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Let's Hear it for Due Process
—An Up to Date Primer on Regulatory Takings

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The United States Supreme Court has recently decided three more cases concerning regulatory takings. The first upheld a state statute requiring that, in the underground mining of coal, some coal be left in place to protect the surface from subsidence.[1] The statute was quite similar to the one struck down in the landmark case, *Pennsylvania Coal Co. v. Mahon*,[2] which provided the starting point for the law of regulatory takings. The second determined that a landowner is entitled to compensation for a temporary taking to the extent that his use of the property has been restricted by a regulation ultimately found to be invalid.[3] The third invalidated a regulation requiring that the owner of property along the seacoast grant the public an easement to walk along the shore as a condition to obtaining a building permit for the property.[4] Whether these cases significantly advance or clarify the law in this area seems open to debate, but one thing is certain. They will substantially increase the anxiety levels of local governing bodies, planners and the attorneys who advise them.

Consideration of the cases requires a somewhat extended review of history, although the scope of the review undertaken here is quite narrow. The discussion which follows is mostly concerned with decisions of the United States Supreme Court, but the subject of land use regulation obviously involves much more than issues of federal constitutional law. Some preliminary observations may be helpful in setting the stage.

Most land use regulations are enacted by local governing bodies pursuant to state enabling legislation or, perhaps, under the local government's home rule authority. Conditions vary widely from community to

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1. Keystone Bituminous Coal Ass'n v. DeBenedictis, 107 S. Ct. 1232 (1987).
2. 260 U.S. 393 (1922).
3. First English Evangelical Lutheran Church v. County of Los Angeles, 107 S. Ct. 2378 (1987).
4. Nollan v. California Coastal Comm'n, 107 S. Ct. 3141 (1987).

community, and it may be expected that regulations will differ in similar fashion. Clearly the problems are different in a county dependent upon mining as compared to one devoted to tourism. The problem for the state legislature, then, is to insure that the enabling legislation is sufficiently flexible for local governments to deal effectively with their individual problems. There may, of course, be areas in which statewide uniformity is desirable, and for these the legislature may either limit the authority of local governments or enact state regulations. Finally, it is worth noting that the federal government has also become involved in certain areas of land use regulation.[5]

Changing conditions, and also changing perceptions of the public interest, have both increased the need for land use regulations and changed the regulatory techniques employed. As in other areas, the automobile may be a principal culprit. Certainly it has made possible a greater dispersion of the population which has blurred the boundaries between urban and rural areas. The problems have been made more difficult by the proliferation of second homes in many environmentally sensitive areas. The end result is that more extensive regulations are needed for the supposed rural areas. But the problems and therefore the solutions are necessarily different from those of urban areas. Put briefly, traditional zoning does not work well in rural areas or, at least, it works differently.[6]

Changes of a different sort have also had a substantial impact. Traditional zoning is apparently based on the assumption that each city lot will be developed individually, as was largely the case prior to World War II. For many years, however, residential areas have been developed by entrepreneurs who construct a substantial number of residential units for sale in the retail market. This has created difficult problems for local governments in providing the necessary services, facilities and amenities. The usual response has been to put the cost on the developer who may pass it on to his customers, rather than financing the improvements by local improvement districts or, perhaps, by general obligation bonds. From a different perspective, however, large scale development makes possible more innovative and supposedly more desirable community planning. The result has been planned unit developments and what might be described as regulation by negotiation.[7]

5. *See* United States v. Riverside Bayview Homes, Inc., 106 S. Ct. 455 (1985) (involving the federal Clean Water Act); Hodel v. Virginia Surface Mining and Reclamation Assoc., 452 U.S. 264 (1981); Hodel v. Indiana, 452 U.S. 314 (1981) (involving the federal Surface Mining Control and Reclamation Act). In the *Virginia Surface Mining Ass'n* case the plaintiffs challenged the federal act as violating the tenth amendment because authority to regulate the use of land has historically been vested in state and local governments. The Court rejected the argument and sustained the statute under the Commerce Clause. Federal regulation seems most appropriate when economic competition among states precludes effective state and local regulations.

6. *See* Boundary Drive Assoc. v. Shrewsbury Township, 491 A.2d 86 (Pa. 1985); Wilson v. County of McHenry, 92 Ill. App. 3d 997, 416 N.E.2d 426 (1981); Rose, *Farmland Preservation Policy and Programs*, 24 NAT. RES. J. 591 (1984); Meyers, *Farmland Preservation in a Democratic Society: Looking to the Future*, 3 AGRIC. L.J. 605 (1982).

7. 2 R. ANDERSON, AMERICAN LAW OF ZONING, ch. 11 (3rd ed. 1986). As used here the term, "planned unit development" also includes "cluster developments" and "planned developments."

Traditional zoning regulations largely take the form of general rules uniformly applicable. If, for example, a landowner has a vacant lot in a residential zone and desires to construct a convenience store, his options are limited. He can seek a variance or, failing that, he can request that the lot be rezoned. Both forms of relief are severely restricted to prevent discriminatory treatment and to preserve the comprehensive zoning plan. By way of contrast, many of the more modern regulatory programs, of which the planned unit development ordinances are the prototype, set a number of fixed requirements but also include very broad and general standards by which the designated local authority is to judge each proposal for development.[8] The end result is likely to be a good deal of negotiation between the developer and the local authority in an effort to enhance the positive aspects of the proposal and minimize the negatives. Regulations of this type are not confined to planned unit developments.

For obvious reasons, a more or less substantial body of case law has developed in each state with respect to these matters. Most of the early zoning laws were very similar, and the case law of the various states was likewise similar and almost interchangeable.[9] This is changing as each state and each community attempts to manage its particular and different problems.

Looming over the entire area is a limited number of United States Supreme Court decisions setting forth the federal constitutional limits on land use regulation. When a lawyer with a specific problem turns to these decisions he will likely experience two difficulties. First, no decision will be closely on point so far as his particular problem is concerned. Second, there is a good deal of inconsistency in the decisions, more perhaps in the opinions than the results. A good deal of intellectual and philosophic energy has already been expended on the earlier cases by other writers, and these efforts will not be replicated here.[10] What follows is intended to be merely descriptive.

THE EARLY CASES

The story begins with *Pennsylvania Coal Co. v. Mahon*,[11] decided by the Supreme Court in 1922. There the Court invalidated a Pennsylvania statute which required that, in the underground mining of coal, a certain amount of coal be left in place to protect the surface from subsidence. Even

8. See the standards for judging a proposed planned unit development in Tri-State Generation and Transmission Co. v. City of Thornton, 647 P.2d 670 (Colo. 1982). These included, "the design and amenities incorporated in the development plan," "a desirable and stable environment," and "the creation of a creative innovation and efficient use of the property." *Id. See also* Michaels Dev. Inc. v. Benzinger Township Bd., 413 A.2d 743 (Pa. Commw. 1980).

9. State case law has been heavily influenced by the early zoning decisions of the United States Supreme Court, discussed later.

10. Sax, *Takings and the Police Power*, 74 YALE L.J. 36 (1964) [hereinafter Sax I]; Sax, *Takings, Private Property and Public Rights*, 81 YALE L.J. 149 (1971), [hereinafter Sax II]; Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165 (1967); Rose, *Mahon Reconstructed: Why the Takings Issue is Still a Muddle*, 57 S. CAL. L. REV. 561 (1984).

11. 260 U.S. 393 (1922).

conceding that the statute served a public interest, it went too far and therefore constituted a taking without compensation in violation of the fifth amendment. It went too far because it impacted too greatly upon the value of the mining company's property interest in the coal. Justice Holmes wrote for the majority. Justice Brandeis dissented, arguing that the case should be considered under the due process clause using traditional police power standards, and concluded that when so judged the statute was valid.[12] Various aspects of *Pennsylvania Coal Co.* will be considered in greater detail as the discussion progresses, but for now it is enough to emphasize that the case was decided under the fifth amendment provision which prohibits the taking of private property for public use without just compensation.

Four years later, in *Village of Euclid v. Ambler Realty Co.*,[13] the Court sustained the sort of zoning now known, fittingly enough, as Euclidian. The ordinance was challenged on due process grounds, and the Court followed standard police power analysis in considering the issue. Most attention was given to the question of whether zoning serves a public interest, and the Court concluded that it did because of the new problems then arising from increased urbanization, such as the concentration of population and increased traffic. Justice Sutherland, writing for the Court, speculated that if the question had come to the Court fifty years earlier the ordinance would have been struck down as "arbitrary and oppressive."[14]

Neither the fifth amendment nor the *Pennsylvania Coal Co.* case was mentioned in the *Village of Euclid* opinion. A possible explanation for the different treatment might be found in the limited issue before the Court in *Village of Euclid.* Only the general validity of zoning as an exercise of the police power was considered, the Court expressly reserving for later determination the validity of a particular zoning classification upon a specific property. There was evidence that the zoning reduced the value of plaintiff's property by 75%, but he had not sought a variance.[15]

The reserved question came to the Court in *Nectow v. City of Cambridge*[16] decided in 1928. The zoning ordinance, as applied, made the plaintiff's property useless, and the Court invalidated it under the due process clause as an improper exercise of the police power. The stated basis for the decision was that the ordinance, as applied to plaintiff's land, did not serve the public interest. In reaching its decision, the Court examined the zoning map and concluded that the zoning plan would be as well served by zoning the particular property industrial rather than residential.[17] The zoning ordinance, as a whole, remained in place.

Justice Sutherland in *Village of Euclid* and Justice Brandeis in his dissent in *Pennsylvania Coal Co.* both relied upon *Hadacheck v. Sebas-*

12. *Id.* at 422.
13. 272 U.S. 365 (1926).
14. *Id.* at 387.
15. *Id.* at 384-86.
16. 277 U.S. 183 (1928).
17. *Id.* at 188.

tian,[18] decided in 1915. In that case, the Court sustained an ordinance prohibiting the operation of brickyards in a specifically described area even though the effect, according to petitioner, was to reduce the value of his property from $800,000 to $60,000. Apart from the reduction in value, the case is noteworthy in three respects. First, the Court relied mostly upon the decision of the California Supreme Court which it affirmed. Second, the Court considered it more or less immaterial that the brickyard was in operation for a substantial period before the residential development of the area began and before the ordinance was adopted. With respect to the police power, the Court said, "A vested interest cannot be considered against it because of conditions once obtaining."[19] Third, the Court refused to consider whether a less harsh regulation would be sufficient for the purpose, stating that such questions were for the legislative body. Finally, it may be noted that petitioner based his case upon the equal protection clause as well as the due process clause.[20]

Contemporaneously with the *Village of Euclid* and *Nectow* cases, the Court decided a third zoning case which did not concern reductions in value as a major issue but is significant in other respects. In *Gorieb v. Fox*[21] the Court sustained, when challenged on due process and equal protection grounds, a rather free-floating regulation governing the distance buildings must be set back from the streets. The ordinance first provided a general rule based upon the distance of existing buildings from the street, but then reserved to the city council the authority to negotiate exceptions in particular cases. The principal complaint was vagueness because of a lack of standards. The Court concluded that on the facts petitioner had not been injured by this, and that, as a general proposition, the provision was appropriate because local governments need flexibility in dealing with newly emerging and unanticipated problems. The Court emphasized the deference that should be accorded to state and local governing bodies in dealing with local problems, and explicitly stated that deference should also be accorded to the decisions of state courts because of their "greater familiarity with local concerns."[22]

Discussion now returns to the problem presented by the entirely different standards applied in *Pennsylvania Coal Co.* and the early zoning cases. Certainly the difference cannot be explained in terms of the relative impact upon property values resulting from the different types of regulations. But an explanation might be found in the rather elusive doctrine of "average reciprocity of advantage." Apparently, the idea is that a class of persons burdened by a legislative act may also be benefited by it, and the latter will serve as a sort of substitute for the compensation mandated by the fifth amendment notwithstanding that some individuals may be

18. 239 U.S. 394 (1915).

19. *Id.* at 410.

20. Welch v. Swasey, 214 U.S. 91 (1909) is a better equal protection case. There the Court, with difficulty, sustained a statute setting lower height limits for buildings in residential areas than those permitted in commercial areas. *Id.* at 103.

21. 274 U.S. 603 (1927).

22. *Id.* at 609.

more burdened than benefited. Justice Holmes coined the phrase in *Pennsylvania Coal Co.*,[23] without further elaboration or citation of authority, to distinguish an earlier decision sustaining a Pennsylvania statute requiring that some coal be left in place for the safety of miners in adjoining mines. In his dissent, Justice Brandeis did cite a number of cases and concluded that the doctrine should not be applied with respect to the police power but only in cases where the legislation in question confers a benefit upon some property owners at the expense of others. If the doctrine were applicable, he found that it was satisfied because the coal company had "the advantage of living and doing business in a civilized community."[24] This, of course, would be applicable to any police power regulation, but zoning probably meets a more restrictive reading of the requirement.

Whatever the merits of the average reciprocity of advantage doctrine, it was ignored in another well known case decided at about the same time as the zoning cases. In *Miller v. Schoene*[25] the Court sustained a Virginia statute requiring the destruction of cedar trees which threatened nearby apple orchards with cedar rust, a disease fatal to apple trees. Again the question was whether this was a proper exercise of the police power when judged under the due process clause. The Court noted that the only question was which of two groups should bear an inevitable loss and concluded that the legislature could properly direct that it fall on the owners of the cedar trees because of the importance of the apple business to the economy of the state.[26] In other words, the statute was a proper exercise of the police power because it served the public interest as determined by the legislature. Clearly the cedar tree owners, as a class, received no reciprocal advantage.

Another possible explanation for the different analysis followed in *Pennsylvania Coal Co.*, when compared to the other cases, might be found in the historical development of a broader constitutional doctrine. Justice Holmes may have been more innovative than his colleagues, or at least ahead of the times.

In *Fallbrook Irrigation District v. Bradley*,[27] decided in 1896, the Court noted that the taking without compensation clause of the fifth amendment applies only to the federal government and therefore is not available in considering the constitutionality of a state statute. For purposes of the case before it, the Court was left, therefore, with only the due process clause, but the result it reached was much the same as that reached by state courts in similar cases decided under state constitutional provisions comparable to the fifth amendment taking provision.[28] The following year,

23. 260 U.S. at 415.
24. *Id.* at 422.
25. 276 U.S. 272 (1928).
26. *Id.* at 277-81. *See* Sax I, *supra* note 10, at 69.
27. 164 U.S. 112 (1896).
28. The state cases, like *Fallbrook*, concerned the validity of special assessments levied by a local improvement district. *See* People v. Mayor of Brooklyn, 4 N.Y. 419, 55 Am. Dec. 266 (1851); McGarvey v. Swan, 17 Wyo. 120, 96 P. 697 (1908); Willard v. Morton, 50 Wyo. 72, 59 P.2d 338 (1936).

in *Chicago B & Q R.R. v. City of Chicago,*[29] the Court did incorporate the taking without compensation prohibition into the fourteenth amendment but without reference to the fifth amendment. Instead the Court determined that, "It is founded in natural equity, and is laid down by jurists as a principle of universal law."[30]

Justice Holmes was not burdened by similar inhibitions when he wrote for the Court in *Noble State Bank v. Haskell,*[31] decided in 1911. The bank challenged on due process grounds a state statute requiring it to contribute to a depositors' guaranty fund. The verbal sleight-of-hand by which the due process and taking without compensation provisions of the constitution were brought together is worth quoting.

> [W]e must be cautious about pressing the broad words of the Fourteenth Amendment to a drily logical extreme. Many laws . . . could be shown, easily enough, to transgress a scholastic interpretation of one or another of the great guaranties in the Bill of Rights.
> . . . .
> The substance of the plaintiff's argument is that the assessment takes private property for private use with out compensation.[32]

Mission accomplished! The two provisions had been joined and the fifth amendment made applicable to the states by the fourteenth. Plaintiff's argument was rejected, however, because the case was one "in which the share of each party in the benefit of a scheme of mutual protection is sufficient compensation for the correlative burden that it is compelled to assume."[33] The statute was sustained as a proper exercise of the police power.

In the *Pennsylvania Coal Co.* case, Justice Holmes stated that the taking rule of the fifth amendment could be applied under the fourteenth amendment,[34] but did not cite the *Noble Bank* case for either the interrelation of the two or for the average reciprocity of advantage.[35] In any event, the use of the fourteenth amendment to make various provisions of the federal Bill of Rights applicable to the states is now commonplace, but when the early zoning cases were decided this was not so well settled and that might explain the Court's reliance upon substantive due process. On the other hand, the Court had no difficulty in reading the taking without compensation limitation into the fourteenth amendment in the *Chicago B & Q R.R.* case which involved a regular eminent domain proceeding rather than a so-called regulatory taking.

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29. 166 U.S. 226 (1897).
30. *Id.* at 236.
31. 219 U.S. 104 (1911).
32. *Id.* at 110 (It should be noted that the bank's principal argument was that its property was being taken for a private rather than a public use as mandated by the fifth amendment.).
33. *Id.* at 111.
34. 260 U.S. 393, 415 (1922).
35. For the incorporation of the taking without compensation limitation into the fourteenth amendment, he cited Hairston v. Danville & W. R. Co., 208 U.S. 598 (1908), which, ironically, relied upon *Falbrook Irrigation Dist.,* 164 U.S. 112 (1896) discussed in text at note 27.

Finally, in *Goldblatt v. Town of Hempstead*,[36] decided in 1962, the police power analysis and the taking without compensation analysis came together. There the Court sustained a regulation which, as applied, prohibited the further mining of gravel from an operating gravel pit. In other respects too, the facts were similar to those of the *Hadacheck* case. The Court rather summarily disposed of the taking without compensation argument based on *Pennsylvania Coal Co.* because there was not sufficient evidence in the record to determine the reduction in value resulting from the regulation. It did note the diminution in value upheld in the *Hadacheck* case and concluded, "we find no indication that the prohibitory effect of Ordinance No. 16 is sufficient to render it an unconstitutional taking if it is otherwise a valid police regulation."[37] This was immediately followed by the statement, "The question, therefore, narrows to whether the prohibition of further excavation below the water table is a valid exercise of the town's police power."[38] The Court was now on more comfortable ground, and the bulk of the opinion is devoted to that question.

At this point, it would appear that *Pennsylvania Coal Co.* might well have been viewed as an aberration that could properly be ignored, and that might have happened if the opinion had been written by a different justice.[39] But Justice Holmes painted with a broad brush and was not overly concerned with the legal niceties. As a result the opinion is very readable, and this may explain its pervasive influence in the more recent decisions. In any event, the later history took a different course.

PENN CENTRAL AND *AGINS*

In *Penn Central Transportation Co. v. New York City*,[40] decided in 1978, the Court sustained the city's landmark preservation ordinance as applied to Grand Central Terminal, even though it substantially limited, or prohibited, the construction of an office tower above the station. The tower would have significantly increased Penn Central's income from the property. Under the ordinance, any plan to alter the exterior of a building designated as an historic landmark had to be approved by the Landmarks Preservation Commission. After the Commission rejected a plan for a fifty story office tower, Penn Central chose not to submit a further plan for a less obtrusive structure and, instead, brought suit.

In his opinion, Justice Brennan substantially rewrote history. The only issue, as he viewed the case, was whether the application of the ordinance to Grand Central constituted an impermissible taking under the fifth

36. 369 U.S. 590 (1962).
37. *Id.* at 594.
38. *Id.*
39. There are of course, many state and lower federal court cases in which the taking analysis has been considered. Prominent examples are Just v. Marinette County, 56 Wis. 2d 7, 201 N.W.2d 761 (1972), and Turnpike Realty Co. v. Town of Dedham, 284 N.E.2d 891 (Mass. 1972) (involving wetland and flood plain zoning). *See also* Responsible Citizens v. City of Asheville, 302 S.E.2d 204 (N.C. 1983).
40. 438 U.S. 104 (1978).

amendment. He discussed most of the cases noted above, but the discussion more or less assumed that the issue involved was whether the particular regulation resulted in a taking without compensation. Apart from *Pennsylvania Coal Co.*, this possibility was addressed only in *Goldblatt v. Hempstead.* Justice Brennan's treatment of *Goldblatt* is especially interesting because he studiously avoided any mention of substantive due process and the police power. One sentence deserves quoting: "It is, of course, implicit in *Goldblatt* 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*; . . . ."[41] As verbal sleight-of-hand this rivals Justice Holmes' opinion in *Noble State Bank.*

Most of the opinion in *Penn Central* is devoted to the question of whether the designation of Grand Central Terminal as a historic site, with the resulting use restrictions, goes too far under the rule of *Pennsylvania Coal Co.* At the outset Justice Brennan distinguished so-called regulatory takings from the exercise of eminent domain to acquire property for city facilities or "entrepreneurial operations." He also distinguished the inverse condemnation cases such as *United States v. Causby,*[42] which have awarded compensation under the fifth amendment when the otherwise unrelated activities of a governmental entity inflict damage to a landowners property.[43] The latter are sometimes referred to as "physical invasions" to distinguish them from regulatory takings, and this is helpful, but then confusion is introduced once more by lumping both under the heading, "inverse condemnation." Those distinctions having been noted, Justice Brennan stated the rule for regulatory takings as follows: "a state statute that substantially furthers important public policies may so frustrate distinct investment-backed expectations as to amount to a 'taking'."[44]

Putting the two limitations together, a regulation that does not serve the public interest is an impermissible taking, but even a regulation that does so serve may be a taking if it significantly frustrates investment backed expectations. Two questions remain. Under what circumstances will a regulation constitute a taking if it goes too far? On this, the Court noted that in a number of the earlier cases, including *Hadacheck* and *Goldblatt,* the Court sustained regulations that prohibited the continuation of an existing use.

The second question concerns the meaning of "investment backed expectations." On the facts of the case, it apparently meant that Penn Central had acquired the property in its present form for its present use, and the cost did not include any additional amount for the possibility that

41. *Id.* at 127.

42. 328 U.S. 256 (1946) (The leading airport noise case.).

43. For an early case, see Pumpelly v. Green Bay Co., 80 U.S. (13 Wall.) 166 (1871). A dam, constructed pursuant to state law, caused flooding of plaintiff's land. The case was decided under the state constitution. *Id.* at 177, 181.

44. 438 U.S. at 127.

it might become economically desirable at some future time to build an office tower above it. Justice Rehnquist in his dissent took the position that Penn Central had a constitutionally protected right to develop the air space over Grand Central, never mind that it came as a financial windfall.

The New York Court of Appeals gave the latter question a good deal of attention in its opinion in the *Penn Central* case, beginning with the statement:

> Undisputed is the principle, rooted in the due process clause of the Constitution, that a government may not by regulation deprive a property owner of all reasonable return on his property. There are two issues nevertheless. The first is the extent to which government, when regulating private property, must assure a reasonable return on that ingredient of property value created not so much by the efforts of the property owner, but instead by the accumulated indirect social and direct governmental investment in the physical property, its functions, and its surroundings.[45]

It was the growth and development of the area around Grand Central Terminal, for which society at large and also government were mostly responsible, that made it economically desirable to construct the office tower. The New York court concluded that Penn Central had a constitutionally protected right to only "a reasonable return on the privately contributed ingredient of the property's value."[46]

This is probably what Justice Brennan had in mind when he coined the phrase, "investment backed expectations," and it works well enough in a situation like *Penn Central.* But further difficulties are presented by cases where the developer has recently purchased the property, and the long term appreciation in value has thereby been realized by his grantor before the developer comes forward with his plan. In any event, the rule as it emerges from Justice Brennan's opinion is somewhat different. A regulation restricting or prohibiting further development is permissible if the landowner can realize a reasonable return from the property in its present form. For this purpose the property as a whole must be considered. It is not appropriate to concentrate only on a specific part—in this case, the right to develop the air space above Grand Central.

The determination of this issue on the particular facts was more complex because the right to develop the air space over Grand Central, apparently provided by different regulations, could be transferred to other nearby property owned by Penn Central. The Court concluded that this would not constitute just compensation for purposes of the fifth amendment, but that it was relevant in determining if the regulation went too far.

Justice Rehnquist raised a further issue in his dissent. The problem lay in distinguishing the restrictions imposed upon the Grand Central

45. Penn Central Transp. Co. v. City of New York, 42 N.Y.2d 324, 366 N.E.2d 1271, 1272-73 (1977).

46. *Id.*, 366 N.E.2d at 1276.

property under the landmark preservation ordinance from the height limitations commonly found in zoning ordinances. For this, he resurrected the average reciprocity of advantage. In the case of zoning, "the burden is shared relatively evenly and it is reasonable to conclude that on the whole an individual who is harmed by one aspect of the zoning will be benefited by another."[47] By way of contrast, Penn Central was being required to bear the entire financial burden of securing a public benefit for which, in fairness, the public should pay. In actions directed against specific property, Justice Rehnquist would limit a government's regulatory authority to cases involving common law nuisances.

Justice Brennan had some difficulty with this. He noted that in a number of the earlier cases, *Hadacheck, Goldblatt* and *Miller v. Schoene,* the property owners were "uniquely burdened" and obviously received no offsetting benefit.[48] All of these however, could be brought into the nuisance category as they were by Justice Rehnquist. Apparently realizing this, Justice Brennan found in the program to preserve historic sites, although it was directed to widely scattered individual properties, a comprehensive plan somewhat similar to the comprehensive plan required for zoning.

The New York Court of Appeals did not have similar difficulties with this question. There were obvious reasons for singling out the Grand Central property for special treatment, and the case, therefore, did not fall into the category of "discriminatory zoning" or spot zoning. The vice in such cases is that a particular property is arbitrarily subjected to more restrictive or more liberal limitations than similar property in the same area which cannot be distinguished. In other words, the only question is whether the special treatment reasonably serves the public interest.

The next case, *Agins v. City of Tiburon,*[49] decided two years after *Penn Central,* will be considered in some detail on a different issue, but it added very little with respect to the proper standards for judging the validity of a land use regulation. In a short opinion, Justice Powell paraphrased *Penn Central* by stating, "The application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests . . . ."[50] This was followed by the observation that, "the question necessarily requires a weighing of private and public interests."[51] *Village of Euclid v. Ambler Realty Co.*[52] served as the primary authority for the latter proposition.

Agins is more interesting on its particular facts as they relate to the question of whether the regulation went too far. The land was included in a particularly restrictive zoning category, designed primarily to protect open space and scenic values. The ordinance set maximum and mini-

47. *Penn Central,* 438 U.S. at 147.
48. *Id.* at 133.
49. 447 U.S. 255 (1980).
50. *Id.* at 260.
51. *Id.* at 261.
52. 272 U.S. 365 (1926).

mum limitations on density and required that individual development plans be submitted for approval. Plaintiffs were entitled to construct at least one residence on their tract and might be allowed as many as five, but they did not seek a permit before challenging the regulation. Therefore, the Court concluded that they remained free to pursue their reasonable investment expectations and could not yet challenge the regulation as applied to their particular property.[53] Apparently the Court was somewhat concerned with the individualized treatment of specific tracts because it noted that, "There is no indication that the appellants' 5-acre tract is the only property affected by the ordinances. Appellants therefore will share with other owners the benefits and burdens of the city's exercise of its police power."[54] In other words, there is an average reciprocity of advantage.[55]

Penn Central and *Agins* obviously changed and refined the law in an abstract sense, but from a practical point of view the changes would not seem significant. The standards for judging police power regulations were moved from the due process clause of the fourteenth amendment to the fifth amendment taking provision but apparently remained unchanged otherwise. This conclusion is amply supported by the Court's continued reliance upon the earlier zoning cases.

The rule of *Pennsylvania Coal Co.*, that a regulation which goes too far constitutes an impermissible taking, was now firmly established as a separate limitation in addition to the traditional police power standards. Under the rule as further refined by *Penn Central*, the real question is whether the landowner can realize a reasonable return from the property once the regulation is in place, and this is to be determined on the basis of the landowner's entire interest in the property rather than the discrete lesser interest impacted by the regulation. State courts have frequently reached the same result under the due process clause. A zoning regulation will be invalid as applied to particular property if it renders the property useless.[56] At this point the regulation no longer serves the public interest. In other cases, the police power analysis calls for weighing the importance of the public interest against the regulation's impact upon the value of the property, as Justice Powell noted, and thus provides a more refined test.[57] *Pennsylvania Coal Co.* would thus appear, at worst, to be an unnecessary fifth wheel.

Penn Central and *Agins* illustrate a further aspect of regulatory taking litigation that has been decisive in other recent cases. Before it can

53. *Agins*, 447 U.S. at 262-63.

54. *Id.* at 262.

55. *Compare* American Sav. & Loan Ass'n v. County of Marin, 653 F.2d 364 (9th Cir. 1981) (the court noted that the particular zoning classification applied only to the tract in question).

56. Kozesnik v. Township of Montgomery, 24 N.J. 154, 131 A.2d 1 (1957); State *ex rel.* George v. Hull, 65 Wyo. 251, 199 P.2d 832 (1948). R. ANDERSON, *supra* note 7, at § 3.27. Nectow v. Village of Cambridge, 277 U.S. 183 (1928) is, of course, most often cited.

57. Davis v. City of Rockford, 60 Ill. App.2d 325, 208 N.E.2d 110 (1965). *See* Macfarlane, *Testing the Constitutional Validity of Land Use Regulations: Substantive Due Process as a Superior Alternative to Takings Analysis*, 57 WASH. L. REV. 715 (1982).

be determined if a regulation goes too far, the landowner must pursue the available administrative procedures to determine precisely what he can do with the property. In this respect the cases are similar to *Village of Euclid.* A regulation will be invalid on its face only if it fails to serve the public interest. As Justice White stated in *Riverside Bayview Homes,* "the mere assertion of regulatory jurisdiction by a governmental body, does not constitute a regulatory taking."[58]

Local governing bodies and administrators could, at this point, also take comfort from the box score. The challenged regulations were sustained in *Penn Central* and *Agins* and also in the earlier cases, discussed above, except for *Pennsylvania Coal Co.* and *Nectow v. City of Cambridge.* Further evidence that the Supreme Court did not pose a serious threat might be found in the Court's reluctance to become involved in the controversy over zoning regulations which operate to exclude low income persons from developing suburban areas. These cases were decided contemporaneously with *Penn Central* and *Agins.*[59]

On the other hand two new areas of uncertainty were created by *Penn Central.* The first involves the full meaning in various circumstances of the phrase, "investment backed expectations." The second concerns the extent to which different standards should be used in judging regulatory specifications tailor-made for a particular property. While regulations of this sort were sustained in both *Penn Central* and *Agins,* the distinction between such regulations and those more broadly applicable appeared to play a significant role in the Rehnquist dissent and caused at least passing difficulty for the Court in *Agins.*

KEYSTONE BITUMINOUS COAL ASS'N V. DE BENEDICTUS

In *Keystone Bituminous Coal Ass'n,*[60] the first of the 1987 cases, the Court upheld a 1966 Pennsylvania statute requiring that substantial amounts of coal be left in place when mining under public buildings, noncommercial buildings used by the public such as churches, and dwellings, streams and reservoirs. The problem for Justice Stevens, who wrote for the majority, was to reconcile the holding with *Pennsylvania Coal Co.* which had struck down a similar statute and provided the starting point for the taking without compensation limitation upon land use regulations. For this, Justice Stevens resorted to the balancing test, long a part of the police power standards under the due process clause and incorporated into the regulatory taking analysis by *Agins.* The 1966 statute served

58. United States v. Riverside Bayview Homes, 474 U.S. 121 (1985). *See also* Hodel v. Surface Min. & Reclam. Ass'n, 452 U.S. 264 (1981); Hodel v. Indiana, 452 U.S. 314 (1981). For a recent application of the rule, see Lake Nacimiento Ranch Co. v. County of San Luis Obispo, 830 F.2d 977 (9th Cir. 1987).

59. Warth v. Seldin, 422 U.S. 490 (1975); Village of Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252 (1977). See also *Riverside Bayview Homes,* 474 U.S. 121, which sustained federal regulations governing the filling of wetlands adopted under the Clean Water Act.

60. 107 S. Ct. 1232 (1987).

a broader and more important public interest than the earlier statute before the Court in *Pennsylvania Coal Co.* Judging solely from the opinions, this would appear to be correct.[61]

Justice Holmes was inclined to view the dispute in *Pennsylvania Coal Co.* as primarily between the owner of the surface and the coal company which owned the mineral estate. From this perspective, the surface owner was not an appealing litigant because his title traced to a conveyance from the coal company which expressly reserved the right to mine the coal without liability to the surface owner for any resulting subsidence. A somewhat broader public interest was recognized where, in other instances, coal might be mined "under streets and cities." The discussion which followed dealt solely with public streets and ended by putting the governmental entities owning the streets into the same category as other surface owners.

Obviously Justice Holmes did weigh the importance of the public interest against the regulation's impact upon the landowner's use of the property. All of the subsequent difficulties, including the tunnel vision analysis required in applying the "goes too far" limitation, may be traced to one or the other of two sentences in the Holmes opinion:

> The general rule at least is, that while property may be regulated to a certain extent, if the regulation goes too far it will be recognized as a taking.... 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.[62]

Clearly there is more to the opinion than that. Some writers have suggested that Justice Holmes employed the taking analysis because of a strong aversion to substantive due process expressed in an earlier dissent.[63]

The Pennsylvania legislature was aware of the problem when it enacted the 1966 statute before the Court in *Keystone.* The statute included a preamble setting forth the public purposes to be served. These included, among others, "the conservation of surface land areas which may be affected in the mining of bituminous coal, . . . to enhance the value of such lands for taxation, to aid in the preservation of surface water drainage and public water supplies and generally to improve the use and enjoyment of such lands . . . ."[64]

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61. *Id.* at 1242. In his dissent, Justice Rehnquist went to the state court opinion in *Pennsylvania Coal Co.* to find that the statute under consideration in that case was intended to serve a broader public interest than recognized by Justice Holmes. *Id.* at 1255-56 (Rehnquist, J., dissenting).

62. *Pennsylvania Coal Co.*, 260 U.S. at 415-16.

63. Williams, Smith, Siemon, Mandelker & Babcock, *The White River Junction Manifesto*, 9 VT. L. REV. 193, 209 (1984).

64. *Keystone*, 107 S. Ct. at 1242 (quoting from the Pennsylvania Bituminous Mine Subsidence and Land Conservation Act).

Therefore according to the Court, there was no real conflict or inconsistency in the decisions. The public interest to be served by the police power had simply changed and expanded over time. Which brings to mind Justice Sutherland's statement in *Village of Euclid:* "And in this there is no inconsistency, for while the meaning of the 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."[65]

Keystone is noteworthy in another respect. The preamble to the statute, quoted above, can be further edited to leave, as the public purposes to be served, "the conservation of surface land areas which may be affected in the mining of bituminous coal . . . and generally to improve the use and enjoyment of such lands." The question suggested is this: How far may the legislature go in prohibiting a landowner from despoiling his own land without reference to the effect of his actions upon his neighbors or even upon the public at large, when the public is viewed as an indeterminate number of outsiders with an immediate interest at stake? For example, in *Penn Central* the public did have an immediate and direct interest in viewing the historic building. In some cases the conflict is between present and future generations. This may be the new frontier in land use regulations.[66] The Pennsylvania legislature did, of course, hedge its bet by including among the purposes of the statute the protection of the tax base, surface water drainage and public water supplies.

Justice Stevens still had to deal with the separate question of whether the regulation went too far. Applying the test set forth in *Penn Central,* he concluded that it did not. The amount of coal required to be left in place was a very small fraction of the coal available for mining. Beyond that, there was no evidence that any mining operations had been made uneconomic by the statute. It may be worth noting that this treatment of the issue follows quite closely the dissent of Justice Brandeis in *Pennsylvania Coal Co.* In the course of an extended consideration of the question, he stated, "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. . . . The sum of the rights in the parts can not be greater than the rights in the whole."[67]

Justice Rehnquist dissented with an opinion which was largely a replay of his dissent in *Penn Central.* Again he took the position that a regulation which burdens a landowner or class of landowners with no offsetting potential benefit can be sustained only if the forbidden use is illegal or a common law nuisance.[68] This goes beyond his dissent in *Penn Central,* which involved regulatory limitations directed to a particular property.

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65. *Village of Euclid,* 272 U.S. at 387.

66. Cribbet, *Property in the Twenty-First Century,* 39 OHIO ST. L.J. 671 (1978). The federal Surface Mining and Control Act of 1977 provides a good example. *See* Hodel v. Surface Min. & Reclam. Ass'n, 452 U.S. 264 (1981); Hodel v. Indiana, 452 U.S. 314 (1981). *See generally* A. LEOPOLD, A SAND COUNTY ALMANAC, (1947); Sax II, *supra* note 10.

67. *Pennsylvania Coal Co.,* 260 U.S. at 419.

68. *Keystone,* 107 S. Ct. at 1256.

It also seems contrary to one of the basic assumptions underlying zoning. A regulation which only prohibits a change in use or restricts future uses is a proper exercise of the police power if it serves the public interest. The nuisance limitation is appropriate only when the regulation prohibits the continuation of an existing use.[69] At this point, the Rehnquist position seems to rely entirely upon the supposed requirement for an average reciprocity of advantage. The position of the majority on this requirement is also reminiscent of the Brandeis dissent which, as noted above, found a sufficient reciprocity of advantage from the fact that the coal company had "the advantage of living and doing business in a civilized community."[70] Justice Stevens stated it this way:

> Under our system of government, one of the state's primary ways of preserving the public weal is restricting the uses individuals can make of their property. While each of us is burdened somewhat by such restrictions, we, in turn, benefit greatly from the restrictions that are placed on others. . . . These restrictions are "properly treated as part of the burden of common citizenship." *Kimball Laundry Co. v. United States,* 338 U.S. 1, 5 (1949).[71]

On the question of whether the regulation went too far, Justice Rehnquist considered only the value of the coal required to be left in place without reference to its relative value when compared to the whole. For this he relied upon the measure of recovery in regular eminent domain proceedings and also inverse condemnation actions involving physical invasions such as the airport noise cases. Three other justices joined the dissent, and this was an increase of one over *Penn Central.*[72] Remarkably, Justice Stevens was one of the dissenters in *Penn Central* but then wrote for the majority in *Keystone.*

FIRST ENGLISH EVAN. LUTH. CHURCH V. LOS ANGELES COUNTY

In the second 1987 case, *First English Evangelical Lutheran Church,*[73] the Court held that a landowner could recover compensation for a temporary taking during the period that his use of the property was inhibited by a regulation ultimately determined to be invalid. Given the short history of the question, the result was not surprising. A broader historical perspective might suggest that it is an illegitimate offspring of the mismating of the police power and the fifth amendment.

The question of whether compensation may be recovered for a regulatory taking first gained prominence with the California Supreme Court's 1979 decision in *Agins v. City of Tiburon.*[74] The issue was decided by an extended dictum which began by characterizing the suit as one for inverse

69. Jones v. Los Angeles, 211 Cal. 304, 295 P. 14 (1930). R. ANDERSON, *supra* note 7, at § 6.06 (on non-conforming uses).
70. *Pennsylvania Coal Co.,* 260 U.S. at 422.
71. *Keystone,* 107 S. Ct. at 1245.
72. *See Penn Central,* 438 U.S. at 106.
73. 107 S. Ct. 2378 (1987).
74. 24 Cal. 3d 266, 598 P.2d 25, 157 Cal. Rptr. 372 (1979).

condemnation under the fifth amendment, and then struggled with the problem before concluding that the only relief available to the aggrieved landowner was a determination that the regulation was invalid and unenforceable. The court was mostly concerned with the unanticipated fiscal impact that a monetary recovery would have upon a local government. The prospect of such liability would make local governments overly timid in dealing with newly arising problems and new perceptions of the public interest. For this, the court relied on *Village of Euclid*. It did put forward a somewhat different analysis of the relationship of the police power to the fifth amendment. Taking some liberty with the court's statement, it comes to this: If the regulation is invalid as an exercise of the police power, it cannot be sustained as a taking for a public purpose because compensation is not paid. When the *Agins* case reached the United States Supreme Court, it affirmed the California court's determination that the regulation was valid, as discussed above, and therefore did not reach the compensation question.[75]

It may be noted at this point that the New York Court of Appeals in *Penn Central* disposed of the claim for compensation with a single sentence: "Of course, any so-called temporary 'taking' is more accurately described as a deprivation of property without due process of law."[76] This contrasts sharply with the difficulties experienced by the California court in dealing with the issue under the fifth amendment taking provision.

The next case to reach the United States Supreme Court, *San Diego Gas and Electric Co. v. City of San Diego*,[77] concerned land in a coastal drainage area which the city had designated as open space and sought to purchase. This failed, however, because the voters refused to authorize a bond issue. At this point, the company sued for compensation alleging that the city's action had made the property valueless. The California Court of Appeals considered only the compensation question and did not decide if there had, on the facts, been a taking. Therefore the Supreme Court dismissed the appeal because the state court had not rendered a final judgment. Justice Brennan dissented and, reaching the substantive issue, concluded that compensation should be awarded.

For Justice Brennan, the most difficult question involved the extent of the taking. The plaintiff contended that, once the regulation became effective, its property had been permanently taken, apparently on the assumption that the regulation would continue in force. However, Justice Brennan noted that the city might elect to repeal or amend the regulation, and in that case the taking would be only temporary. This is confusing. The more likely sequence would be for a court to invalidate the regu-

75. Agins v. City of Tiburon, 447 U.S. 255 (1980).

76. Penn Central Transp. Co. v. City of New York, 42 N.Y.2d 324, 366 N.E.2d 1271, 1274 (1977). *See also* Dade County v. National Bulk Carriers, 450 So. 2d 213 (Fla. 1984). In a case subsequent to *First English Evan. Luth. Church*, Atlanta Bd. of Zoning Adjustment v. Midtown North, 257 Ga. 496, 360 S.E.2d 569 (1987), the court restated its earlier rule, that zoning which is a proper exercise of the police power does not constitute a taking, declaring that it had not been changed.

77. 450 U.S. 621 (1981).

lation in the same proceedings in which the landowner sought compensation. At that point, the city could resort to eminent domain to keep the regulation in force. Justice Brennan should not be blamed for the confusion. In a 1976 decision, a California appellate court sustained an open space zoning ordinance as a proper exercise of the police power, and then stated that the landowner might be awarded compensation for a fifth amendment taking, relying on *Pennsylvania Coal Co.*[78]

Three other justices joined the dissent in *San Diego Gas and Electric,*[79] and Justice Rehnquist in his concurring opinion indicated that he would agree if the issue were properly before the Court. Thereafter a number of courts, both state and federal, considered the issue settled.[80]

The Supreme Court itself had greater difficulties. In two subsequent cases the Court was unable to reach the question of compensation because the landowner, once his original application for a permit was denied, chose to litigate rather than pursue the available administrative procedures that might allow him to go forward with a less desirable but still economically viable development.[81] In this respect the cases are somewhat reminiscent of *Agins, Penn Central* and *Village of Euclid,* in which the Court only sustained the regulations generally and not as ultimately applied.

Some of the Justices were apparently becoming impatient, and as noted above, the question was decided in *First English Evan. Luth. Church.* Justice Rehnquist's opinion was based largely on Justice Brennan's dissent in *San Diego Gas and Electric* and was relatively short. By then little remained unsaid.[82] He did clear up the confusion by recognizing that the temporary taking might end with a judicial decision invalidating the regulation. One statement deserves special mention: "We limit our holding to the facts presented, and of course do not deal with 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 are not before us."[83]

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78. Eldridge v. City of Palo Alto, 57 Cal. App. 3d 613, 129 Cal. Rptr. 575 (1976). *Compare* United States v. Riverside Bayview Homes, 474 U.S. 121 (1985) (involving compensation for taking by federal regulations). In Dade County v. National Bulk Carriers, 450 So. 2d 213 (Fla. 1984), the Florida court stated that zoning cannot be both reasonable and confiscatory.

79. *San Diego Gas,* 450 U.S. at 633, 636 (1981).

80. Rippley v. City of Lincoln, 330 N.W.2d 505 (N.D. 1983); Burrows v. City of Keene, 121 N.H. 590, 432 A.2d 15 (1981); Martino v. Santa Clara Valley Water Dist., 703 F.2d 1141 (9th Cir. 1983); Nemmers v. City of Dubuque, 764 F.2d 502 (8th Cir. 1985).

81. MacDonald, Sommer & Frates v. Yolo County, 477 U.S. 340, (1986) *reh'g denied,* 107 S. Ct. 22 (1986); Williamson County Planning Comm'n v. Hamilton Bank, 473 U.S. 172 (1985). In the latter case the landowner brought suit in federal court under 42 U.S.C. § 1983 (1982), and the Court held that he must first seek compensation under state inverse condemnation law. For an application of this requirement, see Corn v. City of Lauderdale Lakes, 816 F.2d 1514 (11th Cir. 1987).

82. Williams, Smith, Siemon, Mandelker & Babock, *The White River Junction Manifesto,* 9 VT. L. REV. 193 (1984); Scharf, *Inverse Condemnation: Its Availability in Challenging the Validity of a Zoning Ordinance,* 26 STAN. L. REV. 1439 (1974).

83. *First English Evan. Luth. Church,* 107 S. Ct. at 2389.

Justice Stevens dissented. He would allow the landowner to recover damages only in cases involving "improperly motivated, unfairly conducted or unnecessarily protracted governmental decision making."[84] In such cases recovery would be based upon the due process clause rather than the taking provision of the fifth amendment. On this, he drew a distinction between regulatory takings and inverse condemnation actions involving physical invasions.

As Justice Stevens noted, many questions remain unanswered. Is there a taking for which compensation is required when a variance or special exception is denied by the appropriate local authority, or must the denial also be affirmed by the courts? The question will necessarily be different in cases like *Agins* and *Penn Central* where the regulation contemplates a good deal of individual negotiation, and even more difficult when several governmental agencies are involved.[85] This whole area has considerable potential for confusion. The landowner must pursue the administrative procedures to the end before it can be determined if the regulation goes too far. The point at which the time consumed in this constitutes a temporary taking is apparently a separate question. Justice Stevens suggested a further problem. Even though the impact of a particular regulation upon the property's value might be so severe as to constitute a taking if the regulation remained in force, the landowner's loss may not rise to the level of a compensable taking when the regulation is only in effect for a limited period before being invalidated or repealed. This suggests another question. Once it is determined that there has been a taking, does it begin when the regulation becomes effective or only when a permit is first denied?

There would appear to be a further limitation. While it may be appropriate to award compensation when a regulation is judged a taking because it goes too far, the remedy should not be available when the impact of the regulation is determined to be a taking because it does not "substantially advance legitimate state interests." To award compensation in such cases would turn accepted eminent domain law on its head. In a regular condemnation proceeding, the first question is whether the taking is for a public use, or at least serves a public purpose.[86] If the answer is no, that ends the matter, and the question of just compensation is never reached. The landowner may be entitled to damages for the loss he has experienced because of the proceedings, but this is more akin to the alternative remedy proposed by Justice Stevens. This distinction was recognized by Justice Brennan in his dissent in *San Diego Gas and Electric.*

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84. *Id.* at 2399. See also Justice Stevens, concurring in Williamson County Planning Comm'n v. Hamilton Bank, 473 U.S. 172 (1985), in which he characterized temporary regulatory takings as "an inevitable cost of doing business in a highly regulated society." *Id.* at 204 (Stevens, J., concurring).

85. *See* for example, The Wyoming Industrial Development and Information Siting Act, WYO. STAT. §§ 35-12-101 to -119 (1977 & Supp. 1987).

86. Berman v. Parker, 348 U.S. 26 (1954); Hairston v. Danville & W. R. Co., 208 U.S. 598 (1908).

At best, the Court in *First English Evan. Luth. Church* did not show great sensitivity to the budgetary problems of local governments.[87] Will a liability of this sort be covered by a municipality's present insurance? If not, is such insurance available? In any event, local governments are currently experiencing difficulties in obtaining insurance at affordable premiums. In a different area, municipal liability for anti-trust violations, Congress came to the rescue by eliminating damage recoveries against local governments.[88] This sort of relief is not possible for regulatory taking cases because these are based upon the fourteenth and fifth amendments to the Constitution.

NOLLAN V. CALIFORNIA COASTAL COMM'N

Of the three recent cases, *Nollan v. California Coastal Commission*[89] is the most controversial and has the most serious implications. The Court struck down a regulation requiring the owner of a lot along the sea coast to grant the public an easement to walk along the shore as a condition to obtaining a permit to construct a house on the lot. The regulation had been adopted by the Commission in accordance with a state statute enacted to ensure continued public access to the sea.

No question was presented as to whether the regulation went too far, nor was there any question that the purpose to be served was a proper public purpose. Rather the question was whether the regulation met the second requirement for a valid exercise of the police power. Was it a reasonably appropriate means for accomplishing the purpose? Traditionally the courts have accorded a good deal of deference to the legislative judgment on this issue. The question of means is basically a legislative one, and the scope of judicial review is limited by the constitutional doctrine of separation of powers.[90]

The Court, however, began its consideration of the question by quoting the proposition, stated in *Agins* and derived from *Penn Central*, that a regulation is a taking in violation of the fifth amendment if it "does not substantially advance legitimate state interests."[91] Read literally, this leaves no room for deference to the legislative judgment. The reviewing court will make its own decision as to whether the regulation is appropriate based on the facts of the case. Borrowing from the equal protection cases, this might be characterized as "heightened scrutiny." However, Justice Scalia said that for purposes of this new standard neither substantive due process nor equal protection cases are relevant.[92]

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87. Compare Justice Rehnquist's majority opinion in National League of Cities v. Usery, 426 U.S. 833 (1976), with his dissent in Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985) (*Garcia* overruled *National League of Cities*).

88. Local Government Antitrust Act of 1984, 15 U.S.C. §§ 34-36 (Supp. IV 1986).

89. 107 S. Ct. 3141 (1987).

90. Hadacheck v. Sebastian, 239 U.S. 394 (1915); State v. W.S. Buck Merc. Co., 38 Wyo. 47, 264 P. 1023 (1928).

91. *Agins*, 447 U.S. at 260.

92. *California Coastal Comm'n*, 107 S. Ct. at 3147 n.3.

There is something ironic in this. The case which supposedly prompted Justice Holmes to divorce himself from substantive due process, *Lochner v. New York*,[93] struck down a New York statute setting a maximum work week of sixty hours for bakery employees. In his dissent, Justice Holmes criticized the judicial activism then prevailing as the Court struck down numerous state regulatory statutes while sustaining others that were difficult to distinguish. He suggested that the Court was simply applying its own economic views contrary to those of the elected legislative bodies. *California Coastal Commission* demonstrates that the fifth amendment taking provision is at least as good a vehicle for judicial activism as the due process clause.

For Justice Brennan, the chickens had come home to roost. In a long dissent he disclaimed responsibility for the new standard of review set out in *California Coastal Commission*. He now had no reluctance to speak of the police power and quoted at length from one of the early zoning cases, *Gorieb v. Fox*,[94] for the deference to be accorded state and local legislatures in their efforts to deal with newly arising land use problems. Unfortunately he did not refer to the later statements in the *Gorieb* opinion concerning the deference to be accorded state court decisions.

Justice Scalia was well advised to distinguish the equal protection cases. It would be difficult to characterize the owners of residential property along the coast as victims of an invidious or suspect classification. In *City of Cleburne, Tex. v. Cleburne Living Center*,[95] the Court declined to apply heightened scrutiny on behalf of the mentally retarded. For this, it relied on the large body of federal and state statutes designed to protect and advance the rights of the mentally retarded. In some cases it is appropriate to rely, within limits, upon the legislative branch to protect constitutional rights.[96] Certainly landowners and developers can be expected to present their views fully and forcefully to the relevant legislative body.

The Court did provide some justification for the new standard of review. The governmental entity may be misusing its regulatory power to obtain an unrelated benefit for which it should pay. Clearly the regulation should be struck down if that is in fact the case, but usually the question is a difficult one. The airport zoning cases provide a good example. Airport zoning imposes severe height limitations for buildings and foliage upon private property situated off the ends of runways. Some courts have viewed this as the taking of an easement or servitude for use in operating the airport and, accordingly, have invalidated it.[97] Other courts, focusing

93. 198 U.S. 45 (1905).
94. 274 U.S. 603 (1928).
95. 105 S. Ct. 3249 (1985).
96. *See also* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985).
97. McShane v. City of Faribault, 292 N.W.2d 253 (Minn. 1980); Roark v. City of Caldwell, 87 Idaho 557, 394 P.2d 641 (1964). *See* Sax I, *supra* note 10 (relied on by the Minnesota court in *McShane*).

on the safety of passengers and crews, have sustained airport zoning as a proper exercise of the police power.[98]

Incidentally, this may have been the true rationale for the decision in *Pennsylvania Coal Co.* With respect to streets, Justice Holmes noted that the governmental entities had purchased the surface rights, and stated that there was no reason why the right to support should be obtained, without payment, at the expense of the owners of the mineral estate.

Determining whether the regulation is appropriate may depend upon how broadly or narrowly the problem is viewed. The California court recognized that development of the Nollan's lot, by itself, would not seriously affect the public's access to the beach.[99] But it did contribute to the problem arising from the extensive development along the coast in that area. Likewise, the easement across the Nollan's lot, by itself, would not solve the problem, but it made sense as part of the overall plan to mitigate the adverse consequences of the ongoing development. By way of contrast, Justice Scalia concentrated largely upon the undesirable consequences from construction of the Nollan's house, and the efficacy of the easement across their lot as a means for mitigating them.

For this narrow or restricted analysis, Justice Scalia relied upon state court decisions dealing mostly with local ordinances which require subdividers to dedicate land for public parks. There is an obvious similarity. One line of cases, apparently beginning with an Illinois case, *Pioneer Trust and Savings Bank v. Mount Prospect,*[100] holds that the requirement is proper only if the particular sub-division, by itself, creates the need for an additional park and, further, that the resulting park must be tailored to that particular need. The other position, for which *Associated Home Builders v. Walnut Creek,*[101] a California case, is the principal authority, takes a broader view. It is only necessary that the need for additional park land results from the overall growth of the community to which the subdivider contributes.

The box score for the state cases is probably not as one-sided as Justice Scalia suggested by the somewhat cryptic statement, "Our conclusion on this point is consistent with the approach taken by every other court that has considered the question, with the exception of the California state courts."[102] He failed to cite *Coulter v. City of Rawlins*[103] in which the Wyoming court followed *Walnut Creek* and went a step further in upholding a provision requiring the payment of *in lieu* fees when the dedication of park land would not be appropriate under the particular circumstances.

98. Cheyenne Airport Bd. v. Rogers, 707 P.2d 717 (Wyo. 1985), *appeal dismissed,* 106 S. Ct. 1961 (1986); Kimberlin v. City of Topeka, 238 Kan. 299, 710 P.2d 682 (1985).

99. Nollan v. California Coastal Comm'n, 177 Cal. App. 3d 725, 223 Cal. Rptr. 28 (1986).

100. 22 Ill. 2d 375, 176 N.E.2d 799 (1961).

101. 4 Cal. 3d 633, 484 P.2d 606, 94 Cal. Rptr. 630 (1971). In Nollan v. California Coastal Comm'n, 177 Cal. App. 3d 725, 223 Cal. Rptr. 28 (1986), the California Appellate Court relied upon *Walnut Creek.*

102. *California Coastal Comm'n,* 107 S. Ct. at 3149.

103. 662 P.2d 888 (Wyo. 1983).

The only limitation was that the money be used either for new parks or to improve existing ones. In the Utah case cited by Justice Scalia, the court stated the rule somewhat differently; "the dedication should have some reasonable relationship to the need created by the subdivision."[104] For this, it relied upon *Walnut Creek* and a Missouri case, not cited by Justice Scalia, *Home Builders of Greater Kansas City v. City of Kansas City.*[105] There the court expressly rejected the rule of *Pioneer Trust* as being too restrictive. Relying upon both *Walnut Creek* and *Village of Euclid*, the Missouri court stated: "The fact that a subdivision merely threatens to 'contribute' to a community need for open space should not exempt it from bearing a fair share of the burden of meeting the need."[106]

Obviously the decision in *California Coastal Commission* casts doubts upon *Coulter* and similar decisions. It also raises questions about various types of regulatory programs being used to mitigate the undesirable consequences of a wide variety of developments. At best, local governments, planners and attorneys will have to devote considerable effort to reviewing and revising their regulations. *First English Evan. Luth. Church* makes the review more urgent. The California legislature and Coastal Commission will have to go back to the drawing board, and the task will not be easy.[107]

In considering the impact of *California Coastal Commission*, one should not overlook *Keystone*. From one perspective, the two cases deal with entirely different types of regulations. The statute in *Keystone* merely limited the landowner's future use of his property, while the regulation in *California Coastal Commission* exacted a price for a permit to develop. Viewed differently, however, the Pennsylvania statute took the coal that it required to be left in place to protect the public interest in surface water drainage and public water supplies, just as the Coastal Commission regulation took the easement to protect the public's right of access to the sea. The park dedication cases have largely been decided by state courts under the police power standards, and *California Coastal Commission* is at least consistent with that.

Four Justices dissented in *California Coastal Commission*, and it is worth noting that the four dissenters in *Keystone* joined the majority in *California Coastal Commission.*[108]

There are now, apparently, three distinct types of regulatory takings: first, those that go too far; second, those that do not substantially advance

104. Call v. West Jordan, 614 P.2d 1257, 1258 (Utah 1980).

105. 555 S.W.2d 832 (Mo. 1977). Justice Scalia cited an earlier Missouri case, Noland v. St. Louis County, 478 S.W.2d 363 (Mo. 1972), which the Missouri court relied on in *Home Builders Ass'n*, 555 S.W.2d at 834.

106. *Home Builders Ass'n*, 555 S.W.2d at 835.

107. See Justice Brennan's dissent on this and Justice Scalia's response. See also Justice Rehnquist's dissent in Keystone Bituminous Coal Ass'n v. DeBendicitis, 107 S.Ct. 1232 (1987), where he said, in considering whether the statute met the nuisance limitation he advocated, "the legitimacy of this purpose is a question of federal, rather than state law, subject to independent scrutiny by this Court." *Keystone*, 107 S.Ct. at 1256 (Rehnquist, J., dissenting).

108. *California Coastal Comm'n*, 107 S. Ct. at 3142.

the public interest; and finally those involving the misuse of the police power to obtain an unrelated benefit. Damages for a temporary taking are available for cases in the first category, but probably not for cases in the second. Cases of the third type may present further difficulties. If a subdivider complies with the regulation, dedicates the park land and receives approval of his plat, he might well be estopped from then seeking compensation.

WHAT ABOUT TOMORROW

Whatever else, the historical review now completed demonstrates the lasting potency of various words and phrases. These include "taking," "goes too far," "the average reciprocity of advantage," "investment backed expectations," "inverse condemnation," "harm," "nuisance," "benefit," "burden" and now "heightened scrutiny." Prior to *California Coastal Commission* and the Rehnquist dissents, the list might also have included "judicial restraint," "deference to the legislative judgment," and even "state sovereignty," meaning, of course, deference to the decisions of state legislatures, local governing bodies, and state courts on questions of primarily local concern. Ample authority for each of these can be found in the earlier cases and also in more recent decisions by other federal courts.[109] The list should also be expanded to include something to the effect that the public interest changes over time. Unfortunately neither Justice McKenna in *Hadacheck* nor Justice Sutherland in *Village of Euclid* managed to coin a memorable phrase.

Words and phrases aside, the cases as a group do not seem to provide any very useful rules or principles. As suggested at the beginning, there is a fundamental inconsistency or conflict in the opinions. Clearly, the early zoning cases cannot be reconciled with *Pennsylvania Coal Co.* Nor can *Penn Central, Agins* and *Keystone* be reconciled with *California Coastal Commission.* Some of the opinions are primarily concerned with the proper role of government in the land use area. This involves the limits on the police power historically based on the due process clause. Other opinions are most concerned with the right of the landowner to use his property as he sees fit. For this, the fifth amendment taking provision is arguably relevant, although by no means necessary as the zoning cases demonstrate. In any event, it seems unlikely that the draftsman had regulatory takings in mind when the amendment was proposed by Congress in 1789.

Expressly and by obvious implication, the taking provision states two limitations. The government may only take private property for a public

109. In Meredith v. Talbot County, Md., 828 F.2d 228 (4th Cir. 1987), decided shortly before *California Coastal Comm'n*, the court sustained the dismissal by the federal district court of a taking claim based on the county's refusal to approve a subdivision plat. The court relied upon the abstention doctrine under which federal courts are to abstain from deciding cases involving complex state regulatory programs which provide for appropriate administrative determinations and adequate judicial review or, alternatively, raise difficult and unsettled questions of state law. The reason for abstention is to "avoid needless friction in federal-state relations over the administration of purely state affairs." *Id.* at 232 (quoting Fralin and Waldon, Inc. v. City of Martinsville, 493 F.2d 481 (4th Cir. 1974)). *See also* Hope Baptist Church v. City of Bellefontaine Neighbors, 655 F. Supp. 1216 (E.D. Mo. 1987).

use or purpose. Clearly it may not take property from one person for the benefit of another. Second, when property is taken for use by the government, just compensation must be paid. These were the issues involved in the early cases which made the taking without compensation restriction applicable to the states under the fourteenth amendment.[110] In the much cited 1887 decision, *Mugler v. State of Kansas,*[111] the Court stated quite positively that the eminent domain limitations are not relevant in cases involving the police power.

Clearly it is too late in the day to simply eliminate the concept of regulatory takings, but until the recent decisions, one might reasonably have concluded that the end result in a given case would be about the same whether it was decided under the fifth amendment taking provision or the due process clause of the fourteenth amendment. The Supreme Court decisions, at that point, were more significant in framing the argument than determining the outcome. This, of course, has changed with the new damage remedy provided by *First English Evan. Luth. Church,* however it may develop. Among the various words and phrases, "inverse condemnation" has proven the most potent because it blurs the distinction between regulatory takings and cases involving physical invasions. The two are basically different as noted by both Justice Brennan in *Penn Central*[112] and Justice Stevens in his dissent in *First English Evan. Luth. Church.*

The long term consequences of *California Coastal Commission* are more difficult to assess. The new standard of review, by itself, is probably of no great significance unless it results in greater activism by federal courts.[113] The somewhat enigmatic reference to the state court decisions is of more immediate concern. The most disturbing aspect of the opinion is the Court's apparent inability to understand and appreciate the difficulties facing state and local governments as they attempt to deal with new and politically sensitive problems in a period of limited budgets. It is both too easy and unrealistic to say, as Justice Rehnquist suggested in his dissent in *Penn Central,* that the payment of compensation is always an available option. In the long run, the Rehnquist dissents might have the greatest impact because they advance a much more draconian application of the taking without compensation provision.

There is a further difficulty. Some of the propositions stated in the opinions appear to conflict with more or less well developed state law on

110. Chicago B. & Q. R.R. v. City of Chicago, 166 U.S. 226 (1897); Hairston v. Danville & W. R. Co., 208 U.S. 598 (1908).

111. 123 U.S. 623 (1887).

112. *Penn Central,* 438 U.S. at 124. *See* discussion in text at notes 42 and 43.

113. See Justice Stevens' concurring opinion in *Cleburne Living Center,* 105 S. Ct. at 3260. In Nectow v. City of Cambridge, 277 U.S. 183 (1983), the Court apparently examined the zoning map in determining that the zoning of particular property did not rationally serve the purpose of the zoning plan. See however, Turner v. City of Atlanta, 257 Ga. 306, 357 S.E.2d 802 (1987) in which a dissenting judge, relying upon *California Coastal Comm'n,* would have struck down the rezoning of plaintiff's property because the city failed to prove that the regulation "substantially advanced the legitimate state interest." *Turner,* 357 S.E.2d at 804.

zoning and land use regulation based largely on the early zoning cases. A hypothetical based upon the Teton County Comprehensive Plan and Implementation Program (Plan),[114] should provide a fitting conclusion for this discussion.

Under the Plan a development permit must be obtained from the county commissioners for any development or change of use in the unincorporated areas of the county. In considering whether to grant the permit, the commissioners are required to consider the potential effects of the development in a number of areas including air and water quality, utilities and other public facilities, fire safety, traffic, character of the immediate area, scenic resources and, finally, wildlife habitat, wildlife migration routes and fisheries.[115]

Now enters the developer who has paid a very sizable amount for a tract along a ridge overlooking the Snake River with the Teton Mountains in the background. His plan is to construct a substantial number of one and two bedroom condos along the ridge and sell time shares. This should work because some people like to ski, some like to hunt, others like to fish, and there are some who simply enjoy the fresh air and scenery. Obviously the qualities that make the development financially viable are the same as those which the Plan is designed to protect.

The developer, following the procedure mandated by the Plan, first presents his development proposal to the county planner who is to evaluate it and forward it with his recommendation to the Planning Commission, an appointed body that serves in an advisory role to The Board of County Commissioners which makes the final decision. The planner immediately sees a problem. The tract is in an area that the state Game and Fish Department has identified as a critical elk migration route.

At this point the planner is not much concerned with the question of whether the permit might legally be denied. He knows that solution would not be acceptable to the Board of Commissioners which is, after all, an elected body. So negotiations begin. After consultation with the Game and Fish Department, the planner offers to recommend a permit to develop the south half on condition that developer grant the county an open space easement precluding any development at all on the north half. The developer feels the price is too steep, the planner refuses to go further and the case is sent up to the Planning Commission which agrees

114. The Teton County Comprehensive Plan and Implementation Program, 1977, Fourth Printing 1985 [hereinafter "The Plan"] was adopted by the county commissioners pursuant to the county Planning and Zoning statute, WYO. STAT. §§ 18-5-101 to -207 (1977 & Supp. 1987) and the county Real Estate Subdivisions statute, WYO. STAT. §§ 18-5-301 to -315 (1977 & Supp. 1987). It was undoubtedly influenced by the work done in preparing a land use plan mandated by the State Land Use Planning Act, WYO. STAT. § 9-8-301 (1977 & Supp. 1987). The end result is a long and complex set of regulations with a good deal of overlap and some apparent inconsistencies. I am indebted to Brad Mead, a former student, for a detailed analysis of the Plan prepared for a seminar on county land use regulations. Another student, Howard Kushner, reviewed the Plan from a different perspective and entitled his paper, "Is the Grand Teton a Non-Conforming Use?"

115. The Plan, *supra* note 114, at ch. VI, sec. 8. The section, in fact, provides for seventeen "required findings" including those paraphrased in the text.

with the planner. When it goes to the Board of Commissioners they also agree. Therefore, no permit unless the developer accepts the condition proposed by the planner.[116] It should be added that, as required by the Plan, public hearings were held by both the Commission and the Board.[117] A substantial number of vocal citizens appeared and expressed a welter of conflicting opinions.

The developer may now appeal the decision to the district court, and, in view of *First English Evan. Luth. Church*, he will undoubtedly add a new count seeking compensation for a temporary taking.[118] What effect this will have on further settlement negotiations is speculative.

Of the many possible alternative scenarios, one deserves mention. When the case reaches the Board of Commissioners, they feel some sympathy for the developer because of his large investment, although they basically agree with the planner. After checking the county's bank balance and the budgeted expenses for the rest of the year, they conclude that the county can afford to pay developer a reasonable amount for the open space easement. So the case goes back to the planner for further negotiations, but again no agreement is reached. The planner, becoming desperate, asks the county attorney if the county can condemn the easement. He is willing to put the county's fate in the hands of a local jury because the developer has come recently from California. However the county attorney, after searching statutes, advises that eminent domain is not available for this purpose. Once again, if both sides remain firm, the developer will appeal the Commissioners' decision to the district court.

Once it reaches the courts, the case will undoubtedly present a number of state law questions. The Wyoming case law has not developed very far as yet, but the county can find a good deal of rather general support from a number of recent cases.[119]

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116. The hypothetical is quite similar on its facts to Meredith v. Talbot County, Md., 828 F.2d 228 (4th Cir. 1987). In that case the county had approved a subdivision plan only upon the condition that five lots totaling forty acres remain vacant and undeveloped. The lots had been identified as critical habitat for endangered species under the Chesapeake Bay Critical Area Protection Program enacted by the Maryland legislature. The court did not reach the merits of the case. *Id.* at 232.

117. The Plan, *supra* note 114, at ch. VI, §§ 5-7.

118. As an alternative, suit might be brought in federal court under 42 U.S.C. § 1983 (1982). Attorney fees might be recovered under 42 U.S.C. § 1988 (1982). Such suit, however, would present a further issue as to the adequacy of relief under state law. *See* Williamson County Planning Comm'n v. Hamilton Bank, 473 U.S. 172 (1985). *See also* Corn v. City of Lauderdale Lakes, 816 F.2d 1514 (11th Cir. 1987).

119. Cheyenne Airport Bd. v. Rogers, 707 P.2d 717 (Wyo. 1987); Coulter v. City of Rawlins, 662 P.2d 888 (Wyo. 1983); Schoeller v. Board of County Comm'rs, 568 P.2d 869 (Wyo. 1977); Snake River Ventures v. Board of County Comm'rs, 616 P.2d 744 (Wyo. 1980); Board of County Comm'rs v. Teton County Youth Services, Inc., 652 P.2d 400 (Wyo. 1982). In the last cited case, Justice Thomas began his opinion with the statement: "The troublesome problem to be resolved in this case is that of balancing a meaningful review by the judicial branch of government with the prerogative of a board of county commissioners to manage its own affairs." *Teton County Youth*, 652 P.2d at 401.

Concern here is primarily with federal constitutional issues, and the hypo suggests a number. First, does the regulation as applied satisfy the requirement for an average reciprocity of advantage? Mostly it depends upon how broadly the issue is viewed. Looking only at the particular development, it can be argued that the developer is being required to bear the entire cost of a public benefit for which the public should pay. On the other hand, the success of the developer's plan may depend upon other developers being similarly restricted, and reciprocity of advantage could be found from that. But he has no assurance that this will be the result, and it may turn out that he was unfairly discriminated against. Traditional zoning statutes seek to minimize problems of this sort by requiring that all properties within a given district be treated uniformly.[120] This would seem to be the particular weakness of regulatory programs that call for individualized decisions on specific property in accordance with broad standards that leave room for a good deal of discretion. Is this in accordance with a comprehensive plan? The requirement for a comprehensive plan is, of course, the cornerstone for traditional zoning and, as Justice Rehnquist noted in *Penn Central*, provides the necessary average reciprocity of advantage.[121] The county can find some support from *Agins* and also *Gorieb v. Fox*, the 1927 case sustaining a zoning regulation providing for the individual negotiation of set back lines. The procedure is similar to the granting of special exceptions or conditional uses under a typical zoning ordinance which also involves the application of very general standards to a particular property and provides a good deal of discretion.[122]

Should the county's proposal be considered a misuse of its regulatory authority to obtain a property interest for which it should pay?[123] This is the most troublesome. By itself, this development might not seriously impede the elk as they move from their summer range to the winter range. There will still be plenty of open space left. It is only when the cumulative impact of all development is taken into account that the problem becomes acute. The similarity to the park dedication cases is obvious. So too are the disturbing implications of the opinion in *California Coastal Commission*. Of what significance is it that the county may, at one point,

120. In SCIT, Inc. v. Planning Bd., 19 Mass. App. 101, 472 N.E.2d 269 (1984) the court struck down a provision requiring a special permit for any development within a zoning district as violating the uniformity requirement.

121. See Wilson v. County of McHenry, 92 Ill. App. 3d 997, 416 N.E.2d 426 (1981) in which the court relied upon the comprehensive plan in sustaining the agricultural classification of land that the owner desired to subdivide.

122. *See* C & M Sand and Gravel v. Board of County Comm'rs, 673 P.2d 1013 (Colo. App. 1983); Berk v. Wilkinsburg Zon. Hear. Bd., 48 Pa. Commn. 496, 410 A.2d 904 (1980).

123. Flood plain and wetland zoning which seeks to preserve property in its natural state, thereby benefiting recreational users and wildlife, has met with mixed receptions. See Morris County Land Improvement Co. v. Township of Parsippany-Troy Hills, 40 N.J. 539, 193 A.2d 232 (1963), which struck down such zoning as an uncompensated taking for a public purpose, and Just v. Marinette County, 56 Wis. 2d 7, 201 N.W.2d 761 (1972), and Turnpike Realty Co. v. Town of Dedham, 284 N.E.2d 891 (Mass. 1972), both sustaining such regulations because they protect public safety and prevent flooding and pollution. *See also* United States v. Riverside Bayview Homes, 474 U.S. 121 (1985).

have attempted to purchase the easement?[124] On this, the county may again take some comfort from *Agins,* in which the city had considered condemnation before turning to regulation.

Finally, does the regulation as applied go too far? Like the previous questions, this depends mostly upon how narrowly or broadly one views the issue. From one perspective the answer is simple. The land has historically been used to graze cattle and that use may continue. There is no reason to hold the county responsible because the tract purchased by the developer is too small and the price paid too high for grazing to be economically viable.

The Rehnquist dissents in *Penn Central* and *Keystone,* for which there is apparently increased support, might require an entirely different analysis. Considering only the north half of the tract, the question would be the impact of the regulation upon its value as determined by reference to the developer's plans for it and the price he paid.[125] On that basis the developer seems a sure winner. That result, however, would be contrary to much accepted zoning law, at least with respect to end results. The development possibilities could be as severely limited by a density regulation such as the one approved by the Wyoming court in *Snake River Ventures v. Board of County Commissioners,*[126] which limited the number of residential units that could be constructed in a given area. Similarly, the number of units might be limited by establishing very large minimum lot sizes, the sort of zoning apparently involved in *Agins.*[127]

Finally, the Rehnquist analysis, if applied to these facts, would appear to run contrary to one of the major purposes that the typical Planned Unit Development ordinance is intended to serve—arranging the location of buildings on a given tract to preserve as much open space as possible.[128] If need be, the park dedication cases can be distinguished. In those the subdivider is required to convey the property to the public. In a planned unit development, or PUD, the developer continues to own the open space

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124. The New York Court of Appeals, in its opinion in *Penn Central,* 366 N.E.2d at 1278, suggested that regulation and eminent domain were alternatives for the preservation of historic landmarks, and that the choice might depend upon the financial condition of the governmental entity. *Id. Compare* Burrows v. City of Keene, 121 N.H. 590, 432 A.2d 15 (1981). *See* Netherton, *Implementation of Land Use Policy: Police Power v. Eminent Domain,* III LAND & WATER L. REV. 33 (1968).

125. *Compare* American Sav. & Loan Ass'n v. County of Marin, 653 F.2d 364 (9th Cir. 1981). The plaintiff owned two contiguous tracts which were zoned differently with respect to density restrictions. The court was not able to decide if they were to be treated as two tracts or one, under *Penn Central,* in judging the diminution in value, and remanded so plaintiff could present a development plan.

126. 616 P.2d 744 (Wyo. 1980).

127. R. ANDERSON, *supra* note 7, at §§ 7.06 and 7.33, *but see* § 8.14 on the use of large minimum lot sizes to exclude low and moderate income residents. The latter would not seem relevant to Teton County. On density regulations that may go too far see American Sav. & Loan Ass'n v. County of Marin, 653 F.2d 364 (9th Cir. 1981).

128. *See* Friends of Shawangunks, Inc v. Knowlton, 64 N.Y.2d 387, 476 N.E.2d 988 (1985); Orinda Homeowners Comm. v. Board of Supervisors, 11 Cal. App. 3d 774, 90 Cal. Rptr. 88 (1970).

and may exclude the public.[129] He is simply limited in his use. A golf course might be permissible. In our case the developer can lease the north half back to the rancher for grazing.

As it happens, the Teton County Plan does make special provisions for planned unit developments, and, our developer's proposal could properly be considered a planned unit development.[130] The provisions for PUDs relate primarily to the general density limitations which, for purposes of the hypothetical, may be assumed to limit development in the particular district to one dwelling unit for six acres.[131] As a planned unit development, the same number of units can be constructed on a part of the tract as permitted for the entire tract under the general density regulation, if the remainder is dedicated for open space. In addition, if fifty percent of the tract is dedicated for open space, then the developer will be entitled to a "density bonus" and may construct even more units. For our particular developer, however, this is not very useful because the additional units would have to be constructed on the backside of the ridge, away from the river and mountains, and would not bring as high a price as those along the ridge. The density bonus would seem similar to the transferable development rights in *Penn Central*.[132] If the end result is deemed a taking of the north half, the density bonus would probably not constitute just compensation. But it is relevant to the question of whether the regulation goes too far.

The related question suggested by the phrase "investment backed expectations," deserves further consideration. The ranch family that homesteaded the property eventually sold it to the developer, thereby realizing the long term appreciation in value that resulted from changes in demand that could not have been foreseen when the property was acquired. Simple equity suggests that it might make a difference whether the developer purchased the land before or after the adoption of the Plan. But traditional zoning law gives a different result. In the *Snake River Ventures*[133] case the Wyoming Supreme Court held that a developer was bound by a change in density standards adopted while his permit application was pending. The court relied upon cases from a number of jurisdictions holding that a development will not qualify as a non-conforming use until construction actually begins.[134] Merely purchasing the land for

129. *See* Kamhi v. Planning Bd., 59 N.Y.2d 385, 452 N.E.2d 1193 (1983).

130. The Plan, *supra* note 114, at ch. V.

131. *Id.*, ch. II § 1. The Plan does divide the county into zoning districts with use restrictions, density limitations and performance standards. Superimposed upon these are environmental protection districts which include areas subject to flooding or that present problems because of hillside development or development along water courses. Finally every development must be judged individually with respect to the required findings previously noted. This might be challenged as overkill. *See* SCIT, Inc. v. Planning Bd., 19 Mass. App. 107, 472 N.E.2d 269 (1984) discussed in note 118.

132. *See also* American Sav. & Loan Ass'n v. County of Marin, 653 F.2d 364 (9th Cir. 1981).

133. 616 P.2d 744 (Wyo. 1980).

134. R. ANDERSON, *supra* note 7, at §§ 6.20 and 6.21. For a recent example, see Cohn Communities Inc. v. Clayton County, 257 Ga. 357, 359 S.E.2d 887 (1987). Note the reference in the dissent to investment backed expectations. *Cohn*, 359 S.E.2d at 890.

the intended use is not sufficient. Put differently the purchaser does not have a protected property interest in a proposed change in use.

The proper standard for judicial review, highlighted by *California Coastal Commission*, is somewhat complicated under state law. In *Board of Commissioners v. Teton County Youth Services*,[135] the Wyoming court held that commissioners act in a quasi-judicial capacity in considering an application for a development permit, and must therefore follow contested case procedures to develop a record sufficient for meaningful judicial review.[136] The ultimate question was whether the commissioners, in denying the permit, followed the standards set forth in the Plan.[137] The scope of review is obviously greater in such a case than one involving legislative action by a local governing body. This distinction would seem of doubtful relevance when federal courts are considering actions by local governing bodies, especially in cases where the action has been sustained by the appropriate state court. At that point, the question is more one of federalism than separation of powers.

Finally, some comfort can be taken from the fact that, at least at the federal level, there is apparently no question that regulations to protect scenic and wildlife values serve a proper public purpose. This is clearly an area that has evolved and changed over time. In *Welch v. Swasey*,[138] decided in 1909, the United States Supreme Court agreed with the Massachusetts court that state and local legislative bodies may not regulate to preserve aesthetic values but only for the protection of public health and safety. Yet the regulations sustained in both *Penn Central* and *Agins* were directed exclusively to preserving aesthetic values, and on this there appears to be no disagreement among members of the Court. Justice Rehnquist, in his dissent in *Penn Central*, recognized that the historic landmark could be preserved by eminent domain, and this too requires a public purpose.[139] State courts continue to have difficulty with the question, in part because aesthetics are involved in diverse areas of regulation such a historic preservation, billboards, scenic beauty, and architecture.[140]

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135. 652 P.2d 400 (Wyo. 1982).

136. *See* the Wyoming Administrative Procedure Act, WYO. STAT. § 16-3-107(o) and (p) (1977 & Rev. 1982).

137. Two recent Colorado cases involving PUDs have followed the same analysis on a somewhat different question. The general PUD ordinance must provide standards sufficiently definite for the courts to review the subsequent action of the governing body in granting or denying a permit for a particular project. The court stated that the governing body acted in a judicial capacity in passing on applications for permits. Tri-State Generation and Transmission Co. v. City of Thornton, 647 P.2d 670 (Colo. 1982), and Beaver Meadows v. Board of County Comm'rs, 709 P.2d 928 (Colo. 1985). Other courts have held such action to be legislative when PUDs are established by floating zones which require an amendment of the zoning map. *See* R. ANDERSON, *supra* note 7, at §§ 11.15 and 11.17.

138. 214 U.S. 91 (1909).

139. See also Berman v. Parker, 348 U.S. 26 (1954), which is most cited for the proposition that eminent domain may be used to further aesthetic purposes. The public purpose that can be served by eminent domain might, of course, be broader than can be justified under the police power. R. ANDERSON, *supra* note 7, at § 7.14.

140. R. ANDERSON, *supra* note 7, at §§ 7.22—7.25. *Compare* Metromedia Inc. v. City of San Diego, 26 Cal. 3d 848, 610 P.2d 407, 164 Cal. Rptr. 510 (1980), *rev'd on other grounds*, 453 U.S. 490 (1981) *with* Turnpike Realty Co. v. Town of Dedham, 284 N.E.2d 891 (Mass. 1972).

Frequently the preservation and enhancement of aesthetic values may be justified as protecting either property values or the local economy.[141]

The *California Coastal Commission* decision remains troubling. There too, only an easement was involved, and granting the easement would apparently not have had a serious impact on the value of the property. The regulation was in effect when the landowner purchased the lot and a number of his neighbors had complied. But, if the right to exclude the public is the principal attribute of ownership,[142] even *California Coastal Commission* can be distinguished.

When the case reaches the Wyoming Supreme Court, the court would be well advised to devote most of its attention to the state law questions and not be overly concerned with the federal constitutional issues.[143] This would seem entirely proper. As the United States Supreme Court itself has noted, the cases have been decided largely on their particular facts and have not established rules of general and unvarying application. Even the standard for heightened scrutiny set forth in *California Coastal Commission* is consistent with that. There is no reason why the Wyoming court should stir the tea leaves in an effort to predict the outcome on the off chance that the federal Supreme Court might decide to hear the case on appeal. In addition, this approach will make it possible for the Wyoming court to avoid the many problems presented by *First English Evan. Luth. Church.*

At last the discussion turns philosophic, but briefly.[144] Is the early bird entitled to all the worms? If our hypothetical developer is allowed to proceed in accordance with his original proposal, he will presumably have no difficulty in marketing the time shares. But if developments of that sort continue unchecked, the market at some point will be adversely affected. The ski areas will still be there, but there won't be as many elk and the quality of the fishing will be much diminished by streamside developments.[145] It will still be possible to see the Teton Mountains, but they will not be as impressive when viewed over an unbroken string of

141. The Teton County Plan recognized possible legal difficulties in regulating to protect scenic resources and therefore stated a general policy for acquiring scenic easements by purchase. *See* the "Scenic Preservation Element" of the Plan, *supra* note 114, at xi-xii. However, as noted in the text, the operative parts of the program provide for acquiring such easements by dedication in cluster developments and planned unit developments. In addition the provisions for development permits require a finding that the development will not have "any significant adverse impact on the Country's scenic resources." *Id.* at VI-7.

142. *See* Kaiser Aetna v. United States, 444 U.S. 164 (1979).

143. See Rodgers v. City of Cheyenne, 747 P.2d 1137 (Wyo. 1987) in which the court declined to reconsider, on the basis of *First English Evan. Luth. Church* and *California Coastal Comm'n*, its earlier decision sustaining airport zoning. Cheyenne Airport Bd. v. Rogers, 707 P.2d 717 (1985), *appeal dismissed*, 106 S. Ct. 1961 (1986). A number of other state courts have cited one or more of the 1987 U.S. Supreme Court decisions but decided the cases on prior state law. Augustou v. King County, 49 Wash. App. 409, 743 P.2d 282 (1987); Saunders v. City of Jackson, 511 So. 2d 902 (Miss. 1987); Atlanta Bd. of Zoning Adj. v. Midtown North, 247 Ga. 496, 360 S.E.2d 569 (1987).

144. This paragraph was inspired by a trip from Glenwood Springs, Colo. up the Roaring Fork River to Aspen with a detour to Snowmass. That area does not, of course, have scenic and wildlife values comparable to Teton County.

145. *See* H. HOOVER, FISHING FOR FUN AND TO WASH YOUR SOUL (1963).

condos. Some of the purchasers from the developer will become disgruntled, but they will have difficulty in finding buyers and will be able to unload their units only at a considerable loss. Lurking somewhere in the maze there may be an issue of consumer protection.

If this worst case scenario should come to pass, it would probably not be fair to lay the entire responsibility on Justice Holmes. When he wrote the opinion in *Pennsylvania Coal Co.* he obviously did not have Teton County in mind, or even down hill skiing. But he is the one who said, "... a page of history is worth a volume of logic."[146]

146. New York Trust Co. v. Eisner, 256 U.S. 345, 349 (1921).