THE TAKING ISSUE

A Study of the Constitutional Limits of Governmental Authority to Regulate the Use of Privately-owned Land Without Paying Compensation to the Owners.

Written for the Council on Environmental Quality by

Fred Bosselman
David Callies
John Banta
FOREWORD

Few subjects are more fraught with emotion and less understood than the rights of private property and the Constitutional limits to public control of those rights. If this is a highly charged emotional issue, it is no less serious a matter of national concern, as evidenced by the current debate over land use legislation in the Congress and in State legislatures throughout the country.

In a continuing effort to encourage informed public debate on land use reform, the Council commissioned the following study, "The Taking Issue." It is a natural sequel to the authors' earlier report to the Council entitled "The Quiet Revolution in Land Use Control," which examined a number of innovative State land use control initiatives. Since publication of "The Quiet Revolution..." a number of States have passed new land use legislation -- Florida, California, New York and Oregon, for example -- while others, such as Maryland, have confronted serious obstacles to such reforms. At the heart of most controversies over proposed State land use legislation is a fundamental legal question: What are the Constitutional limits to the control of private land? That is the issue which this report addresses. It offers an informative insight into the political and legal history of our Constitutional powers affecting land, the various court interpretations of those powers, and options open to future judicial and legislative action.

We are hopeful that this study of "The Taking Issue" will serve to clarify and inform public debate, in order that America's future can be better served by a more rational system of land use policies and controls.

Russell E. Train
Chairman

Executive Office of the President
Council on Environmental Quality
Washington, D. C.

July 9, 1973
PREFACE

This book has been written in response to the concern of the Council on Environmental Quality about the interrelationship between environmental quality and constitutional law. As the regulation of land use becomes an increasingly important component of programs for enhancing environmental quality the constitutional parameters within which land use regulation must operate become increasingly important.

Although land use regulation can raise issues under a variety of constitutional clauses this study focuses on the clause of the Fifth Amendment to the United States Constitution that poses by far the most significant restraint on the regulation of land use, the "taking clause":

"... nor shall private property be taken for public use without just compensation."

This report traces the distinction between a valid regulation of the use of land and a "taking" that requires compensation, showing the history of the distinction and projecting probable future trends in this area of the law.

The report is divided into four parts:

Part I presents an overview of current land use problems, showing the way in which the taking issue is affecting land use decisions in all parts of the country. It is entitled "The Pervasiveness of the Taking Issue."

Part II traces the concept of "taking" from its origins in Medieval England, down through British and Colonial American history, to the adoption of the "taking clause" in the United States Constitution. It follows the development of the taking clause through Supreme Court decisions of the Nineteenth Century to the major judicial expansions of the taking clause in
the early Twentieth Century. This part is entitled "Taking and Regulation Through Seven and a Half Centuries."

Part III examines the current United States case law on the taking issue. The cases are analyzed from three different perspectives: 1) according to the similarity of their underlying facts; 2) according to certain general principles suggested by legal scholars; and 3) according to the date of decision. This Part is entitled "The Regulatory Taking in Current Law."

Part IV projects possible future trends in the interpretation of the taking clause as it affects the regulation of land use, and proposes a series of four alternative strategies for dealing with the issue, ranging from frontal attack to complete capitulation. This Part is entitled "The Future of the Taking Issue."

This study is an outgrowth of The Quiet Revolution in Land Use Control, an examination of new regulatory techniques which we wrote for the Council on Environmental Quality in 1971. Observation of these techniques in action convinced us of the importance of the taking issue. The reader is referred to that volume for more detailed background information on new types of land use regulation.

This work was made possible by a research grant from the Council on Environmental Quality. We would like to express our deepest appreciation to the members and staff of the Council, not only for their financial assistance but for the creative help in defining this project and analyzing its conclusions.

We would also like to acknowledge and express our appreciation to Stanley Katz, Professor of Legal History at the University of Chicago Law School, J. F. Garner, Professor of Public Law at the University of Nottingham, Professor and Mrs. Albert Kiralfy, University of London, and Sir Desmond Heap, President of the Law Society, all of whom were of great assistance to us in developing the historical analysis in this report, but none of whom bears any blame for the conclusions derived therefrom. We would also like to express our appreciation.
to the London Library (St. James Square), the University of London's Institute for Advanced Legal Studies, and the Library of the House of Commons, for making their normally-private facilities available to us.

Research assistance in the preparation of Part I was provided by Irene Holmes and Robert Snyder; in Part II by Victor Bass, James Deen, James Friedman, Norden Gilbert, Scott Reznick and Merideth Wright; in Part III by Donald Rickertsen, all students in law or history at the University of Chicago. Much of the historical research necessary for this report required examination of original sources and the help of these students proved particularly valuable.

Countless persons responded graciously to our inquiries about current problems under the taking issue that provided the material for Part I. Listing their names would be impossible but we are very thankful for their valuable assistance.

The Task Force on Land Use and Urban Growth of the Citizens' Advisory Committee on Environmental Quality provided a very valuable sounding board for some of our ideas. We would like to express our appreciation to the chairman, Laurance Rockefeller, and to the executive director, William Reilly.

Finally, the study of English law necessary for this report was greatly aided by a travel and study grant from the Ford Foundation.

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INTRODUCTORY NOTE

A CONSTITUTIONAL SLICE THROUGH THE ENVIRONMENT

"Each of these separate views of the environmental system is only a narrow slice through the complex whole. While each can illuminate some features of the whole system, the picture it yields is necessarily false to a degree. For in looking at one set of relationships we inevitably ignore a good deal of the rest; yet in the real world everything in the environment is connected to everything else."

Barry Commoner,
The Closing Circle
23 (1971)

The complexity of environmental issues is notorious. Why, then, have we chosen to pay such close attention to a single point of law that we must examine over 700 years of legal history and analyze hundreds of court decisions? Is the issue really that important?

Just as the analysis of environmental problems demonstrates their interconnectedness, so the search for solutions also involves the fusing together of disparate elements. A solution must make economic sense, have political acceptability, avoid harmful side effects, allow efficient administration . . . and on and on. Solutions to environmental problems are like chains with many interconnected links.

The taking issue is the weak link in many of these chains. All over the country, as Part I demonstrates, attempts to solve environmental problems through land use regulation are threatened by the fear that they will be challenged in court as an unconstitutional taking of property without compensation.

iv.
When these challenges occur it is not enough to respond that everything is interconnected. While breadth of judicial vision is to be encouraged, response to the legal challenge must still be made in the framework of traditional legal concepts. This constitutional slice through the environment will be the field on which the battle is fought.

We do not claim that the strengthening of this one link is a quick cure for all environmental issues. Land use regulation is only one of many tools, suitable for some but not all environmental problems, and the chain of land use regulation has many other links, constitutional and otherwise. Nevertheless, if the challenge posed by the taking issue can be overcome we believe it will make a very significant impact on environmental quality.

If this book seems technical and detailed, it is because it is designed to assist government officials and attorneys who seek to fashion solutions to environmental problems. They are not seeking catchy cliches but detailed documentation from which they can work. That is what this book seeks to provide.
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PART I

THE PERVERASIVENESS OF THE TAKING ISSUE

Introduction

North, east, south and west -- debates over land use are heard in all parts of the country. And whenever problems are severe and strict regulations are suggested, the taking issue is likely to rear its head. Any new regulation brings charges by landowners and developers that their property is being taken without compensation.

One can appreciate the importance of the taking issue only when one sees the tremendous variety of disputes regarding the use of land which are affected by the taking issue: such varied programs as, e.g., wetlands protection, development timing, and historic preservation, all raise issues under the taking clause.

The nature of these issues is remarkably similar throughout the country. Although regional accents vary, the picture of new regulatory programs facing claims under the taking clause can be duplicated in almost every state of the union. A review of some of these current issues will provide an overview of the impact of the taking issue.

We were not surprised to find the taking clause a pervasive problem. We were surprised, after the hundreds of interviews that formed the basis of this Part I, to find the fear of the taking clause as powerful as it appears to be.

Many people seriously believe that the Constitution gives every man the right to do whatever he wants with his land. Foreign concepts like "environmental protection" and "zoning" were probably sneaked through by the Warren court!

Many more people recognize the validity of land use regulation in general, but believe that it may never be used to reduce the value of a man's land to
the point where he can't make a profit on it. After all, what good is land if you can't make a profit on it.

The courts have never adopted either of these philosophies, as Part III demonstrates. Yet they are so influential with the thousands of local government officials who play the major role in regulating the use of land that these philosophies have an independent existence above and beyond the law.

The right to make money buying and selling land is a cherished American folkway, and one that cannot be lightly ignored. But in an increasingly crowded and polluted environment can we afford to continue circulating the myth that tells us that the taking clause protects this right of unrestricted use regardless of its impact on society? Obviously not, yet we must not let concern for the environment blind us to the fact that regulations have real economic impact on real people, and we must search for solutions that will take their interests into account.
CHAPTER 1

THE ATLANTIC COAST GRAPPLES WITH ITS ENVIRONMENT

From the rocky hills and shores of New England to Chesapeake Bay, as elsewhere, "land" is becoming more and more crucial as an issue, before legislatures, in the courts and among the public at large. Titled "the issue of this [1973] legislature" in Maine 1/ and "in jeopardy" in the Christian Science Monitor, 2/ land had become the focus of attention in all of the Atlantic States. Each state is responding in its own way to the new concern over the use of its lands.

Connecticut, which has shown a special concern for its tidal wetlands, 3/ and questions "of the public trust in the air, water and other natural resources of the state," 4/ provides good examples of the type of controversy generated by these new regulations.

The Great Salt Marsh, lying between Stratford and Bridgeport, Connecticut, has gradually decreased in size due to filling for industrial development, including the Bridgeport airport. Rykar Industrial Corporation has long owned a piece of the marsh as a site for future industrial development. 5/ Unlike many of its neighbors however, it failed to undertake its development before the adoption of the new Connecticut Wetlands Statute.

Rykar's parcel adjoins a tidal estuary where marine fisheries are again commercially viable after dredging activities which ended some 20 years ago, and it also

5. Interview with Alexander Goldfarb, October 6, 1972.
adjoints a popular beach and recreation area. Now Rykar finds that plans to fill portions of this remnant of the tidal marshes, whose yellow grasses, salt hay and myriad forms a plant and animal life support fin and shell fishes in the adjoining sound, are stymied. As a result the firm has brought suit demanding over $75 million in compensation for a taking of their land. 6/

In another Connecticut controversy, environmental groups are asserting the "public trust" in preserving the water supply, flood protection and natural ecological resources to prevent the owner of a portion of an inland swamp from operating a dragline and filling the land. The Redding Conservation Commission alleges that filling would result in the destruction of the swamp and its value as a flood plain, and in the pollution of the Saugatuck River and public lands through which it flows. 7/ The owner, Mr. Bonsignore, argues that any law which would prevent his filling of the property is an unconstitutional taking.8/

Since the early 1960's, Massachusetts has enforced similar laws calling for the protection of public interests in wetlands. 9/ Development proposals require a permit which may be accompanied by an order setting standards or special procedures to protect the ecology.

While acutely aware of the problems under the taking clause, the Department of Natural Resources and local conservation commissions have continued to enforce the growing array of state and local regulations which are available to them including successive amendments

6. Rykar Industrial Corporation v. Commissioner of Agricultural Resources, Superior Court, Hartford County, Conn. No. 170229, filed April 2, 1971. The tract involved measures 277 acres and is one of the few remaining undeveloped waterfront sites suitable for a deep water port between Boston and New York City. The taking issue is considerably complicated since much of the land may be submerged at high tide and thereby be subject to ancient doctrines regarding state ownership of land under the seas.

of the Wetlands Act and a Scenic Rivers Act adopted in 1971. Protracted litigation has made local commissioners and the Massachusetts Department of Natural Resources wary of extremely strong protective orders. Nonetheless, Dr. Henry Foster, Massachusetts' Secretary of Environmental Affairs, states that "the Wetlands Act seems to have survived despite the taking issue."  

Tidal wetlands in New Hampshire find their official defenders among the members of the state's Water Resources Board, who have become increasingly vigilant as earlier wetlands protection acts have been updated to meet contemporary standards. Donald W. Stever Jr., an Assistant Attorney General in the Environmental Protection Division, points to litigation brought by the Sibsons, landowners in Rye, New Hampshire, as evidence of the legal longevity of the taking issue. The Sibsons had applied for permission to fill a portion of the Hampton-Seabrook Marsh in Rye, and contend that the denial of such permission amounts to a taking of their property without compensation, since it effectively denies them the right to use their land. The Sibsons have taken their case to the State Supreme Court twice and were again before a local court at the end of 1972.

9 acres in area.

8. Id., Answer to amended complaint, August 1, 1972.
10. M.G.L.A. Ch. 43, Sec. 17B (October 6, 1971).
11. Telephone interview with Dr. Henry Foster, Massachusetts' Secretary of the Environmental Affairs, August 9, 1972.
12. Id.
13. New Hampshire R. S. A. 483 (formerly under the jurisdiction of the New Hampshire Port Authority). Last reported in 110 N.H. 8 (1969) and currently before the Rockingham County Superior Court.
15. Id., Complaint, paragraph 6.
Upper New England is short on tidal marshes but long on tourists. As the New York Times recently put it:

"That 'little place in the country' may become a fading dream for many urban residents because of reaction to the explosive pressures for land development in the Upper New England states." 17/

Vermont adopted a comprehensive program of development regulation designed to control the mushrooming facilities for invaders from the South. Officials administering the program appear to be acutely sensitive to the danger that their decisions could be enshrined in legal precedent as an unlawful taking. Significantly, recent amendments clarifying the standards and procedures applicable to both the planning and review process and adopting a capability and development plan also make access to the lower state courts possible as an avenue of appeal from initial environmental review decisions. 18/

A proposal to drain and dredge a beaver pond, Ryder's Pond near Wilmington, to create a recreational lake in the midst of an approved vacation home development was one in which the District Commission's original position specified that the pond must be left in its natural state as a "rare and irreplaceable natural resource." 19/ After what was characterized as a "rough fight on the taking issue" at the district level, both the state and the developer retreated from their original positions. 20/ The revised development application called for temporarily lowering the water level about five feet, clearing out some dead trees and "muck," and the creation of two small beaches at its ends. 21/ A large peat bog which harbored several rare species of plants and wildlife

18. 1973 - H.326 amending 10 U.S.A. Sections 6001, 6025, 6043, 6046(b), 6085(c), 6086(a) and 6089; 32 U.S.A. Sec. 3481 and to add 3 U.S.A. Sec. 805(e).
19. Haynes Brothers, Inc., Applications #700001 and #2W0060, District Environmental Board No. 2.
21. The pond measures roughly 40 acres in area.
would be preserved under this plan. 22/ Schuyler Jackson, Associate Director of the environmental agency noted that he felt the case never reached the "nuts and bolts economic issues," but that the compromise reached at the state level did avoid the "close" taking question. 23/

In another action, a District Commission denied a Mobil Oil Company application for a permit to construct a gas station on a prime scenic interchange.24/ The state granted the permit subject to design standards. For example, instead of installing a neon sign, Mobil agreed to install a wooden sign with a low level of illumination. Certain other concessions were also made with respect to the design of the station's exterior. The state agreed to this compromise for fear that denial of all development would not stand up against a court challenge based on the taking issue. 25/

In Maine, the Land Use Regulation Commission is drafting land use regulations for the vast unincorporated and unorganized areas of northern Maine. Assistant Attorney General Steve Murray notes that standards for districts in which timber companies have long been engaged in timber-cutting operations are considered particularly likely to give rise to constitutional challenge. 26/ When a timber company finds it could sell or subdivide portions of its land for residential purposes instead of making an estimated $3.00 per acre net profit from its timber-cutting operations, it is likely to protest against any regulation that prevents it from developing the land. 27/

23. Telephone interview with Schuyler Jackson, Associate Director of the Environmental Agency, who indicated that the compromise was dictated by the close constitutional issues involved, August 30, 1972.
24. Mobil Oil Company, Application #300008 and #4C0040, District Commission No. 4.
25. Telephone interview with Schuyler Jackson, August 30, 1972. Although a compromise was felt to be necessary in view of the fact that the initial permit denial was based on "merely" aesthetic grounds, the compromise had the incidental advantage of setting a "standard of regulation" for the next landowner.
Sears Island, proposed as a site for a deep draft oil terminal in an application by Maine Clean Fuels (M.C.F.) before the Maine Environmental Improvement Commission, poses another situation where a major industrial group is challenging state regulation as a taking of property rights. The M.C.F. proposal was rejected in July of 1971 and is now pending before the Maine Supreme Court. 28/

New Jersey's farmers have been complaining about tough flood control measures which recently passed the state legislature. As Arthur West, President of the state's Farm Bureau Federation argued:

"Now, the state wants to stop all development of flood plains through zoning, without any thought of compensation . . . [This] law should make clear that its purpose is not to confiscate property or property rights through zoning, which is unconstitutional." 29/

The new statutes give the state direct control over land use in floodways (natural run-off areas which channel flood waters downstream) with power to block most development there. 30/ They also mandate local controls over other flood hazard areas. 31/

who seeks to introduce development into the area. Thus, when another developer seeks to construct a competing facility at this interchange, the state will be in a position to argue that in fairness, the newcomer should be put in no better competitive position than that occupied by Mobil.

27. Id. A similar argument was made by the City of New York in the Grand Terminal case,
29. Arthur H. West, President, New Jersey Farm Bureau, WCBS-TV Reply Editorial, August 11, 1972, 6:55 p.m.
The transition to comprehensive controls for flood plains is especially annoying for holders of undeveloped land in New Jersey because of the amount of unrestricted residential and commercial construction which had previously taken place in floodway areas. Termed "a special type of insanity" by State Environmental Commissioner, Richard J. Sullivan, 32/ such development nonetheless causes other landowners to consider the new controls an unjustifiable penalty on those who chose not to currently develop land. 33/

In New York, the furor generated over two massive vacation home proposals which would be carved out of eastern portions of the Adirondack Park promises future disputes over the limits on regulatory power over private land use. Horizon Corporation, with tentative plans for 24,000 acres and another developer, Louis Paparazzo, with plans for 18,500 acres, are only two of several hundred holders of large tracts of private land located within the park's boundaries. 34/ Supported by local governments eager to share the fruits of booming growth, they are the first to propose massive high intensity vacation developments. 35/

A drastic reduction in permitted residential density proposed for these and other sections of the park area is the source of current controversy. Park Agency planners show the bulk of the two holdings as a "rural use area," in the plan, released for public hearing late in December, 1972. 36/ Deemed "those areas where signif-

33. WCBS-TV Reply Editorial, August 11, 1972.
36. Preliminary Private Land Use & Development Plan, Adirondack Park, New York Adirondack Park Agency (draft for public hearing purposes - December 21, 1972). Note that provisions in the legislation may have removed Paparazzo's proposal from these controls.
"This week's hearings to determine the landmark's fate go far beyond the obvious considerations of art, history and sentiment to a broader concern with the city's pattern of growth and change, its economic and functional health, and to what degree and by what means the city can, or should, control the gargantuan benefits and disasters that its developers heap upon it." 45/

Culminating several years of negotiation and debate before the city landmarks and planning bodies, denial of development permission for a 59-story tower on the Grand Central site reached a New York trial court in the fall of 1972.

Dealing with valuation issues which James Nespolo, one of the city's attorneys, characterized as "extremely difficult from a trial strategist's point of view," the city worked to justify a regulation which preserved the existing terminal on the choice mid-town site. The preservation law does this by preventing any change in the exterior without a certificate of "no exterior effect," and the denial of such a certificate caused Penn Central to argue that the city had condemned the development potential:

"Depriving plaintiffs of the privilege to make millions of dollars per year, and at the same time having forced Penn Central which is bankrupt, to maintain an aging and deteriorating terminal at a deficit, is a regulation which undeniably goes so far that it amounts to a taking for which compensation must be provided." 46/

46. Plaintiffs Pretrial Memorandum, Penn Central Transportation Co., et al. v. City of New York, et al., Supreme Court of the State of New York, County of New York, No. 14763/69 filed October 7, 1969; the taking issue is complicated by the existence of "development rights" transfer provisions which arguably diminish the burden of historic preservation by allowing unused development potential to be transferred to other sites.
Corresponding suburban demands for land and housing generated by the growth of Metropolitan New York have brought varying responses, most tinged with the strong influence of the taking issue. Experiences in two counties may serve as examples. Suffolk County has pursued a vigorous bipartisan program of land acquisition to preserve park and conservation land. A recent proposal by Joseph Klein, Suffolk County Executive, contemplated expanding the program to include the immediate purchase of three thousand acres of threatened potato croplands to prevent housing development. The total cost of over $30,000,000 for the twelve thousand acres that might be acquired would be only partially borne by a lease-back program. 47/

In Rockland County, the West Branch Conservation Association has reacted to development pressures by urging that two proposed new sewer trunklines not be built. Martus Granirer, President of the Association argued in November, 1972: "We're not obstructionists and we don't love our cesspools, but we have something here that really works. You build a sewer first and all the other things are going to follow." The principal concern of the Association is unrestricted growth of subdivisions. They were supported in their stand by the neighboring town of Ramapo, itself recently victorious in a court battle over growth controls. 48/

The Suffolk and Rockland County examples pose both sides of the taking issue, the high cost of relying only on purchase of land to preserve valuable agricultural or other uses, and the "taking" hardships imposed on new or potential subdivision by the denial of sewers, and perhaps denial of any permission to develop land.

Martha's Vineyard and the Island of Nantucket are other areas where explosive growth had led to clashes between those who wish to restrict access to protect

the existing environment and those who favor development.

"Today, Nantucket and Martha's Vineyard stand on the brink. If unchecked development continues its current course, then there will be no turning back, and generations which follow us will find these offshore islands, in the years to come, little different from today's sprawling suburbs." 49/

A bill introduced before the 92nd Congress would establish a "national Trust" to administer the unincorporated areas of the islands and establish strict land use controls. Advocates of such controls are aware of the taking issue and the 1972 version of the Island Trust Bill provided for a $25 million, three-year appropriation "for acquisition of land and interests therein," which was understood to include partial compensation for highly restrictive federal zoning. 50/ Since land prices on the islands are continually rising in the rush to acquire summer sites, there is some question as to the sufficiency of the proposed fund, not to mention the cost of court proceedings to determine what regulations require compensation. 51/

Plymouth, Massachusetts, one of the oldest communities in the United States has recently adopted new zoning by-laws after unanimously rejecting a moratorium approach to growth control in December of 1972. Provisions defining and mapping wetlands within the town and subjecting them to vigorous regulation pose questions similar to those seen with state regulations which prohibit most filling and related types of development in wetlands. Since the historic areas of the town wrap themselves

49. S.3485, 92nd Cong. 2d Sess., Section 17 (1972); Finkler, "Can a Trust Turn the Tide on the Island?," 38 Planning 263 (November, 1972).
50. Id., Finkler at page 103.
51. Id.
around the water areas, these regulations are important for both historic and environmental reasons.

John Loupos, Chairman of the Local Conservation Commission, indicates that the Commission and the Planning Commission as well, were both primarily concerned with technical and engineering details such as accurate mapping of wetlands areas and soils characteristics for the purpose of the new regulations. 52/ Such concern, however, may reflect implicit concern with Massachusetts court decisions invalidating less carefully drawn regulations.

Nearby the town of Narragansett, Rhode Island, imposed a moratorium on multi-family residential development. 53/ James McGwin, one of the town's attorneys, indicated that because of the small size of the city, multi-family uses could have engulfed virtually all free land within about six months. 54/

The City Council found that land was being overcrowded by a great number of buildings "for occupancy by large numbers of persons disproportionate to the capacity and ability" of the town to provide necessary water and sewer services. They complained of financial "hardship" in accommodating an abnormal influx of persons and an "excessive trend of building activity . . . not caused by the necessity for housing or building space for the inhabitants of said town but . . . brought about by real estate developers which or who are developing land for sale or rent to such an extent that it is excessive in relation to the orderly development of the Town of Narragansett... ."

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53. Ordinance of July 19, 1972, Narragansett, Rhode Island; Sec. 4 of the Ordinance prohibits construction of all but single family dwellings in Class A, Class B, or Class C Residential Districts.
16.

During the first stages of the moratorium, one landowner has challenged its validity on constitutional grounds. David Rubin owned land zoned Class C Residential, a designation which would have permitted construction of apartments, and he had submitted an application to build before the first enactment of the ordinance. This application was rejected as incomplete, and by the time he had resubmitted the completed application the moratorium had been imposed.

Throughout the Atlantic states, both short-lived local regulations and carefully-designed state programs repeatedly pose the same basic issue: When has regulation gone far enough to become a taking of private property?

55. Ehrlich, et al. v. Moretti, Providence County Supreme Court, Civil No. 72-770
Blessed with prime estuarine areas, large and accessible coal deposits, fine beaches and some of the nation's most historic monuments, the south and south-east find governmental concern for fragile sectors of the environment growing apace with development pressure. In some areas, such pressures are localized near population centers, as in Texas and the Central South, while along the south Atlantic coast, and particularly in southeastern Florida, regional environmental problems of crisis proportions are being created by rapid urban growth.

In the 1920's Florida was notorious as the home of the underwater lot. Since then the state has continued to struggle with increasing pressure to accommodate more people and give each newcomer his slice of paradise. Now some municipalities are considering total bans on all development for varying periods due to critical problems with water and sewerage capacity. Joel Kuperberg, Director of the State's Internal Improvement Trust Fund which controls state-owned lands, characterizes the situation:

"With no mountains or gorges, Florida has no natural impediments to man-made changes. Florida is like a big bag of silly putty, and it is being reshaped irreversibly in the hands of the big subdivision developers."  

Facing projections of the nation's highest growth rate, the state has become increasingly concerned about the preservation of her fragile environment. In 1972 the legislature passed Governor Askew's Environmental Land and Water Management Act which provides that large developments and developments in critical areas must obtain regional impact statements and be subject to state review.

The bill authorizes the state to designate "areas of critical state concern" which will be subject to state supervision. These areas are only to be regulated, not acquired, but because of concern aroused by the specter of strict regulation the draftsmen added the following clause:

Protection of Landowner's Rights.

(1) Nothing in this chapter authorizes any governmental agency to adopt a rule or regulation or issue any order that is unduly restrictive or constitutes a taking of property without the payment of full compensation, in violation of the constitutions of this state or of the United States.

(2) If any governmental agency authorized to adopt a rule or regulation or issue any order under this chapter shall determine that, to achieve the purposes of this chapter, it is in the public interest to acquire the fee simple or lesser interest in any parcel of land, such agency shall so certify to the State Land Planning Agency, the Board of Trustees of the Internal Improvement Trust Fund, and other appropriate governmental agencies.

3. Id., Sec. 380.05.
4. Id., Sec. 380.08.
This language was quoted extensively in speeches by the chief sponsor of the legislation, Senator Robert Graham, to reassure landowners that their rights under the taking clause would be observed.

The 1973 session of the Florida legislature is debating the need for additional legislation to protect wetlands. Again the taking issue is being raised by opponents. Florida's prolific wetlands have been prime targets of developers who have used the dredge and fill technique to create many new residential areas. Owners of prime sites for dredge and fill are concerned that new regulations will reduce the demand for their land from speculators.

Dade County and the City of Miami are under enormous pressure to control growth because of difficulties with basic services, particularly sewers. The State Pollution Control Board mandated a moratorium on sewer hookups on all lines which were not receiving 90% treatment in late 1972. While variance procedures now allow hookups when a plan for improved sewerage has been approved, many areas have suffered under severe strains. For example, problems with the North Dade Outfall line led to an order of the State Board on December 19, 1972, prohibiting 1,000 new connections which had been otherwise approved. 5/ Interim measures such as a holding lagoon for raw sewage are meeting community opposition since long term relief is probably five years away. 6/ The Federal Environmental Protection Agency is also in the position of facing possible suits for failure to enforce sufficiently stringent regulations for ocean outfalls which remain the principal method of disposing of sewage in the area.

Dade County has also been employing two to four month building moratoriums for endangered areas of the County enabling the County Commission to review outmoded zoning regulations. County Commissioner Harvey Ruvin points to Key Biscayne as an illustration of the

6. Id.
problem of high-rise-zoned densities which were beyond the actual capacity of the community to absorb. A building moratorium was declared and zoned densities reviewed to identify those areas where cutbacks would be appropriate. 7/ The selective moratorium illustrates an approach to temporary growth controls which seeks to minimize taking issues and has been approved in local court challenges.

Growth controls are emerging in other areas of the state as well. At a recent conference sponsored by the Florida Defenders of the Environment sixty leading scientists and professionals called for a halt to state efforts to attract new residents and studies to determine the limits of desirable growth in the state. Arguing that the citizens of the state already have an "environmental debt we have incurred by not paying the full cost of growth in the past [which] takes the form of polluted water, decrepit streets, and overload of schools," the group expressed particular concern about environmentally sensitive areas of the state. 8/

The St. Petersburg region has also been trying to moderate growth pressures. Municipalities and counties have been actively exercising their zoning powers to reduce density in an effort to control the boom. One developer is now suing the City of St. Petersburg over restrictions which leave the company with about 30 percent of the 10,000 units originally projected for its development. The company demands $15,000,000 in damages or permission to proceed at a higher density. 9/ Tempers have flared on both sides. One city council member describes the litigation as "a prime example of the legal maneuvering the builder-developer, fast buck guy will go through to continue the rape of the land." 10/

Nearby Collier County has made a tentative response to speculative land sales with a six month moratorium on zoning changes on a 500,000 acre tract in the "Big Cypress" area. The moratorium only prevents changes in zoning classifications in what the County's attorney describes as "a statement of policy." Environmental groups have been concerned about sales by Miami real estate firms where purchasers were allegedly instructed "to erect a small shack so that when the government buys it [the land] a high price must be paid." 11/

The state has been making an effort to control coastal construction and excavation. 12/ An integral part of the state regulations is a coastal "construction setback line" along the sand beaches of the state fronting on the Atlantic Ocean and Gulf of Mexico. Established on a county by county basis, the line is for "the protection of upland properties and the control of beach erosion." 13/

In St. Lucie County the Florida Bureau of Beaches and Shores moved the setback line from its original position to one closer to the beach, in response to a substantial outcry from property owners, developers and real estate people. 14/ Although one official stated that the decision to move the line seaward was based on a determination that a line closer to the beach would protect the shoreline substantially as well as the original line, 15/ an attorney for the State Department of Natural Resources stated that he had advised the Bureau that the original line would constitute an unreasonable and arbitrary exercise of the police power. 16/

13. Id.
15. Telephone interview with William T. Carlton, Director, Florida Bureau of Beaches and Shores, August 28, 1972.
An effort by State Senator Warren Henderson during the 1973 legislative session to have the bulkhead line moved back to the line of mean high tide also brought a sharp reply from representatives of the building industry. Alleging that the measure would prevent building on hundreds of feet of previously buildable shoreland, homebuilder representative Perry Odom argued that, "It would provide for outright confiscation without compensation or due process of law." 17/

Although a focal point, Florida isn't the only state suffering under development pressures in the Southeast. Similar growth pressures are found throughout the south and southeastern coastal region.

Georgia enacted a Coastal Marshlands Protection Act in 1970 setting up a Coastal Wetlands Protection Agency as a division of the state's Game and Fish Commission. 18/ The Agency administers a permit review system for any dredging, filling or other alteration of Georgia marshlands and several disputed cases have arisen under these regulations.

In the summer of 1971, the Hercules Powder Company requested permission to dispose of dirt washed from pine tree stumps used in powder manufacturing in a local marsh in Brunswick, Georgia. The Company had previously been giving away much of the soil. Nonetheless, a substantial amount had begun accumulating at the plant forcing an alternate solution. 19/

In negotiation with the Agency, Hercules brought both practical and political pressure to bear, threatening to shut down the plant if the permit was denied, and seeking legislative relief through modification of the rules. 20/ The Agency resisted, instead suggesting a search for alternate sites, and the Company apparently found non-marsh high ground suitable for dumping all of its excess soil.

20. Id.
In another situation the Agency was placed in a dilemma when the Brunswick Pulp and Paper Company planned to despoil protected marshland in an effort to carry out the mandate of the State Water Quality Control Board. The Board had ordered the company to build a treatment plant and cease dumping untreated water from its manufacturing operation into estuarine waters. Brunswick Pulp and Paper had long been located on the marsh and the paper company representatives argued that because they were forced to build the plant, they should be granted a permit.

The Agency disagreed and proposed an alternative plan which used a nearby site in the marsh which had already been disrupted by dredging activity. Although this required Brunswick Pulp and Paper to acquire or lease the proposed site, they agreed to the compromise.

In all of these cases the State of Georgia has taken a firm position on the taking issue. For example, the Attorney General, Arthur K. Bolton, has taken the position that the state is the "legal owner of much, if not all, of the coastal marsh land now being privately claimed," and that "the development of the legal ramifications surrounding the State's ownership has indicated the existence of a public trust administered by the State." 22/

Another thorny subject of land use controls in Georgia is surface or strip mining, regulated by a Surface Mining Board created under the Georgia Surface Mining Act of 1968. 23/ To get a license to strip mine, property owners and operators must submit a land use plan showing how they will mine, reclaim and protect the land. They must regrade the land into rolling topography so that it will blend into the existing landscape. 24/

21. Id.
23. Telephone Interview with Sanford Darby, Georgia Department of Natural Resources, August 29, 1972.
24. Id.
Sanford Norby, formerly with the Mining Board, indicates that the larger national companies have been very cooperative. In two or possibly three cases, however, "stubborn individuals have refused to comply." These may eventually require court action although no cases are currently pending. 25/

North Carolina has joined Georgia in maintaining the state's right to regulate activity which might ruin marshland. 26/ In 1971, the legislature adopted a Dredge and Fill Act to regulate such activities "in or about estuarine waters or state-owned lakes." 27/

The state is attempting to establish their position by means of an action to quiet title to certain submerged lands and tidelands in Brunswick County. 28/ In its complaint dated March 20, 1972, the state alleges that these lands (which include marshlands, oyster beds and mud flats) are below the line of ordinary high water 29/ and that the state is accordingly "the owner in fee simple . . . and entitled to immediate possession" thereof. 30/ As to land to which the state cannot claim outright ownership, or in cases in which the ownership argument is rejected, the state will argue alternatively that the public trust doctrine is applicable. 31/

25. Id.
29. Id., Complaint, Para. 4.
30. Id., Complaint, Para. 5. North Carolina apparently has two distinct rules for determining state ownership of submerged lands. Under the first rule, it has been held that the state owns all lands on the Atlantic Coast which lie below the mean high water level. Carolina Beach Fishing Pier, Inc. v. Town of Carolina Beach, 227 N.E. 297 (1970). As to all other submerged lands, it has been held that state ownership is determined by whether the streams that flood them are navigable in fact. The law with respect to the second rule apparently is somewhat confused. Telephone interview with Thomas Kane, Ocean Law Consultant, August 11, 1972.

In the Chadwick case and another quiet title action brought by a landowner, Brooks, et.al. v. State, Sup. Ct., Brunswick
In one case in early 1972 where the developer failed to apply for a permit, sand dunes were being bulldozed into marshes, also cutting off navigable creeks. The courts granted a mandatory injunction pending permit application and the project was dropped. 32/ About two hundred such applications had been filed by late 1972. Very few had been denied and only three appeals were taken. One of the few denials was an application in New Hanover County which proposed a "Venetian" style trailer park in a marsh. The owner had wanted to dredge a complicated system of canals and site trailers on them. Because the department would only allow modification of an existing stream to provide a navigable channel the owner apparently abandoned the project. 33/

Local action to provide development control is also in the works in Currituck County in the northeastern part of the state. County commissioners there imposed an eight month moratorium on all development until a county plan is prepared. 34/

Efforts to regulate strip mining in the hills of West Virginia have also drawn fire from mining interests. Eight plaintiffs brought suit 35/ challenging the constitutionality of West Virginia's Surface Mining and Reclamation Act. 36/ The overriding issue appears to be whether, in requiring present holders of surface mining permits to bring their operations into compliance with newly adopted standards, 37/ the state would "take" the plaintiffs' property without compensation. 38/

Co., No. 72CVS-284, however, there are indications that the "landowners" may be unable to establish satisfactory record title. Telephone conversation with Thomas Kane, September 7, 1972.
31. Telephone conversation with Thomas Kane, August 11, 1972.
32. Id.
33. Id.
37. Regulation 3.01, Reclamation Commission (May 1, 1972).
38. Telephone interview with Benjamin Greene, Chief of Reclamation West Virginia Department of Natural Resources, September 7, 1972.
Alleging that they have invested a combined total of over $20,000,000 in surface mining equipment, the eight plaintiffs contend "that there is a possibility" that one or more of them will be "forced out of business" if the Act and regulations are enforced. 39/ They contend that Reclamation Commission Regulation 4.02, "as it is threatened to be applied" by the Commission, is an unconstitutional taking in that the Commission "has been and threatens to continue to deny prospecting permits within sight of certain highways, public parks and other areas on the basis that surface mining within such sites would impair the aesthetic value of such highways, public parks and other areas. . . ." 40/

Embedded in the Constitution of the State of Louisiana is one of the oldest programs for historic preservation in this country:

"Hereafter and for the public welfare and in order that the quaint and distinctive character of the Vieux Carre' Section of the City of New Orleans may not be injuriously affected, . . . whenever any application is made for permit for the erection of any new building or whenever any application is made for a permit for alterations or additions to any existing building, any portion of which is to front on any public streets in the Vieux Carre' Section, the plans [relating] to the appearance, color, texture of materials and architectural design of the exterior thereof shall be submitted by the owner to the Vieux Carre' Commission. . . ."

41/

The Vieux Carre' Commission notes proudly that there are only four cities in the United States that have

41. Louisiana Constitution, Art. XIV, Sec. 22A.
whole communities of buildings dating from Colonial or pre-civil war days. Of these, New Orleans Vieux Carre' is by far the largest, "in an area comprising 100 city blocks . . . a whole city almost as it was in the days when cotton was king and New Orleans was the great emporium of the West." 42/

Even though embedded in the state's constitution since 1935, the preservation requirement must meet the continuing scrutiny of citizens eager to invoke the Federal Constitution in defense of their property. Thus, Morris Maher, a resident of the Vieux Carre' has conducted some eight years of litigation in the state and then the federal courts arguing that his property has been improperly restricted by the Vieux Carre' Commission. Under the terms of the Vieux Carre' Ordinances, Maher cannot destroy the building without a permit and he is subject to fines and penalties if he fails to maintain certain parts of the property.

Maher's latest complaint alleges, "the effect of [the Commission's] action on the plaintiff . . . has been to force him to maintain for the benefit of the public the property . . . because said property has 'architectural' and/or 'historical' value. Plaintiff has received no compensation whatsoever for maintaining the said property." 43/  He argues that this economic burden combined with the rising cost for the construction of his more profitable proposed development will cause him "irreparable harm" and amount to a regulatory taking. Thus he asks that the Ordinance be declared unconstitutional and that the Commission be ordered not to interfere with his proposed demolition and reconstruction. 44/

44. Id.
Residential and tourist development of the Fajardo area of Puerto Rico, termed "unique in ecological characteristics" by the local Planning Board, was given a green light by a recent decision of a trial court in the Commonwealth. This capped a fifteen year dispute over issuance of building permits which the Planning Board had denied. Although the permits had been requested in 1958, the Board held the request for years. Repeated discussion of expropriation of the land for public use resulted in further inaction. The judge ruling on the matter acknowledged the right of the Planning Board to control planning in Puerto Rico, but he held that this right did not include the power "to administrationally destroy individual rights guaranteed by the Constitution." 45/

Texas, with thirty bills addressed to shoreland or wetland protection before the current legislature, is moving cautiously in the establishment of land use controls in critical areas of the state. Concern is evident over shorelands, tidal wetlands and coastal subsidence from ground water extraction. 46/ One of the major areas of concern has been the protection of public rights in the use of the beaches. The state has had a longstanding policy of treating the beaches as public property, but prevailing doctrines now require the establishment of public rights on a case by case basis to avoid the direct taking issue. The State Attorney General's office notes, "Before one can say the public has an absolute right of use or easement over all Gulf Coast Beaches, literally thousands of cases must be tried . . . There can be no absolute public right to use Texas' beaches until vast sums of money are allocated to sue under the Open Beaches Act to establish public easement or right of use." 47/

The question of subsidence is also a likely candidate for state intervention. A recent report notes that "severe subsidence in certain coastal areas can only be stopped by the curtailment of groundwater withdrawals." 48/ Professor John Mixon of the University of Houston Law School notes that this could raise constitutional issues before the legislature. 49/

The state has also shown concern over the protection of submerged lands. State Senator A. R Schwartz, a leading advocate of the protection of beach land, notes that restrictions on development of privately owned wetlands will require compensation under the taking clause unless competing aquatic uses such as commercial fishing justify protection of the food chain for the economic well being of the state. The Governor of the state has also indicated he will be concerned with the constitutional limitations imposed by the taking clause in his review of legislative action. Nonetheless, John Foshee, legal director of the State's General Land Office notes that, "the people of Texas are not aware of land use problems. With so much open space and land, and not as much fragile environment, the taking issue just has not yet arisen in the context of land use regulation." 50/

CHAPTER 3

OPEN SPACE AND THE URBAN ENVIRONMENT IN THE CENTRAL STATES

Historically less densely populated, the central part of the nation has only recently become aware that land may not be an endlessly renewable resource. At the present time, scenic rivers, airports, historic preservation, and the control of subdivisions are all subjects being actively contested in various parts of the central United States. Growth controls and significant public sentiment for "non-growth" in some communities suggest future problems as well.

In the midwest, federal encouragement has resulted in a variety of responses for the protection of scenic or particularly valuable river corridors. Ohio's bill imposes relatively mild controls administered by the State Department of Natural Resources. The Director of Natural Resources may designate wild, scenic and recreational river areas if they possess "water conservation, scenic, fish, wildlife, historic, or outdoor recreation values which should be preserved." The Act goes on to prohibit state or municipal actions such as channelizing or highway construction without the permission of the Director.

The Ohio legislature, displaying particular sensitivity to the taking issue, included the following proviso in the Act:

"Declaration by the Director that an area is a wild, scenic, or recreational river area does not authorize the Director or any governmental agency or political

2. Id., Section 1505.160.
3. Id.
subdivision to restrict the use of land by the owner thereof or any person acting under his authority, or to enter upon such land."  

While this language would appear to foreclose any challenge on constitutional issues, two landowners are nonetheless arguing that the law deprives them of their property rights.

While the Ohio Attorney General points to the special restriction already quoted in his contention that the Act cannot result in a taking of private property, 5/ Walter Vrbancic and Anthony Simonic thought otherwise, bringing suit against the state to quiet title to their riverfront property proposed for designation. 6/ Arguing that the Act is "vague, arbitrary and confiscatory and unconstitutional on [its] face" they urge that it be invalidated. Since it grants authority (in their view) "to regulate and restrict the use of private lands; to supervise, operate, protect and maintain private lands in accordance with his [the Director's] design; to exercise his dominion and control . . . These acts constitute the taking of private property for public use without payment of just compensation and are contrary to and in violation of the Fifth and Fourteenth Amendments of the Constitution of the United States. . . ." 7/ This complaint is being heard by a three-judge Federal Court, indicating the respect the constitutional issue draws.

Proposed designation of the Two-Hearted River in Michigan's Upper Peninsula has also stirred controversy over a similar law in Michigan. Designation hearings scheduled for December of 1972 pursuant to the State's Natural Rivers Act were to have considered a

4. Id.
400 foot wilderness zone on each side of the river throughout its 41 mile length. No new building would be permitted within 300 feet of the river and other restrictions would apply to utility lines in the area. 8/

The state owns about 46% of the land which would be affected by the regulations. Local owners of the balance oppose the regulations because they regard them both an infringement of private property rights, and a depressant on the tax base of the county. 9/

Because of the opposition, the state has now delayed hearings until June of 1973. The State's Department of Natural Resources hopes this will "give the local zoning committee and other interested parties more time to work with D.N.R. in an effort to develop a mutually acceptable wilderness river plan." 10/ In the meantime small property holders, who hold only a little more than one third of the land, are watching the actions of the state and a mining company holding the majority interests.

Michigan is also easing the implementation of a new Land Sales Act under which tough regulation of land companies and salesmen had been proposed. Exerting pressure to slow down the State Attorney General's office and delay the effective date of the Act, bankers and realtors had argued that all land sales and even home sales could be stopped if the regulation went into effect as planned. Legislators said that the new October 1, 1973, effective date would give affected land companies time to comply with the regulations, although others suggest that some land companies hope to use the period to persuade the legislature to weaken the act. 11/

Airport-area zoning regulations, such as restrictions on the height or density of construction on land

9. Id.
10. Id.
within flight paths, have often brought forth charges that land has, in effect, been taken.

The community surrounding Wright Patterson Air Force Base in southeastern Ohio has long expressed concern that increasing urban development in the area surrounding the base would eventually cause so many complaints about noise and dangers that pressure would be brought on the Air Force to close down the base. As a result the four surrounding counties obtained the passage of special legislation creating an airport zoning board. The first set of regulations adopted by the board was held unconstitutional by the Ohio Appellate Court but continuing efforts are being made to devise a workable set of airport zoning regulations.

Currently the regulations are being tested by a developer who seeks to build apartments at fifteen units per acre at the edge of the danger zone surrounding the airport. The landowner sought a variation from the Board's regulations alleging that the low-density development required by the regulations would constitute a taking of his property by depriving it of its value for high-density development. County Prosecutor Lee Falke is defending the regulations in court, arguing that the long-range benefits to the public that are created by the presence of the air base in the community far outweigh the loss in value to the individual property owner.

The demise of Louis Sullivan's famed Chicago Stock Exchange may provide yet another example of the effect of the taking issue on official behavior. City officials, given the opportunity to designate the building as an official landmark, rejected any such action. According

12. Ohio Revised Code Sections 4563.01 et seq.
to the chairman of the City Council's Committee on Economic and Cultural Development, fear that delay in demolition would give rise to a suit for compensation for a "taking" was among the reasons why the committee declined to recommend that the Stock Exchange be designated as an official city landmark. 15/ Frank G. Sulewski, Assistant Corporation Counsel and counsel to the Commission on Chicago Historical and Architectural Landmarks, said that while no one as yet has brought suit on the taking issue private attorneys have "made suggestions" along these lines. 16/

The tiny Village of Franklin, Michigan, undeterred by such constitutional arguments, went ahead and adopted an ordinance creating a historic district to preserve its old town center. A lot long used for commercial purposes was reclassified into residential and then historic residential status by the two ordinances implementing the village plan. The old building occupying the site had been abandoned and the owner wanted to destroy it and build a modern commercial building.

Complaining that these ordinances amounted to "confiscation" of his property without just compensation,17/ plaintiff sought to have the Village enjoined from preventing demolition of the existing structure and use of the property for commercial purposes. 18/ Noting that the Village of Franklin "is locally known as the town that time forgot," Circuit Judge Clark Adams held that the ordinance creating the historic district and the statute granting the authority therefor were a proper exercise of the police power since "the history of the state, as found in writing and display of ancient

15. Interview with Alderman Fifieliski, September 18, 1972. Fifieliski said that an important factor in the Committee's decision was the fact that interested parties had undertaken contractual obligations with respect to the site before landmark designation was even proposed.
17. Owen E. Hall v. Village of Franklin, et.al., case file and cite from No. 69-52580; second amended complaint, para. 8, page 2, filed April 5, 1972.
18. Id., pages 3 and 6.
objects, is essential to a full and adequate education of the people." 19/

Ann Arbor, home of the University of Michigan, is a moderate-sized town in southeastern Michigan which now finds itself on the outskirts of Detroit's growth area. Finding the rapid growth of the last decade a strain on city services, the city was nonetheless surprised when a ban on building permits due to overtaxed sewerage facilities was imposed in January of 1972. While the city council lifted the ban a week later when it was determined that a new interceptor sewer would meet near term growth needs, it sparked a special growth study by the city planning department to explore the causes of growth, and particularly the economic factors involved in growth. 20/

One product of the study was to have been a multi-sector econometric model. In the words of the study proposal:

"... We hope to be able to show the effect on police expenditures, fire expenditures, etc., of building one more unit of either low-income multiple-family or high- and moderate-income, single-family housing. Adding up all the tax and expenditure categories will give total tax and expenditure changes induced by the extra housing. By combining the tax and expenditure totals, one may see which of the various housing types 'pay for themselves' in the sense of producing revenues equal or greater than expenditures. ..." 21/

Any findings would be purely advisory. Not only is the city council concerned with the reactions of landowners who might challenge any regulation based on such a study, but an issue also exists with respect to local revenues. With annual deficits regularly occurring in the local budget, the city government is extremely hesitant to take any action which will penalize residents by decreasing revenues and the quality of urban services.

The disapproval of three major land development proposals in metropolitan Detroit presents more tangible evidence of sentiment against sprawling growth in the area. Citizens of Franklin Village, whose historic ordinance has already been noted, voted to stop a proposed retail-commercial development for the village by a margin of more than 2 to 1 in March of 1973. In another suburb, a major regional shopping center was disapproved. The sentiments of a resident, "We want peace; we want quiet; we want our country atmosphere," were apparently reflected in the decision at the public hearing. Voter rejection of financing for sewer improvements which opponents alleged would bring urban sprawl further illustrates the sentiment which has yet to find articulation in official state or regional policies.

Another suburban town, Naperville, Illinois, is battling with subdividers over mandatory land dedication requirements for school purposes. The city, as have many others, had long engaged in "horsetrading" with developers over annexation agreements in which such arrangements were worked out on an individual basis. Naperville, opting for the predictability of a specified formula, abandoned the old system and wrote a formula into the village subdivision ordinance similar to those used in other states. Although such regulation for open space has been accepted by a variety of state courts, it appears that the issue will be relitigated in Illinois as well, with the taking issue playing a

23. Id.
major role in the arguments.24/

In Wisconsin, Governor Lucey and former Governor Knowles have both voiced support for the recommendations of the state Land Resources Committee which recently completed several years of study of land use controls in the state. Acknowledging the primarily local nature of most land use decisions, the report encourages the state legislature to move forward and establish uniform standards for development in five areas of regional or state-wide concern, such as critical environmental regions and very large-scale development. The Committee suggests that these regulations should be implemented and enforced at the local level with the possibility of appeal to a state review board by interested parties, including environmental or state agencies. 25/

These legislative efforts have been encouraged by the recent court approval of similar zoning standards for shoreland areas of the state. This rejection of taking arguments by the Wisconsin Supreme Court in the context of the shoreline zoning ordinance has largely eliminated constitutional challenges to that ordinance and has forced landowners into conventional administrative channels to gain approval of development which requires a special permit. 26/

A suit challenging Minnesota's statute requiring removal of some advertising devices (mainly billboards) along state highways after a four year amortization period again indicates the durability of the "taking" issue and its peculiar relationship to the facts of each particular case. Although they had upheld a three year amortization period in 1968, the Minnesota Supreme Court found that the constitutional issue required a full hearing on the facts and it reversed a lower court's dismissal of the suit. 27/

26. Telephone interview with Maurice Van Suspen, Legal Bureau, Wisconsin Department of Natural Resources, April 17, 1972.
CHAPTER 4

CALIFORNIA AND THE WEST: REGULATORY FRONTIER

In the West, as elsewhere, the major growth areas are also the areas most sensitive to constitutional problems with land use regulation. Land use problems within California are an almost universal phenomenon, but areas as diverse as Boulder, Colorado, Boise, Idaho, and Scottsdale, Arizona are witnessing similar struggles over the effect of population growth on traditional values.

Boulder, Colorado is a prominent example of a town where concern over growth has been growing. In November, 1971, a resolution was submitted to voters asking them to approve an ultimate population limit of 100,000 residents. While the initiative failed, it led the City Council to recommend preparation of an interim program for holding "the rate of growth . . . to a level substantially below that experienced in the 1960's. . . ." 1/

Described as a "laboratory in growth control" in a recent publication of the American Society of Planning Officials, Boulder has already purchased 2,740 acres of green land, raised sewer and water hookup fees, reevaluated its high density and industrial zoning classifications with a view to "discouraging new primary employment centers in the Boulder Valley," and enacted a general height limit. 2/ Developers have threatened to challenge a number of the city's actions in court.

In Idaho, the Boise area spent the latter part of 1972 debating alternate growth plans for the metropolitan area. The more controversial plan would have denied construction permits to sites not served by metropolitan sewers and would have provided for regulated growth of

2. Id. at 83, 84.
the metropolitan area into surrounding agricultural areas through the implementation of a sewage treatment plan. Termed the "urban boundary concept," in effect "circles would be drawn around cities in the county, and only agricultural growth would be permitted outside the circles." 3/ The goal was to provide for most efficient urban services for the population center. Police and fire protection service as well as water and sewerage would be extended shorter distances at less expense than in the more typical suburban leap frog pattern. Boise developers who noted that aspects of the proposal sounded good also suggested that there "were a few bugs" in the program as presented in the discussion proposals. 4/

In the final analysis, Boise, which is the major city in the Council of Governments considering the proposals, recommended "that services be provided as rapidly as federal, state and local funds are available."5/ They thus rejected the more drastic growth constraints, due in part to questions raised regarding the taking issue under more stringent urban boundary approaches.

Similar sentiments were also evident in Scottsdale, Arizona where plans were recently presented for a 53 square mile area to the north of the city projecting population growth from roughly 80 thousand residents to 176 thousand residents. 6/ The issue of the newspaper announcing the growth plans also carried a full page ad by the local homebuilders' association asking "the last resident leaving Scottsdale [to] please turn out the light! - Do you really want a no growth policy?"7/ The homebuilders' reaction was spurred by a proposed charter amendment asking as a matter of municipal policy that newcomers be required to pay their fair share of the costs of growth. Arguing that such a policy "will stop all building," the homebuilders unsuccessfully

4. Id.
7. Id., at 10-L.
fought the voter initiative which passed on April 10, 1973. 8/

To deal with problems equally all-encompassing, but spreading over two states and numerous small communities, the states of Nevada and California have formed the Tahoe Regional Planning Agency (TRPA) through a compact approved by Congress and the two states to deal with development pressures. The developers of Fleu du Lac, a small parcel on the western shore, have found their application for sixty condominium units blocked through the implementation of area wide controls imposed by the TRPA. The owners have filed a claim with the TRPA pursuant to California statute, alleging $4.5 million in damages. Their claim is the first of over $150 million of filed claims to reach courts in the area. 9/

The TRPA's land capability studies concluded that ground water levels and soil capabilities in the area were such that there was a possibility of soil liquification during an earthquake as well as drainage problems due to a high water table. Because of the land capability problems, the agency denied the request for the condominium development. 10/

The landowners in this case argue that the present classification of their land amounts to an unconstitutional taking requiring compensation. They allege that the use and density restrictions imposed by TRPA are based on a factual-engineering judgment which involves a value judgment regarding the most desirable over-all population level for the basin, and that insofar as the limitations on the use of their property are the result of a public decision to maintain the land at an artificially low development density, the landowners must be compensated.

10. TRPA, Minutes of Meeting, May 25, 1972, at 68.
The San Francisco Bay Conservation and Development Commission is another regional agency sanctioned by the California Legislature, this time to deal with ecological problems associated with land use and development in and immediately adjacent to the Bay. The Commission has strong powers of review over both public and private development within the Bay and adjoining wetlands, including undiked marshes. Applications for shoreland development, however, must provide only "maximum feasible access . . . to the Bay and its shoreline" to gain Commission approval. 11/

The Candlestick Properties case, finally decided in 1970, 12/ was the first major test of the Commission's police power authority to prevent filling of the Bay. The legislative mandate approved in that case has allowed the Commission to take a firm stand in several cases where wetlands or the Bay have been endangered by development proposals. Clement Shute, head of the State Attorney General's Environmental Unit notes that the "BCDC's exercise of discretion is controlled by a watchful and concerned public which would sue if there were an abuse of discretion, and also by full media coverage of its meetings." 13/

Working within its narrow regulatory mandate, the Commission works to reach an accommodation whenever possible. The staff Legal Counsel notes that it has used one statutory exception allowing minor filling to facilitate trade-offs in negotiation with permit applicants. An agreement allowing fill of four acres in the Suisun Marsh in the northwest part of the Bay in exchange for dedication of 365 acres to the Conservation


13. Interview with Clement Shute, Assistant Attorney General, September 13, 1972.
Foundation for preservation is one of the more successful agreements reached in this manner. 14/

The 100 acre Hurt Marsh in Marin County is one area where the Commission is currently taking a strong stand in an effort to prevent the loss of one of the few large marshes in that section of the Bay. After proposing several industrial uses to be located on a proposed land-fill, the landowner is now proposing a marina which meets the "water related use" requirement for Bay development on fill. However, recent amendments provide that such development must be built substantially on existing land, a qualification which has prevented approval of even the revised proposal. 15/ The property, if available for commercial development, may be worth as much as $5.5 million dollars, keeping the taking issue alive until the permit application is finally resolved.

The state, supported by the Save San Francisco Bay Association, has filed suit to block development of a 2.3 mile strip along the southwest side of the Bay. 16/ Although Westbay Community Associates owns the submerged land involved, the state urges that the public trust for navigation, commerce and fisheries would be infringed if Westbay is allowed to fill. The Association also argues that there has been long standing public access to the area establishing prescriptive rights in the public. 17/

The voters liked the concept of the BCDC so much they voted in favor of proposition 20 at the November, 1972 elections, thereby establishing a similar control program along the entire coast. The Coastal Zone Act 18/

15. Id.
17. Id.
creates state and regional conservation commissions and directs them to prepare plans for the coastal zone. While the plans are being prepared permits are required for all development in an area extending inland 1,000 yards from the line of mean high tide throughout the length of the zone. A special two-thirds majority vote is required in the following cases:

(a) Dredging, filling or otherwise altering any bay, estuary, salt marsh, river mouth, slough, or lagoon.

(b) Any development which would reduce the size of any beach or other area usable for public recreation.

(c) Any development which would reduce or impose restrictions upon public access to tidal and submerged lands, beaches and the mean high tide-line where there is no beach.

(d) Any development which would substantially interfere with or detract from the line of sight toward the sea from the state highway nearest the coast.

(e) Any development which would adversely affect water quality, existing areas of open water free of visible structures, existing and potential commercial and sport fisheries, or agricultural uses of land which are existing on the effective date of this division.

19. Id., Section 27104. For planning purposes the coastal zone extends back to the ridge line of the first mountain range except in the Los Angeles area where it extends back 5 miles.

20. Id., Section 27401. The legislation permits exemption of "stabilized" areas developed to a density of at least four units per acre, which may then remain under city or county controls.
A suit in Los Angeles' Superior Court charges that this measure is a "confiscation of property for public use" without compensation. Five Los Angeles attorneys filed a class action seeking five hundred billion dollars damages on behalf of all landowners in the coastal zone.

Other recent suits have challenged interim growth controls in the cities of Livermore and Pleasanton, California. These cities have been groping for solutions to sewage, water supply and school problems of their own as city services are straining to accommodate new residents moving east from San Francisco and Oakland. The challenged controls were ceilings on building permit issuance enacted in early 1972. The ceilings were quickly exhausted. Alleging inverse condemnation or taking, the developers in these cases typically argue that "plaintiff has been deprived of all beneficial use of its property and said property has been severely reduced in value, taken and damaged. . . ." 21/

Both cities had justified their moratoria with voter initiatives providing that "no further building permits are to be issued" until: (1) double sessions in the schools are ended; (2) sewerage facilities meet the standards of the Regional Water Quality Control Board; and (3) no rationing of water with respect to human consumption or irrigation and adequate water reserves for fire protection exist. 22/

In both cases a major issue was the existence of a duty upon the cities to accommodate newcomers. Bond issues for municipal improvements which would partially alleviate the "emergency" conditions referred to in the referendums had failed at recent elections. 23/

21. Standard Pacific Corp. v. City of Pleasanton, No. 423602, Superior Court, Alameda County, California, filed May 1, 1972, Complaint at 8.

22. Initiative Ordinance re Building Permits. City of Livermore, April 1, 1972. The Livermore City Council earlier adopted an ordinance along similar lines limiting building permits to the first 1,500 applicants after November 8, 1971.

23. Id.
In nearby Palo Alto, open space and municipal service considerations lay behind a sharp density rollback in large areas of the Palo Alto foothills. Forming the skyline to the west of the city, the rugged ground includes many thousands of acres of raw undeveloped land. After a planning report suggested that higher intensity residential development on these sites would place a disproportionate burden on services, particularly schools, the city decided on the density rollback in partial implementation of the proposed land use plan. City attorneys note that similar physical circumstances "may not be found in more than one or two other cities in the country." They believe that the careful planning studies the city has undertaken in developing this proposition will be an important element of their defense of the new zoning regulations.

Water and sewerage already exists in much of the area, and at least one property owner has challenged the new regulations as a regulatory taking of his property. Although his is a relatively small parcel, the arguments raised in his challenge could also be applied in much of the foothills region and had resulted in some $20 million in claims by early 1973. 24/

The County of Santa Cruz has enacted a special forty-acre minimum lot size zoning classification which has been challenged by the developers of a proposed 40 year, multi-million dollar development planned to eventually house 33,000 persons. 25/ The developers argue that their lands are now used for marginal agricultural and limited grazing purposes, and that the ordinance's classifications "would cause plaintiff loss and damage without compensation . . . [and] be a taking and damaging of property for public use without just compensation. . . ." 26/

25. Moroto Investment Company Limited v. The County of Santa Cruz, No.48607, Superior Court, Santa Cruz County, California, filed September 12, 1972.
26. Id., Complaint at 7.
The owners of gravel rights in Placer County, California are also challenging what they call an "absolute prohibition" by the county denying them permission to quarry, remove and process their gravel. The state had purchased the land from the plaintiffs in 1967 without providing special compensation for the gravel located in the bed of the Bear River. Rather, they allowed a reservation in the deed conveying the property which provided that the former owners had:

"The right to remove and process gravel from exposed gravel bars in the stream bed to a depth not to exceed 20 feet from grade. All removal of gravel shall be subject to state laws pertaining to such gravel extraction."

County zoning authorities nonetheless denied permission to operate the processing plant and the quarrying operation in the river. Arguing danger to the ecology of the river, a county road and other nuisance factors, the county's Board of Appeals and Board of Supervisors both rejected the zoning administrator's grant of permission to mine. The owners of the gravel mining rights which otherwise expired December 31, 1972, have pursued their case on appeal for several years and it is now before a court where they demand compensation for this "taking of property without due process of law."

All this litigation has not stopped other California communities from adopting a variety of new techniques to control growth. The headline "New Mayor at Helm of Political Effort to Determine Pace of Housing Development," signals a systematic program initiated by Mayor Pete Wilson to match growth to urban services in San Diego. The city is withholding building permits if a

28. Id., Argument I at page 25.
public hearing results in a finding of "emergency" conditions regarding public facilities. Further control has resulted from the rezoning of some 40,000 acres on the outskirts of town for agricultural uses only, forcing developers to approach the city with development proposals and discouraging leapfrogging development. 30/

While most of these actions have been heartily supported by constituents, an effort to stall development through a moratorium in the city's Mira Mesa District resulted in a Superior Court ruling that the city had exceeded its statutory powers. There has been no court test of the San Diego programs which reached the constitutional issues. 31/

On the subject of billboards, another somewhat controversial issue in urban aesthetic controls, Mayor Wilson notes that "Sometimes you can't accommodate [competing public and private interests]." San Diego had come to a decision point as it has on some growth issues and decided to eliminate billboards. Mayor Wilson goes on however, "In order to be fair, and to be constitutional, we established a schedule to amortize the investment of each billboard owner." This San Diego effort did meet constitutional challenge in the courts. 32/

Polls in Palm Springs also indicate that substantial voter sentiment supports that city's growth control efforts. The City Council initiated its first action on November 22, 1972, when a 120 day moratorium on condominium and apartment construction was enacted. The Mayor noted, "We aren't in a stop growth policy. All of us on the Council feel that for a community to be viable it has to have a certain amount of growth and progress. So we're not talking about stopping growth. We're talking about contained growth." 33/ The program has not met a major court test, but discussion of zoning changes possibly envisioning a rollback to bring zoned density

30. Id.
31. Id.
32. Cry California, (Fall, 1972) at 19.
into line with planned growth projections make constitutional limitations a factor in future municipal decisions.

Oregon, codifying what residents have customarily recognized, now has a legislative declaration "that the public may have the free and uninterrupted use" of the ocean shore in its "beach bill." Overcoming initial questions based on the taking issue, it now has met general acceptance and court approval, officials suggest, in part because of its minimal economic impact. The beach area is not suitable for structures and has long been used by the public. Ownership of the property east of the vegetation line, however, is not affected by the bill.

Because the beach bill does not provide for public access across adjoining property, recent litigation has been initiated by the state. In the first such suit, the state has argued that where longstanding public use of private land has been tolerated, public rights of access exist. The landowners have resisted, raising the familiar constitutional objections to public appropriation of private land without compensation.

Oregon's Scenic Waterways Act was also carefully drafted to avoid constitutional issues over the taking question. It provides that certain development in designated zones requires one year's notice to the State Highway Commission. If the Commission finds that the proposal would substantially impair the natural scenic quality; it may then acquire the property within the one year waiting period; otherwise the landowner may proceed.

34. Ore. Rev. Stats. Section 390.605 et seq.
36. Id.
38. Id., Section 390.845.
A court holding in 1970 which apparently prohibited any construction in or over the tidelands of the State of Washington provided a significant impetus for a shoreline management program in the state. 39/ In May of 1971, the state became the first to adopt a program of comprehensive shoreline management with implementation beginning in June of 1971. 40/ Presented to the voters as one alternative in an initiative referendum in November of 1972, the legislative program also received voter approval. 41/

The Shoreline Act outlines a planning program which identifies shorelines subject to its protection. Local governments have the primary responsibility for the inventory of shorelines and preparation of master programs for their area. While they may reject this role and cast the burden on the state, the counties have generally accepted their role in the program, particularly after voter approval of the measure in late 1972. 42/ Although the state retains a special interest in "shorelines of statewide significance," primary jurisdiction for planning and permit issuance lies with the local governments.

While policy differences in interpretation of the Act led the Shorelines Hearings Board to deadlock on an appeal from an early application for development in Lake Washington, problems have been ironed out in later proceedings. Likewise, having survived attack through voter referendum, local permit procedures are proceeding relatively smoothly. One of its draftsmen notes that while "it has imperfections, in the bigger context it has worked quite well, the electorate supported it and local officials are going along with the program." 43/

42. Id.
43. Id.
While strict regulation of uses in shoreline areas could pose constitutional issues similar to those seen in other states, no such litigation has yet arisen. A flood plain regulation, however, has raised the issue in a case pending in the local courts. Maple Leaf Investors went before the State Pollution Control Hearings Board in late 1972 to protest a denial of permission to construct a single family subdivision on property on the Cedar River in King County, Washington. The state argued that about 70 percent of the property was in the floodway and the remainder in the flood fringe as defined by the United States Army Corps of Engineers. The state urged the Board to find the denial of the permit "a reasonable exercise of the police power." The state's flood control act had been adopted in 1935, a fact which the state cited in support of its argument regarding the reasonableness of the regulation. 44/

These repeated challenges, either by the state to establish protective standards or by private parties seeking to invalidate regulations complete the survey of the taking issue both in terms of action and reaction. While nuances may shift depending on particular state doctrines, the pattern remains consistent with the challenge raised against legislation which in some cases has been enforced and accepted for several decades.

PART II

TAKING AND REGULATION THROUGH

SEVEN AND A HALF CENTURIES

Introduction

Having obtained a general perspective on the ways the taking clause is influencing current efforts to control the use of land, the user of ordinary English may be puzzled by the meaning of the concept of "taking." The word "take" ordinarily refers to the act of obtaining possession or control of property, and although there are many other usages of the word none of them seems descriptive of governmental regulation of the use of land.

How then did the language "nor shall private property be taken for public use without just compensation" become a limitation on the regulatory power? Curiosity on this subject made us examine legal history back to the Magna Carta.

We found that the concept of "taking" originally referred to the seizure of lands by the government, and that it retained this meaning through the time it was incorporated into our constitution and for a century thereafter. Only around the turn of the Twentieth Century -- a period of conflict between freewheeling growth and expansion and an emerging concern that governmental regulation was needed -- did the courts begin to expand the meaning of "taking" beyond the original conception.

Until this period the law recognized two separate rules regarding governmental powers over land: a duty to pay compensation if land were seized for public use; and a right to regulate the use of land as long as the regulation was reasonably related to a public purpose.

The historical background prior to the merger of these two concepts is of interest not only to those with an abstract curiosity about the original intent of the
founding fathers. The study of history may suggest the possibility of a return to the admittedly unsophisticated, but in retrospect farsighted, idea that the founding fathers originally proposed.
CHAPTER 5

TAKING AND REGULATION: THE ENGLISH HERITAGE

1. Seizure of Land by the King

In Medieval England holding land was a chancy thing at best. The King was entitled to levy on all landowners such charges for the defense of the realm and certain other royal purposes as he saw fit, and if it was not readily forthcoming the King literally seized the offender's land in forfeiture. It is out of the early attempts of English landowners to resist these levies and assert their property rights against the King that our modern constitutional doctrine was born.

Prior to the Norman conquest in 1066 the Anglo-Saxon King of England was elected by a council of nobles. While the council followed a pattern of electing lineal descendants of the previous king to the extent this was consistent with the need for a strong king for protection of the realm, the nobles also sought to preserve their own rights from that same strong monarch in times of peace. Therefore, it became common practice for the nobles to extract some sort of guarantee from the King at his coronation in the form of a charter.

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1. Technically of course the English nobles did not "own" land in the same sense that we would use the term today. Each noble held land, physically occupying it, by virtue of a series of feudal obligations owed his "grantor" who in turn held of his land by virtue of similar obligations to a yet higher lord. Highest in all chains was the King. Each noble's right in land was basically a right to possession, and to subinfeudate -- to give land to others in return for feudal obligations. No one owned land, and indeed it was some time before one's descendants were recognized as having rights to one's "holding" at one's death. See generally, A.W.B. Simpson, An Introduction to the History of the Land Law (1967). For our purposes most of these distinctions are irrelevant and we will treat the nobles as landowners except where the nature of their tenure is of specific importance to the subject.
54.

After the Norman invasion, William the Conqueror continued this practice. 2/ Each of William's successors issued similar charters on his coronation, in terms varying from the real concessions the barons exacted from the weak Henry I to the innocuous promises made by the powerful Henry II. 3/ But it was during the reign of King John, that the nobles obtained real, lasting guarantees and forged the first link in a chain of legal continuities traceable down to the United States Constitution of 1789.

The system of collection and seizure of lands for payment of debts, 4/ which included forfeiture of lands for failure to obey the royal summons to provide funds

2. William had some claim to the throne via the saintly Edward Confessor, King just a few years before. It was to William's advantage to utilize this tenuous link with the "legal" Anglo-Saxon monarch in order both to pacify his subjects and to signify to his own Norman nobles that he was not on the throne solely by the force of their arms. He therefore went through the motions of a formal coronation, complete with coronation charter. Henry Care, English Liberties, Or The Freeborn Subject's Inheritance (4th Ed; 1719) at 8-9. William S. McKenney, Magna Carta: A Commentary on the Great Charter of King John (1905) at 113.

3. William's oath was a fairly innocuous one, but not so that of Henry I. Pressed as he was with respect to his claim to the throne of his father the Conqueror by his uncle the Duke Robert of Normandy, he issued a Charter of Liberties which made real concessions and guarantees to his barons. Stephen I made even greater concessions in his successful but costly efforts to retain the crown against the claims of Henry's daughter Mathilda. These concessions were sharply cut back in the coronation charter of the re-doubtable Henry II of Anjou, architect of the strong central administrative machinery in derogation of baronial power that was so misused by his sons Richard and John in the Thirteenth Century. McKenney, supra, at 113-123.

4. A. W. B. Simpson, An Introduction to the History of the Land Law, (1967) at 7-8; Faith Thompson, The First Century of Magna Carta (1926) at 2-3. It wasn't so much that John converted these military obligations to a general tax as his habit of collecting before a campaign, then making a truce and keeping the money, or collecting on the basis of old, rather than new contingents which his barons were obligated to supply.
to fight the French, 5/ had become particularly burdensome under King John. 6/ While probably no worse an administrator or taskmaster than his brother and predecessor Richard I, he lacked the heroic aura which surrounded a crusader-king. In fact, John had lost a disastrous war on the Continent while attempting to regain those very French provinces over which William I had originally ruled as Duke of Normandy.

And while Richard's collection of feudal dues was seen to by Ministers (he being in England for only a few months of his eleven-year reign) in his absence, upon whose heads public opprobrium was heaped, John, as a resident monarch, found the displeasure of nobles and peasant alike visited directly upon himself. 7/

When "the necessities of King John drove him to severities that had been unknown in the preceding century," 8/ the nobles, having only recently been financially burdened by the raising of ransom for Richard, finally revolted in November of 1214. 9/ They drafted a list of demands, (the "Articles of the Barons" of April, 1215) and proceeded to march on London. 10/

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5. McKechnie, Magna Carta, supra, at p.60. Crown tenants -- those holding directly of the King, apparently found their estates appropriated by the King in the form of escheats, Id., at 483.

6. Care, English Liberties, supra, p.9: John "made use of so many illegal devices to drain them of money" and make frequent encroachments on the Liberties of the people.


9. McKechnie, supra, 72-74; See also by the same author, "Magna Carta (1215-1915), An Address Delivered on its Seventh Centenary to the Royal Historical Society and the Magna Carta Celebration Committee," from Magna Carta Commemoration Essays, pp. 1 et seq. (Henry Elliot Malden, ed., for Royal Historical Society, 1917).

10. It will be recalled that it was Henry I, being pressed by rival claims to the throne who had been forced to accede to the strongest coronation charter to date -- and that the succeeding one by the powerful Henry II reneged on many of the earlier provisions. See, McKechnie, supra, pp.113-123.
While John at first swore angrily he would never accede, events such as the opening of the gates of London by the merchants and people to the rebel barons soon changed his mind and conferences began at Runnymede, near Windsor Castle where John had brought his force of loyal barons and mercenaries.

Out of these conferences finally emerged, in broad Norman hand, the famous Magna Carta. Experts differ as to the exact time and place of the event, but all agree that the handwritten Latin document sealed by King John contained a Chapter 39 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.

[emphasis added] 12/

11. The Clause is sometimes called Article 39 because the original 1215 Magna Carta contained 63 articles, of which the above was Article 39. By 1225, the Charter consisted of 37 Articles as the original 63 were pared down and consolidated of which the aforementioned was number 29. Thompson, supra.

12. The translation is from the following Latin text as reported both by McKechnie and by Coke . . .

Nulles liber homo capiatur, vel imprisonetur, aut disseisatur, aut utlagetur, aut aliquo modo destruatur, nec super eum ibimus, nec super eum mittemus, nisi per legale judicium parium suorum vel per legem terre. (emphasis added).

Edward Coke, (Milite) The Second Part of the Institutes of the Laws of England. London: printed for E. and R. Brouke, Bell-Yard, New Temple Bar, 1797 at page 45. The translation of this text, especially, the underlined portion, varies considerably, however, sometimes reading "No free man shall be . . . stripped of his . . . possessions," or, as in Coke's Second Institutes, "No man shall be disseised . . ." Coke, 499, supra at page 46.
To a large extent Chapter 39 represents one of the biggest sets of grievances which the barons had against the King -- "arbitrary infringements of personal liberty and rights of property." 13/

While it is often assumed that the Magna Carta was immediately and continuously regarded with highest esteem, in fact its early history was stormy. John had probably never meant to abide by the Charter and, following the issuance of a Papal Bull by Innocent III excommunicating the barons, he renounced his signature. Civil war then broke out, but John conveniently died in October of 1216 and the first of many "confirmations" of Magna Carta was made by the regent (a trusted rebel baron) in the name of the infant Henry III, John's son. In 1225, Henry III, needing both money and support from his barons, again confirmed the Charter in a shortened and consolidated form, and it is this version of Magna Carta -- with clause 39 becoming clause 29 -- that was finally enrolled in the Statutes at Large of England. 14/

Magna Carta was born of necessity, foisted upon an unwilling monarch. But immediately after the death of

13. Holdsworth, supra, Vol. II at 215. The Magna Carta contained other limits on royal power as well. See, generally, G. M. Trevelyan, History of England, Vol. 1, at 228. One commentator has suggested that Article 28 -- "No constable or other bailiff of ours shall take grain or other provisions of any one without immediately paying therefore in money. . . ." -- was the basis of the final clause of the Fifth Amendment, at least with respect to eminent domain. Zechariah Chafee, Jr., How Human Rights Got Into the Constitution, (1952) at 45. We did not find this thread picked up by any of the other sources we examined, however.

John and the coronation of Henry III, there is little evidence of bad faith concerning Magna Carta's terms. 15/ It was not until 1223 that the government under Henry III, being financially in need, again ignored rights set out in Magna Carta in seizing of noble lands. This was soon brought to a halt by the 1225 reconfirmation of the Charter. 16/

From 1225 until the early years of the Fourteenth Century -- the reigns of Henry III and Edward I -- Magna Carta was confirmed five more times, and it appears that while they were not so arbitrary as John, both rulers, being often financially pressed, would violate many of the specific "liberties" of the Charter by means of arbitrary exactions. 17/ But there is no mention of the seizure of lands against which Chapter 29 inveighs. 18/

The Magna Carta as a whole is treated very little over the next 75 years or so, as England was involved in a series of foreign and internal conflicts (the 100 Years' War, the War of the Roses), with various factions seizing each others lands for treason as power shifted.

Repetitious confirmations of Magna Carta by the King -- especially during the reign of Edward III in the latter part of the Fourteenth Century -- acted as more of a "talisman" of permanence for enacted laws in troubled times, indicating the "evanescent quality of sovereign

15. Thompson, supra, page 5.
16. Id., at pages 5-6. This 1225 version became the "definite" one with 37 clauses, as noted supra. Henry III began to press for the return of castles and lands into the king's hands -- mainly by escheat -- "earlier than strict right allowed."
17. Id., at 16. Often such exactions took the form of knights fees again, but increasingly these resembled taxes, on such as personal property, more than feudal incidents, services or aids. Id., at 18-19.
18. Id., at pages 15-64. It is interesting that this one commentator purports to treat fairly, exhaustively the "first century of Magna Carta," even cross-referencing in a convenient chart materials in her book on each section -- yet never once mentions Chapter 29 in the context of that period.
guarantees.

Periodically Chapter 29 was made the basis for a petition against seizure of lands simply on petition or suggestion to the King or his counsel by powerful individuals. Thus, it is reported in 1352, that petitions appeal to Chapter 29 of the Charter, insisting that except on indictment or presentment of a jury, no man shall be ousted of his freehold by simple petition to King and council, and the King agrees. In fact, the King was persuaded in a statute of 1352 to agree that such proceedings, in accordance with Article 29 of Magna Carta, would henceforth be dealt with outside the King and Council.

19. William F. Swindler, Magna Carta, Legend and Legacy (1965) at page 141. The reported confirmations -- at least thirty by the time of Henry V can be treated as proof of England's monarchs' tendency to disregard the Charter when convenient, confirming it only when their need for money required them to once again come to terms with all of their nobles. On the other hand, it is possible to view such confirmations only as additional guarantees, to the nobles, the merchants, and eventually, Parliament -- a sort of re-adoption of basic principles, for it is true that many of the confirmations counted by Coke came in the reign of Edward III, during which there is very little evidence of complaint about royal violations. See also, Hazeltine, H. D. "The Influence of Magna Carta on American Constitutional Development" (printed in Magna Carta Commemoration Essays, ed. by Henry Elliot Malden for the Royal Historical Society, 1917) at pages 10-11; McKechnie, Magna Carta, A Commentary, supra, at pages 165-193; Faith Thompson, The First Century of Magna Carta: Why it Persisted as a Document (1925) at page iii.

20. Thompson, supra, page 63.

21. (Bishop) William Stubbs, The Constitutional History of England, (Vol. II, 1929) at 637-638. Similar petitions were filed again in 1362 and 1363. During this time there was much popular dissatisfaction with the autocratic behavior of the nobles on the part of the common people. It is also during this period that the House of Commons as a separate deliberative body was germinating. Again in 1391 and 1392 complaint was made that the common people were being made to "answer for their freeholds" before councils of lords, contrary to the King's right and the common law. Id., at 639.

22. Swindler, supra, at 145-148. It was during this period -- the reign of Edward III -- that Magna Carta was confirmed no less than twenty times.
But during the Tudor period from the latter part of the Fourteenth Century to the end of the Fifteenth Century, virtually nothing -- not even a confirmation -- is reported about Magna Carta.

2. Early English Land Use Regulations.

The pattern of English land use regulation began gradually. Magna Carta itself dealt with another grievance which resulted in considerable restriction on land use. At least since the time of King Canute in 1018, England's monarchs claimed the privilege of designating lands in the kingdom as forests to be used for the King's hunting. Such forests had little value because of restrictions on any use which would make it unfit for hunting -- like fencing, or cultivating, or the erection of any buildings except perhaps a dwelling.

Chapter 47 of the Magna Carta attempted to limit the "wide and ill-defined" right of the monarch to "afforest" whole districts, or to place riverbanks "in defence" (kept clear for fowling and hawking):

"All forests that have been made such in our time shall forthwith be disafforested; and in a similar course shall be followed with regard to riverbanks that have been placed 'in defence' by us in our time."

For the next 100 years -- until the confirmation of this Charter by Edward III in the Fourteenth Century -- England's monarchs attempted to renege on their promises to "disafforest" and enlarge their private preserves, much to the chagrin of their noble tenants who were thus unable to get much profit therefrom. By the reign

23. Henry Care, English Liberties, or the Freeborn Subject's Inheritance (4th Ed; 1719) at pp. 39-58.
24. McKechnie, Magna Carta, supra, p. 507. This provision was amplified in a separate Forest Charter (Carta de Foresta) issued by the young Henry III in 1217.
of Henry VIII the nobles had apparently won, as it is reported that when that monarch afforested land around Hampton Court in 1540 he not only did so with the express approval of Parliament, but also paid compensation to all who suffered damage. 25/

The nobles regulated the growing of crops by their tenants from earliest times. In the Thirteenth and Fourteenth Centuries, a noble's bailiff or steward might, as a matter of administration, simply declare what crops were to be grown by the tenants that year. It would not have occurred to anyone to question the authority, or view it as a "taking" -- after all, everyone "held of" that noble in that area -- their "title" was inferior to his, to that extent. 26/

Twelfth Century customs 27/ also record provisions forbidding the selling of land without first offering

25. McKechnie, supra, at 509-511. The Stuarts apparently tried to revive the old forest rights unsuccessfully in the Seventeenth Century - it is reported that when Charles I created the Forest of Richmond in 1634, it was done only after compensation was promised to those damaged.

26. Interview with Professor and Mrs. Albert Kiralfy on December 28, 1972 in London. Remedies developed, like "distress" -- the seizure of crops or cattle until the service or incident was performed, -- or the writs of cessavit around 1278, by which if one failed to perform one's feudal service within a certain time -- usually 2 years -- the next-superior lord, or the King, was entitled to repossession. Actually a form of escheat. To refuse a feudal service had formerly been a felony, conviction for which automatically led to escheat to one's lord. When it ceased to be a felony, escheat ceased to follow, and the lord was technically remedyless, until passage of the Statute of Gloucester in 1278.

27. Generally the recording official would attempt to discover the oldest remembered practice in the Village before recording. This customary law was regarded by Coke as one of the three major sources of English law, after common and statutory law. This branch of law came to be known formally as the Customary Law of the boroughs of the United Kingdom. Selden Society - Borough Customs, Vol. I (ed. by Mary Bateson) (Vol. 18) London: Bernard Quaritch, 1904, pp. ix - xviii.
it to the lord "for such reasonable price as another would give him for the same." 28/

"When a burgess receives his burgage plot, if it is not built on, the reeve shall order him to build on his burgage within forty days on pain of forfeiture; if he does not he shall be amerced 12d." 29/

More detailed land use regulations were found in urban areas. In 1189 neighbors were required to give 1-1/2 feet of their land each and to construct thereon a stone party wall three feet thick and sixteen feet high. Other provisions of the same date protected views and access to light. References to earlier wood construction and several Eleventh Century and Twelfth Century fires indicate clearly the reasons for these regulations. 30/ Again in 1297 it was additionally ordered that everyone must keep the front of his own house clean, that "low pentices" were to be removed and that pigsties were to be kept from the streets. 31/ By the middle of the Fourteenth Century detailed building regulations required roofs to be covered with stone, tiles or lead. 32/

"In 1302 one Thomas Bat being hailed before the Mayor on a charge of neglecting to put tiles instead of thatch on his houses offered to indemnify the city in case of any fire happening by reason of his thatch. The offer was accepted, on the understanding that the thatch was to be removed by a certain time. The naivete of Mr. Bat in offering and the city accepting, an indemnity in case of fire is truly remarkable. What would Mr. Bat have done, how far would his personal estates have gone, if a quarter of the city had been burned down by reason of his thatch." 33/

Then, as now, London was not an organized city as we would conceive of a city. It consisted of a multiplicity of jurisdictions, each of which constituted a separate interest group and often had its own separate police force. So jealous were the citizens of their prerogatives that even after 1066 no non-citizen was permitted to remain within the city overnight for more than two days without the surety of a citizen.

It was the early "exclusion" of non-citizens -- usually foreign craftsmen with whom the citizens chose not to compete -- that led to the growth of settlements just outside the walls of the city. These early suburbs (populated by commuters as most of the residents of these settlements worked within the city) led to an increase in the population of metropolitan London.

In the Sixteenth Century London was both the commercial and intellectual center of England. As Holdsworth put it:

"The increase in the size of London... was no doubt partly caused by the fact that the centralized government of this period was making it the political, the intellectual, and the fashionable centre of England. All who had ambitions of any kind flocked to London and the Court... Frequent proclamations were issued directing the nobility and gentry to leave London and to return to their county seats, and sometimes threatening them with punishment and loss of office in the event of disobedience."

Moreover, the spirit of mercantilism and the new geographic conditions of the Sixteenth Century moved the center of the then-existing "world" trade from the Mediterranean to seaports on the Atlantic -- like London. 38/ 

The government's response to the economic conditions that forced more and more people to work in London was to enact legislation prohibiting the construction of new housing on the outskirts of London. 39/ In 1580 Queen Elizabeth by proclamation forbade the construction of any new housing within three miles of the City, a rule which would prevent many owners of vacant land from developing it. The Queen's description of the problems of urban growth bears such similarity to current problems that it is worth quoting at length:

"The Queen's Majesty perceiving the state of the City of London (being anciently termed her chamber) and the suburbs and confines thereof to increase daily, by access of people to inhabit the same, in such ample sort, as thereby many inconveniences are seen already, but many greater of necessity like to follow, being such as her Majesty cannot neglect to remedy, having the principal care, under Almighty God to foresee aforehand, to have her people in such a city and confines not only well governed by ordinary justice, to serve God and obey her Majesty, (which by reason of such multitudes laterly increased can hardly be done

38. Id., at 315. Adding to these reasons for the growth of London and the problems associated with it was the dissolution of the monastaries by Henry VIII, (1536-1539). Huge areas in and just outside London, formerly owned by the Church were opened, both officially and otherwise, upon which to build dwellings. To further complicate the problem of increased population thus caused, the new residents claimed the privileges and immunities enjoyed by the former inhabitants, the monks and friars -- including the right to their own system of courts, separate from those of the City of London. Harrison, London Growing, supra, pages 115-116; Trevelyan, supra, (Vol.II) at 58-62. 39. Holdsworth, supra, (Vol. 4) at 303.
without device of more new jurisdictions and offices for that purpose) but to be also provided of substantiation of victual, food and other like necessaries for man's life, upon reasonable prices, without no city can long continue. -- And finally, to the preservation of her people in health by God's goodness, the same is perceived to be in better estate universally than hath been in man's memory; yet where there are such great multitude of people brought to inhabit in small rooms, whereof a great part are seen very poor, yea, such as must live of begging, only worse means, and they heaped up together, and in a sort smothered with many families of children and servants in one house or small tenement; it must needs follow, if one plague or popular sickness should, by God's permission, enter amongst these multitudes, that the same would not only spread itself, and invade the whole city and confines, but that a great mortality would ensue the same, where her Majesties personal preserve is many times required: besides (by) the great confluence of people from all parts of the realm, by reason of the ordinary terms of justice there holden, the infection would be also dispensed through all other parts of the realm, to the manifest detriment of the whole body thereof . . . "

The Royal proclamation was followed by an Act of Parliament in 1588 which tried a new approach -- large lot zoning. It prohibited the construction of any cottage or building at a density greater than one building to four acres:

"After the end of this session of Parliament, no person shall within this realm of England make, build, or erect, or cause to be made, built or erected, any manner of cottage for habitation or dwelling, nor convert or ordain any building or housing made or hereafter to be made, to be used as a cottage for habitation or dwelling, unless the same person do assign and lay to the same cottage or building four acres of ground at the least... being his or her freehold [and] inheritance lying near to the said cottage, so long as the same cottage shall be inhabited."

Since land owned by commoners was typically divided into very small parcels this Act effectively prevented any but the rich from erecting houses in the affected districts.

Four-acre lots apparently failed to solve the problem. In 1592 Parliament returned to the blanket prohibition of new dwellings within three miles of London and added a restraint on the conversion of existing houses to multifamily dwellings.

41. 31 Eliz. I C.7 (Statutes at Large, Vol. 6 at 409, et seq.).
43. 35 Eliz. I C.6: This particular statute is only summarized in the current Statutes at Large; however, in a subbasement of Westminster Palace on the bottom shelf of the storeroom for old statutory series there is a quaint (and quite large) leather-bound volume replete with brass fittings (quite sharp, in fact) entitled, The Second Volume of the Statutes at Large Conteyning all such Acts which at any time heretofore have been printed from the first yeere of the Raigne of Elizabeth late Queene of England, & etc., Until the Sixteenth Yeere of the Raigne of our Soveraigne Lord James, by the Grace of God King of England Scotland France and Ireland, Defender of the Faith, & etc., Together with divers necessary Tables newly added thereto. (London: Printed by Bonham, Norton, and John Bill, Deputie Printers for the Kings most Excellent Majestie. M.D.C. XVIII.) Therein the statute may be found in full.
Act was designed, said Parliament to prevent the "pestering of houses with diverse families, harboring of inmates, and converting of great houses into several tenements or dwellings, and erecting of new buildings" in the London area, "whereby great infection of sickness and dearth of victuals and fewell have grown and ensued, and many idle, vagrant and wicked persons have harbored themselves there and diverse places of the Realme have been disappointed of workmen and dispeoled." 44/

In the early 1600's more Royal proclamations were issued against overcrowding and against the building of houses in and about London, but much new building continued to take place in disregard of the royal proclamations. 45/ These royal proclamations seemed to be concerned with aesthetics as well as safety. 46/ For example, the 1604 Proclamation decreed no new houses were to be built in London or within nine miles thereof, ". . . except all the utter walls and windowes thereof, and the fore-front of the same, be made wholly of bricke, or bricke and stone." 47/ And the 1620 Proclamation established rules for the number and height of stories, size of windows, and so forth. 48/

44. Id., at page 407.
45. The response to the proclamations appeared to be poor. Similar proclamations were issued in 1604, 1605, 1607, 1608, 1611, 1615, 1618, 1619, 1620, 1622, 1625, and 1630. (Holdsworth, Vol. 4 supra, at page 304). While some proclamations were re-issued because they expired within a given time, others were re-issued because the King encountered enforcement problems. See Knowles and Pitt, supra, pages 18-22.
46. Harrison, supra, at page 130.
47. As quoted in Harrison, supra, at page 130.
48. Id., at page 131, 132-133. These royal building regulations were for the most part ignored, as there simply was not a sufficiently-interested body charged with their enforcement. For example, in 1627 one Arthur Cundall was hauled before the King and Council for erecting a house on the King's own land near Parliament stairs, contrary to an ordinance forbidding new houses except on old foundations, issued in 1607. Given 14 days to prove the existence of an old foundation or pull down the buildings, Cundall not only succeeded in defying the King and Council, but obtained licenses to serve ale therein, which he was still doing as late as 1638! Brett-James, "The Growth of Stuart London," as recorded in Knowles and Pitt, supra at page 22.
In 1624, Parliament passed an Act authorizing saltpetre-men to dig up floors of stables and any other place where earth saturated with animal matter could be found, from which gunpowder might be made. Besant recounts that this practice became quite a grievance -- no one was permitted to pave over these floors as a result -- but no help came until 1656 when the threat of civil war had substantially abated. Thereafter, the owner's permission to dig was required. 49/

In response to the great fire of 1666 which destroyed most of London, Parliament again took over the regulation of land use in serious fashion. "An Act for the Rebuilding of the City of London" 50/ divided all new housing in London into four classes, with separate regulations governing each. Uniform roof lines were required in many areas, and the Act required all houses on "high" streets to have front balconies, "four feet broad, with rails and bars of iron, of equal distance from the ground," with pavements in front "of good and sufficient flat stone." The ground floor was required to be not less than six nor more than eighteen inches above street level, and no bulks, jetties, windows, posts, seats, "or anything of like sort" was to be made to extend "beyond the ancient foundation of houses. ..." 51/

Finally, to "encourage" rebuilding, all owners of dwellings were given three years from the date of the Act in which to commence rebuilding. After that time the Mayor and Council of London could upon due notice sell the land to another party who would commence building. 52/

49. Besant, London in the Time of the Stuarts (1903) at pp. 185-186.
50. 19 Ch. II C.3 (8 Stat. Large, pages 233-251).
51. 19 Ch. II C.3 Paragraphs XIII and XIV.
52. 19 Ch. II C.3 Paragraph XV. The rest of the Act reads like a modern health and building code, regulating sewers, methods of construction, etc. For an example of a fire law only, pure and simple, cf. 6 Anne C.3 (1707) (11 Stat./L. 414 et seq.) dealing with making of fire hydrants, engines, fire procedures, etc. Hardly a word about amenity here.
Land use controls were not limited to densely populated areas. The marshy condition of many parts of England gave rise to yet another series of land use controls relating to the creation of drainage systems and the prevention of floods. As various tenants constructed sea-walls and drainage works on their own property, it soon became readily apparent that negligence on the part of a single tenant could result in the inundation of an entire region. Thus as early as 1250 the landowners of Romney Marsh chose 24 "jurats" to watch over the sea-wall and watercourses, compelling each owner to maintain in repair walls of a certain length and "watergangs." Recalcitrant landowners were fined and their goods subject to seizure by the jurats' bailiff. 53/

In 1532, the whole process was formalized by enactment of the Statute of Sewers, 54/ which authorized Commissions to govern the sewers -- sea-walls and watercourses -- in each district. The Commissions for Sewers, as they were called, were authorized to cause repairs to be made and to impress whatever was needed into service, to occupy lands and to seize and transport topsoil. 55/

53. Sidney and Beatrice Webb, English Local Government, Vol. 4, Authorities for Special Purposes (1922) pp. 13-17. Such procedures, with variations, were common in Kent and Surrey as well.

54. 23 Henry VIII C.5. "The word 'sewer' itself alone is sufficient to show the nature of the office created by commissions of sewers. Sewer is a Saxon ward, sae-wer, that is, sea-fence, protection against sea tides, whatever its construction." Smith, supra, at 16.

55. However, it appears that all such occupations and seizures -- as opposed to the ordering of repairs by landowners, was liberally compensated. Webb, supra, at pp. 20-23, 36, 56. See also, Toulmin Smith, The Metropolis Local Management Act, 1855 (London: Henry Sweet, 1855) pp. 5-6, 8-11, 16-26. In pertinent part, the Statute of Sewers charged the Commissioners "to survey the said walls, streams, ditches, banks, gutters, sewers, gates, calcies, bridges, trenches, wills, milldams, floodgates, ponds, locks, hebbing wears and other impediments, lets and annoyances" and to cause them "to be made, corrected, repaired, amended, put down or reformed as the case shall require" and to impress into their service as many "carts, horses, oxen, beasts and other instruments" and "workmen and laborers" as they deemed necessary, as well as to appropriate compulsorily "timber and other necessaries." According to the Webbs (p.36) this authority was never disputed, although throughout the 18th Century the cost of repairs was for the most part borne by the particular owners of frontages (p.56).
Other early land use controls involved "common lands," either open cultivated fields, or non-cultivated woodland or moor known as "wastes." The commons belonged to a manorial lord but neighboring persons had rights to graze cattle or cut wood on them. In either case such property rights were known as "common rights" and those possessing the right to "common" were called "commoners."

The common rights in cultivated fields were usually dispersed in a generally random manner:

As the strips of each farmer lay scattered one here and one there through large common fields, a great part of his time and that of his labourers was spent in journeying from one of his plots to another... At Wendover, in Bucks, one tenant in 1794 held 18 acres in 31 allotments; but he was far outdone by a farmer in Gloucestershire, who had one acre divided into 8 "lands" spread over a large common field, so that he must travel two or three miles to visit the whole of his acre. The expense of reaping and carting was proportionately increased. . . .

As a result of multiple rights in one field, some to plough, some to graze cattle, it was necessary to observe a strict timetable with respect to the sowing and reaping of crops because of serial rights to pasture. The crops were thus subject to trespass, thievery and trampling, not only by individual farmers because of scattered tillage rights, but also by livestock. Improvement in agricultural methodology was thus rendered impossible. 56/ 57/

56. Scrutton, supra, at page 115.
57. For example, in Cambridgeshire, the Village of Pampisford "inter-commoned" with the Village of Whittlesford on 20 acres of arable land "from hay harvest to Lady Day, with a 'bite' on Easter Sunday." This "bite" -- during which commonable animals were allowed to graze -- lasted from 6:00 a.m. to the end of Church services, during which period so many were driven onto the commons that "all chance of a hay crop for the year was destroyed." Scrutton, supra, page 119.
One of the most serious of these agricultural problems was the illegal "surcharge" of the common, as Garrett Hardin described it -- the pasturing of more animals than the common field could support. Each commoner found it to be to his ultimate advantage to pasture as many cows as possible on the common field since he generally possessed, as to grazing, an undivided share in that field. It "cost" him nothing extra, no matter how large or how small his herd might be. Unfortunately, when every commoner came to the same conclusion, surcharging was the result. The animals were thus often half-starved and therefore prey to every disease known at the time. Moreover as the animals were pastured in a common area, once a disease appeared it spread rapidly among them.

Common rights to graze animals in the lord of the manor's "waste" lands were the jealously-guarded prerogative of the yeoman farmer. The Statute of Merton in 1236 sanctioned "enclosure" (i.e., Fencing of the land and extinguishment of the commoner's right to use it) by lords of the manor of such "wastes," but only if the lord was assured that there was sufficient pasturage remaining for the tenants. The idea of interfering with such a right as common pasture was not taken lightly.

But economic conditions provided an increasing incentive to enclose cultivated as well as waste lands. Plagues in the Fourteenth Century reduced the supply of

59. There was a substantial qualitative difference between animals raised on commons as opposed to those raised in an enclosed pasture. The incidence of "rot" among sheep was alleged to be the greater among the former class of animals by a ratio of 5:1, and it was apparently not unusual to lose up to half a flock in one year to "rot." Cf. also Dorothy George, England in Transition, pages 81-96, for accounting of reasons, facts and figures supporting enclosures -- and the often unfortunate effects on village life.
60. Scrutton, supra, pages 116-126.
61. 20 Hen. III C.4; cf. Tate, supra, page 61-62.
labor to work the manorial farms and increased its cost. Meanwhile the wool trade increased following the Wars of the Roses. By turning to sheepherding in enclosed fields, the lord had the advantage of often making as much as he previously did from tillage, with fewer laborers to pay. These factors provided an irresistible impetus to enclose, thereby extinguishing

62. The reduction in the number of commoners forced fifty percent increases in wages (paid to tenants to work his lord's land as well as his own, rather than the old tenurial requirements, which were by now commuted to money payments) so that former methods of open-field cultivation were not profitable to the lords of the manor. The lords sought to revert to the "customary services" of their tenants now far more valuable than their money commutation which was formerly used to hire laborers to do the work originally done by the tenant in return for enfeoffment. When these efforts, including an ill-starred "Statute of Labourers" (25 Edw. III C.1) intended to force tenants to work at the old rates, failed, the lords looked for other ways to turn a profit on their lands.

63. Another impetus to enclose was the suppression of the monasteries and the confiscation of their lands. When abbots' lands, for years "tilled on an easy customary system" were granted to noblemen, they were anxious to convert them to the raising of sheep. This was often accomplished despite a statute which required the grantees of monastery land to retain as much in tillage as formerly. (27 Hen. VIII C.28 Section 17 as quoted in Scrutton, supra, page 81). Even the national defense was used as an excuse to enclose. A statute of 1555 directed enclosure commissioners to see to the enclosing of parts of the northern counties within twenty miles of the Scots border. (2 & 3 Phil. & Mary C.1, cf. Scrutton, supra, page 94.)
common rights of pasture. 64/

Many enclosures were undertaken illegally. Commoners were forced to seek their remedies in court to prevent enclosures which threatened their agricultural livelihood. 65/ By the Sixteenth Century, the commoners received support from such well known figures as Sir Francis Bacon, 66/ Sir Thomas More, 67/ and Sir Anthony

64. Scrutton, supra, page 74-78. There even developed a "legal" method of sorts to accomplish enclosure in the Fifteenth and Sixteenth Centuries by means of an Exchequer or Chancery Decree, allegedly settling a dispute but in fact confirming an agreement to enclose between the lord and possibly certain of his tenants who had been bought out. Often the threat of such a suit would bring tenants around to agreement as the costs could be ruinous to a small farmer. Tate, supra, pages 45-48 and 67 et seq. Such enclosing was not accomplished without opposition in some portions of the realm, and armed struggles and even open rebellion broke out throughout the Sixteenth Century, especially as demand for good grazing land raised rents paid by small landholders to the land, and statutes against enclosures were ignored. Scrutton, supra, pages 86-91; Tate, supra, page 67. Revolts of sorts broke out in 1536, 1549, 1554, 1569, 1596 and 1607. Peter Ramsey, Tudor Economic Problems, London: Victor Gollancz Ltd. (1963) at pages 20-22. Enclosures of wastes in the Thirteenth and Fourteenth Centuries had been more often for the providing of private parks and hunting preserves for manorial barons and other lords. Scrutton, supra, at pages 72-82. This is not to say such creation of parks ceased altogether in the Sixteenth Century. Indeed, it continued to be one of the major commonor complaint with respect to enclosures. Great areas were enclosed for deer parks. One family, Tonneley, was so infamous in taking in parks that local tradition had it that a Tonneley was doomed to wander to and fro in his park, crying "Lay out, lay out," (the opposite of "take in.") See Scrutton, pages 82-86.

65. Scrutton, supra, at page 68 et seq; Tate, supra, page 60 et seq.

66. "Enclosures began to be more frequent, whereby arable land, which could not be manured without people and families, was turned into pasture, which was easily rid by a few herdsmen; and tenancies for years, lives, and of will, whereupon much of the yeomanry lived, were turned into demesnes. This bred a decay of people..." Bacon Works, ed. by Spedding, vi., 93-94, as quoted in Scrutton, supra, page 76.
Fitzhubert, 68/ because the result of enclosure was loss of livelihood for the agricultural tenant and depopulation or even vanishing of whole villages. 69/ A land populated with free tenants ready to fight for their own was far more difficult to invade, they argued, than an unbroken horizon of open fields with the odd manor or shepherd.70/

Throughout the Sixteenth and into the Seventeenth Century common fields could be lawfully enclosed if tenants had absolute but undivided rights in cultivated land, sometimes in common with their lord. The land was divided amongst all that could show a legal interest and the larger parcels could thus be legally enclosed. These agreements were generally confirmed by chancery court or by royal license, if the crown had an interest therein. 71/

But with respect to the formerly open and uncultivated wastes of the manor, and with respect to many open fields, illegal enclosure by force at the hands of the local lord continued. 72/ Throughout the Sixteenth Century, King and Parliament reacted by passing statutes against enclosure, for reasons already noted -- the decline of food production, the desire for a populated

68. Back of Surveying, as quoted in Scrutton, supra, page 79.
69. Scrutton, supra, at pages 130-133.
70. Tate, supra, pages 121-122: Institutes, Vol. III (1644 ed.) at page 205. Even Lord Coke was of the opinion that enclosures -- especially of manorial waste -- were contrary to the common law.
71. In the 1540's the Lord Protector Somerset, just prior to his downfall and eventual execution, issued a proclamation "against enclosures and the taking in of fields that were accustomed to lie open for the behoof of the inhabitants, and ordered those who had enclosed those commons should lay them open by the first of May 1549." (III, 1002, as reported in Scrutton, supra, page 86.) Other statutes and proclamations of the period also attempted, apparently ineffectually, to control the spread of enclosures.
countryside in case of invasion. 73/ Aside from further enclosure to reclaim swamps and marshes, "illegal" enclosures of common pasture, by might more than right and often without compensation, continued well into the Seventeenth Century. 74/

Although originally often illegal, 75/ the enclosure movement gradually received the blessing of parliament through the adoption of a variety of statutes and the creation of enclosure commissions, until by the time of colonization of the new world at the end of the Seventeenth Century the commoners were beginning to be deprived of all rights to use their land through confirmation of "agreed" enclosure by Parliament. 76/

3. Land Use Regulation and Property Rights

Land use regulation, even if it forbade "landowners" any development of their property, did not appear to have offended the medieval sense of justice. "The idea that a man may do as he likes with his own," notes Holdsworth, "would have been wholly denied" by lawyers and philosophers of that day:

73. Scrutton, supra, pages 80-95. A series of acts -- 4 Hen. VII, 27 Hen. VIII C.22, 243 Phil.& Mary C.2, 5 Eliz. C.2 -- all provided for the increase in tillage and the tearing down of enclosures, but were evaded. Even those generally excepted enclosures for the reclaiming of swamps, the growth of woods, and the national defense.

74. Scrutton, supra, at 102, describes such an enclosure in Wiltshire, recorded in a complaint addressed to Parliament by the commons. As late as 1655 complaints were addressed to Parliament concerning arbitrary enclosure of pasture, in complete disregard of common rights. Scrutton, supra, at 105.

75. Cf. Scrutton and Tate, supra, generally.

76. Scrutton, supra, at 80: While some tenants were bought out, others were frightened out. Those with a small common interest in the land proposed to be enclosed were often coerced into the "agreement" which, by the mid-Eighteenth Century was always reduced to a Parliamentary Act. Literally hundreds of such Parliamentary Enclosure Acts were so passed. And the small commoner was left with a parcel so small that he could do nothing but sell -- probably the intent of the big holders anyway -- and thereby lose his livelihood altogether. George, supra, at page 80-82; Scrutton, supra, at 113-150.
"Property, said the Doctor and student, was given by the law of man, not by the law of God or reason, and therefore 'the same law may assigne such conditions upon the propertie as it listeth, so they be not against the law of God nor the law of reason.' Therefore the state could determine the limitations under which property could be acquired. In other words it could regulate the conditions under which all branches of commerce and industry could be carried on." 77/

As long as these regulations were designed to promote the public benefit, rather than the personal benefit of the King, justice was not offended. This attitude was exemplified by the decision in the year 1606 of The Case of the King's Prerogative in Saltpetre. 78/ A landowner claimed compensation because the King's employees had dug saltpetre from his land to make gunpowder. The court defended the King's actions and held that no compensation was required.

"... for the case of saltpetre extends to the defense of the whole realm, in which every subject has benefit; but so it is not in the case of the preparation of the King's houses ... But the King cannot charge the subject for the making of a wall about his own house or to make a bridge to come to his house, for that does not extend to the public benefit: but when enemies come against the realm to the sea-coast, it is lawful to come upon any land adjoining to the same coast, to make trenches or bulwarks for the defense of the realm, for every subject hath a benefit by it ... for this is for the public, and every one hath benefit by it." 79/ [emphasis added]

78. 12 Co. Rep. 12; 77 E.R. 1294.
But coincident in time with the extensive regulation of land use and enclosure of common land that characterized the Elizabethan and Stuart periods was a revival of interest in individual property rights and, in particular, in the Magna Carta. "The Elizabethan revival of Magna Carta had begun in the 1580's," and as Professor William Dunham put it, "for over fifty years the Charter enjoyed an Indian summer." 80/ One commentator has said of the reprinting of Magna Carta during this period that "it thus refreshed legal memory which had not, for a century now, had the formal reminder of a Parliamentary confirmation." 81/

This renewed interest in the Magna Carta was primarily generated by the battle of the Parliaments against domination by the Stuart Kings. Its chief theoretician was Sir Edward Coke.

Coke took issue with James I on the proper place of common law in the hierarchy of law. 82/ Coke's position was basically that the courts had the right and duty to interpret and apply statutes to preserve inviolate the reason of the common law, those principles of natural justice which the common law was generally held to embody at this time. 83/ But James I had brought with him from Scotland no common law -- because there was none in Scotland. To the Stuart King, fundamental law was only that which preserved the lineage and succession of monarchs. 84/ On all else, James I felt himself free to legislate. Coke's response was that the ancient laws, from Magna Carta down, were the "fundamental" guarantees of Englishmen's rights and liberties. 85/ It was against this background that Coke wrote his commentaries on property and the Magna Carta in the Second Institutes: 86/

81. Swindler, supra, at page 164.
83. Gough, supra, pages 48-49.
84. As he told his subjects in his speech at Whitehall on 31 March, 1607, "The True Law of Free Monarchies."
85. Gough, supra, pages 52-57.
86. Edwardo Coke, supra, pages 45-55.
No man shall be disseised, that is, put out of seisen, or dispossessed of his free-hold (that is) lands, or livelihood, or of his liberties or free-domes, and free-customes, as belong to him by his free birthright, unlesse it be by the lawful judgment, that is, verdict of his equals (that is, men of his own condition) or by the law of the land (that is, so to speak, once and for all) by the due course and process of law.

Coke proceeds to illustrate by citing a recent case in which a "custome" of a town permitting a lord to disese his tenant if the tenant should fail in what he owed for two years, and hold it until arrears were paid, was held "a custome against the law of the land, to enter into a man's freehold in that case without action or answer." 88/

By the same token, says Coke, a royal grant of power to the dyers of London to search and seize cloth illegally dyed was similarly declared to be "against the law of the land, and this [Magna Carta] statute: for no forfeitures can grow by letters patent." 89/

Coke's position that the rights of property had "constitutional" status (as we would use the term), and his attempt to ascribe a similar status to jury trial and other civil liberties, 90/ were clearly at

87. Coke, Institutes, supra, page 46.
88. Id., citing 43 E.3 32, Lib. 8 Tr. 41 El. Fol. 125.
90. Some historians argue that Coke's views were also at odds with historical accuracy, and that Coke has foisted his own views on his less learned contemporaries for his own political motives, with very little to actually support them. Professor McKechnie observes that: "There is scarcely one great principle of the English Constitution of the present day, or indeed of any Constitution in any day, calculated to secure national liberties or otherwise to win the esteem of mankind, which has not been read by commentators into the provisions of Magna Carta. In particular, the political leaders of the Seventeenth
odds with the Stuart Kings' own concepts. But Coke was not alone in defending property rights against royal prerogative. The supporters of Parliament all echoed the chorus in response to the divine-right claim of the Stuart monarchs.

Thus in the Parliamentary Debates of 1610 Hobart and Whitloche hotly disputed the right of James I to go contrary to "fundamental laws" and seize property without their consent. In 1628 Pym declared that taxation, being a taking of property, required the consent of Parliament in accordance with "the ancient and fundamental law." And Sir Dudley Diggs, one of the four taking the commons part in the debate on the case arising out of the imprisonment of five knights for refusing to contribute to one of the King's forced loans and their being consequently imprisoned without bail, said:

> It is... an undoubted and fundamental point of this so ancient a law of England [Magna Carta] that the Subjects have a true Property in their Goods, lands and Possessions... Without this

and Eighteenth Centuries discovered among its chapters every important reform which they desired to introduce into England, thereby disguising the revolutionary nature of many of their projects by dressing them in the garb of the past." McKechnie, supra, page 156. And Professor Holt also says of Coke's claim that Magna Carta was declaratory of the principal grounds of fundamental law in England that even today no one can state definitively what Chapter 29 or any other part of Magna Carta really meant. What point is there in demythologizing, then, to arrive at what might be yet another myth? Holt, supra, page 4-8.

91. Coke's views, expressed in written opinion from the bench caused his dismissal, and at one point, his imprisonment. Coke later stood for Parliament and was elected to Commons from which vantage he played a part in precipitating the rebellion against Charles I.


93. Id., at 58, citing State Trials, iii, page 341.

94. The others being Coke, Littleton and Seldon.
80. 

... there can be neither law nor justice in a Kingdom. ... 95/

The King's refusal to confirm these principles was one of the major issues in the English civil war. The Petition of Right reflected Parliament's attempt to restate the basic principles it attributed to the Magna Carta. The Royalists lost the war, of course, and the supremacy of parliament was not challenged again.

And, more importantly for American purposes, the "fundamental" nature of the rights attributed to the Magna Carta was established in the minds of the English citizens who were engaged in the colonization of the new world. 96/

At the time extensive colonization of the new world began, therefore, the colonists were fresh from the victory of property rights over the royal prerogative of seizure. "The great migration of America spanned those years of the early Seventeenth Century when the House of Commons sought to impose its will on the King. ... Those who came to America carried with them the memory of Commons' battle against the King, the outcome of which left an enduring imprint on the development of colonial legislatures during the Seventeenth Century." 97/ The colonists also inherited, however, a concept of property which permitted extensive regulation of the use of that property for the public benefit -- regulation that could even go so far as to deny all

95. Gough, supra, at page 63, citing Lords Journals, iii, 718. It is interesting to note that the result of this debate was a request to the King, from Parliament (over the Royalists' protests that a subject held his property rights only so long as he remained "subject-like") that the King confirm that according to Magna Carta and six Statutes conceived to be explanatory thereof, and the law and customs of the land, every free subject had a "fundamental" property in his goods. This the King refused, and the Petition of Rights, said to be the forerunner of the American Bill of Rights, followed.

96. Hazeltine, supra, pages 182-185.

productive use of the property to the owner if, as Coke himself stated, the regulation "extends to the public benefit . . . for this is for the public, and every one hath benefit by it." 98/
CHAPTER 6

THE COLONIAL BACKGROUND OF THE TAKING ISSUE

The colonists of North America brought the ideas of Seventeenth and Eighteenth Century England to a new continent, one where the land stretched endlessly out before them, and where they were free from the medieval heritage of feudal lords who claimed a share of the profits of the man who worked the land.

This plenitude of land and the cherished freedom to use it generated a fierce pride in land ownership that was a key element in the frontier spirit of self-reliance. Nevertheless, only a few years after colonization began the colonial governments also began to regulate the use of land, and the pattern of regulation that ensued grew to resemble the pattern of regulation in England rather closely.

1. Land Use Regulation in the Colonies

Although the land in North America seemed endless the colonists soon found it necessary to establish intricate systems of regulation to control the growing of certain crops. In 1631 the Virginia House of Burgesses passed an Act requiring each white adult male over 16 to grow two acres of corn, or suffer the penalty by forfeiting an entire tobacco crop. 1/ A 1642 Act required the growing of at least one pound of flax and hemp, 2/ and an Act of 1656 required landowners to cultivate at least ten mulberry trees per 100 acres in order to stimulate the production of silk. 3/

1. 1 H. 166.
2. 1 H. 219.
3. 1 H. 420.
The overzealous planting of valuable and exportable crops often created problems for the colonies. Planters of tobacco in New Amsterdam were finding it lucrative to devote entire plantations to the profitable crop, at the expense of the community's supply of food crops. Accordingly, in 1653 such planters were required to sow equal amounts of corn, peas or grain as tobacco, on pain of forfeiting their entire tobacco crop. 4/

Equally troublesome was the ruining of valuable agricultural land by over planting -- again usually tobacco. Thus in Virginia in 1632 the planting of over 2000 plants per "pol" incurred the penalty of having one's entire crop destroyed. 5/

Regulations in urban areas resembled those in London. The cities enforced strict land use regulations designed to promote health and safety. In the aftermath of the great fire of Boston, restrictions were set up on how a property owner could build his home. A series of laws was passed requiring the use of brick or stone in buildings. No dwelling house could be built otherwise, and the roof had to be of slate or tile upon penalty of a fine equal to double the value of the building. 6/

More common were building measures designed to eliminate unstable structures as well as to provide fire walls. Philadelphia enforced measures concerning the construction of party walls, specifying required thickness and levying fines for violations. 7/

Other measures, similar to present zoning ordinances, sought to locate certain noxious uses in such a manner as would render them least offensive to the local citizenry. Thus a 1692 Boston ordinance confined the location of slaughter, still, curriers' and tallowchandlers' houses "where it may be least offensive." 8/ And in New York City, slaughtering of

7. Bridenbaugh, supra at 238.
animals was periodically banned altogether. 9/

The concept of a "health" regulation was sometimes carried rather far. Thus, in the city of Philadelphia shade trees were required by a 1700 health regulation. In "An Act for regulating streets," it was declared that

> every owner or inhabitant of any and every house in Philadelphia, Newcastle and Chester shall plant one or more tree or trees, viz., pines, un-bearing mulberries, water poplars, lime or other shady and wholesome trees before the door of his, her or their house and houses, not exceeding eight feet from the front of the house, and preserving the same, to the end that the said town may be well shaded from the violence of the sun in the heat of summer and thereby be rendered more healthy. 10/

And in 1647 New Amsterdam appointed three street surveyors, not only to keep hog pens and privies off the public highway, but to prevent the building of unsightly houses, buildings and fences. 11/

Thus the use of land, both in rural and urban areas, was extensively regulated in the colonies. Although the settlers may have cherished their new freedom to use their land they also recognized the need to regulate that use for the good of the community as a whole.

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9. Id., at 239.
10. 2 Pa. Stat. 66, Ch. 53.
11. John W. Reps, Town Planning In Frontier America at 187-188. See also pp. 111, 116-117.
2. Takings of Land for Governmental Purposes

In the early period of colonization the taking of land for governmental purposes presented few problems since land was so plentiful. In general, the colonial governments seem to have compensated landowners when developed land was taken for governmental purposes, but if the land was undeveloped the government sometimes thought it so valueless that the issue of compensation was ignored. 12/

The most common type of public program which required the acquisition of land was for the construction of roads and other transportation projects. Thus in 1691 an act regulating streets in New York City provided that if, in the continuing or laying out of streets private land was taken, the city government was authorized to assess the value of the land and treat with the owner. In case of disagreement, a jury could be impaneled to fix the value. 13/

Massachusetts also provided "reasonable satisfaction" to any man for land taken for roads, though he could not prevent the roads going through his land so long as it did not require the pulling down of his house or the digging up of his orchard. 14/

On the other hand, as late as 1721 it was only for improved or enclosed land that the payment of compensation was required. 15/

Land was also purchased when the need for public buildings arose. Thus an act in Pennsylvania authorized certain representatives of the colony to purchase a piece of land in a convenient place in each county for the construction of a courthouse and prison. 16/

12. Stoebuck, supra, at 582.
13. 1 Laws 269, Ch. 18.
at 600 (note 152).
15. 2 Laws 68, Ch. 415.
16. 4 Pa. Stat. 150, Ch. 310. A later (1742) Act provided for
the purchase of an island for a hospital for sick immigrants.
4 Pa. Stat. 382, Ch. 357.
And in Virginia, land was taken, with compensation, for the erection of virtually new towns, as early as 1680. 17/ An example is the 1742 condemnation of 50 acres of land belonging to one Jethro Summer for the construction of Suffolk Town. 18/

The low value placed on undeveloped land reflected the attitudes of those who were working the land and disliked distant speculators. Thus, in New Amsterdam in 1647 because many persons to whom land had been granted failed to build on their lots the Director General Peter Stuyvesant and his Council decreed that "they must erect on their lots good and convenient houses within 9 months, . . . or in default thereof such unimproved lots shall fall back to the patroon or Landlord." 19/ This desire to encourage development of land became a common theme in early American history.

Although compensation was generally provided when developed land was acquired, exceptions were made for emergencies. In the 1772 case of Emmans v. Brewer 20/ an action of trespass was brought against four men who, pursuant to a 1692 statute, demolished Emmans' house in the course of clearing an area "desolated by the great fire of 3 February 1767." A portion of the land had been designated as a newly-widened street. The remains of the buildings in the area were said to be a common nuisance and hazard to passersby. 21/ The Court held the action of trespass ill-founded, in part on the ground that the demolition was authorized by law.

Shortly thereafter an emergency of national scope arose -- the Revolutionary War. The new Continental
Congress sought to mobilize its resources to fight the war. It passed a resolution on April 11, 1777, to prevent provisions from falling into enemy hands. A considerable store of provisions was taken from various owners and removed to a nearby depot, including some belonging to one Sparhawk. The depot fell to the British, and after the war Sparhawk "exhibited an account" against the public for the price of the provisions which claim was denied by the comptroller-general. The latter refused payment, and litigation followed, culminating in the 1788 decision of the Pennsylvania Supreme Court of Respublica v. Sparhawk. 22/

It is clear from the decision that the state of war which existed in Pennsylvania at the time was a definite factor:

"The transaction, it must be remembered, happened flagrante bello; and many things are lawful in that season, which would not be permitted in a time of peace. The seizure of the property in question, can, indeed, only be justified under this distinction; for otherwise, it would clearly have been a trespass:" 23/

Nevertheless, the court also said that "it is better to suffer a private mischief, than a public inconvenience; and the rights of necessity, form a part of our law." 24/

After giving a number of illustrations of this principle, the court summarized its opinion as follows:

"We are clearly of the opinion, that Congress might lawfully direct the removal of any articles that were necessary to the maintenance of the Continental Army, or

22. 1 Dall. 357 (S. Ct. of Pa., 1788).
23. 1 Dall. 357, at 362.
24. Id.
useful to the enemy, and in danger of falling into their hands; for they were vested with the powers of peace and war, to which this was a natural and necessary incident: And having done it lawfully, there is nothing in the circumstances of the case, which, we think, entitles the Appellant to a compensation for the consequent loss."

The Emmans and Sparhawk cases are among the few examples of court decisions in which land use regulations or acquisitions were contested. In general it appears that the actions of the colonial governments in regard to the use of land provoked relatively little controversy.

3. The Intellectual Background of the Taking Clause

The lack of court decisions in the colonial period is less surprising if we recall that the idea of "unconstitutionality," so familiar to us today, was then only an embryo. While we now think routinely of challenging in court the validity of a dubious legislative or administrative action, in colonial times the supremacy of the judiciary was not so clearly estab-

25. 1 Dall. 357 at 363.
26. Records of local judicial decisions in the colonial period are very difficult to obtain. See Julius Goebel, 1 History of the Supreme Court of the United States 112-113 (1971). No such regulation seems to have been the cause of an appeal to the Privy Council in London, which was the principal appellate court for the colonies. See Joseph H. Smith, Appeals to the Privy Council from the American Plantations (1950). Because most of the land use regulations noted herein were repeated in statutes enacted over a long period of time it can be assumed that they did not encounter serious judicial opposition.
lished. 27/

To understand the intellectual atmosphere which generated the taking clause -- as well as the rest of the bill of rights -- it is necessary to examine various legal and political concepts that were being discussed in Eighteenth Century America.

The idea that the judicial process must comport with certain basic standards of procedural fairness was an ancient English tradition, predating even the Norman conquest. 28/ But in the Seventeenth Century, Sir Edward Coke melded the ancient concept of due process with the revival of the Magna Carta to promote a theory of parliamentary supremacy -- neither judge nor king could contradict "the law of the land" as made by parliament. 29/

Coke's Institutes were basic reading for most colonial lawyers, 30/ as was Henry Care's English Liberties, or the Freeborn Subject's Inheritance, 31/ a work which apparently was widely circulated as one of the first seven books printed in the colonies 32/

27. Acts of the colonial legislatures required approval by the Privy Council, which emphasized to the colonists their subservience to England. From the beginning of the Colonial period at the end of the Seventeenth Century, the various colonies generally resisted the suggestion that there was a right of appeal to the Privy Council from colonial courts. While there was never much dispute that conflicts between chartered colonies might be resolved in the Privy Council in England, the Privy Council often rendered decisions in favor of English Governors and English interests, and against colonial claims. See Joseph Henry Smith, Appeals to the Privy Council from the American Plantations, pages 56-62, 74, 115-118, 279, 295, 314-320.


29. See Chapter 5, supra.


32. H. D. Hazeltine "The Influence of Magna Carta on American Constitutional Development" 17 Col. L. Rev. 1 (1917) at 19-20. Warren, supra, at Ch. II-VI, and VIII.
and which quoted extensively from the passages in the Institutes dealing with property rights and their protection by Chapter 29 of the Magna Carta. 33/

In the latter part of the colonial period the works of Sir William Blackstone were widely circulated. Edmund Burke, in his famous speech to Parliament on Conciliation with America, said "I hear that they have sold nearly as many of Blackstone's Commentaries in America as in England." 34/

Blackstone was a strong advocate of the rights of liberty and property: "So great moreover is the regard of the law for private property, that it will not authorize the least violation if it; no, not even for the general good of the whole community." 35/

Blackstone had lectured at Oxford as Vinerian Professor of Law, and the Commentaries were largely a write-up of those lectures. As early as 1759, John Adams of Massachusetts, later President of the United States, wrote about the favorable impression those lectures had made upon him. 36/ Literally thousands of copies of the Commentaries themselves were available by the time of the revolution itself. 37/ It is thus no wonder that, according to one of Blackstone's biographers, when the Constitutional Convention met in

33. Care, supra, at 26-33.
35. 1 Blackstone, Commentaries at 138-139. See David A. Lockmiller, Sir William Blackstone (1938) 169-175.
36. Lockmiller, supra, at 169.
37. One thousand copies were imported prior to the First American editions in 1771-1772. Fourteen hundred completely-subscribed copies made up that First American edition and, according to Lockmiller -- "The List of subscribers was headed by the Governors of Virginia, Pennsylvania, New Jersey, Connecticut, East Florida and the Bahama Islands. Sixteen of the subscribers afterwards became signers of the Declaration of Independence, six were members of the Constitutional Convention, one became President of the United States, and one was appointed the first Chief Justice of the Supreme Court." Lockmiller, supra, at 170.
1787, "most of the members of that body were familiar with, and they were no doubt greatly influenced by, Blackstone's analysis of the English governmental system. 38/

As with Coke, Blackstone discusses Magna Carta in very "fundamental" terms, while professing belief in Parliamentary (but not popular) sovereignty and supremacy:

III. The third absolute right, inherent in every Englishman, is that of property: which consists in the free use, enjoyment and disposal of all his acquisitions, without any control or diminution, save only by the laws of the land. . . .

Citing Article 29 of the Magna Carta, he points out that common law gives every man a right to go to court if he is "put out of his franchises or freehold." 39/

Also influential at this time was an emerging recognition of eminent domain as a legitimate power of government. We are now accustomed to the idea that the government may insist on taking a man's land if it is needed for public purposes. But why should I give up my land just because the government says it needs it? Regardless of whether they offer me compensation, why must I obey the government's demand for my land?

Most commentators attribute the source of the concept of eminent domain to the natural law movement. 40/ The natural lawyers believed that the power is

38. Lockmille, supra at 174.
40. Arthur Lenhoff traced the concept back to the Seventeenth Century political philosopher Hugo Grotius, who justified eminent domain in terms of the power of the state over all private property within its bounds and the immunity of the sovereign from any claims of his subjects. Arthur Lenhoff, "Development of the Concept of Eminent Domain," 42 Col. L. Rev. 596-597 (1942).
inherent in government because it was necessary for its independent existence and perpetuity. So during colonial times the power of eminent domain was accepted as inherent in government without the need for an express grant of the power. 41/

As the Americans debated about the nature of their fundamental rights they were strongly influenced by these concepts -- parliamentary supremacy as embodied in the Magna Carta, and the inherent nature of the power of eminent domain.

4. Colonial Precursors of the Taking Clause

The parliamentarians said that property could be taken only according to the law of the land as expressed by parliament. The natural law theorists said the sovereign had an inherent power to take property when it was needed for public purposes. But neither of these theories required that compensation be paid to the owner of the taken property. Even under Coke's interpretation the Magna Carta had required only that parliament approve the taking and had made no mention of compensation.

The attempts to define fundamental rights in the early colonial period show little concern over the compensation issue. Many of the colonial charters referred to the taking issue, relying heavily on Magna Carta's Article 29, but made no mention of compensation. The 1641 Massachusetts Body of Liberties incorporated parts of Chapter 29 as well as references to "natural law." 42/

Parts of the Magna Carta were also included in a number of charters granted by the Stuart Kings. 43/

Early "fundamental" laws passed by the colonial legislatures also incorporated various provisions of the Magna Carta. The Massachusetts Body of Liberties of 1641 required that compensation be paid for cattle and goods:

8. No man's cattle or goods of what kinde soever shall be pressed or taken for any publique service unless it be by warrant grounded upon some act of the generall court [i.e., colonial legisla-ture], nor without such reasonable prices and hire as the ordinarie rates of the countrie do afford. And if his Cattle or goods shall perish or suffer damage in such service, the owner shall be suf-ficiently recompenced. 44/

No similar sentiments were expressed, however, about the taking of land. 45/

The Assembly of Pennsylvania, in its first session (Pennsylvania was founded in 1682) passed a "fundamental" law that a freeman could not be dispossessed of his free-hold without due process of law. 46/


44. 1 H. 166. The document as a whole was drafted by Nathaniel Ward, a colonial minister and former lawyer, and passed by the colony's legislature "as a body of grounds of laws, in resemblance to a Magna Carta," according to the then Governor, John Winthrop. (1 H. 266.) "They were apparently compiled from the Scriptures, Magna Carta, and the statutes and common law of England." (1 H. 219).

45. Professor Chafee has suggested an analogy between the taking clause and the 28th Article of the Magna Carta, prohibiting the taking of grain or provisions by the King without payment in money. Z. Chafee, How the Human Rights Got Into The Constitu-tion 45 (1952).

46. 1 H. 420.
Intermediate colonial documents of the revolutionary period continued to follow Coke's pattern, expressing concern only over takings by the executive without legislative approval. The Rights of the Colonists and a List of Infringements and Violations (1772), largely drafted by Samuel Adams, reflected the prevailing philosophy.

The Supreme power cannot justly take from any man, any part of his property without his consent, in person or by his Representative. 47/

5. Early State Bills of Rights

The first American declaration of the principle of just compensation for the taking of land appeared in Vermont's first constitution of 1777:

II. That private property ought to be subservient to public uses when necessity requires it; nevertheless, whenever any particular man's property is taken for the use of the public, the owner ought to receive an equivalent in money. 48/

The document, while passed by the legislature, was never ratified by the people of Vermont, though the compensation clause was included in a later document which was finally ratified in 1786.

47. 1 Schwartz 203.
48. J. B. Wilbur, Ira Allen: Founder of Vermont, 96 (1928). The document was largely drawn by Ira Allen and Dr. Thomas Young, the latter of Pennsylvania. Commentators frequently note its abolition of slavery as a significant departure from the Pennsylvania model, but no one other than Schwartz, (at I, p. 319) seems ever to have commented on the departure as to compensation for taking. Vermont had not been a separate colony but had been part of New Hampshire. In 1777, after New York and New Hampshire had feuded over its territory, Vermont declared its own independence and set up a government. Later in 1777 a convention adopted a Constitution and Declaration of Rights, largely modeled on the Pennsylvania documents of a year earlier. 1 Schwartz 322.
The original Massachusetts constitution was ratified in the interim (1780) thus becoming the first ratified American constitution to have a compensation clause: 49/

X. Each individual of the society has a right to be protected by it in the enjoyment of his life, liberty, and property, according to standing laws. He is obligated, consequently, to contribute his share to the expense of his protection; to give his personal service, or an equivalent, when necessary: But no part of the property of an individual can, with justice, be taken from him or applied to public uses without his own consent, or that of the representative body of the people: In fine the people of this Commonwealth are not controllable by any other laws, than those to which their constitutional representative body have given their consent. And whenever the public exigencies require, that the property of any individual should be appropriated to public uses, he shall receive a reasonable compensation therefor.

[Emphasis added] 50/

The Massachusetts Declaration of Rights, drafted in 1780 by John Adams, and apparently the basis for that constitution, contains a sentence declaratory of the principle of just compensation. This last sentence on compensation was added at the end of Article X by amendment during debate, but the records of the convention give no indication who proposed it or why, or what

49. Stoebuck, supra, at 568, n.57. See also, J.A.C. Grant, "The 'High-Law' Background of the Law of Eminent Domain," C. Wis. L. Rev. 67 (1930) at 71.
50. Oscar and Mary Handlin, The Popular Sources of Political Authority at 444.
discussion may have preceded its adoption. 51/

Other states provided that land might not be taken for public use without consent of the legislature. The provisions were more in the nature of due process clauses, providing that the consent of the property owner, or his representative's was required. Thus Pennsylvania's Declaration of Rights provided:

51. Schwartz 341-342; Stoebuck, supra, at 567. A review of the returns of each town in Massachusetts, rejecting the 1778 attempt of drawing up a constitution for that state, finds the issue of compensation rarely, and then only briefly, mentioned, although one commentator nevertheless maintains the people in the towns rejected that document because of "the lack of a Bill of Rights, about exclusion of Negroes from the suffrage, and about the inadequacy of the safeguards to property." Handlin and Handlin, supra, at 22. The above work reprints the formal "returns" usually in the form of a resolution from each town, both with respect to the 1778 and 1780 Constitutions. In fact only two towns -- Lenox and Essex -- specifically mentioned -- and very briefly -- the need to protect the ownership of property from government action, in giving reasons for rejecting the 1778 document (pp. 254-324). Of much greater concern to those towns (by far the minority) who saw fit to set down reasons for their rejection, were the issues of manner of representation, the existence of a bill of rights generally and Negro suffrage (see pages 202-379).

As to the 1780 Constitution which combined the language quoted above and which was ratified, the town of Pittsfield specifically mentioned in its "charge" to its delegate to the convention that, among the items which ought to be considered in a bill of rights, "that no man's property of right can be taken from him without his consent, given either in person or by his representative" (p. 411) ought to be included. None of the other "charges" collected by the Handlins contain similar language however. Nor is there a single word about property and compensation in the March, 1780, Address of the Convention purporting to explain the 1780 document to "Friends and Countrymen" (pp. 434-440). As to the returns of the towns on the 1780 document, some towns set out in detail the vote of the town on each article. (e. g., Stockbridge at p. 495). Generally, Article X which contained the above-quoted compensation clause passed unanimously. (Though for some reason the people voted against it in Mansfield).
VIII. That every member of society hath a right to be protected in the enjoyment of life, liberty, and property, and therefore is bound to contribute his protection towards the expense of that protection, and yield his personal service when necessary, or an equivalent thereto: But no part of a man's property can be justly taken from him or applied to public uses, without his own consent or that of his legal representatives.

The original (pre-1789) constitutions of Maryland, New York, and North Carolina, and the second (pre-1789) constitutions of South Carolina and New Hampshire, all contained clauses to the effect that one should not be deprived of life, liberty or property without the consent of the law of the land. But the first constitutions of Delaware, Georgia, New Hampshire, New Jersey and South Carolina made no reference to the taking issue at all.

6. The Drafting of the Taking Clause

The Federal Constitutional Convention did not adopt a Bill of Rights, though the subject was brought up towards the end of the convention by Eldridge Gerry of Massachusetts, seconded by George Mason, the draftsman of the Virginia Declaration of Rights. In general, the demand for a Bill of Rights by the states represented anti-federalist sentiment -- largely rural interests. In many of the state conventions which ratified the Constitution the antifederalists opposing the constitution made an issue of the lack of a bill of rights.

Many of the states sent proposed amendments to the new national government for the proposed bill of rights, but apparently the need for an eminent domain clause

52. 1 Schwartz 265.
53. Stoebuck, supra, at 568, n. 57.
54. Id.
did not come up in these debates. 55/ In fact, of the eight states which took the trouble to formulate amendments to the Constitution -- Virginia, Pennsylvania, Massachusetts, Maryland, South Carolina, New Hampshire, New York and North Carolina -- none of them had a word to say in their formal recommendations about property and compensation. 56/ There were only cursory, unofficial references by a few official committees. Thus, in Maryland, there is a record in committee of a number of personal liberty guarantees, but apparently none had anything to do with real property and compensation. Moreover, none of the guarantees were adopted. 57/ New York ratified "in confidence" that a bill of rights would be added, but again there is no record of specific mention of an eminent domain clause. 58/ In Pennsylvania it appears that a "group of 'gentlemen'" met in Philadelphia after ratification and drafted some amendments to be proposed by their legislature to Congress. Again, no mention of an eminent domain clause. 59/

The Federalists argued that no Bill of Rights was needed, but they reluctantly agreed to draft a Bill of Rights to allay popular suspicions. 60/ They asked James Madison, who agreed to draft the Bill of Rights, but not "for any other reason than that it is anxiously desired by others." 61/ (The most influential of those others was undoubtedly Thomas Jefferson, Madison's friend and mentor, who strongly urged that a Bill of Rights be adopted.) 62/

55. 2 Schwartz 1167; see e.g., the Virginia proposed amendments in 3 Eliot, Debates on Ratification 651; 9th. That no free man ought to be taken, imprisoned or disseised of his freehold, liberties, privileges or franchises, or outlawed, or exiled, or in any manner destroyed, or deprived of his life, liberty or property, but by the law of the land.
57. Stoebuck, supra, at 594, n.142.
58. Id. at n. 143.
59. Id. at n. 144.
60. See Goebel, supra, (History . . .) at 425-426.
61. Irving Brant, 3 James Madison, at 236.
In Madison's initial draft he followed closely the Virginia Declaration of Rights. 63/ The Virginia Declaration provided that "men . . . cannot be taxed or deprived of their property for public uses without their own consent, or that of their representatives . . ." 64/ and "that no man be deprived of his liberty except by the law of the land, or the judgment of his peers." 65/ When Madison's draft was first offered to the House in a speech during the first session of Congress, on June 8, 1789, it added a requirement of "just compensation":

No person shall be subject, except in cases of impeachment, to more than one punishment or one trial for the same offense; nor shall be compelled to be a witness against himself; nor be deprived of life, liberty, or property without due process of law; nor be obliged to relinquish his property, where it may be necessary for public use, without a just compensation. 66/

The language, but not the substance changed slightly in Committee, probably also the work of Madison, and in Conference with the Senate, to its present form. 67/ The amendments were debated in the House and Senate but apparently no record of any debate on the just compensation clause exists.

7. The Motivation for the Taking Clause?

There is a conspicuous absence of historical data that might enable one to determine why Madison added

63. See Z. Chaffee, supra, at 19-20.
64. Virginia Declaration of Rights, Section 6.
65. Id., Section 8.
66. 1 Annals of Congress 451-452; 2 Schwartz 1057; Stoebuck, supra, at 595; Dumbauld, supra, at 207.
67. Dumbauld, supra, at 211, setting forth the amendments reported by the Select Committee on July 28, 1789. There follows the amendments passed by the House (August 24, 1789) and Senate (September 9, 1789) with the identical language on just compensation, at pp. 214 and 218 respectively.
the just compensation language to the Fifth Amendment. Records of state constitutional conventions and ratifying conventions shed no light on the subject. Nor do the debates in Congress at the time the Bill of Rights was proposed. Secondary sources likewise appear to overlook the problem.

There is moreover little information available on the debates in the state legislatures on ratification of the Bill of Rights, either in the legislative reports or the contemporary newspapers. Such information as is available discloses virtually no debate on the last clause of what is now the Fifth Amendment.

The commentators who have studied the issue have noted this absence of legislative history. Sax notes the "very short supply" and "great dearth" of commentary on the meaning of the compensation clause. Stoebuck frankly wonders, considering the lack of attention given eminent domain considerations, "how it got into our constitutions at all."

A number of theories have been put forward regarding the precise intellectual inspiration for the just compensation language of the Fifth Amendment: natural law; Grotius and other civil law jurisprudents; English precedent, including Magna Carta; and the common law, all undoubtedly played a part in its history.

Quite possibly the immediate theoretical basis for the just compensation requirement was supplied by Sir William Blackstone. Coke had asserted that the King

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68. 1 Annals of Congress 451-452; 2 Schwartz 1057; Stoebuck, supra, 595; Dumbauld, supra, at 207.
69. Stoebuck, supra, at 594, n. 142.
70. 1 Schwartz 438; Stoebuck, supra, at 593.
71. 2 Schwartz 1167; see e.g., The Virginia proposed amendments in 3 Eliot, Debates on Ratification 651; 9th. That no free ought to be taken, imprisoned or disseised of his freehold, liberties, privileges or franchises, or outlawed, or exiled, or in any manner destroyed, or deprived of his life, liberty or property, but by the law of the land.
72. Stoebuck, supra, at 572-573.
was barred from appropriating property to his own use without consent of Parliament. But Blackstone went further than Coke. Blackstone argued that even Parliament could not give this consent unless the landowner were paid compensation:

So great moreover is the regard of the law for private property, that it will not authorize the least violation of it; no, not even for the general good of the whole community. If a new road, for instance, were to be made through the grounds of a private person, it might perhaps be extensively beneficial to the public; but the law permits no man, or set of men, to do this without consent of the owner of the land. In vain may it be urged, that the good of the individual ought to yield to that of the community; for it would be dangerous to allow any private man, or even any public tribunal, to be the judge of this common good, and to decide whether it be expedient or no. Besides, the public good is in nothing more essentially interested, than in the protection of every individual's private rights, as modeled by the municipal law. In this and similar cases the legislature alone can, and indeed frequently does, interpose and compel the individual to acquiesce. But how does it interpose and compel? Not by absolutely stripping the subject of his property in an arbitrary manner; but by giving him a full indemnification and equivalent for the injury thereby sustained. The public is now considered as an individual, treating with an individual for an exchange. All that the legislature does is to oblige the owner to alienate his possessions for a reasonable price; and even this is an execution of power, which the legislature indulges with
102.

caution, and which nothing but the legislature can perform. 73/

The theory of a "higher" natural or fundamental law which transcends law made by Parliament or Kings was expressed as follows by John Adams:

"There are rights antecedent to all early government -- rights that cannot be repealed or restrained by human laws -- rights derived from the great legislator of the Universe . . . British liberties are not the grants of process or Parliament but original rights, conditions of original contracts coequal with prerogative and coeval with government. 74/

Alexander Hamilton spoke of property as a universal appendage of man, regulated by law yet enjoyed by right. 75/

74. 3 Works of Adams (Charles Francis Adams, ed.) 440, as quoted in J.A.C. Grant, "The 'Higher Law' Background of Eminent Domain" C. Wisc. L. Rev. 67 (1930) at 67.
75. Clinton Rossiter, Alexander Hamilton and the Constitution 177 (1964). Another widely-read colonial law source -- Henry Care's English Liberties -- declared property rights to be fundamental and not at all dependent upon charters: "Besides, these are not properly the concessions of Kings, but Affirmations of the Common Law, and ratified by the suffrages of the people, who claim them as their rights and privileges, and as their Birth-right: And they did not enter into war with the King, (I want King John) because he would not grant them new privileges, but because he abused them of these Rights to which they were entitled as well by the Common Law, as by the grants of any former Kings." Care, supra, at 6. Care continues at page 8: "yet they (the liberties of Magna Carta) must not be understood as mere Emmations of Royal Favour, or new Bounties granted, which the people could not justly challenge, or had not a Right unto before; For the Lord Coke, at divers places, asserts, and all Lawyers know, that this Charter is, for the most part, only Declaration of the principal grounds of the fundamental laws and liberties of England; no new Freedom is hereby granted, but a Restitution of such as lawfully they had before, and to free them of what had been usurped and encroached upon them by any power whatso-
But as Professor Stoebuck has pointed out, it "is no great revelation" to discover that the just compensation requirement was supported on grounds of natural law. "What legal doctrine did they not thus explain? Natural law was the prevailing judicial philosophy." 76/ 

Is it possible that the just compensation clause was incorporated into the Fifth Amendment solely because it was one of a series of rights discussed by Blackstone even though the draftsmen of the Fifth Amendment had no particular grievance with specific takings of property? The decisive analysis of the inner-workings of James Madison's mind on this subject has yet to be presented, but three hypothesis seem worth considering:

First, it should be remembered that Madison was using language from the Magna Carta, and other documents based on it, that was originally designed to protect the legislative branch against arbitrary actions of the executive. But the Bill of Rights was intended to limit both the legislative and executive branches. Certainly it would have been no limitation on the legislative branch to require that takings of property be in accordance with "the law of the land" -- it was the legislature, after all, that would be making the law of the land. It is possible, therefore, that the just compensation language was added merely in an attempt to give some meaning to an oft-cited clause that would otherwise have been out of place. 77/

Second, the Sparhawk case cited earlier shows that the taking of property during revolutionary war did cause a certain amount of controversy. A contemporary commentator within a couple of decades after ratification opined that the compensation clause was probably

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76. Stoebuck, supra, at 573-574.
77. In the debates Madison expressed concern with the inadequacy of restraints on the legislature under the English system. See 1 Annals of Congress 436 (1895).
intended to restrain "the arbitrary and oppressive mode of obtaining supplies for the army, and other public uses, by impressment, as was too frequently practiced during the revolutionary war, without any compensation whatever." 78/

A third possible theory is that Madison, who strongly represented the propertied classes, was concerned that strong populist sentiments might cause the election of a Congress with a more egalitarian philosophy. Certainly some of the demand for protection of property rights in the new Bill of Rights represented a fear by the property-owning group that those less fortunate would soon be running the country. 79/

The ratification of the Fifth Amendment closes one chapter of history and begins another. The exact motivation for the adoption of the taking clause may never be ascertained, but at least one thing is clear: the draftsmen were not troubled by any issue involving regulation of the use of land. Such regulations had been standard practice in England and throughout colonial times and seem to have provoked no serious controversy. There is no evidence that the founding fathers ever conceived that the taking clause could establish any sort of restrictions on the power to regulate the use of land.

78. St. George Tucker, Blackstone's Commentaries with Notes of Reference to the Constitution and Laws of the Federal Government of the United States and the Commonwealth of Virginia, (Book 1, Part 1, 1803) at 305-306.

79. Handlin, supra, at 336.
CHAPTER 7

THE FIRST CENTURY UNDER THE TAKING CLAUSE

The adoption of the Constitution and Bill of Rights transformed dramatically the role of the American courts. No longer were they merely the interpreters of the English common law to the colonial outposts; now they had their own state and federal constitutions to serve as final authority. No longer could their decisions be appealed to the Privy Council in London; now the newly-created United States Supreme Court was the highest court in the land. And under John Marshall it soon assumed a power no English court ever claimed -- the power to declare unconstitutional legislative acts -- a power which state courts also claimed in relation to their own constitutions. 1/

This task of measuring legislative acts against a written constitution required improvisation by the courts since there obviously were no prior cases interpreting any provisions of the Constitution, much less the taking clause itself. 2/ Initially the courts moved cautiously, using their new powers only in exceptional situations. But gradually the courts' self-restraint diminished as they became more confident of their power. This gradual growth of judicial activism is a familiar current in American history.

The first hundred years of judicial interpretation of the taking clause divides rather neatly into two parts: the period before the Civil War, in which the United States Supreme Court had little occasion to consider the taking clause, though many important cases were decided in the state courts; and the period covering

1. After the adoption of the Federal Bill of Rights the various states gradually amended their own constitutions until by mid-century the great majority of state constitutions contained taking clauses. Grant, "The 'Higher Law' of Eminent Domain," 1931 Wis. L. Rev. 67, 70 (1931).
the last third of the Nineteenth Century during which the Supreme Court began formulating its own approach to the taking clause.

1. Early State Court Decisions

Although the federal and some state constitutions provided in general terms for compensation when property was "taken" it was necessary for the courts to define precisely when a taking occurred. During approximately the first half of the Nineteenth Century, this definition was based on a physical conception of taking. The great majority of the cases held that only actual physical appropriation or divesting of title constituted a taking, a theory that has been characterized as "no taking without a touching." Indirect and consequential injuries to property, whether resulting from the acquisition and use of other property or from police power regulations, were excluded from the definition.

During the period the courts were willing to uphold police power regulations even when they left landowners with no feasible use of their land, as evidenced by the 1826 New York case of Brick Presbyterian Church v. The City of New York. The City of New York had conveyed lands for the purposes of a church and cemetery to the Brick Presbyterian Church. Later the city passed a by-law prohibiting the use of these lands as a cemetery. The Court of Appeals upheld the city's action:

"Sixty years ago, when the lease was made, the premises were beyond the inhabited part of the city. They were a common; and bounded on one side by a vineyard. Now they are in the very heart of the city. When the defendants covenanted that the lessees might enjoy the premises for the purposes of burying their dead, it never entered into the contemplation of either party, that

4. 5 Cow. 538 (New York 1826).
the health of the city might require the suspension, or the abolition of that right."  

It was commonly thought at the time that the burying of the dead produced unhealthy vapors and this belief was reflected in the court's opinion:

"It would be unreasonable in the extreme, to hold the plaintiffs should be at liberty to endanger not only the lives of such as belong to the corporation of the church, but also those of the citizens generally, because their lease contains a covenant for quiet enjoyment."

(This case is perhaps the earliest example of judicial approval of a governmental regulation of the use of land designed to promote environmental purposes.)

One year later the Coates case and series of related cases dealt with attacks on the same statute of the

5. 5 Cow. at 542.
6. Id., In Vanderbilt v. Adams, 7 Cow. 349 (N. Y. 1827), a New York statute authorizing the harbor masters to regulate and station vessels in the East and North Rivers in the City of New York was attacked by the owner of the steamboat Legislature who had refused on two separate occasions to obey the orders of one of the harbor masters of the city as to the stationing of his steamboat at a private wharf. After holding that private wharves were subject to the police regulation thus imposed, and finding that the power exercised was essential for the purpose of protecting the rights of all concerned because of the crowded harbor with vessels arriving daily from various ports, the court held:

The line between what would be a clear invasion of right on the one hand, and regulations not lessening the value of the right and calculated for the benefit of all, must be distinctly marked . . . Every public regulation in a city may, and does, in some sense, limit and restrict the absolute right that existed previously. But this is not considered as an injury. So far from it, the individual, as well as others, is supposed to be benefited.

(at 351)

7. 7 Cow. 585 (New York 1827), 7 Cow. 587 (New York 1827), and 7 Cow. 587 (New York 1827).
State of New York authorizing the City of New York to make bylaws regulating or preventing the interment of the dead within the city. The City passed such a bylaw prohibiting the interment of the dead within certain parts of the city despite the fact that plaintiffs had rights under grants or titles to land held in trust for the sole purpose of interment, some of which land had been used for that purpose for more than a century.

Counsel for the plaintiffs argued that a regulation so severe was equivalent to a taking:

"Not even the exercise of the right which becomes a nuisance will warrant its destruction without indemnity. The public good is paramount. This is exemplified in taking land for roads and canals; but land thus taken must be paid for. Is it not the same thing, whether the public good is to be promoted by taking the use of property for public benefit, or destroying the property for the same purpose?"

Counsel for the City responded that it was a "mere regulation."

"No instance has been shown, and none can be found, of a law providing compensation for an injury arising from a mere regulation. In all the cases of compensation cited, the property was either entered upon or taken. Here was no entry, no eviction. This law cannot be called an interference with the property any more than our fire laws."

The court, with respect to the question of the constitutionality of the bylaw, held the reply of counsel for the city conclusive:

8. 7 Cow. at 590.
9. 7 Cow. at 595.
"We are of the opinion that this bylaw is not void either as being un-constitutional or as conflicting with what we acknowledge as a fundamental of civilized society, that private property shall not be taken even for public use without just compensation. No property has, in this instance, been entered upon or taken. None are benefited by the destruction, or rather the suspension of the rights in question, in any other way than citizens always are, when one of their numbers is forbidden to continue a nuisance."

The New York cases were followed with approval in an 1831 Massachusetts case, Baker v. Boston. By indenture between the Town of Boston and the Boston Mill Corporation the corporation granted to the town a certain proportion of a tract of land covered with water, excepting a creek and certain canals for the passage of boats. By a subsequent indenture it was agreed that the town might put a covering over part of the creek provided no interruption or impediment would be made below the covering to boats or rafts passing through the canal. The creek was kept open however and a number of people including Baker used the creek for boat navigation. Baker claimed he had a right of navigation that was taken unconstitutionally by the city when it finally decided to put a cover on for sanitary purposes.

After reciting the importance of safeguarding the public health as a proper municipal function, the court said:

"It is clear then that the city government had the right to remove the nuisance complained of by filling up the creek unless it thereby unlawfully interfered with private property and

10. 7 Cow. at 605 and 606.
11. 12 Pick. 183 (Mass. 1831).
that they did not so interfere we think it is very manifest the measure was a mere health law or regulation and every citizen holds his property subject to such regulations. Police regulations to direct the use of private property so as to prevent it proving pernicious to the citizens at large are not void although they may in some measure interfere with private rights without providing for compensation."  

Again in Massachusetts, in 1846, the regulation of real property was upheld against a claim of unconstitutionality in the famous case of Commonwealth v. Tewksbury. Tewksbury challenged a statute which provided that anyone who removed stones, sand or gravel from any of the beaches in the town of Chelsea should be fined $20.00. Tewksbury owned property on the beach in the town of Chelsea, and alleged that to so prohibit an owner from taking gravel from his own land was a taking of the land for public purpose within the meaning of the Declaration of Rights, Article 10 (which stated that no part of the property of any individual could be taken from him or applied to public uses without making him a reasonable compensation therefore), and since the statute made no provision for compensation to the owner it was unconstitutional and void.

The court in an opinion by Chief Justice Shaw, held the regulation to be a "just and reasonable exercise of the police power:"

"The protection and preservation of beaches in situations where they form the natural embankments to public ports and harbors and navigable streams, is obviously of great public importance; although on many parts of the coast the

12. 12 Pick. at 194.
13. 11 Metc. 55 (Mass. 1846).
situation of the shores is such, that the removal of sand and gravel, by the owner, would not be of the least injury to anybody."

The court then set out the damage to the ancient town of Plymouth Beach which was in danger of being wholly destroyed as a result of the cutting away of wood on a narrow strip of land that protected and extended in front of it. Noting the long history of such acts, some dating prior to the Revolution, and further noting similar acts prohibiting mowing or grazing, some of which did and some of which did not provide compensation, the court concluded:

"Without hazarding an opinion upon any other question, we think that a law prohibiting an owner from removing the soil composing a natural embankment to a valuable, navigable stream, port or harbor, is not such a taking, such an interference with the right and title of the owner, as to give him a constitutional right to compensation, and to render an act unconstitutional which makes no such provisions, but is a just restraint of an injurious use of the property, which the legislature have authority to make."

This period of judicial history culminates in 1853 with the even more famous Massachusetts case, Commonwealth v. Alger. In that case the defendant had violated the statute which prohibited the erection of a wharf beyond specified lines in Boston Harbor by building a wharf on his own property, received under a 1641 grant from the state, made for the very purpose of building wharves. Again Chief Justice Shaw wrote

14. 11 Metc. 55, and 58.
15. 11 Metc. 55 at 59.
16. 7 Cush. 53 (Mass. 1853).
the opinion:

"We think it is a settled principle, growing out of the nature of well-ordered civil society, that every holder of property, however absolute and unqualified may be his title, holds it under the implied liability that his use of it shall not be injurious to the equal enjoyment of others having an equal right to the enjoyment of their property, nor injurious to the rights of the community. . . ." 18/

Shaw found the police power quite distinct and unrelated from the power of eminent domain.

"This is very different from the right of eminent domain, -- the right of a government to take and appropriate private property to public use whenever the public exigency requires it, which can be done only on condition of providing a reasonable compensation therefor . . . Nor does the prohibition of such noxious use of property -- injurious to the public -- although it may diminish the profits of the owner, make it an appropriation to a public use, so as to entitle the owner to compensation." 19/

The key distinction, said Shaw, is whether the public has any right to use the land themselves or make a profit from it:

"But he is restrained, not because the public have occasion to make the like use or to make any use of the property, or to take any benefit or profit to themselves from it, -- but because

18. 7 Cush. 53 at 84.  
19. Id., at 84-85.
it would be a noxious use, contrary to the maxim, *sic utere tuo ut alienum non laedas*. It is not an appropriation of the property to a public use, but the restraint of an injurious private use by the owner; and it is therefore not within the principle of property taken under the right of eminent domain." 20/

According to Chief Justice Shaw, the legislature unquestionably had the power to define a class of things which, if done, were contrary to the public interest regardless of whether the particular facts of a given case constituted a danger to the public (which, in this particular case, in fact it did *not*). 21/ The court conceded, however, that there might be situations in which the legislature would be in doubt whether to accomplish a particular purpose by the police power or by eminent domain:

"The distinction, we think, is manifest in principle; although the facts and circumstances of different cases are so various that it is often difficult to decide whether a particular exercise of legislation is properly attributable to one or the other of these two acknowledged powers." 22/

In his biography of Shaw Leonard Levy summarized the judge's philosophy of the police power:

"[T]he general welfare required the anticipation and prevention of prospective wrongs from the use of private property. Accordingly he held that the legislature might interfere with the use of property before

20. Id., at 85.
22. 7 Cush. at 85.
the owner became amenable to the common law. So a man could not even remove stones from his own beach if prohibited by the legislature, nor erect a wharf on his property beyond the boundary lines fixed by it. Even if his use of his property would be 'harmless or indifferent,' the necessity of restraints was to be judged 'by those to whom all legislative power is intrusted by the sovereign authority.' Similarly the 'reasonableness' of such restraints was a matter of 'experience,' to be determined by the legislature, not the court. The simple expedient of having a precise statutory rule for the obedience of all was sufficient reason for a finding of constitutionality.

Shaw's position was the prevailing view at the time the Civil War approached. Theodore Sedgwick, a contemporary author of a treatise on constitutional law, summarized the status of the taking clause in 1857:

"It seems to be settled that, to entitle the owner to protection under this clause the property must be actually taken in the physical sense of the word. . . ."

2. Supreme Court decisions in the Late Nineteenth Century

The Supreme Court originally construed the Bill of Rights as applicable only to restrain the federal government, not the states.

23. Levy, supra, at 309.
25. See Withers v. Buckley, 61 U.S. 20 (1857), holding the taking clause inapplicable to the states.
government had little need to acquire or regulate land the Court had little occasion to consider the taking clause. 26/ After the Civil War, however, the Court gradually began to incorporate various provisions of the Bill of Rights in the Fourteenth Amendment's due process clause, and by the end of the century it was clear that the states were governed by the taking clause. 27/

The Court's first significant contribution to the interpretation of the taking clause came in Pumpelly v. Green Bay Co., 28/ decided in 1871. A state statute had authorized the construction of a dam to control floods, but the dam caused the flooding of plaintiff's land. The Court held that by flooding it the government had "taken" it:

"It would be a very curious and unsatisfactory result if, in construing a provision of constitutional law, always understood to have been adopted for protection and security to the rights of the individual as against the government, and which has received commendation of jurists, statesmen, and commentators as placing the just principles of the common law on that subject beyond the power of ordinary legislation to change or control them, it shall be held that if the government refrains from the absolute conversion of real property to the uses of the public it can destroy its value entirely, can inflict irreparable permanent injury to any extent, can, in effect, subject it to total destruction without making any compensation, because, in the narrowest sense of the word, it is not taken for the public use." 29/

26. The court did use the "obligation of contract" clause to strike down state actions that would now be dealt with under the taking clause. See Fletcher v. Peck, 2 Cranch (6 U.S.) 87 (1810).
28. 80 U.S. 166 (1871).
29. 80 U.S. at 177.
The opinion limits the holding to cases where real estate is actually invaded "by super-induced additions of water, earth, sand or other material or by having any artificial structure placed on it so as to effectually destroy or impair its usefulness." 30/

The Court followed Pumpelly in U. S. v. Lynah, 31/ where it was held that there had been a taking of petitioner's rice plantation when an overflow, resulting from works in the improvement of navigation on the Savannah River, had turned it into a bog. 32/ But both

30. 80 U.S. at 181.
31. 188 U.S. 445 (1903).
32. The New York case of People v. Platt, 17 Johns. 195 (1819) and the North Carolina case of State v. Glen, 52 No. Car. 321 (1859), invalidated statutes which would in effect require the tearing down of private dams across non-navigable waterways, the ownership of the bottom and banks of which had in each case been granted to the defendant by the state. In each case, the state intended to assure downstream owners a supply of fish, which the dams were impeding. In North Carolina, the court held that "rights acquired in streams ... by grants from the state ... cannot be taken from the owners by the government, except in the exercise of the power of eminent domain, and then only for public use, with a provision for just compensation." (at 334). In New York the court noted of the river there involved:

"It (the river) has been granted, and thus has become private property, as high up as Salmon ascend. The fishing itself has passed under the grants; the defendants and those whose estate they have rightfully and legally acquired, erected the dam sought to be altered; and they have been in the uninterrupted enjoyment of all rights connected with the dam for more than thirty years. Can it admit of a doubt that the defendants' rights, growing out of a contract executed by the state, and for which a valuable and competent consideration has been received, will be impaired by the demolition of the dam, or an alteration of it, which might, and probably would, essentially destroy an immense property?" (at 218-219).

Both these involved the destruction of a physical piece of property as well as the destruction of a property right, which had been received from the state itself. In neither case did the public health or safety require the measure.
Pumpelly and Lynah were distinguished a year later in Bedford v. U.S. 33/ In that case revetments erected by the government for the improvement of navigation on the Mississippi River had produced a gradual erosion of that land, which had also been subject to overflow for a number of years. The Court denied compensation, pointing out that in Pumpelly and Lynah there had been an actual invasion of the land as opposed to consequential damage. 34/

No clear pattern emerged from the Court's early decisions under the taking clause, but when the Court was convinced the purpose was sound it was willing to uphold some governmental actions despite fairly severe damage to private property. In Transportation Co. v. Chicago 35/ the Court denied compensation for acknowledged damages incurred while the city built a tunnel under the Chicago River, noting that:

"Acts done in the proper exercise of governmental powers, and not directly encroaching upon private property, though their consequences may impair its use, are universally held not to be a taking within the meaning of the constitutional provision." 36/

The Court went on to limit the Pumpelly rule to situations where there had been a permanent direct encroachment. Similarly, in Bridge Co. v. U.S. 37/ the Court held that Congress could require substantial modification of a bridge over navigable waters without the payment

33. 192 U.S. 217 (1904).
35. 99 U.S. 635 (1878).
36. 99 U.S. at 642.
37. 105 U.S. 70 (1881).
of compensation. 38/

During the late Nineteenth Century the Court struck down many attempts by government to regulate commerce and transportation, but even in railroad cases, the Supreme Court occasionally favored regulations over property rights, as in Richmond, Fredricksburg & Potomac Ry. Co. v. Richmond. 39/ In that case, the Supreme Court upheld a municipal regulation of the railroad prohibiting its use on public streets saying:

"The power to govern implies the power to ordain and establish suitable police regulations . . . Appropriate regulation of the use of property is not 'taking' property, within the meaning of the constitutional prohibition."

But it was Justice Harlan's opinion in Mugler v. Kansas 41/ that established the most powerful support for a strong police power. The case involved a Kansas statute which prohibited the manufacture and sale of intoxicating liquors. Mugler owned a brewery which, under the statute, was made relatively worthless. 42/

The defendants contended that the doctrine of the Pumpelly case required that they be compensated. Harlan distinguished that case because it arose under the state's eminent domain power rather than the police power. Furthermore, the case "was an extreme qualification of the doctrine, universally held, that 'acts

38. The state courts also continued to provide general support for a strong police power. Thus, for example, in Village of Carthage v. Fredrick, 122 N.Y. 268 (1890) a New York Court upheld a fine assessed against a property owner who had not cleared his private sidewalk of obstructions, despite Fredrick's contention that the ordinance requiring a sidewalk to be cleared authorized the taking of his property for public use without compensation.

39. 96 U.S. 521 (1877).
40. 96 U.S. 521, at 528-529.
42. 123 U.S. 624-627, 8 S.Ct. 273 (1887).
done in the proper exercise of government powers, and not directly encroaching upon private property, though these consequences may impair its use, do not constitute a taking. . . ." In the *Pumpelly* case, said Justice Harlan, "there was a 'permanent flooding of private property,' a 'physical invasion of the real estate of the private owner, and a practical ouster of his possession.'" As a result his property "was, in effect, required to be devoted to the use of the public, and, consequently, he was entitled to compensation." 43/ "A prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community, cannot, in any just sense, be deemed a taking or an appropriation of property for the public benefit. Such legislation does not disturb the owner in the control or use of his property for lawful purposes, nor restrict his right to dispose of it, but is only a declaration by the state that its use by anyone, for certain forbidden purposes, is prejudicial to the public interests. Nor can legislation of that character come within the Fourteenth Amendment, in any case, unless it is apparent that its real object is not to protect the community, or to promote the general well-being, but, under the guise of police regulation, to deprive the owner of his liberty and property, without due process of law."

The police power must not be "burdened" with requirements of compensation, suggested Harlan:

"The exercise of the police power by the destruction of property which is itself a public nuisance, or the prohibition of its use in a particular way, whereby

43. 123 U.S. at 667-668.
its value becomes depreciated, is very different from taking property for public use, or from depriving a person of his property without due process of law. In the one case, a nuisance only is abated; in the other, unoffending property is taken away from an innocent owner."

[emphasis added] 44/

In Harlan's view the difference between a police power regulation upon property use and a public taking of property was not a difference of degree, but a difference in kind. His opinion explicitly stated that a prohibition upon the use of property designed to protect the public health and safety could never be deemed a taking because such a prohibition did not affect an individual's title to his property, not did it result in governmental use of private property. Rather, the sole purpose of such a regulation was to declare that a particular property use was forbidden because it was injurious to the community. The test, therefore, would be whether the regulation had a rational relationship to the public welfare.

The Mugler opinion established as a constitutional principle the doctrine that police power regulations do not constitute compensable takings, but where the government action permanently appropriated the owner's property compensation was required even if the government's purpose was to abate a nuisance.

This was the case in Sweet v. Rechel. 45/ Massachusetts had passed a statute which provided that to abate a nuisance arising from poor drainage, the city might take title to the land by paying the owner compensation for his damages. "The abatement of a nuisance -- nothing more being required or done -- is not of itself, and within the meaning of the constitution, an appropriation of property to public uses." 46/ However:

44. 123 U.S. at 668-669.
45. 159 U.S. 380 (1895).
46. 159 U.S. at 397.
If private property is actually taken and appropriated for public uses, although taken or appropriated in virtue of a statute having as its main or primary object the conservation of the public health, reasonable compensation must be made to the owner . . . And so it was appropriated when the city took the fee, and thereby acquired a right to sell the property after it was improved, and put the proceeds into its treasury. Undoubtedly, the state, without taking the title to itself, may, in some appropriate mode and without compensation to the owner, forbid the use of a specified private property, where such use would be injurious to the public health."

The most difficult test for the Court came when Pennsylvania outlawed the sale of oleomargarine, thus rendering a number of factories virtually useless. The Court was unable to find, said Justice Harlan, that the legislation "has no real or substantial relation" to the protection of the public health, and it upheld the law in 1888 in Powell v. Pennsylvania. The claim under the taking clause was dismissed as "without merit." A number of other Supreme Court cases in the closing years of the Nineteenth and opening years of the Twentieth Century supported the Mugler interpretation of the

47. 159 U.S. at 398. Henry Mills writing before the Court's analysis in this case said, "There can never be any necessity for permanently appropriating land without compensation by the exercise of the police power; the property may be temporarily interfered with or appropriated; but the power ceases with the necessity of its exercise." Henry Mills, The Law of Eminent Domain 58 (2d ed. 1888).
49. 127 U.S. at 687.
122.

taking clause. 50/

The state courts also construed a taking of property in very tangible terms. They thought of a taking as an actual appropriation of the property by the taker for the latter's own use. 51/ There now began rumblings of concern over this strict interpretation. Dissatisfaction with denial of compensation in cases involving damage to owners of abutting property in street-grade cases, such as Rigney v. City of Chicago, 52/ contributed to the passage of state constitutional amendments by Illinois and other states to make sure that such losses were compensated. 53/

50. In Chicago, Burlington and Quincy Ry. Co. v. Chicago, 166 U.S. 26 (1896) the Court held that expenses incurred by the railroad for maintenance for the safety of the public were merely incidental to the exercise of the police power of the state. In New Orleans Gas Light Co. v. Drainage Commission, the Court upheld a police power action which had forced the gas company to change the location of its pipes at its own expense in order to accommodate a new public system of drainage. (197 U.S. 453, 462, -1905-). Finally, in Chicago, Burlington and Quincy R.R. Co. v. Drainage Commissioners, 200 U.S. 561 (1906) the Court justified a police power regulation which required that the railroad tear down a bridge and replace it at its own expense in order to accommodate the public drainage system:

"Whatever conflict there is arises upon the question whether there has been or will be in the particular case, within the true meaning of the Constitution, a 'taking' of private property for public use. If the injury complained of is only incidental to the legitimate exercise of governmental powers for the public good, then there is no taking of property for the public use, and a right to compensation, on account of injury, does not attach under the Constitution." 200 U.S. at 593-594.


52. 108 Ill. 64 (1892).

Those who were dissatisfied began to call for a broader interpretation of the taking clause.

"Theretofore, expropriation had practically coincided with the acquisition of title to land. Now, it was urged that an impairment of the beneficial use or of the value of land ought to be held tantamount to a taking despite the fact that the owner continued to hold the possession of and title to the land. It became manifest that the scope of the right of eminent domain was dependent upon concepts of the nature of property. Why not, it was naturally asked, give the word 'property' a meaning somewhat broader than that supplied by common law concepts?" 54/

As the taking clause reached the end of its first century pressures for change were brewing.

CHAPTER 8

PENNSYLVANIA COAL V. MAHON:

HOLMES REWRITES THE CONSTITUTION

1. Setting the Stage

Meanwhile, back in Massachusetts a young legal scholar was having very different thoughts indeed about the relationship of the police power and the Fifth Amendment. Writing anonymously in the American Law Review in 1872 he asked whether the police power wasn't a term "invented to cover certain acts of the legislature which are seen to be unconstitutional, but which are believed to be necessary? . . ." 1/

After he was appointed to the Supreme Judicial Court of Massachusetts Oliver Wendell Holmes, Jr., had occasion to express his views from the bench. In 1889, just two years after Harlan's apparently dispositive decision in Mugler v. Kansas, Holmes wrote the opinion in Rideout v. Knox. 2/

Massachusetts had passed a law which prohibited property owners from erecting fences more than six feet in height upon their own property if the purpose of erecting such a fence was to annoy adjacent property owners. The Supreme Judicial Court upheld this legislation, but admitted that if the restriction placed upon the property owner were more severe the case might have been decided differently. The question, said Holmes, was one of degree.

"It may be said that the difference is only one of degree; most differences are when nicely analyzed. At any rate,

1. 6 Am. L. Rev. 141-142 (1872). See Mark De Howe, Justice Oliver Wendell Holmes: The Proving Years 57 (1963).
2. 148 Mass. 368 (1889).
difference of degree is one of the distinctions by which the right of the legislature to exercise police power is determined. Some small limitations of previously existing rights incident to property may be imposed for the sake of preventing manifest evil; larger ones could not be except by the exercise of the right of eminent domain."

Justice Oliver Wendell Holmes continued to express this same philosophy after being elevated to the United States Supreme Court. Thus, in Interstate Railway Co. v. Massachusetts, a case involving a street railway corporation's claim that a statute enacted prior to its charter and requiring it to transport public school children at half price deprived the corporation of its property without just compensation, he likened the alleged burden to a tax, and said, "The question narrows itself to the magnitude of the burden imposed - to whether the tax is so great as to exceed the limits of the police power."

Again, a year later in Hudson Water Co. v. McCarter where New Jersey passed a statute making it illegal for Hudson to transport water from that state to New York pursuant to a contract entered into after the statute was passed, Holmes stated, in response to Hudson's claim that its property was thus taken without due process of law:

The limits set to property by other public interests present themselves as a branch of what is called the police power of the State. The boundary at which the conflicting interests balance cannot be determined by any general formula in advance, but points in the line, or helping to establish it, are fixed by decisions

4. 207 U.S. 79 (1907).
5. Id., at 87-88. (The Railway lost.)
that this or that concrete case falls on
the nearer or farther side. For instance,
the police power may limit the height of
buildings, in a city, without compensation.
To that extent it cuts down what other-
wise would be the rights of property. But
if it should attempt to limit the height
so far as to make an ordinary building lot
wholly useless, the rights of property
would prevail over the other public inter-
est, and the police power would fail. To
set such a limit would need compensation
and the power of eminent domain.

It sometimes is difficult to fix
boundary stones between the private right
of property and the police power when, as
in the case at bar, we know of few decisions
that are very much in point. 7/

Holmes' philosophy found expression in an influ-
ential treatise on the police power written in 1904 by
Ernst Freund, a respected law professor at the University
of Chicago. Freund thought that Commonwealth v. Alger
was "based upon no intelligible principle" 8/ while
Powell v. Pennsylvania was simply wrong. 9/

The view espoused by Holmes and Freund reached its
culmination in Holmes' decision in Pennsylvania Coal v.
Mahon on December 11, 1922. Because of the crucial
importance of this decision as the keystone of all sub-
sequent "taking" law it is worth examining the back-
ground of the case in some detail.

2. The Problem of Mine Subsidence

The case began in Northeastern Pennsylvania, which
at the beginning of this century was a well populated

7. Id., at 355. Of incidental note is the strong language with
respect to the state's interest in protecting its environ-
ment at 356-357.
9. Id., at 569-570.
area, rich in anthracite coal. Unfortunately, the digging of mine shafts and the taking of coal from the ground leaves a void beneath the earth's surface. If enough coal is taken, the surface will no longer be adequately supported and will collapse, a phenomenon referred to by the term "surface subsidence," or, as it is sometimes called, "mine subsidence," which literally removes the earth's support from under the towns and cities of the anthracite region.

Coal fields are present in nine counties and cover an area of approximately 5,000 square miles in Northeastern Pennsylvania. 10/ The anthracite region is not rural in character; numerous towns and cities dot the region. In 1922, the year the Pennsylvania Coal case was decided, the largest city in the anthracite region was Scranton, a municipality of 137,000 people located in Lackawanna County. 11/ Wilkes-Barre, situated in Luzerne County, was also a well developed urban center by the early twenties. Given the population centers in the region, and the fact that coal was there for the taking, it is not surprising that mine subsidence should cause problems in Northeastern Pennsylvania.

By the time the Pennsylvania Coal case was decided, coal mining had been going on in Pennsylvania for some two hundred years, but rapid changes in mining technology in the first two decades of the Twentieth Century had literally transformed the scale of mining operations. After World War I the coal companies were taking coal from the ground faster and in greater quantities than before. 12/ As the resulting subsidence continued to increase, residents of the anthracite region saw their homes and businesses destroyed, their own safety threatened. Describing the effects of subsidence upon Scranton,

10. The nine counties are Carbon, Columbia, Luzerne, Northumberland, Schuylkill, Lackawanna, Susquehanna, Wayne and Dauphin.
Philip Mattes, the City Solicitor, wrote:

Scranton bid fair to become a second Verdun, her buildings razed to the ground by shots from below. While every section of the city was more or less affected the worst devastation was in the heart of the business section of West Scranton. Visitors there today (1922) can clamber through pits strewn with broken brick and rubbish covering great areas formerly improved with handsome business blocks but now permitted, in the words of Governor Sproul (of Pennsylvania), "to revert to the wilderness of abandon." Our once level streets are in humps and sags, our gas mains have broken, our water mains threatened to fail us in time of conflagration, our sewers spread their pestilential contents into the soil, our buildings have collapsed under their occupants or fallen into the streets, our people have been swallowed up in suddenly yawning chasms, blown up by gas explosions or asphyxiated in their sleep, our cemeteries have opened and the bodies of our dead have been torn from their casket.

The Pennsylvania legislature was not insensitive to the difficulties facing the anthracite region. In 1911 the two houses of the legislature enacted a joint resolution calling for the appointment of a Governor's Commission "for the purpose of investigating and reporting upon the physical conditions and legal rights in the matter of surface support where anthracite coal has been removed." 14/ The Commission reported its

findings to the legislature in 1913. The legislature responded by passing a law which forbade the mining of coal under municipalities unless the mining company provided sufficient artificial support to replace the coal removed. 15/ But it didn't work. Artificial supports were not enough. Subsidence cave-ins continued. 16/

In 1921 the legislature sent two more pieces of legislation dealing with mine subsidence to the Governor. On May 21, 1921 Governor Sproul signed into law the Fowler Act, 17/ establishing the Pennsylvania State Anthracite Mine-Cave Commission, and the Kohler Act, which prohibited the mining of coal so as to cause the subsidence of any building, structure, or transportation route within the limits of a designated class of municipalities. The Act made it unlawful so to mine anthracite coal as to cause the caving-in, collapse or subsidence of:

(a) Any public building or any structure customarily used by the public as a place of resort, assemblage or amusement, including, but not being limited to, churches, schools, hospitals, theatres, hotels and railroad stations.

(b) Any street, road, bridge or other public passageway dedicated to public use or habitually used by the public.

(c) Any track, roadbed, right of way, pipe, conduit, wire or other facility used in the service of the public by any municipal corporation or public service company as defined by the Public Service Company law.

(d) Any dwelling or other structure used

17. Public Law 1192.
as a human habitation or any factory, store, or other industrial or mercantile establishment in which human labor is employed.

(e) Any cemetery or public burial ground.

In September of 1921, H. J. Mahon and his wife Margaret were residing at 7 Prospect Place, Pittston, Pennsylvania, in Luzerne County. Some forty years earlier the Pennsylvania Coal Company had owned the land upon which the Mahon's home sat. When the Coal Company had conveyed title to the property in 1877 to a Mr. Craig, the Company retained the mineral rights below the surface of the property. Further, Mr. Craig's deed stipulated that he waived any future claim against the coal company for personal injury or property damage due to possible mine subsidence. The mineral rights provision and the waiver were then passed through the chain of title down to the Mahons. Thus the Mahon's deed of 1917 included an express provision reserving the mineral rights to their property in the Pennsylvania Coal Company and the waiver of any claim against the Company for subsidence damage.

The Mahons' situation was not unique. In the late Nineteenth Century the coal companies had been the prime landowners in the anthracite region. To purchase land in a town like Pittston, one bought from the companies, who were often willing to sell parcels to individual buyers, provided that the mineral rights to the properties would remain in the companies. As with the Mahons, the deed would often stipulate that the buyer waived any right he possessed to bring a future claim against the seller for possible subsidence damage. The buyer would normally accept these terms for two reasons. First there was no one to buy land from except the coal companies. Second, the waiver provision did not seem too important if at the time the land was purchased, the nearest mining operations were miles away. Of course eventually the coal companies would assert their mineral rights, so somewhere along the chain of title a purchaser suffered. 18/

On September 2, 1921, the Mahon's received a letter from the Pennsylvania Coal Company which began:

Dear Sir and Madam:

You are hereby notified that the mining operations beneath your premises will by September 15th have reached a point which will then or shortly thereafter cause subsidence and disturbance to the surface of your lot.

The letter went on to note that the Coal Company had reserved the right to mine the property under the original deed executed in 1877 to Mr. Craig. It concluded by noting that while the Company was in no way liable for any injury resulting from the subsidence, it was giving the Mahons notice "for the safety of yourselves and the members of your household."

Six days after receiving the letter, Mahon, an attorney, filed a bill in equity to have mining operations beneath his property permanently enjoined. Mahon admitted the existence of the Coal Company's rights to the minerals below his property, but alleged that the recently passed Kohler Act made any future mining on his property illegal. He pointed out that the Kohler Act expressly provided that injunctive relief was a proper means for its enforcement.

Pennsylvania Coal Company's answer did not challenge the facts alleged by Mahon. Rather, the Company denied liability, on the ground that the Kohler Act was unconstitutional. First, it alleged that the Kohler Act impaired the obligation of contracts in violation of Article I, Section 10 of the Federal Constitution, because its rights under its mineral rights deed had been destroyed. Second, it alleged that the Kohler Act

19. Transcript of Record (29,099) filed August 17, 1922 in the Supreme Court of the United States, October Term, 1922. P. 10.
20. Id., P. 5.
took the Coal Company's property without due process of law. Specifically, the Company argued that the Act was not a police power regulation as claimed by the Pennsylvania legislature, but, rather, the Act amounted to a public taking of private property without just compensation. Finally, it alleged that the Pennsylvania legislature had not acted in good faith in passing the Kohler Act because the legislation favored a particular class of property owners.

After initially granting a preliminary injunction, the Court of Common Pleas denied Mahon the permanent relief he sought. 21/ Mahon appealed to the Supreme Court of Pennsylvania, which on June 24, 1922, reversed the judgment of the Court of Common Pleas, declared the Kohler Act constitutional, reinstated the preliminary injunction, and remanded the case. 22/ That Court specifically held the Kohler Act a valid exercise of the state's police power and asserted that the Act was clearly applicable to the pending controversy:

The police power, "legitimately exercised, can never be limited by contract nor bartered away by the legislature". . . and this court, in dealing with the police power has repeatedly held that private contracts cannot interfere with its legitimate exercise by the state; the theory being that all contracts raising rights or imposing obligations, the exercise of which may affect the public welfare, are, of necessity, made subject to the reserved right of the state to modify them by legitimate assertions of the police power.

It was the harmful results, to the community as a whole, of contracts

22. Id., P. 69.
granting the right to let down the surface under any and all circumstances, that gave rise to the statute now attacked; and the power to enforce the public policy of the state, declared in this legislation, cannot be defeated because they who move the court (plaintiffs at bar) are parties to such a contract. 23/

The Pennsylvania Coal Company appealed to the United States Supreme Court.

3. Holmes' Philosophy

The Coal Company's two basic premises were first that the Kohler Act impaired the obligation of contracts, and second that the Kohler Act took private property without just compensation.

Holmes chose to concentrate on the taking claim, largely ignoring the obligation of contract argument. The issue was neatly framed. Was the Kohler Act simply an exercise of the police power to protect the public health and safety against an ever-growing hazard, as Mr. Mahon and the State of Pennsylvania maintained; or was the Act merely a means of getting the Coal Company's property without paying for it, as the Coal Company argued? In Holmes' view the question was whether the Kohler Act tried to accomplish through police power regulation what could only be accomplished by eminent domain:

Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law. As long recognized, some values are enjoyed under an implied limitation and must yield to the police power. But obviously the implied limi-

23. Id., P. 74.
tation must have its limits or the contract and due process clauses are gone. One fact for consideration in determining such limits is the extent of diminution. When it reaches a certain magnitude, in most if not in all cases there must be an exercise of eminent domain and compensation to sustain the act. So the question depends upon the particular facts. The greatest weight is given to the judgment of the legislature, but it is always open to interested parties to contend that the legislature has gone beyond its constitutional power. 24/

Thus, in Justice Holmes' view the difference between regulation and taking was a difference of degree not kind.

Thus stating the issue went against the entire line of cases to this point, including Justice Harlan's decision in Mugler v. Kansas. 25/ Of course the problem was where to draw the line. And to this problem, Holmes suggested no answer: "So the question depends upon the particular facts."

Having stated his rule, Holmes then proceeded to deal briefly with the facts of the case: "This is the case of a single private house . . . A source of damage to such a house is not a public nuisance even if similar damage is inflicted on others in different places. The damage is not common or public." 26/ But the whole basis of the Kohler Act was that cases like this were widespread, and the danger to life and property extreme. That was why the Kohler Act was passed. Was Holmes contradicting the legislature's judgment? Was he suggesting that things were not as bad in Pennsylvania as Mahon

24. 260 U.S. at 413.
26. 260 U.S. at 413.
and the amicus briefs suggested?

Holmes made practically no reference to the factual situation in Pennsylvania. The only fact mentioned was the Coal Company's ten day notice to the Mahons. From this Holmes concluded the Mahons couldn't really maintain that their well-being was endangered. Further, he asserted that the Kohler Act was really not needed to protect the public's safety because such protection could be provided by notice alone! Holmes thus summarily brushed aside a legislative determination, based upon years of commission reports, on the question of mine subsidence and public safety.

Holmes then concluded that the Kohler Act violated the Fourteenth Amendment due process clause (which was held to have incorporated the Fifth Amendment's taking clause):

It is our opinion that the Act cannot be sustained as an exercise of the police power, so far as it affects the mining of coal where streets or cities in places where the right to mine such coal has been reserved. As said in a Pennsylvania case, "For practical purposes, the right to coal consists in the right to mine it." Commonwealth v. Clear-view Coal Company, 256 Pa. St. 328, 331. What makes the right to mine coal valuable is that it can be exercised with profit. To make it commercially impracticable to mine certain coal has very nearly the same effect for constitutional purposes as appropriating or destroying it. Thus we think we are warranted in assuming the statute does . . .

Holmes went on to state the test that became the basis for countless future decisions:
The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking. 27/

After Pennsylvania Coal the Supreme Court has dealt with the distinction between police power regulation and governmental taking only rarely. The next major case involving land use regulation that was to reach the Supreme Court, beginning just about the time Pennsylvania Coal was decided, never really reached these issues. In November, 1922, the City of Euclid, Ohio adopted a comprehensive zoning ordinance. The Ambler Realty Company, which was holding large tracts of land as potential industrial sites, found some areas restricted to residential use.

Zoning was a novel technique and state courts had handed down varying opinions on its constitutionality. Ambler brought suit in the Federal Court, seeking an injunction against any enforcement of the ordinance, including among its allegations a claim that the ordinance constituted a taking of its property because the ordinance cut the value of its land from $10,000 to $2,500 per acre. 28/

27. Justice Brandeis dissented. (See Ch. 12, infra.) In his view the Kohler Act was a valid exercise of the police power to safeguard the public health and safety. All Pennsylvania had done, Brandeis asserted, was to prevent a noxious use of private property. If coal mining endangered the public, it was certainly in the state's power to regulate such mining. Brandeis concluded that the Kohler Act did not take property without just compensation, but rather, regulated property rights under the aegis of the police power to protect the public welfare. The Brandeis dissent is discussed at length in Chapter 12.

The trial judge, relying on Pennsylvania Coal, held the ordinance invalid, 29/ but the Supreme Court upheld it in an opinion by Justice Sutherland in which both Holmes and Brandeis joined. 30/ However, the Court never reached the taking issue, saying only that it would be time enough to deal with the actual application of the ordinance to particular premises as the cases arose. 31/

Two years later the Supreme Court took another zoning case, Nectow v. Cambridge. There, the plaintiff showed that he had a contract to sell his land for industrial use for $63,000, while under the residential classification of the ordinance the Court found that the land was "of comparatively little value. . . ." This time it found that the loss in value to the property owner outweighed the value to the community and held the particular zoning classification invalid. 32/

The Court, however, did not discuss whether the regulation of land here involved was a taking of property. Instead the court merely found that since there was no clear community interest in so regulating plaintiff's land, plaintiff was correct in his allegation that "the action of the zoning authorities comes within the ban of the Fourteenth Amendment." 33/

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30. Justice Sutherland was strongly oriented toward private property, so his authorship came as something of a surprise, but his biographer suggests he may have been impressed with the argument that zoning would increase overall property values even if it reduced the value of some individual tracts. See J. F. Paschall, Mr. Justice Sutherland 127 (1951).
32. 277 U.S. 183 (1928). In 1927 the court had upheld another zoning ordinance but it does not appear that the plaintiffs had challenged it under the taking clause. Zahn v. Board of Public Works, 274 U.S. 325 (1927).
33. Id., at 189.
In the same year, however, in *Miller v. Schoene* the Court reviewed a statute of the State of Virginia requiring the destruction of red cedar trees without compensation to the owners because they produced a cedar rust that damaged apple orchards. Citing cases such as *Mugler* and *Hadacheck* the Court upheld the validity of the ordinance against the charge that it constituted a taking. 34/

After the 1920's the Supreme Court virtually retired from the field of land use cases. Since the *Nectow* decision the Court has only rarely taken cases involving the regulation of land, preferring to leave these subjects to the state courts. 35/ Because of this, *Pennsylvania Coal Company v. Mahon* has set the parameters for all subsequent taking cases. Cited frequently at first, it has now become so well accepted that, like *Marbury v. Madison*, it has passed into black letter law.

35. The one notable exception is *Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962), in which the Court upheld a regulation prohibiting the operation of a gravel pit in an urbanized area. The Court cited *Pennsylvania Coal* as providing the applicable test. The *Goldblatt* case is discussed in Chapters 9 and 13.
PART III

THE REGULATORY TAKING IN CURRENT LAW

Introduction

Given the nature of the balancing test devised by Justice Holmes it is not surprising to find courts emphasizing that a "taking case" must be decided on its own particular facts.

"When regulatory measures have been challenged as unconstitutional, courts have tended to limit the scope of their decisions to the issues and circumstances before them, declaring that it is not in the nature of things that any definitive list of the police power's applications can be drawn up."

The balancing test involves so few theoretical elements that the court often merely repeats cliches. As Professor Van Alstyne puts it, "The judicial calculus involved in the balancing process is described in a variety of unilluminating ways."

Since the courts themselves emphasize that the facts are usually the determinative element of a taking case it is not surprising that lawyers faced with a taking issue generally look for precedents involving similar fact situations. In Chapter 10 we have categorized the taking cases according to the most common

1. The term "taking case" will be used here to describe any case in which a land use regulation is challenged on the ground that it constitutes a taking of property without compensation.


types of land use regulation that give rise to litigation under the taking clause.

A number of noted legal scholars have attempted to find more abstract principles running through the taking cases. Does the nature of the public purpose behind a land use regulation correlate with its acceptability to the courts? In Chapter 11 we have examined some of the principles that have been suggested.

Finally, in Chapter 12 we examine only the most recent cases -- the cases of the '70's. This examination suggests an interesting hypothesis about the very current attitude of the courts toward land use problems, a hypothesis that is repeated again in the conclusion to the entire book.
CHAPTER 9

THE REGULATORY TAKING IN CURRENT CASE LAW

Introduction

Some types of land use regulation are so well accepted, or have such insubstantial economic impact, that they almost never give rise to a taking issue -- electrical codes, for example, or off-street parking requirements. Certain other types of regulations, however, frequently create such a reduction in property value that they stimulate taking claims.

The categories of regulation that have often generated litigation are those restricting mining, regulations for the preservation of open spaces, regulations that seek to eliminate existing uses, regulations of flood prone areas, wetlands, estuarine and beachlands, and a variety of regulatory deterrents to urban growth.

1. Regulation of Mining

In a recent frontal attack on Pennsylvania Coal before the Third Circuit Court of Appeals, Klein v. Republic Steel Corporation, 1/ the Kleins attempted to enforce a successor to the Kohler Act struck down in Pennsylvania Coal which the Pennsylvania legislature had adopted 15 years later. The new act was similar to the original Kohler Act except for the addition of five words, "in such a negligent manner" after the description of the type of mining prohibited. 2/ Because the plaintiffs had based their action on an absolute statutory liability and had avowed any claim of negligence, the Court found they were outside the scope of the 1937 Act and thus did not reach the constitutional

2. 435 F.2d at 765.
142.

argument. 3/

Recent legislation setting mine safety and pollution discharge standards have resulted in litigation in which the taking issue plays a part in the more complex fabric of regulation of mining. Generally the employee safety standards are approved 4/ as they were in Pennsylvania Coal by Justice Holmes. Pollution standards have not always fared as well.

In Pittsburgh Coal Company v. Sanitary Water Board, 5/ a majority of the Pennsylvania Commonwealth Court found that a regulation requiring treatment of mine waste waters before discharge to be a taking of the operator's property rights. The mine was operated at the lowest point in the basin's seam of coal and was beneath some 100 to 350 billion gallons of polluted waters in abandoned mines higher on the sloping coal seam. Three natural out-flows totaled 17 million gallons a day.

The mine operator argued that of the 3.44 million gallons of water discharged which it pumped daily from its mine, only 1.27 million originated from its mine, the rest coming through breaches in the barrier between the mine and the huge adjoining pool. Therefore, it proposed to treat only its 1.27 million gallons under the Pennsylvania Pure Streams Law. Faced with an order to cease operations if it did not treat its discharge, it appealed to the Courts relying heavily on the constitutional prohibition against taking property without


compensation.

The majority of the judges sitting found:

"No matter how meritorious the desired results may be, the use and enjoyment of property by its owner should not be burdened or impaired in the name of public health, safety or welfare absent a rational relationship between the evil sought to be cured and the use of property as contributing to the evil. It is at this point that curing the evil should be assumed as a direct responsibility of government and not placed upon the property owner in the guise of an exercise of the police power. See Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 43 S. Ct. 158, 67 L. Ed. 322 (1922).

It is important to note that the Pennsylvania Court approved the requirement that the mine operator treat its own wastes, even though it held unconstitutional its application to these particular facts.

The regulation of surface mining has met better acceptance in the courts. Hadacheck v. Sebastian, an early Supreme Court case discussed in Chapter 8, approved stringent regulation of brick manufacture in conjunction with clay mining. In Goldblatt v. Hempstead, also discussed in Chapter 8, the Supreme Court upheld a

6. 286 A.2d at 468.
8. 239 U.S. 394 (1915).
municipal ordinance which regulated dredging and pit excavation on property within the town limits.

At the time the Supreme Court was considering the New York's Goldblatt case, the California Supreme Court was considering a somewhat similar case in which the City of Los Angeles had imposed zoning controls which prohibited rock and gravel mining operations in agricultural and residential districts. 10/

The owner of a parcel of land which the trial court found valuable for rock, sand and gravel excavation, but of "no appreciable economic value" for any other purpose, brought suit alleging an improper exercise of the police power.

The property consisted of three hundred and forty-eight acres zoned for agricultural and residential use. An adjoining tract of 125 acres had been used for a gravel operation for approximately thirty years and was nearing exhaustion.

Exploring many aspects of the taking issue, the trial court had considered air pollution, dangers to children and other nuisance factors, and acknowledged the dangers as minimal. However these factors were held to be issues for legislative judgment since the area was also known as a haven for sufferers of respiratory ailments because of its pure air.

In sustaining the trial court, Justice Dooling of the California Supreme Court distinguished Pennsylvania Coal and a number of other earlier cases. Dealing specifically with the contention that the property had "no appreciable economic value for any of the uses permitted in the districts for which it was zoned," the Court noted that the legislature had considered a number of uses to which it was suited:

"Stabling horses, cattle feeding and grazing, chicken raising, dog kennels,

fish hatcheries, golf courses, certain types of horticulture, and recreation."  

The Court went on to quote an earlier opinion:

"However, the very essence of the police power as differentiated from the power of eminent domain is that the deprivation of individual rights and property cannot prevent its operation, once it is shown that its exercise is proper and that the method of its exercise is reasonably within the meaning of due process of law."  

In other jurisdictions prohibition of surface mining of rock, gravel or sand has frequently been upheld in urban areas, but where a regulation attempts to prohibit mining in a rural undeveloped area it is likely to fail.

11. 20 Cal. Rptr. at 647.
12. Id., quoting Beverly Oil Co. v. City of Los Angeles, 40 Cal. 2d 552, #557-558, 254 P.2d 865, #867.
A recent Michigan Appellate Court opinion is representative of this attitude. In Lyon Sand and Gravel Company v. Township of Oakland, 15/ the Court examined an ordinance which prohibited gravel mining without a permit and which severely limited the depth of excavation and manner of operation of gravel pits. The operators introduced evidence at trial that the township would have only 5,400 residents by 1980, that there were five million tons of gravel on the site "required for road construction and most building," and that the deposit would be exhausted within ten years. 16/ The Court quoted the conclusion of the trial judge with approval:

"Where needed natural resources are known to exist in usable quantity their utilization should be permitted in a manner compatible with the present use of adjacent lands. The taking should not interfere with the reasonable use of neighboring properties but outright prohibition of the taking is in fact confiscation rather than conservation." 17/

A finding that application of any of the provisions of the ordinance "would prevent the removal of any substantial amount of gravel" led the Court to invalidate it in its entirety.

Regulation to prevent topsoil removal in urban areas was tested in a recent Massachusetts case which reaffirmed the principle that municipalities may "regulate the use of land and in so doing they may limit, control or prohibit the removal and sale of loam, sand, gravel, stone or other component parts of the land." 18/ The case picks up a chain of precedent from the late 1940's where municipalities in the northeast were attempt-

16. 190 N.W. 2d at 355, 356.
17. 190 N.W. 2d at 356.
ing to regulate removal and sale of topsoil.  19/ Dealing with a situation where a profitable use exploiting the natural resources of the land left the area barren and unsightly and almost valueless, the courts found the soil removal ordinances a constitutional exercise of municipal police powers.

2. Regulation of Flood Prone Areas

Increasing awareness of the massive property damage floods may entail has lead to increasingly stringent controls of land use in flood hazard areas. 20/ The Courts have reached varying conclusions with respect to regulation of flood prone areas.


21. While older cases seldom distinguish different areas on hydrologic grounds, recent literature has emphasized differences between floodway land and floodway fringe. Generally the floodway is subject to more frequent flooding and its maintenance without substantial obstructions is considered essential if the river or stream channel is to accommodate peak floods without impeding water and aggravating upstream flooding. The floodway is also the zone of greatest danger; the floodway fringe is more likely to be passively flooded, serving as a retention area for peak flood waters which the channel cannot accommodate. See United States Water Resources Council, Regulation of Flood Hazard Areas, (1971); American Society of Planning Officials (ASPO), "Regulations for Flood Plains," Planning Advisory Service Report No. 277 (Feb., 1972).
The Connecticut Supreme Court in *Vartelas v. Water Resources Commission*, 22/ upheld a state statute which authorized the Water Resources Commission to establish an encroachment line, beyond which no structure or encroachment could be placed without special permission from the authority. The land in question had long been occupied by buildings which were destroyed by flood in 1955. After the establishment of the line "only sixty square feet of the property [remained] for the erection of any structure apart from one approved by the commission." 23/

The landowner appealed the decision establishing the line and claimed an unconstitutional taking of his property for a public use without compensation. The Court hedged on the taking issue by noting that the regulatory statute also provided for the exercise of eminent domain in appropriate situations depending "upon the circumstances of the particular case." 24/ The Court found that the plaintiff had not been deprived of the use of his property on these facts, particularly since he had never applied for a special permit to build prior to filing suit.

Apparently, a subsequent application for a concrete block building was denied and although the denial was not an issue in this suit the Court commented:

"The Commission has, at most, refused its permission for the erection of a particular structure. Whether the plaintiff could build another type of structure -- for example, on piers or cantilevers -- which would not impair the capacity of the channel in time of flood is a matter which the commission was not asked to, and did not, pass upon." 25/

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23. 153 A.2d at 823.
24. 153 A.2d at 824.
25. 153 A.2d at 825.
Turning to the regulation establishing the encroachment lines, the Court found:

"The loss of human life and the destruction of property wrought by the floods in August, 1955, justified the legislature in conferring upon the Commission broad powers to adopt preventive measures against their repetition. The trial court found that the encroachment lines as established by the Commission extend for several miles along the Naugatuck River, accord with sound engineering principles and statutory requirements, and were designed to reduce hazard to life and property in the event of recurring floods. The Commission did not abuse its powers in proceeding by way of regulation rather than by way of eminent domain." 26/

A later Connecticut decision, however, dealing with flood prone land on Long Island Sound narrowed the scope of Vartelas. In Dooley v. Town Plan and Zone Commission of Town of Fairfield, 27/ the Connecticut Supreme Court disapproved a local flood plain zoning classification which prevented residential and most commercial construction on the plaintiff's land in a flood zone adjoining Long Island Sound.

The properties involved were located approximately one-half mile from the Sound. One parcel had been subject to an $11,000 sewer assessment when it previously had been in a residential district. The only evidence with respect to flooding which the Supreme Court noted indicated that "much of that [Dooley's] property is on good high ground and was not under water in 1938 hurricane. 28/

26. Id.
27. 151 Conn. 304, 197 A.2d 770 (1964).
28. 197 A.2d at 773.
150.

The ordinance listed permitted uses for the flood plain zone including parks, playgrounds, a marina, a boathouse or landing and dock, clubhouse, wildlife sanctuary, farming and gravel surfaced parking. The Court found the privately oriented uses all resulted in "substantial diminution in the value of the land," noting the conclusion of a real estate expert who found the land had depreciated in value by 75% under the influence of the regulation. The publicly-oriented uses, which they found more realistic, practically restricted the "potential buyers of the property to town or governmental uses. . . ." Thus the Court found the regulation unreasonable and therefore invalid. 29/

Turner v. County of Del Norte, 30/ is a recent California Appellate case affirming an absolute prohibition of residential or commercial structures in a flood plain on facts somewhat similar to those found in Vartelas. In Turner, the plaintiff was the owner and subdivider of approximately 31 acres of land on the Klamath River in California. His subdivision had been approved and he had constructed a model home and sold 21 lots by late December of 1964. Shortly thereafter severe flooding occurred, sweeping all improvements, roads and the water system from the property, eroding the surface and making it more susceptible to future flooding. This was the fourth time since 1927 that the area had flooded.

After the 1964 flood, the U. S. Army Corps of Engineers proposed a flood control program which would protect the town of Klamath, but did not include the plain-

29. 197 A.2d at 773. The Court relied heavily on zoning precedent for its conclusion that the 75% depreciation was unreasonable. See Keller v. Township of Farmington, 358 Mich. 106, 99 N.W. 2d 578 (1959); Hager v. Louisville and Jefferson County Planning and Zoning Commission, 261 S.W.2d 619 (Ky. 1953); Sturdy Homes, Inc., v. Township of Redford, 30 Mich. App. 58, 186 N.W. 2d 43 (1971); Summerville v. North Platte Valley Weather Control District, 170 Neb. 46, 101 N.W. 2d 748 (1960) (Hail suppression program invalidated); Hofkin v. Whitemarsh Township Zoning Board of Adjustment, 88 Montg. 68, 42 D.C. 2d 417 (C.P. 1967).
tiff's land. One condition required in connection with the project was local assurance that flood plain uses would be regulated in the rest of the valley. The Corps of Engineers distrusted zoning as a regulatory device because of its susceptibility to manipulation which might lessen the beneficial effects of the project. However, the California Department of Natural Resources took the position that a state law mandating such regulation in flood control project areas was sufficient guarantee to meet federal and state requirements that there be no such relaxation.

The Court in its holding affirming the local ordinance found:

"We have concluded from the evidence that the zoning ordinance prohibiting certain types of buildings in the area and limiting the use to parks, recreation and agricultural uses did not constitute an unlawful taking of appellants' property and was, in fact, properly enacted within the police power of the Board of Supervisors of Del Norte County."

31/

The property owners also contended that the county had taken a flowage easement over the property. The Court emphatically rejected their argument finding "The flood control project will not increase significantly the extent to which appellant's lands would be inundated in a future flood." 32/ Similar approval has been given in other jurisdictions, often subject to further proof on factual issues. 33/

31. 101 Cal. Rptr. at 95.
32. 101 Cal. Rptr. at 96.
In Turnpike Realty v. Town of Dedham, 34/ the Massachusetts Supreme Judicial Court upheld stringent flood plain restrictions on the Realty Company's property. The severity of the restraint lead the chief justice to separately concur in the decision lest it be read as approving regulations which might impose a "substantial diminution" in value, a question of degree on which the majority of justices are pointedly ambiguous. 35/

The plaintiff in this case owned nearly 70 acres of land, of which two small parcels totaling 3.4 acres were uplands and the remainder was "a low swampy area." All of the land was subject to the town zoning by-law which provided:

(1) The purpose of the Flood Plain District is to preserve and maintain the ground water table; to protect the public health and safety, persons and property against the hazards of flood water inundation for the protection of the community against the costs which may be incurred when unsuitable development occurs in swamps, marshes, along water courses, or in areas subject to flood; and to conserve natural condition, wild life, and open spaces for the education, recreation and general welfare of the public.

(2) Within the Flood Plain District no structure or building shall be erected, altered or used, and no premises shall be used except for one or more of the following uses: Any woodland, grassland, wetland, agricultural, horticultural, or recreational use of land or water not requiring filling. Buildings and sheds

35. 284 N.E. 2d at 901, 902.
accessory to any of the Flood Plain uses are permitted on approval of the Board of Appeals. Notice of each such Flood Plain building permit application shall be given to the Town Public Works Department, to the Town Board of Health, to the Town Planning Board, and to the Town Conservation Commission as well as all other parties required.

The plaintiff attempted to support several arguments in his factual proof. It first attacked the motives for the ordinance arguing its primary purpose was to retain the land in its natural state. This the Court refused to explore in view of the legislative statement of purpose. Rather, the Justices found that "since the by-law is fully supported by other valid considerations of public welfare [protection of individuals, landowners and the community from disaster], the additional purpose of conserving 'natural conditions, wild life, and open spaces' does not bring it into conflict with the enabling act." 36/

The Realty Company also argued that the flooding was not from "natural" causes but rather depended on the operation of a flood control gate but the Court agreed with the trial judge's denial of requests for a ruling on this point. On review the Court noted "extensive evidence on elevation, topography, dams, flood control, flood gates, all bearing on the issue whether or not the locus was subject to 'seasonal' or 'periodic' flooding. . . ." 37/

Conflicting expert opinion on valuation was also considered. Realty argued that the diminution amounted to 88% of the property's value. Citing Hadacheck v. Sebastian 39/ where the United States Supreme Court

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36. 284 N.E. 2d at 894.
37. 284 N.E. 2d at 896.
38. 284 N.E. 2d at 899.
39. 239 U.S. 394 (1915).
sustained a regulation diminishing value by over 90%, the Court however was unable to find evidence of diminution in value sufficient to support an argument that plaintiff's property had been taken. 40/

Baker v. Planning Board of Framingham, 41/ is another Massachusetts case expressing a somewhat different viewpoint from that expressed in Turnpike Realty, and which may suggest a situation which might again lead that Court to a different result.

The land owned by Mrs. Baker consisted of eleven acres of land which had come to be surrounded by subdivisions of the town of Framingham. The town had held an easement for a ditch to conduct storm waters across the property since 1934 which had originally been sufficient to accommodate all runoff. However, as the area was developed, the ditch became inadequate, and during heavy rains and thaws the property served as a retention area for flood waters.

Mrs. Baker's proposed subdivision was disapproved because the creation of the subdivision would deprive the town of the retention basin and as a result, over-tax the downstream drainage facilities. The Court cited the finding of a master in the case:

"The board had but a single reason for disapproving the . . . [definitive] plan, namely, the extra cost to the town of handling the sewage and surface drainage produced by the subdivision."


42. 288 N.E. 2d at 833.
Speaking to the taking issue, it went on "Obviously a planning board may not exercise its authority to disapprove a plan so that a town may continue to use the owner's land as a water storage area and thereby deprive the owner of reasonable use of it." 43/ As this case demonstrates, when the regulation appears to be designed to secure land for a public facility such as a retention basin the Courts are likely to feel that condemnation is the only appropriate technique.

3. Regulation for the Protection of Wetlands or Estuarine Areas

In considering regulations requiring the maintenance of particularly sensitive areas in a relatively unspoiled state, the courts often make an effort to separate flood and property protection objectives from those of preservation of natural resources, wildlife, fishing rights, and water purity. Three of the principal cases in this area exemplify the problems this distinction may create. 44/

Morris County Land Improvement Company v. Parsippany-Troy Hills Township, 45/ is a case from the New Jersey Supreme Court rejecting an ordinance which created a Meadows Development Zone for a portion of a 1500 acre swamp lying within the township. The regulation allowed a variety of agricultural uses, limited residential use in conjunction with the agricultural uses, outdoor recreational uses, public utility transmission

43. Id., See also, Hager v. Louisville and Jefferson County Planning and Zoning Commission, 261 S.W. 2d 619 (Ky. 1953).
lines, radio or television transmission facilities and township sewage treatment plants and water supply facilities. \textsuperscript{46} The ordinance also permitted other uses within the Meadows zone under a strict site plan review program. Fill material was restricted to material from within the marsh and an amendment to the original provision also prohibited taking earth products from the zone.

The plaintiff in this case owned a substantial tract of industrially zoned land and a smaller adjoining 66 acre tract which was within the Meadows zone. It began filling its meadow (marsh) land and continued to do so in disregard of the Meadows Zone regulations. Finally applying for permission to continue their operation, it found its request denied.

The trial court had directly addressed the taking issue concluding:

"There is no question at all but that the township governing council was conscious of the physical nature of this area and that it was concerned about the danger of flooding. There is a limit to fill without adequate safeguards. The ordinance here is predicated on the physical nature of the area to substantial extent. The land at the present time is not suitable for any intensive use." \textsuperscript{47}

The Supreme Court of New Jersey recharacterized this finding: "There cannot be the slightest doubt from the evidence that the prime object of the zone regulations is to retain the land substantially in its natural state." \textsuperscript{48} The Court found that the marsh consisted of about

\textsuperscript{46} 193 A. 2d at 236.
\textsuperscript{47} 193 A. 2d at 239. The trial court was reversed in the Supreme Court opinion.
\textsuperscript{48} Id.
six to eight feet of muck and clay over gravel and that the two layers of muck and clay had to be "removed and replaced with proper fill . . . [or] topsoil" before active uses could be considered. 49/

After a detailed discussion of the engineering difficulties involved in achieving "proper fill," without consideration of the regulations, the Court concluded that it might be virtually impossible under the regulations since absence of an adverse effect on adjacent properties was an element to be proved before a permit to fill would be issued. A large amount of adjacent property was owned by a tax-paying corporation which managed it for conservation purposes and the Court assumed it would be difficult to fill marshland without an adverse effect on the conservation area.

The Court was also concerned that many of the permitted uses were public (recreational uses operated by a governmental agency or division) or quasi-public, here lumping public uses with regulated uses such as utility operations and broadcasting.

With respect to the proof at trial which evidently included hydrologic reports regarding flooding and other ecological evidence, the Court concluded:

"It is equally obvious from the proofs, and legally of the highest significance, that the main purpose of enacting regulations with the practical effect of retaining the meadows in their natural state was for a public benefit. This benefit is twofold, with somewhat interrelated aspects: first, use of the area as a water detention basin in aid of flood control in the lower reaches of the Passaic Valley far beyond this municipality; and second, preservation of

49. Id.
the land as open space for the benefits which would accrue to the local public from an undeveloped use such as that of a nature refuge by wildlife (which paid taxes on it)."

Finally citing Pennsylvania Coal, the Court reversed the trial court:

"We cannot agree with the trial court's thesis that, despite the prime public purpose of the zone regulations, they are valid because they represent a reasonable local exercise of the police power in view of the nature of the area and because the presumption of validity was not overcome."

The Morris County case had a significant influence in the 1960's. MacGibbon v. Board of Appeals of Duxbury, 52/ a decision of the Massachusetts Supreme Judicial Court, reached a similar conclusion with respect to a zoning by-law adopted:

"For the purpose of protecting and preserving from despoliation the natural features and resources of the town, such as salt marshes, wetlands, brooks and ponds. No obstruction of streams or tidal rivers and no excavation or filling of any marsh, wetland or bog shall be done without proper authorization by a special permit issued by the Board of Appeals."

The town board had repeatedly denied an application by Mr. MacGibbon to fill portions of estuarine wetland which he owned. 54/

50. 193 A.2d at 240.
51. 193 A.2d at 242.
53. 255 N.E. 2d at 349.
The Court in MacGibbon read Massachusetts zoning enabling legislation narrowly to prohibit such action by towns in the state:

"The preservation of privately owned land in its natural, unspoiled state for the enjoyment and benefit of the public by preventing the owner from using it for any practical purpose is not within the scope and limits of any power or authority delegated to municipalities under the Zoning Enabling Act." 55/

They thus avoided the taking question which they considered settled by their earlier opinion in Commissioner of Natural Resources v. S. Volpe & Company. 56/

The Volpe case came before the Supreme Judicial Court after an injunction was issued to prevent further filling of a salt marsh pursuant to the Massachusetts Wetlands Act. The trial judge concluded: "That Broad Marsh is a 'saltmarsh' necessary to preserve and protect marine fisheries; . . . [and] that the 'condition' imposed is not an unlawful taking entitling the defendant to compensation." 57/ His findings included extensive evidence of the public purposes served by the regulation.

The Supreme Judicial Court, however, concluded that "this is not the whole matter . . ." Citing Goldblatt v. Hempstead and Morris County and quoting extensively from Pennsylvania Coal, they found the trial judge's consideration of the issue inadequate and remanded for further factual findings. 58/

55. 255 N.E. 2d at 351.
57. 206 N.E. 2d at 668.
The impact of these cases has been further diminished by the opinion of the Supreme Judicial Court in Golden v. Board of Selectmen of Falmouth. In this 1970 case, the Court made clear the distinction it had tentatively drawn in MacGibbon nearly one year earlier. The Court found that "protecting the town's natural resources along its coastal areas" through a permit system a legitimate exercise of local zoning powers. Only when permit denial was "based on a legally untenable ground, or * * * unreasonable, whimsical, capricious or arbitrary," would there be grounds for Court intervention. MacGibbon is cited as one such situation. The Court notes however,

Our construction of [the Wetlands] Act logically permits each of the respective governmental bodies . . . to carry out effectively the legislative and local policy of preserving and protecting coastal wetlands.

The advances thus far made in this Commonwealth with regard to environmental control would be reversed if local communities were prevented from exercising regulatory authority.

State v. Johnson, the Maine Supreme Court opinion frequently cited with Morris County and Volpe on the

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60. 265 N.E. 2d at 575.
61. 265 N.E. 2d at 576.
62. 265 N.E. 2d at 577.
issue of regulatory taking, addressed a Maine statute regulating use of land in salt water marshes. Considering only the facts that the property was "wetland" within the terms of the statute, and was located within the Town of Wells, Maine, and was suitable for building if filled to bring grade above the high water level, the Court found the regulation to be a taking on these facts.

The Court concluded that unless filled the land had no value whatsoever. 64/ The Court focused on the burden born by the landowners: "Their compensation by sharing in the benefits which this restriction is intended to secure is so disproportionate to their deprivation of reasonable use that such exercise of the state's police power is unreasonable." 65/

Strong legislative findings supported by evidence of critical danger to the ecology of the area have resulted in contrary results in California where an order of the San Francisco Bay Conservation and Development Commission prohibiting filling of the Bay was sustained in an appellate court decision. The decision is discussed at length in Chapter 11. 66/

The Wisconsin Supreme Court has also given a strong stamp of approval to shoreline regulation which includes wetlands protection. This comprehensive regulation has ramifications which reach beyond the earlier "single objective" regulations and is also discussed at length in Chapter 11. 67/

More recent wetlands cases suggest that judicial attitudes are changing. The Maryland Court of Appeals in Potomac Sand & Gravel Co. v. Governor of Maryland,68/

64. 265 A. 2d at 716.
65. Id.
67. Just v. Marinette County, 56 Wis. 2d 7, 201 N.W. 2d 761 (1972).
upheld a state law which prohibited gravel extraction from tidal lands.

The Potomac Sand and Gravel Company was the owner of three parcels of tidal lands from which they proposed to remove sand and gravel by dredging. The Court reviewed extensive evidence regarding the biologic productivity of the marshes, the tax history of the parcels, their potential productivity for sand and gravel production, and their total size.

The Court then addressed the issue of whether the regulation amounted to a taking without compensation. They cited Commonwealth v. Tewksbury, 69/ discussed in Chapter 7, bringing it up to date with the more modern cases already noted, and distinguished the Maine court's decision:

"State v. Johnson is inapplicable. The Court limited its holding to the 'facts peculiar to the case.' The case at bar is not concerned with a legislative sanction of dredging in Charles County with an administrative permit procedure. Rather, the case at bar is a legislative prohibition. Chapter 792 was enacted less than a year after the Wetland Act of 1970, and was intended to be more restrictive than the Wetlands Act of 1970. Finally, State v. Johnson is not the law in Maryland." 70/

The legislative prohibition on dredging sand, gravel and other aggregates or minerals was held to be "a limitation upon a use of a property, not a taking ... It is within the purview of the police power for the state to preserve its exhaustible natural resources." 71/

70. 293 A. 2d at 248.
71. Id.
Going on to document their position that the exercise of the police power was reasonable, they applied the Lawton v. Steele 72/ test revived by Goldblatt: 73/

[to justify the State in . . . interposing its authority in behalf of the public, it must appear:]

(1) that the interests of the public generally, distinguished from those of a particular class, require such interference;

(2) that the means are reasonably necessary for the accomplishment of the purpose; and,

(3) that the means are not unduly oppressive upon individuals.

Chapter 792 is not in violation of the Lawton rule. [It] does not benefit a particular class; rather, it benefits all citizens of Maryland. The means utilized are reasonably necessary in light of the potential harm as testified to at trial by experts for both parties." 74/

The Court thus resisted the taking argument and affirmed the denial of permission to dredge on the tidal wetlands. 75/

72. 152 U.S. 133 (1844).
74. 293 A. 2d at 249.
4. Regulation for the Protection of Beach Lands

Relatively few cases have examined constitutional issues raised by regulations for the protection of beach lands, which generally deal with strict regulation of construction in the foreshore or dry sand area or use controls for the protection of barrier dunes. A pair of New Jersey decisions illustrate the Court's analysis of the issues raised by such regulations. In Speigle v. Beach Haven, 76/ a local ordinance adopted under a state enabling act, established controls over beach zones to regulate construction and excavation. The objective was to protect the beaches and dunes from erosion which would aggravate property damage from waves and storm tides. On the ocean side of a "building line," determined by engineering survey, no structures were permitted except fences, pavilions of less than 300 square feet and boardwalks.

The plaintiffs owned four tracts, two of which were fairly evenly divided between buildable and protected land, and two of which were almost entirely seaward of the building line. Plaintiffs argued that the prohibition of structures resulted in a taking of the property.

The Court held that the plaintiffs had failed to meet their burden of proof:

"Plaintiffs failed to adduce any economic use to which the property could be put. The borough, on the other hand, adduced unrebutted proof that it would be unsafe to construct houses oceanward of the building line (apparently the only use to which lands similarly located in defendant's municipality have been put), because of the possibility that they would be destroyed during severe storm --

a result which occurred during March of 1962. Additionally, defendant submitted proof that there was great peril to life and health arising through the likely destruction of streets, sewer, water and gas mains, and electric power lines in the prescribed area in an ordinary storm. The gist of this testimony was that such regulation prescribed only such conduct as good husbandry themselves imposed on the use of their own lands." 77/

The Court also sustained a requirement that the landowner construct a boardwalk for beach access to avoid erosion of sand dunes and thus maintain the dune line.

An earlier lower court decision reached an opposite conclusion where a barrier dune had been constructed by the government on the plaintiff's property after a period of flooding. In Lorio v. Sea Isle City, 78/ the court found the deprivation "of any use of the land" to be the determinative fact on the taking issue. 79/ Therefore the "appropriation for the public necessity," could not be justified under the police power. 80/

A California case, McCarthy v. City of Manhattan Beach, 81/ arose out of a dispute between the owner of a beach and the city which had zoned the land for recreational activities alone. The owner had intended to erect houses on pilings along the beach front.

The land consisted of roughly three-fifths of a mile of sandy beach frontage within the City of Manhattan Beach. The land varied in width between 174 and 186 feet and formed a strip between the ocean and a 50 foot wide strip of land held as a state park. The Court

77. 218 A. 2d at 137.
79. 212 A. 2d at 803.
80. There was no consideration of doctrines of riparian rights. Cf. Annotation, 23 ALR 2d 750.
noted that the level of the state park was from two to fifteen feet below that of an adjoining sidewalk and the nearest buildings. It was also covered with water in times of storm and "on other occasions." The Court noted that the land had been used continuously as a public beach "since at least 1900." 82/

The Court also reviewed a long history of negotiations between Mr. McCarthy and the City in an attempt to arrange for the city's purchase of the land. In 1940 he made a request for business zoning of the land and was refused. In 1941 the ordinance challenging in the court proceeding was adopted. The ordinance permitted use of the land for beach recreational activities for an admission fee, but permitted no permanent structures on the land.

The Court dealt with Pennsylvania Coal summarily:

"That was an action between two private parties, the statute involved admittedly destroyed previously existing right of property and contract as reserved between the parties, and the propriety of the statute's prohibition upon the single valuable use of the property for coal-mining operations was considered in relation to special benefits to be gained by an individual rather than by the whole community. In those circumstances application of the statute to the property was held to effect such diminution in its values as to be unconstitutional and beyond the legitimate scope of the police power." 83/

The Court further found that the plaintiffs had introduced no evidence of value relative to the use of

82. See Gion v. Santa Cruz, 2 Cal. 3d 29, 84 Cal. Rptr. 162, 465 P. 2d 50 (1970) (longstanding public use may result in public having prescriptive right to access).
83. 264 P. 2d at 938, 939.
their property before or after the passage of the 1941 ordinance. Also, since the passage of the ordinance they made no use of the property for commercial recreational purposes, nor did they introduce evidence that the property could not be used in conformity with the ordinance. The Court thus distinguished earlier cases dealing with relative values in respective uses of the property 84/ and affirmed the decision of the trial judge.

Frequently, cases involving beach protection turn on title theories which hold that the owner of adjoining land has never had, or has relinquished, his rights in the property. Thus Oregon has applied a theory of customary law to affirm a legislative declaration of public rights in beach land. 85/ In California and Texas, some-

84. 264 P. 2d at 939.
85. In State ex rel Thorton v. Hay, 254 Ore. 584, 462 P. 2d 671 (1969), the Oregon Supreme Court approved state regulations which prohibited any construction on the ocean side of the vegetation line stretching along the Oregon coast. In doing so they relied on traditional property law doctrines to find that the public had acquired, over the years, an easement to go upon and enjoy the dry sand area from the line of mean high tide to the vegetation line. Implied dedication, prescriptive rights and the law of custom were all considered as the basis for the assertion of public rights in the use of land. The Court rejected implied dedication because they were doubtful that intent to dedicate could be found or even presumed. Although they agreed that prescriptive easements would be established by long standing public use, they also found this unsatisfactory because it required determinations on a tract by tract basis while it was recognized that Oregon's beaches had been used by the public for as long as the land had been inhabited. The Court thus turned to the ancient concept of customary law to arrive at their decision. Looking to Blackstone they found that to be recognized as law a custom must be ancient, uninterpreted, peaceable and free from dispute, reasonable, certain and obligatory. Finding the highly visible, undisputed and longstanding use of the dry sand area of the beach met all these requirements, the Court validated the Oregon statute declaring public rights as a codification of customary law.
what similar prescriptive rights doctrines are applied where public right of use is to be established. 86/

5. Regulations to Create Open Space in New Subdivisions

One of the most actively litigated land use practices in recent years is the practice of requiring mandatory dedication of land, or payment of fees in lieu of land, as a prerequisite to subdivision of land.

Associated Home Builders v. City of Walnut Creek, 87/ a recent decision from the California Supreme Court, approved the formula adopted by the City of Walnut Creek, California, pursuant to state statute. Walnut Creek had adopted a general park and recreation plan for the city. Making reference to this plan, their dedication provision provided:

"That if a park or recreational facility indicated on the general plan falls within a proposed subdivision the land must be dedicated for park use by the subdivider in a ratio (sett forth in a resolution) determined by the type of residence built and the number of future occupants. Pursuant to the ratio, two and one-half acres park or recreation land must be provided for each 1,000 new residents. If, however, no park is designated on the master plan and the subdivision is within three-fourths of a mile of a park or a proposed park, or the dedication of land is not feasible, the subdivider must pay a fee equal to the value of the land which he would have been re-

87. 4 Cal. 3d 633, 94 Cal. Rptr. 630, 484 P. 2d 606 (1971).
quired to dedicate under the formula."

Turning to earlier cases, the Court tested the constitutional parameters by reference to a case relating to mandatory dedication of streets where the landowner had argued that the dedication requirement amounted to the exercise of the power of eminent domain. The Court noted that:

"We held that the city was not acting in eminent domain but, rather, that a subdivider who was seeking to acquire the advantage of subdivision had the duty to comply with reasonable conditions for dedication so as to conform to the welfare of the lot owners and the general public."

In a survey of other recent decisions exploring similar provisions the Court found that none had "held a dedication provision invalid on the ground that, unlike sewers or streets, recreational facilities are not sufficiently related to the health and welfare of subdivision residents to justify the requirement of dedication."

Faced with the slippery slope along which police, fire and general municipal operating expense contributions could also be required, the Court reversed judgment, noting however, two state statutes requiring dedication of access to publicly owned beaches and lakes.

88. 94 Cal. Rptr. at 633. The Court notes in its footnote: "The requirement of dedication is qualified as to subdivisions containing 50 parcels or less. In order to comply with subdivision (g) of Section 11546 only the payment of fees may be required in subdivisions of such size.


90. 94 Cal. Rptr. at 634.

91. Id.
which were neither approved nor criticized in the opinion. 92/

Aunt Hack Ridge Estates, Inc., v. Planning Commission of the City of Danbury, 93/ a Connecticut case dealing with dedication of land for park space in subdivisions, addressed the taking issue more directly. The Danbury ordinance which the Court ruled upon provided:

"The Commission may require that a plan of subdivision show an area for park or playground. Such an area, if required, shall be at a rate of not more than four percent of the total area to be approved for subdivision, but not less than 10,000 square feet. The area shall, in the opinion of the Commission, be suitable for recreational use and located so as to fit in with a city wide recreation plan; it may be required to be contiguous with open spaces of neighboring subdivisions. It shall in all cases be available and accessible to all residents of the subdivision." 94/

The Court first reviewed Connecticut cases approving the exercise of the police power when the laws "have a rational relation to the public welfare . . . and [are] reasonable and impartial." 95/ Noting that this regulation only required dedication of land and not money, the Court found:

"It is clear that the requirement which is cast upon the plaintiff by the regulation and statute with which we

92. Cal. Business & Professional Code, Sections 1161.05, 1161.07.
94. 273 A. 2d at 882.
95. 273 A. 2d at 884.
are concerned is uniquely and solely attributable to its activity in undertaking to establish a subdivision. Engaging in the activity is left to its own choice. When it undertakes to subdivide, the population of the area is necessarily increased and the need for open space for its people becomes a public one."

And concluded:

"Basically, however, the complaint is that the plaintiff should be able to assert an individual interest in filling the entire area with housing as superior to the public interest in maintaining a more healthful open space environment. For the reasons already discussed, the public welfare must be paramount."

Pioneer Trust & Savings Bank v. Village of Mount Prospect, 98/ came to an opposite conclusion under a similar ordinance since there had been no proof that "the need for recreational and education facilities . . . is one that is specifically and uniquely attributable to the addition of the subdivision and which should be cast upon the subdivider as his sole financial burden." 99/ Citing Pennsylvania Coal and the

96. 273 A. 2d at 885.
99. 176 N.E. 2d at 802.
The ordinance had required the dedication of one acre for each sixty acres of residential use and one-tenth acre for each acre of business or industrial site in the subdivision. The Court held:

"The agreed statement of facts shows that the present school facilities of Mount Prospect are near capacity. This is the result of the total development of the community. If this whole community had not been developed to such an extent or if the existing school facilities were greater, the purported need supposedly would not be present. Therefore, on the record in this case the school problem which allegedly exists here is one which the subdivider should not be obliged to pay the total cost of remedying, and to so construe the statute would amount to an exercise of the power of eminent domain without compensation."  101/

Other cases have invalidated similar provisions on varying grounds. 102/

Sommers v. City of Los Angeles, 103/ approved mandatory dedication of property designated on the area master plan for highway widening as a prerequisite to

101. 176 N.E. 2d at 802.
the grant of a building permit for expansion of a service station. The zoning ordinance involved required the dedication before issuance of a building permit if a lot in:

"An R3 or less restricted zone, if such lot abuts on a major or secondary highway, unless the half of the highway located adjacent to such lot has been dedicated or improved to its master plan width. The section then provides certain limitations upon and exceptions to such restriction and a procedure by which a variance from the restrictions and requirements of the section may be procured, or dedication can take place expeditiously if it is desired to build immediately rather than await the widening of the street, if such widening is necessary, by some other means."

The owner of a small and aging service station wished to destroy adjoining property which he owned to expand and modernize the station, and when faced with the dedication requirement, he resisted, arguing that the city had to compensate for the land used as a roadway.

In this case, the required dedication amounted to three feet along 150 feet of frontage and thirteen feet along another shorter side of the lot. The trial court had found a public need for secondary highways, an inadequacy of the present street system and other facts with respect to traffic flow generated by the business use. The Appellate Court, citing Consolidated Rock Products, held:

"Bearing in mind the comprehensive zoning plan of the City of Los Angeles, the findings of the

104. 62 Cal. Rptr. at 523.
trial court and the evidence in support of such findings, we have no difficulty in concluding that all the relevant facts and circumstances amply warrant the legislation here challenged and that it is not unconstitutional."

Reviewing the findings of the trial court, the Court concluded:

"It is asserted that the value of the property requested to be dedicated is $5,000. It should be noted, however, that there was testimony that the value of property ordinarily will increase with permanent street improvements in the area, and it was incontrovertibly established that the improvements to be installed by appellants' lessee would result in a substantial increase in the rental income from the service station."

They thus affirmed the trial court, rejecting allegations that a taking had taken place.

In Selby Realty Co. v. City of San Buenaventura, another California Appellate Court reached the opposite conclusion with a substantially similar ordinance where:

"Such dedication and construction would render plaintiff's land useless for its planned purpose for the reason that there would be insufficient land left for the proposed apartment building. Except for non-

105. 62 Cal. Rptr. at 532.
106. 62 Cal. Rptr. at 534.
conformity with the General Plan, plaintiff's proposed construction was in all respects in compliance with building requirements."

The Court may have been influenced by the fact that the formal ordinance had only been passed on the day the complaint in the case was filed, although there is no reference to bad faith in the opinion. The case is now before the California Supreme Court which may resolve the inconsistencies between Selby Realty and the earlier Sommers case.

6. Regulation to Control Population Density and Preserve Agricultural Land

Preservation of private open space has been the objective of numerous zoning provisions which prescribe large lot sizes and deep building setbacks. In a rural context twenty acre or larger lot sizes may be employed in areas designated for agricultural use, although such a holding zone often permits residential construction as well if special procedures are followed. The zoning precedent makes somewhat confused con-

108. 104 Cal. Rptr. at 870.
109. Since the appeal has been accepted in the Selby case, the appellate opinion has value principally for informational purposes, and the Supreme Court ruling will be determinative of the law.
110. See generally, 2 R. Anderson, The American Law of Zoning 30 (1968). Density zoning has also been used as a control in the vicinity of airports. See, 2 R. Anderson, supra, at 186; Annotation, 77 ALR 2d 1362.
stitutional law because of the interrelationship of enabling legislation and the constitutional parameters. 112/ Many cases hold such restrictions valid, making brief reference to constitutional principles. 113/ Other courts approving large minimum lot size have looked to drainage and physical characteristics of the area to evaluate the restriction. 114/ In some cases, however, other courts have recognized other factors, such as preservation of area character, as justifying low density zoning in certain areas, although such regulation is usually balanced against possible exclusionary motives. 115/

In Salamar Builders Corp. v. Tuttle, 116/ while the plaintiffs' application for subdivision approval was pending, the Town of Southeast increased the minimum lot size required in the area. The developer resisted the change, arguing that his land had been reduced in value to such an extent that the regulation amounted to a taking of his property.

The area proposed for subdivision was in a part of the town where sewer and water facilities were not planned due to difficulties with the terrain. The Court noted:

112. See Annotation, 95 ALR 2d 716 (large lot zoning); 93 ALR 2d 1223 (front setback regulations).

113. See, e.g., Clemons v. Los Angeles, 36 Cal. 2d 95, 222 P. 2d 439 (1950) (5,000 sq.ft.); Garvin v. Baker, 59 So. 2d 360 (Fla. 1952); Dundee Realty Co. v. Omaha, 144 Neb. 448, 13 N.W. 2d 634 (1944); First National Bank v. Chicago, 25 Ill. 2d 366, 185 N.E. 2d 181 (1962) (25,000 sq.ft.).


115. See e.g., Steel Hill Development Corp. v. Sanborntown, 469 F. 2d 956 (1st Cir. 1972); County Commissioners of Queen Anne's Co. v. Miles, 246 Md. 355, 228 A. 2d 450 (1967); But see National Land & Investment Co. v. Kohn, 419 Pa. 504, 215 A. 2d 597 (1965).

"expert testimony to the effect that the topography and soil conditions were such as to inhibit the installation of central sewer and water systems, so that any present residential development would necessarily be limited to the use of wells and septic tanks; and that, in turn, largely because of the area's topography, its location within or contiguous to the New York City watershed, and drainage difficulties, the area would best be zoned for residences on two-acre plots in order to provide ample space for drainage and thus minimize the danger of water pollution. Additional testimony was adduced which established that the rezoning was initiated as part of a well-coordinated and comprehensive land use scheme for the Town of Southeast generally..."

In spite of this testimony, the trial court had found that a $3,650 increase in cost per lot was "significant economic injury" requiring invalidation of the ordinance because of the absence of countervailing considerations.

The Court of Appeals noted its earlier decision in Fulling v. Palumbo, where it had ruled that evidence of significant economic injury could rebut the standard presumptions of validity supporting an ordinance. First the landowner must show significant injury, then the city must demonstrate by affirmative proof the relationship to health, safety and welfare, which the landowner again may overcome if he may show that he is deprived of "any use of the property to which it is reasonably adopted," or if the regulation destroys "the greater part of the value of the property."

117. 325 N.Y.S. 2d at 936.
119. 325 N.Y.S. 2d at 938.
In his proof, the plaintiff apparently went too far, since his expert's testimony established that subdivision under both the old and the new zoning ordinance would be uneconomical. The Court, noting that "the extent of the loss . . . relates more to plaintiff's qualifications as an entrepreneur than the question of confiscation," 120/ thus held the ordinance valid and constitutional. 121/

In Kavanewsky v. Zoning Board of Appeals of the Town of Warren, 122/ the Supreme Court of Connecticut rejected a similar ordinance. The Town of Warren had rezoned land from one to two acre minimum lot sizes while Mr. Kavanewsky was preparing his subdivision plan of one acre lots. While it had requested soil and subsoil studies in this area, none had been prepared and the rezoning was basically "made in demand of the people to keep Warren a rural community with open spaces and keep undesirable businesses out." 123/

The Connecticut Court never reached the constitutional taking issue since it found the action to be improper under the State's enabling legislation controlling local zoning. The legislation was specific, referring to such factors as "congestion in the streets" and "fire, panic, flood and other dangers" 124/ and thus may be distinguished from the more general constitutional parameters governing the police power. 125/ However, the statute did make reference to the "character of the district" and provision of sewer, both of which arguably are related to lot size. Thus the opinion while not reaching the taking question, may indicate the type

120. 325 N.Y.S. 2d at 939.
121. See also, Flora Realty & Investment Co. v. Ludue, 362 Mo. 1025, 246 S.W. 2d 771 (1952) app. dismissed 344 U.S. 802 (1952).
122. 160 Conn. 397, 279 A. 2d 567 (1971).
123. 279 A. 2d at 571.
125. See e.g., Steel Hill Development Inc. v. Town of Sanbornton, 469 F. 2d 956 (1st Cir. 1972) where the enabling legislation encompassed the more general health, safety, and public welfare standard.
of substantiation efforts to maintain "a rural community with open spaces" required. 126/

An extension of these concepts was applied in Steel Hill Development, Inc., v. Town of Sanbornton, 127/ to validate a "forest preserve" district for the preservation of open space and the rural character of the town of Sanbornton, New Hampshire. The town of Sanbornton is a small town in the hills of New Hampshire with a year round population of around 1,000 residents. With the growth of both winter and summer recreational facilities in the area, the extension of Interstate Highway 93 and lake and ski facilities nearby, Sanbornton had attracted some 400 seasonal homes and a regular influx of about 1,000 summer residents.

Steel Hill Development Company had proposed adding about another 500 units on 510 acres. It began negotiations on special zoning text amendments and rezonings which would permit the first stage of the development. These hearings aroused substantial public opposition and although the planning board approved the subdivision plan for thirty-seven lots, it also approved zoning district changes which placed approximately 70 percent of Steel Hill's land in a six acre minimum lot size agricultural district and prohibited "cluster" development.

Steel Hill appealed the rezoning asking that it be found unreasonable because it bore no rational relationship to the health, safety, morals or general welfare as required by the State of New Hampshire and because the reduction of the value of the land was a taking without compensation.

127. 469 F. 2d 956 (1st Cir. 1972).
The Court explored precedent relating to the duty of a municipality to accommodate growth and found that no precedent applied to the facts of this case where "a local legislative determination that the general welfare will be promoted by exclusion of an unwanted use from a non-metropolitan community is not likely to conflict with a regional need for local space for that use." 

The Court then reviewed the factors which entered the town's decision:

"We recognize, as within the general welfare, concerns relating to the construction and integration of hundreds of new homes which would have an irreversible effect on the area's ecological balance, destroy scenic values, decrease open space, significantly change the rural character of this small town, pose substantial financial burdens on the town for police, fire, sewer, and road service, and open the way for the tides of weekend 'visitors' who would own second homes. If the federal government itself has thought these concerns to be within the general welfare, see, e.g., 42 U.S.C. §4321, et seq., we cannot say that Sanbornton cannot similarly consider such values and reflect them in its zoning ordinance. Though some courts may have rejected them within the suburban zoning context, as in Kohn, and its progeny, or where permanent first homes are involved, as


129. 469 F. 2d at 961, citing Note, 57 Iowa L. Rev. 126 (1972).
in Kavanewsky, but cf. Morgan Hill, we think they are persuasive in the case before us. Many environmental and social values are involved in a determination of how land would best be used in the public interest. The choice of the voters of [the city] is not lacking in support of this regard."

The Court was not, however, enthusiastic about the manner in which Sanbornton reached its objectives. It noted "serious worries whether the basic motivation of the town meeting [at which the decision was made] was not simply to keep outsiders, provided they wished to come in quantity, out of town." 130/ Nonetheless, the Court treated this as an interim measure:

"But, at this time of uncertainty as to the right balance between ecological and population pressures, we cannot help but feel that the town's ordinance, which severely restricts development, may properly stand for the present as a legitimate stop-gap measure." 131/

With that qualification the Court turned to the taking issue; citing the Ramapo 132/ and Candlestick Properties 133/ cases the Court held:

"The zoning ordinance here in question has been in existence less than two years. Hopefully, Sanbornton has begun or soon will begin to plan with more precision for the

130. Id.
131. 469 F. 2d at 962.
future, taking advantage of numerous federal or state grants for which it might qualify. Additionally, the New Hampshire legislation, to the extent it expects small towns like Sanbornton to cope with environmental problems posed by private developments, might adopt legislation similar to the federal National Environmental Policy Act, 42 U.S.C. §4321 et seq., and thereby require developers to submit detailed environmental statements, if such power does not already reside within the town's arsenal of laws. Thus, while we affirm the district court's determination at the present time, we recognize that this is a very special case which cannot be read as evidencing a general approval of six-acre zoning, and that this requirement may well not indefinitely stand without more homework by the concerned parties."  

7. Regulation for the Preservation of Historic Buildings or Districts

Historic preservation has been the objective of numerous local ordinances and state laws. In Louisiana, the Vieux Carre provisions were established in the mid-'30's in the state's constitution. In other states there is sometimes specific enabling legislation authorizing local governments to adopt historic preservation as a regulatory objective.

134. 369 F. 2d at 962.
In the courts, historic preservation has fared well. The case law in this field shows surprisingly few cases where the regulation was invalidated, particularly on constitutional grounds. 136/

City of New Orleans v. Pergament 137/ is an early case confirming the authority to the City of New Orleans to pass an ordinance creating a commission for the preservation of the antiquity of the "French and Spanish quarter of the city." The Pergament case concerned the regulation of the size and the nature of signs to be used by businesses in the historic quarters. Mr. Pergament argued that since his gas station was a modern structure having no architectural or historical worth it was not subject to regulations adopted pursuant to the Louisiana Constitution.

The Court found that issues might arise under the equal protection clause in the Fourteenth Amendment with arbitrary decisions or a failure to prescribe similar standards for all persons similarly situated. It failed to consider arguments that such regulations might result in a taking of private property also prescribed by the Fourteenth Amendment. The Court noted:

"The purpose of the ordinance is not only to preserve the old buildings themselves, but to preserve the antiquity of the whole French and Spanish quarter, the tout ensemble, so to speak, by defending this relic against iconoclasm or vandalism. Preventing or prohibiting eyesores in such a locality is within the police power and within the


137. 198 La. 852, 5 So. 2d 129 (1941).
The preservation of the Vieux Carre as it was originally is a benefit to the inhabitants of New Orleans generally, not only for the sentimental value of this show place but for its commercial value as well, because it attracts tourists and conventions to the city, and is in fact a justification for the slogan, 'American's most interesting city.'" 138/

The Louisiana Supreme Court thus enunciated a principle which is well established in Louisiana law today. 139/

The Supreme Court of Massachusetts in an advisory opinion in 1955 also approved a proposed act to establish historic districts in Nantucket. Within these districts: "'no building or structure shall hereafter be erected, reconstructed, altered or restored' until an application for a building permit shall have been approved as to exterior architectural features subject to public view from public street, way or place, and evidence of such approval shall be 'a certificate of appropriateness' issued by the commission." 140/ The commission could also prevent destruction of any building or structure "the removal of which in the opinion of said commission would be detrimental to the public interest." 141/

The Massachusetts Supreme Judicial Court was asked by the state legislature whether the statute would violate the Fourteenth Amendment to the Constitution of the United States. In its ruling, the Court concluded:

138. 5 So. 2d at 131.
140. 128 N.E. 2d at 559.
141. Id.
"There are many regulations belonging in these categories [police regulation without compensation] too numerous and too familiar to require specific reference here. Those which in many respects most nearly resemble the proposed act are the zoning laws the constitutionality of which is in general thoroughly established . . . Many zoning regulations are as severe in their operation on landowners as any of the provisions of the proposed act would be likely to be." 142/

The Court noted that it had previously approved the "prohibition of billboards in places 'where they deface natural scenery and places of historic interest.'" 143/ The Court took judicial notice that Nantucket had been a famous seat of the whaling industry in earlier years and now depended heavily on vacation and travel business. Noting that "it is not difficult to imagine how the erection of a few wholly incongruous structures might destroy one of the principal assets of the town," 144/ the Court was of the opinion that the proposed act would be constitutional as an act for the promotion of the public welfare. 145/

Other localities have employed regulation to meet specific objectives in the preservation of historic districts. In Rebman v. City of Springfield, 146/ property owners challenged a city ordinance that established a historic zone which permitted property located within the zone to be used only for residences, churches, publicly-owned centers, auditoriums, historical museums and professional government or business offices not used for retail sales. The objective of the city of Springfield, Illinois was to preserve the area immediately

142. 128 N.E. 2d at 561.
143. Id.
144. 128 N.E. 2d at 562.
surrounding the home formerly owned and occupied by Abraham Lincoln from commercial exploitation.

Plaintiffs originally instituted their action after their application for rezoning permitting a "Top Boy" drive-in restaurant was denied. The Court conceded that the Rebmans' property would be more valuable to them if they could use it for purposes not permitted by the existing zoning. The Court then turned to the historic factors, finding "the common denominator" is the fact that preservation of historical areas under reasonable limitations as to use is within the concept of public welfare and may be affected by the exercise of the usual police power attendant upon zoning." 147/ Thus the Court held the historic preservation objectives mentioned by the state legislature a proper exercise of the police power and not a taking of the plaintiffs property. 148/

In Bohannan v. City of San Diego, 149/ a California Appellate Court approved historic district zoning in the "Old San Diego Architectural Control District." The ordinance establishing the district controlled exterior characteristics of buildings and signs within public view in the area which formed the original settlement of San Diego, characterized by the Court as "the birth place of California." 150/

Relating the ordinance to both cultural and economic factors, the Court noted with regard to the taking issue, "there is no showing [that] compliance with the provision impairing style requirements upon remodeling or repairing existing buildings in practical effect would render them valueless or substantially less valu-

147. 250 N.E. 2d at 288.
150. 106 Cal. Rptr. at 335.
New York's highest court reached a contrary conclusion in ruling upon a law designed to preserve the old metropolitan opera house in New York City. In *Keystone Associates v. Moerdler*, the Court held unconstitutional the provision of a 180 day holding period during which a special corporation with the power of eminent domain was to raise funds to condemn the old opera house.

The legislation enacted by the state legislature in 1967 created the Old Met Opera House Corporation and vested it with the power to condemn the opera house and appropriate it for use as an auditorium in which operas and other musical and cultural events could be held. The legislation also provided that the superintendent of buildings of the City of New York could refuse a demolition permit for a period of 180 days upon the request of the trustees of the corporation if they secured a deposit of $200,000. Shortly after the statute was approved Keystone Associates who held demolition rights initiated court proceedings to compel the issuance of a demolition permit.

The Court focused on the uncertainty of compensation which resulted from the fact that the corporation was not funded by the legislature. Turning to the 180 day holding period, the Court held:

"What the legislature cannot do directly, it cannot do indirectly, as the Constitution guards as effectually against insidious approaches"


as an open and direct attack. Whenever a law deprives the owner of the beneficial use and free enjoyment of his property, or imposes restraints upon such use and enjoyment that materially affect its value, without legal process or compensation, it deprives him of his property, within the meaning of the Constitution. All that is beneficial in property arises from its use and the fruits of that use, and whatever deprives a person of them deprives him of all that is desirable or valuable in the title and possession. It is not necessary, in order to render a statute obnoxious to the restraints of the Constitution, that it must, in terms or in effect authorize an actual physical taking of the property or the thing itself, so long as it affects its free use and enjoyment, or the power of dispossession at the will of the owner."

[Emphasis by Court] 153/

9. Regulation of Signs and Related Aesthetic Considerations

Aesthetic controls, particularly when exercised

153. 278 N.Y.S. 2d at 189. As noted by the chief judge in his dissent, the New York court in this case ruled on a moot issue. The 180 day period had expired by the time of the decision and by the terms of the statute the superintendent of buildings of New York City was required to issue the demolition permit. The dissent also puzzled over the majority's statements with reference to the absence of any exercise of the police power, noting "the majority had given no weight whatever to the ancient presumption of constitutionality of statutes and little credit to the proper legislative purpose of protecting a part of our cultural heritage and of the structures which enshrined those traditions. The making of statutes such as this should be encouraged by the courts not found upon because of the comparative novelty of the methods used." 278 N.Y.S. 2d 192.
over signs and exterior architectural features, are closely related to historic preservation controls noted previously. The law in this respect has evolved quite rapidly in the late 1960's and has drawn considerable comment. 154/ Generally the courts are displaying increasing sympathy for aesthetic regulation, but some recent decisions have tied the aesthetic judgment to economic considerations as well. 155/

In People v. Goodman 156/ the New York Court of Appeals approved a sign regulation ordinance adopted as a village ordinance pursuant to regulations under the Fire Island National Seashore Act. The ordinance banned signs greater than four square feet in area and required removal of existing nonconforming signs after two years.

Mr. Goodman was a pharmacist in the Village of Ocean Beach where he provided pharmaceutical services and on occasion furnished first aid in the village. With four signs which violated the village ordinance, he was tried, convicted and fined.

Finding, "It is now settled that aesthetics is a


valid subject of legislative concern," 157/ the Court addressed itself to the reasonableness of the regulation. In doing so it qualified its position in the earlier case of Cromwell v. Ferrier 158/ by making a requirement of substantial relationship to the "economic, social and cultural patterns of the community or district," 159/ the key to reasonableness. The ordinance was regulatory, not prohibitory, and it established minimal erection and maintenance standards, both factors which impressed the court.

The Courts have generally been quite lenient with regulation of signs through amortization of nonconforming sign uses. 160/ In National Advertising Company v. County of Monterey, 161/ the California Supreme Court reversed a lower court decision which had found a one year amortization period to be unreasonable with respect to 42 off-site signs owned by the National Advertising Company. The court found that the signs were constructed between 1933 and 1950 and that thus 31 of the signs had been fully amortized for tax purposes before the end of the amortization period. Finding the amount of book value listed by the plaintiff was "supported by nothing more than plaintiff's bare assertion," the Court saw no sign of arbitrariness or unreasonableness with respect to the 31 signs which were fully amortized. With respect to the other 11 signs the Court found that there

157. 338 N.Y.S. 2d at 100.
159. 338 N.Y.S. 2d at 101.
should be a reasonable amortization period in order to permit National Advertising to recover the original cost.

The opinion is suggestive of an approach dealing with such provisions on a case by case basis. Other courts have also been reasonably tolerant of sign amortization provisions. In a few states however amortization of nonconforming uses seems to be considered an unconstitutional exercise of the police power. The Ohio Supreme Court in City of Akron v. Chapman held that:

"The right to continue to use one's property in a lawful business and in a manner which does not constitute a nuisance and which was lawful at the time such business was established is within the protection of Section 1, Article 14, Amendments, United States Constitution, and Section 16, Article 1 of the Ohio Constitution, providing that no person shall be deprived of life, liberty or property without due process of law."

The Court went on to hold an amortization provision included in comprehensive zoning ordinance of the City of Akron which would have eliminated a junkyard


164. 160 Ohio St. 382, 116 N.E. 2d 697 (1953).

165. Id.
over a one year amortization period to be unconstitutional as a taking of private property. Since "the substantial value of property lies in its use," 166/ the Court found the amortization provision to be unrelated to the objectives of comprehensive zoning. 167/

10. Regulation for the Purpose of Phasing or Timing Residential Development

Traditional learning holds that a municipality may not escape the burdens of growth in the guise of regulation to maintain a status quo or artificially low density. 168/ Nevertheless, there has been some recognition of the right to restrict development in accord with the ability of the municipality to provide essential services. 169/

The principle of phased development in accord with a community capital budget or plan was approved in Golden v. Planning Board of Town of Ramapo, 170/ by the Court of Appeals in New York. Ramapo had extended the concept of zoning to include a permit system for residential development which measured the availability of municipally provided services to evaluate the suitability of the land for residential development.

The program was fairly simple. A developer could not build more than one residential unit on a pre-existing zoning lot without showing that each lot to

166. 116 N.E. 2d at 700.
be developed was within a minimal distance from sewers, fire protection, schools and the like. Points were assigned according to proximity to the required services, and a developer with fifteen points could build.

The necessary facilities were scheduled for the entire town in a six year capital budget and two supplemental six year capital plans. 171/ Under this program, it was possible that some land could be kept from residential development for as long as eighteen years. Other factors which moderated the effects of the regulation were tax relief provisions for land blocked from development or preserved for agriculture and a low income housing program for residents.

The Court explored the growth pressures and comprehensive planning recommendations which had resulted in the provisions to eliminate premature subdivision and unchecked suburban sprawl. The Court distinguished Arverne Bay v. Thatcher, 172/ a classic case finding a taking under a restrictive zoning provision, because the Ramapo provision was "of a certain duration and founded upon estimate determined by fact." 173/ The Court found the restrictions "substantial in nature and duration," but "not absolute." The Court concluded:

"In sum, where it is clear that the existing physical and financial resources of the community are inadequate to furnish the essential services and facilities which a substantial increase in population requires, there is a rational basis for 'phased growth' and hence, the challenged ordinance is not violative of the Federal and State Constitutions." 174/

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171. Both sanctioned by New York enabling legislation. A developer could buy the needed points, although in some cases (sewerage in particular) the buy-out provision might not generate as many points as the municipally provided facilities.
172. 278 N.Y. 222, 15 N.E. 2d 587 (1938).
173. 285 N.E. 2d at 304.
174. 285 N.E. 2d at 303.
The earlier case of Westwood Court Estate, Inc. v. Village of South Nyack, 175/ decided by the same court, provides a useful counterpoint. The Village of South Nyack had adopted an ordinance barring all new apartment dwellings to alleviate the burden on the village sewerage facilities.

Noting that the village could take "appropriate steps under its other and general police powers" to control hazards from its sewage disposal problems, the Court nonetheless invalidated the zoning provision. In so doing, it noted in particular that the requirement did not arise from "any requirement of or change in the comprehensive plan for the development of the Village."

Thus the New York Court established a "limit of necessity" test whereby an ordinance which was not limited as to time nor directly related to sanitation was struck down. The complex and interrelated tests of Ramapo, which possibly could restrain residential development for a generation, were nonetheless approved. 176/

CHAPTER 10

ARE SOME PUBLIC PURPOSES MORE PUBLIC THAN OTHERS?

When the Supreme Court lost interest in land use regulation after the '20's it left the state and lower federal courts with a general principle for making decisions -- the balancing test in Pennsylvania Coal -- and few examples of its application. 1/ Since that time the courts have applied that test to a wide variety of fact situations, as the previous chapter indicates.

As this wealth of cases has piled up legal scholars have searched for some pattern that would provide guidelines to predict the outcome of future cases. Most of the scholars who have made the attempt have concluded that the search was not too rewarding.

Professor Arvo Van Alstyne, whose exhaustive analysis of the taking cases is one of the most recent, concludes that "judicial opinions rejecting constitutional attacks . . . seldom provide reliable guides to the relevant substantive standards. . . ." while "decisions invalidating land use controls are often equally devoid of helpful explanatory data. . . ." 2/ Professor Allison Dunham of the University of Chicago Law School has characterized the cases as "a crazy-quilt pattern of Supreme Court Doctrine" and concludes that "it is not surprising that there are floundering and differences among judges and among generations of judges." 3/

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1. The Supreme Court has issued a number of decisions regarding the taking clause since the '20's (See Allison Dunham, "Griggs v. Allegheny County in Perspective: Thirty Years of Supreme Court Expropriation Law," 1962 Sup. Ct. Rev. 63) but except for the brief opinion in Goldblatt v. Hempstead, the cases did not involve questions about the regulation of the use of land.
Professor Joseph Sax of the University of Michigan is similarly convinced that little progress has been made:

"Few legal problems have proved as resistant to analytical efforts as that posed by the Constitution's requirement that private property not be taken for public use without payment of just compensation. Despite the intensive efforts of commentators and judges, our ability to distinguish satisfactorily between 'takings' ... and exercises of the police power ... has advanced only slightly since the Supreme Court began to struggle with the problem some eighty years ago."

To the same effect, Professor Frank Michelman of Harvard Law School observes:

"The attempt to formulate rules of decision for compensability cases has, with suggestive consistency, yielded rules which are ethically unsatisfying. This observation seems to justify the hypothesis that decisional rules simply cannot be formulated which will yield other than a partial, imperfect, unsatisfactory solution and still be consonant with judicial action."

Despite this universal agreement among some of the

Most prominent academic authorities about the lack of consistency in the judicial opinions, each of them derives a few general principles from their analyses of the cases. Because Van Alstyne's study 6/ is the most recent, and certainly one of the most thorough, the underlying structure of his analysis is used as the outline for this chapter.

1. The Nature of the Regulatory Objective

Many legal scholars who have examined the cases have found a correlation between the nature of the public purpose which the regulation is designed to achieve and the willingness of judges to uphold the regulation. As Van Alstyne puts it, "novel and nontraditional policy goals, perceived as lacking in broad community acceptability, have sometimes failed to obtain judicial approval. Objectives with a strong historic pattern of social approval are thus more likely to survive constitutional attack. . . ." 7/ The traditional embodiment of public policy in regard to land use is found in common law concepts of nuisance. 8/ The common law might prohibit as a nuisance -- if in the wrong place -- emission of dense smoke from industrial furnaces, 9/ the maintenance of fertilizer works, 10/ the operation of livery stables 11/ or the storage of gasoline. 12/ Netherton notes that "historically the process of extending the application of the police power can be traced

6. Van Alstyne, n. 2, supra.
7. Id., at 15.
8. Professor Michelman, while he would prefer to dispense with it, also agrees there is "a general rule dispensing with compensation in respect of all regulations apparently of the 'nuisance-prevention' type." Michelman, n. 5, supra, at 1197.
to efforts to complement nuisance law." 13/

The classical example of this case is Hadacheck v. Sebastian, discussed at length in Chapter 8. 14/ In that case, the Supreme Court upheld a city ordinance outlawing the operation of a preexisting brick yard within recently expanded city limits as a proper exercise of police power, noting that the brick yard produced excessive smoke and odor. The Court conceded that the value of the subject property was diminished from $800,000 to $60,000 but found the ordinance a justifiable exercise of the police power. Modern examples may be found in cases sustaining prohibitions against the use of incinerators for the burning of rubbish 15/ as well as controls aimed at the reduction of air pollution. 16/

13. Netherton, supra, at 36. Professor Yanggen and Professor Kusler in their study of flood plain regulations reach a similar conclusion:

"Protection of public safety and prevention of nuisance uses have been given great weight. Usually protection of esthetic values has not."


15. Lees v. Bay Area Pollution Control District, 48 Cal. Rptr. 295 (1965); and Board of Health v. New York Central Railroad, 90 A. 2d 729 (1952).
16. Id. Another very famous Supreme Court case regarding nuisance-type land uses is Goldblatt v. Hempstead, (369 U.S. 590, 1963) also discussed in Chapter 8, in which a municipal ordinance regulating quarries was upheld. An otherwise valid exercise of the police power is not unconstitutional merely because it deprives property of its most beneficial uses, the Court held. (369 U.S. at 592).
In Consolidated Rock Products Co. v. The City of Los Angeles, the local ordinance sought to end the nuisance caused by the mining of rock and gravel in agricultural and residential districts. It was alleged that the land was capable of no other use that would create appreciable economic value. Even though the Court determined that the nuisance factors alleged (such as air pollution, danger to children and the like) were minimal, it held these factors to be issues for legislative judgment and sustained the regulation.

When this line of cases is relied on, the absence of nuisance-like effect can be fatal, as the case of Lyon Sand and Gravel Co. v. Township of Oakland clearly demonstrates. There the Court had before it an ordinance prohibiting gravel mining without a permit, at the same time severely limiting the depth of excavation and the manner of operation in a relatively rural area. As the relatively light population distribution precluded any serious nuisance consequences, the Court struck down the regulation as "a confiscation rather than conservation." 

The courts often seem less willing to uphold regulations if they obviously benefit a narrow segment of the population rather than the community as a whole. Thus regulations are often stricken, finds Professor Van Alstyne, "where severe private detriment has not been offset by widely shared public benefits but has instead inured chiefly to the advantage of a narrowly defined but specifically identifiable class of private beneficiaries."  

Thus, for example, when a village encouraged the construction of a regional shopping center but then declined to permit commercial uses across the highway the

18. 190 N.W. 2d 354 (1971).  
19. 190 N.W. 2d at 356.  
Minnesota Supreme Court threw out the regulation as an invalid attempt to protect a small group of businesses from competition. 21/

Similarly, a Delaware court held unconstitutional a local attempt to prohibit the location of a new service station within 200 feet of any existing service station. "It may be that older gas stations may benefit from the absence of a new modern station in the area," said the Court, "but the public interest is not served." 22/

Professor Van Alstyne notes that cases of this sort are rather rare:

"Such decisions necessarily assume judicial capability for distinguishing between regulations primarily serving private rather than public interests, in direct opposition to the presumptively valid legislative judgment on the matter." 23/

The line is difficult to draw, he notes, because every regulation tends to have incidental beneficial consequences for some private interests.

Courts have generally struck down cases which enrich the government in its proprietary capacity at the expense of individual landowner or group of landowners. When the government is operating utilities or other income-generating services, or even when it is operating schools or parks, the courts tend to treat the government in much the same way as they would treat a private

22. Mobil Oil Corporation v. Board of Adjustment of the Town of Newport, 283 A. 2d 837 (Del. Super. 1971). The courts are by no means unanimous in striking down this type of ordinance, but when such an ordinance is squarely based on control of competition its chances are slim. See 1 Anderson, American Law of Zoning, 547-552 (1968) (Florida 300 yd. case).
landowner. Thus, if the government seeks to use its regulatory power to reduce its costs of acquiring land the courts generally disapprove.

Professor Van Alstyne cites the general principle:

"A regulation which restricts the use of private property solely to governmental functions, such as use for public schools, public parks, or public housing, as a prelude to later eminent domain proceedings, is uniformly regarded as an unconstitutional infringement of private property rights. Even in the absence of a limitation of public activities, highly restrictive use regulations, imposed for the purpose of preventing private developments that would increase the cost of planned future acquisition of the subject property for governmental purposes, are equally invalid." 24/

And Professor Dunham cites a number of specific examples:

"Thus it has been held unconstitutional to compel an owner, without compensation, to leave his land vacant in order

24. Id., at 23. Yanggen and Kusler also note the dangers at regulating land in a manner that appears to be an attempt to reduce compensation costs. Similarly, Professor Michelman notes others have suggested:

(that the way to distinguish between compensable and noncompensable impositions is to ask whether the imposition simply restrains conduct which is harmful to others or whether, on the other hand, it aims at positive enrichment of the public through the extraction of public good from private property. The idea is that compensation is required when the public helps itself to good at private expense, but not when the public simply requires one of its members to stop making a nuisance of himself."  

Michelman, supra, at 1196.
to obtain the advantages of open land for the public or in order to save the land for future public purchase, but it is within constitutional power to compel an owner to leave a portion of his land vacant where building would be harmful to the use and enjoyment of other land (e.g., setback lines). It is unconstitutional to compel an owner to commit his land to park use in order to meet the public desire for a park, but an owner may be compelled to furnish a portion of his land for a park where the need for a park results primarily from activity on other land of the owner. It is unconstitutional to compel him to use his land as a parking lot in order to obtain a parking lot for the community, but it is within constitutional power to compel an owner to provide a parking lot for the parking needs of activities on his own land. It is improper to compel a railroad to install grade-crossings for highways in order to promote the convenience of highway users, but it is permissible to compel the railroad to install grade-crossings so as to eliminate danger and hazards from the railroad's use of its own property. It is not permissible to compel an owner to hold land in reserve for industrial purposes by restricting his use to industrial purposes only, but it is permissible to exclude industrial development from districts where such development will harm other uses in the district. It is beyond state power to compel an owner without compensation to set aside or give land to the public for a street or highway, but it is within that power to compel him to do so where the need for the streets is related
to the traffic generated by the owner's use of his other land." 25/

In that case, Framingham 26/ disapproved a subdivision plan for the subject property in part on the ground that the proposed development would deprive the town of a retention basin and over-tax downstream drainage. The Court stated:

"Obviously a planning board may not exercise its authority to disapprove a plan so that a town may continue to use the owner's land as a water storage area and thereby deprive the owner of reasonable use of it." 27/

In Morris County Land Improvement Company v. Parsippany-Troy Hills Township, discussed in Chapter 9, the New Jersey Supreme Court rejected an ordinance creating a meadow development zone to govern land uses. Throughout the opinion, it is obvious that the Court is convinced that the regulation is meant to accomplish the acquisition of rights and property for public benefit, rather than regulation to protect the public interest. The main purpose of the regulation, said the Court, was to obtain:

"Use of the area as a water retention basin in aid of flood control in the lower reaches of the Passaic Valley far beyond this municipality; and second, preservation of the land as open space for the benefits which would accrue to the local public from an undeveloped use such as that of a nature refuge by wildlife (which paid taxes on it)."

25. Dunham, Legal Basis for City Planning, supra, at 666-667. See also, Dunham, Griggs v. Allegheny County, supra, at 75.
27. 288 N.E. 2d at 833.
The Court also noted that many of the permitted uses were public or quasi-public.

2. Suitability of the Regulation to the Nature of the Property

Commentators frequently note that the validity of a regulation often varies with its "suitability" to the property to which it is applied.

On the other hand, the claim that land use controls have taken or damaged private property interests in an unconstitutional sense is frequently advanced today as the basis for an attack upon the validity of a particular restriction as applied to a particular parcel of land. In a particularized challenge of this sort, the factual components of the individual cases are obviously of crucial significance, and tend to defy meaningful generalization; the decisions, as one might expect, often repeat the familiar judicial disclaimers that the legal result necessarily "varies with circumstances and conditions," and that an exact line between valid measures and unconstitutional overreaching "is not capable of precise delimitation." 28/

Thus in zoning cases courts have typically looked to see whether the regulation permits the land to be used in a manner similar to the uses of surrounding and nearby land. 29/ Thus, for example a Florida Court

29. Id., at 29. Professor Van Alstyne adds:

Why this result necessarily follows from the legal premise, however, is seldom explained. Often, on the apparent assumption that the connective reasoning is self-evident, the result is merely announced in conclusionary form. Sometimes it is accompanied by references to evidence showing
held unconstitutional a regulation limiting property to single-family use under the following circumstances:

"In the instant case, the only property in the neighborhood which is used for single family dwellings is separated from appellant's property by vacant marshlands and a sewage disposal plant. The property surrounding appellant's tract is used to maintain the yards of the railroad, a convenience store, a gas station, a large apartment complex and a sewage disposal system." 30/

A corollary proposition is that the uses permitted under the regulation must be the kind of uses that could reasonably be undertaken on the property:

"If existing uses of surrounding or nearby land are so highly incompatible with permitted uses of the subject property that development for the latter purposes is unlikely to occur, the restriction may be deemed arbitrary and confiscatory." 31/

that the less restrictively zoned adjoining land was physically similar to the subject property, that the latter land would be more valuable without the existing use restrictions, and that elimination of those restrictions would not adversely affect surrounding lands. Each of the reinforcing factors mentioned, however, has been said to be insufficient, standing alone, to invalidate a zoning regulation. Accordingly, the controlling question relates to the weight to be ascribed to the several factual elements and their interrelationship in the total judicial equation. On these matters, however, typical judicial opinions are generally uninformative.

31. Van Alstyne, n. 2 supra, at 33. See Also, Yanggen and Kusler, at 399-405.
This rule is often described as the principle that there must be a rational relationship to regulatory objectives. As Professor Dunham observes, "the standard, that regulation without compensation requires a casual relationship between the regulated activity and a harm, is a test with some element of objectivity." 32/

The classic case cited for this proposition has been Arverne Bay Construction Co. v. Thatcher. 33/ Plaintiff owned a tract of land on the northerly side of Linden Boulevard in Brooklyn, described by the Court (in 1938) as an "almost undeveloped" area with a few farm buildings being the only structures within a mile." 34/

Plaintiff wanted to build a gas station but the city zoned the property residential. The Court found the regulation unsuitable to the condition of the surrounding area:

"Findings of the trial judge, sustained by evidence presented by the plaintiff, establish that, in the vicinity of the plaintiff's premises, the city operates an incinerator which "gives off offensive fumes and odors which permeate plaintiff's premises." About 1,200 or 1,500 feet from the plaintiff's land, "a trunk sewer carrying both storm and sanitary sewage empties into an open creek. ** The said creek runs to the south of plaintiff's premises and gives off nauseating odors which permeate the said property." 35/

32. Dunham, Griggs v. Allegheny, supra, at 75.
33. 278 N.Y. 222, 15 N.E. 2d 587 (1938).
34. 15 N.E. 2d at 590.
35. Id., at 591.
The Court said the property couldn't be profitably or "reasonably used" under the regulation and held it invalid, citing Holmes' balancing test.

"The warning of Mr. Justice Holmes should perhaps be directed rather to Legislatures than to courts; for the courts have not hesitated to declare statutes invalid wherever regulation has gone so far that it is clearly unreasonable and must be 'recognized as taking,' and unless regulation does clearly go so far the courts may not deny force to the regulation. We have already pointed out that in the case which we are reviewing, the plaintiff's land cannot at present or in the immediate future be profitably or reasonably used without violation of the restriction. An ordinance which permanently so restricts the use of property that it cannot be used for any reasonable purpose goes, it is plain, beyond regulation, and must be recognized as a taking of the property. The only substantial difference, in such case, between restriction and actual taking, is that the restriction leaves the owner subject to the burden of payment of taxation, while outright confiscation would relieve him of that burden."  36/

36. Id., at 590-591.
3. The Extent of Loss in Land Values

In a test based on balancing public gain against private loss the extent of the private loss is obviously a significant element. Various commentators have attempted to reach some numerical assessment of the amount of loss in land value that the courts will find acceptable.

Ten years ago Professors Jan Krasnowiecki and Ann Louise Strong concluded that a loss of two-thirds of the property's value represented the average point where a taking occurred:

"One of the authors recently made a survey of cases involving the issue of unconstitutional taking of private property by regulation, covering all the cases which cite value figures. It was found that the average breaking point between valid regulation and 'taking' is at a loss of two-thirds of the admitted value for some other use. Even though such surveys without differentiation between the facts of each case contain some element of naivete, the average loss countenanced by the courts surely supports the view that the courts are willing to go very far in allowing regulation to roll back the market."

37. Van Alstyne, n. 2, supra, at 37.

"to determine compensability one is expected to focus on the particular 'thing' injuriously affected and to inquire what proportion of its value is destroyed by the measure in question. If this proportion is so large as to approach totality, compensation is due; otherwise, not."

Michelman, supra, at 1192.
On the other hand Professor Anderson's attempt to find a mathematical correlation proved inconclusive:

"No basis for precise prediction can be found in the dollars-and-cents evidence reported by the courts in the constitutional cases. Examination of approximately 50 cases in which the courts mentioned proof of the value of the subject land if used for a permitted purpose, as compared with its value if used for a proposed purpose outlawed by the ordinance, revealed that about half of the ordinances were approved and half were found unconstitutional. Moreover, the loss of use value in the cases where the ordinances were upheld was about the same as the loss proved in the cases where an opposite result was reached. If any conclusion is warranted by this random sampling, it is that financial loss is a relevant consideration, but not a single or decisive one." 39/

Whether or not such quantification is possible, at least most commentators agree that extent of loss is important. As Professor Sax notes, "the conventional view [is] that any governmental regulation that makes a private right essentially worthless is a taking of property for which compensation must be paid." 40/

Although the commentators recognize that land values

40. Sax, supra, at 152,156.

Under present practice, the question posed by a court would be whether the governmental regulations, however justified, so reduced the value of the restricted owner's land as to deprive it of all present economic productivity. If the effect of prohibiting strip mining were to make the mining land utterly worthless to the holder, who might own only coal mining rights, most courts today would award compensation to him.
play a role in determining validity they also recognize that the loss of land values by itself has little predictive value in determining the outcome of cases. Zoning regulations have been upheld, says Professor Anderson, when the difference in land value was as great as 8 to 1 and where the asserted loss was as much as $350,000.

On the other hand, when the courts talk about loss of land values in striking down a regulation it is usually only one of a number of reasons.

"In nearly all of the cases where an illegal taking of property was detected by the courts, the evidence disclosed not only a serious loss of use value, but other factors which rendered the permitted uses impossible or impractical. Thus, an ordinance which limited certain land to residential use, for which it had no value, and proscribed uses which would have rendered the land useful at least to the extent of $17,000, was held confiscatory. The same result was reached where land was unsuitable to residential use and the ordinance which limited it to that purpose reduced its value $8,000 per acre."

Finally, one major caveat should be noted in regard to this entire chapter. The analyses of case law referred to, and the cases cited, are from the 1960's or earlier. Most of them predate the great upwelling of environmental awareness that the 1970's has produced. Consequently, many of the conclusions suggested by these earlier cases may already be out of date.

As the next chapter will indicate, the more recent cases suggest that many courts are aware that traditional common law nuisance theories are not adequate to deal with modern problems. It is perhaps fitting to close this chapter with a quotation from Chief Judge Brown of

41. Anderson, supra, at 102.
42. Id., at 103-104.
the 5th Circuit Court of Appeals from a case decided as the '70's were just beginning:

"It is the destiny of the Fifth Circuit to be in the middle of great, oftentimes explosive issues of spectacular public importance. So it is here as we enter in depth the contemporary interest in the preservation of our environment. . . ."

"We hold that nothing in the statutory structure compels the Secretary to close his eyes to all that others see or think they see. The establishment was entitled, if not required, to consider ecological factors and, being persuaded by them, to deny that which might have been granted routinely five, ten, or fifteen years ago before man's explosive increase made all, including Congress, aware of civilization's potential destruction from breathing its own polluted air and drinking its own infected water and the immeasurable loss from a silent-spring-like disturbance of nature's economy. We reverse."

CHAPTER 11

CASES FROM THE SEVENTIES: A QUIET JUDICIAL REVOLUTION

The scholars whose analyses were quoted in the previous chapter were writing in the 1960's. 1/ That view of the American system as it moved to more severely restrict the free use of land was succinctly put by Professor Daniel R. Mandelher in 1961:

"The law can take cognizance of individual circumstances and compensate fully when limitations are imposed. . . . Or the law can expand the concept of community well-being which is essential to a finding of constitutional validity under the police power." 2/

A dramatic change in American attitudes toward the environment came in the opening years of the decade of the 1970's. We wondered whether the courts were affected by this same change in attitudes. To test this hypothesis we culled out the Appellate Court opinions bearing a decision date of January 1, 1970 or later in which the taking issue was discussed. We recognize that the cases from a period only slightly longer than three years may seem to be a very small sample, especially when dealing with an issue that traces its lineage back over seven centuries. Nevertheless, this sampling gives some signs that a quiet revolution in judicial attitudes may be in the making.

1. The Mood of the Seventies

The 1970's have brought an intangible but highly significant change in the attitudes of the public toward

1. A few of the works cited in that chapter bear 1970 or 1971 dates, but even these appear to have been based primarily on research conducted in the 1960's.
the use of land that has resulted in a series of state legislative enactments imposing new regulations on land use. In *The Quiet Revolution in Land Use Control*, 3/ we described this changed attitude toward land that we observed:

If one were to pinpoint any single predominant cause of the quiet revolution it is a subtle but significant change in our very concept of the term "land," a concept that underlies our whole philosophy in land use regulation . . . Basically, we are drawing away from the Nineteenth Century idea that land's only function is to enable its owner to make money.

This concern over the interrelatedness of land uses had led to a recognition of the need to deal with entire ecological systems rather than small segments of them . . . Increasingly the question being asked is not only, "Will this use reduce the value of surrounding land?" but "Will this make the best use of our land resources?" 4/

The Citizens' Advisory Committee on Environmental Quality describes the changing attitudes toward the use of land as a "new mood" in the nation, a mood that recognizes for the first time that decisions regarding the use of land will have a major impact on our society. 5/

The wave of state land use legislation generated by the new mood really began around the beginning of the 1970's. 6/ This legislation, though differing widely in

4. *Id.*, at 314-318.
its details, shared a common emphasis. It viewed the use of land as a resource decision that must be analyzed from a state or regional perspective not merely with an eye to its effect on the immediate neighbors. Thus 1972 brought such significant legislative breakthroughs as California's Coastal Zone Conservation Act, 7/ and Florida's Environmental Land and Water Management Act of 1972. 8/

2. Court Decisions Regarding State and Regional Systems of Regulation

Attempts to use state or regional mechanisms to control the use of land are brand new. The pioneering Hawaiian Land Use Law was enacted in 1963, but wasn't followed by any similar state legislation until the late '60's, and the real legislative push began in 1970.

Since the legislation is so young, and frequently involves "start-up" periods of at least a year before it achieves full impact, judicial decisions construing these legislative efforts are not yet common. Generalizing from such meager data is hazardous, but the initial returns are very encouraging for advocates of this type of system.

One of the first systems for regional control of land use was the system administered by the San Francisco Bay Conservation and Development Commission under the McAteer-Petris Act of 1969. 9/ The outgrowth of a long and concerted effort by citizens determined to prevent the bay from becoming a "river," 10/ the legislation

proclaimed the public interest in preserving San Francisco Bay, and recognized the inherent danger in unregulated fill activities. The Commission was directed to prepare a comprehensive plan for the conservation of the shoreline and to issue or deny permits for any proposed project that involved filling or dredging the bay. 11/ 

Candlestick Properties bought a parcel of land which was submerged by high-tide waters of the bay with the idea of depositing fill from construction projects. Candlestick alleged that the land had no value for any other purpose. Candlestick was denied a fill permit from the Commission and sought damages for an alleged taking of its property.

The case came before the Court of Appeals in Candlestick Properties, Inc. v. San Francisco Bay Conservation and Development Commission. 12/ In upholding the Commission's decision the Court explained its view of the modern attitude toward the police power. Quoting one of its earlier decisions, the Court declared:

"In short, the police power, as such, is not confined within the narrow circumspection of precedents, resting upon past conditions which do not cover and control present day conditions . . . that is to say, as a commonwealth develops politically, economically, and socially, the police power likewise develops, within reason, to meet the changed and changing conditions." 13/

13. 89 Cal. Rptr. at 905, citing Miller v. Board of Public Works, 234 P. 2d 381 at 383.
The Court set forth its distinction between the police power and eminent domain:

"However, under the police power property is not taken for use by the public; its use by private persons is regulated or prohibited where necessary for the public welfare." 14/

After paraphrasing the purpose clause of the McAteer-Petris Act the Court emphasized the need for a regional approach:

"In those sections the legislature has determined that the bay is the most valuable single natural resource of the entire region and changes in one part of the bay may also affect all other parts; that the present uncoordinated, haphazard manner in which the bay is being filled threatens the bay itself and is therefore inimical to the welfare of both present and future residents of the bay area; and that a regional approach is necessary to protect the public interest in the bay." 15/

The Court conceded the plaintiff's argument that an undue restriction on the use of private property would be as much a taking as appropriating it or destroying it, citing Pennsylvania Coal v. Mahon. 16/ But the Court expressly found that case inapplicable to the facts before it:

"It cannot be said that refusing to allow appellant to fill its bay land amounts to an undue restriction on its use. In view of the necessity for controlling the filling of the bay . . .

14. 89 Cal. Rptr. 905
15. Id.
it is clear that the restriction imposed does not go beyond proper regulation such that the restriction would be referable to the power of eminent domain rather than the police power."

In 1966 Wisconsin enacted the Shoreland Protection Act requiring that local governments adopt shoreland zoning regulations to protect the condition of the state's many lakes and waterways. The State Department of Natural Resources published a model ordinance which recommended that some shoreland areas be placed in a conservancy district. The conservancy district is designed primarily to protect shorelands designated as swamps or marshes, which are described as "seldom suitable for building," and lists a number of permitted uses (forestry, transmission lines, hunting, fishing, riding, golf courses) and special exception uses (dams, farming, piers and docks). Residential, commercial or industrial development is not permitted.

Marinette County passed a shoreland zoning ordinance based on the state's model. Mr. and Mrs. Just owned property fronting on Lake Norquebay, the front half of which was covered with aquatic plants, and the back of which contained a stand of trees. They began filling the front half of the property contrary to the ordinance. The county obtained an injunction and the Justs appealed to the Supreme Court of Wisconsin which issued its opinion October 31, 1972, in Just v. Marinette County.

There is a serious conflict, said the Court, between the public interest in stopping the despoilation of natural resources, which our citizens until recently have taken as inevitable and for granted, and an owner's asserted right to use his property as he wishes.

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17. 89 Cal. Rptr. 906.
20. 56 Wis. 2d 7, 201 N.W. 2d 761 (1972).
21. 201 N.W. 2d at 767.
"There can be no disagreement," said the Court, "over the public purpose sought to be obtained by the ordinance." 22/ The Court went on to describe the traditional test under the taking clause:

"The distinction between the exercise of the police power and condemnation has been said to be a matter of degree of damage to the property owner. In the valid exercise of the police power reasonably restricting the use of property, the damage suffered by the owner is said to be incidental. However, where the restriction is so great the landowner ought not to bear such a burden for the public good, the restriction has been held to be a constructive taking even though the actual use or forbidden use has not been transferred to the government so as to be a taking in the traditional sense." 23/

The Court quoted Professor Ernst Freund's classic analysis that "the state takes property by eminent domain because it is useful to the public, and under the police power because it is harmful. . . ." 24/ Thus if the proposed use of the land would cause "public harm," says the Court, no compensation need be paid, whereas if the regulation were designated to produce a public benefit it would be beyond the scope of the police power. (Although not cited, the Court's opinion follows closely the framework of analysis by Justice Brandeis in his dissenting opinion in Pennsylvania Coal Co. v. Mahon.)

The Court noted that the lakes and rivers were originally clean, and said that the State of Wisconsin has a obligation in the nature of a public trust to

22. 201 N.W. 2d at 765.
23. 201 N.W. 2d at 767.
"eradicate the present pollution and to prevent further pollution." It found that the regulation sought to prevent harm to "the natural status quo of the environment," and was not designed to produce a public benefit for which compensation would be required.  

The Court went on to emphasize that lands "adjacent to or near navigable waters exist in a special relationship to the state." 

"What makes this case different from most condemnation or police power zoning cases is the interrelationship of the wetlands, the swamps and the natural environment of shorelands to the purity of the water and to such natural resources as navigation, fishing, and scenic beauty. Swamps and wetlands were once considered waste-land, undesirable, and not picturesque. But as the people became more sophisticated, an appreciation was acquired that swamps and wetlands serve a vital role in nature, and part of the balance of nature and are essential to the purity of the water in our lakes and streams. Swamps and wetlands are a necessary part of the ecological creation and now, even to the uninitiated, possess their own beauty in nature."

As a result, the Court continued, man can no longer do with his land as he likes - in fact, public rights can be protected by means of the police power even if it means private lands are restricted to their "natural" uses:

25. 201 N.W. 2d at 768.
26. Id., at 769.
27. Id. The Court's analysis is similar to that of Professor Sax in the article discussed in Chapter 15.
"The changing of wetlands and swamps to the damage of the general public by upsetting the natural environment and the natural relationship is not a reasonable use of that land which is protected from police power regulation." 28/

Elaborating on this "natural use" concept, and focusing on the broad "public purpose to preserve the natural condition of the area" the Court held:

"It seems to us that filling a swamp not otherwise commercially usable is not in and of itself an existing use, which is prevented, but rather is the preparation for some future use which is not indigenous to a swamp. Too much stress is laid on the right of an owner to change commercially valueless land when that change does damage to the rights of the public." 29/

"The Jusfs argued their property has been severely depreciated in value. But this depreciation of value is not based on the use of the land in its natural state but on what the land would be worth if it could be filled and used for the location of a dwelling. While loss of value is to be considered in determining whether a restriction is a constructive taking, value based upon changing the character of the land at the expense of harm to public rights is not an essential factor or controlling." 30/

28. 201 N.W. 2d at 768.
29. 201 N.W. 2d at 770.
30. 201 N.W. 2d at 771.
The Marinette Court commented on the case of *Pennsylvania Coal v. Mahon*. 31/ Focusing on that portion of Holmes' opinion that warns of the "danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change," the Court attempted to distinguish the case:

"The observation refers to the improvement of the public condition, the securing of a benefit not presently enjoyed and to which the public is not entitled. The shoreland zoning ordinance preserves nature, the environment, and natural resources as they were created and to which the people have a present right. The ordinance does not create or improve the public condition but only preserves nature from the despoilation and harm resulting from the unrestricted activities of humans." 32/

The Maine Site Location Law 33/ requires persons intending to construct or operate a development which may substantially affect the local environment to notify the Environmental Improvement Commission of their intention before commencing operations. If the Commission determines that a hearing is necessary, the developer then has the burden of satisfying the Commission that the development will not substantially adversely affect the environment or pose a threat to the public health, safety or general welfare. 34/

Lakesites, Inc., owned a tract of approximately

31. 260 U.S. 393 (1922).
32. 201 N.W. 2d at 771.
33. 38 M.R.S.A. Sections 481-488.
92 acres located alongside Raymond Pond. Under the authority of the Site Location Law, the State Environmental Improvement Commission directed Lakesites to stop developing the subject property until Lakesites had applied for and received the Commission's approval of their Spring Valley development. The property was to be divided into 90 lots to be sold to individual purchasers for the construction of both "year-around or part-time" homes. While Lakesites had cleaned and graded portions of the property and built a road for ingress and egress, it did not intend to construct the buildings itself, nor to control the land use on individual lots. According to an agreed statement of facts, Lakesites had done nothing to provide water and sewer services for any of the lots.

Lakesites appealed to the Supreme Judicial Court of Maine, which issued its decision on February 9, 1973, In the Matter of Spring Valley Development. 35/ After holding that the Site Location Law did apply to residential subdivisions, units of which were to be sold at a profit, 36/ the Court proceeded to Lakesite's contention that the application of the Act to its property amounted to an unconstitutional taking of its land without compensation. The Court dismissed the contention out-of-hand:

"We see no merit to the Lakesites' contention that the application of the Act to it is an unconstitutional taking of its land without compensation. Nothing in the record indicates that the Act as applied constitutes such an unreasonable burden upon the property as would

35. 300 A. 2d 736 (Me. 1973).
36. The Law does not mention residential construction, but only commercial and industrial development as subject to the Act. The Court took the position that development affecting the environment would include residential development offered commercially for sale.
equal an uncompensated taking. State v. Johnson, Me., 265 A. 2d 711 (1970); 16 Am. Jur. 2d, Constitutional Law, §294. In fact, the record demonstrates only that the Appellant's land cannot be sold for residential purposes while subdivided to the extent and in the manner Lakesites originally planned.

The Court emphasized that the state was fully justified in considering the environmental impact of land use in drafting police power regulations:

"It seems self-evident in these times of increased awareness of the relationship of the environment to human health and welfare that the state may act -- if it acts properly -- to conserve the quality of air, soil and water.

To do so the State may justifiably limit the use which some owners may make of their property.

We consider it indisputable that the limitation of use of property for the purpose of preserving from unreasonable destruction the quality of air, soil and water for the protection of the public health and welfare is within the police power."

In so holding the Court emphasized, not the degree of injury with which Holmes had been concerned, but the difference between regulation under the police power

37. 300 A. 2d at 749.
38. Id., at 746-748. Although the Court did not overrule the case of State v. Johnson, 265 A. 2d 711 (Me., 1970), which had held the state's wetland law invalid as applied to a particular tract, the Court's language gives hope to those who continue to believe the Maine wetlands legislation is viable.
and taking under eminent domain. First, the Court cited an 1835 Maine decision, Wadleigh v. Gilman:

"Police regulations may forbid such a use, and such modifications, of private property, as would prove injurious to the benefits which men derive from associating in communities. It may sometimes occasion an inconvenience to an individual; but he has a compensation, in participating in the general advantage. Laws of this character are unquestionably within the scope of the legislative power, without impairing any constitutional provision. It does not appropriate private property to public uses; but merely regulates its enjoyment. . . ."

Finally, with respect to the particular case before it the Court again emphasized what it felt to be the crucial relationship between the environment and the police power:

"While most such developments may be expected to "affect" the environment adversely to the extent that they add to the demands already made upon it, it is the unreasonable effect upon existing uses, scenic character and natural resources which the Legislature seeks to avoid by empowering the Commission to measure the nature and extent of the proposed use against the environment's capacity to tolerate the use . . . The Act recognizes the public interest in the preservation of the environment because of its relationship to the quality of human life, and in insisting

39. 12 Me. 403, at 405 (1935).
that the public's existing uses of the environment and its enjoyment of the scenic values and natural resources receive consideration, the Legislature used terms capable of being understood in the context of the entire bill. The Legislature has declared the public interest in preserving the environment from anything more than minimal destruction to be superior to the owner's rights in the use of his land and has given the Commission adequate standards under which to carry out the legislative purpose."

In 1971 Maryland enacted state wetlands legislation declaring unlawful the dredging of any tidal waters or marshlands of Charles County for sand or gravel. 41/ Potomac Sand and Gravel Company sought a declaratory judgment that the law was unconstitutional. The trial judge dismissed the suit and his opinion was adopted by the Court of Appeals of Maryland in Potomac Sand and Gravel Co., v. Governor of Maryland. 42/

The Court described at length the ecological values to be preserved in the wetlands area. It described the statute as "a prohibition limited to dredging sand, gravel or other aggregates or minerals," which, it said, was "a limitation upon a use of a property, not a taking . . ." and "a valid exercise of the police powers . . . for the State to preserve its exhaustable natural resources." 43/ "The current trend," said the Court, "is to consider the preservation of natural resources as a valid exercise of the police powers." 44/

40. 300 A. 2d at 751.
41. Laws of Md., 1971, Ch. 792.
42. Potomac Sand & Gravel Co., v. Governor of Maryland, 266 Md. 358, 293 A. 2d 241, Cert. den. 41 LW 3309.
43. 293 A. 2d at 249.
The Tahoe Regional Planning Agency was created in 1970 pursuant to an interstate compact between California and Nevada. 45/ The Agency adopted a plan and regulations governing the use of land in the Tahoe Basin, 46/ which has been attacked by a number of landowners who allege that their property has been taken without compensation. 47/

While the "taking" litigation has yet to be decided, the California Supreme Court has already affirmed the constitutionality of the Agency's formation in the face of a challenge by local governments that their "home rule" powers under the California Constitution were being violated. While the Court's opinion in People ex rel Younger v. County of El Dorado, 48/ does not deal with the taking issue its emphasis on the need for regional solutions to environmental problems is worth quoting at some length:

"A staggering increase in population, a greater mobility of people, an affluent society and an incessant urge to invest, to develop, to acquire and merely to spend -- all have combined to pose a severe threat to the Tahoe regions. Only recently has the public become aware of the delicate balance of the ecology, and of the compact interrelated natural processes which keep the lake's waters clear and fresh, preserve the mountains from unsightly erosion, and maintain all forms of wildlife at appropriate levels. Today, and for the foreseeable future, the ecology of Lake Tahoe stands in grave danger before a mounting wave of population and development.

46. See, Bosselman and Callies, The Quiet Revolution in Land Use Control, pages 291-293.
47. See Chapter 4, page 40.
48. 5 Cal. 3d 480, 487 P. 2d 1198, 96 Cal. Rptr. 553 (1971).
The Court described the adoption of the Tahoe Regional Planning Compact as "imaginative and commendable":

"The basic concept of the Compact is a simple one -- to provide for the region as a whole the planning, conservation and resource development essential to accommodate a growing population within the region's relatively small area without destroying the environment.

To achieve this purpose, the Compact establishes the Tahoe Regional Planning Agency with jurisdiction over the entire region. (§66801, Art. III, subd. (a).) The Agency has been given broad powers to make and enforce a regional plan of an unusually comprehensive scope." 49/

The Court quoted the legislative findings that the subject matter of the compact was regional in nature and beyond the scope of home rule powers. 50/ But even without such findings, said the Court:

"We could hardly avoid a conclusion that the purpose of the Compact is to conserve the natural resources and control the environment of the Tahoe Basin as a whole through area-wide planning. Lake Tahoe itself is an interstate body of water; the surrounding region, defined by the Compact, is also interstate, since it includes not only the lake but the adjacent parts of three counties of Nevada and two counties of California. . . . The water that the Agency is to purify cannot be confined within one county or state; it circulates freely throughout Lake Tahoe. The air which the Agency must preserve from pollution knows no political boundaries. The wild-

49. 5 Cal. 3d at 486-487.
50. 5 Cal. 3d at 493.
life which the Agency should protect ranges freely from one local jurisdiction to another. Nor can the population and explosive development which threaten the region be contained by any of the local authorities which govern parts of the Tahoe Basin. Only an Agency transcending local boundaries can devise, adopt and put into operation solutions for the problems besetting the region as a whole. Indeed, the fact that the Compact is the product of the cooperative efforts and mutual agreement of two states is impressive proof that its subject matter and objectives are of regional rather than local concern."

Given the regional nature of the problem, said the Court, it is "fatuous" to suggest that it must be solved by local methods.

"Furthermore, problems which exhibit exclusively local characteristics at certain times in the life of a community, acquire larger dimensions and changed characteristics at others. 'It is *** settled that the constitutional concept of municipal affairs is not a fixed or static quantity. It changes with the changing conditions upon which it is to operate.' . . . When the effects of change are felt beyond the point of its immediate impact, it is fatuous to expect that controlling such change remains a local problem to be solved by local methods. Old attitudes confer no irrevocable license to continue looking with unseeing eyes."  

51. 5 Cal. 3d at 493-494.
52. 5 Cal. 3d at 498-499.
The reasoning in these cases involves a common element. Each court expressed a strong willingness to abide by the legislature's judgment that the public interest required extensive police power regulation. Each decision emphasizes that the challenged enactment represents a determination of the state legislature that is not to be lightly overturned.

3. Local Land Use Regulations

The "new mood" of the public toward the land has not been reflected only in state or regional solutions. As Part I points out, local governments all over the nation are also seeking to protect their land resources through a variety of new regulations. These too have increased greatly in the last few years.

Traditionally, local land use regulations have not been treated by the courts with the same deference shown by the courts to state regulations. Although the courts have established a "presumption of validity" for local regulations, in many states the presumption is easily rebutted. To determine whether this attitude has changed in the '70's we examined all of the printed appellate cases alleging that local land use regulations amounted to a taking.

If the cases involving local regulations were equally favorable then the cases upholding state and regional systems of regulation would probably represent only a part of a general trend of judicial concern for the environment which leads courts to uphold restrictive land use regulations regardless of whether they implement some overall state or regional policy.

But an examination of the taking cases involving local land use regulations shows no particular change from the trend of decisions in the 1960's:


10. 1971 Associated Home Builders v. City of Walnut Creek, 4 Cal. 3d 633, 94 Cal. Rptr. 630, 484 P. 2d 606 (1971). (Upheld mandatory dedication).


Measuring changes in the law by counting ayes and nays is risky business, but this list gives some rough sense of the way the cases have been going. Local governments have won most of them -- but then they always have. The "myth" of the taking clause has always lured landowners to expect more from it than prior precedents really justify.

This is not meant to detract from some of the very significant victories won by local governments in the early years of the Seventies. Turnpike Realty Co., v. Town of Dedham, 53/ in which the Massachusetts Supreme Judicial Court strongly upheld wetlands protection despite previous adverse decisions, is an important case. So is Associated Home Builders v. City of Walnut Creek, 54/ in

54. 4 Cal. 3d 633, 94 Cal. Rptr. 630, 484 P. 2d 606 (1971).
Extensive use of mandatory dedication raises important legal issues, and may be questionable as a social policy, but the court is surely correct in holding that it is not a taking.
which the California Supreme Court upheld mandatory dedication of open space.

But local governments lost a number of significant cases as well. And in some of those that were won the Court expressed misgivings about permitting local governments to enforce strict regulations in the absence of some plan for a larger area.

Steel Hill Development, Inc. v. Town of Sanbornton, 55/ discussed in Chapter 9, approved the designation of the plaintiff's land as a "forest conservation district" in which buildings could be constructed only on lots six acres or larger. But the Court said it was "disturbed" by the "crude manner" in which the law was passed without "any professional or scientific study."

"Were we to adjudicate this as a restriction for all time, and were the evidence of pressure from land-deprived and land-seeking outsiders more real, we might well come to a different conclusion. Where there is natural population growth it has to go somewhere, unwelcome as it may be, and in that case we do not think it should be channelled by the happenstance of what town gets its veto in first." 56/

The Court upheld the local ordinance as a "stopgap measure" until "an adequate study can be made of future needs."

"Hopefully, Sanbornton has begun or soon will begin to plan with more precision for the future, taking advantage of numerous federal or state grants for which it might qualify.

55. 469 F. 2d 956 (1st Cir. 1972).
56. 469 F. 2d at 962.
Additionally, the New Hampshire legislature, to the extent it expects small towns like Sanbornton to cope with environmental problems posed by private developments, might adopt legislation similar to the federal National Environmental Policy Act, 42 U.S.C. § 4321 et seq., and thereby require developers to submit detailed environmental statements, if such power does not already reside within the town's arsenal of laws."

The New York Court of Appeals volunteered similar sentiments while upholding the development timing ordinance adopted by the Town of Ramapo. In Golden v. Planning Board of Town of Ramapo, the Court criticized the current zoning enabling legislation for its failure to include a regional element:

"Undoubtedly, current zoning enabling legislation is burdened by the largely antiquated notion which deigns that the regulation of land use and development is uniquely a function of local government -- that the public interest of the State is exhausted once its political subdivisions have been delegated the authority to zone (ALI, A Model Land Development Code [Tent. Draft No. 1], Intro. Mem., p. xxi). While such jurisdictional allocations may well have been consistent with formerly prevailing conditions and assumptions, questions of broader public interest have commonly been ignored (ALI, A Model Land Development Code [Tent. Draft No. 1], Intro. Mem., p. xxi; see also, Roberts, "Demise of Property

57. Id.
Experience has shown, said the Court, "serious defects" in "community autonomy in land use controls." Ordinances such as Ramapo's raise serious questions, said the Court, which cannot be solved by one community alone but depend on the "accommodation of widely disparate interests. . . ."

"To that end, state-wide or regional control of planning would insure that interests broader than that of the municipality underlie various land use policies. Nevertheless, that should not be the only context in which growth devices such as these, aimed at population assimilation, not exclusion, will be sustained; especially where, as here, we would have no alternative but to strike the provision down in the wistful hope that the efforts of the State Office of Planning Coordination and the American Law Institute will soon bear fruit."

These cases indicate an increasing concern on the part of the courts over the failure of some local governments to base their land use regulations on anything but popular prejudice. In an often cited 1955 article, Professor Charles Haar criticized the courts for failing to put teeth in the statutory requirement that zoning be "in accordance with a comprehensive plan." Perhaps the courts are finally arriving at that result through the back door.

59. 285 N.E. 2d at 299.
60. 285 N.E. 2d at 300.
PART IV
GOVERNMENTAL STRATEGIES FOR APPROACHING
THE TAKING ISSUE

A governmental unit that seeks to regulate the use of land to preserve the environment is faced with the amorphous mass of taking cases discussed in the previous chapters. What strategy should it employ to achieve the most desirable balance between the needs for environmental protection and the rights of its individual citizens. The next five chapters consider five possible strategies.

One approach would be a firm stand against the liberal construction that Holmes and his followers gave to the taking clause. A return to a strict construction of the clause according to the original intent of the draftsmen could culminate in a dramatic overruling by the Supreme Court of Pennsylvania Coal v. Mahon and a return to earlier precedents. A dramatic and news-worthy event of this sort might be the only thing that could destroy the "myth" of the taking clause which seems so much more powerful than the clause itself.

A second strategy would rely on a gradual increase in the weight given by courts to the environmental purposes behind land use regulations. This strategy would concede the validity of the balancing test -- weighing the importance of the public purpose against the loss of value to each landowner -- but argue that our increasing knowledge of the environmental damage caused by some patterns of land use makes many public purposes weigh so heavily that they can virtually never be out-balanced by an individual's loss of property values.

A third tactic would propose legislative standards to codify more precisely the line between regulation and taking. A number of commentators have suggested that the courts would welcome legislative clarification of this question. The English have adopted such standards and seem to find them quite satisfactory.
Approach number four would not rely on any change in the substantive law but would count on careful drafting and factual presentation to resolve disputes over land use regulation. Many of the government's losses in taking cases can be attributed to sloppy legal workmanship. Careful preparation can greatly increase the chance of success.

Finally, the taking issue can be avoided entirely if the government uses its land acquisition powers rather than its regulatory powers whenever it seeks to restrict severely the development of land. The government could acquire the fee title to such lands, or it could acquire easements or development rights, or it could institute a system of compensable regulations. Only budgetary limitations limit the usefulness of this strategy.

In the next five chapters we present the arguments on behalf of each of these five strategies respectively.
CHAPTER 12

THE STRATEGY OF STRICT CONSTRUCTION

Governmental regulation of the use of land is subjected to a stricter judicial test than other types of governmental regulation. While other regulations are only tested to determine whether they bear a reasonable relationship to a valid public purpose, land use regulations must be tested by balancing the value of the regulation against the loss in value to each affected property owner. 1/

This balancing test was established as the law by the famous case of Pennsylvania Coal Co. v. Mahon. 2/ It can be argued that the balancing test is historically unsound, logically unnecessary, and environmentally disastrous.

The Supreme Court could overrule Pennsylvania Coal and return to the strict construction of the taking clause by declaring that a regulation of the use of land, if reasonably related to a valid public purpose, can never constitute a taking. A dramatic gesture of this magnitude would go a long way toward overcoming the popular myth that land can't be severely reduced in value through regulation. It is this myth, as noted in Chapters 1 through 14, which has led so many people to shy away from undertaking needed regulatory measures.

1. The Original Intent of the Draftsmen

In Chapters 5 through 8 of this book we have examined the historical evidence and found no indication that the draftsmen of the taking clause ever conceived the possibility that a regulation of the use of land could be considered a taking. The fear of expropriation of property

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1. Obviously all types of governmental regulations are subject to a whole range of other constitutional limitations but none relevant to the present discussion.
2. 260 U.S. 412 (1922).
by the King, as exemplified in the Magna Carta and carried down in British legal thought through the Seventeenth and Eighteenth Centuries, provided the motivation for the draftsmen of the taking clause. But during this same period extensive regulation of the use of land was common, both in England and in America, and both before and after the adoption of the taking clause.

Professor Cormack has correctly summarized the founding fathers' conception of a "taking" as "a purely physical conception . . ." deriving from colonial times when there was infrequent need for eminent domain.

"Whenever there was any occasion for the institution of eminent domain proceedings, the land was "taken" in every sense of the word. Under these conditions, the physical concept of the taking of property for public use developed. Its use was later encouraged by the adoption of constitutional provisions containing the words "take" and "property," with their physical connotations."

There is no evidence that anyone involved in the drafting of the state or federal bills of rights ever considered the possibility that a regulation might be thought to be a taking, even when the regulation effectively prohibited any economic use of the land.

The idea that too extensive regulation of the use of land could constitute a taking was an invention of the early Twentieth Century. This expansion of the taking clause had no support in the historical analysis of the origins of the Constitution. It was the product of a Supreme Court which had thrown out all kinds of regulatory measures from child labor laws to milk quality controls. The great majority of those decisions have now

been either overruled or silently ignored. The Pennsylvania Coal decision remains valid only because the Supreme Court has effectively abdicated its jurisdiction of cases involving land use regulation, apparently treating these cases as primarily local in import.

The idea that a regulation of the use of land which prevents the owner from making money can amount to a taking assumes that a landowner has a constitutional right to use and develop his land for some purpose which will result in personal profit, regardless of the effect that such development will have on the public. Such a holding gives land as a commodity a constitutional status higher than other commodities -- a status land no longer deserves. 4/

2. Holmes' Fascination with the "Bundle of Sticks"

Why did Holmes, noted for his strict construction of the due process clause and his willingness to support legislative experiments, take an opposite approach when these experiments affected real estate? What was there about the "bundle of sticks," as he conceived rights in real property, that made them more sacrosanct than other values?

Holmes had to silently ignore a host of inconsistent precedent to reach the result he sought. His majority opinion in Pennsylvania Coal conveniently ignored the whole line of police power cases terminating in Mugler v. Kansas 5/ which approved regulations making Mugler's brewery virtually worthless. Mugler v. Kansas had become a frequently cited classic on the nature of the police power, but Holmes ignored it entirely.

However, if Holmes did not challenge Mugler directly in his opinion, he was well aware that Mugler did not

5. 123 U.S. 623 (1887). This case is discussed at length in Chapter 7.
support his "question of degree" approach to the distinction between regulation and taking. In a letter to Harold Laski, dated January 13, 1923, Holmes' feelings about Mugler were made explicit:

"I fear I am out of accord for the moment with my public minded friends in another way. Frankfurter generally writes to me about any important opinions of mine and he has been silent as to the one I sent you in which Brandeis dissented (Pa. Coal); probably feeling an unnecessary delicacy about saying that he disagrees. Of course I understand the possibility of thinking otherwise - I could not fail to, even if Brandeis had agreed. But nevertheless when the premises are a little more emphasized, as they should have been by me, I confess to feeling as much confidence as I often do. I have always thought old Harlan's decision in Mugler v. Kansas was pretty fishy.

Knowing Holmes' stance in Pennsylvania Coal, his feelings about Mugler are hardly surprising. And yet, to an individual familiar with Holmes' achievements in general, but not familiar with Pennsylvania Coal, Holmes' assessment of Mugler might look a little unusual. After all, Harlan's respect for the police power and deference to legislative judgment are characteristics associated with Justice Holmes as well. In fact, Holmes' popular reputation has rested in large part upon his similar respect and deference. Yet, Holmes could not accept Mugler as being a proper way of handling a claim under the taking clause.

Holmes' disagreement with Mugler and his stand in Pennsylvania Coal point up his conflicting approaches

to constitutional challenges based upon the taking clause or the due process clause. Holmes was tolerant of legislative experiment and generally skeptical towards substantive due process attacks upon such experiment. For the most part he did his best not to translate his own policy predilections into constitutional limitations upon the police power of the state. 7/ Realizing that the role of the Supreme Court was not to pass upon the "wisdom" of a statute, but rather upon its constitutionality, Holmes practiced restraint. It was enough for him that a statute should be "reasonable," it did not have to be wise.

Given this attitude towards judicial restraint, Holmes' skepticism towards judicial efforts of the 1920's and 1930's to invalidate other regulations is more easily understood. A judge could make "substantive due process" mean just about anything. Dissenting in Truax v. Corrigan, 8/ a case which held unconstitutional a state law forbidding the issuance of injunctions against peaceful picketing in labor disputes, Holmes wrote:

"There is nothing I more deprecate than the use of the Fourteenth Amendment beyond the absolute compunction of its words to prevent the making of social experiments, that an important part of the community desires, in the insulated chambers afforded by the several states, even noxious to me and to those whose judgment I most respect." 9/

When faced with a substantive due process argument against the constitutionality of police power legislation, Holmes' approach was quite similar to Harlan's treatment of the taking claim in Mugler. He generally focused upon

8. 257 U.S. 312 (1921).
the public purpose and rationality of the regulation under attack. Then the regulation's effect upon contract rights could be put into proper perspective, and the regulation would usually be upheld.

In Lochner v. New York, 10/ for example, the issue before the Court was whether a New York law which limited bakers' employment to sixty hours per week was unconstitutional because it interfered with "liberty of contract" as guaranteed in the Fourteenth Amendment due process clause. The majority held the law unconstitutional. Holmes' famous dissent did not concentrate upon the statute's effect upon contractual rights, but rather concerned itself with the purpose and rationality of the law. Finding the purpose (bakers' health) to be a permissible one under the police power, Holmes concluded that the statute was reasonably related to its purpose and stated that in his opinion the law was constitutional.

Yet, clearly this was not the approach Holmes took to the taking claim in Pennsylvania Coal. There the primary focus was upon the regulation's effect upon a certain individual's property rights. The public purpose and rationality of the statute were peripheral concerns.

The question becomes, why did Holmes grant the taking clause a judicial deference which he did not hold for the contracts clause in Article I of the Constitution? Or why did Holmes uphold the police power against "liberty of contract" challenges, but not against "taking of property" challenges? Clearly the numerous arguments Holmes made on behalf of public power against private contractual rights could just as easily be made against private property rights. There is no inherent reasoning that demands that the balancing of public and private interests should change when the private interest involved is proprietary in nature rather than contractual. Yet Holmes did in effect give property rights a preferred position.

It is evident from his opinion that Holmes was much impressed with the idea that the Coal Company had mineral

10. 198 U.S. 45 (1905).
rights to the Mahons' property prior to the Kohler Act, and that the Act, in effect, took these rights away. In a letter to Frederick Pollock, Holmes elaborated on this theme:

"My ground (for decision) is that the public only got on this land by paying for it and that if they saw fit to pay only for the surface rights they can't enlarge it. . . ."

If Holmes really based his decision primarily on this ground he failed to qualify the broad language of his opinion in a way to convey such a limited intent. Possibly he emphasized this point later to explain away a bad decision, although at least some judges have seized upon this point to distinguish his opinion.

Holmes constantly professed a good-natured impatience with Brandeis' preoccupation with the facts, preferring to think cases could be decided by reliance on basic principles. But because Brandeis concentrated on the facts he easily saw the fallacy of permitting the landowner to divide his "bundle of sticks" into a series of conceptually separate property rights and then argue that one of these rights was completely destroyed:

"The rights of an owner as against the public are not increased by dividing the interests in his property into surface and subsoil. The sum of the rights in the parts cannot be greater than the rights of the whole . . . No one would


12. Holmes wrote: "That diabolical Brandeis has skewered my heart by speaking thus as to vacation: '. . . You should do something new -- take an excursion into some domain of unfamiliar fact, e.g. the textile industry in Massachusetts, and . . . go to Lawrence and see with your own eyes what it means.' I hate facts, and I feel as if it might be a solemn call to duty . . . It has made me squirm within anyhow." James Bishop Peabody, (ed.) The Holmes-Einstein Letters 187 (1964).
contend that by selling his interest above one hundred feet from the surface he could prevent the State from limiting, by the police power, the height of structures in a city." 13/

Brandeis recognized that the conveyance by the Mahons of their subsurface rights was in fact an involuntary submission to a condition imposed by the coal companies on anyone who sought to live in the area. As land sales actually took place in northeastern Pennsylvania prior to the turn of the century, it was not a question of whether a buyer "saw fit" to pay only for the surface rights. The Coal Company was the only landlord in certain mining towns and would not sell the mineral rights, so the buyer could hardly argue. There was little mutuality in such a transaction.

Holmes himself recognized that the apparent tangibility of real property encouraged greater rigidity in the conception of property rights than of other rights. Pennsylvania Coal might have come out differently if Holmes had followed the principles he had espoused in Block v. Hirsch. 14/ In that case, Holmes upheld a District of Columbia rent-control law which was challenged by landlords as a taking of their property. Holmes responded:

"The fact that tangible property is also visible tends to give a rigidity to our conception of our rights in it that we do not attach to others less concretely clothed. But the notion that the former are exempt from the legislative modification required from time to time in civilized life is contradicted not only by the doctrine of eminent domain, under which what is taken is paid for, but by that of police

power in its proper sense, under which property rights may be cut down, to that extent taken, without pay. . . ."

3. Land Use Regulations Deserve Equal Status With Other Regulations

To argue that Holmes was wrong does not suggest that land use regulations should be immune from judicial review. But it does suggest that they should be reviewed under the same standards applied by the courts to other governmental regulations.

In general, government regulations are held invalid only if they fail to bear a reasonable relationship to a valid public purpose. Because Brandeis was one of the earliest exponents of this standard of judicial review, it is helpful to review the Brandeis dissent in Pennsylvania Coal and his general approach to judicial policy in this area, because Brandeis' dissent and later decisions indicate some of the restraints on the exercise of the police power that are generally applicable to government regulations and would be specifically applied to land use regulations if his view had prevailed.

Perhaps Brandeis' most fundamental characteristic was his concern for fact. The inventor of the "Brandeis Brief" did not lose his research abilities upon taking the bench. It was not uncommon for Brandeis to devote numerous pages of an opinion to historical, social and economic analysis of the problem facing the Court. 16/ Such research was necessary, he believed, if the Court was to understand the basis for the legislation under review.

In analyzing Brandeis' dissent the first point worth noting is his distinction between regulation and

15. 256 U.S. at 155.
taking. He rejects Holmes' contention that the difference between the two is one of degree. In Brandeis' view the difference between regulation and taking is a difference in kind. According to Brandeis the government takes property only when it actually assumes title to the property or makes use of it.

Given Brandeis' definition of a taking it is not surprising that he found the arguments of the Pennsylvania Coal Company against the Kohler Act untenable. In the first paragraph of his dissent, Justice Brandeis stated the basic theme of his opinion:

"Coal in place is land; and the right of the owner to use land is not absolute. He may not so use it as to cause a public nuisance; and uses, once harmless, may owing to changed conditions seriously threaten the public welfare. Whenever they do, the legislature has power to prohibit such uses without paying just compensation; and the power to prohibit extends alike to the manner, the character and the purpose of the use."

Brandeis was fully aware of the economic burden placed upon the Coal Company by the Pennsylvania legislation. It was apparent to everyone that the value of company land was greatly diminished if it could not be used for mining coal. But in Brandeis' view such differences in degree with respect to value did not concern the taking issue, and he looked instead to other constitutional principles which might be invoked.

"Restriction upon use does not become inappropriate as a means merely because it deprives the owner of the only use in which property can be put," he argued. A restriction would only be unconstitutional if its purpose were not to "protect the public" or if it were not

17. 260 U.S. 393, 417 (1922) (dissenting opinion).
an "appropriate means" to a valid purpose. 18/ A restriction upon property rights would not become inappropriate merely because it made the property unprofitable. He then stated, "The liquor and oleomargarine cases settled that." 19/

Powell v. Pennsylvania, 20/ the oleomargarine case, was decided just a few years after Mugler, the liquor case discussed earlier. In Powell, Pennsylvania's statutory prohibition of the manufacture or sale of oleomargarine was attacked as a taking of private property. Pennsylvania argued that the prohibition of oleomargarine was necessary to protect the public against widespread fraud, since a substantial number of enterprising merchants had been passing oleomargarine off as butter. The Supreme Court upheld the prohibition, relying explicitly on Mugler. There was nothing in the record, said the Court, to suggest that Pennsylvania's judgment on the gravity of the fraud evil and the need for the chosen remedy was unreasonable.

Another case cited by Brandeis is worth noting. In Hadacheck v. Los Angeles, 21/ a municipal ordinance prohibiting the manufacture of bricks within a specified area of Los Angeles was held to be a constitutional exercise of the police power, despite the fact that Hadacheck's property rights and property value were shown to be considerably modified by the ordinance. Prior to the passage of the ordinance Hadacheck had bought a piece of land rich in clay for the purpose of making bricks. Thus he was able to show quite graphically how severely his rights were affected when the ordinance became law. He had a lot of clay worth very little now that it could not be made into bricks at that location.

Approving the ordinance, the Court recognized an allegation that the land would diminish in value by over

90%, from $800,000 to $60,000, if it could not be used for brick-making purposes. The Court noted:

"It is to be remembered that we are dealing with one of the most essential powers of government, one that is the least limitable. It may, indeed, seem harsh in its exercise, usually is on some individual, but the imperative necessity for its existence precludes any limitation upon it when not exerted arbitrarily."

To Brandeis, the Pennsylvania Coal case presented a concise question. Could the State of Pennsylvania control mine subsidence under the authority of its police power? To reach his answer Brandeis merely asked the same questions that Justice Harlan had asked in Mugler v. Kansas, 23/ and Justice Holmes in Lochner v. New York. 24/ Was the purpose of the legislation a valid one under the police power? Was the legislation an appropriate means to the purpose? Simply put, Brandeis believed Pennsylvania Coal Company v. Mahon was a police power case. The fact that the rights affected by the legislation were rooted in real property rather than in a contract did not change the character of the case.

In Nashville, C & St. Louis Ry. v. Walters, 25/ decided in 1935, Brandeis elaborated his views as to the limits of the police power. The State of Tennessee had by statute imposed upon the plaintiff one-half of the cost of an underpass to separate the grades of its main line and proposed new highway. Speaking for the majority Brandeis found the Tennessee action so "arbitrary and unreasonable" as to violate the Fourteenth Amendment. "State action imposing upon a railroad the cost of eliminating a dangerous grade crossing of an
existing street might be valid although it appears that the improvement benefits commercial highway users who make no contribution towards its cost," 26/ he said, but he found that such was not the case here.

The railroad had adduced a host of facts -- something to which Brandeis was always sympathetic -- all tending to show that the public benefit resulting from the overpass was largely unrelated to the public protection from the dangers of the railroad grade crossing. Brandeis compared the attempt to charge the railroad for half the cost of the overpass to an assessment for public improvements laid upon particular property owners which are "ordinarily constitutional only if based on benefits received by them." 27/

Another majority opinion written by Brandeis in 1937, Thompson v. Consolidated Gas Utilities Corporation, 28/ considered the constitutionality of a Texas gas proration order. This regulation forced Consolidated Gas Utilities Corporation to cut back its production of certain kinds of natural gas and thus forced the Corporation to purchase gas from other producers to fill its customer's order. Texas argued that the regulation met a public purpose, namely preventing waste of natural gas. The Corporation had produced evidence, however, which suggested that in effect the regulation was designed to make Consolidated Gas provide the use of its own pipeline for other less efficient private producers.

Justice Brandeis again found a violation of the due process clause of the Fourteenth Amendment. The regulation did not bear an appropriate relationship to the admittedly proper purpose of limiting waste in the production of natural gas. Although Brandeis believed the proration order before the Court to be unconstitutional, he expressed no doubt as to the state's power to restrict private production for public purposes. He explicitly stated that Texas could constitutionally prorate natural

26. 294 U.S. at 413, 430.
27. 294 U.S. at 430.
gas production to prevent waste. The problem was that all the legislation did was to make an efficient producer buy from a less efficient producer. Brandeis concluded that while a state could regulate private property for the benefit of the public welfare, it could not do so for the benefit of a private interest. 29/

To reiterate Brandeis' test of due process suggests the same standard for decision applied in a variety of other modern situations where regulation works severe economic detriment. Recent cases dealing with water quality standards offer contemporary illustrations. The Minnesota Supreme Court, asked to consider prohibition on the discharge of treated sewage over one mile downstream from the nearest water intake on the Mississippi River, struck down the regulation as applied to a local sanitary district. They based their conclusions on two factors:

"First, the prohibition is absolute, subject only to the variance provision, without reference to the purity of the effluent; and secondly and decisively, we concur in the finding that the prohibition is unreasonable to the extent it is based on the possibility of effluent discharged . . . reaching the main Minneapolis water intake 1.1 miles up the river." 30/


The decision was based on voluminous testimony to this effect, and the Court pointedly noted that it could not invalidate the entire regulation since the clear implication of testimony received was that upstream discharges would result in hazardous contamination.

A Federal District Court was recently asked to consider the issues presented by a ban on phosphates in detergent imposed by the City of Chicago. The Court heard extensive arguments on the degree of algae formation which could be attributed to phosphates. The question framed by Judge MacMillen was:

"[W]hether the plaintiffs have the right to sell and ship a harmless product in interstate commerce. The evidence of increased costs . . . is relevant to show a burden on interstate commerce. It then becomes the task of the defendant City to justify its ordinance by showing at least some need to protect the public health, safety or welfare. The need is not measurable in dollars and cents but can be weighed equitably against the plaintiff's right to free trade." 31/

Based on the evidence, the Court found that the City of Chicago failed to show demonstrable harm from phosphate discharges.

Professor Ratner, discussing the function of the due process clause as reflected in our constitutional philosophy of government, suggests that it may embody:

"A social purpose limitation on government, requiring not public gain heavier than private determent, but a regulatory purpose that reflects recognizable community values and a regu-

tory method that intrudes on individual choice no more than necessary to implement the purpose."

Overruling the Pennsylvania Coal decision would not mean the end of judicial review. If the Brandeis proposition that regulation is different in kind from taking is accepted, the full panoply of due process protections remains, but the focus is shifted to the purpose and effect of the regulation, where the emphasis really belongs.

The Task Force on Land Use and Urban Growth recently considered the taking issue at length and concluded that the Supreme Court should reexamine its precedents that focus on the diminution of property values affected by regulations and seek to balance public benefit against land value loss in every case. We are aware of the sensitivity of this matter, and of the important issues of civil liberty associated with ownership of property. But it is worth remembering that when U. S. constitutional doctrine on the taking issue was formulated during the late Nineteenth and early Twentieth Centuries, land was regarded as unlimited and its use not ordinarily of concern to society. Circumstances are different today. Now there is growing recognition of the need to see that urbanization proceeds in an orderly and non-destructive fashion and that our limited natural and cultural resources are conserved. It is time that the U. S. Supreme Court re-examine its earlier precedents that seem to require a balancing of public benefit against land value loss in every case and declare that when the protection of natural, cultural, or aesthetic resources or the assurance of orderly development are involved, a mere loss in land value will never be justification for invalidating the regulation of land use. Such a re-examination is particularly appropriate considering the consensus that is forming on the need for a national land-use policy. Although fifty years have passed, it is not too late to recognize that Justice Brandeis was right.

4. The Need for Compensation for Real Takings

None of the previous discussion should suggest any doubt that a real taking -- the appropriation of land by the government, feared since the days of Magna Carta and barred by the Fifth Amendment -- must be compensated! To say that a regulation is different in kind from a taking does not eliminate the need for the taking clause. An actual appropriation of land for public use, such as for a park, highway or reservoir, must be accompanied by compensation; this no one would dispute.

Pumpe1ly v. Green Bay Company, the 1871 case which established the principle that land did not have to be formally expropriated to require compensation, is consistent with such a position. A new dam constructed for flood control had caused land to be flooded although the land had not been purchased for such use. The Supreme Court found arguments that such a physical invasion was not a taking call for "a very curious and unsatisfactory result. . . ."

It would be equally curious to allow enterprising communities to zone land for public parks or buildings, and the courts have not permitted regulations which limit private land to public uses. For example, in City of Plainfield v. Middlesex Borough 34/ a town had attempted to preserve space for "parks, playgrounds and public schools" with such a special zoning classification. Their case was rejected by the Court on taking grounds which would remain valid under the doctrines of Pumpe1ly. Although there was no formal resolution for the purchase of the land, evidence of negotiations for purchase and preliminary agreement offered convincing proof of such a purpose. On the other hand, where the landowner is able to make a profit by operating his land as a public recreation area, the courts will not invalidate a regulation which prohibits him from using it for any other purpose. 35/

It has been fashionable to deprecate Harlan's "simplistic" approach in Mugler, but his theory is consistent with the intent of the founding fathers: when the government physically appropriated your property -- that was a taking. A return to this simple and unsophisticated principle would go a long way toward upholding the type of environmental protection currently needed.
CHAPTER 13
THE STRATEGY OF EVOLVING PUBLIC PURPOSE

The balancing test of *Pennsylvania Coal* requires that the value to the public of the regulation be weighed against the loss to the individual property owner. In practice, though not in theory, the Courts have often recognized an exception to the balancing test when the regulation is designed to prevent a use of land so harmful to the public safety or health that it would present a serious and immediate danger. Then the Courts have frequently weighed the value to the public so heavily as to overbalance any loss to the property owner.

It can be argued that this exception should be expanded to treat many more types of land use regulations as "heavyweights" now that we are increasingly aware of the adverse ecological consequences of many more types of land use. The Courts need only recognize that the uses of land prohibited by modern environmental regulations, though they may not be as obviously harmful as unfenced quarries or fungus-bearing cedars, are in the long run equally damaging.

Although less dramatic than a return to strict construction, a strategy of gradual evolution is consistent with current trends. In the evolution of a constitution, it is far more common to find a case gliding gracefully into oblivion than to find it dramatically overruled. Such could be the fate of *Pennsylvania Coal* as an evolving appreciation of public purpose and public necessity takes form in the 1970's. Courts may increasingly find particular regulations for the protection of certain environmental and ecological values such an important exercise of the police power that they outweigh any loss of land values under the *Pennsylvania Coal* balancing test.
1. "Heavyweight" Public Purposes in Earlier Decisions

The myth of the taking clause says that government can never tell a man that he can't "use" his land (i.e., make money out of it) unless it pays him compensation. In reality, however, courts have often upheld regulations that effectively prohibit any profitable use of land if the regulation serves a "heavyweight" public purpose.

No neat classification of public purposes can explain the pattern of previous decisions. A number of commentators have noted that regulations prohibiting uses of land that resemble common-law nuisances have often been treated as heavyweights. 1/ The classic example, previously discussed but worth repeating, is Goldblatt v. Town of Hempstead. 2/ Mr. Goldblatt was the owner of a sand pit in the town of Hempstead, Long Island. The sand mining and dredging operation had once been located in a rural area but the rapid growth of Nassau County soon brought it into the middle of a thriving residential neighborhood. Meanwhile, a high water table had led Mr. Goldblatt to remove sand through dredging techniques creating a lake with steep banks and depths ranging to over forty feet. Although Mr. Goldblatt attempted to seal off the quarry from his neighbors with fencing the children in the neighborhood apparently found ways to sneak over or under the fences to play in this highly attractive flooded excavation. The town officials sought to eliminate the hazard by passing an ordinance prohibiting the use of the land as a quarry. Mr. Goldblatt contested the ordinance alleging that it took his property without just compensation. Although unsuccessful in the New York State Courts he filed a Writ of Certiorari and the petition was heard by the United States Supreme Court.

In a rather brief opinion a unanimous Court disposed of the case without substantial difficulty. Although

1. See Chapter 10.
citing and relying on the Pennsylvania Coal case the Court held that the type of regulation imposed by the Town of Hempstead was not so unreasonable as to constitute a taking of property. This despite the fact that it is hard to imagine any other profit-making use of a water-filled quarry other than quarrying. Professor Sax points out that "since it has been argued that the ordinance wholly destroyed the economic value of the land," then the "opinion leaves some doubt about whether the Court is following, or repudiating, the Holmesian doctrine." 3/

Other cases that seem to fit the nuisance analogy are discussed in Chapter 10. Perhaps the most glaring gap in the nuisance theory, however, is the Pennsylvania Coal case itself. What could be a greater nuisance than having your land collapse underneath your house?

Some courts have attempted to eliminate this gap by distinguishing Pennsylvania Coal as a case in which the plaintiffs had previously bargained away their rights. There is some substantial indication that the Supreme Court of California has virtually eliminated the traditional application of Pennsylvania Coal through this approach, by treating as dicta Holmes' language regarding the applicability of the Kohler Act to public streets and buildings, and interpreting the case as a private dispute. Seizing the opportunity in Consolidated Rock Products Company v. City of Los Angeles, 4/ the Court noted:

"It [Pennsylvania Coal] was decided before the principles of comprehensive zoning were established and differs from our case additionally in that the mining

4. 57 Cal. 2d 515, 370 P. 2d 342, 20 Cal. Rptr. 638 (1962), appeal dismissed, 371 U.S. 36 (1962). This case upheld a regulation prohibiting all quarrying on the plaintiff's property. As in the Goldblatt, the plaintiff was left with a half-completed quarry, the usefulness of which is quite limited.
was to be done underground and the persons to be benefited by the legislation were grantees as to whom the right to mine had been expressly reserved." [emphasis added] 5/

An earlier case from the Ninth Circuit Court of Appeals, sitting in California, rendered an even more explicit reading of Pennsylvania Coal:

"The State Legislature prohibited mining in such fashion as would interfere with the structures erected by the grantees upon the surface, thus in effect giving to the grantees a security in the enjoyment of the surface which they had not bargained nor paid for, and depriving a grantor of the right it had reserved in its deed to the grantee." 6/

It can be argued that the United States Supreme Court itself has accepted the Pennsylvania Coal doctrine more in theory than in practice. Six years after Pennsylvania Coal, the Supreme Court held in Miller v. Schoene, 7/ that a Virginia statute which provided for the destruction of red cedar trees infected by the cedar rust disease was a proper exercise of the state's police power. The fungus infection was not dangerous to the cedar trees, but the fungus destroyed the fruit and foliage of apple trees. The Court found the destruction of red cedars within two miles of an orchard to be the "only practicable method of controlling the disease and protecting apple trees from its ravages. . . ." 8/ and

5. 20 Cal. Rptr. at 646.
6. Marblehead Land Company v. City of Los Angeles, 47 F. 2d 528, 532 (9th Cir. 1931). See also, McCarthy v. City of Manhattan Beach, 4 Cal. 2d 879, 264 P. 2d 932 (1953), cert. den. 348 U.S. 817 (1954).
7. 276 U.S. 272 (1928).
8. 276 U.S. at 278.
260.

found the state faced with an unavoidable decision as to which would be protected to prevent the spread of the fungus. It failed to cite Pennsylvania Coal, instead relying on Hadacheck and other earlier cases as evidence that a preponderant public concern justified the state's decision to protect apple trees.

2. Heavyweight Public Purposes in the Seventies

Chapter 11 examined the cases of the '70's and found a judicial willingness to support state and regional programs to regulate the use of land. Viewed from a different angle these same cases can be interpreted as expressing support for a variety of new and sophisticated public purposes -- purposes so important that they outweigh any loss in land values.

One of the most dramatic of these recent cases is Just v. Marinette County, 9/ the Wisconsin case approving a statewide program for zoning controls in shoreline areas. Accepting the legislative determinations which were supported by extensive factual and planning data, the Wisconsin Court nonetheless did not repudiate Pennsylvania Coal. Rather it shifted the balance for designated shoreline areas to reflect as its initial equilibrium the natural state of the land and water. A prohibition of uses which could destroy water quality or the natural character of the land could be accepted as reasonable under this new balance.

The Task Force on Land Use and Urban Growth has recently recommended such an approach. The courts can begin to fill information deficiencies if they will acquire a healthy respect for the unknown. In the past ten years, story after story has appeared on the adverse effects of changes in land use that are recognized only after the fact. Pelicans died, and we learned that DDT was responsible. The edges of Lake Tahoe turned green, and we learned that storm water runoff from parking lots was the cause. Houses careened down hills in mudslides,

9. 56 Wis. 2d 7, 201 N.W. 2d 761 (1972).
and we learned that grading practices were responsible. There have been so many examples of unforeseen adverse consequences from changes in the natural ecosystem that the impact of these unknown consequences should be considered in a balancing of private and public interests.

The courts should "presume" that any change in existing natural ecosystems is likely to have adverse consequences difficult to foresee. The proponent of the change should therefore be required to demonstrate, as well as possible, the nature and extent of any changes that will result. Such a presumption would build into common law a requirement that a prospective developer who wishes to challenge a governmental regulation prepare a statement similar to the environmental impact statements now required of public agencies under federal programs. 10/

The Maine Supreme Court has expressed similar views in approving a Site Location Law which brings most major development in the state before the Environmental Improvement Commission. Their opinion, In The Matter of Spring Valley Development, 11/ emphasized the difference between regulation under the police power and taking under eminent domain. Significantly, they noted, "[T]he legislature has declared the public interest in preserving the environment from anything more than minimal destruction to be superior to the owner's rights in the use of his land and has given the Commission adequate standards under which to carry out the legislative purpose." 12/ The Court went on to approve the program and its application in the Spring Valley Development case.

California, whose early attempts to diminish the impact of Pennsylvania Coal on zoning regulations have already been noted, is another state where certain legislatively declared public purposes have been given particular judicial deference. The regional control approach

11. 300 A. 2d 736 (Me. 1973).
12. 300 A. 2d at 751.
of the San Francisco Bay Conservation and Development Commission is one example. In the Candlestick Properties case developers had applied for fill permits which were rejected with little more than a recitation of the extensive findings made by the California Legislature in drawing its enabling statutes: "The public has an interest in the Bay as the most valuable single natural resource of an entire region. . . . The legislature further finds and declares * * * uncoordinated, haphazard * * * filling in San Francisco Bay * * * threatens the Bay itself and is therefore inimical to the welfare of both the present and future residents of the area surrounding the Bay. . . ."

This concern may extend to regulations adopted at the local level as well when they are supported by sound legislative findings. The recent California Appellate opinion approving historic controls in the city of San Diego is an illustration where findings of significant public purpose have lead a court to approve a restrictive land use regulation. 14/

Massachusetts legislation allowing towns to zone to protect their flood plains has been given similar approval by the Supreme Judicial Court. In Turnpike Realty v. The Town of Dedham, 15/ zoning to preserve areas of the flood plain of the Charles River lying within the town received approval with the court stressing the public purpose served by prevention of such nuisance-like characteristics. 16/

Professor Joseph Sax of the University of Michigan Law School has provided a very interesting theoretical framework for the presentation of facts to support the

16. Reference to Chapter 11 will provide other situations and more detailed explanation of the analysis by courts which have sustained regulation which met particular public purposes.
public benefits created by land use regulations in a recent article in the Yale Law Journal. 17/ Professor Sax accepts the soundness of the Holmes' position in Pennsylvania Coal but says the existing law has often failed to measure the true benefits generated by land use regulations because it failed to recognize the interconnectedness of land uses. Too often, he says, the court looks only at the impairment of the owner's ability to profit from the land without looking at the broader costs to others that will result from his proposed development.

The one who profits from a piece of property, he argues, uses not only the resources of the physical property itself but uses the complex interrelationship of that property with other property as well.

"Frequently, the use of any given parcel of property is at the same time effectively a use of, or a demand upon, property beyond the border of the user." 18/

Frequently a proposed use of one owner's land would cause substantial economic detriment to the owners of neighboring property. In such cases the balancing test should be weighed to insure that the loss to neighboring property owners is included as part of the equation.

Even more frequently, however, the benefits generated by regulations are not confined to a small number of neighboring property owners but accrue to all property owners in the community in amounts that may be negligible to any individual property owner but quite substantial when viewed in the aggregate. In such situations Professor Sax argues the benefits of the regulation should be treated as "public rights." Where such public rights are well recognized they should be allowed to prevail over any normal amount of private injury without the necessity of quantification of proof. 19/

18. Id., at 152.
19. Id., at 155-159.
Professor Sax's analysis follows the pioneering work by Professor Allison Dunham of the University of Chicago Law School. Sax accepts Dunham's argument that police power regulation should be permissable only when designed to protect against harm to the public caused by particular development proposals, not when designed to encourage development that would produce public benefits. Thus under Sax's theory as well as Dunham's the presentation of facts would concentrate on the public rights that would be subject to deprivation if the development proposed by the landowner were to be undertaken, not on positive benefits to be gained.

Some of the cases previously discussed indicate, however, that the courts may go beyond the balancing test altogether if the public purpose is sufficiently strong. Although the courts, including the Supreme Court, credit the continuing validity of the principle that regulation may constitute a taking, they appear to be recognizing evolving areas where the balancing test is inoperative. Such public purposes as the safety of children (Goldblatt), protection of public waters (Just), or more conventional zoning for the enhancement of community values have drawn increasing attention and approval. For the legislation advancing these purposes, it can be argued that there is virtually no balancing test, because their public purpose is weighed so heavily that Pennsylvania Coal remains only to indicate to legislative bodies the heavy burden of justification that land use regulation must bear.

One may see this simply as a return to the standards of Mugler and Powell, discussed at length in the preceding chapter. After all, Holmes did not refer to

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these cases sustaining police power regulations in his opinion and they themselves have never been formally overruled. It would be only appropriate if Pennsylvania Coal met a similar fate.
CHAPTER 14

STATUTORY LIMITATIONS ON REGULATION

Since the taking clause is a basic constitutional provision the courts are the final arbiters of its interpretation. Nevertheless, courts have commonly deferred to reasonable legislative attempts to define more precisely such difficult standards as the line between taking and regulation. Legislative bodies could easily use the technique of statutory definition as a means of limiting the operation of the taking clause and preventing its use against types of regulation that are clearly necessary in the public interest.

Two leading legal scholars have advocated the use of statutory definition as a means of providing a more sensible and equitable system for resolving the compensation issue. Arvo Van Alstyne of the University of Utah, and Frank I. Michelman of Harvard Law School both have suggested that the lack of standards for distinguishing between regulation and taking indicate a need for legislated standards.

Van Alstyne finds the judicial efforts to devise a useable test for deciding whether police power measures impose constitutionally compensable losses to be "notably unsuccessful."

"This state of affairs . . .
reflects the absence of a generally accepted theoretical rationale for circumscribing the boundaries of

the police power, as well as the persistent reluctance of legislatures to provide statutory guidelines or criteria for the resolution of the issues thus posed." 2/

He believes the courts would welcome legislative assistance:

"One of the most conspicuous features of constitutional law is the disposition of courts to give full effect to statutory measures designed to implement or govern the application of broadly worded constitutional precepts." 3/

Professor Michelman is similarly disenchanted with judicial attempts to resolve regulation/taking solutions, characterizing the results as "liberally salted with paradox." 4/ and concluding that "fairness as a standard for judging a political decision may simply be too difficult for courts to grasp and apply successfully." 5/ He suggests that the matter of standards and rules be placed in the hands of the legislature for solution:

"Here is a situation in which a legislature can impose a useful fairness discipline which eludes the grasp of the courts." 6/

The feasibility of this strategy need not rely solely on theory. A model is available in the very country from which the taking clause originated -- England, which has for a number of years established statutory standards defining the limits of regulation and providing for cases in which compensation need be paid. An examination of the operation of the British

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2. 44 S. Cal. L. Rev. at 3.
3. 19 Stan. L. Rev. at 729.
4. 80 Harv. L. Rev. at 1170.
5. 80 Harv. L. Rev. at 1246-1247.
6. 80 Harv. L. Rev. at 1255; see generally pp. 1252-1256.
system of compensation will give us an idea of how such a system might work in this country.

England's system of land use regulation is really quite similar to our own. Although the terminology is different, making the systems sound foreign to each other, "the differences between American and English planning administration are not so great as they seem."  

In each country the regulatory process begins with a proposal by a developer to build something. This proposal is submitted to the local authorities for their approval. In England the local authority must measure the proposal against the officially-adopted plan for the area. In the United States it must measure the proposal against the community's zoning and other land use ordinances. But in practice the English plans are drawn sufficiently loosely to give local authorities a large measure of discretion, and the American ordinances are usually drawn sufficiently tightly to assure that any major development proposal in a newly-developing area will require an amendment to the ordinances, which under the law of most American states is treated as a discretionary legislative action. Thus in both countries the development process involves a highly discretionary approval or disapproval of a development proposal by local authorities.

What can the aggrieved applicant do if he is denied "planning permission" (as local approval is called in


8. Of course in the United States there are some communities which employ no regulatory ordinances or which use only very loose regulations, but the practice of "wait-and-see" zoning herein described is the typical one in this country.
269.

England? Under the English system of government the courts have no power to declare an act of parliament void or unconstitutional. Nevertheless, the English courts have used their powers of statutory construction to support the principle that compulsory acquisition requires full compensation: 

"It is a well-established principle that, unless no other interpretation is possible, justice requires that statutes should not be construed to enable the land of a particular individual to be confiscated without payment."  

Parliament has specified certain situations in which a landowner may obtain compensation for a land use restriction by serving of a "purchase notice" requiring the purchase of his land by the local authorities. A purchase notice must be confirmed by the Secretary of State for the Environment before it is enforcible. The Secretary may, in lieu of confirming the purchase notice, grant the requested permission to develop, or grant permission for other development. In general, if the Secretary decides to confirm a purchase notice, he must find first:

(a) the land is incapable of reasonably beneficial use in its existing state; and,

(b) that the land cannot be rendered capable of reasonably beneficial use by the carrying out of any other development for which permission either has

11. The national government bears all or part of the cost whenever it decides to do so.
been granted or has been undertaken to be granted either by the local planning authority or by the Secretary.

Thus, the owner must demonstrate the uselessness of his land in its existing state, wholly apart from any potential value for development which it may have.

The Town and Country Planning Act contains a number of detailed provisions setting forth whether compensation need be paid in given situations. Thus, for example, compensation is often required when a permit is granted and then later revoked. On the other hand many detailed rules forbid the payment of compensation if, for example, development is prohibited because of a danger of flooding or because of lack of water supplies or sewerage services:

Compensation . . . shall not be payable in respect of the refusal of permission to develop land, if the reason or one of the reasons stated for the refusal is that development of the kind proposed would be premature by reference to . . .

(a) the order of priority (if any) indicated in the development plan for the area in which the land is situated for development in that area; [or]

(b) any existing deficiency in the provision of water supplies or sewerage services, and the period within which any such deficiency may reasonably be expected to be made good;

13. Id., at Section 180.
15. Id., at Section 164.
Compensation . . . shall not be payable . . . if the land is unsuitable for the proposed development on account of its liability to flooding or to subsidence.

Thus by establishing an order of priority of development in the development plan for the area the payment of compensation may be avoided.

Nor is compensation payable because a landowner is unable to obtain permission for the type of development or the density, design, lay-out, or type of buildings he wants to construct:

Compensation under this Part of this Act shall not be payable --

(a) in respect of the refusal of planning permission for any development which consists of or includes the making of any material change in the use of any buildings or other land; or

(b) in respect of any decision made on an application in pursuance of regulations under Section 63 of this Act for consent to the display of advertisements.

Compensation under this Part of this Act shall not be payable in respect of the imposition, on the granting of planning permission to develop land, of any condition relating to --

(a) the number or disposition of buildings on any land;

16. *Id.*, at Section 147 (4) and (5).
(b) the dimensions, design, structure or external appearance of any building, or the materials to be used in its construction;

(c) the manner in which any land is to be laid out for the purposes of the development, including the provision of facilities for the parking, loading, unloading or fueling of vehicles on the land;

(d) the use of any buildings or other land; or

(e) the location or design of any means of access to a highway, or the materials to be used in the construction of any such means of access.

Decisions by the Secretary in purchase notice cases are rendered only after an administrative hearing. Some very recent administrative decisions will illustrate the operation of the system. In the first, the Secretary of State for the Environment reluctantly confirmed a purchase notice upon finding that the land in question was incapable of reasonably beneficial use. The site was partly open, but no one appeared interested in any agricultural use. The owners sought to build a warehouse and office building, and planning permission had been denied.

The Secretary concluded that "open storage," one of the few uses the local authority was willing to permit, would generate little or no value because of the lack of demand. Similarly he found no demand for the land for agricultural purposes. He then concluded that the site was incapable of reasonably beneficial use in its existing state. After summarizing his reasons for

17. _Id._, at Section 147 (1) and (2).
18. _Id._, at Section 182.
finding the site unsuitable for commercial or residential use, he concluded there was no suitable use, and confirmed the purchase notice. 19/

In a second case, a purchase notice was served with respect to three parcels of land near an agricultural estate after permission to build 11 houses was denied. The parcels had buildings, foundations and loose brick scattered on them so that the inspector was constrained to report that at least one parcel "might be of a lower agricultural quality for a few years to come." Nevertheless, the Secretary recommended that the purchase notice not be confirmed because the three parcels could be effectively utilized for agricultural purposes in connection with the agriculturally-utilized estate lands adjacent. This agricultural potential was regarded as sufficient to be reasonably beneficial. 20/

Another recent case involved property in a housing subdivision in which the owner served a purchase notice with respect to land which comprised the major portion of a former clay pit filled during the early 1960's to within a few feet of the general level of the surrounding development, also owned by the owner of the subject property. It was still rough, unlevelled and, in part, water-logged and, in the words of an inspector "... in its existing state is incapable of reasonably beneficial use to the owners." The same inspector felt that planning permission ought not to be granted for residential development, and further, that the land would have been capable of reasonably beneficial use if the owners had developed it as a landscaped tract for open space in accordance with a condition attached to a planning permission with respect to the whole estate, granted at an earlier date. But the Secretary held that even if that earlier condition would have been fulfilled, the land would not be capable of reasonably beneficial use under

the statute, and confirmed the purchase notice. 21/

In another example, a purchase notice was confirmed on land occupied by unsafe buildings, holding that an income of $35.00 a month on such property demonstrated no reasonably beneficial use, in its existing state, and that all other possible uses involved such great expenditures for repair (including the use for which planning permission was refused) that the property could not be rendered capable of reasonably beneficial use.

22/

Sometimes the Secretary directs that the request for planning permission be granted in lieu of confirming a purchase notice. In one such case the subject property was originally planned for open space so the local authority denied planning permission. 23/ However, the local council was in the process of acquiring a similar site for such purposes. This and other circumstances convinced the government to grant permission for residential development rather than confirm the purchase notice.

24/

Appeals to the courts have upheld the government's position that property need not be purchased merely because it will lose value due to denial of planning permission. In R. v. Minister of Housing and Local Government 25/ after an applicant had failed to obtain planning

23. No doubt in most cases the landowner serving the purchase notice hopes for this result, just as American landowners do when they seek to upset local zoning decisions. See Donald G. Hagman, "Planning (Condemnation) Blight, Participation and Just Compensation: Anglo-American Comparisons," 4 Urban Lawyer, 434, 435 n.7.
25. 2 ALL E. R. 407 (1960). Note that the suit was against the "Minister" -- of Housing and Local Government, whole references have been to the "Secretary" -- of State, for Environment. In 1970 a reorganization combined the responsibilities of several Ministers whose activities had considerable impact on the environment, such as the Ministry of Highways and the Ministry of Housing and Local Government, into one Department of the Environment, headed by a Secretary. Most of the previous examples cited are post-1970 and hence the appropriate governmental official was the Secretary of the State for the Environment.
permission to put 60 - 70 caravans or bungalows on a site used to locate 20 - 30 caravans, he served a purchase notice alleging, inter alia, the loss of double value on his land. The Court upheld the Minister in refusing to confirm the purchase notice.

What practical effect does this English system have on the land development process? To answer this question, we asked a number of England's more prominent property developers what they thought of their land use control system, what were its chief drawbacks, and how it affected the property which their companies proposed to develop. While each developer has his own views there were certain common conclusions with which nearly all agreed.

26. Richard Coopman, Director, London and Overseas Property and Investment Company, Ltd. (The Company is principally a developer of commercial and office property); B. D. East, Chairman and Managing Director, and W. Wade, Director (and Barrister) of Town and City Properties, Limited (the company engages primarily in office and commercial development); Stanley Ferrada, Director, the Hammerson Property and Investment Trust Limited (the company develops primarily office and commercial properties); Michael Fenton-Jones, Director, Commercial Union Properties, Limited (the company engages primarily in commercial office development); Nigel Mobbs, Managing Director, Slough Estates, Limited (the company engages primarily in industrial development, with some commercial development); R. I. Northen, Executive Director for Development, Capital and Counties Property Company Limited (the company develops primarily office and other commercial properties); M. F. Sanderson, Managing Director, Bovis Limited (the company engages in residential development); J. J. Walker, Managing Director, English and Continental Properties Company, Ltd. (the company develops principally commercial and office property, with some residential). Also interviewed was Mr. T. J. Nardecchia, one of the best-known chartered surveyors in London, and partner in the prestigious firm of Montagu Evans & Sons. Mr. Nardecchia's profession often performs the function of consulting and guiding development proposals which falls to lawyers and consultant planners in the United States.
By far the most uniform agreement came with respect to compensation and its place in the development of land. None of the developers considered the limited availability of compensation for planning law restrictions a detriment to land development. Most of the developers agreed with Fenton-Jones — that if property had been purchased for development without planning permission, that would most certainly have been reflected in the purchase price, and if not, then "someone has not done his homework."

There was also uniform agreement with respect to the most important area of receiving compensation relating to a land use restriction — the situation in which a local authority revokes a planning permission. Most of the developers agreed with Nigel Mobbs that they would certainly at least threaten to seek compensation under this circumstance, always hoping the local authority would reconsider the revocation. 27/

Next in order of importance came the purchase notice. All confirmed it was rarely used. Some — like Nigel Mobbs — could not recall a precise instance when they had served a purchase notice and carried the procedures through to conclusion. Usually the local authority would at some point either further modify the conditions under which the planning permission was granted, or if permission had been actually refused, relent and grant a modified permission of some sort. As R. I. Northen and Richard Coopman pointed out, most disputes between local authorities and property developers involve densities, design, and amenity features like the preservation of trees. Very few disputes in the above category would actually give rise to a situation in which an owner-developer could allege that conditions imposed would amount to rendering the subject property "incapable of reasonable beneficial use in its existing state." 28/

27. In the United States such cases are often treated under the category of "vested rights" or "estoppel" and do not reach the taking issue.

28. Another area of unanimous agreement came with respect to compensation still payable under the unexpended balance of 400 million pound fund created by the 1947 Town and Country Planning Act. As Barry East explained, one would be made aware of any such unexpended balance, usually as a matter of course from reports on property upon which one contemplated development, but no one
As indicated above, the practice appears to be to reach a settlement with the local authority that refuses or harshly-conditions a planning permission, even if the result of the local authority creates a purchase-notice situation. Local authorities, according to R. I. Northen, don't like to pay out money for either the compulsory acquisition of property under the purchase-notice procedures or the paying of compensation for the revocation of a previously-granted permission.

This is not to say that there are not circumstances warranting approvals, though. Nigel Mobbs recounts a situation in the town of Slough in which his company sought planning permission to develop 19 sites which the city showed as car parks on its development plan. As soon as planning permission was sought, the Minister "called in" the case and granted permission on 14 of the 19. The company then served a purchase notice with respect to the other five and an inspector from the central government agreed that they were incapable of reasonably beneficial use in their existing state. Rather than pay for all five, the city compromised and granted planning permission for development on three of the five. The company used the remaining two for car parks.

All the developers agreed the English system of land use regulation was basically good. Some thought it was the best in the world, while freely admitting it was easier for them to proceed elsewhere -- like Australia. 29/ This is not to say the developers themselves found

ever made a decision to purchase or develop land based upon the existence (or lack of it) of such balance. In fact, it was rarely worth the effort to go through the procedures for making a claim on the fund.

29. Interestingly enough, the harshest criticism of the system as a whole came from T. J. Nardecchia who considers the whole system both out-of-date and cumbersome: "What is urgently needed is a simplified system of releasing land for housing purposes, and this must be preceded by the infrastructure. You do not release land by drawing lines on a map. You need sewers and other types of public services."
the system faultless. While not all experienced the frustration of the Hammerson Group in Salisbury as reported by Mr. Ferrada -- 8 years of negotiations after a refusal, and a lost appeal, only to have virtually the same plan approved as initially submitted -- the experience of Richard Coopman appears to be typical. His company sought and was denied planning permission to develop an office center near Oxford, thereby reducing the value of the site from 200,000 pounds to 50,000 pounds. Coopman does not so much resent the decision -- indeed he admits the traffic effect on Oxford would be considerable -- but upon taking an appeal to the central government at a cost of 35,000 pounds, he reports it took fifteen months to obtain a decision: J. J. Walker figures that even on a relatively simple appeal from a local authority decision it will take six months to a year to get a hearing before an inspector, an additional six months to a year to get a decision.

Another common complaint is the competence and authority of local planning officers. While negotiations must first be carried out with these staff people, the decision is ultimately made by the planning committee of the local authority. J. J. Walker reported an instance where after spending eight months working out differences with respect to a development with the local planning staff, he was turned down cold by the committee anyway. Messrs. East and Wade agreed that the ability of a local planning officer to "carry his committee" was often in doubt. Moreover, according to Sanderson, sometimes the local planner himself is technically incompetent or inarticulate, particularly if the local pay scale is too low to attract good men.

Often, the developers agreed, the problems resulted from the obstinacy or incompetence of the people sitting on the local committee. As M. F. Sancerson of Bovis put it:

"The Planning Committee will often fail to examine the site of a proposed development until after all the work has been done on a plan. Then it will go out and chalk-mark trees that absolutely must be preserved."
But on the whole, we were left with the distinct impression that the developer was pleased with what appears to all intents and purposes to be a very restrictive system. Why? We wondered if there were more to the development story, so we also talked with a number of England's more prominent and/or experienced planning officers and conservationists. 30/

First of all, the planners agreed that there is virtually no practical method of obtaining compensation for a denial of planning permission other than the serving of a purchase notice; and if this was a relatively minor consideration for the developer, it appears to be of even less importance to the local authority -- especially in the major urban regions. Thus, while Liverpool, a city of about 600,000 people, may be served with approximately two hundred purchase notices per year (most of which are pursued to a conclusion -- usually confirmed) causing an annual outlay of between 1.25 and 2.50 million dollars, this is a very small portion -- .6% to 1.3% -- of the city's 187.5 million dollar budget.31/

30. Ian Campbell, Secretary, Commons, Open Spaces and Footpaths Preservation Society; Graham Ashworth, Director of the Civic Trust for the Northwest, President-Elect of the Royal Town Planning Institute and Professor of Urban Studies, University of Salford; Dennis Browne, Director of Development, London Borough of Hammersmith; Sir Desmond Heap, Controller and City Solicitor, London, and President of the Law Society; F. J. C. Amos, City Planning Officer, Liverpool, and past President of the Royal Town Planning Institute; Alfred Wood, County Planning Officer, Worcestershire, and former City Planning Officer, Norwich; David Hall, Director, Town and Country Planning Association.

31. Moreover, according to Amos, nearly half are "invited" purchase notices, in order to facilitate the acquisition of land by Liverpool. The price paid for the land may be determined by a "district valuer" while the city may have little to say about how he will fix the value, it does usually serve a certificate of alternative use what the land would be used for if the city were to grant planning permission -- and the valuer generally works from this basis.
The situation is apparently different in smaller urban areas, such as Norwich (population less than 50,000), which was successfully served with but a single purchase notice between 1967 and 1972, and that one cost the city a mere $10,000. Again, the payment of such compensation could hardly be called a problem for the local authority.

A unique situation appears to arise in London itself. Due to skyrocketing land values in the London area it is so difficult to carry the burden of demonstrating that denial of planning permission renders land incapable of reasonably beneficial use in its existing state that in the Borough of Hammersmith, near central London, for example, not a single purchase notice has been successfully served in the past 2-1/2 years.

Similarly, it would seem that under most circumstances, all agreed the developer's only "lever" with the municipality is a threatened appeal to the Secretary of State for the Environment or the serving of a purchase notice (which must be confirmed by that Secretary) should the local authority deny planning permission for development. But this is time consuming and costly. 32/ In fact, the developer will usually attempt to ascertain what the sticky points are from the local planning officer before formally seeking planning permission - though sometimes it is not until after it is denied that he is taken aside and wised up, as it were. A possible exception to the lack of levers may occur when the developer is in partnership with the local authority to develop a city center. As the local authority clearly desires development at that point, the developer starts with the toughest part of his battle over. 33/ It is worth noting generally at this point that land use designations on a development plan are a good deal less

32. In some situations there is one other lever, when land is "blighted" with undesirable structures, a developer will often offer to clear them away for some concessions on permitted development.

33. Indeed, it has been suggested perhaps the average citizen is not best served by such partnerships as the relationship between the local authority and the developer becomes considerably less than arms-length.
281.

precise than on an American Zoning map. Land may very well be designated "commercial" in such plans, but whether that means it is suitable for, say, hotels or not is another matter, and merely because a local authority desires planning permission for some specific, admittedly commercial use on land so designated will not assure a developer of a successful appeal to the Secretary.

Of considerable interest is the changing pattern of development in green belt land. Long a sacred preserve of open space constituting as much a hedge against future development than the much-vaunted "green lung" for the cities, England's green belts are under fresh assault -- principally because of recent actions by, of all people, the central government which saw to their creation in the first place.

Previously, even the addition of more than a house or two to an existing settlement or the construction of agricultural buildings was the best for which a land-owner could hope. Not that the developers didn't try -- for the rewards could be enormous as the land could be optioned cheaply because the chance of success was so remote. Standard developers' arguments included: (1) there is a shortage of housing (especially in London and the southeast); (2) there is high unemployment (especially in the southeast and north); (3) this land is "gray" -- more or less derelict and not really green; (4) this land is on the edge of urban development; (5) we must exploit existing utility facilities; (6) development will increase the tax base thereby enabling the local authority to upgrade the quality of life for its citizens.

34. David Hall of the Town and Country Planning Association offers ready responses to many of these: there will always be an "edge" of other development somewhere; yes, there is a need for more housing but the whole point of comprehensive planning is to decide where they ought best to be put -- presumably the decision was made not to situate it on green belt land; to call land "gray" begs the question. Ian Campbell further suggests that jobs are often ephemeral; there is work while construction is going on, but often not thereafter. He cites an example from a North Sea development project which was supposed to provide 200-300 jobs in a town with 40% unemployment. But once the construction was finished,
Until recently the applications for development were regularly turned down, and the Department of Environment could be counted upon to back up decisions. Even when the local government unit was won over by hard lobbying, in most rural areas the planning authority over green belt land was in the hands of the County planning authority, which was generally not subject to such pressure.

The prospects for development in the green belt brightened considerably in April of 1973 with the publication by the central government of a "white paper" on housing advocating the release of 2000 acres for housing in the London green belt alone. As it is that central government, via the Secretary of State for Environment, to which appeals are made from local planning decisions, the implication is clear. It is widely expected that many local authorities in the southeast will immediately begin releasing land for residential development in the southeast of England.

Undoubtedly a system of statutory standards for compensation adapted to United States needs would differ in many major respects from the current English model. Nevertheless, the English example provides encouraging grounds for experimenting with statutory criteria for defining cases in which compensation should be paid. As the Task Force on Land Use and Urban Growth recently pointed out:

the facility employed exactly 9 men -- on three shifts -- largely as button-pushers.

But there are exceptions. Thus in County Kent in the London green belt, a developer successfully sought planning permission to create a "new village" for 6000 people. Unfortunately -- or fortunately, depending on your viewpoint -- the developers of "New Ash Green" went bankrupt before their project was sufficiently under way.


Id., at para. 16, p. 5.

Mandelker, supra, 49 Cal. L. Rev. 699, 740. e.g., Professor Mandelker notes general difficulties, few of which have been cured by time.
"It is this system of land-use controls that has enabled the English to preserve large amounts of open space in metropolitan greenbelts and in open country without paying compensation." 39/

Moreover, the standard of "no reasonably beneficial use" that appears in the English system might provide a workable starting point for any such program. 40/

40. In addition, it is possible that American courts could examine the English precedents and reach somewhat similar results through statutory interpretation.
A basic change in the law, either through new court interpretations or new statutes, would fortify the government's position in taking cases. But even under existing law much can be accomplished by basing legislation on persuasive scientific evidence and drafting it with the earlier interpretations of the taking clause in mind.

The complexity of the evidentiary issues and the legal techniques defy simplification, and a few examples must suffice. The brevity with which these issues are summarized should not cause an underestimation of the importance of these questions.

1. The Importance of Evidence

Facts are of paramount importance in any litigation. They are particularly important when the legal issue is as diffuse as the balancing test that has been Justice Holmes' legacy to us, "... a pragmatic, case-by-case resolution of the policy-conflict which he perceived to lie at the heart of the problem -- the conflict between public need and private loss." 1/

Our modern concept of the proper way to deal with cases involving complex factual issues was pioneered by the dissenter in Pennsylvania Coal, Justice Brandeis. Before he was nominated to the bench, Louis Brandeis was already one of the most famous attorneys of the early Twentieth Century. As a Boston lawyer he succeeded in convincing previously hostile courts to uphold the pioneering social legislation of the day. He presented the factual evidence of the working conditions in sweatshops and mines so clearly and convincingly that the courts for the first time upheld legislative limitations on hours of labor.

The technique of obtaining judicial approval of social legislation through a detailed and carefully prepared factual presentation became so widely emulated that it still bears the name of "the Brandeis brief." The analogy between the social legislation of Brandeis' day and today's environmental legislation is sufficiently significant that it seems appropriate to quote briefly the description of Brandeis' first brief to the Supreme Court by his biographer Thomas Mason:

"Brandeis then outlined the material needed for his brief. The legal part he would himself cover in a few pages. For the economic and social data showing the evil of long hours and the possible benefits from legislative limitation, he would look to his sister-in-law. It was on these materials, not on the legal argument, that he would base his case. 2/

Reliance on facts rather than traditional precedents was a new technique:

"This was a bold innovation. No one knew whether or not the Court would notice a brief so unconventional. But, Brandeis noted, in all the cases in which social legislation had been set aside, the judges, by recourse to abstract logic, had confidently denied any 'reasonable' relation between the legislation and the stated objective of improved public health. Sometimes the Court more modestly suggested that if any such 'reasonable' relation did exist, it had not in fact been shown. The inference was, therefore, that if the reasonable relation could be proved, the Court would be forced

to accept it. So far no lawyer had dared to furnish the requisite social and economic statistics, to demonstrate this 'reasonable' relation. No lawyer had confidence in his ability to make the judges see the 'reasonable' relation, whether they wanted to see it or not. That is, no lawyer had this confidence in the judges or in himself -- except Brandeis . . .

Brandeis' brief-making enormously extended the bounds of common knowledge and compelled the Court to 'take judicial notice' of this extension. In the Muller brief only two scant pages were given to conventional legal arguments. Over one hundred pages were devoted to the new kind of evidence drawn from hundreds of reports, both domestic and foreign, of committees, statistical bureaus, commissioners of hygiene, and factory inspectors -- all proving that long hours are as a matter of fact dangerous to women's health, safety and morals, that short hours result in social and economic benefits. . . ." 3/

In the case of Muller v. Oregon, 4/ the Court upheld the ten hour law for women, relying heavily on Brandeis' brief, and spawned a whole new style of constitutional litigation.

"Here for the first time the Supreme Court was recognizing the need for facts to establish the reasonableness or unreasonableness of social legislation. For the time being the Court had rejected its own freedom-of-contract fiction as regards working women. Brandeis

3. Id., at 249.
followed up this advantage immediately. After the Muller case he appeared for oral argument in defense of other labor laws and sent briefs to some fourteen different courts."

America now stands at a similar point in its history with regard to environmental legislation as it stood with regard to social legislation at the time of Louis Brandeis. Our knowledge of the social, economic and environmental relationships of various uses of land has become increasingly sophisticated and complex, but unless this knowledge is brought to the attention of courts and legislatures they will make decisions on the basis of outmoded concepts dating from a simpler age. Does the proposed development look like other development in the area? Does it have any resemblance to the types of land use that have been considered to be "nuisances" since the early days of the common law? These traditional tests seem just as inadequate to resolve complex ecological questions as the Supreme Court's "freedom-of-contract fiction" was inadequate to resolve the Muller case. But unless the courts are presented with sound factual evidence supporting the need for land use regulations it is these ancient tests that are likely to prevail.

Many of the recent cases in which environmental regulations have been upheld demonstrate the value of careful evidentiary preparation. Thus, for example, in Potomac Sand and Gravel Co., v. Governor of Maryland, the Court summarized extensively the state's evidence regarding the biological condition of the wetlands in question and the ecological advantages of their preservation.

Mattawoman Creek is one of ten main spawning streams supporting anadromous fish in the drainage sys-

tem of the Potomac River. It is one of the finest freshwater marshes in the Upper Potomac Estuary, and is the only area along the Maryland shores where the rare native lotus (water lily) and [zizania aquatica] (wild rice) are to be found. Its aquatic plants act as a rinsing agent by absorbing and using in their biological process pollutants, suspended dirt particles, and other inorganic materials that, in excessive amounts, cause conditions of aquatic overfertilization. The vegetation is an important source of dissolved oxygen, food, and protection necessary for anadromous fish which utilize the marshes for resting and spawning each spring.

Mattawoman Creek is a spawning area for yellow perch, white perch, striped bass and herring; in addition, sunfish, pike, shad, and catfish can be found there. It is also a habitat for the bald eagle, black duck, mallard duck, deer, rabbit, mink, otter, beaver, and has one of the larger wood duck roosts. 7/

Contrast on the other hand the case of Sturdy Homes Inc., v. Township of Redford, 8/ where the Court refused to uphold a flood plain zoning ordinance because the town had failed to prove that the land was subject to flooding:

"It is uncontested that the plaintiff's land has never flooded . . . The claims of the defendant are, essentially, merely that nearby

7. 293 A. 2d at 243-244.
areas flood . . . The danger to plaintiff's property is not so great as to justify a zoning ordinance which deprives that plaintiff of any use of his property."

Or consider the case of Spiegle v. Borough of Beach Haven 10/ where the New Jersey Supreme Court approved a beach set-back regulation, citing at length the careful documentation of the hazards to safety as demonstrated by the town's engineering evidence.

"The borough, on the other hand, adduced unrebutted proof that it would be unsafe to construct houses oceanward of the building line (apparently the only use to which lands similarly located in defendant municipality have been put), because of the possibility that they would be destroyed during a severe storm -- a result which occurred during the storm of March, 1962. Additionally, defendant submitted proof that there was great peril to life and health arising through the likely destruction of streets, sewer, water and gas mains, and electric power lines in the proscribed area in an ordinary storm. The gist of this testimony was that such regulation prescribed only such conduct as good husbandry would dictate that plaintiffs should themselves impose on the use of their own lands. Consequently, we find that plaintiffs did not sustain the burden of proving that the ordinance resulted in a taking of any beneficial economic use of their lands."

9. 186 N.W. 2d at 46.
11. 218 A. 2d at 137.
Compare, on the other hand, the case of Lyon Sand and Gravel Co., v. Town of Oakland, 12/ where the landowner's extensive evidence about the economic value of the gravel and its need for various construction purposes outweighed the township's failure to present any significant planning evidence.

The importance of a sound factual presentation is apparent in the urban context as well. The town of Ramapo, on the outskirts of the New York Metropolitan area, successfully defended a growth control ordinance before New York's highest court with success due in no small part to a thorough presentation of their case. In their defense they had to rebut contentions based on a number of recent cases exhibiting hostility and sharp judicial criticism of similar controls in other communities.

The town was able to present a vast array of planning data in their defense. In its statement of the facts in Golden v. Planning Board of the Town of Ramapo, 13/ the Court of Appeals pointed to the Town Master Plan, whose "preparation included a four volume study of the existing land uses, public facilities, transportation, industry and commerce housing needs, and projected population trends. * * * Additional sewage district and drainage studies were undertaken which culminated in the adoption of a Capital Budget... ." 14/ Thus, not only could the town rely upon a large number of formal municipal actions, adoption of a Master Plan, a Capital Budget, zoning and subdivision ordinances and the like, but they could also document each with thorough and detailed planning studies.

This impressive detail allowed the Court to open its consideration of legal issues on the premises that:

"The undisputed effect of these integrated efforts in land use plan-

ning and development is to provide an overall program of orderly growth and adequate facilities through a sequential development policy commensurate with progressing availability and capacity of public facilities."

Thus the Court could at the outset of its discussion of the taking issue, term the program reasonable, "both in its inception and its implementation." 16/

They reached these preliminary conclusions in spite of a number of cases from the late 1950's and 1960's displaying great judicial hostility towards exclusionary regulations. National Land Investment Co. v. Kohn, 17/ is representative, where the Court held:

"Zoning is a means by which a governmental body can plan for the future -- it may not be used as a means to deny the future . . . Zoning provisions may not be used . . . to avoid the increased responsibilities and economic burdens which time and economic growth bring." 18/

The town of Ramapo, however, gave the Court a surplusage of facts to deal with such arguments relating to improper public purposes. Turning to the narrower taking issue, the Court gave it rather summary treatment. Although the growth phasing program could block development for as long as eighteen years for some land, the Court noted that:

"The hardship of holding unproductive property for some time might

15. 285 N.E. 2d at 296.
18. 215 A. 2d at 610.
be compensated for by the ultimate benefit insuring to the individual owner in the form of a substantial increase in valuation; or, for that matter, the landowner might be compelled to chafe under the temporary restriction, without the benefit of such compensation, when the burden serves to promote the public good."

Ramapo had extensively documented its position on both issues from the outset of its growth control program, a fact which was not lost before the Court of Appeals.

As emphasized in Chapter 13, the analytical framework suggested by Professors Sax and Dunham suggests that the government emphasize facts showing that harm to public rights or interests would result from the use being prohibited. But one need not depend on any particular analytical approach to recognize the importance of factual preparation in environmental cases. Anyone reading a few cases might well conclude that courts are deciding cases under the taking clause by a very simple sense of equity. They examine how much value the regulation appears to have, and how much harm it causes the plaintiff, and then they either say it is all right or it isn't. As Professor Van Alstyne puts it:

"With some exceptions the decisional law is largely characterized by confusing and incompatible results, often explained in conclusionary terminology, circular reasoning, and empty rhetoric [usually accompanied] by the frequently reiterated judicial declaration that each case must be decided on its own facts." 19/

The absence of clear theoretical guidelines makes the facts become much more important than the law. What goes into the balance is more important than the process of balancing. Both in drafting and defending land use regulations careful factual preparation is called for.

The Task Force on Land Use and Urban Growth recently made a number of important recommendations to governmental agencies regarding the development of factual data:

Extensive case preparation is necessary to demonstrate the constitutional validity and public benefit of land-use regulations. To facilitate that preparation, the trend toward "environmental divisions" within the offices of state attorneys general and county and municipal attorneys should continue, and attorneys in those divisions should be urged to devote a substantial share of their efforts to land-use regulation.

Existing non-profit organizations should be supported and appropriate additional organizations established that will provide government attorneys with the expert testimony, research assistance, and skilled tactical advice needed to prepare for important land-use cases.

For the private landowner similar advise is appropriate. Fewer and fewer cases are going to be decided by emotional appeals to the myth of the taking clause. More and more are going to depend on highly complex factual issues that may involve a number of scientific disciplines. The side which best masters the facts is likely to succeed.

2. The Need for Careful Draftsmanship

The cases discussed in the earlier chapters of this book provide many examples of regulations that stood or fell largely on the basis of the quality of their draftsmanship. The need for careful drafting seems so obvious that it need not be belabored. A few examples will suffice.

Obviously, the more that a landowner is allowed to make use of his property the less he is likely to raise a taking issue. The careful draftsman will search diligently to insure that the regulations permit as much development as can be allowed consistent with the purpose of the regulation. If strict performance standards are applied to the use of land the careful draftsman often finds that many more types of development could be permitted than an initial reaction might have suggested.

Professor Daniel Wilkes argues that even a salt marsh -- typically thought of as usable only if filled -- may be able to generate economic gain through a variety of "harmless" uses:

Illustrative of activities which might be offered to establish the economic "rent" value of a marsh or of a restricted coastal area of scenic beauty are: (1) Permission for biology class use on field trips on payment by a school district of an annual fee, perhaps set by proof of school expenses incurred in trips to museums with adequate substitute experiences; (2) entrance fees for tourist access to walkways built over the marsh, as has been done at the Cornell Bird Sanctuary in Ithaca, New York; (3) value of marshes already acquired for sanctuary purposes to ensure migratory birds for hunting citizens in terms of what citizen groups would have to pay
alternatively to "import" a like number of birds to substitute for the marsh-feeding population; (4) access fees across marshes to non-motored boat marinas beyond the marsh; (5) rental of a marsh to commercial scientific laboratories for controlled study under unique conditions; (6) rent value for movie and television site locations; (7) reasonable fees which local fishermen might find economical to pay for marsh enrichment through sprat seeding, nursing, or hatching of new species, imported larvae, or the like; and, (8) commercial value of the marsh as an adjunct to borderlands whose lot values are enhanced by unobstructed marsh views. 21/

Lest this argument seem far-fetched, consider the uses permitted in the Marinette County shoreland protection ordinance challenged in Just v. Marinette County: 22/

"3.41 Permitted Uses.

(1) Harvesting of any wild crop such as marsh hay, ferns, moss, wild rice, berries, tree fruits and tree seeds.

(2) Sustained yield forestry subject to the provisions of Section 5.0 relating to removal of shore cover.

22. 56 Wis. 2d 7, 201 N.W. 2d 761 (1972).
(3) Utilities such as, but not restricted to, telephone, telegraph and power transmission lines.

(4) Hunting, fishing, preservation of scenic, historic and scientific areas and wildlife preserves.

(5) Non-resident buildings used solely in conjunction with raising water fowl, minnows, and other similar lowland animals, fowl or fish.

(6) Hiking trails and bridle paths.

(7) Accessory Uses.

(8) Signs, subject to the restriction of Section 2.0.

"3.42 Conditional Uses.

The following uses are permitted upon issuance of a Conditional Use Permit as provided in Section 9.0 and issuance of a Department of Resource Development permit where required by Section 30.11, 30.12, 30.19, 30.195 and 31.05 of the Wisconsin Statutes.

(1) General farming provided farm animals shall be kept one hundred feet from any non-farm residence.

(2) Dams, power plants, flowages and ponds.

(3) Relocation of any water course.

(4) Filling, drainage or dredging of wetlands according to the provisions of Section 5.0 of this Ordinance.
(5) Removal of top soil or peat.

(6) Cranberry bogs.

(7) Piers, docks, boathouses."

The plaintiff applied for a conditional use permit to fill his land under §3.42 (4) but was refused. On appeal the court found the other uses permitted under the ordinance to be sufficient to avoid unconstitutionality.

In contrast, consider the attitude of the Supreme Court of New Jersey toward a similar attempt to draft a list of permitted uses for wetlands in a township in that state:

In addition, it will be noted that many of the previously listed permitted uses in the zone are public or quasi-public in nature, rather than of the type available to the ordinary private landowner as a reasonable means of obtaining a return from his property, i.e., outdoor recreational uses to be operated only by some governmental unit, conservation uses and activities, township sewage treatment plants and water facilities and public utility transmission lines, substations and radio and television transmitting stations and towers. All in all, about the only practical use which can be made of property in the zone is a hunting or fishing preserve or a wildlife sanctuary, none of which can be considered productive.

* * *

23. 201 N.W. 2d at 765.
It is equally obvious from the proofs, and legally of the highest significance, that the main purpose of enacting regulations with the practical effect of retaining the meadows in their natural state was for a public benefit.

* * *

This prime public, rather than private utilization can be clearly implied from the purpose sections of the zone regulations previously quoted. And it is established beyond any question by the testimony of the township's own witnesses.

Enumeration of permitted uses is not the only avenue in which draftsmanship plays a part. State and local regulations trying to preserve historic landmarks are often vulnerable to a number of constitutional attacks, including the taking issue. Careful draftsmanship may significantly aid in court presentation of arguments exploring the purposes and effect of such land use regulation and rebutting these arguments.

In 1966 old Metropolitan Opera House was vacated after 83 years of use by the Metropolitan Opera Association due to the Association's move to new facilities in Lincoln Center. On May 10, 1966, a new tenant obtained possession of the property and on May 16 it filed an application for a permit to demolish the building.

On the same day the application for a demolition permit was received, the state legislature adopted a statute creating a corporation to acquire the building for the "recreational and cultural needs of the citizens of this state." The corporation held the power of eminent domain and could request a 180 day delay in issuance of demolition certificates.

Some six weeks later the Governor approved the statute and in August the corporation posted a two hundred thousand dollar bond to cover any damages the new tenant might suffer during the 180 day delay. The legislature left the new corporation to rely on its own resources (the good will of the people of New York) as a source of funds for the acquisition of the building.

Shortly after the Governor approved the "preservation" measure, the new tenant, Keystone Associates, Inc., began an action to compel the issuance of the demolition certificate and declare the statute unconstitutional as an uncompensated "taking" of property. Winning in both the lower courts, Keystone presented their case to New York's highest court in December of 1966. 25/

The corporation argued that the six month delay (technically imposed by the city) was a reasonable exercise of the police power, and that even if there was a "taking," just compensation was provided.

The Court of Appeals was unimpressed. Looking to the statute as drafted, it noted:

"It seems perfectly clear that the purpose of this statute is the appropriation of the . . . property to a public use." 26/

The Court went on:

"The statute was clearly not intended to protect the public health, safety, and welfare, as those terms are understood."

Unable to find a determination of necessity of preservation for historic purposes, nor one indicating "a shortage of such auditoriums," the Court concluded that

the legislature had drawn a condemnation statute which did not provide just compensation.

"The statute here in questioning constituted an attempt to indulge those citizens -- among whom is included the writer of this opinion -- who desire the preservation of this grand old building for the staging of opera. However, that purpose may not be achieved by the appropriation of the property of other citizens. If dedication and use for a public purpose is desired, then just compensation must be paid, that is the command of our Constitution."

At the same time, the City of New York was beginning implementation of its landmarks Preservation law, an Act carefully drawn by the city to provide for designation and protection of New York City's principal historic landmarks and landmark districts. The statute prohibits changes in the exterior of buildings without a certificate of "no exterior effect" from the landmarks commission or proof that there is no economic use for the existing structure and includes a number of procedural protections for landmark owners. Contrast the reaction of the Appellate Division of one of the state's lower courts in 1968.

"We deem certain of the basic questions raised to be no longer arguable. In this category is the right, within power limitations, of the state to place restrictions on the use to be made by an owner of his own property for the cultural and aesthetic benefit of the community."

27. 278 N.Y.S. 2d at 190.
29. 288 N.Y.S. 2d at 315.
The Landmarks Preservation Commission had designated buildings owned by Sailor's Snug Harbor as landmarks. The sailors' organization operated the buildings as a home for seafaring men beyond the age of active duty. When challenged in the court proceeding the Commission convinced the court that the group of buildings was one of the two best examples of Greek Revival architecture in the country.

No conclusion was reached on the taking issue due to an absence of sufficient facts on which to base a judgment. As in the Moerdler case, the challenge had been brought at the onset of the administrative proceedings under the law. Unlike Moerdler, however, the Preservation Law survived. As noted in the first chapter, it is currently challenged as applied in one case, the Grand Central Terminal, but in the interim careful draftsmanship has smoothed the way for its implementation and acceptance in a number of other situations.

Throughout the cases discussed in Part III will be found many other examples where draftsmanship played a major part in achieving a favorable result, and vice versa.
CHAPTER 16
SIDESTEPPING THE TAKING ISSUE

The safest way to avoid the taking issue is to avoid using regulation as a means of enforcing strict limitations on the use of land. If the government obtains title to all land on which development is to be prohibited it can control development without ever raising the taking issue.

The government could obtain such a property interest in at least three ways: (1) by creating a system of compensable regulations under which the government compensates the regulated landowner; (2) by demonstrating a preexisting government property interest in the land; or (3) by buying all the land on which development is to be severely restricted.

1. Compensable Regulations

Systems of compensable regulations have often been discussed but rarely tried as a means of dealing with the taking issue. In substance, a system of compensable regulations is a means of validating land use regulations that are so restrictive that the courts would hold them to be a taking in the absence of compensation paid to the landowner. If enough compensation is paid to avoid the unconstitutionality then the regulation remains valid. In effect compensable regulations attempt to steer a middle course between regulation under the police power and taking under eminent domain. 1/

Under existing systems of land regulation the landowner challenges a regulation by seeking an injunction

against its enforcement or a declaration of its invalidity. If he succeeds the court permits him to undertake the development he proposes. If he fails the regulation is held valid. But traditional legal doctrines rarely allow the court to strike a middle ground by awarding the landowner such compensation as is necessary to prevent the regulation from being held unconstitutional. 2/

As an example, a community surrounding a military airfield wants to prevent intensive development of the land in the vicinity of the airfield, knowing that if intense development is permitted the complaints about noise and fear of accidents will create sufficient political pressure to persuade the government to shut down the airfield, thereby eliminating one of the major employers in the community. Based on an existing court decision, however, the community knows that an ordinance that restricted all land in the vicinity of the airport to low-density housing might be held invalid as a taking of property without just compensation.

Therefore, the community passes an ordinance restricting most of the land to low-density uses but providing an administrative procedure whereby claims can be filed alleging an unconstitutional taking. If a taking is proven the governments are responsible either to raise sufficient funds to compensate the landowner for the unconstitutional damage or to allow the proposed development to take place. Such a system of regulation is in effect in the Dayton, Ohio area in response to the earlier court decision in Hageman v. Trustees of Wayne Township. 3/

The tentative drafts of the American Law Institute's Model Land Development Code propose a system under which the local government could choose to pay compensation for any land use regulation held to be invalid as a taking. The proposed code provides that whenever a

regulation is challenged in court and the court finds that the regulation would constitute a taking in the absence of compensation, it may withhold relief until the local government has had an opportunity to provide compensation.

"If the complainant is a landowner challenging the validity of an order, rule or ordinance applicable to his land and if the court is satisfied that as applied to his land the order, rule or ordinance constitutes a taking of his property without just compensation, the court shall retain jurisdiction if it further determines that the limitation on development could be lawfully imposed if compensation were paid and request the local government to determine whether it wishes to institute proceedings . . . to pay compensation." 4

The proposed code goes on to authorize the local government to pay compensation whenever necessary to enable a regulation enacted for a valid purpose to remain effective. It may pay this compensation through the purchase or condemnation of a development right or other interest in the affected land, paying the landowner the value of the interest acquired:

A local government may, when reasonably necessary, acquire an interest in land to achieve the objectives of a state or local Land Development Plan or the objectives of permissible regulation under this Code including the following purposes:

4. Tentative Draft #3, American Law Institute Model Land Development Code, Section 9-111 (3). The drafts have been published for discussion purposes only and have not been approved by the ALI.
(1) To protect or improve environmental values including ecological balance;

(2) To preserve historical or archeological structures or sites;

(3) To minimize potential damage from floods, earthquakes, hurricanes or other natural disasters;

(4) To protect existing scenic or recreational values or to preserve open space;

(5) To facilitate the future construction of, or the continued usefulness of, needed public facilities.

Unlike programs of land acquisition which require large quantities of front money, programs of compensable regulation postpone payment until after the need for payment has been determined. And the earlier chapters of this book suggest that the need may be decreasing; Krasnowiecki and Strong observed the same trend ten years ago when they proposed a system of compensable regulations:

Most advocates of an approach through compensation point to the constitutional restraint upon the

5. Tentative Draft #5, American Law Institute Model Land Development Code, Section 4-205 (1973). In the commentary to the Model Code the draftsmen discussed the purposes behind their system: This code attempts to accomplish a merger of the purposes for which regulation and land acquisition can be used. The choice of whether to regulate or acquire land should be determined by a weighing of the equities in each case rather than by the arbitrary statutory limitations on existing powers of acquisition and regulation. This section grants a power of acquisition comparable in scope to the powers of regulation authorized by the Code. Id., at 21.
use of the police power: zoning and related controls, however reasonable and necessary, may not be carried to the point of a "taking" of private property without just compensation.

While the significance of this limitation should not be minimized, few are aware that the decisions of the courts show a remarkable elasticity in the concept of "taking." The more reasonable and necessary the regulation seems, the more willing have the courts shown themselves to permit the resulting loss in value to the property . . .

Given an urgent public need and procedures, including comprehensive planning, guaranteeing its rational expression, there is really no knowing what zoning controls the courts may approve.

Most systems of compensable regulation have assumed that compensation would be paid in the form of money. There has been increasing interest, however, in systems of "density transfer" which would provide compensation in the form of floating rights to a share in the profits from other property. Thus the owner of severely restricted wetlands might be entitled to a variance to obtain greater density on other property he owns.

Transfer systems create complex property relationships that require sophisticated mechanisms for implementation. To date their use has been limited but considerable experimentation is proceeding. A proposal by Professor Costonis of the University of Illinois Law School for a transfer system for historic preservation has attracted considerable attention.

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6. Krasnowiecki and Strong, supra, at 89.
In the early part of this century, when the taking clause was being given its broadest interpretation, there was substantial debate between those who thought comprehensive zoning could be enforced by the police power and those who thought it required eminent domain. The Supreme Court's decision in Village of Euclid v. Ambler Realty Co., settled the fact that local governments could validly impose most land use regulations without the payment of compensation, and compensation is now used only very rarely to supplement zoning regulations.

The Courts have occasionally chosen to award compensation without specific statutory authorization, particularly where it is apparent that invalidation of the regulation would have very serious effects beyond the boundary of the immediate land in question because


10. See, City of Kansas City v. Kindle, 446 S.W. 2d 807 (Mo. 1969); Anno. 41 A.L.R. 3d 636. The Congress has undertaken to provide compensation for billboard owners when the demolition of their signs is required under beautification regulations. See, The Federal-Aid Highway Act, 23 USCA Section 131 (g).

11. See, Bydlon v. United States, 175 F. Supp. 891 (Ct. Cl. 1959) (Compensation awarded to owners of fly-in resorts in the Minnesota National Forest whose businesses were destroyed by a federal prohibition of airplane landings in the forest); Lomarch Corp. v. Mayor of Englewood, 51 N.J. 108, 237 A. 2d 881 (1968) (Compensation awarded to owner of parcel of land which the municipality, acting under a state statute regulating subdivision planning, had reserved as park site and thereby prevented its development for one year); Petition of Clinton Water District of Island County, 36 Wash. 2d 284, 218 P. 2d 309 (1950) (Regulation by water district converting a lake into a reservoir and preventing swimming or boating held to constitute a taking of the riparian rights of the surrounding summer-home owners). See, F. P. Bossemann, Alternatives to Urban Sprawl, 28-29 (1968); Badler, supra, n. 1.
the new development would "characterize" the surrounding area in a manner that makes it practically impossible to deny other proposals for similar development.

The tentative drafts of the American Law Institute's Model Code emphasize that the government need not always acquire the fee title in order to accomplish its purpose:

This Article authorizes either permanent or temporary acquisition of development rights, scenic easements or other partial interests in land. There are a number of advantages to acquiring the development rights as opposed to the fee simple. First, if future public improvement of the property is demonstrable, acquisition of the development rights would prevent private development in the interim which would cause public acquisition of improved rather than undeveloped property. Second, if no future public development is contemplated, but planning objectives require that the land development would permit the government to prohibit development while at the same time allowing the owner to remain in possession and to use the land for any unimproved purpose compatible with those objectives. In both cases, the land would not be idle but would continue to generate income for the owner and tax revenue for the government. 12/

Proposals for compensable regulations have evoked some concern that open-ended financial liabilities might be created. The National Commission on Urban Problems, although endorsing such a system, expressed such concerns:

12. Tentative Draft #5, supra, note to Section 4-205.
As an adjunct to regulations, provisions to compensate property-owners can be of substantial benefit in assuring that achievement of a desirable result does not offend constitutional or other requirements of fairness. Of course, unsatisfactory relaxation of regulations could sometimes occur if compensation were required in too many situations. The "fiscal" preoccupation of regulating governments in the United States makes the dangers of this unusually great. Where this is a real danger, localities might well experiment with compensative regulation on a limited basis -- e.g., allowing it only for aesthetic and open space regulations and for elimination of nonconforming uses without allowing a legally sufficient period of amortization. 13/

Proponents of compensable regulations respond, however, that courts should award compensation only in cases in which the regulations would otherwise be held invalid, so that the government can always amend the regulation to eliminate the invalidity, avoiding the expense of compensation and being at least no worse off than before.

2. Preexisting Title

In some cases governmental agencies can avoid the taking issue, not through the acquisition of new title to the land in question, but by reestablishing a preexisting state interest in the land. The techniques and property law doctrines vary from state to state but claims of preexisting title have been most prevalent.

along the ocean shores, both for sandy beaches and tidal lands.

As noted earlier, the state of Oregon has looked to custom, the concept of a practice so longstanding that "the mind of man runneth not to the contrary," to affirm state ownership of the foreshore or dry sand area of their beaches. The Thornton case affirming the Oregon legislature's declaration of the public right and interest in its beach lands explores several theories supporting the "creation" of property interests in the public as well. It is interesting to note that in reaching their conclusions the Oregon Court dismissed a 1935 United States Supreme Court decision holding that federal grants of land (as in Oregon) granted record title to the line of mean high tide, as inapplicable in view of public usage of virtually all of Oregon's beach land. 14/

A California case has applied a similar doctrine on a narrower basis to find that under certain circumstances public rights in the recreational use of land may arise through implied dedication of land to the public. The Court also looked to longstanding free public use, municipal improvements and similar factors in reaching their conclusion. 15/

A different approach has been taken with respect to tidal wetlands. It was an established principle in the early Nineteenth Century that title to these lands has been reserved to the states with the creation of the federal union. Tracing the passage of title to lands from the British Crown through the original colonies, the Supreme Court in 1842 held:

14. State ex rel Thornton v. Hay, 254 Ore. 584, 562 P. 2d 671 (1969). The 1935 decision did not resolve conflicts between federal and state governments over which controlled submerged lands. This issue has been the subject of both litigation and legislation throughout this century as offshore oil became a significant resource.
For when the Revolution took place, the people of each state became themselves sovereign; and in that character hold the absolute right to all their navigable waters and the soils under them for their own common use, subject only to the rights since surrendered by the Constitution to the general government.

The Court denied that an earlier grant of land to private persons granted an absolute interest in the property in view of the paramount public rights involved.

In general, it is argued that actual title to tidal wetlands remains in the states because the state holds that title "for the public trust." Important qualifications exist, since the state may grant rights of usage ordinarily associated with ownership such as wharfage and excavation. While the parameters governing the public trust in tidal wetlands are fuzzy, Maryland's highest court has approved legislation reasserting state title in "lands under the navigable waters of the state below the mean high tide, which are affected by the regular rise and fall of the tide." Looking to the rights held by riparian owners, they found there was no inherent right to dredge sand and gravel from the tidal lands which could not be absolutely prohibited by the state to preserve the states natural resources.

New Jersey presents another example of the application of these principles. The State's Environmental

Protection Department is completing tidal flow maps drawn from current surveys, old tax records and maps drawn before extensive filling took place which will form the basis for challenges to private ownership of property in a number of areas of the state. The Environmental Protection Commissioner, Richard J. Sullivan, notes that the state will "let the chips fall where they may, and we expect the state to receive fair market value for the land it acquires and decides to sell." 19/ Proceeds from these sales will go to the New Jersey Public School Fund.

More limited legal efforts to restore filled lands are taking place in other areas as well. In Tampa, the United States beat the state's Internal Improvement Fund to court to initiate a suit to restore 60 acres of land which had been filled in the Tampa area on the Gulf of Mexico. 20/

Similar arguments are made by the Attorney General of the State of Georgia in a memorandum from the State Law Department expressing a position "which the Department intends to pursue in the future concerning the marshlands of Georgia." The Georgia Attorney concludes:

Extensive research into the legal ramifications of both the proposed uses and the claims to legal ownership have convinced the Attorney General that the state of Georgia is the legal owner to much, if not all, of the coastal marshland now being privately claimed. In addition, the development of the legal ramifications surrounding the State's ownership has indicated the existence of a public trust administered by the State and covering the marshlands of the State which imposes upon the ownership of such lands various burdens in favor of the general public. As a re-

sult, it is the position of the Attorney
General that the marshlands of Georgia
are not susceptible to private exploi-
tation or conservation without regard
to the common-law trust purposes to
which these lands have been long ded-
icated. 21/

In some states, a public trust approach to inland
wetlands may also find roots in older doctrines govern-
ing navigable waters, fisheries and riparian property
rights. One such state is Wisconsin where the recent
case of Just v. Marinette County involved a reassess-
ment of such doctrines in light of new state regulations
for shoreline zoning. 22/ Noting that "[t]he active
public trust duty of the state of Wisconsin in respect
to navigable waters requires the state not only to pro-
mote navigation but also to protect and preserve those
waters for fishing, recreation, and scenic beauty," the
Wisconsin Supreme Court approved stringent shoreline
regulations. 23/

Professor Joseph Sax has discussed at length this
concept of property "as an interdependent network of
competing uses" in articulating an expanded theory of
the public trust inherent in property. 24/ Obviously
the possibility of claiming such paramount title inter-
ests is useful only in regard to particular types of
property, but where available may be the easiest method
of avoiding the taking issue.

3. Land Acquisition

In the absence of a claim of preexisting title the

22. 201 N.W. 2d 761 (1972).
23. 201 N.W. 2d at 768.
L. J. 149, 140 (1971).
government can assert a proprietary interest in the land only through the acquisition of the fee or some form of development rights. On the surface, at least, such a system sounds inherently equitable. All landowners would receive compensation for their reasonable expectations as to future economic gain from their land, and the public would obtain the benefits of sound land use policies without causing any individual harm.

It might be suggested, however, that any such program would encourage rampant land speculation and stimulate rapid increases in land prices. Moreover, the economic costs of using land acquisition to accomplish the purposes of regulation must be foreseen.

Take for example the goal of wetland preservation. In the State of Florida alone the Coastal Coordinating Council has identified almost a million acres of coastal wetlands now in private hands that should be preserved. 25/ When one considers the high speculative values placed on many wetlands for dredge and fill development, it is obvious that the cost of acquiring all the necessary land is staggering. 26/

The preservation of green belts around urban areas is another important land use goal. A Committee of the National Academy of Sciences and National Academy of Engineering recently estimated cost of land in major metropolitan areas as follows: 27/


26. Purchasing development rights only would not significantly reduce the cost since the only value of wetlands on the open market is for development purposes thus development rights would cost approximately the same as the fee title.

<table>
<thead>
<tr>
<th>City</th>
<th>Suburban Price/Acre</th>
</tr>
</thead>
<tbody>
<tr>
<td>Atlanta, Ga.</td>
<td>$1,791</td>
</tr>
<tr>
<td>Berkeley, Cal.</td>
<td>10,614</td>
</tr>
<tr>
<td>Cincinnati, Ohio</td>
<td>3,696</td>
</tr>
<tr>
<td>Dallas, Texas</td>
<td>7,277</td>
</tr>
<tr>
<td>Harrisburg, Pa.</td>
<td>2,255</td>
</tr>
<tr>
<td>Minneapolis, Minn.</td>
<td>2,160</td>
</tr>
<tr>
<td>Orlando, Fla.</td>
<td>3,089</td>
</tr>
<tr>
<td>Portland, Ore.</td>
<td>4,078</td>
</tr>
<tr>
<td>Syracuse, N. Y.</td>
<td>2,600</td>
</tr>
<tr>
<td>Washington, D. C.</td>
<td>5,785</td>
</tr>
</tbody>
</table>

Given the size of these metropolitan areas it can be seen that the cost of land acquisition necessary to provide any substantial amount of additional open space would be overwhelming.

Nevertheless, a number of leading scholars have advocated public ownership of land as a more effective method of control than present regulatory methods. In the 1930's Lewis Mumford proposed "a sound land policy which shall vest ownership in the community, and guarantee tenure, for definitely assigned periods, to those who work the land thriftily and pay their communal taxes. This policy can be put into effect piecemeal, by permitting cities to buy up land necessary for their development and to hold it permanently; an indispensable aid in four-dimensional planning." 28/

More recently John Reps has proposed emulation of the Scandanavian system under which central cities purchase large tracts of open land in the suburban areas, some of which are then used as sites for future development:

The proposed method of directing urban expansion would promote contiguous

development rather than the wasteful, discontinuous pattern which now prevails and which results very largely from the whimsical characteristics of the peripheral land market. In order to find land on which to build, the developer must often leap-frog over near-in tracts which are held off the market for one reason or another. The expense of public services and facilities becomes unnecessarily high, and the cost to individuals in time and money is increased by this useless and unessential dispersal. The proposed system would normally place on the market only land contiguous to the existing network of services, but it could also be employed to create new town or detached satellites where this is found desirable. 29/

Charles Haar, former Assistant HUD Secretary for Metropolitan Development and authority on land use law, has also advocated large scale land acquisition programs. 30/

It can be seen that the cost of land acquisition as a means of accomplishing the goals now being achieved by regulation would be so high that, given the various demands of other governmental programs, persuading the

public to expend funds in that manner would be difficult. Nevertheless, such a program offers a way of accomplishing environmental goals with the least disruption to landowners' expectations, and to the extent that funds are available may be useful in solving some of the most difficult of the taking problems.
PART V

SUMMARY AND CONCLUSIONS

The founding fathers placed in the Constitution the following words:

"... nor shall private property be taken for public use without just compensation."

The application of this "taking clause" to land use regulation is the subject of this book.

Why do these twelve words deserve so much study? Because any system of land use regulation will work only if it satisfies each and every link in a chain of interconnected tests. It must be politically feasible; it must make sense economically; ... and it must hold up in court. The taking issue is an important link in that chain, because if the courts find the system of regulation so severe that it constitutes a taking, the whole system collapses.

Our survey of land use problems around the country (Chapters 1-4) found that the similarities between the various sections of the country are greater than the differences. It is true that there are fewer land use problems in those states that are experiencing little growth pressure, and there are more problems in those states that have a particularly fragile environment. But throughout the country attempts are being made to regulate the use of land in new ways — and throughout the country these regulations are being influenced by concern over the taking issue.

Our strongest impression from this survey is that the fear of the taking issue is stronger than the taking clause itself. It is an American fable or myth that a man can use his land any way he pleases regardless of

1. U. S. Constitution, Amendment V.
his neighbors. The myth survives, indeed thrives, even though unsupported by the pattern of court decisions. Thus, attempts to resolve land use controversies must deal not only with the law, but with the myth as well.

1. The History of the Taking Issue

How did a constitutional clause concerned with the taking of land become applicable to the regulation of land anyway? Originally it wasn't. The "taking" clause derived from the English nobles' fear of the King's seizures of land for his own use, a fear that was reflected in the Magna Carta:

"No free man shall be deprived . . . of his freehold . . . unless by the lawful judgment of his peers and by the law of the land." 2/

But the use of land was being regulated -- often very severely regulated -- throughout English and early American history. Only around the turn of the Twentieth Century did judges and legal scholars popularize the notion that if regulation of the use of land became excessive, it could amount to the equivalent of a taking.

Chapter 5 sets out the early land use conflicts in medieval England. It discusses the various statutes and proclamations which attempted to control the growth and building of London and its environs, and highlights the movement towards the fencing of English common land between the Thirteenth and Seventeenth Centuries. Finally, the Chapter closes with a summary of the attitudes toward property of Coke and Blackstone -- philosophies which affected property concepts carried to the New World.

Chapter 6 picks up the story in Colonial America. An examination and analysis of colonial regulations shows that the prevailing pattern of land use regulation was quite similar to that in England. Compensation was

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2. The Clause is sometimes called Article 39 because the original 1215 Magna Carta contained 63 articles, of which the above was Article 39. By 1225, the Charter consisted of 37 Articles as the original 63 were pared down and consolidated, of which the aforementioned was number 29.
generally provided for physical takings of developed property, but literally hundreds of regulations of the use of land were enforced without any compensation to the landowner.

Nor was the issue of compensation for land use regulation raised either during the revolutionary period or in the drafting of the Constitution or Bill of Rights. Rather the draftsmen of the taking clause seem to have carried over the historic British concern over arbitrary seizure of land by the King, -- perhaps as reflected in seizures during the then recent revolutionary war -- and to have applied that concern to actions of the new Federal Government.

The courts have insisted that the taking clause be strictly observed. Whenever the government has needed land for some public purpose it has either purchased the land on the open market or exercised the power of condemnation, paying the owner the fair market value of his land.

Court decisions during the entire first half of the Nineteenth Century (Chapter 7) find courts construing the taking clause strictly. To paraphrase a well-known commentator of the period writing in 1857, in order for an owner to be entitled to protection under the taking clause his property must have been actually taken in the physical sense of the word. No indirect or consequential damage, no matter how serious, warranted compensation.

The last half of the Nineteenth Century led to a certain ambivalence on the part of the courts, as the country's tremendous economic expansion inevitably produced conflicts with vested interests. Nonetheless, late in the Nineteenth Century the Supreme Court handed down cases such as Powell v. Pennsylvania 3 and Mugler v. Kansas 4 which denied compensation to the owners of

3. 127 U.S. 393 (1922).
business properties that became virtually valueless because of state regulatory statutes. These statutes were held to be valid police regulations, not takings of property within the meaning of the constitutional prohibition.

But Justice Holmes was soon to change the Court's direction, as Chapter 8 points out. Only two years after Mugler v. Kansas, Holmes wrote from the bench of the Massachusetts Supreme Court in Rideout v. Knox 5/ that the power of eminent domain (the power to acquire land) and the police power (the power to regulate land) differed only in degree and no clear line could be drawn between them. He continued to develop this philosophy in subsequent decisions and influenced a number of leading scholars of the period.

Then, in December of 1922, in the now famous case of Pennsylvania Coal Company v. Mahon, Holmes announced his famous rule:

"The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." 6/

When a diminution of property values reaches a certain magnitude, he said, a taking occurs. Thus, Holmes declared Pennsylvania's Kohler Act, passed to prevent coal mine subsidence from destroying whole towns, unconstitutional as an undue regulation of the property of the coal company.

Based on Holmes' reasoning the courts have continued to use a balancing test -- a weighing of the public benefits of the regulation against the extent of loss of property values. The Supreme Court lost interest in the issue soon after Pennsylvania Coal and has refused to hear cases arising under the taking clause except in very rare instances. As a result, the application of the Court's

6. 260 U.S. at 415.
balancing test has been left to the lower Federal Courts -- and especially to the state courts, in which most land use regulation cases arise.

2. The State of the Current Law

Over the last fifty years the state courts have decided literally hundreds of cases, each of which determines whether the value of a particular land use regulation does or does not outweigh the loss of property value to a particular landowner. As might be expected, given the lack of leadership from a common central court, this mass of decisions has often been characterized as "chaotic." Since no state court feels itself particularly bound by the decisions of the courts of a different state, interpretations of the taking clause vary considerably.

Chapters 9, 10 and 11 look at these state court decisions from three different perspectives. Chapter 9 categorizes the cases in relation to various types of land use regulation that are involved. This classification is particularly useful for people concerned with specific regulations for such purposes as wetland protection, historic preservation, etc. In general this Chapter shows a general tendency of the courts to uphold well thoughtout regulations, though there are very few subjects on which one cannot find cases going both ways on very similar facts.

Chapter 10 reviews the legal literature on the relationship between land use regulation and the taking clause. Most of the scholars who have studied this subject have found that there are no universal principles which will consistently explain the results of the cases. Each case is decided on its own facts, as the courts frequently point out. Nevertheless, the commentators have found a few tendencies worth noting. The one most often described is the tendency of the courts to prefer regulations that control those uses of land that were treated as "nuisances" under the traditional common law.
Commentators have also tried to find some correlation between the amount that property values are reduced by a regulation and the willingness of the courts to find the regulation constitutional. For the most part, this attempt to find some numerical correlation appears not to have proven useful in predicting the outcome of future decisions.

A dramatic upsurge of concern over the environment took place in the late '60's and early '70's. We wondered whether this "new mood" would affect the judiciary, so we culled out the taking cases decided after January 1, 1970, and examined them separately in Chapter 11.

We discovered an interesting trend. Although the number of cases is still small, there is a strong tendency on the part of the courts to approve land use regulations if the purpose of the regulation is statewide or regional in nature rather than merely local. Although the courts are also supporting local land use regulations with a reasonable degree of consistency, they show an obvious preference for regulations having broad multi-purpose goals.

3. Strategies for the Future: The Importance of the Myth

The court decisions form only the visible surface of the law. Below the surface lies the myth of the taking clause -- a powerful public perception of the clause as the embodiment of every man's right to buy and sell land for a profit. As the Task Force on Land Use and Urban Growth put it, "The popular impression of the takings clause may be even more out of date than some court opinions." 7/

Land use regulation is predominantly a function of local government -- over ten thousand separate local

governments, each exercising control over the land within its particular jurisdiction. Since the "myth" of the taking clause assumes that less can be regulated than the court decisions actually permit, many local governments fail to exercise their powers -- or if they do, they back down easily when challenged. Other local governments despair of reaching any reasonable accommodation with landowners and decide to prohibit everything, leaving the issue up to the courts to resolve.

Why has the myth of the taking clause made land values so much more sacrosanct than a reading of the court decisions would actually suggest? We suspect a number of causes inherent in the structure of American local government.

The myth of the taking clause is inhibiting the sort of reasonable regulatory action that is needed to protect the environment while respecting the position of individual landowners. In weighing strategies to deal with the taking issue, therefore, we begin with awareness that a new legal doctrine will have little impact unless it filters down to where the action is. The law in this area is what local officials think it is. While it is important to establish sound legal principles, it is equally important to communicate these principles to the people who are making the decisions.

4. Strategies for Dealing with the Taking Issue: Experience, Not Logic

The taking clause has bedeviled some of our brightest and most lucid legal scholars. A number of excellent articles have appeared in our legal periodicals over the past ten years. We were impressed with the profound logic by which each author attempted to make sense out of the confused body of cases -- at least until we read the next article in which a new author convincingly demolished the logic of his predecessor and expounded a new and even more convincing system of analysis.
We eventually came away with a sense of frustration, convinced that the world did not need one more analytically good, true and beautiful solution to the taking problem. Holmes' own observation that experience, not logic, governed the law, seemed most appropriate here.

We began by arraying five portential strategies for approaching the taking issue, ranging from one end of the spectrum to the other. Chapter 12 presents the argument that the courts should discard the idea that a regulation of the use of land can constitute a "taking." It suggests that the idea of a regulatory taking was a judicial fiction of the early 1900's, wholly inconsistent with the tradition of the founding fathers. It recommends a return to the strict construction of the taking clause in the manner in which it was originally conceived. Such an approach would subject land use regulations to the same standards of judicial review that now apply to other government regulations.

Chapter 13 proposes a less direct approach. It points out that many courts have apparently treated the idea of regulatory taking more as a hypothetical possibility than a real one. The Supreme Court of California, for example, appears unlikely to hold any regulation invalid under the taking clause. The United States Supreme Court itself (the last time it ruled on the issue) left some doubt whether any regulation could constitute a taking as long as the court was convinced that the public purpose served by the regulation was important. This suggests an emphasis on demonstrating the importance of the purpose behind land use regulations.

Chapter 14 discusses another approach to the taking issue, one that has been suggested by a number of commentators: the drafting of statutory standards to determine when compensation is required. Although the taking test is a constitutional one which is ultimately in the hands of the courts, the courts have generally accepted legislative determinations in similar situations.

The English have for years used a system of statutory standards for determining whether compensation must
be paid to a person affected by a land use regulation. In general, compensation is paid only if the land is capable of "no reasonably beneficial use," under the regulation. But even then compensation is not paid if the regulation is designed to promote certain listed purposes (e.g., flood control, adequacy of sewerage services, etc.). Surprisingly, the British system appears to please both developer, administrator and environmentalist. It might be studied in more depth as a model for statutory standards to be adopted here.

The first three strategies have sought some change in the substantive law. Chapter 15 suggests that even if the existing law remains unchanged most land use regulations can survive attack in the courts if they are based on sound factual evidence and are carefully drafted. This Chapter discusses some examples to illustrate these points.

Finally, Chapter 16 explores the alternative of providing compensation whenever possible to foreclose attacks on land use regulations under the taking clause. It discusses various suggestions for systems of compensable regulations including the one newly proposed to the American Law Institute. It also points out the possibility of using massive land acquisition programs in lieu of regulation, but does not discuss this alternative extensively because the cost appears to make such a program impractical.

5. Evaluating the Strategies

Having examined a range of possible strategies we concluded that it was impossible to recommend one single strategy to deal with the taking issue. The taking issue represents an inevitable conflict between two valid and important interests; the need for a livable environment and the importance of private property rights. No magic words will make the conflict disappear.

A dramatic overruling of the Pennsylvania Coal case
would help deflate the myth that now makes the taking clause so powerful. But courts would still evaluate regulations against their own standards of reasonableness, and if the purpose of the regulation appears doubtful the extent of individual losses will surely affect a judge's sense of what is reasonable.

Much can be accomplished by expanding the courts' awareness of the important purposes that lie behind land use regulations. Judges suspect that a parochial viewpoint motivates many local zoning decisions. This suspicion can often be allayed by showing that the regulation is consistent with an important policy that transcends local boundaries. The work of Professors Dunham, Sax and Van Alstyne is helpful in providing a framework for the necessary factual presentation.

We were impressed with the success of the British system of providing statutory standards to determine when compensation should be paid. Any system that seems to please developers, environmentalists and planning officials deserves further study. Experiments with similar systems deserve a trial in this country.

But in the long run the strategy that would contribute most to a more equitable resolution of the taking cases would be simply to spend more time in the drafting of regulations and the presentation of facts supporting -- or opposing -- them. Too often these regulations take the form of sweeping prohibitions and blanket indictments of all development simply because no one has taken the time to study the problem in depth and work out a reasonable compromise between the needs of the environment and the rights of the individuals.

Finally, state and local governments should undertake experiments with new methods to provide compensation to landowners. The system of compensable regulations proposed for the American Law Institute's Model Land Development Code is an example of such a system. Density transfer systems such as those proposed by Professor Costonis also may provide a way of furnishing landowners the equivalent of compensation.
We doubt that any of these strategies will provide an answer for all situations. It will be necessary to pick and choose a strategy or combination of strategies to deal with each set of problems as they arise. Only an approach that rejects the two extremes -- stop-growth and full-speed-ahead -- will provide a long range solution to the problems posed by the taking issue.

6. Highlights

In final summary, we were most struck by the following:

A. The taking clause is a serious problem wherever there is substantial pressure for urban growth, and particularly where the environment is sensitive.

B. The popular fear of the taking clause is an even more serious problem than actual court decisions.

C. There is little historical basis for the idea that a regulation of the use of land can constitute a taking of the land.

D. The most recent court decisions, those of the '70's, strongly support land use regulations based on overall state or regional goals -- regulations of the type we discussed in The Quiet Revolution in Land Use Control. 8/

E. More thorough consideration should be given to the possibility of statutory standards to determine when compensation must be paid. The British have found their experience with such standards highly satisfactory.

F. Finally, there is a great deal that a good lawyer can do working within existing laws if he has access to good factual evidence and if he practices careful draftsmanship. These subjects deserve more

detailed consideration in order to provide attorneys with the kind of expert assistance they need.