable to urban development." S. Rep. No. 91-510, pp. 3-4 (1969).

suit, Petitioners — a total of around 2,400 landowners — also filed their suit, seeking compensation for the moratorium that had been in effect from 1981-1984. That litigation became protracted “produc[ing] four opinions by the Court of Appeals for the Ninth Circuit and several published District Court opinions.” The majority in this case held that only the 1981 moratorium, not the additional delay caused by the federal injunction was before it. It also characterized Petitioners as mounting only a facial challenge to the moratorium. “For petitioners, it is enough that a regulation imposes a temporary deprivation—no matter how brief—of all economically viable use to trigger a per se rule that a taking has occurred.”]

IV

The text of the Fifth Amendment itself provides a basis for drawing a distinction between physical takings and regulatory takings. Its plain language requires the payment of compensation whenever the government acquires private property for a public purpose, whether the acquisition is the result of a condemnation proceeding or a physical appropriation. But the Constitution contains no comparable reference to regulations that prohibit a property owner from making certain uses of her private property.³ Our jurisprudence involving condemnations and physical takings is as old as the Republic and, for the most part, involves the straightforward application of *per se* rules. Our regulatory takings jurisprudence, in contrast, is of

³ In determining whether government action affecting property is an unconstitutional deprivation of ownership rights under the Just Compensation Clause, a court must interpret the word “taken.” When the government condemns or physically appropriates the property, the fact of a taking is typically obvious and undisputed. When, however, the owner contends a taking has occurred because a law or regulation imposes restrictions so severe that they are tantamount to a condemnation or appropriation, the predicate of a taking is not self-evident, and the analysis is more complex.

more recent vintage and is characterized by “essentially ad hoc, factual inquiries,” *Penn Central*, 438 U. S., at 124, designed to allow “careful examination and weighing of all the relevant circumstances.” *Palazzolo*, 533 U. S., at 636 (O’Connor, J., concurring).

When the government physically takes possession of an interest in property for some public purpose, it has a categorical duty to compensate the former owner, *United States v. Pewee Coal Co.*, 341 U. S. 114, 115 (1951), regardless of whether the interest that is taken constitutes an entire parcel or merely a part thereof. Thus, compensation is mandated when a leasehold is taken and the government occupies the property for its own purposes, even though that use is temporary. *United States v. General Motors Corp.*, 323 U. S. 373 (1945); *United States v. Petty Motor Co.*, 327 U. S. 372 (1946). Similarly, when the government appropriates part of a roof top in order to provide cable TV access for apartment tenants, *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U. S. 419 (1982); or when its planes use private airspace to approach a government airport, *United States v. Causby*, 328 U. S. 256 (1946), it is required to pay for that share no matter how small. But a government regulation that merely prohibits landlords from evicting tenants unwilling to pay a higher rent, *Block v. Hirsh*, 256 U. S. 135 (1921); that bans certain private uses of a portion of an owner’s property, *Village of Euclid v. Ambler Realty Co.*, 272 U. S. 365 (1926); *Keystone Bituminous Coal Assn. v. DeBenedictis*, 480 U. S. 470 (1987); or that forbids the private use of certain airspace, *Penn Central Transp. Co. v. New York City*, 438 U. S. 104 (1978), does not constitute a categorical taking. “The first category of cases requires courts to apply a clear rule; the second necessarily entails complex factual assessments of the purposes and economic effects of government actions.” *Yee v. Escondido*, 503 U. S. 519, 523 (1992). See also *Loretto*, 458 U. S., at 440; *Keystone*, 480 U. S., at 489, n. 18.

This longstanding distinction between acquisitions of property for public use, on the one hand, and regulations prohibiting private uses, on the other, makes it inappropriate to treat cases involving physical takings as controlling precedents for the evaluation of a claim that there has been a “regulatory taking,”⁴ and vice versa. For the same reason that we do not ask whether a physical appropriation advances a substantial government interest or whether it deprives the owner of all economically valuable use, we do not apply our precedent from the physical takings context to regulatory takings claims. Land-use regulations are ubiquitous and most of them impact property values in some tangential way—often in completely unanticipated ways. Treating them all as *per se* takings would transform government regulation into a luxury few governments could afford. By contrast, physical appropriations are relatively rare, easily identified, and usually represent a greater affront to individual property rights.⁵ “This case does not present the ‘classi[c] taking’ in

⁴ To illustrate the importance of the distinction, the Court in *Loretto*, 458 U. S., at 430, compared two wartime takings cases, *United States v. Pewee Coal Co.*, 341 U. S. 114, 116 (1951), in which there had been an “actual taking of possession and control” of a coal mine, and *United States v. Central Eureka Mining Co.*, 357 U. S. 155 (1958), in which, “by contrast, the Court found no taking where the Government had issued a wartime order requiring nonessential gold mines to cease operations” 458 U. S., at 431. *Loretto* then relied on this distinction in dismissing the argument that our discussion of the physical taking at issue in the case would affect landlord-tenant laws. “So long as these regulations do not require the landlord to suffer the physical occupation of a portion of his building by a third party, they will be analyzed under the multifactor inquiry generally applicable to nonpossessory governmental activity.” *Id.*, at 440 (citing *Penn Central*).

⁵ According to The Chief Justice’s dissent, even a temporary, useprohibiting regulation should be governed by our physical takings cases because, under *Lucas v. South Carolina Coastal Council*, 505 U. S. 1003, 1017 (1992), “from the landowner’s point of view,” the moratorium is the functional equivalent of a forced leasehold, *post*, at 348. Of course, from both the landowner’s and the government’s standpoint there are critical differences between a leasehold and a moratorium. Condemnation of a leasehold gives the government possession of the property, the right to admit and exclude others, and the right to use it for a public purpose. A regulatory taking, by contrast, does not give the government any right to use the property, nor does it dispossess the owner or affect her right to exclude others.

which the government directly appropriates private property for its own use,” *Eastern Enterprises v. Apfel*, 524 U. S. 498, 522 (1998); instead the interference with property rights “arises from some public program adjusting the benefits and burdens of economic life to promote the common good,” *Penn Central*, 438 U. S., at 124.

Perhaps recognizing this fundamental distinction, petitioners wisely do not place all their emphasis on analogies to physical takings cases. Instead, they rely principally on our decision in *Lucas v. South Carolina Coastal Council*, 505 U. S. 1003 (1992)—a regulatory takings case that, nevertheless, applied a categorical rule—to argue that the *Penn Central* framework is inapplicable here. A brief review of some of the cases that led to our decision in *Lucas*, however, will help to explain why the holding in that case does not answer the question presented here.

As we noted in *Lucas*, it was Justice Holmes’ opinion in *Pennsylvania Coal Co. v. Mahon*, 260 U. S. 393 (1922),⁶ that gave birth to our regulatory takings jurisprudence.⁷ In

The Chief Justice stretches *Lucas*’ “equivalence” language too far. For even a regulation that constitutes only a minor infringement on property may, from the landowner’s perspective, be the functional equivalent of an appropriation. *Lucas* carved out a narrow exception to the rules governing regulatory takings for the “extraordinary circumstance” of a permanent deprivation of all beneficial use. The exception was only partially justified based on the “equivalence” theory cited by The Chief Justice’s dissent. It was also justified on the theory that, in the “relatively rare situations where the government has deprived a landowner of all economically beneficial uses,” it is less realistic to assume that the regulation will secure an “average reciprocity of advantage,” or that government could not go on if required to pay for every such restriction. 505 U. S., at 1017-1018. But as we explain, *infra*, at 339-341, these assumptions hold true in the context of a moratorium.

⁶ The case involved “a bill in equity brought by the defendants in error to prevent the Pennsylvania Coal Company from mining under their property in such way as to remove the supports and cause a subsidence of the surface and of their house.” *Mahon*, 260 U. S., at 412. Mahon sought to prevent Pennsylvania Coal from mining under his property by relying on a state statute, which prohibited any mining that could undermine the foundation of a home. The company challenged the statute as a taking of its interest in the coal without compensation.

⁷ In *Lucas*, we explained: “Prior to Justice Holmes’s exposition in *Pennsylvania Coal Co. v. Mahon*, 260 U. S. 393 (1922), it was generally thought that the Takings Clause

subsequent opinions we have repeatedly and consistently endorsed Holmes' observation that "if regulation goes too far it will be recognized as a taking." *Id.*, at 415. Justice Holmes did not provide a standard for determining when a regulation goes "too far," but he did reject the view expressed in Justice Brandeis' dissent that there could not be a taking because the property remained in the possession of the owner and had not been appropriated or used by the public.⁸ After *Mabon*, neither a physical appropriation nor a public use has ever been a necessary component of a "regulatory taking."

In the decades following that decision, we have "generally eschewed" any set formula for determining how far is too far, choosing instead to engage in "essentially ad hoc, factual inquiries." *Lucas*, 505 U. S., at 1015 (quoting *Penn Central*, 438 U. S., at 124). Indeed, we still resist the

reached only a 'direct appropriation' of property, *Legal Tender Cases*, 12 Wall. 457, 551 (1871), or the functional equivalent of a 'practical ouster of [the owner's] possession,' *Transportation Co. v. Chicago*, 99 U. S. 635, 642 (1879) Justice Holmes recognized in *Mabon*, however, that if the protection against physical appropriations of private property was to be meaningfully enforced, the government's power to redefine the range of interests included in the ownership of property was necessarily constrained by constitutional limits. 260 U. S., at 414-415. If, instead, the uses of private property were subject to unbridled, uncompensated qualification under the police power, 'the natural tendency of human nature [would be] to extend the qualification more and more until at last private property disappear[ed].' *Id.*, at 415. These considerations gave birth in that case to the oft-cited maxim that, 'while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.' *Ibid.* " 505 U. S., at 1014 (citation omitted).

⁸ Justice Brandeis argued: "Every restriction upon the use of property imposed in the exercise of the police power deprives the owner of some right theretofore enjoyed, and is, in that sense, an abridgment by the State of rights in property without making compensation. But restriction imposed to protect the public health, safety or morals from dangers threatened is not a taking. The restriction here in question is merely the prohibition of a noxious use. The property so restricted remains in the possession of its owner. The State does not appropriate it or make any use of it. The State merely prevents the owner from making a use which interferes with paramount rights of the public." *Mabon*, 260 U. S., at 417 (dissenting opinion).

temptation to adopt *per se* rules in our cases involving partial regulatory takings, preferring to examine “a number of factors” rather than a simple “mathematically precise” formula.⁹ Justice Brennan’s opinion for the Court in *Penn Central* did, however, make it clear that even though multiple factors are relevant in the analysis of regulatory takings claims, in such cases we must focus on “the parcel as a whole”:

“‘Taking’ jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, this Court focuses rather both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole—here, the city tax block designated as the ‘landmark site.’ ” *Id.*, at 130-131.

This requirement that “the aggregate must be viewed in its entirety” explains why, for example, a regulation that prohibited commercial transactions in eagle feathers, but did not bar other uses or impose any physical invasion or restraint upon them, was not a taking. *Andrus v. Allard*, 444 U. S. 51, 66 (1979). It also clarifies why restrictions on the

⁹ In her concurring opinion in *Palazzolo*, 533 U. S., at 633, Justice O’Connor reaffirmed this approach: “Our polestar instead remains the principles set forth in *Penn Central* itself and our other cases that govern partial regulatory takings. Under these cases, interference with investment-backed expectations is one of a number of factors that a court must examine.” *Ibid.* “*Penn Central* does not supply mathematically precise variables, but instead provides important guide posts that lead to the ultimate determination whether just compensation is required.” *Id.*, at 634. “The temptation to adopt what amount to *per se* rules in either direction must be resisted. The Takings Clause requires careful examination and weighing of all the relevant circumstances in this context.” *Id.*, at 636.

use of only limited portions of the parcel, such as setback ordinances, *Gorieb v. Fox*, 274 U. S. 603 (1927), or a requirement that coal pillars be left in place to prevent mine subsidence, *Keystone Bituminous Coal Assn. v. DeBenedictis*, 480 U. S., at 498, were not considered regulatory takings. In each of these cases, we affirmed that “where an owner possesses a full ‘bundle’ of property rights, the destruction of one ‘strand’ of the bundle is not a taking.” *Andrus*, 444 U. S., at 65-66.

While the foregoing cases considered whether particular regulations had “gone too far” and were therefore invalid, none of them addressed the separate remedial question of how compensation is measured once a regulatory taking is established. In his dissenting opinion in *San Diego Gas & Elec. Co. v. San Diego*, 450 U. S. 621, 636 (1981), Justice Brennan identified that question and explained how he would answer it:

“The constitutional rule I propose requires that, once a court finds that a police power regulation has effected a ‘taking,’ the government entity must pay just compensation for the period commencing on the date the regulation first effected the ‘taking,’ and ending on the date the government entity chooses to rescind or otherwise amend the regulation.”
Id., at 658.

Justice Brennan’s proposed rule was subsequently endorsed by the Court in *First English*, 482 U. S., at 315, 318, 321. *First English* was certainly a significant decision, and nothing that we say today qualifies its holding. Nonetheless, it is important to recognize that we did not address in that case the quite different and logically prior question whether the temporary regulation at issue had in fact constituted a taking.

In *First English*, the Court unambiguously and repeatedly characterized the issue to be decided as a “compensation question” or a “remedial question.” *Id.*, at 311 (“The disposition of the case on these grounds isolates the remedial question for our consideration”); see also *id.*, at 313, 318. And the Court’s statement of its holding was equally unambiguous: “We merely hold that where the government’s activities *have already worked a taking* of all use of property, no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective.” *Id.*, at 321 (emphasis added). In fact, *First English* expressly disavowed any ruling on the merits of the takings issue because the California courts had decided the remedial question on the assumption that a taking had been alleged. *Id.*, at 312-313 (“We reject appellee’s suggestion that ... we must independently evaluate the adequacy of the complaint and resolve the takings claim on the merits before we can reach the remedial question”). After our remand, the California courts concluded that there had not been a taking, *First English Evangelical Church of Glendale v. County of Los Angeles*, 210 Cal. App. 3d 1353, 258 Cal. Rptr. 893 (1989), and we declined review of that decision, 493 U. S. 1056 (1990).

To the extent that the Court in *First English* referenced the antecedent takings question, we identified two reasons why a regulation temporarily denying an owner all use of her property might not constitute a taking. First, we recognized that “the county might avoid the conclusion that a compensable taking had occurred by establishing that the denial of all use was insulated as a part of the State’s authority to enact safety regulations.” 482 U. S., at 313. Second, we limited our holding “to the facts presented” and recognized “the quite different questions that would arise in the case of normal delays in obtaining building permits, changes in zoning ordinances, variances, and the like which [were] not before us.” *Id.*, at 321. Thus, our

decision in *First English* surely did not approve, and implicitly rejected, the categorical submission that petitioners are now advocating.

Similarly, our decision in *Lucas* is not dispositive of the question presented. Although *Lucas* endorsed and applied a categorical rule, it was not the one that petitioners propose. Lucas purchased two residential lots in 1988 for \$975,000. These lots were rendered “valueless” by a statute enacted two years later. The trial court found that a taking had occurred and ordered compensation of \$1,232,387.50, representing the value of the fee simple estate, plus interest. As the statute read at the time of the trial, it effected a taking that “was unconditional and permanent.” 505 U. S., at 1012. While the State’s appeal was pending, the statute was amended to authorize exceptions that might have allowed Lucas to obtain a building permit. Despite the fact that the amendment gave the State Supreme Court the opportunity to dispose of the appeal on ripeness grounds, it resolved the merits of the permanent takings claim and reversed. Since “Lucas had no reason to proceed on a ‘temporary taking’ theory at trial,” we decided the case on the permanent taking theory that both the trial court and the State Supreme Court had addressed. *Ibid.*

The categorical rule that we applied in *Lucas* states that compensation is required when a regulation deprives an owner of “all economically beneficial uses” of his land. *Id.*, at 1019. Under that rule, a statute that “wholly eliminated the value” of Lucas’ fee simple title clearly qualified as a taking. But our holding was limited to “the extraordinary circumstance when *no* productive or economically beneficial use of land is permitted.” *Id.*, at 1017. The emphasis on the word “no” in the text of the opinion was, in effect, reiterated in a footnote explaining that the categorical rule would not apply if the diminution in value

were 95% instead of 100%. *Id.*, at 1019, n. 8.¹⁰ Anything less than a “complete elimination of value,” or a “total loss,” the Court acknowledged, would require the kind of analysis applied in *Penn Central*. *Lucas*, 505 U. S., at 1019-1020, n. 8.¹¹

Certainly, our holding that the permanent “obliteration of the value” of a fee simple estate constitutes a categorical taking does not answer the question whether a regulation prohibiting any economic use of land for a 32-month period has the same legal effect. Petitioners seek to bring this case under the rule announced in *Lucas* by arguing that we can effectively sever a 32-month segment from the remainder of each landowner’s fee simple estate, and then ask whether that segment has been taken in its entirety by the moratoria. Of course, defining the property interest taken in terms of the very regulation being challenged is circular. With property so divided, every delay would become a total ban; the moratorium and the normal permit process alike would constitute categorical takings. Petitioners’ “conceptual severance” argument is unavailing because it ignores *Penn Central*’s admonition that in regulatory takings cases we must focus on “the parcel as a whole.” 438 U. S., at 130– 131. We have consistently rejected such an approach to the “denominator” question. See *Keystone*, 480 U. S., at 497. See also *Concrete Pipe & Products of Cal., Inc. v. Construction Laborers Pension Trust for Southern Cal.*, 508 U. S. 602, 644 (1993) (“To the extent that any portion of property is taken, that portion is always taken in its entirety; the relevant question, however, is whether the property taken is all, or only a portion of, the

¹⁰ Justice Kennedy concurred in the judgment on the basis of the regulation’s impact on “reasonable, investment-backed expectations.” 505 U. S., at 1034.

¹¹ It is worth noting that *Lucas* underscores the difference between physical and regulatory takings. See *supra*, at 322-325. For under our physical takings cases it would be irrelevant whether a property owner maintained 5% of the value of her property so long as there was a physical appropriation of any of the parcel.

parcel in question”). Thus, the District Court erred when it disaggregated petitioners’ property into temporal segments corresponding to the regulations at issue and then analyzed whether petitioners were deprived of all economically viable use during each period. 34 F. Supp. 2d, at 1242-1245. The starting point for the court’s analysis should have been to ask whether there was a total taking of the entire parcel; if not, then *Penn Central* was the proper framework.¹²

An interest in real property is defined by the metes and bounds that describe its geographic dimensions and the term of years that describes the temporal aspect of the owner’s interest. See Restatement of Property §§ 7-9 (1936). Both dimensions must be considered if the interest is to be viewed in its entirety. Hence, a permanent deprivation of the owner’s use of the entire area is a taking of “the parcel as a whole,” whereas a temporary restriction that merely causes a diminution in value is not. 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. Cf. *Agins v. City of Tiburon*, 447 U. S., at 263, n. 9 (“Even if the appellants’ ability to sell their property was limited during the pendency of the condemnation proceeding, the appellants were free to sell or develop their property when the proceedings ended. Mere fluctuations in value during the process of governmental decisionmaking, absent extraordinary delay, are ‘incidents of ownership. They cannot be considered as a “taking” in the constitutional sense’ ” (quoting *Danforth v. United States*, 308 U. S. 271, 285 (1939))).

Neither *Lucas*, nor *First English*, nor any of our other regulatory takings cases compels us to accept petitioners’

¹² The Chief Justice’s dissent makes the same mistake by carving out a 6-year interest in the property, rather than considering the parcel as a whole, and treating the regulations covering that segment as analogous to a total taking under *Lucas*, *post*, at 351.

categorical submission. In fact, these cases make clear that the categorical rule in *Lucas* was carved out for the “extraordinary case” in which a regulation permanently deprives property of all value; the default rule remains that, in the regulatory taking context, we require a more fact specific inquiry. Nevertheless, we will consider whether the interest in protecting individual property owners from bearing public burdens “which, in all fairness and justice, should be borne by the public as a whole,” *Armstrong v. United States*, 364 U. S., at 49, justifies creating a new rule for these circumstances.¹³

V

Considerations of “fairness and justice” arguably could support the conclusion that TRPA’s moratoria were takings of petitioners’ property based on any of seven different theories. First, even though we have not previously done so, we might now announce a categorical rule that, in the interest of fairness and justice, compensation is required whenever government temporarily deprives an owner of all economically viable use of her property. Second, we could craft a narrower rule that would cover all temporary landuse restrictions except those “normal delays in obtaining building permits, changes in zoning ordinances, variances, and the like” which were put to one side in our opinion in *First English*, 482 U. S., at 321. Third, we could adopt a rule like the one suggested by an *amicus* supporting petitioners that would “allow a short fixed period for deliberations to take place without compensation—say maximum one year—after which the just compensation

¹³ *Armstrong*, like *Lucas*, was a case that involved the “total destruction by the Government of all value” in a specific property interest. 364 U. S., at 48-49. It is nevertheless perfectly clear that Justice Black’s oft-quoted comment about the underlying purpose of the guarantee that private property shall not be taken for a public use without just compensation applies to partial takings as well as total takings.

requirements” would “kick in.”¹⁴ Fourth, with the benefit of hindsight, we might characterize the successive actions of TRPA as a “series of rolling moratoria” that were the functional equivalent of a permanent taking.¹⁵ Fifth, were it not for the findings of the District Court that TRPA acted diligently and in good faith, we might have concluded that the agency was stalling in order to avoid promulgating the environmental threshold carrying capacities and regional plan mandated by the 1980 Compact. Cf. *Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U. S. 687, 698 (1999). Sixth, apart from the District Court’s finding that TRPA’s actions represented a proportional response to a serious risk of harm to the lake, petitioners might have argued that the moratoria did not substantially advance a legitimate state interest, see *Agins* and *Monterey*. Finally, if petitioners had challenged the application of the moratoria to their individual parcels, instead of making a facial challenge, some of them might have prevailed under a *Penn Central* analysis.

As the case comes to us, however, none of the last four theories is available. The “rolling moratoria” theory was presented in the petition for certiorari, but our order granting review did not encompass that issue, 533 U. S. 948 (2001); the case was tried in the District Court and reviewed in the Court of Appeals on the theory that each of the two moratoria was a separate taking, one for a 2-year period and the other for an 8-month period. 216 F. 3d, at 769. And, as we have already noted, recovery on either a bad faith theory or a theory that the state interests were insubstantial is foreclosed by the District Court’s

¹⁴ Brief for the Institute for Justice as *Amicus Curiae* 30. Although *amicus* describes the 1-year cutoff proposal as the “better approach by far,” *ibid.*, its primary argument is that *Penn Central* should be overruled, *id.*, at 20 (“All partial takings by way of land use restriction should be subject to the same prima facie rules for compensation as a physical occupation for a limited period of time”).

¹⁵ Brief for Petitioners 44. See also Pet. for Cert. i.

unchallenged findings of fact. Recovery under a *Penn Central* analysis is also foreclosed both because petitioners expressly disavowed that theory, and because they did not appeal from the District Court's conclusion that the evidence would not support it. Nonetheless, each of the three *per se* theories is fairly encompassed within the question that we decided to answer.

With respect to these theories, the ultimate constitutional question is whether the concepts of "fairness and justice" that underlie the Takings Clause will be better served by one of these categorical rules or by a *Penn Central* inquiry into all of the relevant circumstances in particular cases. From that perspective, the extreme categorical rule that any deprivation of all economic use, no matter how brief, constitutes a compensable taking surely cannot be sustained. Petitioners' broad submission would apply to numerous "normal delays in obtaining building permits, changes in zoning ordinances, variances, and the like," 482 U. S., at 321, as well as to orders temporarily prohibiting access to crime scenes, businesses that violate health codes, fire-damaged buildings, or other areas that we cannot now foresee. Such a rule would undoubtedly require changes in numerous practices that have long been considered permissible exercises of the police power. As Justice Holmes warned in *Mabon*, "[g]overnment hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law." 260 U. S., at 413. A rule that required compensation for every delay in the use of property would render routine government processes prohibitively expensive or encourage hasty decisionmaking. Such an important change in the law should be the product of legislative rulemaking rather than adjudication.¹⁶

¹⁶ In addition, we recognize the anomaly that would be created if we were to apply *Penn Central* when a landowner is permanently deprived of 95% of the use of her property, *Lucas*, 505 U. S., at 1019, n. 8, and yet find a *per se* taking anytime the same

More importantly, for reasons set out at some length by Justice O'Connor in her concurring opinion in *Palazzolo v. Rhode Island*, 533 U. S., at 636, we are persuaded that the better approach to claims that a regulation has effected a temporary taking “requires careful examination and weighing of all the relevant circumstances.” In that opinion, Justice O'Connor specifically considered the role that the “temporal relationship between regulatory enactment and title acquisition” should play in the analysis of a takings claim. *Id.*, at 632. We have no occasion to address that particular issue in this case, because it involves a different temporal relationship—the distinction between a temporary restriction and one that is permanent. Her comments on the “fairness and justice” inquiry are, nevertheless, instructive:

“Today’s holding does not mean that the timing of the regulation’s enactment relative to the acquisition of title is immaterial to the *Penn Central* analysis. Indeed, it would be just as much error to expunge this consideration from the takings inquiry as it would be to accord it exclusive significance. Our polestar instead remains the principles set forth in *Penn Central* itself and our other cases that govern partial regulatory takings. Under these cases, interference with investment-backed expectations is one of a number of factors that a court must examine... .

property owner is deprived of all use for only five days. Such a scheme would present an odd inversion of Justice Holmes’ adage: “A limit in time, to tide over a passing trouble, well may justify a law that could not be upheld as a permanent change.” *Block v. Hirsh*, 256 U. S. 135, 157 (1921).

“The Fifth Amendment forbids the taking of private property for public use without just compensation. We have recognized that this constitutional guarantee is ‘designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.’” *Penn Central*, [438 U. S.], at 123-124 (quoting *Armstrong v. United States*, 364 U. S. 40, 49 (1960)). The concepts of ‘fairness and justice’ that underlie the Takings Clause, of course, are less than fully determinate. Accordingly, we have eschewed ‘any “set formula” for determining when “justice and fairness” require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons.’ *Penn Central*, *supra*, at 124 (quoting *Goldblatt v. Hempstead*, 369 U. S. 590, 594 (1962)). The outcome instead ‘depends largely “upon the particular circumstances [in that] case.’” *Penn Central*, *supra*, at 124 (quoting *United States v. Central Eureka Mining Co.*, 357 U. S. 155, 168 (1958)).” *Id.*, at 633.

In rejecting petitioners’ *per se* rule, we do not hold that the temporary nature of a land-use restriction precludes finding that it effects a taking; we simply recognize that it should not be given exclusive significance one way or the other.

A narrower rule that excluded the normal delays associated with processing permits, or that covered only delays of more than a year, would certainly have a less severe impact

on prevailing practices, but it would still impose serious financial constraints on the planning process.¹⁷ Unlike the “extraordinary circumstance” in which the government deprives a property owner of all economic use, *Lucas*, 505 U. S., at 1017, moratoria like Ordinance 81-5 and Resolution 83-21 are used widely among land-use planners to preserve the status quo while formulating a more permanent development strategy.¹⁸ In fact, the consensus in the planning community appears to be that moratoria, or

¹⁷ Petitioners fail to offer a persuasive explanation for why moratoria should be treated differently from ordinary permit delays. They contend that a permit applicant need only comply with certain specific requirements in order to receive one and can expect to develop at the end of the process, whereas there is nothing the landowner subject to a moratorium can do but wait, with no guarantee that a permit will be granted at the end of the process. Brief for Petitioners 28. Setting aside the obvious problem with basing the distinction on a course of events we can only know after the fact—in the context of a facial challenge—petitioners’ argument breaks down under closer examination because there is no guarantee that a permit will be granted, or that a decision will be made within a year. See, e. g., *Dufau v. United States*, 22 Cl. Ct. 156 (1990) (holding that 16-month delay in granting a permit did not constitute a temporary taking). Moreover, under petitioners’ modified categorical rule, there would be no *per se* taking if TRPA simply delayed action on all permits pending a regional plan. Fairness and justice do not require that TRPA be penalized for achieving the same result, but with full disclosure.

¹⁸ See, e. g., *Santa Fe Village Venture v. Albuquerque*, 914 F. Supp. 478, 483 (N. M. 1995) (30-month moratorium on development of lands within the Petroglyph National Monument was not a taking); *Williams v. Central*, 907 P. 2d 701, 703-706 (Colo. App. 1995) (10-month moratorium on development in gaming district while studying city’s ability to absorb growth was not a compensable taking); *Woodbury Place Partners v. Woodbury*, 492 N. W. 2d 258 (Minn. App. 1993) (moratorium pending review of plan for land adjacent to interstate highway was not a taking even though it deprived property owner of all economically viable use of its property for two years); *Zilber v. Moranga*, 692 F. Supp. 1195 (ND Cal. 1988) (18-month development moratorium during completion of a comprehensive scheme for open space did not require compensation). See also Wayman, Leaders Consider Options for Town Growth, *Charlotte Observer*, Feb. 3, 2002, p. 15M (describing 10-month building moratorium imposed “to give town leaders time to plan for development”); Wallman, City May Put Reins on Beach Projects, *Sun-Sentinel*, May 16, 2000, p. 1B (2-year building moratorium on beach front property in Fort Lauderdale pending new height, width, and dispersal regulations); Foderaro, In Suburbs, They’re Cracking Down on the Joneses, *N. Y. Times*, Mar. 19, 2001, p. A1 (describing moratorium imposed in Eastchester, New York, during a review of the town’s zoning code to address the problem of oversized homes); Dawson, Commissioners recommend Aboite construction ban be lifted, *Fort Wayne News Sentinel*, May 4, 2001, p. 1A (3-year moratorium to allow improvements in the water and sewage treatment systems).

“interim development controls” as they are often called, are an essential tool of successful development.¹⁹ Yet even the weak version of petitioners’ categorical rule would treat these interim measures as takings regardless of the good faith of the planners, the reasonable expectations of the landowners, or the actual impact of the moratorium on property values.²⁰

The interest in facilitating informed decisionmaking by regulatory agencies counsels against adopting a *per se* rule that would impose such severe costs on their deliberations. Otherwise, the financial constraints of compensating property owners during a moratorium may force officials to rush through the planning process or to abandon the practice altogether. To the extent that communities are forced to abandon using moratoria, landowners will have incentives to develop their property quickly before a comprehensive plan can be enacted, thereby fostering inefficient and ill-conceived growth. A finding in the 1980 Compact itself, which presumably was endorsed by all three legislative bodies that participated in its enactment, attests to the importance of that concern. 94 Stat. 3243 (“The

¹⁹ See J. Juergensmeyer & T. Roberts, *Land Use Planning and Control Law* §§ 5.28(G) and 9.6 (1998); Garvin & Leitner, *Drafting Interim Development Ordinances: Creating Time to Plan*, 48 *Land Use Law & Zoning Digest* 3 (June 1996) (“With the planning so protected, there is no need for hasty adoption of permanent controls in order to avoid the establishment of nonconforming uses, or to respond in an ad hoc fashion to specific problems. Instead, the planning and implementation process may be permitted to run its full and natural course with widespread citizen input and involvement, public debate, and full consideration of all issues and points of view”); Freilich, *Interim Development Controls: Essential Tools for Implementing Flexible Planning and Zoning*, 49 *J. Urb. L.* 65 (1971).

²⁰ The Chief Justice offers another alternative, suggesting that delays of six years or more should be treated as *per se* takings. However, his dissent offers no explanation for why 6 years should be the cutoff point rather than 10 days, 10 months, or 10 years. It is worth emphasizing that we do not reject a categorical rule in this case because a 32-month moratorium is just not that harsh. Instead, we reject a categorical rule because we conclude that the *Penn Central* framework adequately directs the inquiry to the proper considerations—only one of which is the length of the delay.

legislatures of the States of California and Nevada find that in order to make effective the regional plan as revised by the agency, it is necessary to halt temporarily works of development in the region which might otherwise absorb the entire capability of the region for further development or direct it out of harmony with the ultimate plan”).

... .

We would create a perverse system of incentives were we to hold that landowners must wait for a takings claim to ripen so that planners can make well-reasoned decisions while, at the same time, holding that those planners must compensate landowners for the delay.

Indeed, the interest in protecting the decisional process is even stronger when an agency is developing a regional plan than when it is considering a permit for a single parcel. In the proceedings involving the Lake Tahoe Basin, for example, the moratoria enabled TRPA to obtain the benefit of comments and criticisms from interested parties, such as the petitioners, during its deliberations.²¹ Since a categorical rule tied to the length of deliberations would likely create added pressure on decisionmakers to reach a quick resolution of land-use questions, it would only serve to disadvantage those landowners and interest groups who are not as organized or familiar with the planning process. Moreover, with a temporary ban on development there is a lesser risk that individual landowners will be “singled out” to bear a special burden that should be shared by the public as a whole. *Nollan v. California Coastal Comm’n*, 483 U. S. 825, 835 (1987). At least with a moratorium there is a clear

²¹ Petitioner Preservation Council, “through its authorized representatives, actively participated in the entire TRPA regional planning process leading to the adoption of the 1984 Regional Plan at issue in this action, and attended and expressed its views and concerns, orally and in writing, at each public hearing held by the Defendant TRPA in connection with the consideration of the 1984 Regional Plan at issue herein, as well as in connection with the adoption of Ordinance 81-5 and the Revised 1987 Regional Plan addressed herein.” App. 24.

“reciprocity of advantage,” *Mabon*, 260 U. S., at 415, because it protects the interests of all affected landowners against immediate construction that might be inconsistent with the provisions of the plan that is ultimately adopted. “While each of us is burdened somewhat by such restrictions, we, in turn, benefit greatly from the restrictions that are placed on others.” *Keystone*, 480 U. S., at 491. In fact, there is reason to believe property values often will continue to increase despite a moratorium. See, e. g., *Growth Properties, Inc. v. Klingbeil Holding Co.*, 419 F. Supp. 212, 218 (Md. 1976) (noting that land values could be expected to increase 20% during a 5-year moratorium on development). Cf. *Forest Properties, Inc. v. United States*, 177 F. 3d 1360, 1367 (CA Fed. 1999) (record showed that market value of the entire parcel increased despite denial of permit to fill and develop lake-bottom property). Such an increase makes sense in this context because property values throughout the Basin can be expected to reflect the added assurance that Lake Tahoe will remain in its pristine state. Since in some cases a 1-year moratorium may not impose a burden at all, we should not adopt a rule that assumes moratoria always force individuals to bear a special burden that should be shared by the public as a whole.

It may well be true that any moratorium that lasts for more than one year should be viewed with special skepticism. But given the fact that the District Court found that the 32 months required by TRPA to formulate the 1984 Regional Plan was not unreasonable, we could not possibly conclude that every delay of over one year is constitutionally unacceptable.²² Formulating a general rule of this kind is a

²² We note that the temporary restriction that was ultimately upheld in the *First English* case lasted for more than six years before it was replaced by a permanent regulation. *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 210 Cal. App. 3d 1353, 258 Cal. Rptr. 893 (1989).

suitable task for state legislatures.²³ In our view, the duration of the restriction is one of the important factors that a court must consider in the appraisal of a regulatory takings claim, but with respect to that factor as with respect to other factors, the “temptation to adopt what amount to *per se* rules in either direction must be resisted.” *Palazzolo*, 533 U. S., at 636 (O’Connor, J., concurring). There may be moratoria that last longer than one year which interfere with reasonable investment-backed expectations, but as the District Court’s opinion illustrates, petitioners’ proposed rule is simply “too blunt an instrument” for identifying those cases. *Id.*, at 628. We conclude, therefore, that the interest in “fairness and justice” will be best served by relying on the familiar *Penn Central* approach when deciding cases like this, rather than by attempting to craft a new categorical rule.

Accordingly, the judgment of the Court of Appeals is affirmed.

It is so ordered.

CHIEF JUSTICE REHNQUIST, with whom JUSTICE SCALIA and JUSTICE THOMAS join, dissenting.

²³ Several States already have statutes authorizing interim zoning ordinances with specific time limits. See Cal. Govt. Code Ann. § 65858 (West Supp. 2002) (authorizing interim ordinance of up to two years); Colo. Rev. Stat. § 30-28-121 (2001) (six months); Ky. Rev. Stat. Ann. § 100.201 (2001) (one year); Mich. Comp. Laws Ann. § 125.215 (West 2001) (three years); Minn. Stat. § 394.34 (2000) (two years); N. H. Rev. Stat. Ann. § 674:23 (West 2001) (one year); Ore. Rev. Stat. Ann. § 197.520 (1997) (10 months); S. D. Codified Laws § 11-2-10 (2001) (two years); Utah Code Ann. § 17-27-404 (1995) (18 months); Wash. Rev. Code § 35.63.200 (2001); Wis. Stat. § 62.23(7)(d) (2001) (two years). Other States, although without specific statutory authority, have recognized that reasonable interim zoning ordinances may be enacted. See, e. g., *S. E. W. Freil v. Triangle Oil Co.*, 76 Md. App. 96, 543 A. 2d 863 (1988); *New Jersey Shore Builders Assn. v. Dover Twp. Comm.*, 191 N. J. Super. 627, 468 A. 2d 742 (1983); *SCA Chemical Waste Servs., Inc. v. Konigsberg*, 636 S. W. 2d 430 (Tenn. 1982); *Sturgess v. Chilmark*, 380 Mass. 246, 402 N. E. 2d 1346 (1980); *Lebanon v. Woods*, 153 Conn. 182, 215 A. 2d 112 (1965).

For over half a decade petitioners were prohibited from building homes, or any other structures, on their land. Because the Takings Clause requires the government to pay compensation when it deprives owners of all economically viable use of their land, see *Lucas v. South Carolina Coastal Council*, 505 U. S. 1003 (1992), and because a ban on all development lasting almost six years does not resemble any traditional land-use planning device, I dissent.

I

“A court cannot determine whether a regulation has gone ‘too far’ unless it knows how far the regulation goes.” *MacDonald, Sommer & Frates v. Yolo County*, 477 U. S. 340, 348 (1986) (citing *Pennsylvania Coal Co. v. Mahon*, 260 U. S. 393, 415 (1922)).²⁴ In failing to undertake this inquiry, the Court ignores much of the impact of respondent’s conduct on petitioners. Instead, it relies on the flawed determination of the Court of Appeals that the relevant time period lasted only from August 1981 until April 1984.

... .

Because respondent caused petitioners’ inability to use their land from 1981 through 1987, that is the appropriate period of time from which to consider their takings claim.

²⁴ We are not bound by the Court of Appeals’ determination that petitioners’ claim under 42 U. S. C. § 1983 (1994 ed., Supp. V) permitted only challenges to Ordinance 81-5 and Regulation 83-21. Petitioners sought certiorari on the Court of Appeals’ ruling that respondent Tahoe Regional Planning Agency (hereinafter respondent) did not cause petitioners’ injury from 1984 to 1987. Pet. for Cert. 27-30. We did not grant certiorari on any of the petition’s specific questions presented, but formulated the following question: “Whether the Court of Appeals properly determined that a temporary moratorium on land development does not constitute a taking of property requiring compensation under the Takings Clause of the United States Constitution?” 533 U. S. 948-949 (2001). This Court’s Rule 14(1)(a) provides that a “question presented is deemed to comprise every subsidiary question fairly included therein.” The question of how long the moratorium on land development lasted is necessarily subsumed within the question whether the moratorium constituted a taking. Petitioners did not assume otherwise. Their brief on the merits argues that respondent “effectively blocked all construction for the past two decades.” Brief for Petitioners 7.

II

I now turn to determining whether a ban on all economic development lasting almost six years is a taking. *Lucas* reaffirmed our “frequently expressed” view that “when the owner of real property has been called upon to sacrifice *all* economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking.” 505 U. S., at 1019. See also *Agin v. City of Tiburon*, 447 U. S. 255, 258-259 (1980). The District Court in this case held that the ordinances and resolutions in effect between August 24, 1981, and April 25, 1984, “did in fact deny the plaintiffs all economically viable use of their land.” 34 F. Supp. 2d 1226, 1245 (Nev. 1999). The Court of Appeals did not overturn this finding. And the 1984 injunction, issued because the environmental thresholds issued by respondent did not permit the development of single-family residences, forced petitioners to leave their land economically idle for at least another three years. The Court does not dispute that petitioners were forced to leave their land economically idle during this period. See *ante*, at 312. But the Court refuses to apply *Lucas* on the ground that the deprivation was “temporary.”

Neither the Takings Clause nor our case law supports such a distinction. For one thing, a distinction between “temporary” and “permanent” prohibitions is tenuous. The “temporary” prohibition in this case that the Court finds is not a taking lasted almost six years.²⁵ The “permanent” prohibition that the Court held to be a taking in *Lucas* lasted less than two years. See 505 U. S., at 1011-1012. The “permanent” prohibition in *Lucas* lasted less than two years because the law, as it often does, changed. The South Carolina Legislature in 1990 decided to amend the 1988 Beach front Management Act to allow the issuance of

²⁵ Even under the Court’s mistaken view that the ban on development lasted only 32 months, the ban in this case exceeded the ban in *Lucas*.

“‘special permits’ for the construction or reconstruction of habitable structures seaward of the baseline.” *Id.*, at 1011-1012. Landuse regulations are not irrevocable. And the government can even abandon condemned land. See *United States v. Dow*, 357 U. S. 17, 26 (1958). Under the Court’s decision today, the takings question turns entirely on the initial label given a regulation, a label that is often without much meaning. There is every incentive for government to simply label any prohibition on development “temporary,” or to fix a set number of years. As in this case, this initial designation does not preclude the government from repeatedly extending the “temporary” prohibition into a long-term ban on all development. The Court now holds that such a designation by the government is conclusive even though in fact the moratorium greatly exceeds the time initially specified. Apparently, the Court would not view even a 10-year moratorium as a taking under *Lucas* because the moratorium is not “permanent.”

Our opinion in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U. S. 304 (1987), rejects any distinction between temporary and permanent takings when a landowner is deprived of all economically beneficial use of his land. *First English* stated that “temporary takings which, as here, deny a landowner all use of his property, are not different in kind from permanent takings, for which the Constitution clearly requires compensation.” *Id.*, at 318. Because of *First English*’s rule that “temporary deprivations of use are compensable under the Takings Clause,” the Court in *Lucas* found nothing problematic about the later developments that potentially made the ban on development temporary. 505 U. S., at 1011-1012 (citing *First English, supra*); see also 505 U. S., at 1033 (Kennedy, J., concurring in judgment) (“It is well established that temporary takings are as protected by the Constitution as are permanent ones” (citing *First English, supra*, at 318)).

More fundamentally, even if a practical distinction between temporary and permanent deprivations were plausible, to treat the two differently in terms of takings law would be at odds with the justification for the *Lucas* rule. The *Lucas* rule is derived from the fact that a “total deprivation of beneficial use is, from the landowner’s point of view, the equivalent of a physical appropriation.” 505 U. S., at 1017. The regulation in *Lucas* was the “practical equivalence” of a long-term physical appropriation, *i. e.*, a condemnation, so the Fifth Amendment required compensation. The “practical equivalence,” from the landowner’s point of view, of a “temporary” ban on all economic use is a forced leasehold. For example, assume the following situation: Respondent is contemplating the creation of a National Park around Lake Tahoe to preserve its scenic beauty. Respondent decides to take a 6-year leasehold over petitioners’ property, during which any human activity on the land would be prohibited, in order to prevent any further destruction to the area while it was deciding whether to request that the area be designated a National Park.

Surely that leasehold would require compensation. In a series of World War II-era cases in which the Government had condemned leasehold interests in order to support the war effort, the Government conceded that it was required to pay compensation for the leasehold interest.²⁶ See *United States v. Petty Motor Co.*, 327 U. S. 372 (1946); *United States v. General Motors Corp.*, 323 U. S. 373, 376 (1945). From

²⁶ There was no dispute that just compensation was required in those cases. The disagreement involved how to calculate that compensation. In *United States v. General Motors Corp.*, 323 U. S. 373 (1945), for example, the issues before the Court were how to value the leasehold interest (*i. e.*, whether the “long-term rental value [should be] the sole measure of the value of such short-term occupancy,” *id.*, at 380), whether the Government had to pay for the respondent’s removal of personal property from the condemned warehouse, and whether the Government had to pay for the reduction in value of the respondent’s equipment and fixtures left in the warehouse. *Id.*, at 380-381.

petitioners' standpoint, what happened in this case is no different than if the government had taken a 6-year lease of their property. The Court ignores this "practical equivalence" between respondent's deprivation and the deprivation resulting from a leasehold. In so doing, the Court allows the government to "do by regulation what it cannot do through eminent domain—i. e., take private property without paying for it." 228 F. 3d 998, 999 (CA9 2000) (Kozinski, J., dissenting from denial of rehearing en banc).

Instead of acknowledging the "practical equivalence" of this case and a condemned leasehold, the Court analogizes to other areas of takings law in which we have distinguished between regulations and physical appropriations, see *ante*, at 321-324. But whatever basis there is for such distinctions in those contexts does not apply when a regulation deprives a landowner of all economically beneficial use of his land. In addition to the "practical equivalence" from the landowner's perspective of such a regulation and a physical appropriation, we have held that a regulation denying all productive use of land does not implicate the traditional justification for differentiating between regulations and physical appropriations. In "the extraordinary circumstance when *no* productive or economically beneficial use of land is permitted," it is less likely that "the legislature is simply 'adjusting the benefits and burdens of economic life' ... in a manner that secures an 'average reciprocity of advantage' to everyone concerned," *Lucas, supra*, at 1017-1018 (quoting *Penn Central Transp. Co. v. New York City*, 438 U. S., at 124, and *Pennsylvania Coal Co. v. Mahon*, 260 U. S., at 415), and more likely that the property "is being pressed into some form of public service under the guise of mitigating serious public harm," *Lucas, supra*, at 1018.

The Court also reads *Lucas* as being fundamentally concerned with value, *ante*, at 329-331, rather than with the

denial of “all economically beneficial or productive use of land,” 505 U. S., at 1015. But *Lucas* repeatedly discusses its holding as applying where “no productive or economically beneficial use of land is permitted.” *Id.*, at 1017; see also *ibid.* (“[T]otal deprivation of beneficial use is, from the landowner’s point of view, the equivalent of a physical appropriation”); *id.*, at 1016 (“[T]he Fifth Amendment is violated when land-use regulation ... *denies an owner economically viable use of his land*”); *id.*, at 1018 (“[T]he *functional* basis for permitting the government, by regulation, to affect property values without compensation ... does not apply to the relatively rare situations where the government has deprived a landowner of all economically beneficial uses”); *ibid.* (“[T]he fact that regulations that leave the owner of land without economically beneficial or productive options for its use ... carry with them a heightened risk that private property is being pressed into some form of public service”); *id.*, at 1019 (“[W]hen the owner of real property has been called upon to sacrifice *all* economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking”). Moreover, the Court’s position that value is the *sine qua non* of the *Lucas* rule proves too much. Surely, the land at issue in *Lucas* retained some market value based on the contingency, which soon came to fruition (see *supra*, at 347), that the development ban would be amended.

Lucas is implicated when the government deprives a landowner of “all economically beneficial or productive use of land.” 505 U. S., at 1015. The District Court found, and the Court agrees, that the moratorium “temporarily” deprived petitioners of “all economically viable use of their land.” *Ante*, at 316. Because the rationale for the *Lucas* rule applies just as strongly in this case, the “temporary” denial of all viable use of land for six years is a taking.

III

The Court worries that applying *Lucas* here compels finding that an array of traditional, short-term, land-use planning devices are takings. *Ante*, at 334-335, 337-338. But since the beginning of our regulatory takings jurisprudence, we have recognized that property rights “are enjoyed under an implied limitation.” *Mahon, supra*, at 413.

... .

But a moratorium prohibiting all economic use for a period of six years is not one of the longstanding, implied limitations of state property law.²⁷ Moratoria are “interim controls on the use of land that seek to maintain the status quo with respect to land development in an area by either ‘freezing’ existing land uses or by allowing the issuance of building permits for only certain land uses that would not be inconsistent with a contemplated zoning plan or zoning change.” 1 E. Ziegler, Rathkopf’s *The Law of Zoning and Planning* § 13:3, p. 13-6 (4th ed. 2001). Typical moratoria thus prohibit only certain categories of development, such as fast-food restaurants, see *Schafer v. New Orleans*, 743 F. 2d 1086 (CA5 1984), or adult businesses, see *Renton v. Playtime Theatres, Inc.*, 475 U. S. 41 (1986), or all commercial development, see *Arnold Bernhard & Co. v. Planning & Zoning Comm’n*, 194 Conn. 152, 479 A. 2d 801 (1984). Such moratoria do not implicate *Lucas* because they do not deprive landowners of all economically beneficial use of their land. As for moratoria that prohibit all development, these do not have the lineage of permit and zoning

²⁷ Six years is not a “cutoff point,” *ante*, at 338, n. 34; it is the length involved in this case. And the “explanation” for the conclusion that there is a taking in this case is the fact that a 6-year moratorium far exceeds any moratorium authorized under background principles of state property law. See *infra*, at 353-354. This case does not require us to undertake a more exacting study of state property law and discern exactly how long a moratorium must last before it no longer can be considered an implied limitation of property ownership (assuming, that is, that a moratorium on all development is a background principle of state property law, see *infra*, at 353).

requirements and thus it is less certain that property is acquired under the “implied limitation” of a moratorium prohibiting all development. Moreover, unlike a permit system in which it is expected that a project will be approved so long as certain conditions are satisfied, a moratorium that prohibits all uses is by definition contemplating a new land-use plan that would prohibit all uses.

But this case does not require us to decide as a categorical matter whether moratoria prohibiting all economic use are an implied limitation of state property law, because the duration of this “moratorium” far exceeds that of ordinary moratoria. As the Court recognizes, *ante*, at 342, n. 37, state statutes authorizing the issuance of moratoria often limit the moratoria’s duration. California, where much of the land at issue in this case is located, provides that a moratorium “shall be of no further force and effect 45 days from its date of adoption,” and caps extension of the moratorium so that the total duration cannot exceed two years. Cal. Govt. Code Ann. § 65858(a) (West Supp. 2002); see also Minn. Stat. § 462.355, subd. 4 (2000) (limiting moratoria to 18 months, with one permissible extension, for a total of two years). Another State limits moratoria to 120 days, with the possibility of a single 6-month extension. Ore. Rev. Stat. Ann. § 197.520(4) (1997). Others limit moratoria to six months without any possibility of an extension. See Colo. Rev. Stat. § 30-28-121 (2001); N. J. Stat. Ann. § 40:55D-90(b) (1991).²⁸ Indeed, it has long been understood that moratoria on development exceeding these short time periods are not a legitimate planning device. See,

²⁸ These are just some examples of the state laws limiting the duration of moratoria. There are others. See, *e. g.*, Utah Code Ann. §§ 17-27– 404(3)(b)(i)–(ii) (1995) (temporary prohibitions on development “may not exceed six months in duration,” with the possibility of extensions for no more than “two additional six-month periods”). See also *ante*, at 337, n. 31.

e. g., Holdsworth v. Hague, 9 N. J. Misc. 715, 155 A. 892 (1931).

Resolution 83-21 reflected this understanding of the limited duration of moratoria in initially limiting the moratorium in this case to 90 days. But what resulted—a “moratorium” lasting nearly six years—bears no resemblance to the short-term nature of traditional moratoria as understood from these background examples of state property law.

Because the prohibition on development of nearly six years in this case cannot be said to resemble any “implied limitation” of state property law, it is a taking that requires compensation.

* * *

Lake Tahoe is a national treasure, and I do not doubt that respondent’s efforts at preventing further degradation of the lake were made in good faith in furtherance of the public interest. But, as is the case with most governmental action that furthers the public interest, the Constitution requires that the costs and burdens be borne by the public at large, not by a few targeted citizens. Justice Holmes’ admonition of 80 years ago again rings true: “We are in danger of forgetting that 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.” *Mabon*, 260 U. S., at 416.

Lingle, Governor of Hawaii, et al. v. Chevron U.S.A. Inc.

544 U.S. 528 (2005)

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

Mark J. Bennett, Attorney General of Hawaii, argued the cause for petitioners. With him on the briefs were *Michael L. Meaney*, Deputy Attorney General, *Seth P. Waxman*, *Paul R. Q. Wolfson*, *Robert G. Dreher*, and *John D. Echeverria*.

Deputy Solicitor General Kneedler argued the cause for the United States as *amicus curiae* in support of petitioners. With him on the brief were *Acting Solicitor General Clement, Assistant Attorney General Keisler, Malcolm L. Stewart, Mark B. Stern, and Sharon Swingle.*

Craig E. Stewart argued the cause for respondent. With him on the brief were *Donald B. Ayer, Michael S. Fried, and Louis K. Fisher.*

JUSTICE O'CONNOR delivered the opinion of the Court.

On occasion, a would-be doctrinal rule or test finds its way into our case law through simple repetition of a phrase – however fortuitously coined. A quarter century ago, in *Agins v. City of Tiburon*, 447 U. S. 255 (1980), the Court declared that government regulation of private property “effects a taking if [such regulation] does not substantially advance legitimate state interests... .” *Id.*, at 260. Through reiteration in a half dozen or so decisions since *Agins*, this language has been ensconced in our Fifth Amendment takings jurisprudence. See *Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U. S. 687, 704 (1999) (citing cases).

In the case before us, the lower courts applied *Agins*’ “substantially advances” formula to strike down a Hawaii statute that limits the rent that oil companies may charge to dealers who lease service stations owned by the companies. The lower courts held that the rent cap effects an uncompensated taking of private property in violation of the Fifth and Fourteenth Amendments because it does not substantially advance Hawaii’s asserted interest in controlling retail gasoline prices. This case requires us to decide whether the “substantially advances” formula announced in *Agins* is an appropriate test for determining whether a regulation effects a Fifth Amendment taking. We conclude that it is not.

... .

II

A

The Takings Clause of the Fifth Amendment, made applicable to the States through the Fourteenth, see *Chicago, B. & Q. R. Co. v. Chicago*, 166 U. S. 226 (1897), provides that private property shall not “be taken for public use, without just compensation.” As its text makes plain, the Takings Clause “does not prohibit the taking of private property, but instead places a condition on the exercise of that power.” *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U. S. 304, 314 (1987). In other words, it “is designed not to limit the governmental interference with property rights *per se*, but rather to secure *compensation* in the event of otherwise proper interference amounting to a taking.” *Id.*, at 315 (emphasis in original). While scholars have offered various justifications for this regime, we have emphasized its role in “bar[ring] Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.” *Armstrong v. United States*, 364 U.S. 40, 49 (1960); see also *Monongahela Nav. Co. v. United States*, 148 U. S. 312, 325 (1893).

The paradigmatic taking requiring just compensation is a direct government appropriation or physical invasion of private property. See, e.g., *United States v. Pewee Coal Co.*, 341 U. S. 114 (1951) (Government’s seizure and operation of a coal mine to prevent a national strike of coal miners effected a taking); *United States v. General Motors Corp.*, 323 U. S. 373 (1945) (Government’s occupation of private warehouse effected a taking). Indeed, until the Court’s watershed decision in *Pennsylvania Coal Co. v. Mahon*, 260 U. S. 393 (1922), “it was generally thought that the Takings Clause reached *only* a ‘direct appropriation’ of property, or the functional equivalent of a ‘practical ouster of [the owner’s] possession.’” *Lucas v. South Carolina Coastal Council*, 505 U. S. 1003, 1014 (1992)(citations omitted and emphasis

added; brackets in original); see also *id.*, at 1028, n. 15 (“[E]arly constitutional theorists did not believe the Takings Clause embraced regulations of property at all”).

Beginning with *Mahon*, however, the Court recognized that government regulation of private property may, in some instances, be so onerous that its effect is tantamount to a direct appropriation or ouster – and that such “regulatory takings” may be compensable under the Fifth Amendment. In Justice Holmes’ storied but cryptic formulation, “while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.” 260 U. S., at 415. The rub, of course, has been – and remains – how to discern how far is “too far.” In answering that question, we must remain cognizant that “government regulation – by definition – involves the adjustment of rights for the public good,” *Andrus v. Allard*, 444 U. S. 51, 65 (1979), and that “Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law,” *Mahon*, *supra*, at 413.

Our precedents stake out two categories of regulatory action that generally will be deemed *per se* takings for Fifth Amendment purposes. First, where government requires an owner to suffer a permanent physical invasion of her property – however minor – it must provide just compensation. See *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U. S. 419 (1982) (state law requiring landlords to permit cable companies to install cable facilities in apartment buildings effected a taking). A second categorical rule applies to regulations that completely deprive an owner of “all economically beneficial us[e]” of her property. *Lucas*, 505 U. S., at 1019 (emphasis in original). We held in *Lucas* that the government must pay just compensation for such “total regulatory takings,” except to the extent that “background principles of nuisance and property law”

independently restrict the owner's intended use of the property. *Id.*, at 1026-1032.

Outside these two relatively narrow categories (and the special context of land-use exactions discussed below, see *infra*, at 546-548), regulatory takings challenges are governed by the standards set forth in *Penn Central Transp. Co. v. New York City*, 438 U. S. 104 (1978). The Court in *Penn Central* acknowledged that it had hitherto been “unable to develop any ‘set formula’” for evaluating regulatory takings claims, but identified “several factors that have particular significance.” *Id.*, at 124. Primary among those factors are “[t]he economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations.” *Ibid.* In addition, the “character of the governmental action” – for instance whether it amounts to a physical invasion or instead merely affects property interests through “some public program adjusting the benefits and burdens of economic life to promote the common good” – may be relevant in discerning whether a taking has occurred. *Ibid.* The *Penn Central* factors – though each has given rise to vexing subsidiary questions – have served as the principal guidelines for resolving regulatory takings claims that do not fall within the physical takings or *Lucas* rules. See, e. g., *Palazzolo v. Rhode Island*, 533 U. S. 606, 617-618 (2001); *id.*, at 632-634 (O’CONNOR, J., concurring).

Although our regulatory takings jurisprudence cannot be characterized as unified, these three inquiries (reflected in *Loretto*, *Lucas*, and *Penn Central*) share a common touchstone. Each aims to identify regulatory actions that are functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his domain. Accordingly, each of these tests focuses directly upon the severity of the burden that government imposes upon private property rights. The

Court has held that physical takings require compensation because of the unique burden they impose: A permanent physical invasion, however minimal the economic cost it entails, eviscerates the owner's right to exclude others from entering and using her property – perhaps the most fundamental of all property interests. See *Dolan v. City of Tigard*, 512 U. S. 374, 384 (1994); *Nollan v. California Coastal Comm'n*, 483 U. S. 825, 831-832 (1987); *Loretto, supra*, at 433; *Kaiser Aetna v. United States*, 444 U. S. 164, 176 (1979). In the *Lucas* context, of course, the complete elimination of a property's value is the determinative factor. See *Lucas, supra*, at 1017 (positing that “total deprivation of beneficial use is, from the landowner's point of view, the equivalent of a physical appropriation”). And the *Penn Central* inquiry turns in large part, albeit not exclusively, upon the magnitude of a regulation's economic impact and the degree to which it interferes with legitimate property interests.

B

In *Agins v. City of Tiburon*, a case involving a facial takings challenge to certain municipal zoning ordinances, the Court declared that “[t]he application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests, see *Nectow v. Cambridge*, 277 U. S. 183, 188 (1928), or denies an owner economically viable use of his land, see *Penn Central Transp. Co. v. New York City*, 438 U. S. 104, 138, n. 36 (1978).” 447 U. S., at 260. Because this statement is phrased in the disjunctive, *Agins*' “substantially advances” language has been read to announce a stand-alone regulatory takings test that is wholly independent of *Penn Central* or any other test. Indeed, the lower courts in this case struck down Hawaii's rent control statute based solely upon their findings that it does not substantially advance a legitimate state interest. See *supra*, at 534, 536. Although a number of our takings precedents have recited the “substantially advances” formula minted in *Agins*, this is our first

opportunity to consider its validity as a freestanding takings test. We conclude that this formula prescribes an inquiry in the nature of a due process, not a takings, test, and that it has no proper place in our takings jurisprudence.

There is no question that the “substantially advances” formula was derived from due process, not takings, precedents. In support of this new language, *Agins* cited *Nectow v. Cambridge*, 277 U. S. 183, a 1928 case in which the plaintiff claimed that a city zoning ordinance “deprived him of his property without due process of law in contravention of the Fourteenth Amendment,” *id.*, at 185. *Agins* then went on to discuss *Village of Euclid v. Ambler Realty Co.*, 272 U. S. 365 (1926), a historic decision holding that a municipal zoning ordinance would survive a substantive due process challenge so long as it was not “clearly arbitrary and unreasonable, having no *substantial relation to the public health, safety, morals, or general welfare.*” *Id.*, at 395 (emphasis added); see also *Nectow*, *supra*, at 187-188 (quoting the same “substantial relation” language from *Euclid*).

When viewed in historical context, the Court’s reliance on *Nectow* and *Euclid* is understandable. *Agins* was the Court’s first case involving a challenge to zoning regulations in many decades, so it was natural to turn to these seminal zoning precedents for guidance. See Brief for United States as *Amicus Curiae* in *Agins v. City of Tiburon*, O. T. 1979, No. 79-602, pp. 12-13 (arguing that *Euclid* “set out the principles applicable to a determination of the facial validity of a zoning ordinance attacked as a violation of the Takings Clause of the Fifth Amendment”). Moreover, *Agins*’ apparent commingling of due process and takings inquiries had some precedent in the Court’s then-recent decision in *Penn Central*. See 438 U. S., at 127 (stating in dicta that “[i]t is ... implicit in *Goldblatt [v. Hempstead]*, 369 U. S. 590 (1962),] that a use restriction on real property may constitute a ‘taking’ if not reasonably necessary to the

effectuation of a substantial public purpose, see *Nectow v. Cambridge, supra*). But see *Goldblatt v. Hempstead*, 369 U. S. 590, 594-595 (1962) (quoting “‘reasonably necessary’” language from *Lawton v. Steele*, 152 U. S. 133, 137 (1894), a due process case, and applying a deferential “‘reasonableness’” standard to determine whether a challenged regulation was a “valid exercise of the ... police power” under the Due Process Clause). Finally, when *Agins* was decided, there had been some history of referring to deprivations of property without due process of law as “takings,” see, e. g., *Rowan v. Post Office Dept.*, 397 U. S. 728, 740 (1970), and the Court had yet to clarify whether “regulatory takings” claims were properly cognizable under the Takings Clause or the Due Process Clause, see *Williamson County Regional Planning Comm’n v. Hamilton Bank of Johnson City*, 473 U. S. 172, 197-199 (1985).

Although *Agins*’ reliance on due process precedents is understandable, the language the Court selected was regrettably imprecise. The “substantially advances” formula suggests a means-ends test: It asks, in essence, whether a regulation of private property is *effective* in achieving some legitimate public purpose. An inquiry of this nature has some logic in the context of a due process challenge, for a regulation that fails to serve any legitimate governmental objective may be so arbitrary or irrational that it runs afoul of the Due Process Clause. See, e. g., *County of Sacramento v. Lewis*, 523 U. S. 833, 846 (1998)(stating that the Due Process Clause is intended, in part, to protect the individual against “the exercise of power without any reasonable justification in the service of a legitimate governmental objective”). But such a test is not a valid method of discerning whether private property has been “taken” for purposes of the Fifth Amendment.

In stark contrast to the three regulatory takings tests discussed above, the “substantially advances” inquiry reveals nothing about the *magnitude or character of the burden a*

particular regulation imposes upon private property rights. Nor does it provide any information about how any regulatory burden is *distributed* among property owners. In consequence, this test does not help to identify those regulations whose effects are functionally comparable to government appropriation or invasion of private property; it is tethered neither to the text of the Takings Clause nor to the basic justification for allowing regulatory actions to be challenged under the Clause.

Chevron appeals to the general principle that the Takings Clause is meant “to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.” Brief for Respondent 17-21 (quoting *Armstrong*, 364 U. S., at 49). But that appeal is clearly misplaced, for the reasons just indicated. A test that tells us nothing about the actual burden imposed on property rights, or how that burden is allocated, cannot tell us when justice might require that the burden be spread among taxpayers through the payment of compensation. The owner of a property subject to a regulation that *effectively* serves a legitimate state interest may be just as singled out and just as burdened as the owner of a property subject to an *ineffective* regulation. It would make little sense to say that the second owner has suffered a taking while the first has not. Likewise, an ineffective regulation may not significantly burden property rights at all, and it may distribute any burden broadly and evenly among property owners. The notion that such a regulation nevertheless “takes” private property for public use merely by virtue of its ineffectiveness or foolishness is untenable.

Instead of addressing a challenged regulation’s effect on private property, the “substantially advances” inquiry probes the regulation’s underlying validity. But such an inquiry is logically prior to and distinct from the question whether a regulation effects a taking, for the Takings Clause presupposes that the government has acted in pursuit of a

valid public purpose. The Clause expressly requires compensation where government takes private property “for public use.” It does not bar government from interfering with property rights, but rather requires compensation “in the event of *otherwise proper interference* amounting to a taking.” *First English Evangelical Lutheran Church*, 482 U. S., at 315 (emphasis added). Conversely, if a government action is found to be impermissible – for instance because it fails to meet the “public use” requirement or is so arbitrary as to violate due process – that is the end of the inquiry. No amount of compensation can authorize such action.

Chevron’s challenge to the Hawaii statute in this case illustrates the flaws in the “substantially advances” theory. To begin with, it is unclear how significantly Hawaii’s rent cap actually burdens Chevron’s property rights. The parties stipulated below that the cap would reduce Chevron’s aggregate rental income on 11 of its 64 lessee-dealer stations by about \$207,000 per year, but that Chevron nevertheless expects to receive a return on its investment in these stations that satisfies any constitutional standard. See *supra*, at 534. Moreover, Chevron asserted below, and the District Court found, that Chevron would recoup any reductions in its rental income by raising wholesale gasoline prices. See *supra*, at 535. In short, Chevron has not clearly argued – let alone established – that it has been singled out to bear any particularly severe regulatory burden. Rather, the gravamen of Chevron’s claim is simply that Hawaii’s rent cap will not actually serve the State’s legitimate interest in protecting consumers against high gasoline prices. Whatever the merits of that claim, it does not sound under the Takings Clause. Chevron plainly does not seek compensation for a taking of its property for a legitimate public use, but rather an injunction against the enforcement of a regulation that it alleges to be fundamentally arbitrary and irrational.

Finally, the “substantially advances” formula is not only *doctrinally* untenable as a takings test – its application as such would also present serious practical difficulties. The *Aginis* formula can be read to demand heightened means-ends review of virtually any regulation of private property. If so interpreted, it would require courts to scrutinize the efficacy of a vast array of state and federal regulations – a task for which courts are not well suited. Moreover, it would empower – and might often require – courts to substitute their predictive judgments for those of elected legislatures and expert agencies.

Although the instant case is only the tip of the proverbial iceberg, it foreshadows the hazards of placing courts in this role. To resolve Chevron’s takings claim, the District Court was required to choose between the views of two opposing economists as to whether Hawaii’s rent control statute would help to prevent concentration and supracompetitive prices in the State’s retail gasoline market. Finding one expert to be “more persuasive” than the other, the court concluded that the Hawaii Legislature’s chosen regulatory strategy would not actually achieve its objectives. See 198 F. Supp. 2d, at 1187-1193. The court determined that there was no evidence that oil companies had charged, or would charge, excessive rents. See *id.*, at 1191. Based on this and other findings, the District Court enjoined further enforcement of Act 257’s rent cap provision against Chevron. We find the proceedings below remarkable, to say the least, given that we have long eschewed such heightened scrutiny when addressing substantive due process challenges to government regulation. See, *e. g.*, *Exxon Corp. v. Governor of Maryland*, 437 U. S. 117, 124-125 (1978); *Ferguson v. Skrupa*, 372 U. S. 726, 730-732 (1963). The reasons for deference to legislative judgments about the need for, and likely effectiveness of, regulatory actions are by now well established, and we think they are no less applicable here.

For the foregoing reasons, we conclude that the “substantially advances” formula announced in *Agins* is not a valid method of identifying regulatory takings for which the Fifth Amendment requires just compensation. Since Chevron argued only a “substantially advances” theory in support of its takings claim, it was not entitled to summary judgment on that claim.

... .

* * *

Twenty-five years ago, the Court posited that a regulation of private property “effects a taking if [it] does not substantially advance [a] legitimate state interes[t].” *Agins*, 447 U. S., at 260. The lower courts in this case took that statement to its logical conclusion, and in so doing, revealed its imprecision. Today we correct course. We hold that the “substantially advances” formula is not a valid takings test, and indeed conclude that it has no proper place in our takings jurisprudence. In so doing, we reaffirm that a plaintiff seeking to challenge a government regulation as an uncompensated taking of private property may proceed under one of the other theories discussed above – by alleging a “physical” taking, a *Lucas*-type “total regulatory taking,” a *Penn Central* taking, or a land-use exaction violating the standards set forth in *Nollan* and *Dolan*. Because Chevron argued only a “substantially advances” theory in support of its takings claim, it was not entitled to summary judgment on that claim. Accordingly, we reverse the judgment of the Ninth Circuit and remand the case for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE KENNEDY, concurring.

This separate writing is to note that today’s decision does not foreclose the possibility that a regulation might be so

arbitrary or irrational as to violate due process. *Eastern Enterprises v. Apfel*, 524 U. S. 498, 539 (1998) (KENNEDY, J., concurring in judgment and dissenting in part). The failure of a regulation to accomplish a stated or obvious objective would be relevant to that inquiry. Chevron voluntarily dismissed its due process claim without prejudice, however, and we have no occasion to consider whether Act 257 of the 1997 Hawaii Session Laws “represents one of the rare instances in which even such a permissive standard has been violated.” *Apfel, supra*, at 550. With these observations, I join the opinion of the Court.

4.4. Procedural Issues

Williamson County Regional Planning Commission et al. v. Hamilton Bank of Johnson City

473 U.S. 172 (1985)

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Robert L. Estes argued the cause for petitioners. With him on the brief was *M. Milton Sweeney*.

Edwin S. Kneedler argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Solicitor General Lee*, *Assistant Attorney General Habicht*, *Deputy Solicitor General Claiborne*, and *David C. Shilton*.

G. T. Nebel argued the cause for respondent. With him on the brief was *Gus Bauman*.

JUSTICE BLACKMUN delivered the opinion of the Court.

Respondent, the owner of a tract of land it was developing as a residential subdivision, sued petitioners, the Williamson County (Tennessee) Regional Planning Commission and its members and staff, in United States District Court, alleging that petitioners’ application of various zoning laws and regulations to respondent’s property amounted to a “taking” of that property. At trial, the jury agreed and

awarded respondent \$350,000 as just compensation for the “taking.” Although the jury’s verdict was rejected by the District Court, which granted a judgment notwithstanding the verdict to petitioners, the verdict was reinstated on appeal. Petitioners and their *amici* urge this Court to overturn the jury’s award on the ground that a temporary regulatory interference with an investor’s profit expectation does not constitute a “taking” within the meaning of the Just Compensation Clause of the Fifth Amendment,¹ or, alternatively, on the ground that even if such interference does constitute a taking, the Just Compensation Clause does not require money damages as recompense. Before we reach those contentions, we examine the procedural posture of respondent’s claim.

I

A

Under Tennessee law, responsibility for land-use planning is divided between the legislative body of each of the State’s counties and regional and municipal “planning commissions.” The county legislative body is responsible for zoning ordinances to regulate the uses to which particular land and buildings may be put, and to control the density of population and the location and dimensions of buildings. Tenn. Code Ann. § 13-7-101 (1980). The planning commissions are responsible for more specific regulations governing the subdivision of land within their region or municipality for residential development. §§ 13-3-403, 13-4-303. Enforcement of both the zoning ordinances and the subdivision regulations is accomplished in part through a requirement that the planning commission

¹ “[N]or shall private property be taken for public use, without just compensation.”

The Fifth Amendment’s prohibition, of course, applies against the States through the Fourteenth Amendment. *Chicago, B. & Q. R. Co. v. Chicago*, 166 U. S. 226, 241 (1897); see also *San Diego Gas & Electric Co. v. San Diego*, 450 U. S. 621, 623, n. 1 (1981).

approve the plat of a subdivision before the plat may be recorded. §§ 13-3-402, 13-4-302 (1980 and Supp. 1984).

Pursuant to § 13-7-101, the Williamson County “Quarterly Court,” which is the county’s legislative body, in 1973 adopted a zoning ordinance that allowed “cluster” development of residential areas. Under “cluster” zoning,

both the size and the width of individual residential lots in ... [a] development may be reduced, provided ... that the overall density of the entire tract remains constant – provided, that is, that an area equivalent to the total of the areas thus ‘saved’ from each individual lot is pooled and retained as common open space.

2 N. Williams, *American Land Planning Law* § 47.01, pp. 212-213 (1974).

Cluster zoning thus allows housing units to be grouped, or “clustered” together, rather than being evenly spaced on uniform lots.

As required by § 13-3-402, respondent’s predecessor-in-interest (developer) in 1973 submitted a preliminary plat for the cluster development of its tract, the Temple Hills Country Club Estates (Temple Hills), to the Williamson County Regional Planning Commission for approval. At that time, the county’s zoning ordinance and the Commission’s subdivision regulations required developers to seek review and approval of subdivision plats in two steps. The developer first was to submit for approval a preliminary plat, or “initial sketch plan,” indicating, among other things, the boundaries and acreage of the site, the number of dwelling units and their basic design, the location of existing and proposed roads, structures, lots, utility layouts, and open space, and the contour of the land.

App. in No. 82-5388 (CA6), pp. 857, 871 (CA App.). Once approved, the preliminary plat served as a basis for the preparation of a final plat. Under the Commission's regulations, however, approval of a preliminary plat "will not constitute acceptance of the final plat." *Id.*, at 872. Approval of a preliminary plat lapsed if a final plat was not submitted within one year of the date of the approval, unless the Commission granted an extension of time, or unless the approval of the preliminary plat was renewed. *Ibid.* The final plat, which is the official authenticated document that is recorded, was required to conform substantially to the preliminary plat, and, in addition, to include such details as the lines of all streets, lots, boundaries, and building setbacks. *Id.*, at 875.

On May 3, 1973, the Commission approved the developer's preliminary plat for Temple Hills. App. 246-247. The plat indicated that the development was to include 676 acres, of which 260 acres would be open space, primarily in the form of a golf course. *Id.*, at 422. A notation on the plat indicated that the number of "allowable dwelling units for total development" was 736, but lot lines were drawn in for only 469 units. The areas in which the remaining 276 units were to be placed were left blank and bore the notation "this parcel not to be developed until approved by the planning commission." The plat also contained a disclaimer that "parcels with note 'this parcel not to be developed until approved by the planning commission' not a part of this plat and not included in gross area." *Ibid.* The density of 736 allowable dwelling units was calculated by multiplying the number of acres (676) by the number of units allowed per acre (1.089). *Id.*, at 361. Although the zoning regulations in effect in 1973 required that density be calculated "on the basis of total acreage less fifty percent (50%) of the land lying in the flood plain ... and less fifty percent (50%) of all land lying on a slope with a grade in excess of twenty-five percent (25%)," CA App. 858, no

deduction was made from the 676 acres for such land. Tr. 369.

Upon approval of the preliminary plat, the developer conveyed to the county a permanent open space easement for the golf course, and began building roads and installing utility lines for the project. App. 259-260. The developer spent approximately \$3 million building the golf course, and another \$500,000 installing sewer and water facilities. Defendant's Ex. 96. Before housing construction was to begin on a particular section, a final plat of that section was submitted for approval. Several sections, containing a total of 212 units, were given final approval by 1979. App. 260, 270, 278, 423. The preliminary plat, as well, was reapproved four times during that period. *Id.*, at 270, 274, 362, 423.

In 1977, the county changed its zoning ordinance to require that calculations of allowable density exclude 10% of the total acreage to account for roads and utilities. *Id.*, at 363; CA App. 862. In addition, the number of allowable units was changed to one per acre from the 1.089 per acre allowed in 1973. *Id.*, at 858, 862; Tr. 1169-1170, 1183. The Commission continued to apply the zoning ordinance and subdivision regulations in effect in 1973 to Temple Hills, however, and reapproved the preliminary plat in 1978. In August 1979, the Commission reversed its position and decided that plats submitted for renewal should be evaluated under the zoning ordinance and subdivision regulations in effect when the renewal was sought. App. 279-282. The Commission then renewed the Temple Hills plat under the ordinances and regulations in effect at that time. *Id.*, at 283-284.

In January 1980, the Commission asked the developer to submit a revised preliminary plat before it sought final approval for the remaining sections of the subdivision. The Commission reasoned that this was necessary because the original preliminary plat contained a number of surveying errors, the land available in the subdivision had been

decreased inasmuch as the State had condemned part of the land for a parkway, and the areas marked “reserved for future development” had never been platted. Plaintiff’s Exs. 1078 and 1079; Tr. 164-168. A special committee (Temple Hills Committee) was appointed to work with the developer on the revision of the preliminary plat. Plaintiff’s Ex. 1081; Tr. 169-170.

The developer submitted a revised preliminary plat for approval in October 1980.² Upon review, the Commission’s staff and the Temple Hills Committee noted several problems with the revised plat. App. 304-305. First, the allowable density under the zoning ordinance and subdivision regulations then in effect was 548 units, rather than the 736 units claimed under the preliminary plat approved in 1973. The difference reflected a decrease in 18.5 acres for the parkway, a decrease of 66 acres for the 10% deduction for roads, and an exclusion of 44 acres for 50% of the land lying on slopes exceeding a 25% grade. Second, two cul-de-sac roads that had become necessary because of the land taken for the parkway exceeded the maximum length allowed for such roads under the subdivision regulations in effect in both 1980 and 1973. Third, approximately 2,000 feet of road would have grades in excess of the maximum allowed by county road regulations. Fourth, the preliminary plat placed units on land that had grades in excess of 25% and thus was considered undevelopable under the zoning ordinance and subdivision regulations. Fifth, the developer had not fulfilled its obligations regarding the construction and maintenance of the main access road. Sixth, there were inadequate fire protection services for the area, as well as inadequate open space for children’s recreational activities. Finally, the lots proposed in the preliminary plat had a road

² The developer also submitted the preliminary plat that had been approved in 1973 and reapproved on several subsequent occasions, contending that it had the right to develop the property according to that plat. As we have noted, that plat did not indicate how all of the parcels would be developed. App. 84-85.

frontage that was below the minimum required by the subdivision regulations in effect in 1980.

The Temple Hills Committee recommended that the Commission grant a waiver of the regulations regarding the length of the cul-de-sacs, the maximum grade of the roads, and the minimum frontage requirement. *Id.*, at 297, 304-306. Without addressing the suggestion that those three requirements be waived, the Commission disapproved the plat on two other grounds: first, the plat did not comply with the density requirements of the zoning ordinance or subdivision regulations, because no deduction had been made for the land taken for the parkway, and because there had been no deduction for 10% of the acreage attributable to roads or for 50% of the land having a slope of more than 25%; and second, lots were placed on slopes with a grade greater than 25%. Plaintiff's Ex. 9112.

The developer then appealed to the County Board of Zoning Appeals for an "interpretation of the Residential Cluster zoning [ordinance] as it relates to Temple Hills."³

³ The Board of Zoning Appeals was empowered:

"a. To hear and decide appeals on any permit, decision, determination, or refusal made by the [County] Building Commissioner or other administrative official in the carrying out or enforcement of any provision of this Resolution; and to interpret the Zoning map and this Resolution.

.....

"c. To hear and decide applications for variances from the terms of this Resolution. Such variances shall be granted only where by reason of exceptional narrowness, shallowness, or shape of a specific piece of property which at the time of adoption of this Resolution was a lot of record, or where by reason of exceptional topographic situations or conditions of a piece of property the strict application of the provisions of this Resolution would result in practical difficulties to or undue hardship upon the owner of such property." Plaintiff's Ex. 9112.

See also Tenn. Code Ann. §§ 13-7-106 to 13-7-109 (1980).

App. 314. On November 11, 1980, the Board determined that the Commission should apply the zoning ordinance and subdivision regulations that were in effect in 1973 in evaluating the density of Temple Hills. *Id.*, at 328. It also decided that in measuring which lots had excessive grades, the Commission should define the slope in a manner more favorable to the developer. *Id.*, at 329.

On November 26, respondent, Hamilton Bank of Johnson City, acquired through foreclosure the property in the Temple Hills subdivision that had not yet been developed, a total of 257.65 acres. *Id.*, at 189-190. This included many of the parcels that had been left blank in the preliminary plat approved in 1973. In June 1981, respondent submitted two preliminary plats to the Commission – the plat that had been approved in 1973 and subsequently reapproved several times, and a plat indicating respondent’s plans for the undeveloped areas, which was similar to the plat submitted by the developer in 1980. *Id.*, at 88. The new plat proposed the development of 688 units; the reduction from 736 units represented respondent’s concession that 18.5 acres should be removed from the acreage because that land had been taken for the parkway. *Id.*, at 424, 425.

On June 18, the Commission disapproved the plat for eight reasons, including the density and grade problems cited in the October 1980 denial, as well as the objections the Temple Hills Committee had raised in 1980 to the length of two cul-de-sacs, the grade of various roads, the lack of fire protection, the disrepair of the main-access road, and the minimum frontage. *Id.*, at 370. The Commission declined to follow the decision of the Board of Zoning Appeals that the plat should be evaluated by the 1973 zoning ordinance and subdivision regulations, stating that the Board lacked jurisdiction to hear appeals from the Commission. *Id.*, at 187-188, 360-361.

B

Respondent then filed this suit in the United States District Court for the Middle District of Tennessee, pursuant to 42 U. S. C. § 1983, alleging that the Commission had taken its property without just compensation and asserting that the Commission should be estopped under state law from denying approval of the project.⁴ Respondent's expert witnesses testified that the design that would meet each of the Commission's eight objections would allow respondent to build only 67 units, 409 fewer than respondent claims it is entitled to build,⁵ and that the development of only 67 sites would result in a net loss of over \$1 million. App. 377. Petitioners' expert witness, on the other hand, testified that the Commission's eight objections could be overcome by a design that would allow development of approximately 300 units. Tr. 1467-1468.

After a 3-week trial, the jury found that respondent had been denied the "economically viable" use of its property in violation of the Just Compensation Clause, and that the Commission was estopped under state law from requiring respondent to comply with the current zoning ordinance and subdivision regulations rather than those in effect in 1973. App. 32-33. The jury awarded damages of \$350,000 for the temporary taking of respondent's property. *Id.*, at 33-34.⁶ The court entered a permanent injunction requiring

⁴ Respondent also alleged that the Commission's refusal to approve the plat violated respondent's rights to substantive and procedural due process and denied it equal protection. The District Court granted a directed verdict to petitioners on the substantive due process and equal protection claims, and the jury found that respondent had not been denied procedural due process. App. 32. Those issues are not before us.

⁵ *Id.*, at 377; Tr. 238-243. Respondent claimed it was entitled to build 476 units: the 736 units allegedly approved in 1973 minus the 212 units already built or given final approval and minus 48 units that were no longer available because land had been taken from the subdivision for the parkway.

⁶ Although the record is less than clear, it appears that the jury calculated the \$350,000 award by determining a fair rate of return on the value of the property for the time between the Commission's rejection of the preliminary plat in 1980 and the jury's verdict in March 1982. See *id.*, at 800-805; Tr. of Oral Arg. 25, 32-33. In

the Commission to apply the zoning ordinance and subdivision regulations in effect in 1973 to Temple Hills, and to approve the plat submitted in 1981. *Id.*, at 34.

The court then granted judgment notwithstanding the verdict in favor of the Commission on the taking claim, reasoning in part that respondent was unable to derive economic benefit from its property on a temporary basis only, and that such a temporary deprivation, as a matter of law, cannot constitute a taking. *Id.*, at 36, 41. In addition, the court modified its permanent injunction to require the Commission merely to apply the zoning ordinance and subdivision regulations in effect in 1973 to the project, rather than requiring approval of the plat, in order to allow the parties to resolve “legitimate technical questions of whether plaintiff meets the requirements of the 1973 regulations,” *id.*, at 42, through the applicable state and local appeals procedures.⁷

A divided panel of the United States Court of Appeals for the Sixth Circuit reversed. 729 F. 2d 402 (1984). The court held that application of government regulations affecting an owner’s use of property may constitute a taking if the regulation denies the owner all “economically viable” use of the land, and that the evidence supported the jury’s finding that the property had no economically feasible use during the time between the Commission’s refusal to approve the preliminary plat and the jury’s verdict. *Id.*, at 405-406. Rejecting petitioners’ argument that respondent never had

light of our disposition of the case, we need not reach the question whether that measure of damages would provide just compensation, or whether it would be appropriate if respondent’s cause of action were viewed as stating a claim under the Due Process Clause.

⁷ While respondent’s appeal was pending before the Court of Appeals, the parties reached an agreement whereby the Commission granted a variance from its cul-de-sac and road-grade regulations and approved the development of 476 units, and respondent agreed, among other things, to rebuild existing roads, and build all new roads, according to current regulations. App. to Brief for Petitioners 35.

submitted a plat that complied with the 1973 regulations, and thus never had acquired rights that could be taken, the court held that the jury's estoppel verdict indicates that the jury must have found that respondent had acquired a "vested right" under state law to develop the subdivision according to the plat submitted in 1973. *Id.*, at 407. Even if respondent had no vested right under state law to finish the development, the jury was entitled to find that respondent had a reasonable investment-backed expectation that the development could be completed, and that the actions of the Commission interfered with that expectation. *Ibid.*

The court rejected the District Court's holding that the taking verdict could not stand as a matter of law. A temporary denial of property could be a taking, and was to be analyzed in the same manner as a permanent taking. Finally, relying upon the dissent in *San Diego Gas & Electric Co. v. San Diego*, 450 U. S. 621, 636 (1981), the court determined that damages are required to compensate for a temporary taking.⁸

II

We granted certiorari to address the question whether Federal, State, and local Governments must pay money damages to a landowner whose property allegedly has been "taken" temporarily by the application of government regulations. 469 U. S. 815 (1984). Petitioners and their *amici*

⁸ Judge Wellford dissented. 729 F. 2d, at 409. He did not agree that the evidence supported a finding that respondent's property had been taken, in part because there was no evidence that respondent had formally requested a variance from the regulations. Even if there was a temporary denial of the "economically viable" use of the property, Judge Wellford would have held that mere fluctuations in value during the process of governmental decisionmaking are "incidents of ownership" and cannot be considered a "taking," *id.*, at 410, quoting *Agins v. Tiburon*, 447 U. S. 255, 263, n. 9 (1980). He also did not agree that damages could be awarded to remedy any taking, reasoning that the *San Diego Gas* dissent does not reflect the views of the majority of this Court, and that this Court never has awarded damages for a temporary taking where there was no invasion, physical occupation, or "seizure and direction" by the State of the landowner's property. 729 F. 2d, at 411.

contend that we should answer the question in the negative by ruling that government regulation can never effect a “taking” within the meaning of the Fifth Amendment. They recognize that government regulation may be so restrictive that it denies a property owner all reasonable beneficial use of its property, and thus has the same effect as an appropriation of the property for public use, which concededly would be a taking under the Fifth Amendment. According to petitioners, however, regulation that has such an effect should not be viewed as a taking. Instead, such regulation should be viewed as a violation of the Fourteenth Amendment’s Due Process Clause, because it is an attempt by government to use its police power to effect a result that is so unduly oppressive to the property owner that it constitutionally can be effected only through the power of eminent domain. Violations of the Due Process Clause, petitioners’ argument concludes, need not be remedied by “just compensation.”

The Court twice has left this issue undecided. *San Diego Gas & Electric Co. v. San Diego*, *supra*; *Agins v. Tiburon*, 447 U. S. 255, 263 (1980). Once again, we find that the question is not properly presented, and must be left for another day. For whether we examine the Planning Commission’s application of its regulations under Fifth Amendment “taking” jurisprudence, or under the precept of due process, we conclude that respondent’s claim is premature.

III

We examine the posture of respondent’s cause of action first by viewing it as stating a claim under the Just Compensation Clause. This Court often has referred to regulation that “goes too far,” *Pennsylvania Coal Co. v. Mahon*, 260 U. S. 393, 415 (1922), as a “taking.” See, *e. g.*, *Ruckelshaus v. Monsanto Co.*, 467 U. S. 986, 1004-1005 (1984); *Agins v. Tiburon*, 447 U. S., at 260; *Prune Yard Shopping Center v. Robins*, 447 U. S. 74, 83 (1980); *Kaiser Aetna v. United States*, 444 U. S. 164, 174 (1979); *Andrus v. Allard*, 444 U. S. 51, 65-

66 (1979); *Penn Central Transp. Co. v. New York City*, 438 U. S. 104, 124 (1978); *Goldblatt v. Hempstead*, 369 U. S. 590, 594 (1962); *United States v. Central Eureka Mining Co.*, 357 U. S. 155, 168 (1958). Even assuming that those decisions meant to refer literally to the Taking Clause of the Fifth Amendment, and therefore stand for the proposition that regulation may effect a taking for which the Fifth Amendment requires just compensation, see *San Diego*, 450 U. S., at 647-653 (dissenting opinion), and even assuming further that the Fifth Amendment requires the payment of money damages to compensate for such a taking, the jury verdict in this case cannot be upheld. Because respondent has not yet obtained a final decision regarding the application of the zoning ordinance and subdivision regulations to its property, nor utilized the procedures Tennessee provides for obtaining just compensation, respondent's claim is not ripe.

A

As the Court has made clear in several recent decisions, a claim that the application of government regulations effects a taking of a property interest is not ripe until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue. In *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U. S. 264 (1981), for example, the Court rejected a claim that the Surface Mining Control and Reclamation Act of 1977, 91 Stat. 447, 30 U. S. C. § 1201 *et seq.*, effected a taking because:

There is no indication in the record that appellees have availed themselves of the opportunities provided by the Act to obtain administrative relief by requesting either a variance from the approximate-original-contour requirement of § 515(d) or a waiver

from the surface mining restrictions in § 522(e). If [the property owners] were to seek administrative relief under these procedures, a mutually acceptable solution might well be reached with regard to individual properties, thereby obviating any need to address the constitutional questions. The potential for such administrative solutions confirms the conclusion that the taking issue decided by the District Court simply is not ripe for judicial resolution.

452 U. S., at 297 (footnote omitted).

Similarly, in *Agins v. Tiburon*, *supra*, the Court held that a challenge to the application of a zoning ordinance was not ripe because the property owners had not yet submitted a plan for development of their property. 447 U. S., at 260. In *Penn Central Transp. Co. v. New York City*, *supra*, the Court declined to find that the application of New York City's Landmarks Preservation Law to Grand Central Terminal effected a taking because, although the Landmarks Preservation Commission had disapproved a plan for a 50-story office building above the terminal, the property owners had not sought approval for any other plan, and it therefore was not clear whether the Commission would deny approval for all uses that would enable the plaintiffs to derive economic benefit from the property. 438 U. S., at 136-137.

Respondent's claim is in a posture similar to the claims the Court held premature in *Hodel*. Respondent has submitted a plan for developing its property, and thus has passed beyond the *Agins* threshold. But, like the *Hodel* plaintiffs, respondent did not then seek variances that would have allowed it to develop the property according to its proposed plat, notwithstanding the Commission's finding

that the plat did not comply with the zoning ordinance and subdivision regulations. It appears that variances could have been granted to resolve at least five of the Commission's eight objections to the plat. The Board of Zoning Appeals had the power to grant certain variances from the zoning ordinance, including the ordinance's density requirements and its restriction on placing units on land with slopes having a grade in excess of 25%. Tr. 1204-1205; see n. 3, *supra*. The Commission had the power to grant variances from the subdivision regulations, including the cul-de-sac, road-grade, and frontage requirements.⁹ Indeed, the Temple Hills Committee had recommended that the Commission grant variances from those regulations. App. 304-306. Nevertheless, respondent did not seek variances from either the Board or the Commission.

Respondent argues that it "did everything possible to resolve the conflict with the commission," Brief for Respondent 42, and that the Commission's denial of approval for respondent's plat was equivalent to a denial of variances. The record does not support respondent's claim, however. There is no evidence that respondent applied to the Board of Zoning Appeals for variances from the zoning

⁹ The subdivision regulations in effect in 1980 and 1981 provided:

"Variances may be granted under the following conditions:

"Where the subdivider can show that strict adherence to these regulations would cause unnecessary hardship, due to conditions beyond the control of the subdivider. If the subdivider creates the hardship due to his design or in an effort to increase the yield of lots in his subdivision, the variance will not be granted.

"Where the Planning Commission decides that there are topographical or other conditions peculiar to the site, and a departure from their regulations will not destroy their intent."

CA App. 932.

ordinance. As noted, the developer sought a ruling that the ordinance in effect in 1973 should be applied, but neither respondent nor the developer sought a variance from the requirements of either the 1973 or 1980 ordinances. Further, although the subdivision regulations in effect in 1981 required that applications to the Commission for variances be in writing, and that notice of the application be given to owners of adjacent property,¹⁰ the record contains no evidence that respondent ever filed a written request for variances from the cul-de-sac, road-grade, or frontage requirements of the subdivision regulations, or that respondent ever gave the required notice.¹¹ App. 212-213; see also Tr. 1255-1257.

¹⁰ The Commission's regulations required that

“Each applicant must file with the Planning Commission a written request for variance stating at least the following:

“a. The variance requested.

“b. Reason or circumstances requiring the variance.

“c. Notice to the adjacent property owners that a variance is being requested.

“Without the application any condition shown on the plat which would require a variance will constitute grounds for disapproval of the plat.”

Id., at 933.

¹¹ Respondent's predecessor-in-interest requested, and apparently was granted, a waiver of the 10% road-grade regulation for section VI of the subdivision. See Plaintiff's Exs. 1078, 9094. The predecessor-in-interest wrote a letter on January 3, 1980, that respondent contends must be construed as a request for a waiver of the road-grade regulation for the entire subdivision:

“I contend that the road grade and slope question ... is adequately provided for by both the [subdivision] Regulations and the Zoning Ordinance. In both, the Planning Commission is given the authority to approve roads that have grades in excess of 10%.

Indeed, in a letter to the Commission written shortly before its June 18, 1981, meeting to consider the preliminary sketch, respondent took the position that it would not request variances from the Commission until *after* the Commission approved the proposed plat:

[Respondent] stands ready to work with the Planning Commission concerning the necessary variances. Until the initial sketch is renewed, however, and the developer has an opportunity to do detailed engineering work it is impossible to determine the exact nature of any variances that may be needed.

Plaintiff's Ex. 9028, p. 6.

The Commission's regulations clearly indicated that unless a developer applied for a variance in writing and upon notice to other property owners, "any condition shown on the plat which would require a variance will constitute grounds for disapproval of the plat." CA App. 933. Thus, in the face of respondent's refusal to follow the procedures

"In our particular case, it was common knowledge from the beginning that due to the character of the land involved that there would be roads that exceeded the 10% slope. In fact in our first Section there is a stretch of road that exceeds the 10%; therefore I respectfully request that this letter be made an official part of the Planning Commission Minutes of January 3, 1980 and further the Zoning Approval which has been granted be allowed to stand without any changes."

Defendants' Ex. 96.

Even assuming, *arguendo*, that the letter constituted a request for a variance, respondent's taking claim nevertheless is not ripe. There is no evidence that respondent requested variances from the regulations that formed the basis of the other objections raised by the Commission, such as those regulating the length of cul-de-sacs. Absent a final decision regarding the application of *all* eight of the Commission's objections, it is impossible to tell whether the land retained any reasonable beneficial use or whether respondent's expectation interests had been destroyed.

for requesting a variance, and its refusal to provide specific information about the variances it would require, respondent hardly can maintain that the Commission's disapproval of the preliminary plat was equivalent to a final decision that no variances would be granted.

As in *Hodel*, *Agins*, and *Penn Central*, then, respondent has not yet obtained a final decision regarding how it will be allowed to develop its property. Our reluctance to examine taking claims until such a final decision has been made is compelled by the very nature of the inquiry required by the Just Compensation Clause. Although "[t]he question of what constitutes a 'taking' for purposes of the Fifth Amendment has proved to be a problem of considerable difficulty," *Penn Central Transp. Co. v. New York City*, 438 U. S., at 123, this Court consistently has indicated that among the factors of particular significance in the inquiry are the economic impact of the challenged action and the extent to which it interferes with reasonable investment-backed expectations. *Id.*, at 124. See also *Ruckelshaus v. Monsanto Co.*, 467 U. S., at 1005; *PruneYard Shopping Center v. Robins*, 447 U. S., at 83; *Kaiser Aetna v. United States*, 444 U. S., at 175. Those factors simply cannot be evaluated until the administrative agency has arrived at a final, definitive position regarding how it will apply the regulations at issue to the particular land in question.

Here, for example, the jury's verdict indicates only that it found that respondent would be denied the economically feasible use of its property if it were forced to develop the subdivision in a manner that would meet each of the Commission's eight objections. It is not clear whether the jury would have found that the respondent had been denied all reasonable beneficial use of the property had any of the eight objections been met through the grant of a variance. Indeed, the expert witness who testified regarding the economic impact of the Commission's actions did not itemize the effect of each of the eight objections, so the

jury would have been unable to discern how a grant of a variance from any one of the regulations at issue would have affected the profitability of the development. App. 377; see also *id.*, at 102-104. Accordingly, until the Commission determines that no variances will be granted, it is impossible for the jury to find, on this record, whether respondent “will be unable to derive economic benefit” from the land.¹²

Respondent asserts that it should not be required to seek variances from the regulations because its suit is predicated upon 42 U. S. C. § 1983, and there is no requirement that a plaintiff exhaust administrative remedies before bringing a

¹² The District Court’s instructions allowed the jury to find a taking if it ascertained that “the regulations in question as applied to [respondent’s] property denied [respondent] economically viable use of its property.” Tr. 2016. That instruction seems to assume that respondent’s taking theory was simply that its property was rendered valueless by the application of new zoning laws and subdivision regulations in 1980. The record indicates, however, that respondent’s claim was based upon a state-law theory of “vested rights,” and that the alleged “taking” was the Commission’s interference with respondent’s “expectation interest” in completing the development according to its original plans. The evidence that it was not economically feasible to develop just the 67 units respondent claims the Commission’s actions would limit it to developing was based upon the cost of building the development according to the original plan. The expected income from the sale of the 67 units apparently was measured against the cost of the 27-hole golf course and the cost of installing water and sewer connections for a large development that would not have had to have been installed for a development of only 67 units. App. 191-197; Tr. 690; see also *id.*, at 2154-2155. Thus, the evidence appears to indicate that it would not be profitable to develop 67 units because respondent had made various expenditures in the expectation that the development would contain far more units; the evidence does not appear to support the proposition that, aside from those “reliance” expenditures, development of 67 units on the property would not be economically feasible.

We express no view of the propriety of applying the “economic viability” test when the taking claim is based upon such a theory of “vested rights” or “expectation interest.” Cf. *Andrus v. Allard*, 444 U. S. 51, 66 (1979) (analyzing a claim that Government regulations effected a taking by reducing expected profits). It is sufficient for our purposes to note that whether the “property” taken is viewed as the land itself or respondent’s expectation interest in developing the land as it wished, it is impossible to determine the extent of the loss or interference until the Commission has decided whether it will grant a variance from the application of the regulations.

§ 1983 action. *Patsy v. Florida Board of Regents*, 457 U. S. 496 (1982). The question whether administrative remedies must be exhausted is conceptually distinct, however, from the question whether an administrative action must be final before it is judicially reviewable. See *FTC v. Standard Oil Co.*, 449 U. S. 232, 243 (1980); *Bethlehem Steel Corp. v. EPA*, 669 F. 2d 903, 908 (CA3 1982). See generally 13A C. Wright, A. Miller, & E. Cooper, *Federal Practice and Procedure* § 3532.6 (1984). While the policies underlying the two concepts often overlap, the finality requirement is concerned with whether the initial decisionmaker has arrived at a definitive position on the issue that inflicts an actual, concrete injury; the exhaustion requirement generally refers to administrative and judicial procedures by which an injured party may seek review of an adverse decision and obtain a remedy if the decision is found to be unlawful or otherwise inappropriate. *Patsy* concerned the latter, not the former.

The difference is best illustrated by comparing the procedure for seeking a variance with the procedures that, under *Patsy*, respondent would not be required to exhaust. While it appears that the State provides procedures by which an aggrieved property owner may seek a declaratory judgment regarding the validity of zoning and planning actions taken by county authorities, see *Fallin v. Knox County Bd. of Comm'rs*, 656 S. W. 2d 338 (Tenn. 1983); Tenn. Code Ann. §§ 27-8-101, 27-9-101 to 27-9-113, and XX-XX-XXX to XX-XX-XXX (1980 and Supp. 1984), respondent would not be required to resort to those procedures before bringing its § 1983 action, because those procedures clearly are remedial. Similarly, respondent would not be required to appeal the Commission's rejection of the preliminary plat to the Board of Zoning Appeals, because the Board was empowered, at most, to review that rejection, not to participate in the Commission's decisionmaking.

Resort to those procedures would result in a judgment whether the Commission's actions violated any of respondent's rights. In contrast, resort to the procedure for obtaining variances would result in a conclusive determination by the Commission whether it would allow respondent to develop the subdivision in the manner respondent proposed. The Commission's refusal to approve the preliminary plat does not determine that issue; it prevents respondent from developing its subdivision without obtaining the necessary variances, but leaves open the possibility that respondent may develop the subdivision according to its plat after obtaining the variances. In short, the Commission's denial of approval does not conclusively determine whether respondent will be denied all reasonable beneficial use of its property, and therefore is not a final, reviewable decision.

B

A second reason the taking claim is not yet ripe is that respondent did not seek compensation through the procedures the State has provided for doing so.¹³ The Fifth Amendment does not proscribe the taking of property; it proscribes taking without just compensation. *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U. S., at 297, n. 40. Nor does the Fifth Amendment require that just compensation be paid in advance of, or contemporaneously with, the taking; all that is required is that a "reasonable, certain and adequate provision for obtaining compensation"

¹³ Again, it is necessary to contrast the procedures provided for review of the Commission's actions, such as those for obtaining a declaratory judgment, see Tenn. Code Ann. §§ 29-14-101 to XX-XX-XXX (1980), with procedures that allow a property owner to obtain compensation for a taking. Exhaustion of review procedures is not required. See *Patsy v. Florida Board of Regents*, 457 U. S. 496 (1982). As we have explained, however, because the Fifth Amendment proscribes takings *without just compensation*, no constitutional violation occurs until just compensation has been denied. The nature of the constitutional right therefore requires that a property owner utilize procedures for obtaining compensation before bringing a § 1983 action.

” exist at the time of the taking. *Regional Rail Reorganization Act Cases*, 419 U. S. 102, 124-125 (1974) (quoting *Cherokee Nation v. Southern Kansas R. Co.*, 135 U. S. 641, 659 (1890)). See also *Ruckelshaus v. Monsanto Co.*, 467 U. S., at 1016; *Yearsley v. W. A. Ross Construction Co.*, 309 U. S. 18, 21 (1940); *Hurley v. Kincaid*, 285 U. S. 95, 104 (1932). If the government has provided an adequate process for obtaining compensation; and if resort to that process “yield[s] just compensation,” then the property owner “has no claim against the Government” for a taking. *Monsanto*, 467 U. S., at 1013, 1018, n. 21. Thus, we have held that taking claims against the Federal Government are premature until the property owner has availed itself of the process provided by the Tucker Act, 28 U. S. C. § 1491. *Monsanto*, 467 U. S., at 1016-1020. Similarly, if a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and been denied just compensation.

The recognition that a property owner has not suffered a violation of the Just Compensation Clause until the owner has unsuccessfully attempted to obtain just compensation through the procedures provided by the State for obtaining such compensation is analogous to the Court’s holding in *Parratt v. Taylor*, 451 U. S. 527 (1981). There, the Court ruled that a person deprived of property through a random and unauthorized act by a state employee does not state a claim under the Due Process Clause merely by alleging the deprivation of property. In such a situation, the Constitution does not require predeprivation process because it would be impossible or impracticable to provide a meaningful hearing before the deprivation. Instead, the Constitution is satisfied by the provision of meaningful postdeprivation process. Thus, the State’s action is not “complete” in the sense of causing a constitutional injury “unless or until the state fails to provide an adequate

postdeprivation remedy for the property loss.” *Hudson v. Palmer*, 468 U. S. 517, 532, n. 12 (1984). Likewise, because the Constitution does not require pretaking compensation, and is instead satisfied by a reasonable and adequate provision for obtaining compensation after the taking, the State’s action here is not “complete” until the State fails to provide adequate compensation for the taking.¹⁴

Under Tennessee law, a property owner may bring an inverse condemnation action to obtain just compensation for an alleged taking of property under certain circumstances. Tenn. Code Ann. § 29-16-123 (1980). The statutory scheme for eminent domain proceedings outlines the procedures by which government entities must exercise the right of eminent domain. §§ 29-16-101 to XX-XX-XXX. The State is prohibited from “enter[ing] upon [condemned] land” until these procedures have been utilized and compensation has been paid the owner, § 29-16-122, but if a government entity does take possession of the land without following the required procedures,

the owner of such land may petition
for a jury of inquest, in which case the
same proceedings may be had, as near

¹⁴ The analogy to *Parratt* is imperfect because *Parratt* does not extend to situations such as those involved in *Logan v. Zimmerman Brush Co.*, 455 U. S. 422 (1982), in which the deprivation of property is effected pursuant to an established state policy or procedure, and the State could provide predeprivation process. Unlike the Due Process Clause, however, the Just Compensation Clause has never been held to require pretaking process or compensation. *Ruckelshaus v. Monsanto Co.*, 467 U. S. 986, 1016 (1984). Nor has the Court ever recognized any interest served by pretaking compensation that could not be equally well served by post-taking compensation. Under the Due Process Clause, on the other hand, the Court has recognized that predeprivation process is of “obvious value in reaching an accurate decision,” that the “only meaningful opportunity to invoke the discretion of the decisionmaker is likely to be before the [deprivation] takes effect,” *Cleveland Board of Education v. Loudermill*, 470 U. S. 532, 543 (1985), and that predeprivation process may serve the purpose of making an individual feel that the government has dealt with him fairly. See *Carey v. Piphus*, 435 U. S. 247, 262 (1978). Thus, despite the Court’s holding in *Logan*, *Parratt*’s reasoning applied here by analogy because of the special nature of the Just Compensation Clause.

as may be, as hereinbefore provided;
or he may sue for damages in the
ordinary way

§ 29-16-123.

The Tennessee state courts have interpreted § 29-16-123 to allow recovery through inverse condemnation where the “taking” is effected by restrictive zoning laws or development regulations. See *Davis v. Metropolitan Govt. of Nashville*, 620 S. W. 2d 532, 533-534 (Tenn. App. 1981); *Speight v. Lockhart*, 524 S. W. 2d 249 (Tenn. App. 1975). Respondent has not shown that the inverse condemnation procedure is unavailable or inadequate, and until it has utilized that procedure, its taking claim is premature.

. . . .

**San Remo Hotel, L.P. v. City and County of San
Francisco**

545 U.S. 323 (2005)

CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE NINTH CIRCUIT

Paul F. Utrecht argued the cause for petitioners. With him on the briefs was *Andrew M. Zacks*.

Seth P. Waxman argued the cause for respondents. With him on the brief were *Andrew W. Schwartz*, *Fran M. Layton*, *Ellison Folk*, *Edward C. DuMont*, and *Therese M. Stewart*.

JUSTICE STEVENS delivered the opinion of the Court.

This case presents the question whether federal courts may craft an exception to the full faith and credit statute, 28 U. S. C. § 1738, for claims brought under the Takings Clause of the Fifth Amendment.

Petitioners, who own and operate a hotel in San Francisco, California (hereinafter City), initiated this litigation in response to the application of a city ordinance that required them to pay a \$567,000 “conversion fee” in 1996. After the

California courts rejected petitioners' various state-law takings claims, they advanced in the Federal District Court a series of federal takings claims that depended on issues identical to those that had previously been resolved in the state-court action. In order to avoid the bar of issue preclusion, petitioners asked the District Court to exempt from § 1738's reach claims brought under the Takings Clause of the Fifth Amendment.

Petitioners' argument is predicated on *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U. S. 172 (1985), which held that takings claims are not ripe until a State fails "to provide adequate compensation for the taking." *Id.*, at 195. Unless courts disregard § 1738 in takings cases, petitioners argue, plaintiffs will be forced to litigate their claims in state court without any realistic possibility of ever obtaining review in a federal forum. The Ninth Circuit's rejection of this argument conflicted with the Second Circuit's decision in *Santini v. Connecticut Hazardous Waste Management Serv.*, 342 F. 3d 118 (2003). We granted certiorari to resolve the conflict, 543 U. S. 1032 (2004),¹ and now affirm the judgment of the Ninth Circuit.

I

The San Remo Hotel is a three-story, 62-unit hotel in the Fisherman's Wharf neighborhood in San Francisco. In December 1906, shortly after the great earthquake and fire destroyed most of the City, the hotel – then called the "New California Hotel" – opened its doors to house dislocated individuals, immigrants, artists, and laborers. The

¹ Although petitioners asked this Court to review two separate questions, our grant of certiorari was limited exclusively to the question whether "a Fifth Amendment Takings claim [is] barred by issue preclusion based on a judgment denying compensation solely under state law, which was rendered in a state court proceeding that was required to ripen the federal Takings claim?" Pet. for Cert. i. Thus, we have no occasion to reach petitioners' claim that, under California law, the substantive state takings law decision of the California Supreme Court was not entitled to preclusive effect in federal court. See Brief for Petitioners 19-21.

City officially licensed the facility to operate as a hotel and restaurant in 1916, and in 1922 the hotel was given its current name. When the hotel fell into financial difficulties and a “dilapidated condition” in the early 1970’s, Robert and Thomas Field purchased the facility, restored it, and began to operate it as a bed and breakfast inn. See *San Remo Hotel, L. P. v. City and County of San Francisco*, 100 Cal. Rptr. 2d 1, 5 (Cal. App. 2000) (officially depublished).

In 1979, San Francisco’s Board of Supervisors responded to “a severe shortage” of affordable rental housing for elderly, disabled, and low-income persons by instituting a moratorium on the conversion of residential hotel units into tourist units. San Francisco Residential Hotel Unit Conversion and Demolition Ordinance (hereinafter Hotel Conversion Ordinance or HCO) §§ 41.3(a)-(g), App. to Pet. for Cert. 195a-197a. Two years later, the City enacted the first version of the Hotel Conversion Ordinance to regulate all future conversions. San Francisco Ordinance No. 330-81, codified in § 41.1 *et seq.* Under the 1981 version of the HCO, a hotel owner could convert residential units into tourist units only by obtaining a conversion permit. And those permits could be obtained only by constructing new residential units, rehabilitating old ones, or paying an “in lieu” fee into the City’s Residential Hotel Preservation Fund Account. See §§ 41.12-41.13, App. to Pet. for Cert. 224a-231a. The City substantially strengthened the HCO in 1990 by eliminating several exceptions that had existed in the 1981 version and increasing the size of the “in lieu” fee hotel owners must pay when converting residential units. See 145 F. 3d 1095, 1099 (CA9 1998).

The genesis of this protracted dispute lies in the 1981 HCO’s requirement that each hotel “file an initial unit usage report containing” the “number of residential and tourist units in the hotel[s] as of September 23, 1979.” § 41.6(b)(1), App. to Pet. for Cert. 206a. Jean Iribarren was operating the San Remo Hotel, pursuant to a lease from

petitioners, when this requirement came into effect. Iribarren filed the initial usage report for the hotel, which erroneously reported that all of the rooms in the hotel were “residential” units.² The consequence of that initial classification was that the City zoned the San Remo Hotel as “residential hotel” – in other words, a hotel that consisted entirely of residential units. And that zoning determination ultimately meant that, despite the fact that the San Remo Hotel had operated in practice as a tourist hotel for many years, 145 F. 3d, at 1100, petitioners were required to apply for a conditional use permit to do business officially as a “tourist hotel,” *San Remo Hotel, L. P. v. City and County of San Francisco*, 27 Cal. 4th 643, 654, 41 P. 3d 87, 94 (2002).

After the HCO was revised in 1990, petitioners applied to convert all of the rooms in the San Remo Hotel into tourist use rooms under the relevant HCO provisions and requested a conditional use permit under the applicable zoning laws. In 1993, the City Planning Commission granted petitioners’ requested conversion and conditional use permit, but only after imposing several conditions, one of which included the requirement that petitioners pay a \$567,000 “in lieu” fee.³ Petitioners appealed, arguing that the HCO requirement was unconstitutional and otherwise improperly applied to their hotel. See *id.*, at 656, 41 P. 3d, at

² It seems that despite this initial classification, the San Remo Hotel has operated as a mixed hotel for tourists and long-term residents since long before the HCO was enacted. According to the California Supreme Court, in “a 1992 declaration by [petitioners], Iribarren filed the ‘incorrect’ initial unit usage report without their knowledge. They first discovered the report in 1983 when they resumed operation of the hotel. They protested the residential use classification in 1987, but were told it could not be changed because the appeal period had passed.” *San Remo Hotel, L. P. v. City and County of San Francisco*, 27 Cal. 4th 643, 654, 41 P. 3d 87, 94 (2002).

³ The application specifically required petitioners (1) to pay for 40 percent of the cost of replacement housing for the 62 lost residential units; (2) to offer lifetime leases to any then-current residential users; and (3) to “obtain variances from floor-area ratio and parking requirements.” *Id.*, at 656, 41 P. 3d, at 95.

95. The City Board of Supervisors rejected petitioners' appeal on April 19, 1993.

In March 1993, petitioners filed for a writ of administrative mandamus in California Superior Court. That action lay dormant for several years, and the parties ultimately agreed to stay that action after petitioners filed for relief in Federal District Court.

Petitioners filed in federal court for the first time on May 4, 1993. Petitioners' first amended complaint alleged four counts of due process (substantive and procedural) and takings (facial and as-applied)⁴ violations under the Fifth and Fourteenth Amendments to the United States Constitution, one count seeking damages under Rev. Stat. § 1979, 42 U. S. C. § 1983, for those violations, and one pendent state-law claim. The District Court granted respondents summary judgment. As relevant to this action, the court found that petitioners' facial takings claim was untimely under the applicable statute of limitations, and that the as-applied takings claim was unripe under *Williamson County*, 473 U. S. 172.

On appeal to the Court of Appeals for the Ninth Circuit, petitioners took the unusual position that the court should not decide their federal claims, but instead should abstain under *Railroad Comm'n of Tex. v. Pullman Co.*, 312 U. S. 496 (1941), because a return to state court could conceivably moot the remaining federal questions. See App. 67-68; see also 145 F. 3d, at 1101. The Court of Appeals obliged petitioners' request with respect to the facial challenge, a

⁴ Specifically, count 3 alleged that the HCO was facially unconstitutional under the Takings Clause because it "fails to substantially advance legitimate government interests, deprives plaintiffs of the opportunity to earn a fair return on its investment, denies plaintiffs economically viable use of their property, and forces plaintiffs to bear the public burden of housing the poor, all without just compensation." First Amended and Supplemental Complaint, No. C-93-1644-DLJ (ND Cal., Jan. 24, 1994), p. 20, ¶ 49. Count 4, which advanced petitioners' as-applied Takings Clause violation, was predicated on the same rationale. *Id.*, at 21.

request that respondents apparently viewed as an “outrageous act of chutzpah.” *Id.*, at 1105. That claim, the court reasoned, was “ripe the instant the 1990 HCO was enacted,” *id.*, at 1102, and appropriate for *Pullman* abstention principally because petitioners’ “entire case” hinged on the propriety of the planning commission’s zoning designation – the precise subject of the pending state mandamus action, 145 F. 3d, at 1105.⁵ The court, however, affirmed the District Court’s determination that petitioners’ as-applied takings claim – the claim that the application of the HCO to the San Remo Hotel violated the Takings Clause – was unripe. Because petitioners had failed to pursue an inverse condemnation action in state court, they had not yet been denied just compensation as contemplated by *Williamson County*. 145 F. 3d, at 1105.

At the conclusion of the Ninth Circuit’s opinion, the court appended a footnote stating that petitioners would be free to raise their federal takings claims in the California courts. If, however, they wanted to “retain [their] right to return to federal court for adjudication of [their] federal claim, [they] must make an appropriate reservation in state court.” *Id.*, at 1106, n. 7 (citations omitted).⁶ That is precisely what petitioners attempted to do when they reactivated the dormant California case. Yet petitioners advanced more than just the claims on which the federal court had abstained, and phrased their state claims in language that sounded in the rules and standards established and refined by this Court’s takings jurisprudence. Petitioners claimed, for instance, that “imposition of the fee ‘fails to substantially advance a legitimate government interest’ and that [t]he amount of the fee imposed is not roughly

⁵ The Court of Appeals did not answer the question whether this claim was barred by the statute of limitations, as the District Court had held.

⁶ The reservation discussed in the Ninth Circuit’s opinion was the common reservation of federal claims made in state litigation under *England v. Louisiana Bd. of Medical Examiners*, 375 U. S. 411, 420-421 (1964).

proportional to the impact’ of the proposed tourist use of the San Remo Hotel.” 27 Cal. 4th, at 656, 41 P. 3d, at 95 (quoting petitioners’ second amended state complaint).⁷ The state trial court dismissed petitioners’ amended complaint, but the intermediate appellate court reversed. The court held that petitioners’ claim that the payment of the “in lieu” fee effected a taking should have been evaluated under heightened scrutiny. Under more exacting scrutiny, the fee failed this Court’s “essential nexus” and “rough proportionality” tests because, *inter alia*, it was based on the original flawed designation that the San Remo Hotel was an entirely “residential use” facility. See *id.*, at 657-658, 41 P. 3d, at 96-97 (summarizing appellate court opinion) (internal quotation marks omitted).

The California Supreme Court reversed over the partial dissent of three justices.⁸ The court initially noted that petitioners had reserved their federal causes of action and had sought no relief for any violation of the Federal Constitution. *Id.*, at 649, n. 1, 41 P. 3d, at 91, n. 1.⁹ In the portion of its opinion discussing the Takings Clause of the California Constitution, however, the court noted that “we appear to have construed the clauses congruently.” *Id.*, at 664, 41 P. 3d, at 100-101 (citing cases). Accordingly, despite the fact that petitioners sought relief only under California

⁷ With respect to claims that a regulation fails to advance a legitimate state interest, see generally *Lingle v. Chevron U. S. A. Inc.*, 544 U. S. 528, 540-545 (2005). With respect to “rough proportionality” claims, see generally *Nollan v. California Coastal Comm’n*, 483 U. S. 825 (1987); *Dolan v. City of Tigard*, 512 U. S. 374 (1994).

⁸ Justice Baxter and Justice Chin opined that because some hotel rooms had been previously rented to tourists, the “in lieu” payment was excessive. 27 Cal. 4th, at 691, 41 P. 3d, at 119-120. Justice Brown opined that a 1985 statute had effectively superseded the HCO and disagreed with the majority’s analysis of the constitutional issues. *Id.*, at 699, 700-704, 41 P. 3d, at 125-128.

⁹ “Plaintiffs sought no relief in state court for violation of the Fifth Amendment to the United States Constitution. They explicitly reserved their federal causes of action. As their petition for writ of mandate, as well, rests solely on state law, no federal question has been presented or decided in this case.” *Id.*, at 649, n. 1, 41 P. 3d, at 91, n. 1.

law, the state court decided to “analyze their takings claim under the relevant decisions of both this court and the United States Supreme Court.” *Ibid.*, 41 P. 3d, at 101.¹⁰

... .

Applying the “reasonable relationship” test, the court upheld the HCO on its face and as applied to petitioners. As to the facial challenge, the court concluded that the HCO’s mandated conversion fees “bear a reasonable relationship to the loss of housing ... in the *generality* or *great majority* of cases... .” *Id.*, at 673, 41 P. 3d, at 107. With respect to petitioners’ as-applied challenge, the court concluded that the conversion fee was reasonably based on the number of units designated for conversion, which itself was based on petitioners’ own estimate that had been provided to the City in 1981 and had remained unchallenged for years. *Id.*, at 678, and n. 17, 41 P. 3d, at 110-111, and n. 17. The court therefore reversed the appellate court and reinstated the trial court’s order dismissing petitioners’ complaint.

Petitioners did not seek a writ of certiorari from the California Supreme Court’s decision in this Court. Instead, they returned to Federal District Court by filing an amended complaint based on the complaint that they had filed prior to invoking *Pullman* abstention.¹¹ The District

¹⁰ See also *id.*, at 665, 41 P. 3d, at 101 (“[I]t is the last mentioned prong of the *high court’s takings analysis* that is at issue here” (emphasis added)).

¹¹ The third amended complaint, which was filed on November 14, 2002, alleged two separate counts. See App. 88-93. Count 1 alleged that the HCO was facially unconstitutional and unconstitutional as applied to petitioners because (a) it failed “to substantially advance legitimate government interests”; (b) it forced petitioners “to bear the public burden of housing the poor”; and (c) it imposed unreasonable conditions on petitioners’ request for a conditional use permit (the in lieu fee and the required lifetime leases to residential tenants). *Id.*, at 88-89. Count 2 sought relief under 42 U. S. C. § 1983 based on (a) extortion through the imposition of the \$567,000 fee; (b) an actual taking of property under *Penn Central Transp. Co. v. New York City*, 438 U. S. 104 (1978); (c) the failure of the HCO as applied to petitioners to advance legitimate state interests; (d) the City’s requirement that petitioners bear the full cost of providing a general public benefit (public housing) without just compensation.

Court held that petitioners' facial attack on the HCO was not only barred by the statute of limitations, but also by the general rule of issue preclusion. See App. to Pet. for Cert. 85a-86a.¹² The District Court reasoned that 28 U. S. C. § 1738 requires federal courts to give preclusive effect to any state-court judgment that would have preclusive effect under the laws of the State in which the judgment was rendered. Because California courts had interpreted the relevant substantive state takings law coextensively with federal law, petitioners' federal claims constituted the same claims that had already been resolved in state court.

The Court of Appeals affirmed. The court rejected petitioners' contention that general preclusion principles should be cast aside whenever plaintiffs "must litigate in state court pursuant to *Pullman* and/or *Williamson County*." 364 F. 3d 1088, 1096 (CA9 2004). Relying on unambiguous Circuit precedent and the absence of any clearly contradictory decisions from this Court, the Court of Appeals found itself bound to apply general issue preclusion doctrine. Given that general issue preclusion principles governed, the only remaining question was whether the District Court properly applied that doctrine; the court concluded that it did. The court expressly rejected petitioners' contention "that California takings law is not coextensive with federal takings law," *ibid.*, and held that the state court's application of the "reasonable relationship" test was an "equivalent determination" of such claims under the federal takings clause," *id.*, at 1098.¹³ We granted certiorari and now affirm.

¹² The District Court found that most of petitioners' as-applied claims amounted to nothing more than improperly labeled facial challenges. See App. to Pet. for Cert. 82a-85a. The remainder of petitioners' as-applied claims, the court held, was barred by the statute of limitations. *Id.*, at 84a-85a.

¹³ California courts apply issue preclusion to a final judgment in earlier litigation between the same parties if "(1) the issue decided in the prior case is identical with the one now presented; (2) there was a final judgment on the merits in the prior case, and (3) the party to be estopped was a party to the prior adjudication." 364 F.

II

Article IV, § 1, of the United States Constitution demands that “Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.” In 1790, Congress responded to the Constitution’s invitation by enacting the first version of the full faith and credit statute. See Act of May 26, 1790, ch. 11, 1 Stat. 122.¹⁴ The modern version of the statute, 28 U. S. C. § 1738, provides that “judicial proceedings ... shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State” This statute has long been understood to encompass the doctrines of *res judicata*, or “claim preclusion,” and collateral estoppel, or “issue preclusion.” See *Allen v. McCurry*, 449 U. S. 90, 94-96 (1980).¹⁵

The general rule implemented by the full faith and credit statute – that parties should not be permitted to relitigate issues that have been resolved by courts of competent

3d, at 1096. The court reasoned that the California Supreme Court’s decision satisfied those criteria because petitioners’ takings challenges “raised in state court are identical to the federal claims ... and are based on the same factual allegations.” *Ibid.* Our limited review in this case does not include the question whether the Court of Appeals’ reading of California preclusion law was in error.

¹⁴ “This statute has existed in essentially unchanged form since its enactment just after the ratification of the Constitution” *Allen v. McCurry*, 449 U. S. 90, 96, n. 8 (1980).

¹⁵ “Under *res judicata*, a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action. Under collateral estoppel, once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue in a suit on a different cause of action involving a party to the first case.” *Id.*, at 94 (citations omitted).

jurisdiction – predates the Republic.¹⁶ It “has found its way into every system of jurisprudence, not only from its obvious fitness and propriety, but because without it, an end could never be put to litigation.” *Hopkins v. Lee*, 6 Wheat. 109, 114 (1821). This Court has explained that the rule

is demanded by the very object for which civil courts have been established, which is to secure the peace and repose of society by the settlement of matters capable of judicial determination. Its enforcement is essential to the maintenance of social order; for, the aid of judicial tribunals would not be invoked for the vindication of rights of person and property, if, as between parties and their privies, conclusiveness did not attend the judgments of such tribunals in respect of all matters properly put in issue and actually determined by them.

Southern Pacific R. Co. v. United States, 168 U. S. 1, 49 (1897).

As this case is presented to us, under our limited grant of certiorari, we have only one narrow question to decide: whether we should create an exception to the full faith and credit statute, and the ancient rule on which it is based, in order to provide a federal forum for litigants who seek to advance federal takings claims that are not ripe until the

¹⁶ “The authority of the *res judicata*, with the limitations under which it is admitted, is derived by us from the Roman law and the Canonists.” *Washington, Alexandria, & Georgetown Steam-Packet Co. v. Sickles*, 24 How. 333, 341 (1861); see also *id.*, at 343 (noting that the rule also has its pedigree “[i]n the courts upon the continent of Europe, and in the courts of chancery and admiralty in the United States and Great Britain, where the function of adjudication is performed entire by a tribunal composed of one or more judges ...”).

entry of a final state judgment denying just compensation. See *Williamson County*, 473 U. S. 172.¹⁷

The essence of petitioners' argument is as follows: because no claim that a state agency has violated the federal Takings Clause can be heard in federal court until the property owner has "been denied just compensation" through an available state compensation procedure, *id.*, at 195, "federal courts [should be] required to disregard the decision of the state court" in order to ensure that federal takings claims can be "considered on the merits in ... federal court." See Brief for Petitioners 8, 14. Therefore, the argument goes, whenever plaintiffs reserve their claims under *England v. Louisiana Bd. of Medical Examiners*, 375 U. S. 411 (1964), federal courts should review the reserved federal claims *de novo*, regardless of what issues the state court may have decided or how it may have decided them.

We reject petitioners' contention. Although petitioners were certainly entitled to reserve some of their federal claims, as we shall explain, *England* does not support their erroneous expectation that their reservation would fully negate the preclusive effect of the state-court judgment with respect to any and all federal issues that might arise in the future federal litigation. Federal courts, moreover, are not free to disregard 28 U. S. C. § 1738 simply to guarantee that all takings plaintiffs can have their day in federal court. We turn first to *England*.

III

¹⁷ We did not grant certiorari on many of the issues discussed by the parties and *amici*. We therefore assume for purposes of our decision that all other issues in this protracted controversy have been correctly decided. We assume, for instance, that the Ninth Circuit properly interpreted California preclusion law; that the California Supreme Court was correct in its determination that California takings law is coextensive with federal law; that, as a matter of California law, the HCO was lawfully applied to petitioners' hotel; and that under California law, the "in lieu" fee was imposed evenhandedly and substantially advanced legitimate state interests.

England involved a group of plaintiffs who had graduated from chiropractic school, but sought to practice in Louisiana without complying with the educational requirements of the State’s Medical Practice Act. 375 U. S., at 412. They filed suit in federal court challenging the constitutionality of the Act. The District Court invoked *Pullman* abstention and stayed the proceedings to enable the Louisiana courts to decide a preliminary and essential question of state law – namely, whether the state statute applied at all to chiropractors. 375 U. S., at 413.¹⁸ The state court, however, reached beyond the state-law question and held not only that the statute applied to the plaintiffs but also that its application was consistent with the Fourteenth Amendment to the Federal Constitution. The Federal District Court then dismissed the federal action without addressing the merits of the federal claim.

On appeal, we held that when a federal court abstains from deciding a federal constitutional issue to enable the state courts to address an antecedent state-law issue, the plaintiff may reserve his right to return to federal court for the disposition of his federal claims. *Id.*, at 419. In that case, the antecedent state issue requiring abstention was *distinct* from the reserved federal issue. See *id.*, at 418-419. Our discussion of the “typical case” in which reservations of federal issues are appropriate makes clear that our holding was limited to cases that are fundamentally distinct from petitioners’. “Typical” *England* cases generally involve federal constitutional challenges to a state statute that can be avoided if a state court construes the statute in a particular manner.¹⁹ In such cases, the purpose of

¹⁸ We stressed in *England* that abstention was essential to prevent the district court from deciding “questions of constitutionality on the basis of preliminary guesses regarding local law.” 375 U. S., at 416, n. 7 (quoting *Spector Motor Service, Inc. v. McLaughlin*, 323 U. S. 101, 105 (1944)).

¹⁹ 375 U. S., at 420 (describing the “typical case” as one in which “the state courts are asked to construe a state statute against the backdrop of a federal constitutional challenge”).

abstention is not to afford state courts an opportunity to adjudicate an issue that is functionally identical to the federal question. To the contrary, the purpose of *Pullman* abstention in such cases is to avoid resolving the federal question by encouraging a state-law determination that may moot the federal controversy. See 375 U. S., at 416-417, and n. 7.²⁰ Additionally, our opinion made it perfectly clear that the effective reservation of a federal claim was dependent on the condition that plaintiffs take no action to broaden the scope of the state court’s review beyond decision of the antecedent state-law issue.²¹

Our holding in *England* does not support petitioners’ attempt to relitigate issues resolved by the California courts. With respect to petitioners’ facial takings claims, the Court of Appeals invoked *Pullman* abstention after determining that a ripe federal question existed – namely, “the facial takings challenge to the 1990 HCO.” 145 F. 3d, at 1105.²² It did so because “land use planning is a sensitive area of social policy” and because petitioners’ pending state mandamus action had the potential of mooting their facial challenge to the HCO by overturning the City’s original

²⁰ As we explained in *Allen*, 449 U. S., at 101-102, n. 17, “[t]he holding in *England* depended entirely on this Court’s view of the purpose of abstention in such a case: Where a plaintiff *properly invokes* federal-court jurisdiction in the first instance on a federal claim, the federal court has a duty to accept that jurisdiction. Abstention may serve only to postpone, rather than to abdicate, jurisdiction, since its purpose is to determine whether resolution of the federal question is even necessary, or to obviate the risk of a federal court’s erroneous construction of state law.” (Emphasis added and citations omitted.)

²¹ 375 U. S., at 419 (“[I]f a party freely and without reservation submits his federal claims for decision by the state courts, litigates them there, and has them decided there, then ... he has elected to forgo his right to return to the District Court”).

²² Petitioners’ facial challenges to the HCO were ripe, of course, under *Yee v. Escondido*, 503 U. S. 519, 534 (1992), in which we held that facial challenges based on the “substantially advances” test need not be ripened in state court – the claims do “not depend on the extent to which petitioners are deprived of the economic use of their particular pieces of property or the extent to which these particular petitioners are compensated.” *Ibid.*

classification of the San Remo Hotel as a “residential” property. *Ibid.* Thus, petitioners were entitled to insulate from preclusive effect one federal issue – their facial constitutional challenge to the HCO – while they returned to state court to resolve their petition for writ of mandate.

Petitioners, however, chose to advance broader issues than the limited issues contained within their state petition for writ of administrative mandamus on which the Ninth Circuit relied when it invoked *Pullman* abstention. In their state action, petitioners advanced not only their request for a writ of administrative mandate, 27 Cal. 4th, at 653, 41 P. 3d, at 93, but also their various claims that the HCO was unconstitutional on its face and as applied for (1) its failure to substantially advance a legitimate interest, (2) its lack of a nexus between the required fees and the ultimate objectives sought to be achieved via the ordinance, and (3) its imposition of an undue economic burden on individual property owners. *Id.*, at 672-676, 41 P. 3d, at 106-109. By broadening their state action beyond the mandamus petition to include their “substantially advances” claims, petitioners effectively asked the state court to resolve the same federal issues they asked it to reserve. *England* does not support the exercise of any such right.

Petitioners’ as-applied takings claims fare no better. As an initial matter, the Court of Appeals did not abstain with respect to those claims. Instead, the court found that they were unripe under *Williamson County*. The court therefore affirmed the District Court’s dismissal of those claims. 145 F. 3d, at 1106. Unlike their “substantially advances” claims, petitioners’ as-applied claims were never properly before the District Court, and there was no reason to expect that they could be relitigated in full if advanced in the state proceedings. See *Allen*, 449 U. S., at 101, n. 17. In short, our opinion in *England* does not support petitioners’ attempt to circumvent § 1738.

IV

Petitioners' ultimate submission, however, does not rely on *England* alone. Rather, they argue that federal courts simply should not apply ordinary preclusion rules to state-court judgments when a case is forced into state court by the ripeness rule of *Williamson County*. For support, petitioners rely on the Court of Appeals for the Second Circuit's decision in *Santini*, 342 F. 3d, at 130.

In *Santini*, the Second Circuit held that parties "who litigate state-law takings claims in state court involuntarily" pursuant to *Williamson County* cannot be precluded from having those very claims resolved "by a federal court." 342 F. 3d, at 130. The court did not rest its decision on any provision of the federal full faith and credit statute or our cases construing that law. Instead, the court reasoned that "[i]t would be both ironic and unfair if the very procedure that the Supreme Court required [plaintiffs] to follow before bringing a Fifth Amendment takings claim ... also precluded [them] from ever bringing a Fifth Amendment takings claim." *Ibid.* We find this reasoning unpersuasive for several reasons.

First, both petitioners and *Santini* ultimately depend on an assumption that plaintiffs have a right to vindicate their federal claims in a federal forum. We have repeatedly held, to the contrary, that issues actually decided in valid state-court judgments may well deprive plaintiffs of the "right" to have their federal claims relitigated in federal court. See, e. g., *Migra v. Warren City School Dist. Bd. of Ed.*, 465 U. S. 75, 84 (1984); *Allen*, 449 U. S., at 103-104. This is so even when the plaintiff would have preferred not to litigate in state court, but was required to do so by statute or prudential rules. See *id.*, at 104. The relevant question in such cases is not whether the plaintiff has been afforded access to a federal forum; rather, the question is whether the state court actually decided an issue of fact or law that was necessary to its judgment.

In *Allen*, the plaintiff, Willie McCurry, invoked the Fourth and Fourteenth Amendments in an unsuccessful attempt to suppress evidence in a state criminal trial. After he was convicted, he sought to remedy his alleged constitutional violation by bringing a suit for damages under 42 U. S. C. § 1983 against the officers who had entered his home. Relying on “the special role of federal courts in protecting civil rights” and the fact that § 1983 provided the “only route to a federal forum,” the Court of Appeals held that McCurry was entitled to a federal trial unencumbered by collateral estoppel. 449 U. S., at 93. We rejected that argument emphatically.

The actual basis of the Court of Appeals’ holding appears to be a generally framed principle that every person asserting a federal right is entitled to one unencumbered opportunity to litigate that right in a federal district court, regardless of the legal posture in which the federal claim arises. But the authority for this principle is difficult to discern. It cannot lie in the Constitution, which makes no such guarantee, but leaves the scope of the jurisdiction of the federal district courts to the wisdom of Congress. And no such authority is to be found in § 1983 itself There is, in short, no reason to believe that Congress intended to provide a person claiming a federal right an unrestricted opportunity to relitigate an issue already decided in state court simply because the issue arose in a state proceeding in which he would rather not have been engaged at all.

Id., at 103-104 (footnote omitted).²³

As in *Allen*, we are presently concerned only with issues *actually decided* by the state court that are dispositive of federal claims raised under § 1983. And, also as in *Allen*, it is clear that petitioners would have preferred not to have been forced to have their federal claims resolved by issues decided in state court. Unfortunately for petitioners, it is entirely *unclear* why their preference for a federal forum should matter for constitutional or statutory purposes.

The only distinction between this case and *Allen* that is possibly relevant is the fact that petitioners here originally invoked the jurisdiction of a Federal District Court, which abstained on *Pullman* grounds while petitioners returned to state court. But petitioners' as-applied takings claims were never properly before the District Court because they were unripe. And, as we have already explained, the Court of Appeals invoked *Pullman* abstention only with respect to petitioners' "substantially advances" takings challenge, which petitioners then gratuitously presented to the state court. At a bare minimum, with respect to the facial takings claim, petitioners were "in an offensive posture in [their] state-court proceeding, and could have proceeded first in federal court had [they] wanted to litigate [their] "substantially advances"] federal claim in a federal forum." *Migra*, 465 U. S., at 85, n. 7. Thus, the only distinction between this case and *Allen* is a distinction of no relevant significance.

²³ We expressed similar views in *Migra v. Warren City School Dist. Bd. of Ed.*, 465 U. S. 75, 84 (1984):

"Although such a division may seem attractive from a plaintiff's perspective, it is not the system established by § 1738. That statute embodies the view that it is more important to give full faith and credit to state-court judgments than to ensure separate forums for federal and state claims. This reflects a variety of concerns, including notions of comity, the need to prevent vexatious litigation, and a desire to conserve judicial resources."

The second reason we find petitioners' argument unpersuasive is that it assumes that courts may simply create exceptions to 28 U. S. C. § 1738 wherever courts deem them appropriate. Even conceding, *arguendo*, the laudable policy goal of making federal forums available to deserving litigants, we have expressly rejected petitioners' view. "Such a fundamental departure from traditional rules of preclusion, enacted into federal law, can be justified only if plainly stated by Congress." *Kremer v. Chemical Constr. Corp.*, 456 U. S. 461, 485 (1982). Our cases have therefore made plain that "an exception to § 1738 will not be recognized unless a later statute contains an express or implied partial repeal." *Id.*, at 468 (citing *Allen*, 449 U. S., at 99). Even when the plaintiff's resort to state court is involuntary and the federal interest in denying finality is robust, we have held that Congress "must 'clearly manifest' its intent to depart from § 1738." 456 U. S., at 477.

The same concerns animate our decision here. Congress has not expressed any intent to exempt from the full faith and credit statute federal takings claims. Consequently, we apply our normal assumption that the weighty interests in finality and comity trump the interest in giving losing litigants access to an additional appellate tribunal. As we explained in *Federated Department Stores, Inc. v. Moitie*, 452 U. S. 394 (1981):

[W]e do not see the grave injustice which would be done by the application of accepted principles of res judicata. 'Simple justice' is achieved when a complex body of law developed over a period of years is evenhandedly applied. The doctrine of res judicata serves vital public interests beyond any individual judge's ad hoc determination of the equities in a particular case. There is simply 'no principle of law or equity which

sanctions the rejection by a federal court of the salutary principle of *res judicata*.²⁴

Id., at 401 (quoting *Heiserv. Woodruff*, 327 U. S. 726, 733 (1946)).

Third, petitioners have overstated the reach of *Williamson County* throughout this litigation. Petitioners were never required to ripen the heart of their complaint – the claim that the HCO was facially invalid because it failed to substantially advance a legitimate state interest – in state court. See *Yee v. Escondido*, 503 U. S. 519, 534 (1992). Petitioners therefore could have raised most of their facial takings challenges, which by their nature requested relief distinct from the provision of “just compensation,” directly in federal court.²⁴ Alternatively, petitioners had the option of reserving their facial claims while pursuing their as-applied claims along with their petition for writ of administrative mandamus. Petitioners did not have the right, however, to seek state review of the same substantive issues they sought to reserve. The purpose of the *England* reservation is not to grant plaintiffs a second bite at the apple in their forum of choice.

With respect to those federal claims that did require ripening, we reject petitioners’ contention that *Williamson County* forbids plaintiffs from advancing their federal claims in state courts. The requirement that aggrieved property owners must seek “compensation through the procedures the State has provided for doing so,” 473 U. S., at 194, does not preclude state courts from hearing simultaneously a plaintiff’s request for compensation under state law and the claim that, in the alternative, the denial of compensation

²⁴ In all events, petitioners may no longer advance such claims given our recent holding that the “substantially advances’ formula is not a valid takings test, and indeed ... has no proper place in our takings jurisprudence.” *Lingle*, 544 U. S., at 548.

would violate the Fifth Amendment of the Federal Constitution. Reading *Williamson County* to preclude plaintiffs from raising such claims in the alternative would erroneously interpret our cases as requiring property owners to “resort to piecemeal litigation or otherwise unfair procedures.” *MacDonald, Sommer & Frates v. Yolo County*, 477 U. S. 340, 350, n. 7 (1986).

It is hardly a radical notion to recognize that, as a practical matter, a significant number of plaintiffs will necessarily litigate their federal takings claims in state courts. It was settled well before *Williamson County* that “a claim that the application of government regulations effects a taking of a property interest is not ripe until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue.” 473 U. S., at 186. As a consequence, there is scant precedent for the litigation in federal district court of claims that a state agency has taken property in violation of the Fifth Amendment’s takings clause. To the contrary, most of the cases in our takings jurisprudence, including nearly all of the cases on which petitioners rely, came to us on writs of certiorari from state courts of last resort.²⁵

Moreover, this is not the only area of law in which we have recognized limits to plaintiffs’ ability to press their federal claims in federal courts. See, e. g., *Fair Assessment in Real Estate Assn., Inc. v. McNary*, 454 U. S. 100, 116 (1981) (holding that taxpayers are “barred by the principle of comity from asserting § 1983 actions against the validity of

²⁵ See, e. g., *Dolan*, 512 U. S., at 383; *Yee*, 503 U. S., at 526; *Nollan*, 483 U. S., at 830; *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U. S. 304, 310-311 (1987); *Penn Central*, 438 U. S., at 120-122. Indeed, Justice Holmes’ famous “too far” formulation, which spawned our regulatory takings jurisprudence, was announced in a case that came to this Court via a writ of certiorari to Pennsylvania’s highest court. *Pennsylvania Coal Co. v. Mahon*, 260 U. S. 393, 415 (1922).

state tax systems in federal courts”). State courts are fully competent to adjudicate constitutional challenges to local land-use decisions. Indeed, state courts undoubtedly have more experience than federal courts do in resolving the complex factual, technical, and legal questions related to zoning and land-use regulations.

At base, petitioners’ claim amounts to little more than the concern that it is unfair to give preclusive effect to state-court proceedings that are not chosen, but are instead *required* in order to ripen federal takings claims. Whatever the merits of that concern may be, we are not free to disregard the full faith and credit statute solely to preserve the availability of a federal forum. The Court of Appeals was correct to decline petitioners’ invitation to ignore the requirements of 28 U. S. C. § 1738. The judgment of the Court of Appeals is therefore affirmed.

It is so ordered

CHIEF JUSTICE REHNQUIST, with whom JUSTICE O’CONNOR, JUSTICE KENNEDY, and JUSTICE THOMAS join, concurring in the judgment.

I agree that the judgment of the Court of Appeals should be affirmed. Whatever the reasons for petitioners’ chosen course of litigation in the state courts, it is quite clear that they are now precluded by the full faith and credit statute, 28 U. S. C. § 1738, from relitigating in their 42 U. S. C. § 1983 action those issues which were adjudicated by the California courts. See *Migra v. Warren City School Dist. Bd. of Ed.*, 465 U. S. 75, 84 (1984); *Allen v. McCurry*, 449 U. S. 90, 103-105 (1980). There is no basis for us to except from § 1738’s reach all claims brought under the Takings Clause. See, e. g., *Kremer v. Chemical Constr. Corp.*, 456 U. S. 461, 485 (1982). I write separately to explain why I think part of our decision in *Williamson County Regional Planning Comm’n v. Hamilton Bank of Johnson City*, 473 U. S. 172 (1985), may have been mistaken.

In *Williamson County*, the respondent land developer filed a § 1983 suit in federal court alleging a regulatory takings claim after a regional planning commission disapproved respondent's plat proposals, but before respondent appealed that decision to the zoning board of appeals. *Id.*, at 181-182. Rather than reaching the merits, we found the claim was brought prematurely. *Id.*, at 200. We first held that the claim was "not ripe until the government entity charged with implementing the regulations [had] reached a final decision regarding the application of the regulations to the property at issue." *Id.*, at 186. Because respondent failed to seek variances from the planning commission or the zoning board of appeals, we decided that respondent had failed to meet the final-decision requirement. *Id.*, at 187-191. We then noted a "second reason the taking claim [was] not yet ripe": "respondent did not seek compensation through the procedures the State [had] provided for doing so." *Id.*, at 194. Until the claimant had received a final denial of compensation through all available state procedures, such as by an inverse condemnation action, we said he could not "claim a violation of the Just Compensation Clause." *Id.*, at 195-196.

It is not clear to me that *Williamson County* was correct in demanding that, once a government entity has reached a final decision with respect to a claimant's property, the claimant must seek compensation in state court before bringing a federal takings claim in federal court. The Court in *Williamson County* purported to interpret the Fifth Amendment in divining this state-litigation requirement. See, e. g., *id.*, at 194, n. 13 ("The nature of the constitutional right ... requires that a property owner utilize procedures for obtaining compensation before bringing a § 1983 action"). More recently, we have referred to it as merely a prudential requirement. *Suitum v. Taboe Regional Planning Agency*, 520 U. S. 725, 733-734 (1997). It is not obvious that either constitutional or prudential principles require

claimants to utilize all state compensation procedures before they can bring a federal takings claim. Cf. *Patsy v. Board of Regents of Fla.*, 457 U. S. 496, 516 (1982)(holding that plaintiffs suing under § 1983 are not required to have exhausted state administrative remedies).²⁶

The Court today attempts to shore up the state-litigation requirement by referring to *Fair Assessment in Real Estate Assn., Inc. v. McNary*, 454 U. S. 100 (1981). *Ante*, at 347. There, we held that the principle of comity (reflected in the Tax Injunction Act, 28 U. S. C. § 1341) bars taxpayers from asserting § 1983 claims against the validity of state tax systems in federal courts. 454 U. S., at 116. Our decision that such suits must be brought in state court was driven by the unique and sensitive interests at stake when federal courts confront claims that States acted impermissibly in administering their own tax systems. *Id.*, at 102-103, 107-113. Those historically grounded, federalism-based concerns had led to a longstanding, “fundamental principle of comity between federal courts and state governments ..., particularly in the area of state taxation,” a principle which predated the enactment of § 1983 itself. *Id.*, at 103, 107-114. We decided that those interests favored requiring that taxpayers bring challenges to the validity of state tax systems in state court, despite the strong interests favoring federal court review of alleged constitutional violations by state officials. *Id.*, at 115-116.

The Court today makes no claim that any such longstanding principle of comity toward state courts in handling federal takings claims existed at the time *Williamson County* was decided, nor that one has since

²⁶ In creating the state-litigation rule, the Court, in addition to relying on the Fifth Amendment’s text, analogized to *Ruckelshaus v. Monsanto Co.*, 467 U. S. 986 (1984), and *Parratt v. Taylor*, 451 U. S. 527 (1981). As several of petitioners’ *amici* in this case have urged, those cases provided limited support for the state-litigation requirement. See Brief for Defenders of Property Rights et al. as *Amici Curiae* 9-12; Brief for Elizabeth J. Neumont et al. as *Amici Curiae* 10-14.

developed. The Court does remark, however, that state courts are more familiar with the issues involved in local land-use and zoning regulations, and it suggests that this makes it proper to relegate federal takings claims to state court. *Ante*, at 347. But it is not apparent that any such expertise matches the type of historically grounded, federalism-based interests we found necessary to our decision in *Fair Assessment*. In any event, the Court has not explained why we should hand authority over federal takings claims to state courts, based simply on their relative familiarity with local land-use decisions and proceedings, while allowing plaintiffs to proceed directly to federal court in cases involving, for example, challenges to municipal land-use regulations based on the First Amendment, see, e. g., *Renton v. Playtime Theatres, Inc.*, 475 U. S. 41 (1986); *Young v. American Mini Theatres, Inc.*, 427 U. S. 50 (1976), or the Equal Protection Clause, see, e. g., *Cleburne v. Cleburne Living Center, Inc.*, 473 U. S. 432 (1985); *Village of Belle Terre v. Boraas*, 416 U. S. 1 (1974). In short, the affirmative case for the state-litigation requirement has yet to be made.

Finally, *Williamson County*'s state-litigation rule has created some real anomalies, justifying our revisiting the issue. For example, our holding today ensures that litigants who go to state court to seek compensation will likely be unable later to assert their federal takings claims in federal court. *Ante*, at 346-347. And, even if preclusion law would not block a litigant's claim, the *Rooker-Feldman* doctrine might, insofar as *Williamson County* can be read to characterize the state courts' denial of compensation as a required element of the Fifth Amendment takings claim. See *Exxon Mobil Corp. v. Saudi Basic Industries Corp.*, 544 U. S. 280 (2005). As the Court recognizes, *ante*, at 346-347, *Williamson County* all but guarantees that claimants will be unable to utilize the federal courts to enforce the Fifth Amendment's just compensation guarantee. The basic principle that state courts are competent to enforce federal rights and to

adjudicate federal takings claims is sound, see *ante*, at 347, and would apply to any number of federal claims. Cf. 28 U. S. C. § 2254 (providing for limited federal habeas review of state-court adjudications of alleged violations of the Constitution). But that principle does not explain why federal takings claims in particular should be singled out to be confined to state court, in the absence of any asserted justification or congressional directive.²⁷

* * *

I joined the opinion of the Court in *Williamson County*. But further reflection and experience lead me to think that the justifications for its state-litigation requirement are suspect, while its impact on takings plaintiffs is dramatic. Here, no court below has addressed the correctness of *Williamson County*, neither party has asked us to reconsider it, and resolving the issue could not benefit petitioners. In an appropriate case, I believe the Court should reconsider whether plaintiffs asserting a Fifth Amendment takings claim based on the final decision of a state or local government entity must first seek compensation in state courts.

²⁷ Indeed, in some States the courts themselves apply the state-litigation requirement from *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U. S. 172 (1985), refusing to entertain any federal takings claim until the claimant receives a final denial of compensation through all the available state procedures. See, e. g., *Breneric Assoc. v. City of Del Mar*, 69 Cal. App. 4th 166, 188-189, 81 Cal. Rptr. 2d 324, 338-339 (1998); *Melillo v. City of New Haven*, 249 Conn. 138, 154, n. 28, 732 A. 2d 133, 143, n. 28 (1999). This precludes litigants from asserting their federal takings claim even in *state* court. The Court tries to avoid this anomaly by asserting that, for plaintiffs attempting to raise a federal takings claim in state court as an alternative to their state claims, *Williamson County* does not command that the state courts themselves impose the state-litigation requirement. *Ante*, at 346. But that is so only if *Williamson County's* state-litigation requirement is merely a prudential rule, and not a constitutional mandate, a question that the Court today conspicuously leaves open.

4.5. Exactions

Dolan v. City of Tigard, 512 U.S. 374

114 S. Ct. 2309 (1994)

David B. Smith, Tigard, OR, for petitioner.

Timothy V. Ramis, Portland, OR, for respondent.

Edwin S. Kneedler, Washington, DC, for U.S., as amicus curiae by special leave of the Court.

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

Petitioner challenges the decision of the Oregon Supreme Court which held that the city of Tigard could condition the approval of her building permit on the dedication of a portion of her property for flood control and traffic improvements. 317 Ore. 110, 854 P.2d 437 (1993). We granted certiorari to resolve a question left open by our decision in *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 107 S.Ct. 3141, 97 L.Ed.2d 677 (1987), of what is the required degree of connection between the exactions imposed by the city and the projected impacts of the proposed development.

I

The State of Oregon enacted a comprehensive land use management program in 1973. Ore.Rev.Stat. ss 197.005-197.860 (1991). The program required all Oregon cities and counties to adopt new comprehensive land use plans that were consistent with the statewide planning goals. ss 197.175(1), 197.250. The plans are implemented by land use regulations which are part of an integrated hierarchy of legally binding goals, plans, and regulations. ss 197.175, 197.175(2)(b). Pursuant to the State's requirements, the city of Tigard, a community of some 30,000 residents on the southwest edge of Portland, developed a comprehensive plan and codified it in its Community Development Code

(CDC). The CDC requires property owners in the area zoned Central Business District to comply with a 15% open space and landscaping requirement, which limits total site coverage, including all structures and paved parking, to 85% of the parcel. CDC, ch. 18.66, App. to Pet. for Cert. G-16 to G-17. After the completion of a transportation study that identified congestion in the Central Business District as a particular problem, the city adopted a plan for a pedestrian/bicycle pathway intended to encourage alternatives to automobile transportation for short trips. The CDC requires that new development facilitate this plan by dedicating land for pedestrian pathways where provided for in the pedestrian/bicycle pathway plan.¹

The city also adopted a Master Drainage Plan (Drainage Plan). The Drainage Plan noted that flooding occurred in several areas along Fanno Creek, including areas near petitioner's property. Record, Doc. No. F, ch. 2, pp. 2-5 to 2-8; 4-2 to 4-6; Figure 4-1. The Drainage Plan also established that the increase in impervious surfaces associated with continued urbanization would exacerbate these flooding problems. To combat these risks, the Drainage Plan suggested a series of improvements to the Fanno Creek Basin, including channel excavation in the area next to petitioner's property. App. to Pet. for Cert. G-13, G-38. Other recommendations included ensuring that the floodplain remains free of structures and that it be preserved as greenways to minimize flood damage to structures. Record, Doc. No. F, ch. 5, pp. 5-16 to 5-21. The

¹ CDC s 18.86.040.A.1.b provides: "The development shall facilitate pedestrian/bicycle circulation if the site is located on a street with designated bikepaths or adjacent to a designated greenway/open space/park. Specific items to be addressed [include]: (i) Provision of efficient, convenient and continuous pedestrian and bicycle transit circulation systems, linking developments by requiring dedication and construction of pedestrian and bikepaths identified in the comprehensive plan. If direct connections cannot be made, require that funds in the amount of the construction cost be deposited into an account for the purpose of constructing paths." App. to Brief for Respondent B-33 to B-34.

Drainage Plan concluded that the cost of these improvements should be shared based on both direct and indirect benefits, with property owners along the waterways paying more due to the direct benefit that they would receive. Id., ch. 8, p. 8-11. CDC Chapters 18.84 and 18.86 and CDC s 18.164.100 and the Tigard Park Plan carry out these recommendations.

Petitioner Florence Dolan owns a plumbing and electric supply store located on Main Street in the Central Business District of the city. The store covers approximately 9,700 square feet on the eastern side of a 1.67-acre parcel, which includes a gravel parking lot. Fanno Creek flows through the southwestern corner of the lot and along its western boundary. The year-round flow of the creek renders the area within the creek's 100-year floodplain virtually unusable for commercial development. The city's comprehensive plan includes the Fanno Creek floodplain as part of the city's greenway system.

Petitioner applied to the city for a permit to redevelop the site. Her proposed plans called for nearly doubling the size of the store to 17,600 square feet and paving a 39-space parking lot. The existing store, located on the opposite side of the parcel, would be razed in sections as construction progressed on the new building. In the second phase of the project, petitioner proposed to build an additional structure on the northeast side of the site for complementary businesses and to provide more parking. The proposed expansion and intensified use are consistent with the city's zoning scheme in the Central Business District. CDC s 18.66.030, App. to Brief for Petitioner C-1 to C-3.

The City Planning Commission (Commission) granted petitioner's permit application subject to conditions imposed by the city's CDC. The CDC establishes the following standard for site development review approval:

“Where landfill and/or development is allowed within and adjacent to the 100-year floodplain, the City shall require the dedication of sufficient open land area for greenway adjoining and within the floodplain. This area shall include portions at a suitable elevation for the construction of a pedestrian/bicycle pathway within the floodplain in accordance with the adopted pedestrian/bicycle plan.” CDC s 18.120.180.A.8, App. to Brief for Respondent B-45 to B-46.

Thus, the Commission required that petitioner dedicate the portion of her property lying within the 100-year floodplain for improvement of a storm drainage system along Fanno Creek and that she dedicate an additional 15-foot strip of land adjacent to the floodplain as a pedestrian/bicycle pathway.² The dedication required by that condition encompasses approximately 7,000 square feet, or roughly 10% of the property. In accordance with city practice, petitioner could rely on the dedicated property to meet the 15% open space and landscaping requirement mandated by the city’s zoning scheme. App. to Pet. for Cert. G-28 to G-29. The city would bear the cost of maintaining a landscaped buffer between the dedicated area and the new store. *Id.*, at G-44 to G-45.

Petitioner requested variances from the CDC standards. Variances are granted only where it can be shown that, owing to special circumstances related to a specific piece of the land, the literal interpretation of the applicable zoning

² The city’s decision includes the following relevant conditions: “1. The applicant shall dedicate to the City as Greenway all portions of the site that fall within the existing 100-year floodplain [of Fanno Creek] (i.e., all portions of the property below elevation 150.0) and all property 15 feet above (to the east of) the 150.0 foot floodplain boundary. The building shall be designed so as not to intrude into the greenway area.” App. to Pet. for Cert. G-43.

provisions would cause “an undue or unnecessary hardship” unless the variance is granted. CDC s 18.134.010, App. to Brief for Respondent B-47.³ Rather than posing alternative mitigating measures to offset the expected impacts of her proposed development, as allowed under the CDC, petitioner simply argued that her proposed development would not conflict with the policies of the comprehensive plan. Id., at E-4. The Commission denied the request.

The Commission made a series of findings concerning the relationship between the dedicated conditions and the projected impacts of petitioner’s project. First, the Commission noted that “[i]t is reasonable to assume that customers and employees of the future uses of this site could utilize a pedestrian/bicycle pathway adjacent to this

³ CDC s 18.134.050 contains the following criteria whereby the decisionmaking authority can approve, approve with modifications, or deny a variance request:

“(1) The proposed variance will not be materially detrimental to the purposes of this title, be in conflict with the policies of the comprehensive plan, to any other applicable policies and standards, and to other properties in the same zoning district or vicinity;

“(2) There are special circumstances that exist which are peculiar to the lot size or shape, topography or other circumstances over which the applicant has no control, and which are not applicable to other properties in the same zoning district;

“(3) The use proposed will be the same as permitted under this title and City standards will be maintained to the greatest extent possible, while permitting some economic use of the land;

“(4) Existing physical and natural systems, such as but not limited to traffic, drainage, dramatic land forms, or parks will not be adversely affected any more than would occur if the development were located as specified in the title; and

“(5) The hardship is not self-imposed and the variance requested is the minimum variance which would alleviate the hardship.”

App. to Brief for Respondent B-49 to B-50.

development for their transportation and recreational needs.” City of Tigard Planning Commission Final Order No. 91-09 PC, App. to Pet. for Cert. G-24. The Commission noted that the site plan has provided for bicycle parking in a rack in front of the proposed building and “[i]t is reasonable to expect that some of the users of the bicycle parking provided for by the site plan will use the pathway adjacent to Fanno Creek if it is constructed.” Ibid. In addition, the Commission found that creation of a convenient, safe pedestrian/bicycle pathway system as an alternative means of transportation “could offset some of the traffic demand on [nearby] streets and lessen the increase in traffic congestion.” Ibid.

The Commission went on to note that the required floodplain dedication would be reasonably related to petitioner’s request to intensify the use of the site given the increase in the impervious surface. The Commission stated that the “anticipated increased storm water flow from the subject property to an already strained creek and drainage basin can only add to the public need to manage the stream channel and floodplain for drainage purposes.” Id., at G-37. Based on this anticipated increased storm water flow, the Commission concluded that “the requirement of dedication of the floodplain area on the site is related to the applicant’s plan to intensify development on the site.” Ibid. The Tigard City Council approved the Commission’s final order, subject to one minor modification; the city council reassigned the responsibility for surveying and marking the floodplain area from petitioner to the city’s engineering department. Id., at G-7.

Petitioner appealed to the Land Use Board of Appeals (LUBA) on the ground that the city’s dedication requirements were not related to the proposed development, and, therefore, those requirements constituted an uncompensated taking of her property under the Fifth Amendment. In evaluating the federal taking

claim, LUBA assumed that the city's findings about the impacts of the proposed development were supported by substantial evidence. *Dolan v. Tigard*, LUBA 91-161 (Jan. 7, 1992), reprinted at App. to Pet. for Cert. D-15, n. 9. Given the undisputed fact that the proposed larger building and paved parking area would increase the amount of impervious surfaces and the runoff into Fanno Creek, LUBA concluded that "there is a 'reasonable relationship' between the proposed development and the requirement to dedicate land along Fanno Creek for a greenway." *Id.*, at D-16. With respect to the pedestrian/bicycle pathway, LUBA noted the Commission's finding that a significantly larger retail sales building and parking lot would attract larger numbers of customers and employees and their vehicles. It again found a "reasonable relationship" between alleviating the impacts of increased traffic from the development and facilitating the provision of a pedestrian/bicycle pathway as an alternative means of transportation. *Ibid.*

The Oregon Court of Appeals affirmed, rejecting petitioner's contention that in *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 107 S.Ct. 3141, 97 L.Ed.2d 677 (1987), we had abandoned the "reasonable relationship" test in favor of a stricter "essential nexus" test. 113 Ore.App. 162, 832 P.2d 853 (1992). The Oregon Supreme Court affirmed. 317 Ore. 110, 854 P.2d 437 (1993). The court also disagreed with petitioner's contention that the *Nollan* Court abandoned the "reasonably related" test. 317 Ore., at 118, 854 P.2d, at 442. Instead, the court read *Nollan* to mean that an "exaction is reasonably related to an impact if the exaction serves the same purpose that a denial of the permit would serve." 317 Ore., at 120, 854 P.2d, at 443. The court decided that both the pedestrian/bicycle pathway condition and the storm drainage dedication had an essential nexus to the development of the proposed site. *Id.*, at 121, 854 P.2d, at 443. Therefore, the court found the conditions to be

reasonably related to the impact of the expansion of petitioner's business. *Ibid*⁴ We granted certiorari, 510 U.S. 989, 114 S.Ct. 544, 126 L.Ed.2d 446 (1993), because of an alleged conflict between the Oregon Supreme Court's decision and our decision in *Nollan*, *supra*.

II

The Takings Clause of the Fifth Amendment of the United States Constitution, made applicable to the States through the Fourteenth Amendment, *Chicago, B. & Q.R. Co. v. Chicago*, 166 U.S. 226, 239, 17 S.Ct. 581, 585, 41 L.Ed. 979 (1897), provides: “[N]or shall private property be taken for public use, without just compensation.”⁵ One of the principal purposes of the Takings Clause is “to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.” *Armstrong v. United States*, 364 U.S. 40, 49, 80 S.Ct. 1563, 1569, 4 L.Ed.2d 1554 (1960). Without question, had the city simply required petitioner to dedicate a strip of land along Fanno Creek for

⁴ The Supreme Court of Oregon did not address the consequences of petitioner's failure to provide alternative mitigation measures in her variance application and we take the case as it comes to us. Accordingly, we do not pass on the constitutionality of the city's variance provisions.

⁵ Justice STEVENS' dissent suggests that this case is actually grounded in “substantive” due process, rather than in the view that the Takings Clause of the Fifth Amendment was made applicable to the States by the Fourteenth Amendment. But there is no doubt that later cases have held that the Fourteenth Amendment does make the Takings Clause of the Fifth Amendment applicable to the States, see *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 122, 98 S.Ct. 2646, 2658, 57 L.Ed.2d 631 (1978); *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 827, 107 S.Ct. 3141, 3143, 97 L.Ed.2d 677 (1987). Nor is there any doubt that these cases have relied upon *Chicago, B. & Q.R. Co. v. Chicago*, 166 U.S. 226, 17 S.Ct. 581, 41 L.Ed. 979 (1897), to reach that result. See, e.g., *Penn Central*, *supra*, 438 U.S., at 122, 98 S.Ct., at 2658 (“The issu[e] presented ... [is] whether the restrictions imposed by New York City's law upon appellants' exploitation of the Terminal site effect a ‘taking’ of appellants' property for a public use within the meaning of the Fifth Amendment, which of course is made applicable to the States through the Fourteenth Amendment, see *Chicago, B. & Q.R. Co. v. Chicago*, 166 U.S. 226, 239, 17 S.Ct. 581, 585, 41 L.Ed. 979 (1897)”).

public use, rather than conditioning the grant of her permit to redevelop her property on such a dedication, a taking would have occurred. *Nollan*, supra, 483 U.S., at 831, 107 S.Ct., at 3145. Such public access would deprive petitioner of the right to exclude others, “one of the most essential sticks in the bundle of rights that are commonly characterized as property.” *Kaiser Aetna v. United States*, 444 U.S. 164, 176, 100 S.Ct. 383, 391, 62 L.Ed.2d 332 (1979).

On the other side of the ledger, the authority of state and local governments to engage in land use planning has been sustained against constitutional challenge as long ago as our decision in *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 47 S.Ct. 114, 71 L.Ed. 303 (1926). “Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law.” *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413, 43 S.Ct. 158, 159, 67 L.Ed. 322 (1922). A land use regulation does not effect a taking if it “substantially advance[s] legitimate state interests” and does not “den [y] an owner economically viable use of his land.” *Agins v. City of Tiburon*, 447 U.S. 255, 260, 100 S.Ct. 2138, 2141, 65 L.Ed.2d 106 (1980).⁶

The sort of land use regulations discussed in the cases just cited, however, differ in two relevant particulars from the present case. First, they involved essentially legislative determinations classifying entire areas of the city, whereas here the city made an adjudicative decision to condition petitioner’s application for a building permit on an

⁶ There can be no argument that the permit conditions would deprive petitioner of “economically beneficial us[e]” of her property as she currently operates a retail store on the lot. Petitioner assuredly is able to derive some economic use from her property. See, e.g., *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1019, 112 S.Ct. 2886, 2895, 120 L.Ed.2d 798 (1992); *Kaiser Aetna v. United States*, 444 U.S. 164, 175, 100 S.Ct. 383, 390, 62 L.Ed.2d 332 (1979); *Penn Central Transp. Co. v. New York City*, supra, 438 U.S., at 124, 98 S.Ct., at 2659.

individual parcel. Second, the conditions imposed were not simply a limitation on the use petitioner might make of her own parcel, but a requirement that she deed portions of the property to the city. In *Nollan*, *supra*, we held that governmental authority to exact such a condition was circumscribed by the Fifth and Fourteenth Amendments. Under the well-settled doctrine of “unconstitutional conditions,” the government may not require a person to give up a constitutional right—here the right to receive just compensation when property is taken for a public use—in exchange for a discretionary benefit conferred by the government where the benefit sought has little or no relationship to the property. See *Perry v. Sindermann*, 408 U.S. 593, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972); *Pickering v. Board of Ed. of Township High School Dist. 205, Will Cty.*, 391 U.S. 563, 568, 88 S.Ct. 1731, 1734, 20 L.Ed.2d 811 (1968).

Petitioner contends that the city has forced her to choose between the building permit and her right under the Fifth Amendment to just compensation for the public easements. Petitioner does not quarrel with the city’s authority to exact some forms of dedication as a condition for the grant of a building permit, but challenges the showing made by the city to justify these exactions. She argues that the city has identified “no special benefits” conferred on her, and has not identified any “special quantifiable burdens” created by her new store that would justify the particular dedications required from her which are not required from the public at large.

III

In evaluating petitioner’s claim, we must first determine whether the “essential nexus” exists between the “legitimate state interest” and the permit condition exacted by the city. *Nollan*, 483 U.S., at 837, 107 S.Ct., at 3148. If we find that a nexus exists, we must then decide the required degree of connection between the exactions and

the projected impact of the proposed development. We were not required to reach this question in *Nollan*, because we concluded that the connection did not meet even the loosest standard. *Id.*, at 838, 107 S.Ct., at 3149. Here, however, we must decide this question.

A

We addressed the essential nexus question in *Nollan*. The California Coastal Commission demanded a lateral public easement across the Nollans' beachfront lot in exchange for a permit to demolish an existing bungalow and replace it with a three-bedroom house. *Id.*, at 828, 107 S.Ct., at 3144. The public easement was designed to connect two public beaches that were separated by the Nollan's property. The Coastal Commission had asserted that the public easement condition was imposed to promote the legitimate state interest of diminishing the "blockage of the view of the ocean" caused by construction of the larger house.

We agreed that the Coastal Commission's concern with protecting visual access to the ocean constituted a legitimate public interest. *Id.*, at 835, 107 S.Ct., at 3148. We also agreed that the permit condition would have been constitutional "even if it consisted of the requirement that the Nollans provide a viewing spot on their property for passersby with whose sighting of the ocean their new house would interfere." *Id.*, at 836, 107 S.Ct., at 3148. We resolved, however, that the Coastal Commission's regulatory authority was set completely adrift from its constitutional moorings when it claimed that a nexus existed between visual access to the ocean and a permit condition requiring lateral public access along the Nollans' beachfront lot. *Id.*, at 837, 107 S.Ct., at 3148. How enhancing the public's ability to "traverse to and along the shorefront" served the same governmental purpose of "visual access to the ocean" from the roadway was beyond

our ability to countenance. The absence of a nexus left the Coastal Commission in the position of simply trying to obtain an easement through gimmickry, which converted a valid regulation of land use into " 'an out-and-out plan of extortion.' " Ibid., quoting *J.E.D. Associates, Inc. v. Atkinson*, 121 N.H. 581, 584, 432 A.2d 12, 14-15 (1981).

No such gimmicks are associated with the permit conditions imposed by the city in this case. Undoubtedly, the prevention of flooding along Fanno Creek and the reduction of traffic congestion in the Central Business District qualify as the type of legitimate public purposes we have upheld. *Agins*, 447 U.S., at 260-262, 100 S.Ct., at 2141-2142. It seems equally obvious that a nexus exists between preventing flooding along Fanno Creek and limiting development within the creek's 100-year floodplain. Petitioner proposes to double the size of her retail store and to pave her now-gravel parking lot, thereby expanding the impervious surface on the property and increasing the amount of storm water runoff into Fanno Creek.

The same may be said for the city's attempt to reduce traffic congestion by providing for alternative means of transportation. In theory, a pedestrian/bicycle pathway provides a useful alternative means of transportation for workers and shoppers: "Pedestrians and bicyclists occupying dedicated spaces for walking and/or bicycling ... remove potential vehicles from streets, resulting in an overall improvement in total transportation system flow." A. Nelson, *Public Provision of Pedestrian and Bicycle Access Ways: Public Policy Rationale and the Nature of Private Benefits* 11, Center for Planning Development, Georgia Institute of Technology, Working Paper Series (Jan. 1994). See also *Intermodal Surface Transportation Efficiency Act of 1991*, Pub.L. 102-240, 105 Stat.1914 (recognizing pedestrian and bicycle facilities as necessary components of any strategy to reduce traffic congestion).

B

The second part of our analysis requires us to determine whether the degree of the exactions demanded by the city's permit conditions bears the required relationship to the projected impact of petitioner's proposed development. *Nollan*, supra, 483 U.S., at 834, 107 S.Ct., at 3147, quoting *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 127, 98 S.Ct. 2646, 2660, 57 L.Ed.2d 631 (1978) ("[A] use restriction may constitute a "taking" if not reasonably necessary to the effectuation of a substantial government purpose' "). Here the Oregon Supreme Court deferred to what it termed the "city's unchallenged factual findings" supporting the dedication conditions and found them to be reasonably related to the impact of the expansion of petitioner's business. 317 Ore., at 120-121, 854 P.2d, at 443.

The city required that petitioner dedicate "to the City as Greenway all portions of the site that fall within the existing 100-year floodplain [of Fanno Creek] ... and all property 15 feet above [the floodplain] boundary." *Id.*, at 113, n. 3, 854 P.2d, at 439, n. 3. In addition, the city demanded that the retail store be designed so as not to intrude into the greenway area. The city relies on the Commission's rather tentative findings that increased storm water flow from petitioner's property "can only add to the public need to manage the [floodplain] for drainage purposes" to support its conclusion that the "requirement of dedication of the floodplain area on the site is related to the applicant's plan to intensify development on the site." *City of Tigard Planning Commission Final Order No. 91-09 PC, App. to Pet. for Cert. G-37.*

The city made the following specific findings relevant to the pedestrian/bicycle pathway:

"In addition, the proposed expanded use of this site is anticipated to generate additional vehicular traffic

thereby increasing congestion on nearby collector and arterial streets. Creation of a convenient, safe pedestrian/bicycle pathway system as an alternative means of transportation could offset some of the traffic demand on these nearby streets and lessen the increase in traffic congestion.” Id., at G-24.

The question for us is whether these findings are constitutionally sufficient to justify the conditions imposed by the city on petitioner’s building permit. Since state courts have been dealing with this question a good deal longer than we have, we turn to representative decisions made by them.

In some States, very generalized statements as to the necessary connection between the required dedication and the proposed development seem to suffice. See, e.g., *Billings Properties, Inc. v. Yellowstone County*, 144 Mont. 25, 394 P.2d 182 (1964) ; *Jenad, Inc. v. Scarsdale*, 18 N.Y.2d 78, 271 N.Y.S.2d 955, 218 N.E.2d 673 (1966). We think this standard is too lax to adequately protect petitioner’s right to just compensation if her property is taken for a public purpose.

Other state courts require a very exacting correspondence, described as the “specifi[c] and uniquely attributable” test. The Supreme Court of Illinois first developed this test in *Pioneer Trust & Savings Bank v. Mount Prospect*, 22 Ill.2d 375, 380, 176 N.E.2d 799, 802 (1961).⁷ Under this standard, if the local government cannot demonstrate that its

⁷ The “specifically and uniquely attributable” test has now been adopted by a minority of other courts. See, e.g., *J.E.D. Associates, Inc. v. Atkinson*, 121 N.H. 581, 585, 432 A.2d 12, 15 (1981); *Divan Builders, Inc. v. Planning Bd. of Twp. of Wayne*, 66 N.J. 582, 600-601, 334 A.2d 30, 40 (1975); *McKain v. Toledo City Plan Comm’n*, 26 Ohio App.2d 171, 176, 270 N.E.2d 370, 374 (1971); *Frank Ansuini, Inc. v. Cranston*, 107 R.I. 63, 69, 264 A.2d 910, 913 (1970).

exaction is directly proportional to the specifically created need, the exaction becomes “a veiled exercise of the power of eminent domain and a confiscation of private property behind the defense of police regulations.” *Id.*, at 381, 176 N.E.2d, at 802. We do not think the Federal Constitution requires such exacting scrutiny, given the nature of the interests involved.

A number of state courts have taken an intermediate position, requiring the municipality to show a “reasonable relationship” between the required dedication and the impact of the proposed development. Typical is the Supreme Court of Nebraska’s opinion in *Simpson v. North Platte*, 206 Neb. 240, 245, 292 N.W.2d 297, 301 (1980), where that court stated:

“The distinction, therefore, which must be made between an appropriate exercise of the police power and an improper exercise of eminent domain is whether the requirement has some reasonable relationship or nexus to the use to which the property is being made or is merely being used as an excuse for taking property simply because at that particular moment the landowner is asking the city for some license or permit.”

Thus, the court held that a city may not require a property owner to dedicate private property for some future public use as a condition of obtaining a building permit when such future use is not “occasioned by the construction sought to be permitted.” *Id.*, at 248, 292 N.W.2d, at 302.

Some form of the reasonable relationship test has been adopted in many other jurisdictions. See, e.g., *Jordan v. Menomonee Falls*, 28 Wis.2d 608, 137 N.W.2d 442 (1965); *Collis v. Bloomington*, 310 Minn. 5, 246 N.W.2d 19 (1976)

(requiring a showing of a reasonable relationship between the planned subdivision and the municipality's need for land); *College Station v. Turtle Rock Corp.*, 680 S.W.2d 802, 807 (Tex.1984); *Call v. West Jordan*, 606 P.2d 217, 220 (Utah 1979) (affirming use of the reasonable relation test). Despite any semantical differences, general agreement exists among the courts "that the dedication should have some reasonable relationship to the needs created by the [development]." *Ibid.* See generally Note " 'Take' My Beach Please!": *Nollan v. California Coastal Commission* and a Rational-Nexus Constitutional Analysis of Development Exactions, 69 B.U.L.Rev. 823 (1989); see also *Parks v. Watson*, 716 F.2d 646, 651-653 (CA9 1983).

We think the "reasonable relationship" test adopted by a majority of the state courts is closer to the federal constitutional norm than either of those previously discussed. But we do not adopt it as such, partly because the term "reasonable relationship" seems confusingly similar to the term "rational basis" which describes the minimal level of scrutiny under the Equal Protection Clause of the Fourteenth Amendment. We think a term such as "rough proportionality" best encapsulates what we hold to be the requirement of the Fifth Amendment. No precise mathematical calculation is required, but the city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development.⁸

⁸ Justice STEVENS' dissent takes us to task for placing the burden on the city to justify the required dedication. He is correct in arguing that in evaluating most generally applicable zoning regulations, the burden properly rests on the party challenging the regulation to prove that it constitutes an arbitrary regulation of property rights. See, e.g., *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 47 S.Ct. 114, 71 L.Ed. 303 (1926). Here, by contrast, the city made an adjudicative decision to condition petitioner's application for a building permit on an individual parcel. In this situation, the burden properly rests on the city. See *Nollan*, 483 U.S., at 836, 107 S.Ct., at 3148. This conclusion is not, as he suggests, undermined by our decision in *Moore v. East Cleveland*, 431 U.S. 494, 97 S.Ct. 1932, 52 L.Ed.2d 531 (1977), in which we struck down a housing ordinance that limited occupancy

Justice STEVENS' dissent relies upon a law review article for the proposition that the city's conditional demands for part of petitioner's property are "a species of business regulation that heretofore warranted a strong presumption of constitutional validity." Post, at 2325. But simply denominating a governmental measure as a "business regulation" does not immunize it from constitutional challenge on the ground that it violates a provision of the Bill of Rights. In *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 98 S.Ct. 1816, 56 L.Ed.2d 305 (1978), we held that a statute authorizing a warrantless search of business premises in order to detect OSHA violations violated the Fourth Amendment. See also *Air Pollution Variance Bd., of Colo. v. Western Alfalfa Corp.*, 416 U.S. 861, 94 S.Ct. 2114, 40 L.Ed.2d 607 (1974); *New York v. Burger*, 482 U.S. 691, 107 S.Ct. 2636, 96 L.Ed.2d 601 (1987). And in *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980), we held that an order of the New York Public Service Commission, designed to cut down the use of electricity because of a fuel shortage, violated the First Amendment insofar as it prohibited advertising by a utility company to promote the use of electricity. We see no reason why the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First Amendment or Fourth Amendment, should be relegated to the status of a poor relation in these comparable circumstances. We turn now to analysis of whether the findings relied upon by the city here, first with respect to the floodplain easement, and second with respect to the pedestrian/bicycle path, satisfied these requirements.

of a dwelling unit to members of a single family as violating the Due Process Clause of the Fourteenth Amendment. The ordinance at issue in *Moore* intruded on choices concerning family living arrangements, an area in which the usual deference to the legislature was found to be inappropriate. *Id.*, at 499, 97 S.Ct., at 1935.

It is axiomatic that increasing the amount of impervious surface will increase the quantity and rate of storm water flow from petitioner's property. Record, Doc. No. F, ch. 4, p. 4-29. Therefore, keeping the floodplain open and free from development would likely confine the pressures on Fanno Creek created by petitioner's development. In fact, because petitioner's property lies within the Central Business District, the CDC already required that petitioner leave 15% of it as open space and the undeveloped floodplain would have nearly satisfied that requirement. App. to Pet. for Cert. G-16 to G-17. But the city demanded more-it not only wanted petitioner not to build in the floodplain, but it also wanted petitioner's property along Fanno Creek for its greenway system. The city has never said why a public greenway, as opposed to a private one, was required in the interest of flood control.

The difference to petitioner, of course, is the loss of her ability to exclude others. As we have noted, this right to exclude others is "one of the most essential sticks in the bundle of rights that are commonly characterized as property." *Kaiser Aetna*, 444 U.S., at 176, 100 S.Ct., at 391. It is difficult to see why recreational visitors trampling along petitioner's floodplain easement are sufficiently related to the city's legitimate interest in reducing flooding problems along Fanno Creek, and the city has not attempted to make any individualized determination to support this part of its request.

The city contends that the recreational easement along the greenway is only ancillary to the city's chief purpose in controlling flood hazards. It further asserts that unlike the residential property at issue in *Nollan*, petitioner's property is commercial in character, and therefore, her right to exclude others is compromised. Brief for Respondent 41, quoting *United States v. Orito*, 413 U.S. 139, 142, 93 S.Ct. 2674, 2677, 37 L.Ed.2d 513 (1973) ("The Constitution extends special safeguards to the privacy of the home" (')).

The city maintains that “[t]here is nothing to suggest that preventing [petitioner] from prohibiting [the easements] will unreasonably impair the value of [her] property as a [retail store].” *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 83, 100 S.Ct. 2035, 2042, 64 L.Ed.2d 741 (1980).

Admittedly, petitioner wants to build a bigger store to attract members of the public to her property. She also wants, however, to be able to control the time and manner in which they enter. The recreational easement on the greenway is different in character from the exercise of state-protected rights of free expression and petition that we permitted in *PruneYard*. In *PruneYard*, we held that a major private shopping center that attracted more than 25,000 daily patrons had to provide access to persons exercising their state constitutional rights to distribute pamphlets and ask passers-by to sign their petitions. *Id.*, at 85, 100 S.Ct., at 2042. We based our decision, in part, on the fact that the shopping center “may restrict expressive activity by adopting time, place, and manner regulations that will minimize any interference with its commercial functions.” *Id.*, at 83, 100 S.Ct., at 2042. By contrast, the city wants to impose a permanent recreational easement upon petitioner’s property that borders Fanno Creek. Petitioner would lose all rights to regulate the time in which the public entered onto the greenway, regardless of any interference it might pose with her retail store. Her right to exclude would not be regulated, it would be eviscerated.

If petitioner’s proposed development had somehow encroached on existing greenway space in the city, it would have been reasonable to require petitioner to provide some alternative greenway space for the public either on her property or elsewhere. See *Nollan*, 483 U.S., at 836, 107 S.Ct., at 3148 (“Although such a requirement, constituting a permanent grant of continuous access to the property, would have to be considered a taking if it were not attached to a development permit, the Commission’s assumed

power to forbid construction of the house in order to protect the public's view of the beach must surely include the power to condition construction upon some concession by the owner, even a concession of property rights, that serves the same end"). But that is not the case here. We conclude that the findings upon which the city relies do not show the required reasonable relationship between the floodplain easement and the petitioner's proposed new building.

With respect to the pedestrian/bicycle pathway, we have no doubt that the city was correct in finding that the larger retail sales facility proposed by petitioner will increase traffic on the streets of the Central Business District. The city estimates that the proposed development would generate roughly 435 additional trips per day.⁹ Dedications for streets, sidewalks, and other public ways are generally reasonable exactions to avoid excessive congestion from a proposed property use. But on the record before us, the city has not met its burden of demonstrating that the additional number of vehicle and bicycle trips generated by petitioner's development reasonably relate to the city's requirement for a dedication of the pedestrian/bicycle pathway easement. The city simply found that the creation of the pathway "could offset some of the traffic demand ... and lessen the increase in traffic congestion."¹⁰

As Justice Peterson of the Supreme Court of Oregon explained in his dissenting opinion, however, "[t]he findings of fact that the bicycle pathway system 'could offset

⁹ The city uses a weekday average trip rate of 53.21 trips per 1,000 square feet. Additional Trips Generated = 53.21 X (17,600-9,720). App. to Pet. for Cert. G-15.

¹⁰ In rejecting petitioner's request for a variance from the pathway dedication condition, the city stated that omitting the planned section of the pathway across petitioner's property would conflict with its adopted policy of providing a continuous pathway system. But the Takings Clause requires the city to implement its policy by condemnation unless the required relationship between petitioner's development and added traffic is shown.

some of the traffic demand' is a far cry from a finding that the bicycle pathway system *will*, or is *likely to*, offset some of the traffic demand." 317 Ore., at 127, 854 P.2d, at 447 (emphasis in original). No precise mathematical calculation is required, but the city must make some effort to quantify its findings in support of the dedication for the pedestrian/bicycle pathway beyond the conclusory statement that it could offset some of the traffic demand generated.

IV

Cities have long engaged in the commendable task of land use planning, made necessary by increasing urbanization, particularly in metropolitan areas such as Portland. The city's goals of reducing flooding hazards and traffic congestion, and providing for public greenways, are laudable, but there are outer limits to how this may be done. "A strong public desire to improve the public condition [will not] warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." *Pennsylvania Coal*, 260 U.S., at 416, 43 S.Ct., at 160.

The judgment of the Supreme Court of Oregon is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

JUSTICE STEVENS, with whom JUSTICE BLACKMUN and JUSTICE GINSBURG join, dissenting.

The record does not tell us the dollar value of petitioner Florence Dolan's interest in excluding the public from the greenway adjacent to her hardware business. The mountain of briefs that the case has generated nevertheless makes it obvious that the pecuniary value of her victory is far less important than the rule of law that this case has been used to establish. It is unquestionably an important case.

Certain propositions are not in dispute. The enlargement of the Tigard unit in Dolan's chain of hardware stores will have an adverse impact on the city's legitimate and substantial interests in controlling drainage in Fanno Creek and minimizing traffic congestion in Tigard's business district. That impact is sufficient to justify an outright denial of her application for approval of the expansion. The city has nevertheless agreed to grant Dolan's application if she will comply with two conditions, each of which admittedly will mitigate the adverse effects of her proposed development. The disputed question is whether the city has violated the Fourteenth Amendment to the Federal Constitution by refusing to allow Dolan's planned construction to proceed unless those conditions are met.

The Court is correct in concluding that the city may not attach arbitrary conditions to a building permit or to a variance even when it can rightfully deny the application outright. I also agree that state court decisions dealing with ordinances that govern municipal development plans provide useful guidance in a case of this kind. Yet the Court's description of the doctrinal underpinnings of its decision, the phrasing of its fledgling test of "rough proportionality," and the application of that test to this case run contrary to the traditional treatment of these cases and break considerable and unpropitious new ground.

I

Candidly acknowledging the lack of federal precedent for its exercise in rulemaking, the Court purports to find guidance in 12 "representative" state court decisions. To do so is certainly appropriate.¹¹ The state cases the Court consults, however, either fail to support or decidedly undermine the Court's conclusions in key respects.

¹¹ Cf. *Moore v. East Cleveland*, 431 U.S. 494, 513-521, 97 S.Ct. 1932, 52 L.Ed.2d 531 (1977) (STEVENS, J., concurring in judgment).

First, although discussion of the state cases permeates the Court's analysis of the appropriate test to apply in this case, the test on which the Court settles is not naturally derived from those courts' decisions. The Court recognizes as an initial matter that the city's conditions satisfy the "essential nexus" requirement announced in *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 107 S.Ct. 3141, 97 L.Ed.2d 677 (1987), because they serve the legitimate interests in minimizing floods and traffic congestions. Ante, at 2317-2318.¹² The Court goes on, however, to erect a new constitutional hurdle in the path of these conditions. In addition to showing a rational nexus to a public purpose that would justify an outright denial of the permit, the city must also demonstrate "rough proportionality" between the harm caused by the new land use and the benefit obtained by the condition. Ante, at 2319. The Court also decides for the first time that the city has the burden of establishing the constitutionality of its conditions by making an "individualized determination" that the condition in question satisfies the proportionality requirement. See *Ibid*.

Not one of the state cases cited by the Court announces anything akin to a "rough proportionality" requirement. For the most part, moreover, those cases that invalidated

¹² In *Nollan* the Court recognized that a state agency may condition the grant of a land use permit on the dedication of a property interest if the dedication serves a legitimate police-power purpose that would justify a refusal to issue the permit. For the first time, however, it held that such a condition is unconstitutional if the condition "utterly fails" to further a goal that would justify the refusal. 483 U.S., at 837, 107 S.Ct., at 3148. In the *Nollan* Court's view, a condition would be constitutional even if it required the *Nollans* to provide a viewing spot for passers-by whose view of the ocean was obstructed by their new house. *Id.*, at 836, 107 S.Ct., at 3148. "Although such a requirement, constituting a permanent grant of continuous access to the property, would have to be considered a taking if it were not attached to a development permit, the Commission's assumed power to forbid construction of the house in order to protect the public's view of the beach must surely include the power to condition construction upon some concession by the owner, even a concession of property rights, that serves the same end." *Ibid*.

municipal ordinances did so on state law or unspecified grounds roughly equivalent to Nollan's "essential nexus" requirement. See, e.g.,

Simpson v. North Platte, 206 Neb. 240, 245-248, 292 N.W.2d 297, 301-302 (1980) (ordinance lacking "reasonable relationship" or "rational nexus" to property's use violated Nebraska Constitution); *J.E.D. Associates, Inc. v. Atkinson*, 121 N.H. 581, 583-585, 432 A.2d 12, 14-15 (1981) (state constitutional grounds). One case purporting to apply the strict "specifically and uniquely attributable" test established by *Pioneer Trust & Savings Bank v. Mount Prospect*, 22 Ill.2d 375, 176 N.E.2d 799 (1961), nevertheless found that test was satisfied because the legislature had decided that the subdivision at issue created the need for a park or parks. *Billings Properties, Inc. v. Yellowstone County*, 144 Mont. 25, 33-36, 394 P.2d 182, 187-188 (1964). In only one of the seven cases upholding a land use regulation did the losing property owner petition this Court for certiorari. See *Jordan v. Menomonee Falls*, 28 Wis.2d 608, 137 N.W.2d 442 (1965), appeal dismissed, 385 U.S. 4, 87 S.Ct. 36, 17 L.Ed.2d 3 (1966) (want of substantial federal question). Although 4 of the 12 opinions mention the Federal Constitution—2 of those only in passing—it is quite obvious that neither the courts nor the litigants imagined they might be participating in the development of a new rule of federal law. Thus, although these state cases do lend support to the Court's reaffirmance of Nollan's reasonable nexus requirement, the role the Court accords them in the announcement of its newly minted second phase of the constitutional inquiry is remarkably inventive.

In addition, the Court ignores the state courts' willingness to consider what the property owner gains from the exchange in question. The Supreme Court of Wisconsin, for example, found it significant that the village's approval of a proposed subdivision plat "enables the subdivider to profit financially by selling the subdivision lots as home-

building sites and thus realizing a greater price than could have been obtained if he had sold his property as unplatted lands.” *Jordan v. Menomonee Falls*, 28 Wis.2d, at 619-620, 137 N.W.2d, at 448. The required dedication as a condition of that approval was permissible “[i]n return for this benefit.” *Ibid.* See also *Collis v. Bloomington*, 310 Minn. 5, 11-13, 246 N.W.2d 19, 23-24 (1976) (citing *Jordan*); *College Station v. Turtle Rock Corp.*, 680 S.W.2d 802, 806 (Tex.1984) (dedication requirement only triggered when developer chooses to develop land). In this case, moreover, Dolan’s acceptance of the permit, with its attached conditions, would provide her with benefits that may well go beyond any advantage she gets from expanding her business. As the United States pointed out at oral argument, the improvement that the city’s drainage plan contemplates would widen the channel and reinforce the slopes to increase the carrying capacity during serious floods, “confer[ring] considerable benefits on the property owners immediately adjacent to the creek.” Tr. of Oral Arg. 41-42.

The state court decisions also are enlightening in the extent to which they required that the entire parcel be given controlling importance. All but one of the cases involve challenges to provisions in municipal ordinances requiring developers to dedicate either a percentage of the entire parcel (usually 7 or 10 percent of the platted subdivision) or an equivalent value in cash (usually a certain dollar amount per lot) to help finance the construction of roads, utilities, schools, parks, and playgrounds. In assessing the legality of the conditions, the courts gave no indication that the transfer of an interest in realty was any more objectionable than a cash payment. See, e.g., *Jenad, Inc. v. Scarsdale*, 18 N.Y.2d 78, 271 N.Y.S.2d 955, 218 N.E.2d 673 (1966); *Jordan v. Menomonee Falls*, 28 Wis.2d 608, 137 N.W.2d 442 (1965); *Collis v. Bloomington*, 310 Minn. 5, 246 N.W.2d 19 (1976). None of the decisions identified the

surrender of the fee owner's "power to exclude" as having any special significance. Instead, the courts uniformly examined the character of the entire economic transaction.

II

It is not merely state cases, but our own cases as well, that require the analysis to focus on the impact of the city's action on the entire parcel of private property. In *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978), we stated that takings jurisprudence "does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated." *Id.*, at 130-131, 98 S.Ct., at 2662. Instead, this Court focuses "both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole." *Ibid.* *Andrus v. Allard*, 444 U.S. 51, 100 S.Ct. 318, 62 L.Ed.2d 210 (1979), reaffirmed the nondivisibility principle outlined in *Penn Central*, stating that "[a]t least where an owner possesses a full 'bundle' of property rights, the destruction of one 'strand' of the bundle is not a taking, because the aggregate must be viewed in its entirety." 444 U.S., at 65-66, 100 S.Ct., at 327.¹³ As recently as last Term, we approved the principle again. See *Concrete Pipe & Products of Cal., Inc. v. Construction Laborers Pension Trust for Southern Cal.*, 508 U.S. 602, 644, 113 S.Ct. 2264, 2290, 124 L.Ed.2d 539 (1993) (explaining that "a claimant's parcel of property [cannot] first be divided into what was taken and what was left" to demonstrate a compensable taking). Although limitation of the right to exclude others undoubtedly constitutes a significant infringement upon property ownership, *Kaiser Aetna v. United States*, 444

¹³ Similarly, in *Keystone Bituminous Coal Assn. v. DeBenedictis*, 480 U.S. 470, 498-499, 107 S.Ct. 1232, 1249, 94 L.Ed.2d 472 (1987), we concluded that "[t]he 27 million tons of coal do not constitute a separate segment of property for takings law purposes" and that "[t]here is no basis for treating the less than 2% of petitioners' coal as a separate parcel of property."

U.S. 164, 179-180, 100 S.Ct. 383, 393, 62 L.Ed.2d 332 (1979), restrictions on that right do not alone constitute a taking, and do not do so in any event unless they “unreasonably impair the value or use” of the property. *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 82-84, 100 S.Ct. 2035, 2041-2042, 64 L.Ed.2d 741 (1980).

The Court’s narrow focus on one strand in the property owner’s bundle of rights is particularly misguided in a case involving the development of commercial property. As Professor Johnston has noted:

“The subdivider is a manufacturer, processor, and marketer of a product; land is but one of his raw materials. In subdivision control disputes, the developer is not defending hearth and home against the king’s intrusion, but simply attempting to maximize his profits from the sale of a finished product. As applied to him, subdivision control exactions are actually business regulations.” Johnston, *Constitutionality of Subdivision Control Exactions: The Quest for A Rationale*, 52 *Cornell L.Q.* 871, 923 (1967).¹⁴

The exactions associated with the development of a retail business are likewise a species of business regulation that

¹⁴ Johnston’s article also sets forth a fair summary of the state cases from which the Court purports to derive its “rough proportionality” test. See 52 *Cornell L.Q.*, at 917. Like the Court, Johnston observed that cases requiring a “rational nexus” between exactions and public needs created by the new subdivision—especially *Jordan v. Menomonee Falls*, 28 Wis.2d 608, 137 N.W.2d 442 (1965)—“steer[r] a moderate course” between the “judicial obstructionism” of *Pioneer Trust & Savings Bank v. Mount Prospect*, 22 Ill.2d 375, 176 N.E.2d 799 (1961), and the “excessive deference” of *Billings Properties, Inc. v. Yellowstone County*, 144 Mont. 25, 394 P.2d 182 (1964). 52 *Cornell L.Q.*, at 917.

heretofore warranted a strong presumption of constitutional validity.

In Johnston's view, "if the municipality can demonstrate that its assessment of financial burdens against subdividers is rational, impartial, and conducive to fulfillment of authorized planning objectives, its action need be invalidated only in those extreme and presumably rare cases where the burden of compliance is sufficiently great to deter the owner from proceeding with his planned development." *Id.*, at 917. The city of Tigard has demonstrated that its plan is rational and impartial and that the conditions at issue are "conducive to fulfillment of authorized planning objectives." Dolan, on the other hand, has offered no evidence that her burden of compliance has any impact at all on the value or profitability of her planned development. Following the teaching of the cases on which it purports to rely, the Court should not isolate the burden associated with the loss of the power to exclude from an evaluation of the benefit to be derived from the permit to enlarge the store and the parking lot.

The Court's assurances that its "rough proportionality" test leaves ample room for cities to pursue the "commendable task of land use planning," *ante*, at 2322—even twice avowing that "[n]o precise mathematical calculation is required," *ante*, at 2319, 2322—are wanting given the result that test compels here. Under the Court's approach, a city must not only "quantify its findings," *ante*, at 2322, and make "individualized determination[s]" with respect to the nature and the extent of the relationship between the conditions and the impact, *ante*, at 2319, 2320, but also demonstrate "proportionality." The correct inquiry should instead concentrate on whether the required nexus is present and venture beyond considerations of a condition's nature or germaneness only if the developer establishes that a concededly germane condition is so grossly disproportionate to the proposed development's adverse

effects that it manifests motives other than land use regulation on the part of the city.¹⁵ The heightened requirement the Court imposes on cities is even more unjustified when all the tools needed to resolve the questions presented by this case can be garnered from our existing case law.

III

Applying its new standard, the Court finds two defects in the city's case. First, while the record would adequately support a requirement that Dolan maintain the portion of the floodplain on her property as undeveloped open space, it does not support the additional requirement that the floodplain be dedicated to the city. Ante, at 2320-2322. Second, while the city adequately established the traffic increase that the proposed development would generate, it failed to quantify the offsetting decrease in automobile traffic that the bike path will produce. Ante, at 2321-2322. Even under the Court's new rule, both defects are, at most, nothing more than harmless error.

In her objections to the floodplain condition, Dolan made no effort to demonstrate that the dedication of that portion of her property would be any more onerous than a simple prohibition against any development on that portion of her property. Given the commercial character of both the existing and the proposed use of the property as a retail store, it seems likely that potential customers "trampling along petitioner's floodplain," ante, at 2320, are more valuable than a useless parcel of vacant land. Moreover, the duty to pay taxes and the responsibility for potential tort liability may well make ownership of the fee interest in

¹⁵ Dolan's attorney overstated the danger when he suggested at oral argument that without some requirement for proportionality, "[t]he City could have found that Mrs. Dolan's new store would have increased traffic by one additional vehicle trip per day [and] could have required her to dedicate 75, 95 percent of her land for a widening of Main Street." Tr. of Oral Arg. 52-53.

useless land a liability rather than an asset. That may explain why Dolan never conceded that she could be prevented from building on the floodplain. The city attorney also pointed out that absent a dedication, property owners would be required to “build on their own land” and “with their own money” a storage facility for the water runoff. Tr. of Oral Arg. 30-31. Dolan apparently “did have that option,” but chose not to seek it. *Id.*, at 31. If Dolan might have been entitled to a variance confining the city’s condition in a manner this Court would accept, her failure to seek that narrower form of relief at any stage of the state administrative and judicial proceedings clearly should preclude that relief in this Court now.

The Court’s rejection of the bike path condition amounts to nothing more than a play on words. Everyone agrees that the bike path “could” offset some of the increased traffic flow that the larger store will generate, but the findings do not unequivocally state that it will do so, or tell us just how many cyclists will replace motorists. Predictions on such matters are inherently nothing more than estimates. Certainly the assumption that there will be an offsetting benefit here is entirely reasonable and should suffice whether it amounts to 100 percent, 35 percent, or only 5 percent of the increase in automobile traffic that would otherwise occur. If the Court proposes to have the federal judiciary micro-manage state decisions of this kind, it is indeed extending its welcome mat to a significant new class of litigants. Although there is no reason to believe that state courts have failed to rise to the task, property owners have surely found a new friend today.

IV

The Court has made a serious error by abandoning the traditional presumption of constitutionality and imposing a novel burden of proof on a city implementing an admittedly valid comprehensive land use plan. Even more consequential than its incorrect disposition of this case,

however, is the Court's resurrection of a species of substantive due process analysis that it firmly rejected decades ago.¹⁶

The Court begins its constitutional analysis by citing *Chicago, B. & Q.R. Co. v. Chicago*, 166 U.S. 226, 239, 17 S.Ct. 581, 585, 41 L.Ed. 979 (1897), for the proposition that the Takings Clause of the Fifth Amendment is "applicable to the States through the Fourteenth Amendment." Ante, at 2316. That opinion, however, contains no mention of either the Takings Clause or the Fifth Amendment;¹⁷ it held that the protection afforded by the Due Process Clause of the Fourteenth Amendment extends to matters of substance as well as procedure,¹⁸ and that the substance of "the due process of law enjoined by the Fourteenth Amendment requires compensation to be made or adequately secured to the owner of private property taken for public use under the authority of a State." 166 U.S., at 235, 236-241, 17 S.Ct., at 584, 584-586. It applied the same kind of substantive due process analysis more frequently identified with a better known case that accorded similar substantive protection to a baker's liberty interest in working 60 hours a week and 10 hours a day. See *Lochner v. New York*, 198 U.S. 45, 25 S.Ct. 539, 49 L.Ed. 937 (1905).¹⁹

¹⁶ See, e.g., *Ferguson v. Skrupa*, 372 U.S. 726, 83 S.Ct. 1028, 10 L.Ed.2d 93 (1963).

¹⁷ An earlier case deemed it "well settled" that the Takings Clause "is a limitation on the power of the Federal government, and not on the States." *Pumpelly v. Green Bay Co.*, 13 Wall. 166, 177, 20 L.Ed. 557 (1872).

¹⁸ The Court held that a State "may not, by any of its agencies, disregard the prohibitions of the Fourteenth Amendment. Its judicial authorities may keep within the letter of the statute prescribing forms of procedure in the courts and give the parties interested the fullest opportunity to be heard, and yet it might be that its final action would be inconsistent with that amendment. In determining what is due process of law regard must be had to substance, not to form." *Chicago, B. & Q.R. Co. v. Chicago*, 166 U.S. 226, 234-235, 17 S.Ct. 581, 584, 41 L.Ed. 979 (1897).

¹⁹ The *Lochner* Court refused to presume that there was a reasonable connection between the regulation and the state interest in protecting the public health. 198

Later cases have interpreted the Fourteenth Amendment's substantive protection against uncompensated deprivations of private property by the States as though it incorporated the text of the Fifth Amendment's Takings Clause. See, e.g., *Keystone Bituminous Coal Assn. v. DeBenedictis*, 480 U.S. 470, 481, n. 10, 107 S.Ct. 1232, 1240, n. 10, 94 L.Ed.2d 472 (1987). There was nothing problematic about that interpretation in cases enforcing the Fourteenth Amendment against state action that involved the actual physical invasion of private property. See *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 427-433, 102 S.Ct. 3164, 3172-3175, 73 L.Ed.2d 868 (1982); *Kaiser Aetna v. United States*, 444 U.S., at 178-180, 100 S.Ct., at 392-393. Justice Holmes charted a significant new course, however, when he opined that a state law making it "commercially impracticable to mine certain coal" had "very nearly the same effect for constitutional purposes as appropriating or destroying it." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 414, 43 S.Ct. 158, 159, 67 L.Ed. 322 (1922). The so-called "regulatory takings" doctrine that the Holmes dictum²⁰ kindled has an obvious kinship with the line of substantive due process cases that *Lochner* exemplified. Besides having similar ancestry, both doctrines are potentially open-ended sources of judicial power to invalidate state economic regulations that Members of this Court view as unwise or unfair.

This case inaugurates an even more recent judicial innovation than the regulatory takings doctrine: the application of the "unconstitutional conditions" label to a mutually beneficial transaction between a property owner

U.S., at 60-61, 25 S.Ct., at 544. A similar refusal to identify a sufficient nexus between an enlarged building with a newly paved parking lot and the state interests in minimizing the risks of flooding and traffic congestion proves fatal to the city's permit conditions in this case under the Court's novel approach.

²⁰ See *Keystone Bituminous Coal Assn. v. DeBenedictis*, 480 U.S., at 484, 107 S.Ct., at 1241 (explaining why this portion of the opinion was merely "advisory").

and a city. The Court tells us that the city's refusal to grant Dolan a discretionary benefit infringes her right to receive just compensation for the property interests that she has refused to dedicate to the city "where the property sought has little or no relationship to the benefit."²¹ Although it is well settled that a government cannot deny a benefit on a basis that infringes constitutionally protected interests—"especially [one's] interest in freedom of speech," *Perry v. Sindermann*, 408 U.S. 593, 597, 92 S.Ct. 2694, 2697, 33 L.Ed.2d 570 (1972)—the "unconstitutional conditions" doctrine provides an inadequate framework in which to analyze this case.²²

²¹ Ante, at 2317. The Court's entire explanation reads: "Under the well-settled doctrine of 'unconstitutional conditions,' the government may not require a person to give up a constitutional right—here the right to receive just compensation when property is taken for a public use—in exchange for a discretionary benefit conferred by the government where the benefit sought has little or no relationship to the property."

²² Although it has a long history, see *Home Ins. Co. v. Morse*, 20 Wall. 445, 451, 22 L.Ed. 365 (1874), the "unconstitutional conditions" doctrine has for just as long suffered from notoriously inconsistent application; it has never been an overarching principle of constitutional law that operates with equal force regardless of the nature of the rights and powers in question. See, e.g., Sunstein, *Why the Unconstitutional Conditions Doctrine is an Anachronism*, 70 B.U.L.Rev. 593, 620 (1990) (doctrine is "too crude and too general to provide help in contested cases"); Sullivan, *Unconstitutional Conditions*, 102 Harv.L.Rev. 1415, 1416 (1989) (doctrine is "riven with inconsistencies"); Hale, *Unconstitutional Conditions and Constitutional Rights*, 35 Colum.L.Rev. 321, 322 (1935) ("The Supreme Court has sustained many such exertions of power even after announcing the broad doctrine that would invalidate them"). As the majority's case citations suggest, ante, at 2316, modern decisions invoking the doctrine have most frequently involved First Amendment liberties, see also, e.g., *Connick v. Myers*, 461 U.S. 138, 143-144, 103 S.Ct. 1684, 1688, 75 L.Ed.2d 708 (1983); *Elrod v. Burns*, 427 U.S. 347, 361-363, 96 S.Ct. 2673, 2684, 49 L.Ed.2d 547 (1976) (plurality opinion); *Sherbert v. Verner*, 374 U.S. 398, 404, 83 S.Ct. 1790, 1794, 10 L.Ed.2d 965 (1963); *Speiser v. Randall*, 357 U.S. 513, 518-519, 78 S.Ct. 1332, 1338, 2 L.Ed.2d 1460 (1958). But see *Posadas de Puerto Rico Associates v. Tourism Co. of P.R.*, 478 U.S. 328, 345-346, 106 S.Ct. 2968, 2979, 92 L.Ed.2d 266 (1986) ("[T]he greater power to completely ban casino gambling necessarily includes the lesser power to ban advertising of casino gambling"). The necessary and traditional breadth of municipalities' power to regulate property development, together with the absence here of fragile and easily "chilled" constitutional rights such as that of free speech, make it quite clear that

Dolan has no right to be compensated for a taking unless the city acquires the property interests that she has refused to surrender. Since no taking has yet occurred, there has not been any infringement of her constitutional right to compensation. See *Preseault v. ICC*, 494 U.S. 1, 11-17, 110 S.Ct. 914, 921-924, 108 L.Ed.2d 1 (1990) (finding takings claim premature because property owner had not yet sought compensation under Tucker Act); *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U.S. 264, 294-295, 101 S.Ct. 2352, 2370, 69 L.Ed.2d 1 (1981) (no taking where no one “identified any property ... that has allegedly been taken”).

Even if Dolan should accept the city’s conditions in exchange for the benefit that she seeks, it would not necessarily follow that she had been denied “just compensation” since it would be appropriate to consider the receipt of that benefit in any calculation of “just compensation.” See *Pennsylvania Coal Co. v. Mahon*, 260 U.S., at 415, 43 S.Ct., at 160 (noting that an “average reciprocity of advantage” was deemed to justify many laws); *Hodel v. Irving*, 481 U.S. 704, 715, 107 S.Ct. 2076, 2082, 95 L.Ed.2d 668 (1987) (such “reciprocity of advantage” weighed in favor of a statute’s constitutionality). Particularly in the absence of any evidence on the point, we should not presume that the discretionary benefit the city has offered is less valuable than the property interests that Dolan can retain or surrender at her option. But even if that discretionary benefit were so trifling that it could not be considered just compensation when it has “little or no relationship” to the property, the Court fails to explain why the same value would suffice when the required nexus is present. In this respect, the Court’s reliance on the “unconstitutional conditions” doctrine is assuredly novel, and arguably incoherent. The city’s conditions are by no

the Court is really writing on a clean slate rather than merely applying “well-settled” doctrine. *Ante*, at 2316.

means immune from constitutional scrutiny. The level of scrutiny, however, does not approximate the kind of review that would apply if the city had insisted on a surrender of Dolan's First Amendment rights in exchange for a building permit. One can only hope that the Court's reliance today on First Amendment cases, see ante, at 2317 (citing *Perry v. Sindermann*, supra, and *Pickering v. Board of Ed. of Township High School Dist. 205, Will Cty.*, 391 U.S. 563, 568, 88 S.Ct. 1731, 1734, 20 L.Ed.2d 811 (1968)), and its candid disavowal of the term "rational basis" to describe its new standard of review, see ante, at 2319, do not signify a reassertion of the kind of superlegislative power the Court exercised during the *Lochner* era.

The Court has decided to apply its heightened scrutiny to a single strand—the power to exclude—in the bundle of rights that enables a commercial enterprise to flourish in an urban environment. That intangible interest is undoubtedly worthy of constitutional protection—much like the grandmother's interest in deciding which of her relatives may share her home in *Moore v. East Cleveland*, 431 U.S. 494, 97 S.Ct. 1932, 52 L.Ed.2d 531 (1977). Both interests are protected from arbitrary state action by the Due Process Clause of the Fourteenth Amendment. It is, however, a curious irony that Members of the majority in this case would impose an almost insurmountable burden of proof on the property owner in the *Moore* case while saddling the city with a heightened burden in this case.²³

²³ The author of today's opinion joined Justice Stewart's dissent in *Moore v. East Cleveland*, 431 U.S. 494, 97 S.Ct. 1932, 52 L.Ed.2d 531 (1977). There the dissenters found it sufficient, in response to my argument that the zoning ordinance was an arbitrary regulation of property rights, that "if the ordinance is a rational attempt to promote 'the city's interest in preserving the character of its neighborhoods,' *Young v. American Mini Theatres [Inc.]*, 427 U.S. 50, 71 [96 S.Ct. 2440, 2452, 49 L.Ed.2d 310 (1976)] (opinion of STEVENS, J.), it is ... a permissible restriction on the use of private property under *Euclid v. Ambler Realty Co.*, 272 U.S. 365 [47 S.Ct. 114, 71 L.Ed. 303 (1926)], and *Nectow v. Cambridge*, 277 U.S. 183 [48 S.Ct. 447, 72 L.Ed. 842 (1928)]." *Id.*, 431 U.S., at 540, n. 10, 97 S.Ct., at 1956, n. 10. The dissent went on to state that my calling the city to task for failing to explain the

In its application of what is essentially the doctrine of substantive due process, the Court confuses the past with the present. On November 13, 1922, the village of Euclid, Ohio, adopted a zoning ordinance that effectively confiscated 75 percent of the value of property owned by the Ambler Realty Company. Despite its recognition that such an ordinance “would have been rejected as arbitrary and oppressive” at an earlier date, the Court (over the dissent of Justices Van Devanter, McReynolds, and Butler) upheld the ordinance. Today’s majority should heed the words of Justice Sutherland:

“Such regulations are sustained, under the complex conditions of our day, for reasons analogous to those which justify traffic regulations, which, before the advent of automobiles and rapid transit street railways, would have been condemned as fatally arbitrary and unreasonable. And in this there is no inconsistency, for while the meaning of constitutional guaranties never varies, the scope of their application must expand or contract to meet the new and different conditions which are constantly coming within the field of their operation. In a changing world, it is impossible that it should be otherwise.” *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 387, 47 S.Ct. 114, 118, 71 L.Ed. 303 (1926).

need for enacting the ordinance “*place[d] the burden on the wrong party.*” *Ibid.* (emphasis added). Recently, two other Members of today’s majority severely criticized the holding in *Moore*. See *United States v. Carlton*, 512 U.S. 26, 40-42, 114 S.Ct. 2018, 2027, 129 L.Ed.2d 22 (1994) (SCALIA, J., concurring in judgment); see also *id.*, at 39, 114 S.Ct. at 2020 (SCALIA, J., concurring in judgment) (calling the doctrine of substantive due process “an oxymoron”).

In our changing world one thing is certain: uncertainty will characterize predictions about the impact of new urban developments on the risks of floods, earthquakes, traffic congestion, or environmental harms. When there is doubt concerning the magnitude of those impacts, the public interest in averting them must outweigh the private interest of the commercial entrepreneur. If the government can demonstrate that the conditions it has imposed in a land use permit are rational, impartial and conducive to fulfilling the aims of a valid land use plan, a strong presumption of validity should attach to those conditions. The burden of demonstrating that those conditions have unreasonably impaired the economic value of the proposed improvement belongs squarely on the shoulders of the party challenging the state action's constitutionality. That allocation of burdens has served us well in the past. The Court has stumbled badly today by reversing it.

I respectfully dissent.

JUSTICE SOUTER, dissenting.

This case, like *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 107 S.Ct. 3141, 97 L.Ed.2d 677 (1987), invites the Court to examine the relationship between conditions imposed by development permits, requiring landowners to dedicate portions of their land for use by the public, and governmental interests in mitigating the adverse effects of such development. *Nollan* declared the need for a nexus between the nature of an exaction of an interest in land (a beach easement) and the nature of governmental interests. The Court treats this case as raising a further question, not about the nature, but about the degree, of connection required between such an exaction and the adverse effects of development. The Court's opinion announces a test to address this question, but as I read the opinion, the Court does not apply that test to these facts, which do not raise the question the Court addresses.

First, as to the floodplain and greenway, the Court acknowledges that an easement of this land for open space (and presumably including the five feet required for needed creek channel improvements) is reasonably related to flood control, see ante, at 2317-2318, 2320, but argues that the “permanent recreational easement” for the public on the greenway is not so related, see ante, at 2320-2321. If that is so, it is not because of any lack of proportionality between permit condition and adverse effect, but because of a lack of any rational connection at all between exaction of a public recreational area and the governmental interest in providing for the effect of increased water runoff. That is merely an application of Nollan’s nexus analysis. As the Court notes, “[i]f petitioner’s proposed development had somehow encroached on existing greenway space in the city, it would have been reasonable to require petitioner to provide some alternative greenway space for the public.” Ante, at 2321. But that, of course, was not the fact, and the city of Tigard never sought to justify the public access portion of the dedication as related to flood control. It merely argued that whatever recreational uses were made of the bicycle path and the 1-foot edge on either side were incidental to the permit condition requiring dedication of the 15-foot easement for an 8-foot-wide bicycle path and for flood control, including open space requirements and relocation of the bank of the river by some 5 feet. It seems to me such incidental recreational use can stand or fall with the bicycle path, which the city justified by reference to traffic congestion. As to the relationship the Court examines, between the recreational easement and a purpose never put forth as a justification by the city, the Court unsurprisingly finds a recreation area to be unrelated to flood control.

Second, as to the bicycle path, the Court again acknowledges the “theor[etically]” reasonable relationship between “the city’s attempt to reduce traffic congestion by

providing [a bicycle path] for alternative means of transportation,” ante, at 2318, and the “correct” finding of the city that “the larger retail sales facility proposed by petitioner will increase traffic on the streets of the Central Business District,” ante, at 2321. The Court only faults the city for saying that the bicycle path “could” rather than “would” offset the increased traffic from the store, ante, at 2322. That again, as far as I can tell, is an application of *Nollan*, for the Court holds that the stated connection (“could offset”) between traffic congestion and bicycle paths is too tenuous; only if the bicycle path “would” offset the increased traffic by some amount could the bicycle path be said to be related to the city’s legitimate interest in reducing traffic congestion.

I cannot agree that the application of *Nollan* is a sound one here, since it appears that the Court has placed the burden of producing evidence of relationship on the city, despite the usual rule in cases involving the police power that the government is presumed to have acted constitutionally.²⁴ Having thus assigned the burden, the Court concludes that the city loses based on one word (“could” instead of “would”), and despite the fact that this record shows the connection the Court looks for. *Dolan* has put forward no evidence that the burden of granting a dedication for the bicycle path is unrelated in kind to the anticipated increase in traffic congestion, nor, if there exists a requirement that

²⁴ See, e.g., *Goldblatt v. Hempstead*, 369 U.S. 590, 594-596, 82 S.Ct. 987, 990, 8 L.Ed.2d 130 (1962); *United States v. Sperry Corp.*, 493 U.S. 52, 60, 110 S.Ct. 387, 393-394, 107 L.Ed.2d 290 (1989). The majority characterizes this case as involving an “adjudicative decision” to impose permit conditions, ante, at 2390, n. 8, but the permit conditions were imposed pursuant to *Tigard’s* Community Development Code. See, e.g., s 18.84.040, App. to Brief for Respondent B-26. The adjudication here was of *Dolan’s* requested variance from the permit conditions otherwise required to be imposed by the Code. This case raises no question about discriminatory, or “reverse spot,” zoning, which “singles out a particular parcel for different, less favorable treatment than the neighboring ones.” *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 132, 98 S.Ct. 2646, 2663, 57 L.Ed.2d 631 (1978).

the relationship be related in degree, has Dolan shown that the exaction fails any such test. The city, by contrast, calculated the increased traffic flow that would result from Dolan's proposed development to be 435 trips per day, and its Comprehensive Plan, applied here, relied on studies showing the link between alternative modes of transportation, including bicycle paths, and reduced street traffic congestion. See, e.g., App. to Brief for Respondent A-5, quoting City of Tigard's Comprehensive Plan ("Bicycle and pedestrian pathway systems will result in some reduction of automobile trips within the community"). Nollan, therefore, is satisfied, and on that assumption the city's conditions should not be held to fail a further rough proportionality test or any other that might be devised to give meaning to the constitutional limits. As Members of this Court have said before, "the common zoning regulations requiring subdividers to ... dedicate certain areas to public streets, are in accord with our constitutional traditions because the proposed property use would otherwise be the cause of excessive congestion." *Pennell v. San Jose*, 485 U.S. 1, 20, 108 S.Ct. 849, 862, 99 L.Ed.2d 1 (1988) (SCALIA, J., concurring in part and dissenting in part). The bicycle path permit condition is fundamentally no different from these.

In any event, on my reading, the Court's conclusions about the city's vulnerability carry the Court no further than Nollan has gone already, and I do not view this case as a suitable vehicle for taking the law beyond that point. The right case for the enunciation of takings doctrine seems hard to spot. See *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1076, 112 S.Ct. 2886, 2925, 120 L.Ed.2d 798 (1992) (statement of SOUTER, J.).

4.6. German Takings Law

Summary of German Law Relating to Compensation Resulting from Land Use Planning

From the Basic Law for the Federal Republic of Germany

(Grundgesetz, GG)

Article 14 [Property, inheritance, expropriation]

1. Property and the right of inheritance shall be guaranteed. Their content and limits shall be defined by the laws.
2. Property entails obligations. Its use shall also serve the public good.
3. Expropriation shall only be permissible for the public good. It may only be ordered by or pursuant to a law that determines the nature and extent of compensation. Such compensation shall be determined by establishing an equitable balance between the public interest and the interests of those affected. In case of dispute respecting the amount of compensation, recourse may be had to the ordinary courts.

The following is a brief summary adapted from *Takings International: A Comparative Perspective on Land Use Regulations and Compensation Rights*, Rachelle Alterman, ed., American Bar Association, 2010. The chapter on the Federal Republic of Germany was authored by Gerd Schmidt-Eichstaedt.

Under the Basic Law, compensation for expropriation must be provided for in a law that expropriates. But even regulations that are not deemed expropriating may require compensation under other laws. Namely, sections 39-44 of the Federal Building Code (*Baugesetzbuch*) provide for compensation for injuries from land use planning. Such causes of action are distinct from those claiming injury from unlawful action under civil law.

Land Use Plans that Designate Private Property for Public Uses

Under German planning law, binding land-use plans (or B-plans) may be relied upon by developers, and developments that comply with these plans will usually be permitted. These plans may also designate privately held property for public uses, such as roads, schools, and environmental protection. Actually making the public use requires the government to resort to expropriation procedures, but often the lands are purchased through voluntary negotiation.

A problem arises when there is a long interval between the plan and the realization of the public use. As might be guessed, it often takes time to move from planning stages to implementation. If it's reasonable for the landowner to keep using his property during this period, then he must do so. He may not make improvements that increase the value of the property, and thus what the public must pay when the planned public use is ready to be implemented, without the consent of the government. If, on the other hand, maintaining the current use is infeasible, the landowner may initiate a claim for transfer of title, which would result in compensation. Lesser, but still substantial, impacts on the current use may trigger compensation for what is lost.

Land use plans that grant public rights to walk or drive through property also result in compensation, at least where the property's value is reduced significantly.

Land Use Plans that Alter Permitted Private Uses

Under section 42 of the Federal Building Code, a landowner is entitled to develop according to a B-plan for a period of seven years after the plan's adoption. If the plan is altered during that time, landowners are entitled to compensation for the reduction in property values, whether or not they have developed in accordance with the plan. *After* seven years have elapsed, a change in the plan will lead to compensation only if (1) it reduces the value of a use the landowner is actually making, (2) the amended plan designates the landowner's property for a public use, or (3) the uses the amended plan allows the landowner to make are insubstantial. If development is made impossible by factors outside of the

developer's control, such as a development moratorium, then this period is added to the seven years. And again, to the extent a plan interferes with a current use, compensation is generally required, no matter how long it has been since the plan was last changed.

In the United States, changes in plans that lead to less valuable uses are called "downzonings." And current uses that do not comply with the new plan are called non-conforming uses. Many jurisdictions in the U.S. permit non-conforming uses to continue, despite the new zoning, for a certain period, until the landowner changes the use, or until the ownership of the property changes.

Not all downzonings in Germany are permitted. Courts may strike them down as "balancing errors" if they are not justified by what Schmidt-Eichstaedt calls "solid town planning principles." This would amount to a substantive attack on the plan, rather than a claim that an otherwise legitimate plan triggered a compensation obligation.

Developers may also seek compensation for specific development expenditures made in reliance on an existing plan that was later amended. This would result in compensation for engineering and architectural services, for example, to the extent the new plan reduces their value.

Finally, German law authorizes municipalities to freeze development during the preparation of a new plan. Without this authority, developers might rush to develop, perhaps unwisely, and in ways that will make implementation of the new plan and its goals difficult. The Federal Building Code authorizes a freeze when a municipality decides to prepare or amend a B-plan. This freeze lasts for two years, but may be extended for an additional year. A fourth year may be added to the freeze if "special circumstances" so require. No compensation is owed for development forestalled by the freeze.

**Excerpt from Gregory S. Alexander, *Property as a
Fundamental Constitutional Right? The German
Example***

88 Cornell L. Rev. 733 (2003)

Unlike the U.S. Supreme Court, the German Constitutional Court has been clear about the legal source used in defining what interests are protected as constitutional property.¹ For Article 14 purposes, the Basic Law itself defines the meaning of the term “ownership” (*Eigentum*). Constitutional property is not limited to those interests defined as property by nonconstitutional law (that is, the German Civil Code.) The Constitutional Court has clearly and consistently stated that the term “ownership” (or “property”) has a broader meaning under Article 14 than it has for private law purposes under the Civil Code.

Although the Court looks to the Basic Law to define the range of protected interests, its approach is not one of direct textual interpretation. Rather, it identifies the substantive interests that animate the Basic Law as a whole. These interests serve as criteria used to distinguish those interests that count as constitutional property from those that do not. This strategy, although textually rooted, differs in important ways from the “originalist” and “traditionalist” approaches favored by conservative American judges and constitutional scholars. The German approach avoids temporally freezing the meaning of constitutional property in any particular historical moment, permitting Article 14’s protection over time to embrace new and unprecedented sorts of interests.

¹ For a lucid and insightful discussion of the muddled state of American constitutional doctrine on this question, see Thomas W. Merrill, *The Landscape of Constitutional Property*, 86 Va. L. Rev. 885 (2000). The difference between the American and German experiences may be due in part to the fact that the German Basic Law has a single property clause and a single property-dependent doctrine, while the American Constitution has two property clauses (the Fifth and Fourteenth Amendments) and three property-dependent doctrines (the takings doctrine of the Fifth Amendment and the procedural-due-process and substantive-due-process doctrines of the Fourteenth Amendment). Of course, the mere existence of multiple references to property in the American Constitution does not necessitate a multiplicity of meanings.

Behind this approach to defining the constitutional limits of governmental power over property is a certain level of distrust of the market as a reliable mechanism for serving the public good (*Gemeinwohl*) with respect to particular sorts of resources. This has been especially so with respect to natural resources. The Court has been remarkably solicitous of environmental regulations aimed at protecting natural resources that the Court has characterized as basic to human existence.

An important example of this development is the notorious series of “Groundwater Cases” (*Naßsausskiesungsentscheidungen*), litigated before the federal Supreme Civil Court (*Bundesgerichtshof*) as well as the Constitutional Court. These cases, especially the Constitutional Court’s opinion, are among the most widely discussed constitutional property cases in Germany of the past several decades and are worth reflecting on to consider what they indicate about current German legal attitudes toward property, the market, and the public weal.

The litigation concerned the constitutional validity of the 1976 amendments to the Federal Water Resources Act (*Wasserhaushaltgesetz*), first enacted in 1957. The most important of these amendments was a provision requiring anyone wishing to make virtually any use of surface or groundwater to obtain a permit. That amendment represented an extension of the Act’s basic premise, which declared that

the attainment of a sensible and useful distribution of the surface water and groundwater, in quantity and quality, for the whole Federal Republic ... [can be achieved only] if the free disposition by private owners is restricted and if the interest of the public weal is the starting point for all action.

Under the Act, the owner of the surface has no entitlement to such a use permit; indeed, the permit must be denied wherever the proposed use threatens the “public weal.”

The plaintiff, who owned and operated a gravel pit, applied for a permit to use the water beneath his land. He had previously taken groundwater for decades for the purpose of extracting gravel, but the city denied him permission to continue doing so because his quarry operation threatened the city’s water wells. He sued for damages, claiming that the permit denial was an uncompensated expropriation of his property that is unconstitutional under Article 14 of the Basic Law.

The federal Supreme Civil Court, the highest civil court in Germany, held that the permit denial indeed violated the plaintiff’s constitutional property right and that the amendment to the Water Resources Act was unconstitutional under Article 14(1). Under German law, however, only the Constitutional Court has the authority to declare statutes unconstitutional, so the Supreme Civil Court was required to submit the case to the Constitutional Court. The latter Court held that the Water Resources Act was constitutional and that the permit denial was not an expropriation of the plaintiff’s constitutionally protected property. In the course of a long and extraordinarily complicated opinion, the Court squarely rejected a conception of property that identifies as its primary function the maximization of individual wealth. The Court stated, “From the constitutional guarantee of property the owner cannot derive a right to be permitted to make use of precisely that which promises the greatest possible economic advantage.” The Court acknowledged that the constitutional guarantee of property in Article 14(1) prohibits the legislature from undermining the basic existence of the right embedded in the private law of property in a way that removes or substantially impairs the guaranteed zone of freedom under Article 14. The guarantee of the legal institution of property, the Court continued, is not encroached on, however, when the security and defense of resources that are vital to the common welfare of the public are placed under the authority of the public, rather than the private, legal order.

Water is such a resource. The Court stated that, whatever the meaning of ownership for private law purposes, the constitutional meaning of land ownership has never entailed ownership of water below the surface. Legal rights concerning ground water are not determined by, or at least not primarily by, the ordinary rules of property law under the Civil Code (*Bürgerliches Gesetzbuch*, or *BGB*), because property rights in groundwater are inherently and historically public, not private, in character.² Private rights in land end when they reach the water level. Consequently, the Water Resources Act, in subjecting the owner's ability to exploit groundwater to a permit system, did not take from landowners any property right (*Anspruch*) that they ever had under the Constitution.

So, the German Constitutional Court regards water as special, too important to be left completely to the market, or private ordering, to allocate. One is left, though, to answer the nagging question of why water is special. Why, exactly, do private property rights not extend to groundwater in the same way that they do to land? A coherent, substantive answer to this question is absolutely necessary if one is to assuage the Supreme Civil Court's entirely understandable fear that regulatory measures like the Federal Water Law have effectively erased the line between the social obligation of ownership, on the one hand, and expropriation, on the other. If regulatory measures limiting or even eliminating private rights to resources can always be rationalized as simply expressions of the *Sozialbindung*, then hardly any protection against uncompensated expropriations under Article 14(3) would remain. The doctrine of regulatory takings (*enteignungsgleicher Eingriff*) would be emptied of all

² The Supreme Civil Court had reasoned that ownership of land confers ownership of water below the land relying on a provision of the Civil Code that states that "[t]he right of the owner of a parcel of land extends to the space above the surface and to the resources below the surface," § 905 BGB. American property lawyers will recognize this norm as the counterpart to the common-law maxim *usque ad coelum et ad infernos* (up to the sky and down to the depths). The Constitutional Court never questioned that this is correct as a matter of private law, but it concluded that the constitutional meaning of property is not determined solely by the private-law meaning, but is determined by the constitution itself. BVerfGE 58 at 335.

content. In Justice Holmes's terms, it would be impossible to say that a regulation "goes too far."

Unfortunately, it was just at this most crucial stage that the Constitutional Court's analysis broke down. The Court relied on two factors, history and social need, to explain why property rights in water are so limited—why groundwater is essentially or inherently public in character. Historically, the Court pointed out, German private law has separated property rights concerning land and water. This separation was constitutionally authorized at least since the time of the German constitution of 1871, the Court noted. Fine, but that does not answer the question; it only changes the character of the question. Why has it historically been constitutional to assign property rights in land to the private realm and rights in water to the public realm?

The Court gave more extended consideration to the functional role of water in society. As part of its reasoning that the Water Law falls within the "contents and limits" (*Inhalt und Schranken*) of ownership of land, a matter over which the legislature has complete regulatory authority,³ the Court emphasized that social changes occurring in this century have necessitated certain adjustments in the legal regulation of water. Water has always been a vital resource to society, the Court pointed out, but it has become even more so in modern German society.] As the Court observed, the processes of growing industrialization, urbanization, and construction have increased the scarcity and social importance of water. The Court declared that

water is one of the most important
bases of all of human, animal, and
plant life. [Today] it is used not only
for drinking and personal use, but also

³ This statement requires an important caveat: Under Article 14(1), the legislature has sole competence to define the "contents and limits" of ownership, *see* Grundgesetz [GG] art. 14(1) (F.R.G.), but Article 19(2) requires that the Constitutional Court define the essence of the constitutionally protected property right, Grundgesetz [GG] art. 19(2) (F.R.G.) ("In no case may the essential content of a basic right be encroached upon.").

as a factor of industrial production. Because of these simultaneous yet diverse demands, it was previously established as a matter of constitutional law that an orderly water management scheme was vital for the population as well as for the overall economy.

At this point, one wants to say, yes, water is essential to life, but so are many other resources. Would the Court be prepared to hold that the Basic Law does not recognize private property rights in all other natural resources that are necessary for life? Indeed, what about land, which clearly also is essential to the existence of animals and plants? Are we to surmise that private ownership of land is somehow being put in jeopardy? That hardly seems likely. The point is that it begs the question simply to declare that because certain resources are essential to human existence, the constitutional status of property rights in those resources must somehow be different from property rights in other resources.

There are, however, important differences between water and land. The most obvious respect in which subterranean water differs from land, of course, is water's "fugitive," or ambient character. Whereas land is necessarily immobile, underground water is not. The Constitutional Court alluded to this factor when discussing the functional significance of water. The Court emphasized that, as a human resource, water is now vital both for purposes of drinking and industry, and the increase in these social uses has brought the two more and more in conflict with each other. This is especially true in the case of groundwater, the Court noted. In that context, there is an inevitable conflict between commercial uses such as excavation of subsurface resources and the community interest in protecting both the supply and quality of subterranean water. The constitutional status of water must be determined by taking into account the need to reconcile these conflicting social interests. The Court concluded that the first priority must be to preserve the quality of drinking water; industrial uses of groundwater, such as

the discharge of chemicals into it, simply cannot be left to the discretion of each owner of land parcels. Why? Why not rely on the market, predicated on private property rights, to achieve an efficient allocation of groundwater?

Although the Court's answer here was a bit murky, its reasoning echoes points that some American property scholars have made concerning the limits of the market as a means of allocating rights in groundwater. These scholars have pointed out that, left as a commons, groundwater involves major problems with externalities, or spillover effects. Self-interest is not a reliable means of protecting a resource whose use, especially given the resource's fugitive character, has substantial external effects. As Eric Freyfogle has stated, "In the case of water, ... many external harms affect ecosystems and future generations, or are otherwise uncertain in scope and infeasible to calculate or trace." Flowing water, Freyfogle points out, is "communally embedded," both in a social and an ecological sense. The ecological community includes "soils, plants, animals, microorganisms, nutrient flows, and hydrological cycles." These two communities are themselves so interdependent that a threat to one is a threat to the other. Under these circumstances, any individual use of water profoundly affects the entire community and directly implicates the common weal.

As the Constitutional Court stated, the major legal question is whether shifting water regulation from the private to the public realm can be constitutionally justified. The argument was made that individual rights in groundwater are constitutionally inseparable from ownership of the surface. Rejecting this argument, the Court stated that federal regulation of groundwater use would not effectively empty landownership of all its content (*Substanzentleerung des Grundeigentums*). Landownership would not become completely subordinated to the social obligation. Merely subjecting the owner's right to use groundwater to regulatory approval does not remove the entire use-interest from the bundle of rights. Even if it did, the Court reasoned, there would be no constitutional violation because the right to use groundwater is not a twig that is essential to private ownership of the land. The Court stated that ownership of land is

valuable primarily with respect to use of the surface, not subterranean water. Even with respect to the surface, the Constitution permits regulation of various uses: “The constitutionally guaranteed right to property does not permit the owner to make use of just that use having the greatest economic value.”

The Court’s second basis for the constitutional validity of the Federal Water Law did not involve the constitutional property right itself, but instead drew from the principle of equality. Article 3 of the Constitution secures a principle of equality (*das Gleichbehandlungsgebot*), which the Court has repeatedly stated informs the meaning of other constitutional values, including property. The plaintiff had argued that the Federal Water Law arbitrarily burdened him, thus violating his Article 3 equality right, because his quarry was located close to groundwater while other quarry owners were not affected. The Court had little difficulty dismissing that objection, pointing out that the regulation affected all similarly situated quarry owners equally.

Similarly, the regulation did not violate the constitutional principle of proportionality (*Verhältnismäßigkeit*), because no particular owner was singled out to bear a disproportionate share of the burden necessary to achieve the benefits sought by the statute.

The final significant aspect of the case concerns the recurrent problem of legal transitions. The Federal Water Law denied the plaintiff a legal right that he once had and had previously exercised; he had been quarrying gravel since 1936, and under the law existing at that time, the right of property clearly protected the right to use groundwater. The Court directly confronted the familiar dilemma: stability versus dynamism. On the side of stability, the Court stated,

It would be incompatible with the content of the Constitution if the government were authorized suddenly and without any transitional period to block the continued exercise of property rights that had required substantial capital investment. Such a law ... would upset confidence in the stability

of the legal order, without which responsible structuring and planning of life would be impossible in the area of property ownership.

The Court was equally frank about the need to avoid freezing the distribution of property rights extant at any given time:

The constitutional guarantee of ownership exercised by the plaintiff does not imply that a property interest, once recognized, would have to be preserved in perpetuity or that it could be taken away only by way of expropriation [i.e., with compensation]. [This Court] has repeatedly ruled that the legislature is not faced with the alternative of either preserving old legal positions or taking them away in exchange for compensation every time an area of law is to be regulated anew.

The Constitution resolves this dilemma, the Court said, by permitting the legislature to “restructure individual legal positions by issuing an appropriate and reasonable transition rule whenever the public interest merits precedence over some justified expectation, based on continuity of practice, in the continuance of a vested right.” The statute followed this constitutionally sanctioned path by providing a grace period of five years, during which owners could continue to use groundwater without a permit. Because the Act did not take effect until thirty-one months after its enactment, the claimant effectively had almost eight years of continued use. Moreover, owners could get an extension if they had filed for a permit. The consequence of these provisions in the instant case, the Court noted, was that the plaintiff had been able to continue his gravel operations for some seventeen years after the statute’s enactment. Under these circumstances, the statute’s transition provisions reasonably accommodated the plaintiff’s economic interest.

German constitutional scholars have debated whether the “Groundwater Cases” made obsolete the concept of a regulatory

taking (*enteignungsgleicher Eingriff*, or equivalent expropriation). In American terms, the question is whether there remains an inverse condemnation action available to property owners. It is understandable why some scholars believe that there is not. The Court did, after all, permit the legislature to wipe away, without compensation, a discrete property right that had once been expressly recognized. How could there be any circumstance, then, in which the legislative obliteration of a legally recognized property interest would trigger the obligation to compensate? How could there be any circumstance in which the legislature has “gone too far”?

One distinguished German scholar has argued that the case, properly read, does not abolish the idea of compensation for regulatory takings. He points out that the Constitutional Court never mentioned the doctrine of regulatory takings anywhere in its opinion. More significantly, subsequent developments in the case reveal that the possibility of compensation for a regulatory taking is far from dead. Following the Constitutional Court’s decision, the case went back to the Supreme Court. That Supreme Court awarded the plaintiff compensation. It did so on the theory that, although the basic principle of property protection emerges from constitutional principles, the particulars of protection must be determined based on nonconstitutional law (*einfaches Recht*). The relevant nonconstitutional basis for state liability in the case, said the Court, is the principle of individual sacrifice (*Aufopferungsgedanke*). If governmental action sacrifices an individual for the benefit of the general public, the state is liable to compensate the individual in an action that is similar to, but not technically, an “expropriation,” as used in Article 14(3).⁴

⁴ What really seems to be going on here is a tug-of-war game between the Constitutional Court and the Supreme Civil Court, with the latter taking a more expansive view of the state’s obligation to compensate private owners for governmental encroachment of their property interests. In American terms, the conflict is somewhat analogous to the difference between the views of Justice Brennan and Chief Justice Rehnquist in the *Penn Central* case. See *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104 (1978). Ossenbühl has expressed the interesting idea that the alternative, nonconstitutional basis for compensation in

This debate has continued without any clear resolution, leaving this aspect of German state liability law (*Staatshaftungsrecht*) in considerable confusion. Whatever its legal basis, the Supreme Civil Court's decision does seem to leave open the possibility of monetary compensation for regulatory takings. More interestingly, it creates the possibility of compensation *without* a taking in cases in which justice seems to demand it even though the Constitution does not.

Three final comparative points about the "Groundwater Cases" need to be made. First, the case makes clear that the German Constitutional Court, like its American counterpart, has rejected what in American takings literature has become known as "conceptual severance." Conceptual severance, a term first coined by Margaret Jane Radin, means that every incident of ownership, every twig in the bundle of rights, is itself ownership. The implication of conceptual severance, of course, would be to strengthen vastly the bite of the Takings Clause, because virtually every regulation affecting private ownership of any resource would become a taking of ownership itself. The U.S. Supreme Court's reaction to conceptual severance has been somewhat ambiguous, but the German Court clearly rejected it, at least with respect to the relationship between land and subsurface resources. In fact, none of the Court's decisions under its constitutional property clause provides any basis at all for supposing that the Court is prepared to entertain such an approach.

The second point concerns the Court's statement in the "Groundwater Cases" that the constitutional right to property does not guarantee the right to exploit the resource for its highest economic value. This statement indicates that German constitutional protection of property is not rooted either in notions of wealth maximization or libertarianism. Eliminating those two possible theoretical bases of constitutional protection of property

cases of regulatory takings should be customary law. That is, the concept of *enteignungsgleicher Eingriff* should be separated from Article 14 of the *Grundgesetz* and treated as a matter of customary law.

has important implications for determining how a wide variety of contemporary American takings disputes would be resolved under German law. Wetlands regulation is an obvious example. Landowners (especially farmers) whose parcels include regulated wetlands have been very vocal in recent years about their supposed constitutional right to capture the full potential market value of the affected land. Using the Takings Clause, they have challenged wetlands regulations precisely on the ground that they deprive the owner of the ability to put the land to its highest economic use. Whether or not German courts might find another basis for striking down wetlands regulations, they clearly would reject the basic premise of the attack on American wetlands regulations.

The third respect in which American property lawyers can learn from the “Groundwater Cases” concerns the approach that the German Court took to determine that the property interest in question was what Carol Rose has called “inherently public property.” The Court focused on both the social necessity of the resource and the degree of social interdependence associated with the resource and the conditions of contemporary society. What the Court implicitly said was the following: Any use of flowing water by any single person or group of persons affects both the social and ecological communities in multiple ways, and it is unrealistic to suppose that any given owner will take into account all of these external effects. Indeed, precisely because of the intensity of the social and ecological interdependence that characterizes flowing water, no owner can possibly take into account all or even most of the external effects of a given use when choosing among possible uses. The consequences of any given use by an individual are both wildly unpredictable and profoundly felt by the entire community. Under such circumstances of intense interdependency, the boundary between *meum* and *tuum* is both meaningless and dangerously misleading. A resource whose use so profoundly affects the interdependent social and natural communities is inherently public and can only be regulated by public norms as expressions of the common will. Under this view, the German Federal Water Law at issue in the “Groundwater Cases” is not

redistributive. It does not take an asset from A and give it to B . Rather, the statute is premised on the understanding that groundwater, for constitutional purposes at least, is now and always has been both A 's and B 's. It is not the state's property, but property that is "inherently public."