OUT OF THE CHAOS: TOWARDS A NATIONAL SYSTEM OF LAND USE PROCEDURES

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I. INTRODUCTION

At times, the procedures governing land use decisions can be equal to the impacts of the substance of land use laws. Often completely unique to a local land use forum, identifying and pursuing the most appropriate procedure may be outcome-determinative. At any rate, those choices are full of potential hazards and pitfalls. The procedures limiting today's land use forum are amalgamations taken from more than 85 years of experience regulating land in the United States. Since the New York legislature permitted the City of New York to regulate the use of land in 1916,[1] all states, except Texas,[2] authorize, though not necessarily require, their municipalities and political subdivisions to undertake land use regulations. However, prior planning to support such land use regulations is not universally required of local governments. Further, there is no national system of land use planning or regulation. Instead, these functions are left to the states, which have planned and regulated land with varying degrees of competency and success.

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1 New York Laws, 1916, ch. 496. As a result, the City of New York adopted the Building Zone Ordinance on July 25, 1916. That ordinance was upheld against various challenges in Lincoln Trust Co. v. Williams Building Corp., 229 N.Y. 313, 128 N.E. 208 (1920).

2 D. Brooks, County and Special District Law, ch. 43 (West St. Paul 1989).

Despite the lack of a comprehensive national system of planning, there have been three major efforts to organize and systematize the procedures connected with land use planning and regulation. The authors believe these efforts are worthy and should continue. In this article, we describe these efforts, particularly the most recent one undertaken by the American Planning Association, and set forth the characteristics of each of those efforts. Next, we set forth those limitations on land use decision-making that are imposed by the nature of administrative decision-making itself, by the federal Constitution,[3] and by the nature of the judicial process. Finally, we suggest methods in which local land use decision-making, as well as judicial review thereof, may be improved. Such reform is consistent with other efforts in administrative law and judicial administration to provide for a fair process where differing interests may appear and be heard, where the process is speedy, efficient and not costly, takes advantage of expertise and minimizes discretion in administrative and judicial forums.

In summary, the purposes of this article are:

1. to understand past efforts to bring order to the procedures by which land use decisions are made in the United States;
2. to suggest the parameters in which future efforts should operate; and
3. to set forth some basic reforms in decision-making and judicial review that appear desirable and necessary in the light of that background and those parameters.

[3] The authors concede that state constitutions, which have been traditionally silent on matters of planning and regulation, may also impose limitations on the scope and substance of these powers. The authors also assume, however, that most land use planning and regulation will continue to be a local, rather than a state, matter and recognize that the state may impose limitations on these powers through general legislative action.

We believe that the complete atomization of the substance and procedures for planning and land use regulation in the United States has caused reform efforts to be concentrated on individual states, rather than coordinated nationally. Moreover, because of the lack of legislative guidance, nationwide reforms have been rare and often ham-handed.[4] At this point in our national political life, it is unlikely that Congress will undertake either nationwide planning or land use regulation. Nevertheless, we believe some reform may be achieved by examining the current Balkanized systems of planning, finding some common difficulties, and suggesting reforms for those common problems. In this article, we focus on some common procedures that may be used to deal with those common problems.

We frequently allude to one of the principal reforms we find desirable, i.e., the requirement of a separate and binding comprehensive plan as a means of limiting the scope of land use decision-making. However in this article we focus on a review of past procedural reform proposals and recommend new ones. We suggest these reforms, along with the requirement of a separate and binding comprehensive plan, are necessary to reform American land use law. Let us begin with a review of past efforts at procedural reform.

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[4] See, e.g., Dolan v. City of Tigard, 512 U.S. 374 (1994), where the limitations on exactions of land were imposed, according to a 5-4 majority of the Supreme Court, by the Fifth Amendment to the federal Constitution. In another article, Return of the Platonic Guardians (forthcoming), 34 Urban Lawyer ___ (2002), one of the authors suggests that such an expansive reading of the Fifth Amendment is unjustified. That article also suggests the salutary results of Dolan could have been achieved through a different alternative. That alternative consists of a more careful attention to the nature of the decision made and the function of traditional judicial review. Those results could also have been achieved by legislation or more considered judicial review.

II. LAND USE PROCEDURE GENERALLY - THE THREE WAVES OF MODEL LAND USE LEGISLATION

Early in the history of land use regulation, rapid industrialization necessitated a need for clear analysis to justify how and why a substantive regulation fits underneath the state's legislative or "police" power to protect for the health, safety and welfare of its citizens. In 1926, in the landmark case, *Village of Euclid v. Ambler Realty,* the Supreme Court recognized local government's right to regulate land use through zoning as a valid exercise of a state's police power.[5] Two years later, in *Nectow v. Cambridge,* the Court struck down an action under a zoning ordinance, stating there was no justification for imposing different zoning designations on two adjacent and similar properties.[6] At this point, it became increasingly clear that *ad hoc* regulation would not work; local governments needed model enabling legislation upon which land use regulations and hearing procedures could be created and withstand judicial challenge. Today, we understand this system as land use planning. We understand that comprehensive planning and uniform land use procedures are solutions that overcome allegations of arbitrary and capricious decision-making in favor of a rational decision-making process. However, this understanding did not occur overnight. Over the past century, three waves of model legislation have been proposed to guide the land use decision-making process.

A. The Standard Zoning Enabling Act

The first wave of procedure governing land use decisions was the Standard Zoning Enabling Act (SZEA).[7] Adopted in 1926, the SZEA was prepared by a special

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5 272 U.S. 365 (1926).

6 277 U.S. 183 (1928).

7 (U.S. Dept. of Commerce rev., ed. 1926).

advisory committee, under the direction of the Secretary of the Department of Commerce, Herbert Hoover. The SZEA authorized a municipal legislature to divide the municipality into zoning districts as "may be deemed best suited to carry out the purposes of the act."[8] It was assumed that once these districts or zones were established they would remain static and a harmony of uses would automatically result. The essential purpose of planning legislation was not to encourage desirable development but rather to restrict undesirable development.[9] The SZEA espouses total localism and complete delegation to the local government of all power to plan for and regulate land uses.[10] As such, each individual locality was charged with making its own regulatory determinations in regulating to protect for the health, safety and welfare.

The SZEA creates a zoning commission to prepare a zoning plan and related ordinances;[11] however, it also creates a Board of Zoning or Adjustment (BZA), which may freely make zoning changes to accommodate individual uses. The SZEA does not explain the details by which a zoning map may be changed, nor does it establish any criteria for determining when exceptions to the regulations should be granted.[12] Rezoning, as opposed to variances and special uses, was seen as "legislative" in nature, even if it only affected a few properties. The only "release valve" for varying the established zoning scheme was granted from the BZA. The BZA was characterized as an

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8 SZEA §8.

9 Mandelker, Daniel, Land Use Law, 4th Edition (Charlottesville: Lexis Law Publishing, 1997) at 108.

10 Id. at 109; SZEA §1.

11 SZEA § 4.09.

12 *See* Stuart Meck, Gen. Editor, Growing Smart Legislative Guidebook: Model Statutes for Planning and the Management of Change, 2002 Edition (Chicago: American Planning Association, forthcoming in January 2002) at 10.

independently appointed agency. Delegation over zoning exceptions and variances to the BZA was thought necessary to remove the influence of political agendas on local government decision-making. Further, unlike the New York City Board of Appeals upon which it was modeled, the SZEA had no BZA membership requirements.[13]

Procedural hearing requirements emerge from the SZEA in reference to the BZA.[14] The SZEA requires notice of proposed land use decision by publication in a newspaper only.[15] Rather than a simple majority vote, a four-out-of-five member majority was required for the BZA to reverse an administrative land use decision or permit a variance.[16] Although it does require a public hearing and minutes kept on the record, the SZEA does not require any written decision supported by findings or rationale based on the record.[17] Finally, the SZEA does not set out any standards for judicial review.

Perhaps the most famous legacy remaining from the SZEA is the requirement that zoning must be "in accordance with a comprehensive plan."[18] Interestingly, the term "comprehensive plan" was not defined and a lack of definition has caused continual confusion for local planners and the courts. The confusion emerged as a result of footnote 22 to the SZEA, which states that planning in accordance with a comprehensive plan "will prevent haphazard or piecemeal zoning. No zoning should be done without

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13 Id. at 11.

14 SZEA §8. See also Meck, supra, at 10-6.

15 SZEA §7. See also Meck, supra, at 10-7.

16 Id.

17 Id.

18 SZEA §3.

such a comprehensive study."[19] Contemporary land use systems have for many years embraced a system where a comprehensive plan exists. However, even today, few states "plan" by means of a document labeled the "comprehensive plan."

One of the earliest scholars to enter into a dialogue considering the role comprehensive planning must play in the zoning process was Charles Haar. In his 1955 article, In Accordance With a Comprehensive Plan, Professor Haar examined the judicial treatment of the comprehensive plan requirement to see what legal significance the master plan maintains in guiding land use decisions.[20] Haar explains that the easiest way to successfully attack a zoning scheme is to assert that it is not "comprehensive" in its consideration of geographic coverage. As noted below, the term "comprehensive" has three meanings: (1) comprehensive in terms of addressing an entire geographic area; (2) comprehensive in terms of having an "all-encompassing" scope; and (3) comprehensive as in a separate long-term planning document. For example, zoning only a portion of a municipality when the local government has the authority to zone the entire city is viewed as arbitrary and discriminatory, violating both due process and equal protection.[21] Courts commonly stated: "A zoning ordinance, whatever the source of its authorization, in order to be valid must apply to the city as a whole and not alone to particular streets."[22] Interim zoning ordinances often were struck down on procedural grounds, as they often

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[19] SZEA, footnote 22.

[20] Charles M. Haar, In Accordance with a Comprehensive Plan, 68 Harv. L. Rev. 1154 (1955); see also Sullivan and Kressel, Twenty Years After: Renewed Significance of the Comprehensive Plan Requirement, 9 Urb. Law Annual 33 (1975).

[21] Id. at 1159.

[22] Id. citing Darlington v. Board of Councilmen, 282 Ky. 778, 782, 140 S.W.2d 392, 394 (1940) and 1163 citing 1 Yokley, Zoning Law & Practice, 178-81 (2d ed. 1953). See also Miller v. Board of Public Works, 195 Cal. 477, 496, 234 Pac. 381, 388 (1925), writ of error dismissed, 273 U.S. 781 (1927).

failed to meet the public hearing or notice requirements of the SZEA.[23] The term "comprehensive" was also used to mean "all-encompassing" regulations that addressed a number of factors, such as use, height and area.[24] The common thread amid all of these "comprehensive" qualities was that zoning must seem on the whole to be reasonable. In our view, these types of zoning regulations also shared a common defect because they failed to ask whether the ordinance is in "accordance with" the comprehensive plan.

In one of the most often-cited cases, Kozesnik v. Township of Montgomery , a zoning amendment was challenged because the municipality had failed to adopt a comprehensive plan. Although the court held that the "in accordance with" language did not require a separate comprehensive plan per se, the court held that it did impose a fairness and reasonableness test to prevent the "capricious exercise" of the government's zoning powers.[25]

Interestingly, nearly all states require that zoning take place in accordance with the comprehensive plan and about three-quarters of the states have adopted the SZEA approach to comprehensive planning.[26] The majority interpretation is that comprehensive planning requires some form of forethought and reasoned consideration, as opposed to a separate plan document that becomes an overarching constitution guiding development.

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[23] Id.

[24] Id. at 1165.

[25] Kozesnik v. Township of Montgomery, 131 A.2d 1 (N.J. 1957).

[26] To some extent, this error was compounded by the "701" planning grants given under the Housing Act of 1954, 40 U.S.C. §461(b), which funded local planning efforts, but did not require those efforts to be binding.

B. ALI Model Land Development Code

The second wave of land use planning is most often characterized by a regional or statewide approach. In 1976, the American Law Institute drafted the Model Land Development Code ("Model Code").[27] The purpose of the Model Code was to fashion a more modern and flexible form that would still address zoning, land subdivision, city planning and urban redevelopment.[28] Although primary planning responsibility could remain with the local governments, the Model Code called for the creation of a regional or state Land Planning Agency. Similar to the base environmental regulations adopted by the federal government, such as the National Environmental Policy Act (NEPA) and the Clean Water Act (CWA), the State Land Planning Agency's purpose was to establish statewide or regional land use standards. Broad oversight was called for to address larger area impacts or issues involving more than one municipality, e.g., critical environmental areas, airports, public utility lines or major highways.[29]

The Model Code permitted, but did not require, that each municipality adopt a "Land Development Plan" (LDP) constituting the official land development policy of the municipality.[30] Unlike the SZEA attempt to preserve existing uses, the Model Code envisioned a more pro-active approach to directing development based on the community's unique features and needs. Creation of the LDP required what, at the time, must have been seen as an exhaustive study of the local cultural, social and economic

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[27] American Law Institute ("ALI"), A Model Land Development Code: Complete Text and Commentary (Philadelphia, American Law Institute, 1976).

[28] Meck, supra, at 10-13.

[29] ALI Code §8-101.

[30] ALI Code §3-104.

landscape that must be incorporated into the plan. The study would include such factors as: population distribution by age, education level, income, employment and race; location of commerce and industry; available housing; transportation and utility availability; land use patterns; natural resources; historical and cultural resources; blighted and deteriorated areas; and other factors relevant to the community.[31] The study was the basis for adoption of a series of short-term implementation strategies that were to be achieved within one to five years of the adoption of the plan.[32]

Even after all of this forethought and planning, the Model Code still did not require the adoption of a comprehensive plan. Although the Model Code provided many incentives for local governments to adopt a comprehensive plan, adoption of an LDP was entirely optional.[33] The comments to §3 explain that the drafters were accommodating critics of long-range planning who believed that planning should focus on short-term programs to realize specific objectives. These critics believed that a "comprehensive plan" would stifle free-flowing priorities and continuously changing values.[34] They were also concerned that if a state decided to create a State Land Planning Agency, the state would be more likely to mandate adoption of comprehensive plans, or intervene in local development regulation.[35]

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31 Id.

32 Id. at §3-101, 105.

33 Id. at 123.

34 Id. at 124.

35 Id.

The Model Code envisioned a more streamlined hearing procedure, providing joint hearings for developments that required more than one permit.[36] Even though nothing required that all decision-making be consistent with a separate master or comprehensive plan, the Model Code required that land use decisions balance "detriments and benefits including economic need, transportation and infrastructure impacts as well as consistency with the State or Local Land Development Plan.[37] For the first time, the Model Code required that all decisions set forth the "findings on which the decision was based."[38]

The Model Code also provided standards for judicial review of "orders, rules or ordinances," including review by equity proceedings, such as mandamus, certiorari, injunction, or other declaratory relief.[39] The Model Code set out who may initiate review, including not only the applicant and the local government, but also those who participated in the hearing at the local level, owners of land within 500 feet of the proposed development, neighborhood organizations whose boundaries are within 500 feet of the proposed development, and those who were denied the opportunity to participate in the local hearing.[40]

The Model Code required the creation of a record of the proceedings below and review based on that record.[41] The Model Code sets out "Bases for Judicial Relief,"

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36 Id.

37 Id. at §7-402.

38 Id. at §7-401.

39 Id. at §9-101.

40 Id. at §9-103.

41 Id. at §9-109.

which include: unconstitutionality, excess of statutory authority, failure to follow statutorily proscribed procedures, arbitrary and capricious decision-making, error of law, and decision not based on findings of fact or substantial evidence. Interestingly, in reviewing decisions by the State Land Adjudicatory Board, which is charged with the benefit/detriment balancing, the court must give due weight to the "discretionary and policy-making authority conferred upon the Board." Finally, the court must "give due weight" to whether the challenged action was consistent with the Local or State Land Development Plan.[42] Even though the Model Code explicitly sets out procedures and relevant factors for inclusion in the comprehensive plan, the Model Code did not provide for any uniform judicial or administrative review for compliance with those procedures.

Very few states adopted the Model Code. Minnesota, Colorado, Nevada, and Wyoming have adopted a portion of the Model Code, providing for jurisdiction to designate and regulate development in "areas of critical concern." Florida's land use system most resembles the ALI Model Code approach. Three statutes establish Florida's land use, forming a "planning pyramid." They are the State Comprehensive Plan adopted in 1985, the Florida Environmental Land and Water Management Act (FLWMA) adopted in 1973, and the Local Government Comprehensive Planning Act of 1975. It is the second element, the FLWMA, that reflects the provisions of the Model Code and provides for state involvement in setting and enforcing planning parameters. The broad and ambitious scope of the Model Code prevented most states from adopting it. The Model Code sought to uniformly manage and control (1) environmentally sensitive lands; (2) major development sites; (3) areas that would most impact the state or municipality; and (4) the siting of all development. Many states had separate bodies already in place to

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[42] Id. at §9-110.

handle these areas of concern, and they were not willing to abandon their existing system to adopt such a comprehensive series of statutes. As a result, portions of the Model Code were adapted to fit individual state needs. Finally, the Model Code did not require regional or statewide coordination of plans. This was especially problematic in light of the 1970s' realization of the problems caused by continued multi-jurisdictional suburban sprawl.

C. APA Growing Smart Legislative Guidebook

The third and final wave of land use procedures is set forth in the American Planning Association's Growing Smart Legislative Guidebook (Guidebook). Although yet to be published, the APA is hopeful that the Guidebook will lead state and local government land use regulations into the twenty-first century. Chapter 10 sets out procedures for local government permit issuance and permit review and creates a Land Use Review Board, authorized to make variance decisions and perform judicial review.[43] Learning from the deficiencies with the SZEA and Model Code, as well as 85 years of perspective on the judicial review of procedural limitations, the Guidebook envisions either complete adoption of Chapter 10 or piecemeal selection of alternatives for insertion into pre-existing land use legislation.[44]

The APA's goals in drafting the Guidebook were to streamline the procedure, increase efficiency and reduce costs to local governments, while still ensuring fairness and reliability to the citizens utilizing the process.[45] At the outset, the Guidebook sets

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[43] Meck, supra, at 10-1.

[44] Id.

[45] Id. at 10-16; 10-20.

forth the reasons why the land use permitting process should be reformed. These reasons are set forth here, not only because they work to justify most of the Guidebook proposals, but because they are also important tenets to keep in mind for any municipality when revising its land use procedures.

- To assure fairness and due process to protect the rights of all participants.
- To make citizen participation more constructive, responsive, and timely.
- To make the regulatory system accountable and reduce opportunities for backroom agreements or corruption.
- To establish better working relationships between permit applicants and reviewers.
- To enable public officials to use their time more efficiently.
- To contain rising administrative costs.
- To control one of the factors that increase the cost of new housing.
- To encourage the kind of development the community wants by giving the community a competitive edge.[46]

Rather than setting out the appropriate boards to create or review permit decisions, the Guidebook adopts a flexible allocation of responsibility to various boards or commissions within the local government. Based on the complexity of the authorization needed, the local government may decide whether the type of permit

[46] Meck 10-14, citing John Vranicar, Welford Sanders, and David Mosena, Streamlining Land Use Regulation: A Guidebook for Local Governments, prepared by the American Planning Association for the U.S. Department of Housing and Urban Development Office of Policy Development and Research (Washington, DC: U.S. GPO, November 1980).

needed requires simple ministerial review or if a planning commission or other specialized zoning board is necessary. Further, the local government is free to use an administrative process, where the record is created only upon appeal, or a hearing on the record, where the record works to limit the scope of judicial review.[47]

Time limits are another crucial element for maintaining an efficient and reliable permit procedure. All permit process ordinances must provide time limits for application completion and for judicial review. Adequate time for completion is based on reasonable good-faith determinations as required by due process.[48] These limits not only ensure timely local government action, they provide the applicant with assurances about when a final and definitive ruling will eventually occur.

An efficient land use process is similarly well served by retaining an administrative review process for particular types of decisions. The Guidebook retains the administrative review process for uncomplicated land use determinations. Although administrative review does not require a hearing on the record, notice of the decision is necessary, and opponents must be given an opportunity to submit additional evidence concerning the application.[49] To avoid confusion about what has been decided, the administrative decision must be written and based on the ordinance criteria or regulations.[50] The Guidebook also provides a formal request for clarification for any

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47 Id. at 10-22.

48 Id. at 10-43.

49 Id. at 10-28; 10-30.

50 Id. at 10-30.

party who needs clarification on any issue raised by the local government.[51] Finally, all subsequent appeals are heard on the record.[52]

Like the SZEA and the Model Code, the Guidebook provides for the creation of a Land Use Review Board, also known as the Zoning Board of Adjustment or Zoning Board of Appeals. The difference between the earlier model acts and the Guidebook are that the Guidebook does not mandate a fixed and inflexible structure for the Board in its review of non-conforming uses, variances or other land use decisions. Rather, it allows the local government to decide the officer or body that shall make such decisions and the criteria that governs such decisions.[53] The suggested standards for variance approval retain the "uniqueness" requirements, which means variances should be granted infrequently.[54] Further, the Guidebook does not permit "use" variances because such variances improperly permit an administrative body to amend a zoning ordinance.[55]

Another "release valve" for land development applications is the mediation process. A relatively new remedy in the land use arena, mediation is a non-binding process where a neutral third party assists the parties by negotiating a solution that will satisfy all parties.[56] Mediation is often a very helpful solution because continued "bad blood" between neighbors often breeds further litigation. The good faith that is necessary

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51 Id.

52 Id. at 10-28.

53 Id. at 10-52.

54 Id.

55 Id. at 10-53.

56 Id. at 10-54.

for successful mediation can often "mend fences" so that parties may live together amicably.[57]

Rather than a single avenue of judicial review, such as certiorari or mandamus, the Guidebook provides alternatives for review. The options include: state-established remedies similar to the federal section 1983 remedy applied to land use decisions, expanded statutory basis for review, standards for writs for certiorari, and revised state administrative procedures act mechanisms to permit review of local government decisions.[58] Because the methods of both direct attack upon, and judicial review of, local government decision-making vary widely among the states, the Guidebook did not seek to provide a uniform system to deal with challenges to land use regulations and actions.

We have yet to see how the Guidebook will influence local government and state legislatures to reform. It must be remembered that there is only so much direction the model legislation can provide as much depends on local legal culture and tradition. This Guidebook contains an important caveat that is a good lesson for all land use practitioners:

> It should be emphasized that there are limits to what state enabling legislation can accomplish in the development review area, since the process is so susceptible to (a) the political and administrative direction the local review agencies receive; (b) their organizational culture (in predictability); and (c) the capabilities and competence of the staff and boards conducting permit reviews. Moreover, if a local (or state) reviewing agency wishes to drag its feet to demonstrate its importance or independence or if the local political culture rewards delay, or when sweet reason otherwise fails, there is little else one can do short of litigation.[59]

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57 Id.

58 Id. at 10-61.

59 Id. at 10-17.

III. CONSTITUTIONAL AND OTHER LIMITATIONS ON LOCAL LAND USE DECISION-MAKING

A. Characterizing the Decision

Any discussion of the parameters of local land use decision-making must begin with an analysis of the nature and kinds of that decision-making and the process for judicial review for each of those kinds of decision-making. Traditionally, American law recognizes three types of local land use decision-making. The first occurs when a determination must be made without the exercise of discretion or factual judgment, in what is normally termed a "ministerial" act. Judicial review of ministerial decisions is comparatively simple -- the decision below was either correct or not -- and relief is normally through mandamus. For example, most building permits result from ministerial decisions.

At the other end of the spectrum are legislative decisions, where there is a broad range of available outcomes, and a great deal of discretion among those outcomes is possible. In legislative or policy decision-making, great deference is given to the decision-maker. Such policy decisions are prospective in nature and apply generally to a large number of persons, places or circumstances.[60] These legislative decisions are normally tested only against those limitations inherent in a legislative setting, such as following proper procedures and acting within applicable constitutional or legislative limitations. Judicial relief is ordinarily limited to extraordinary intervention, for example, through declaratory judgments coupled with injunctive relief. Separation-of-powers

[60] See, Comment, Zoning Amendments: The Product of Judicial or Quasi-Judicial Action, 33 Ohio St. L. J. 130, 134-135 (1972).

considerations and the deference given the decision-maker provide those challenging legislative or policy actions with little prospect of success, at least in theory.

Between these two extremes is the third category - quasi-judicial decisions, where the decision requires discretion, but is confined to the limits of previously determined policy, already adopted through the legislative process. In this category, previously determined policy is applied to a particular person, place or circumstance and looks retrospectively upon the same to determine a future outcome.[61] A frequent, but not exclusive, method of judicial review of such decisions has been through common law certiorari or its statutory derivatives.[62] In such cases, the court reviews the record of the lower proceeding against the claims made in the petition for relief.

Under the SZEA, both special (or conditional) use and variance decisions have been treated as quasi-judicial decisions.[63] However, the issue that has plagued land use law in the United States is the classification of small-tract rezonings. The SZEA required adoption of the zoning map by ordinance[64] and assumed the change of the map would be accomplished by ordinance.[65] Because of this, changing the designation of one or a few properties on a zoning map was labeled as a legislative act, and, thus, judicial review was presumed to be limited.[66]

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61 Ibid.; Fasano v. Board of County Commissioners, 264 Or. 574, 507 P.2d 23 (1973).

62 See, e.g., T. Pelham, *Evaluating the Prospective Case After the Administrative Decision*, in L. Smith, ed., How to Litigate a Land Use Case (2000), at 204-05; Mandelker, supra, at 348; and Yokley, Zoning Law and Practice 4th Edition (1979), at § 24-9.

63 SZEA, § 7.

64 SZEA, §§ 2 and 4.

65 SZEA, § 5.

66 Of course such review was not so limited at all, as courts invented ways of separating "good" from "bad" rezonings, through such judicial constructs as "spot zoning," "change or mistake," or "appearance of

A proper characterization of small-tract rezoning, one that is consistent with the nature of the action, is as a quasi-judicial act in which policy, set forth in the comprehensive plan, is applied to individual properties. If the proposed rezoning is inconsistent with the plan, it must be denied. With this classification, we may now approach application of constitutional law and judicial review.

B. Federal Constitutional Limitations on Local Land Use Decision-Making

Only a few provisions of the federal Constitution are raised in connection with local land use decision-making. Some do not ordinarily deal with procedures, such as the First Amendment restrictions on religious, press or expressive freedoms, and the commerce clause. Those Constitutional provisions that affect local procedures are found in the due process, equal protection, and privileges and immunities clauses of the Fourteenth Amendment and the takings clause of the Fifth Amendment. We focus on these provisions.

1. Procedural Due Process

The antecedent of procedural due process is section 38 of the Magna Charta, which prohibited the loss of life, liberty or property except under the law of the land.[67] As applied to land use planning and regulation, the first issue is whether there is an adequate property interest at issue. An abstract need or desire is insufficient; there must

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fairness." This penchant for judicial invention has the hallmarks of the evils of substantive due process, which is discussed below.

[67] The words are usually translated as follows:

> No freeman shall be arrested, or detained in prison, or deprived of his freehold, or in any way molested; and we will not set forth against him, nor send against him, unless by the lawful judgment of his peers and by the law of the land.

Bosselman, Callies and Banta, The Takings Issue (1973), at 56.

be legitimate claim of entitlement in order for a claimant to be able to raise the procedural due process issue.[68] This claim must ordinarily be recognized as such under state law.[69] Once a property right is recognized, the nature of the right to procedural due process varies with the circumstances, as the federal Supreme Court has been reluctant to find a "one size fits all" level of process that is "due."

Rather, that court has used a three-part balancing test to make a determination of what process is "due." That test requires the balancing of (1) the private interest affected, (2) the risk of erroneous deprivation of such interest, and (3) the probable value of additional procedural safeguards, and the governmental interest, including the fiscal and administrative burdens of the additional safeguards.[70] There are other aspects of procedural due process that arise out of pre-Fifth and Fourteenth Amendment due process concerns, including the requirement of a hearing before a disinterested adjudicator.[71]

The issues that arise most often in a procedural due process context revolve around a determination as to whether a sufficient property interest exists and the extent and type of the process that is "due" under the circumstances.

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68 Board of Regents v. Roth, 408 U.S. 564, 578 (1972).

69 Pruneyard Shopping Center v. Robbins, 447 U.S. 74 (1980).

70 Mathews v. Eldridge, 424 U.S. 319, 334-35 (1976).

71 Sullivan, The Missing Link: Fairness, British Natural Justice and American Planning and Administrative Law, 11 *Urban Lawyer* 75 (1979). See also Withrow v. Larkin, 421 U.S. 970 (1980).

2. Substantive Due Process

Due process was seen solely as a guaranty of procedural fairness in the United States until the federal Supreme Court's decision in Mugler v. Kansas,[72] in which the first Justice Harlan stated for the Court:

> * * *The courts are not bound by mere forms, nor are they to be misled by mere pretences. They are at liberty, indeed, are under a solemn duty, to look at the substance of things, whenever they enter upon the inquiry whether the legislation has transcended the limits of its authority. If, therefore, a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the constitution.[73]

This *dicta* was not necessary for the result in that case, which involved the adoption of prohibition on alcoholic beverages. Nevertheless, this analysis was used as a tool to invalidate legislation the Court found improvident. As formulated in Lawton v. Steele,[74] the test required an examination of the legislation to determine whether its ends and chosen means were appropriate and whether or not it was "unduly oppressive" to those regulated by it.[75]

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72 123 U.S. 623 (1887).

73 Id. at 699.

74 152 U.S. 133 (1894).

75 The Court said in Lawton v. Steele at 137:

> To justify the state in thus interposing its authority in behalf of the public, it must appear--first, that the interests of the public generally, as distinguished from those of a particular class, require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals. The Legislature may not, under the guise of protecting the public interests, arbitrarily interfere with private business, or impose unusual and unnecessary restrictions upon lawful occupations; in other words, its determination as to what is a proper exercise of its police powers is not final or conclusive, but is subject to the supervision of the courts. 152 U.S. at 137.

For approximately 50 years, substantive due process was ascendant. During that time, the federal Supreme Court struck down a number of state and local laws on substantive due process grounds, while upholding others,[76] presumably because the Court agreed with their ends and means and did not find them "unduly oppressive."[77] Many found this analysis a mask for the imposition of the economic, social, and political views of the members of the Court on the nation, through the use of elastic terms that could justify any result.[78] One of the most trenchant critics of substantive due process was Oliver Wendell Holmes, and his most well-known criticism is found in his dissent in Lochner v. New York.[79] Holmes found no adoption of any particular economic or social philosophy in the Constitution, much less the prevailing "Social Darwinism" then prevailing in a conservative laissez-faire culture. In other words, Holmes found that Congress and the state legislatures had the power to meet new social and economic issues through legislation, and the Constitution did not ordinarily impose an impediment to those powers.

Substantive due process lasted until the late 1930s, when the Court invalidated some of the principal New Deal programs under its rubric. The National Recovery Act, in particular, was a program in which the federal government attempted to meet the

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[76] Compare, for example, cases in which state or local enactments failed the substantive due process "tests" in Lochner v. New York, 198 U.S. 45 (1905), and Allgeyer v. Louisiana, 165 U.S. 578 (1897), with those that passed the "test" in Muller v. Oregon, 208 U.S. 412 (1908).

[77] M. & St. P.R. Co. v. Minnesota, 134 U.S. 418 (1890); Muller v. Oregon, note 76 supra; Nebbia v. New York, 291 U.S. 502 (1934).

[78] For a critique of the resurrected version of substantive due process in a land use regulatory context, *see* Sullivan, Emperors and Clothes: The Genealogy and Operation of the Agins Tests, 33 *Urban Lawyer* 343 (2001).

[79] Note 76, supra.

depression by regulation of various industries and trades.[80] When that legislation was found unconstitutional,[81] President Roosevelt attempted to "pack" the Supreme Court, so as to change results such as these.[82] The plan did not work; nevertheless, over an 18-month period from the time the court-packing proposal was put forth, Roosevelt was able to appoint seven justices. As expected, these justices were more sympathetic to government intervention in social and economic areas than those they replaced. As a result, substantive due process waned.[83] The final blow came in 1938 in United States v. Carolene Products Co.,[84] in which Chief Justice Stone set forth the new standard of review of legislation in the oft-cited footnote 4:

> There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth. * * *
>
> It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation. On restrictions upon the right to vote* * ; on restraints upon the dissemination of information * * *; on

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80 15 U.S.C. §§701-712 (1933).

81 Schecter Poultry Co. v. United States, 295 U.S. 495 (1935); Panama Refining Co. v. Ryan, 293 U.S. 388 (1935).

82 In his "Fireside Chat on Reorganization of the Judiciary" on March 9, 1937, President Roosevelt said:

> When the Congress has sought to stabilize national agriculture, to improve the conditions of labor, to safeguard business against unfair competition, to protect our national resources, and in many other ways, to serve our clearly national needs, the majority of the Court has been assuming the power to pass on the wisdom of these acts of the Congress - and to approve or disapprove the public policy written into these laws.

83 See, e.g., West Coast Hotel v. Parrish, 300 U.S. 379 (1937).

84 304 U.S. 144 (1938).

> interferences with political organizations * * * ; as to prohibition of peaceable assembly * * *.
>
> Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious, * * * or racial minorities,* * * whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry. * * *[85]
>
> Substantive due process has had a significant role in American legal history.

Aside from its defense of the ascendant economic, political and social order, this doctrine resonated in other areas as well, preventing exclusion of the German language from primary schools in Nebraska, [86] and the closure of non-public schools in Oregon.[87] Even after its supposed demise in Carolene Products, it has resurrected itself in a case involving municipal prohibitions on various generations of a family living together,[88] and on abortion.[89] Most recently, the doctrine was used in a decision regarding the imposition of liability on a company that had left the business before the prohibition was made law.[90]

The future of the doctrine is uncertain. For liberals, it is the tool by which a conservative court may cloak objections over the wisdom of legislation in constitutional

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85 304 U.S. 144, at 152.

86 Meyer v. Nebraska, 262 U.S. 390 (1923).

87 Society of Sisters v. Pierce, 268 U.S. 510 (1925).

88 Moore v. East Cleveland, 431 U.S. 494 (1976).

89 Roe v. Wade, 410 U.S. 113 (1973).

90 Eastern Enterprises v. Apfel, 524 U.S. 498 (1998). Actually, the use of substantive due process as a basis to invalidate the law was made only by Justice Kennedy in a 5-4 decision. The other four members of the majority used the takings clause of the Fifth Amendment to invalidate the law. The four dissenters rejected an analysis under the takings clause and used a substantive due process analysis to reach their conclusions.

terms.[91] For some conservatives, substantive due process is a means to restrict undesirable social engineering.[92] The paucity of the use of this doctrine since 1938 makes it unlikely that it will be used in the future to any great extent. Nevertheless, the doctrine, or its derivative in recent takings decisions, introduces a "wild card" into the predictability and fairness of land use law by allowing judicial preferences to mask as constitutional law to achieve a result in a specific case.

Nevertheless, judicial review of American planning and land use regulatory law may be seen as caught in a "time warp" of substantive due process. The United States Supreme Court decided only four land use cases between 1926 and 1928, at the apogee of substantive due process.[93] No other planning or land use regulatory case came before that Court until 1978. Two of the four cases have had a lasting impact on this area of the law. In the first, Euclid v. Ambler Realty Co.,[94] the Court upheld zoning against an attack based largely on substantive due process. But in the second, Nectow v. Town of Cambridge,[95] the Supreme Court upheld the trial and appellate courts determination that a particular application of zoning was unjustified under substantive due process. Because no other planning or land use regulatory case came before the Supreme Court, state and lower federal courts applied the only Supreme Court precedent available, i.e., Euclid and Nectow. But these cases came to different outcomes based on a substantive due process

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91 See Abortion Law Homepage, http://www.hometown.aol.com/abtrbng.

92 Planned Parenthood v. Casey, 505 U.S. 833, 998 (1992) (Scalia, J. dissenting).

93 Nectow v. Town of Cambridge, 277 U.S. 183 (1928); Gorieb v. Fox, 274 U.S. 603 (1927); Zahn v. Board of Public Works, 274 U.S. 325 (1927); Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).

94 Note 75, supra.

95 Note 76, supra.

analysis that had fallen out of favor with the Supreme Court since 1938. Nevertheless, the "dead hand" of this analysis lived on through use of these two cases in numerous later cases.

Not only did substantive due process survive in land use through those cases, the current Supreme Court continues to apply substantive due process under a different name through the takings clause, as discussed below. This creates problems because process analysis has largely been focused upon substantive due process, but a focus upon the procedures used in planning and land use regulatory cases, particularly on the manner of decision-making, may be more profitable than a substantive due process analysis that looks at the determination of outcomes.

C. Takings

Until 1922, takings law had been limited to those instances in which the federal or state government had acquired title to, or physically occupied, land.[96] Indeed, the "takings clause" of the Fifth Amendment had not been applied to state or local governments, by way of incorporation through the Fourteenth Amendment's due process clause until 1897.[97] In 1922, however, Justice Holmes, writing for the entire Supreme Court, except for Justice Brandeis, found a state regulatory action to be a taking in Pennsylvania Coal v. Mahon.[98]

Pennsylvania Coal involved a state legislative action to prohibit mining under houses, places of public assembly, and roads. The need for the legislation was based on a practice of coal companies in northeast Pennsylvania selling off surface rights to potential

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96 See, e.g., Pumpelly v. Green Bay Co., 80 U.S. 166 (1872).

97 Chicago, Burlington & Quincy R.R. v. Chicago, 166 U.S. 226, 239 (1897).

mining lands but retaining the mineral rights, which was an accepted property law practice. The result of this practice was the loss of lateral support when the lands were mined. The Supreme Court invalidated the law by conflating takings law with substantive due process analyses. Justice Holmes, the author of the opinion, never used words associated with substantive due process in his majority opinion. Instead, he used the takings clause and acknowledged that property could be regulated even if the regulation lessened the property's value. However, he added that if the regulation went "too far," it is transmuted into a taking.

The imprecision of the test, along with the fact that substantive due process, the real basis for the test, had largely been abandoned, caused this case to lay dormant for over 50 years. However, it was brought back to life in Penn Central Transp. Co. v. New York City,[99] the first land use case to come to the federal Supreme Court in half a century. In Penn Central, the Court analyzed a New York State landmarks preservation ordinance in terms of whether it went "too far" and caused a taking. While a majority of the Court found that the ordinance did not amount to a taking, it had only Pennsylvania Coal as precedent for the regulatory taking issue that was raised. Perhaps with future cases in mind, the Court set out three "factors" it said it would use in evaluating a regulatory taking. The Court said it would consider the economic impact of the regulation, the manner in which it would affect "investment-backed expectations," and

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98 260 U.S. 393 (1922).

99 438 U.S. 104 (1978).

the character of the regulation.[100] These unweighted factors of doubtful provenance[101] provided little guidance for future cases.

The difficulty of predicting the outcome of a regulatory takings case was increased by the decision of another majority opinion two years later in Agins v. City of Tiburon.[102] In Agins, the majority, without citing Penn Central, came up with a two-part alternative analysis for takings, i.e., whether the regulation substantially advances a legitimate state interest, or deprives the owner of all beneficial use of the land.[103] Thus, litigants were left with two fairly vague tests for regulatory takings and no guide as to when to use either.

The takings clause affects procedures principally in the area of conditions requiring the dedication or transfer of title of land to the public in exchange for land use approval. The Supreme Court has decided two cases in this area, Nollan v. California Coastal Commission[104] and Dolan v. City of Tigard.[105] Both cases involve the forced dedication of land in exchange for land use approval. In the first, the Court found no justification in terms of the stated goal of the agency requiring the dedication, while in the second, the Court found no proportionality between the impacts of the proposal and the dedications required. Both cases rely on the first prong of Agins, i.e., that there be a

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100 Id. at 124.

101 John D. Echeverria, *Is the Penn Central Three-Factor Test Ready for History's Dustbin?*, 1 LAND USE LAW & ZONING DIGEST 3 (2000).

102 447 U.S. 255 (1980).

103 447 U.S. at 260. In another article, one of the authors suggests that the Agins tests are the result of *dicta* and are really based on substantive due process. Emperors and Clothes: The Genealogy and Operation of the Agins Tests, note 78 supra.

104 483 U.S. 825 (1987).

105 512 U.S. 374 (1994).

substantial advancement of a legitimate state interest. One of the striking results from the two cases is, at least in the case of the relinquishment of real property rights, the burden is reversed. Instead of requiring the challenger to show unconstitutionality of the government action, the state or local government now must justify the exaction. Moreover, that agency must also demonstrate that the exaction is roughly proportional to the needs created by the use approved.

D. Judicial Review -- Form Follows Function

Judicial review of administrative action should be consistent with the role of the courts, so that the level of review is dependent on the nature of the underlying action. In particular, we have identified three points on a spectrum of judicial review of state or local government administrative actions that demonstrate this contention. Judicial review will be more, or less, exacting of the agency, depending on the point on the spectrum on which the challenged action is found. For the ministerial action, the court has a fairly small scope -- the action is, or is not, required by the applicable law. It is with the other two points on the spectrum that controversy arises.

Fortunately, American constitutional and administrative law has, at the beginning of the last century, considered and disposed of the level of review, as well as the level of procedures, to be accorded various administrative actions.[106] Two cases in particular are the foundations for the federal and state administrative procedures acts that followed later in that century.[107]

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[106] For a more extended discussion of the level of review and state or local procedures, see Return of the Platonic Guardians, note 4, supra.

[107] Land use decision-making is, after all, a branch of administrative law, rather than some *sui generis* area of the law.

In Londoner v. City and County of Denver,[108] plaintiff challenged a local improvement district assessment undertaken under the City's charter. The assessment was levied on those abutting a certain street to pay for the paving of the street; however, the City did not provide any opportunity to be heard on the matter. Plaintiffs challenged the assessment, contending that they had a right as a matter of federal due process. The Supreme Court found that such right existed, saying:

> * * * [W]here the legislature of a state, instead of fixing the tax itself, commits to some subordinate body the duty of determining whether, in what amount, and upon whom it shall be levied, and of making its assessment and apportionment, due process of law requires that, at some stage in the proceedings, before the tax becomes irrevocably fixed, the taxpayer shall have an opportunity to be heard, of which he must have notice, either personal, by publication, or by law fixing the time and place of the hearing.[109]

Notice that the action of the City in this case revolved around an individualized determination of the amount due under the assessment. That individualized determination, as with the determination of the rough proportionality of an exaction of land in Dolan, requires notice and an opportunity to be heard.

On the other hand, a law of general application that does not deal with individual circumstances does not require such notice and an opportunity to be heard. In Bi-Metallic Investment Co. v. State Board of Equalization,[110] plaintiff landowner challenged an order of Defendant Board and the Colorado Tax Commission that would have increased the assessed value of all property in Denver by 40 percent. Plaintiff alleged it had the same rights to individual notice and an opportunity to be heard as in Londoner

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108 210 U.S. 373 (1908).

109 Id. at 385.

110 239 U.S. 441 (1915).

under the Fourteenth Amendment. Justice Holmes, a dissenter in Londoner, held that the federal Constitution was not implicated in this case:

> Where a rule of conduct applies to more than a few people, it is impracticable that everyone should have a direct voice in its adoption. The Constitution does not require all public acts to be done on town meeting or an assembly as a whole. General statutes within the state power are passed that affect the person or property of individuals, sometimes to the point of ruin, without giving them a chance to be heard. Their rights are protected in the only way they can be in a complex society, by their power, immediate or remote, over those who make the rule.[111]

Justice Holmes' opinion in Bi-Metallic foreshadows the famous footnote 4 in Carolene Products, i.e., that there is no relief from ordinary and generally applicable social and economic legislation that may cause harm to property rights, except through the ballot box.

Thus, Londoner and Bi-Metallic are important because the level of process "due" to those affected by general social and economic legislation and to those affected by its particular application are facts that are important, both as to the fairness of the proceedings, as well as to judicial review. These cases require an enhanced level of notice and opportunity to be heard as general legislation is applied in particular fact situations. With one important exception, noted immediately below, the pattern provided by the foundation provides the basis for the formulation of procedures to deal with application of comprehensive plans and general land use legislation to individual persons, places or situations.

E. Constitutional Conflation -- The Holdover of Substantive Due Process

As noted above, the United States Supreme Court has not favored substantive due process as a basis for constitutional decision-making since 1938 and is not likely to be

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[111] Id. at 445.

favored in the future. As suggested elsewhere,[112] the three-part test of substantive due process found in Lawton v. Steele[113] can now be found either in the three-factor test of Penn Central or the two-part test of Agins. Just as the tests for substantive due process are elastic and may be used to justify any number of outcomes, so also may the current takings tests. To be consistent with the close of the era of substantive due process as iterated in Carolene Products, planning and the regulation of property must be seen in the same light as other social and economic legislation, with deference given to the legislative judgment. To create an exception for real property under the takings clause of the Fifth Amendment is inconsistent with the history of that Amendment[114] and elevates real property to the same specially protected status as speech and religion. However, other property does not receive these special protections; if property were treated like any other commodity, symmetry in treatment would be accorded participants in land use hearings with those in other types of administrative hearings where individuated determinations were required.

IV. REFORMING LOCAL PROCEDURES

The procedural reforms proposed in this section have been taken from the APA Guidebook. The examples underlying most of these proposals are listed from Oregon law because the authors' land use experience centers on Oregon. Further, the basic framework of Oregon's land use system has been in place for over 30 years, allowing a

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[112] See Emperors and Clothes: The Genealogy and Operation of the Agins Tests, note 78, supra, and Return of the Platonic Guardians, note 4, supra.

[113] Note 74, supra.

[114] See Treanor, The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment, 94 Yale L.J. 694 (1985).

greater perspective in judging its strengths and weaknesses that might not be available in other jurisdictions.

A. The Nature of Proceedings

One of the most fundamental components to creating a clear and easily understandable land use process is for all statutes, plans and regulations to explicitly articulate the type of local decision being made. As explored above, the type of decision, ministerial, quasi-judicial or legislative, should directly effect necessary procedural safeguards and set the parameters of constitutional protections.

Determining what types of decisions constitute "land use" decisions may also have a great deal of impact on the type of judicial review available. In Oregon, the Land Use Board of Appeals (LUBA) maintains exclusive jurisdiction to review all local government "land use decisions." Appeals from LUBA go directly to the Oregon Court of Appeals, an intermediate appellate body. Whether or not the decision appealed is a "land use" decision is crucial to whether LUBA retains jurisdiction to hear the case.[115]

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[115] Or. Rev. Stats. 197.825; Or. Rev. Stats. 197.015(10) defines "land use decisions" to include:

> (A) A final decision or determination made by a local government or special district that concerts the adoption, amendment or application of:
>
> (i) The goals;
>
> (ii) A comprehensive plan provision;
>
> (iii) A land use regulation;
>
> (iv) A new land use regulation; or
>
> (B) A final decision or determination of a state agency other than the commission with respect to which the agency is required to apply the goals.

Further, LUBA is given the authority to hear limited land use decisions,[116] which include land division applications and ministerial approvals, such as site or design review.[117]

B. Assignment of Hearing Responsibilities

As discussed above, the traditional approach for allocating hearing responsibilities is a "top down" approach wherein the local government legislative body adopts the plan, zoning ordinances and amendments to that plan and ordinances. All quasi-judicial hearings are conducted by a planning commission, a Board of Adjustment or a Board of Zoning Appeals. This is often not the best approach because planning commissions are, in many cases, comprised of local volunteers who have neither the expertise nor the time to understand sophisticated applications and/or land use laws. Complex decisions, such as whether to grant a residential variance or conditionally permit a large shopping center upon environmentally sensitive property, fall on citizens who may not be adequately equipped with the tools needed to make consistent and legally supportable decisions.

The solution for an over-taxed and under-experienced planning commission is the employment of hearing examiners or officers. These are people who bring their experience in land use and planning law with them and, in turn, are compensated by the local government for their services. The Guidebook espouses the retention of expertise in the land use arena by allowing hearings officers to review particular types of permit applications, comprehensive plan amendments, and interpret and administer regulations.[118]

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116 Or. Rev. Stats. 197.825; Or. Rev. Stats. 197.015(12).

117 Id.

118 Meck, at 10-49.

Another way local government can create a more efficient and uniform hearing procedure is to clearly articulate the roles of sub-governing bodies. First, local regulation should explicitly determine who conducts initial review of the application. If planning staff provides these reports, they need to be equipped with the expertise to draft an informed staff recommendation. Second, local governments must identify the body that makes the initial decision and how or when decisions become "final" for purposes of appeal.

Finally, it is crucial that the local government adopt procedural hearing rules and that all decision-making bodies understand these rules. Timely decision-making requires established procedures that are consistently followed with every application. All board members must understand what the formal hearing process requires. This process may include: the right to cross-examination, oaths, subpoenas, sufficiency of the evidence in an administrative setting, official notice, procedures for creating a record of the hearing and the availability of a staff report in advance of the hearing.

C. Conduct of Hearings on Permits and Other Development Actions

Perhaps the most basic element for an orderly and efficient local land use procedure is the necessity for a clear and complete application. Local governments must identify their target audience in drafting application forms whose requirements are easily understandable. A legitimate local land use system is one where the applicant knows what is required and what to expect from the permit process.

Further, clear application requirements provide certainty to the applicant and the local government as to when the application is deemed complete. The Guidebook requires that the local government provide formal written notice of application

completeness within 28 days of initial receipt of the application.[119] Once the application is deemed complete, the local government is given 90, 120 or 180 days to approve or deny any development application, including record hearings or administrative reviews. An essential requirement to planning pursuant to the Guidebook is formal determination on when an application is complete. A written determination of completeness is necessary because it starts the clock for the local government to either approve or deny the application, including the resolution of all appeals.[120]

Municipal regulations must set forth time limits for approval and, should they be violated, effective remedies should also be provided. Possible remedies for violating the time limits include automatic approval or the right to seek mandamus. Local regulations must set out any exceptions to established time limits. These exceptions may include delays that are not within local government control or items such as comprehensive plan amendments. In addition, the exceptions may permit an applicant to consent or waive the time limitation. Time limit regulations may also require the local government to reduce the fee or to issue a refund.

Another procedural requirement should be a fee schedule, which, if clearly set out, avoids any allegations of impropriety. Typically, there are two ways to determine local government fee schedules. Some municipalities determine the fee based on a percentage of the actual cost of the proposed development application. The second alternative is to set fees by averaging the amount spent by that applicant in that

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[119] Meck, at 10-26, Or. Rev. Stats. 215.428(1); 227.178(1).

[120] Meck, at 10-23. Interestingly, the Guidebook prohibits waiver of the time limits for making a completeness determination. One rationale for this is that if the applicant were permitted to waive this the applicant might feel pressured by the local government to waive in an effort to appease the body that will rule on the substance of the application.

jurisdiction. A local government is also well served by providing fee waivers as incentives to participate for indigents or community planning organizations. Ultimately, the fee must be reasonably related to the cost of processing or reviewing the application.[121]

Local government regulations must set out, and staff must consistently follow, all notice requirements. Notice ordinances should specify the required notice media (such as

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[121] Or. Rev. Stats. 215.422(1)(c) provides:

> The governing body may prescribe, by ordinance or regulation, fees to defray the costs incurred in acting upon an appeal from a hearings officer, planning commission or other designated person. The amount of the fee shall be reasonable and shall be no more than the average cost of such appeals or the actual cost of the appeal, excluding the cost of preparation of a written transcript.

newspaper, posting, mailing or electronic), the contents of the notice,[122] as well as the remedies that are available to those who fail to receive notice.[123]

An orderly and efficient local land use process requires clear substantive standards that are consistently applied to all applications. States and local jurisdictions should require adoption of a separate planning document, known as a comprehensive or master plan, which becomes a land-use "constitution" providing long-term guidance and consistency to interpreting ordinances and regulations. Oregon has required that cities and counties adopt comprehensive plans and has required independent state agency review of those plans for the last 30 years.[124] However, more than two-thirds of the rest

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122 Or. Rev. Stats. 197.763(3) provides that notices shall:

(a) Explain the nature of the application and the proposed use or uses which could be authorized;

(b) List the applicable criteria from the ordinance and the plan that apply to the application at issue;

(c) Set forth the street address or other easily understood geographical reference to the subject property;

(d) State the date, time and location of the hearing;

(e) State that the failure of an issue to be raised in a hearing, in person or by letter, or failure to provide statements or evidence sufficient to afford the decision-maker an opportunity to respond to the issue precludes appeals to the board based on that issue;

(f) Be mailed at least; (timing requirements)

(g) Include the name of a local government representative to contact and the telephone number where additional information may be obtained;

(h) State that a copy of the application, all documents and evidence submitted by or on behalf of the applicant and applicable criteria are available for inspection at no cost and will be provided at reasonable cost; and

(i) Include a general explanation of the requirements for submission of testimony and the procedure for conduct of hearings.

123 Or. Rev. Stats. 215.416(6); 227.175(6).

124 Sullivan, "Remarks to University of Oregon Symposium Marking the Twenty-Fifth Anniversary of S.B. 100," 77 *Oregon Law Review* 3 (1998).

of the nation operates without comprehensive plan consistency requirements or without comprehensive plans at all. As a result, the authors cannot emphasize enough the need for all local governments to make land use decisions based on the standards and criteria set out in the comprehensive plan and ordinances that are consistent with – and adequate to carry out - the plan.[125]

Local governing regulations and the hearing bodies applying these regulations must understand how to condition approval. At first blush, placing conditions upon application approval seems like a great way to negotiate approval; meeting everyone's needs or concerns. However, conditions can be treacherous business and those imposing conditions must understand clear regulatory guidance on when or to what extent conditions may be statutorily or constitutionally imposed. If conditions are imposed in the form of exactions or dedications in exchange for conditional use approval, *Dolan v. City of Tigard* places the burden on the local government to show, not only the reasonableness of the goal pursued by the required dedication,[126] but also a "rough proportionality" between the impact of the application and the dedications required.[127] Thus, a local government could spend a great deal of time crafting elaborate conditions and then incur substantial legal fees and headaches proving, in the face of a takings

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125 Guidebook § 10-201(1): "The legislative body of each local government shall adopt, as part of its land development regulations, an ordinance that establishes a unified development permit review process for applications for development permits."

In Oregon, Or. Rev. Stats. 227.173 provides that "approval or denial of a discretionary permit application be based on standards and criteria, which shall be set forth in the development ordinance and which shall relate approval or denial of a discretionary permit application to the development ordinance and to the comprehensive plan for the area in which the development would occur and to the development ordinance and comprehensive plan for the city as a whole."

126 Nollan v. California Coastal Commission, 483 U.S. 845 (1987).

127 512 U.S. 374 (1994).

challenge, that the dedications imposed are "roughly proportional" to the impact of the application. In light of these limitations, the local government should consider requiring formal acceptance of the conditions by the applicant following issuance of the final order, or entering into development agreements between the local government and the applicant to ensure compliance with conditions.

Because of the limited time period that the local government has for completing the approval or denial of an application, a consolidated permit review process is often the easiest way to resolve all the issues at once. When necessary, due to the complexity of the development requested, local governments should be encouraged to consolidate the permit process, such that the local government may review and rule on all permits, including zoning changes, at one time.[128] For example, design review and consideration of zoning map amendments can be simplified by one record hearing and one record appeal.[129]

All local ordinances or state statutes should establish procedures for dealing with bias, conflicts or ex parte contacts of decision-makers. Local decision-makers do not live in a bubble, shut away from the rest of society. Rather, they are typically fairly visible members of the community who are constantly exposed to political trends, editorials by the press and influenced by fellow residents and businesses. In many small communities, it is difficult to find a quorum of decision-makers who do not have a personal or professional interest in the outcome. Additionally, allegations of impartiality can destroy the credibility of boards and its members. Procedures must be established so that board

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128 Meck, at 10-39.

129 Id.

members know when influences from outside become "substantial" and what remedies will lead to a fair process for all involved.[130]

As challenging as it may seem, local governments should try to prohibit conflicts or bias of its decision-makers by explicitly setting out a procedure to deal with ex parte communications. Ex parte communications are permitted and are often necessary for making an informed decision.[131] However, record hearings require additional procedural safeguards to assure an unbiased decision-maker. The Guidebook proposes two alternatives for dealing with "substantial" ex parte communications, excluding *de minimus* contacts. The first alternative is to ban ex-parte contacts altogether. The second alternative requires disclosure of the communication into the record so that it may be used as a prejudicial error on appeal. The drawback of the second alternative is that the onus for disclosure rests with the decision-maker only and the challenger must show direct prejudice to the outcome.[132]

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130 Or. Rev. Stats. 227.180 states, for example:

> (3) No decision or action of a planning commission or city governing body shall be invalid due to ex parte contact or bias resulting from ex parte contact with a member of the decision-making body, if the member of the decision-making body receiving the contact:
>
> > (a) Places on the record the substance of any written or oral ex parte communications concerning the decision or action; and
> >
> > (b) Has a public announcement of the content of the communication and of the parties' right to rebut the substance of the communication made at the first hearing following the communication where action will be considered or taken on the subject to which the communication is related.
>
> (4) A communication between city staff and the planning commission or governing body shall not be considered an ex parte contact for the purposes of subsection (3) of this section.
>
> (5) Subsection (3) of this section does not apply to ex parte contact with a hearings officer.

131 Meck, at 10-28.

132 Id. at 10-36.

Once a decision is reached, local government regulations must provide an appeal route that is clear and efficient. The local government has several options, including the Guidebook approach of creating a specialized review board to hear appeals, traditional review by a board of commissioners or city council, or skipping the local government appeal altogether and allowing direct judicial review. Once again, appellate fees must be reasonable. Local regulations must set out whether review of the decision will be based on the record or will be *de novo*, and, if the decision will be based on the record, what situations allow for supplementing the record.

A statutorily mandated procedural limitation that has served Oregon well is the requirement of "raise it or waive it."[133] Oregon law limits all appellants of local government decisions to those issues that they brought up at the hearing below. Parties must have raised the argument or issue below or they are deemed to have waived the argument or issue on appeal. This can be a double-edged sword depending on previous participation in the decision process. The scope of issues on appeal may be very short if one arrives late in opposition and possible avenues were not pursued in previous proceedings. On the other hand, during the hearing process, applications and issues often change significantly and, even though the issues may have been raised initially, other issues often arise later that must also be addressed in order to survive a waiver challenge.

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[133] Or. Rev. Stats. 197.763(1) states:

> An issue which may be the basis for an appeal to the Land Use Board of Appeals shall be raised not later than the close of the record at or following the final evidentiary hearing on the proposal before the local government. Such issues shall be raised and accompanied by statements or evidence sufficient to afford the governing body, planning commission, hearings body or hearings officer, and the parties an adequate opportunity to respond to each issue.

Another statutory procedural provision that has improved the efficiency and fairness of the Oregon land use system is the "no changing the goal posts" rule.[134] That rule provides that approval or denial of an application must be based on the standards and criteria that were applicable at the time the application was deemed complete. This is especially important, after considering that land use regulation in Oregon is not just local; local regulations must be consistent with regional and state policies. As noticed earlier, planning is constantly evolving. Twenty-year vision plans and implementing regulations are constantly being created, reviewed and revised to remain current and retain consistency. Thus, it is important that an applicant knows beforehand the state of the law to get the criteria by which their application will be judged.

V. REFORMING JUDICIAL REVIEW

The timing of judicial review is often confusing as federal and state courts maintain different rules. Federal courts' ripeness rules require that an "actual case and controversy" exist before jurisdiction is proper.[135] Many state courts do not require such formal ripeness requirements, making review by state court easier. However, many states' statutes specify when a land use decision is deemed final for purposes of appeal or provide "exhaustion" rules such that appellate jurisdiction is proper.[136] The Guidebook

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[134] Or. Rev. Stats. 227.178(3): If the application was complete when first submitted or the applicant submits the requested additional information within 180 days of the date the application was first submitted and the city has a comprehensive plan and land use regulations acknowledged under Or. Rev. Stats. 197.251, approval or denial of the application shall be based upon standards and criteria that were applicable at the time the application was first submitted.

[135] Meck, at 10-62, 10-71, 10-73.

[136] Id. See also Or. Rev. Stats. 197.015(10).

suggests legislation that links federal and state court jurisdiction by providing a procedure for a remand to the state court, as well as resolution of *res judicata* issues.[137]

Standing is another procedural limitation that must be clearly spelled out in statutes to permit orderly appeals. The biggest problem with standing arises in the context of "third parties." Third parties are generally organizations or non-residents who challenge a particular decision based on political or social concerns, even when the applicant, local government and immediate neighbors have agreed on a decision. Some states statutorily proscribe standing to those parties who participated in the local government decision-making process. Other states require that the party seeking standing must be "aggrieved" by the land use decision.[138] If the standard is limited to those that are "aggrieved," the Guidebook suggests that a "clear and tailored" definition is necessary so that parties will know, at the outset, whether they will have standing to appeal.[139] "Aggrieved" is defined in the Guidebook to mean:

> that a land use decision has caused, or is expected to cause [special] harm or injury to a person, neighborhood planning council, neighborhood or community organization, or governmental unit, [distinct from any harm or injury caused to the public generally]; and that the asserted interest of the person, council, organization, or unit are among those the local government is required to consider when it makes the land use decision.

Like the timing requirements for local government decision-making, statutes should proscribe time limits for judicial review. In Oregon, a Notice of Intent to Appeal must be filed within 21 days after the final determination of the local government.[140] In

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137 Id.

138 Utsey v. Coos County, 176 Or. App. 524, ___ P.3d ___ (2001), pet. for rev. pending.

139 Meck, 10-64.

140 Meck, at 10-73; Or. Rev. Stats. 197.830(3), (4); OAR 661-10-0015.

order to further reduce the expense and disruption to local government planning while the appeal is pending, the Guidebook calls for expedited judicial review where the hearing must be set within 60 days after the record has been submitted. Similarly, Oregon statutes proscribe that LUBA, the agency charged with hearing all local government appeals, make its final decision within 77 days after it receives the record.[141] If LUBA fails to issue its final order within 77 days, a party may bring a mandamus action to compel issuance of that order.[142]

Since clear time limits and timely resolution are key determinations, statutes or administrative rules must set forth the circumstances within which a stay of the proceeding will be permitted.[143] Every motion for a stay should set forth the factual basis for the motion. Considerations for determining whether a stay should be granted include whether the stay is necessary to prevent irreparable injury and whether the stay will cause substantial harm to other parties. In certain cases, the court may require filing of a security or financial undertaking before a stay may be granted.[144]

Appellate review of factual issues must be based on the record made before the local decision-maker.[145] The Guidebook provides for a limited series of exceptions to introduce new evidence to supplement the record. These circumstances include: (1) for standing or to disqualify a member of the decision-making body; (2) items that were

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141 Or. Rev. Stats. 197.830(13).

142 Id.

143 Meck, at 10-77; OAR 661-10-0068.

144 Meck, at 10-77; OAR 661-10-0068(4).

145 Meck, at 10-79.

improperly excluded from the record hearing; and (3) to correct ministerial errors. [146] The Guidebook includes an additional option to admit additional evidence based on the court's own discretion.[147] Permitting an appellate court, in its own discretion to add additional evidence to the record can sometimes be taken too far, undermining the entire review based on the record requirement.[148]

The Guidebook calls for clear statutory provisions that govern the court's standards for granting relief. Unlike the first two waves of model legislation, the Guidebook allows for remand of land use decisions that are inconsistent with the local comprehensive plan.[149] Guidebook standards for review include "erroneous interpretations of law" and substantial evidence challenges based on the findings of fact and the evidence in the record.[150] Additional state and federal constitutional causes of action are also available. However, the Guidebook does not contemplate court-awarded compensation as part of judicial review. Instead, petitioners may join a claim under Section 1983 of the Federal Civil Rights Act, 42 U.S.C. §1983 claim for compensation with its other claims for review.[151]

In Oregon, administrative review occurs by LUBA. Created in 1980, LUBA is comprised of a three-person, governor-appointed administrative agency that maintains

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146 Meck, at 10-80.

147 Id.

148 See, Sullivan, Review on the Record Below, in Smith, ed., How to Litigate a Land Use Case, supra, note 62.

149 Meck, at 10-81, 10-83; "Local comprehensive plan" is defined in Chapter 3 of the Guidebook.

150 Id. at 10-82.

151 Id. at 10-82; see section 602(3).

exclusive jurisdiction to hear all land use cases in the State of Oregon.[152] "Land use decision" includes quasi-judicial or legislative determinations by municipal, county and regional governments and of special districts and state agencies.[153] By statutory provision, LUBA must reverse and remand land use decisions that (a) violate the Constitution, state goals or the applicable comprehensive plan, (b) are based on an error in law, or (c) have an inadequate evidentiary basis.[154] Appellate review of LUBA decisions is taken directly to the Oregon Court of Appeals. Agency adjudication in the land use field provides for expertise, allows for greater accuracy and consistency through a uniform body of precedent, is more efficient, and saves cost and time to the general jurisdiction court docket.

Rather than creating an agency to review all "land use decisions" like LUBA, the State of Washington established special independent agencies with authority to review particular types of land use decisions. These land use hearings boards consist of three regional appeals boards that are authorized to rule on inconsistent application of county or city plans under the Growth Management Act or the Shoreline Management Act.[155]

Even after initial judicial review is completed, statutes must provide procedural guidance for further appeal. Like the 21-day limit for bringing the original appeal, Oregon statutes require notice of appeal before the Oregon Court of Appeals be filed within 21 days after LUBA issues the final decision.[156] LUBA must submit the record

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152 Or. Rev. Stats. 197.825.

153 Id.

154 Or. Rev. Stats. 197.830(5) – (10).

155 R.C.W. §36.70A.280.

156 Or. Rev. Stats. 197.850(3)(a).

within seven days after the service of petition to appeal, and review by the Court of Appeals is limited to the record.[157] Permissible grounds for remand or reversal of a LUBA decision include: (1) substantive or procedural error (but only if the procedural error substantially prejudiced the rights of the petitioner); (2) unconstitutional decision; or (3) a decision not based on substantial evidence in the whole record.[158]

Finally, procedures must be established to guide remand proceedings. It is here that both the Oregon land use system and the Guidebook fall short. Like a book that is missing its last page, Oregon statutes fail to mandate local government remand procedures and Chapter 10 of the Guidebook ends after judicial review. Time limits and specific decision criteria must be in place so that remand proceedings are timely and comport with due process requirements. For example, there is no requirement in Oregon that, in making its subsequent decision on remand, the decision-maker address all of the errors sustained by LUBA.

VI. CONCLUSION

This article attempts to trace the history of national efforts to establish, or change, land use procedures in the United States. It is ironic that the earliest and weakest of those efforts, the SZEA, has been the most widely adopted and durable set of procedures in use. The ALI Code finally coalesced years of criticism of the SZEA. Nevertheless, the Code was largely ineffective, hampered by the refusal of its drafters to require the adoption of the comprehensive plan as the standard against which land use regulations and actions may be judged. Moreover, the Code did not address the difference between policy-

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157 Or. Rev. Stats. 197.855(5), (8).

158 Or. Rev. Stats. 197.855(9).

making and policy application across the broad range of municipal planning actions. Growing Smart has the twin virtues of thought and internal consistency, both of which will be necessary to overcome the comfort and familiarity of long-established procedures.

Reform of the mélange of different state and local procedures is supported by the classification of land use decisions under traditional administrative law principles. The distinctions among mandatory, or ministerial, actions, policy-making, or legislative, actions, and policy-applying, or quasi-judicial, actions are known to those familiar with administrative or public law. Moreover, each of these classifications appears to have its own associated form and level of intrusiveness through judicial review.

What is less clear, however, is the "fit" of these classifications with constitutional limitations on land use controls. While a wide scope of judicial intrusion may be justified in review of ministerial acts, where usually the only question is one of law, a more deferential scope (in principle, if not in practice) is appropriate in review of policy formulated by another branch of government. The wide range of treatment of policy application by the courts provides no uniform rule to judicial review of local quasi-judicial land use decision-making. This article suggests that reference should be made to the very nature of the decision under consideration, as was done many years ago by the federal Supreme Court in Londoner and Bi-Metallic. Such an approach may overcome the fog of diverse precedent in this area.

Quasi-judicial decision-making should generally be reviewed on the record of the decision below in order to avoid overly intrusive invasions of the functions of another branch of government in applying policy. Moreover, that review should be limited to assuring that the administrator or agency (1) remains within constitutional and

jurisdictional bounds, (2) heard the matter consistent with statutory and procedural due process limitations, (3) properly interprets the law, and (4) that necessary facts for the decision are supported by substantial evidence in the whole record.

This conceptual reform must be undertaken against the background noise of an insufficiently developed constitutional jurisprudence in the field of land use. While substantive due process may be dead in other fields of public law, its ghost lives on in the land use field, due to the time warp created by the absence of activity before the United States Supreme Court from 1928 to 1978. This gap allowed the caselaw to fester on an analysis that is essentially grounded in substantive due process. The difficulties of constitutional interpretation were compounded by the anomalous decision of Justice Holmes in Pennsylvania Coal and the creative jurisprudence of that Court in interpretations of the takings clause and other constitutional provisions that mark the survival of substantive due process in other forms.

Reform of constitutional law in the land use field will take years, if not generations, because of the economic interests involved and the composition of the Court in the present and the immediate future. Reform is likely to be the result of swings in the political, economic, and jurisprudential views on the Court and its dialogue on the subject with lower federal and state courts, the academy, and popular opinion. Yet perhaps too much is ascribed to changes in federal constitutional interpretation and the psephology of the Court in achieving reform, at the expense of practical legislative reform at the state and local levels. Lasting and concrete reform is more likely to occur in the trenches of legislative action to establish achievable standards of fairness and judicial review proportional to the nature of the decision under review. Such legislative reform may well

provide more meaningful and beneficial change than any Pauline conversion of the justices in formulating general rules for the conduct of land use hearings and judicial review of those proceedings.

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