SUBSTANTIVE DUE PROCESS AND AMERICAN PLANNING LAW

Certain jurisprudence of the Supreme Court continues its profound, and perhaps baneful, effect on American planning law. That jurisprudence relates to the invented constitutional doctrine of substantive due process, which remains popular among lawyers attacking and defending land use actions. This article analyzes that doctrine, attempts to demonstrate its inadequacies, and suggests alternatives to its use.

Most planners haven't heard the term "substantive due process," but they have heard of the terms that are associated with it, such as "public health, safety, morals, and general welfare" (the axiom often used to defend a land use regulation or action) or "arbitrary and capricious" (the axiom used to attack a regulation or action). These words do not appear in the federal constitution, so how can they be used as part of a constitutional attack or defense?

Most people have heard about "due process." Some may know it is derived from the Magna Charta of 1215 to provide for some form of procedural fairness when one of the barons who sought King John's assent at Runnymede might find himself facing loss of life or property. That notion of procedural fairness, to provide the legal process that was "due" under the circumstances, found its way into the federal constitution through the 14th Amendment, which prohibits states (and derivatively local governments) from depriving "any person of life, liberty, or property, without due process of law." However in *Mugler v. Kansas*,[1] Justice John Marshall Harlan appeared to enlarge the powers of the Supreme Court in *dicta* in a case upholding Kansas' enactment of prohibition:

> It does not at all follow that every statute enacted ostensibly for the promotion of these ends, is to be accepted as a legitimate exertion of the police powers of the State. There

[1] 123 US 623 (1887).

> are, of necessity, limits beyond which legislation cannot rightfully go. While every possible presumption is to be indulged in favor of the validity of a statute,* * * the courts must obey the Constitution rather than the law-making department of government, and must, upon their own responsibility, determine whether, in any particular case, these limits have been passed. * * * 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 legislature 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.

This *dicta* (a portion of a decision not necessary to decide a case) ultimately became a standard analysis for government actions in the nineteenth and early twentieth centuries. The equal protection, privileges and immunities, and takings clauses were not robust at all during this period. The contours of substantive due process were set in *Lawton v. Steele*[2] in 1894:

> 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.

Thus, the Supreme Court found it appropriate to "second guess" state and local government legislation and actions so that they could review both their ends and means and could also determine whether either were "unduly oppressive." This time is often referred to as the *Lochner* era[3], because it was characterized by the high court weighing the wisdom of legislation under the

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[2] 14 S. Ct. 499 (1894)

[3] The era was named for *Lochner v. New York*, 123 U.S. 623 (1905), where the court invalidated a limit on working hours for bakers. The dissent of Justice Holmes effectively accused the majority of improperly substituting its judgment for that of the New York legislature on the wisdom of the legislation.

guise of constitutional law. However by the end of the 1930s, the Supreme Court abjured most inquiries into economic and social legislation.[4]

How is this relevant to planning law? The answer is that the U.S. Supreme Court decided only 4 cases involving land use before 1974 (when the Supreme Court began to review land use cases once again), two of which were important[5], and all of which involved substantive due process challenges. Between 1928 and 1974, there were frequent constitutional challenges to land use regulations and actions, but the takings clause of the Fifth Amendment was not the weapon of choice for plaintiffs. Overwhelmingly, that weapon was substantive due process, i.e., that the challenged regulation or action did not advance the public health, safety morals or general welfare or was "arbitrary and capricious." The standard was sufficiently vague to accommodate almost any argument and provide cover to judges to strike down regulations or actions that they did not understand or with which they did not agree. For lawyers, it gave the opportunity to be inventive and successful for reasons that might not be related to the merits of their case.

But for planners, the use of substantive due process was a disaster. It gave the edge to style over the application of standards and elevated the predilections of the judge to a greater degree. More importantly, it retarded the growth of planning law, but by allowing a so-called constitutional standard to rule, a standard that had been abandoned in other areas of the law when substantive due process fell out of favor in the Supreme Court. Nevertheless, the substantive due process land use decisions from the 1920s have never formally been overruled and provide

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4 *See* the famous "footnote 4" in *United States v. Carolene Products Company*, 304 U.S. 144 at 152 (1938).

5 *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926) and *Nectow v. Cambridge*, 277 U.S. 183 (1928).

precedent for lawyers who wish to use that analysis. Moreover, state courts apply their own state constitutions (most of which have a due process clause) and apply their state due process clauses in a similar way. Thus, because the only cases on land use decided by the Supreme Court before 1974 were substantive due process cases, lawyers continue to cite them and courts continue to use the analysis they have created. Reliance on substantive due process hinders the development of American planning law, which should be concerned with establishing standards adopted by elected bodies for cabining land use regulations and actions.

The best of those standards is an adopted comprehensive plan. An adopted plan will provide policy guidance for those adopting or administering policy, but more importantly will give review bodies something more than their own predilections on which to base their conclusions. Perhaps local governments are deterred by the time and cost of preparing such a plan. More likely, it is the potential loss of "flexibility" in decision-making that motivates lawyers, planners, developers, neighbors and local government officials to allow them to retain their influence. In any event, the fear of having an outside reference against which land use regulations and actions are reviewed, and a preference to "roll the dice" under substantive due process is unfortunately still the default position in many states. The plan should take the place of the outdated view that judges can, and should, determine what is good for the rest of us.

Whatever the reason for its continued use, substantive due process is suspect in origin, uncertain in application, and a hindrance to providing a planning system in which adopted policy governs land use regulation and action. The planning world would be far better off without it.