

# FRED BOSSELMAN AND THE TAKING ISSUE

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## I. INTRODUCTION

Fred Bosselman's contribution to land use planning law theory and practice is legendary. Three works in particular stand out: *The Quiet Revolution in Land Use Control*,<sup>1</sup> *The Taking Issue*<sup>2</sup> and A Model Land Development Code.<sup>3</sup> The first two he did for the President's Council on Environmental Quality. The last he did as reporter for the American Law Institute (ALI). All three had tremendous influence on the course of land use law, and influenced a generation of lawyers, law professors and judges. All involved some aspect of what we now call "the taking issue" – the point at which a land use regulation so restricts a landowner's use of land that it becomes a constitutionally protected taking of property, either without compensation or without due process of law.<sup>4</sup> I had the extraordinary privilege of working with Fred on the first two projects and helping with his implementation of the Model Land Development Code in Florida shortly after its adoption by the ALI. What follows is a summary of the formulation and implementation of these landmark projects.

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1. FRED P. BOSSELMAN & DAVID L. CALLIES, *THE QUIET REVOLUTION IN LAND USE CONTROL* (1972).

2. FRED P. BOSSELMAN, DAVID L. CALLIES & JOHN BANTA, *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* (1973).

3. *MODEL LAND DEV. CODE* (Proposed Official Draft 1975).

4. There are dozens of articles on regulatory taking, most following publication of *THE TAKING ISSUE*, *supra* note 2, as described later in the text. For two perspectives on what has happened in the past thirty years in this fertile field of property law, see ROBERT MELTZ ET AL., *THE TAKINGS ISSUE: CONSTITUTIONAL LIMITS ON LAND USE CONTROL AND ENVIRONMENTAL REGULATION* (1999); and STEVEN J. EAGLE, *REGULATORY TAKINGS* (2d ed. 2001).

The story of these landmark projects needs to be set against the backdrop of the law firm that helped make them possible: Ross, Hardies, O'Keefe, Babcock and Parsons of Chicago. Direct successor and descendent of the politically powerful early twentieth century firm of Cook, Sullivan and Ricks,<sup>5</sup> by the 1960s the firm, one of Chicago's largest, was best known for its corporate and utility work, particularly its representation of Peoples Gas, Natural Gas Pipeline and Central Telephone Company. The firm's reputation changed, however, when its managing partner, Clarence Ross, in the 1960s, brought in Richard F. Babcock, a liberal Democrat from another large firm, to take over the representation of Peoples Gas, and eventually to himself become managing partner. Babcock, however, had nurtured another specialty for which the firm was soon to develop a national reputation: zoning and associated land use controls. In 1967, he published a thin volume entitled *The Zoning Game*,<sup>6</sup> hailed as a masterpiece of explanation of what really went on in the local classification and regulation of land use. A close friend of Dennis O'Harrow, of the fledgling American Society of Planning Officials (now the American Planning Association), Babcock was soon writing regular articles for *Land Use Law and Zoning Digest* and seeing to the collection and digesting of land use cases for that publication using a cadre of young associates whose names were soon to become as famous as his own: Marlin Smith, Don Glaves, David McBride, and later Bill Singer and John Costonis; and, of course, Fred Bosselman. Others later joined the firm for various periods of time so that the firm's "alumni" list soon read like a who's who of land use lawyers (affectionately christened "Babcock's Bastards" by Vanderbilt Dean John Costonis) and its increasingly national land use practice became the envy of everyone who wanted to "do" land use.

## II. THE QUIET REVOLUTION IN LAND USE CONTROL

While most eventually concentrated on other aspects of the firm's diverse practice, Fred Bosselman found land use to be the perfect outlet for his uncanny knack for predicting future trends and his keen intellect. After joining Babcock on several projects in the late 1960s, Bosselman became involved in the ALI Model Land Development Code at the behest of Babcock, who chaired the project's advisory committee, eventually becoming its associate, and

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5. Indeed, so powerful was the firm that its managing partners allegedly successfully directed a state supreme court justice to resign and join its ranks in order to further burnish its image.

6. RICHARD F. BABCOCK, *THE ZONING GAME: MUNICIPAL PRACTICES AND POLICIES* (1966); see also RICHARD F. BABCOCK & CHARLES L. SIEMON, *THE ZONING GAME REVISITED* (1985).

principal, reporter. About the same time, he approached the President's Council on Environmental Quality (CEQ), then headed by Boyd Gibbons and staffed by a former firm summer associate, William K. Reilly, who later headed Laurence Rockefeller's Citizen's Council on Environmental Quality, The Conservation Foundation, The World Wildlife Fund, and the U.S. Environmental Protection Agency, all organizations with which Fred would later work in his capacity as an expert in land use.<sup>7</sup> Bosselman and Reilly convinced Gibbons that a study of the growing role of states in the control of land use would be useful in support of a federal bill to implement the Model Code which sought to require a formal state role in the planning and use of land to solve regional and statewide land use problems. Thus was born *The Quiet Revolution in Land Use Control*.<sup>8</sup>

As Bosselman conceived it, the study and report which followed it would concentrate on several key states which "took back" some of the police power delegated through zoning-enabling legislation to local governments. The reasons were varied: to end the "balkanization" of local zoning; to save statewide resources; and to better manage large regional development projects. The choice of states reflected both geographic and technical diversity: from Hawaii's statewide zoning in the west to Vermont's multi-tiered statewide environmental project reviews in the east. In the middle were such regional controls as San Francisco's Bay Area Conservation and Development Commission designed to preserve what was left of that Bay, and Minnesota's Twin Cities Metro Council, designed to manage growth in order to coordinate infrastructure in the Twin Cities region. The scope of this ambitious project was enormous for the times.<sup>9</sup>

Equally impressive was the methodology which Bosselman proposed: over a two-year period, both a junior associate and Bosselman would visit each of the nine states (and several other "also-rans") to interview not only government officials and politicians, but also representatives of the land development community to find out exactly how these "revolutionary" land use controls actually worked. Bosselman generally concentrated on the

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7. He was, for example, a contributor to the Rockefeller Fund's report, *THE USE OF LAND: A CITIZEN'S POLICY GUIDE TO URBAN GROWTH* (William K Reilly ed., 1973); and author of *IN THE WAKE OF THE TOURIST: MANAGING SPECIAL PLACES IN EIGHT COUNTRIES* (1978), a product of The Conservation Foundation's International Comparative Land Use Project.

8. BOSSELMAN & CALLIES, *supra* note 1.

9. The nine state and regional land use programs included: Hawaii, Vermont, San Francisco, Massachusetts (2), Maine, the Twin Cities, Wisconsin and the New England River Basin. The bills passed the House time and again, only to be defeated in the Senate. Eventually, part of the bill became law in the federal Coastal Zone Management Act, 16 U.S.C. § 1455 (2000).

officials, and the rest of us, variously Bill Eades, John Banta and myself, batted cleanup in the public sector and talked with the developers. Bosselman, Eades and I wrote the first draft of several chapters (Banta later drafted 2 more), but when Eades left to pursue other interests, I ended up rewriting many of them with Bosselman, and hence became co-author of the report, albeit clearly a junior one. Fred reviewed and revised much of every single chapter, fretting ceaselessly over notes and wording to delete anything sounding remotely like legalese, until, as Bill Reilly described the final product: "It sings."

Allowing for that justifiable hyperbole, *The Quiet Revolution in Land Use Control*<sup>10</sup> easily became the most influential study of land use in the 1970s, if not in the entire last quarter of the twentieth century, even though the model legislation it was designed to support never did pass Congress. It has been "revisited" many times, and its methodology repeated over and over not only in further state and regional studies, but in the Conservation Foundation's famous International Comparative Land Use Study<sup>11</sup> and the many books and articles it produced in the late 1970s and early 1980s.

However, in the course of reviewing the "revolutionary" state land use controls of the 1960s and the handful of cases supporting them, Bosselman became increasingly troubled by the specter of constitutional challenges as viewed by state legislators and other officials. The issue was the constitutionality of regulating so much private land outside the context of local zoning and the warning of Chief Justice Oliver Wendell Holmes in the 1922 U.S. Supreme Court case of *Pennsylvania Coal Company v. Mahon*<sup>12</sup>: If a regulation went "too far" it could be construed as a taking, as if the government took the property by eminent domain. In other words, a "regulatory taking." Indeed, local zoning almost suffered the fate of being declared such an unconstitutional taking in 1923 in *Village of Euclid v. Ambler Realty Company*,<sup>13</sup> sustained only after rehearing and largely on the basis of protecting single-family residential districts from the nuisance-like predations of physically-overpowering apartment towers, which, incidentally, had nothing whatsoever to do with the facts of the case. However, as Bosselman noted later, after declaring a specific instance of zoning

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10. BOSSELMAN & CALLIES, *supra* note 1.

11. CONSERVATION FOUND., *GROPING THROUGH THE MAZE: FOREIGN EXPERIENCE APPLIED TO THE U.S. PROBLEM OF COORDINATING DEVELOPMENT CONTROLS: A CONSERVATION FOUNDATION REPORT FROM THE INTERNATIONAL COMPARATIVE LAND-USE PROGRAM* (John H. Noble, John S. Banta & John S. Rosenberg eds., 1977).

12. 260 U.S. 393 (1922).

13. 272 U.S. 365 (1926).

unconstitutional as applied the very next year in *Nectow v. City of Cambridge*,<sup>14</sup> the Supreme Court had virtually retired from the zoning game, leaving it up to the state courts to define what constituted a regulatory taking under the U.S. Constitution. These state courts had riddled the regulatory taking doctrine with holes, leading Bosselman to conclude it should have no effect on either statewide or local land use regulatory practice. But how to convince the rest of the country?

### III. THE TAKING ISSUE

The answer was a second report to the Council on Environmental Quality: *The Taking Issue*.<sup>15</sup> Its purpose was threefold: (1) to set out in painstaking detail how relatively anomalous *Pennsylvania Coal*<sup>16</sup> was for the legal times; (2) to point out the dearth of federal guidance since the 1920s; and finally, (3) to enumerate and digest the growing multitude of state court decisions which all but ignored *Pennsylvania Coal*.<sup>17</sup> Bosselman's first task, therefore, was to cast doubt on the theory of regulatory taking in any form. This we did, first, by examining the historical roots of physical takings and land use regulations. Fred dispatched me to London for the better part of an entire summer to examine British records and treatises on early land use regulation during Elizabethan times. He then enlisted Professor Stanley Katz of the University of Chicago and his legal history seminar students to research and write papers on colonial land use controls and the roots of the Constitution's takings clause. John Banta, a summer and later regular associate at the firm, commenced collecting state court cases from around the country which largely ignored *Pennsylvania Coal*<sup>18</sup> in upholding land use regulations against takings challenges. Fred concentrated on *Pennsylvania Coal*<sup>19</sup> itself and what led to the decision.

After a year of research, conferring, drafting and redrafting, the evidence led to several basic conclusions. First, land use regulations had been around for several centuries, both in England and the United States, without any hint that a regulation could become a constitutionally protected physical taking under the Fifth Amendment. Second, there was no precedent for so holding in the years leading up to 1922, either in caselaw or relevant treatises. Third, the Court had abandoned the area of land use controls for the

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14. 277 U.S. 183 (1928).

15. BOSSELMAN, CALLIES & BANTA, *supra* note 2.

16. 260 U.S. 393 (1922).

17. *Id.*

18. *Id.*

19. *Id.*

past half-century. Fourth, state courts had all but ignored the case and its regulatory taking doctrine for almost all of that time. All of which led us to conclude that regulatory taking was dying and that the Court should repudiate it at the earliest opportunity, thereby recognizing what many state courts had already done.

That left the writing of the report and its naming. Oddly, the former was easier than the latter. Many conferences ended without anything nearly so catchy as *The Quiet Revolution in Land Use Control*.<sup>20</sup> After one particularly fruitless conference, Fred announced in frustration that if Banta and I could not between us come up with a title by the end of the week, he was going to send along the report to the CEQ with its file title: *The Taking Issue: An Analysis of the Constitutional Limits of Land Use Control*. And so, *The Taking Issue*<sup>21</sup> it was. The book was published in 1973 with a rendering of the U.S. Constitution in an off-shade of red against a pale reddish-tan background, with the title at the bottom. Which leads to one final anecdote: Fred was asked by his alma mater, Harvard Law School, to give a lecture on the book that was taking the land use world by storm and assuring the law firm's place as the leading firm in the nation to do land use work. However, that fame had not fully permeated the hallowed precincts of Harvard Law School. When Fred arrived for his lecture, he found the venue papered with posters advertising a lecture by its famous alumnus based on his new and famous book, the title of which had been hurriedly gleaned from the front jacket: "We The People!"

#### IV. MODEL LAND DEVELOPMENT CODE

Fred's work on the ALI, A Model Land Development Code (Model Code),<sup>22</sup> is less familiar to me than its implementation in Florida. As noted above, Fred largely replaced Michigan Law Dean Terrance Sandalow, one of three Assistant Reporters, in 1969, becoming the Associate Reporter with Chief Reporter Professor Allison Dunham, who had replaced Charles Haar of Harvard upon his 1966 appointment as Assistant Secretary of HUD. Designed as a source for the rethinking of prevailing norms, the purpose of the Model Code<sup>23</sup> was not to provide a comprehensive statute like the Uniform Commercial Code, but to provide an accordion-like resource, parts of which could be adopted, or not, depending upon

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20. BOSSELMAN & CALLIES, *supra* note 1.

21. BOSSELMAN, CALLIES & BANTA, *supra* note 2.

22. MODEL LAND DEV. CODE, *supra* note 3.

23. *Id.*

the goals and political climate in a particular jurisdiction. The Model Code<sup>24</sup> was formally adopted by the ALI in 1975.

As noted above, the Model Code never did make it through Congress as a land use statute, though parts were adopted in the federal Coastal Zone Management Act.<sup>25</sup> However, the Model Code<sup>26</sup> sparked the interest of the late Professor Gilbert Finnell, then at Florida State University, and part of a task force charged with drafting statewide legislation for controlling development and saving some of the environment in Florida. A vacation resident of Florida for decades, Fred was soon shuttling regularly between Chicago and the state capital of Tallahassee to meet with state officials in aid of drafting what eventually became the Environmental Land and Water Management Act (ELMS) of 1973.<sup>27</sup> Based on the Model Code's Article 7,<sup>28</sup> the Act provided for regional review of defined Developments of Regional Impact – those with impacts on more than one county (marinas, shopping centers, large residential developments) and state designation of development-free Areas of Critical State Concern. One of the first such Areas designated were the Florida Keys.<sup>29</sup> The Act became a model for use of parts of the Model Code<sup>30</sup> in state land use legislation.

## V. CONCLUSION

In sum, Fred's influence on the law of takings, particularly regulatory takings, was, and is, immense. His work goes beyond theory into the practical realm of achieving land use controls within the context of regulatory takings, moving more recently into the environmental realm and the negotiating of habitat conservation agreements under the Endangered Species Act.<sup>31</sup> Of course, the U.S. Supreme Court eventually returned to the issue of regulatory takings in a series of cases commencing with *Penn Central Transportation Company v. City of New York*<sup>32</sup> in 1978 (defining partial takings) and ending with the recent *Palazzolo v. Rhode Island*<sup>33</sup> in 2001 (dealing with the so-called "notice" rule pertaining

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24. *Id.*

25. 16 U.S.C. § 1455 (2000).

26. MODEL LAND DEV. CODE, *supra* note 3.

27. FLA. STAT. § 380.012-10 (1973).

28. MODEL LAND DEV. CODE, *supra* note 3, § 7.

29. For contemporary commentary on ELMS, see Gilbert L. Finnell, Jr., *Saving Paradise: The Florida Environmental Land and Water Management Act of 1972*, 6 URB. L. ANN. 103 (1973). See also ROBERT G. HEALY & JOHN S. ROSENBERG, LAND USE AND THE STATES 126-176 (2d ed. 1979).

30. MODEL LAND DEV. CODE, *supra* note 3.

31. 16 U.S.C. §§ 1531-1544 (2000).

32. 438 U.S. 104 (1978).

33. 533 U.S. 606 (2001).

to landowners who acquire interests in land knowing of existing stringent land use controls). In between, the Court announced a categorical or *per se* rule for regulations which deny a landowner all economically beneficial use (*Lucas v. South Carolina Coastal Council*<sup>34</sup> in 1992) and decided when a controversy over land use regulation was sufficiently “ripe” for determination in federal court (*Williamson County Regional Planning Commission v. Hamilton Bank of Johnson County*<sup>35</sup> in 1985). The legal landscape with respect to regulatory takings is much changed today from the early 1970s, but Fred Bosselman continues to counsel state and local governments on how best to regulate land in order to avoid – the taking issue.

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34. 505 U.S. 1003 (1992).

35. 473 U.S. 172 (1985).