PLANNING LAW IN THE 1990'S*

By Norman Williams**

The problem necessarily faced in approaching American land use law was well stated in a book review some years ago:

> The appellate cases on planning and zoning all too frequently seem a jumble of inconsistencies reflecting either inordinate judicial subjectivism or undue judicial acquiescence. Incantation of the police power nouns . . . often takes the place of probing analysis.[1]

This attitude is the natural, almost the inevitable reaction anyone would have, right after a first look into the vast flood of reported cases in American land use — which now run to about 20,000 decisions. Anyone who did not get this reaction at first could probably be dismissed as not particularly perceptive. However, after long consideration (and reading most of these decisions), I have come to almost precisely the opposite conclusion. The patterns of decision in land use law are admittedly extraordinarily complex; yet once one understands the various categories into which the decisions fall, the decisions within each category follow patterns which are highly repetitive.[2] There is great variation as to both time and place, yet for each period within each state the results are reasonably predictable. This was obvious as of the late 1960's; it remains true now, even though for the last 20 years we have been going through a period (or rather two periods) of major transition, which will be spelled out below.

THE FIVE KEYS

The keys to understanding American land use litigation are actually fairly simple. There are five keys which must be kept constantly in mind; if these are kept in mind, the law is not really all that difficult to understand.

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1. Schroeder, Book Review, 61 A.B.A.J. 1320 (1975) (American Land Planning Law; Land Use and the Police Power).

2. My experience has been that, if one knows the state, the year, and the type of plaintiff, predictability in state land use cases has been running about 80-90% — except in Pennsylvania, where there really is none. *See infra* note 23. The percentage is unlikely ever to be higher, for there is always the unusual case where the equities look different from the way they usually do in that type of situation; some states (e.g. Illinois) take care of this by having a minority rule, which says exactly the opposite from the majority rule. However, the Supreme Court's recent intervention in the field may have destroyed much of this hard-earned predictability. *See* Williams, *And Now We Are Here on a Darkling Plain*, 13 VT. L. REV. 635 (1989).

1. *Judicial Policy-Making.*

Land use law is first of all an area of judicial policy-making at the constitutional level. A good shorthand description of land use law in this century[3] would be to say that we have been watching the constitutional revolution of 1937[4] working its way through the state courts. Now of course the problem of defining the proper role of the judicial function in policy-making, as distinguished from the legislative function, involves complicated and serious questions — a debate often referred to in terms of the difference between the Warren Court and the Burger Court. This is not the place to spell out these problems, which are both complex and difficult; I merely note their importance in our chosen field. The long tradition in this field of law has been that most major policy decisions are made not by legislators but by courts — based upon their preconceptions of social values. Land use law is therefore one of the areas of "gut jurisprudence" par excellence. This is quite simply the way it works; it always has. For this reason the various legal doctrines discussed below are best understood as the expression of differing social interests.

2. *Three Types of Plaintiffs.*

Almost all land use cases fall into three categories, differing as to the type of plaintiff. Now land use litigation only appears when there is some friction in the mechanism.[5] In what has been the most common type of case in many states, a developer will seek some sort of permission (usually by rezoning, variance, or special permit) to do something not permitted as of right by the prevailing zoning regulations; what is usually sought is permission for some more intensive development, which would make more money. If the town refuses to adjust the regulations to permit the proposed land use, then the developer may take the case to court; this is what we call a developer's case.

In many instances, however, the town officials are more cooperative — perhaps because they think the developer has a better proposal, perhaps because some mistake was made in the underlying plan and/or zoning, perhaps because conditions have changed, or perhaps because this particular developer made a political contribution to the right official's campaign — and so the town proceeds to change the regulations to accommodate the proposed development. Normally there is no such thing as a neighbor who is ready and willing to have more intensive land use nearby; and so in this situation

3. As it happens, the first significant case came down in 1899. Attorney General v. Williams, 174 Mass. 476, 55 N.E. 77 (1899), and see Williams v. Parker, 188 U.S. 491 (1903), upholding the use of eminent domain (on public-use grounds) for height restrictions around Copley Square in Boston.

4. On this, see L. TRIBE, AMERICAN CONSTITUTIONAL LAW, chs. 1, 8, 11-17 (2d edition 1988). Another way to describe it would be to say that a system originally devised to deal with the physical impact of urbanization has gradually been used increasingly to deal with the social and economic impacts thereof.

5. Under the more usual situation, a developer will submit a proposal for some new development which would conform to the various applicable ordinances; a building permit will be granted, and he will go ahead and build. In these cases no one turns up in the law courts, there is therefore no reported law, and law professors do not know that anything is going on.

neighbors will frequently object vigorously. If the town goes ahead with the change, the neighbors may then sue for a judicial declaration that the relaxation is invalid — often under the comprehensive plan doctrine.[6] In this situation we have what is known as a neighbor's case.

Finally, in the 1970's a third type of plaintiff came to the fore — representing those who are shut out of all new development, and in fact are prevented from moving into an area by the overall operation of the land use control system — primarily because land use controls frequently tend to raise the cost of new housing, and in fact are frequently adopted explicitly for that purpose. Let us call this type of plaintiff "third party non-beneficiaries."

The important thing to realize is that most state courts differ strikingly in the way they handle claims made by (a) developers, (b) neighbors, and (c) third party non-beneficiaries.

3. *Differences in Time.*

There have also been striking variations between different periods of American land use law, which I will spell out in more detail below.

4. *Differences in Place.*

There have been striking differences in land use law as it has been set forth in the courts of the various states, where almost all such law takes place. Between 80 and 90 percent of current land use law comes from 13 major states — the major states in the Northeast (Massachusetts, Rhode Island, Connecticut, New York, New Jersey, Pennsylvania, and Maryland), three large mid-western states (Ohio, Michigan, and Illinois), and three big states around our coastline (Florida, Texas, and California). Most American land use law is essentially the law of these states, though occasionally an important decision turns up from some other state. Moreover, the case law in each of these major states is quite distinctive.[7]

5. *Favored Uses.*

Finally, under a trend particularly evident since the early 1970's, certain types of uses are regarded as favored uses; as to these, the normal presumption of the validity of land use regulations is reversed when their proponents turn up as plaintiffs. These uses are thus treated completely differently from ordinary commercial uses — probably much to the envy of the lawyers for the latter.

WHY LAND USE?

In considering this part of American law, the natural first question is, why all this concern with land use? The short answer is that a number of

6. For a detailed discussion of this doctrine, see 1 N. WILLIAMS, AMERICAN LAND PLANNING LAW chs. 20-33 (2d ed. 1988).

7. For a detailed description of the differences between states, see 1 N. WILLIAMS, AMERICAN LAND PLANNING LAW ch. 6 (2d ed. 1988).

important and broader matters usually turn up, and are decided, in the form of land use decisions. For example, the amount of employment available in a community is a matter of real importance to its life; if there is a decision on this as a matter of public policy, it usually takes the form of a decision on how much land is zoned for commercial or industrial purposes.

The importance of land use arises primarily from the fact that the various kinds of land use have several different kinds of impacts upon their surroundings, in quite different ways. The most obvious case is of course the physical impact of one land use upon another — what the economists like to refer to as dealing with the "externalities" of the situation. If a nuisance-producing factory, or a traffic-generating commercial or industrial establishment, turns up in a pleasant low-density residential neighborhood, its physical impact on the area will be obvious for all to see. It is clear that the official American land-use-control system, as developed in the early decades of this century, was originally thought of almost entirely in terms of regulating the physical impacts of land use which result from urbanization[8] — quite specifically, in terms of protecting less intensive land use against the impact of more intensive land use.

However, in recent decades increasing attention in land use decisions has been paid to the economic and social impacts of land use upon the surroundings. As for the economic impact, the effect on the amount of employment is the obvious example, although (as explained below) more attention may actually be paid to the tax-paying characteristics of a proposed land use — whether it is a "good ratable" or "bad ratable."

The social impact of land use is perhaps equally important. To make the point in an obvious extreme case, an area developed with 5-acre estates is likely to have a quite different social structure, and very different resulting social and physical problems, from an area devoted entirely to low-income public housing.

THE THREE SYSTEMS

If one surveyed the secondary literature on land use — a course not to be recommended, for most of it is close to useless — the most striking single feature to be noted would be the very critical attitude towards the existing system in almost all the literature. Nearly everyone has noted the large gap between the rather dreary quality of much new development and the potential for higher quality, even without any appreciable increases in cost. There are all sorts of possible theories on who and what is to blame; some people place primary blame on the land-use-control system. In fact, the system actually does a great deal of good, first of all in protecting residential neighborhoods, and also (*inter alia*) in making possible the rational planning of public facilities — but no one would ever know this from the tone of the literature. When the whole situation is considered carefully, however, the most serious shortcomings in the system arise from one simple fact. We have not one

8. In the early decades almost all zoning cases came from the big cities and their inner suburbs. In the post-1945 period, most have come from the expanding outer suburbs. Rural land use litigation is a relatively recent development.

system of public land use control, but three separate systems, which frequently point in opposite directions, working against each other.[9] There is no reason to expect that this will work well.

1. *Taxation and Ratables.*

The first system of public land use control, and clearly the most important one, is indirect — for this involves the effect upon land use of the long-time American dependence on local real property taxation to finance major public services. As was pointed out to me by a Vermont legislator over 20 years ago,[10] the system of local real property taxation is visibly breaking down all around us; it cannot fulfill its primary function of providing the necessary revenue, and in addition it has all sorts of devastating secondary ill-effects. One of these is the result of the well-known search for ratables. To define our terms — a "good ratable" is a form of land use which brings in quite a lot in local property taxation,[11] and does not require much in the way of local services; obvious examples include a research laboratory or perhaps a shopping center. A "bad ratable" is the converse, bringing in relatively small amounts in local real property taxation and requiring a lot of local public services; the obvious example is low- and moderate-income housing, the kind we need the most. Since most local governments are desperately short of revenue to cover the needed services — in the midst of consciously-whipped-up public hysteria against taxation — the system provides a strong incentive to encourage good ratables and discourage bad ratables, as an easy alternative to the painful process of raising taxes. There has been a lot of talk in recent years about incentive zoning; the main problem with the current system is we have a very strong incentive built into the system — an incentive to do exactly the wrong thing. These communities which encourage good ratables and discourage bad ratables may profit considerably

9. For the purpose of this discussion, we will define public land use control to include all of those forms of public action which have a major impact on land use, *whether or not* this was their original intention. In a recent article I suggested that a fourth system has been evolving in some areas. Williams, *And Now We Have Four Systems*, 12 VT. L. REV. 1 (1987). Under this system, the real purpose of the land use restrictions is to force the developers to come to the city authorities seeking a permit, so that the latter may extract some exaction from the developer, which will provide mini-relief to the municipal fisc.

10. Senator Kitchel's remarkably prescient advice is quoted in Williams, *The Three Systems of Land Use Control*, 25 RUTGERS L. REV. 80, 85 (1970).

11. The effect of tax systems on land use controls may vary somewhat with different systems of state and local taxation. The situation referred to in the text is probably the most common. Among many possible variations, a city where local sales taxes are important may bias its annexation policy in order to pick up commercial areas. Or take the situation in Vermont, where the local formula (adopted in the late 1960's) on allocating state aid to schools looked as if it were adopted in response to a *Serrano*-type court decision (*see* Serrano v. Priest, 5 Cal. 3d 584, 96 Cal. Rptr. 601, 487 P.2d 1241 (1971)); the formula is biassed against towns with good ratables, and in favor of the poorer towns. As a result, in a case involving a large suburban shopping center which (by plausible allegation) would result in a substantial reduction of business — and so of ratables — in downtown Burlington, under Vermont law this would result in serious harm to Burlington's ability to finance non-school municipal expenditures, but would not affect Burlington's ability to support schools. In effect, most other towns in the state would have to chip in part of their share of state aid in order to make up for Burlington's loss. *See* In re Pyramid Mall, Application No. 4C0281, Findings of Fact and Conclusions of Law and Order Denying Land Use Permit, District Environmental Commission No. 4, Oct. 12, 1978, and on appeal, In re Pyramid Co. of Burlington, 141 Vt. 294, 449 A.2d 915 (1982).

thereby; those which take a more socially-conscious view may take a beating. In effect, the whole system operates as a means of subsidizing anti-social conduct, and penalizing humane legislation. Again, there is no reason to expect that this will work well.

2. *Major Public Works.*

A second type of public influence on land use involves the effect of some major public works on surrounding land use. To take an obvious example, one may with confidence expect filling stations, fast-food places, and perhaps some motels on land in the vicinity of interstate highway interchanges. Decisions on the location of an interstate interchange are made in the state capital by highway engineers, with no concern at all for the effect on surrounding land use in particular cities; yet the result mentioned above is almost inevitable. Again, a interceptor sewer is an expensive form of public investment, and a necessary one in all growing areas except the very lowest-density ones. Once such a system has been put in, there is a strong temptation to increase residential density along the sewer line, in order to end up with more people helping to pay for the sewer.

3. *The Official System.*

The third, and clearly the least important, system of land use is what is normally covered in a course on the subject — zoning, subdivision control, the official map, urban renewal, and so on. Actually this official system of direct land use controls may include four different kinds of approaches:

1. Simple persuasion, which is often under-played — it may be the most effective measure;

2. Public regulation without compensation under the police power — the most widely-used approach;

3. The use of incentives to encourage developers to do the right thing, which might be described as persuasion plus a carrot;

4. Direct public action to take over land and develop it.

While this official system is the most direct form of public land use control, it is definitely not the most powerful; indeed, it is not too far off the mark to suggest that the official system of public control consists of a central register of decisions made elsewhere for other reasons.

Finally, it is important to remember that, in the developmental world, things are not always what they seem. Almost invariably, if one investigates the actual background of a major land use decision, it turns out that the real issues are quite different from those which have filtered up through the legal process for decision by a judge.[12] In other words, read, mark, and inwardly digest all the relevant land use materials — but don't believe a word of it.

12. Examples are legion. One of the most striking is the real story involved in Rockhill v. Chesterfield, 23 N.J. 117, 128 A.2d 473 (1957), spelled out in 1 N. WILLIAMS, AMERICAN LAND PLANNING LAW § 26.03 (2d ed. 1988).

VARIATIONS BY TIME AND PLACE

We now turn to the major variations based upon differences in time and by place.

The Five Periods.

In the first period of American land use control, covering roughly the first two decades of this century, the law seemed clear and simple: the government could not regulate structures and activities on land, period. Fairly consistently, the courts held that any attempt to separate out various land uses into different areas, or to regulate land uses generally, was an unconstitutional invasion of the developer's property rights. In particular, any attempt to keep commercial land use out of residential areas was regarded as merely aesthetic, and aesthetic regulation was said to be none of the government's business.

The second period of American land use controls began in the 1920's, and has lasted for varying lengths of time in the various states. In one important state, New Jersey, the shift out of the second period can be dated precisely; for in the late 1940's New Jersey drew up a new State Constitution, and the draftsmen thereof — conscious of the long history of judicial obstruction of land use controls in New Jersey — inserted into the Constitution a presumption in favor of municipal action, including particularly action in connection with land use.[13] What was more important, they also appointed a new set of judges, dedicated to carrying out the new spirit in new ways. The tone of New Jersey zoning and planning law changed immediately. In most other states this second period ran roughly through the 1930's and 1940's. In this period zoning restrictions on land use were accepted as a general principle; it was recognized that there were some situations in which it would be appropriate to exclude commercial and industrial land use. However, when a developer challenged the application of land use restrictions to his land, he usually won. In other words, zoning was valid in general principle, but usually invalid in practice — or you might say, quite valid as long as you did not use it.[14] As indicated above, the second period lasted for varying periods in various states; in one state, Illinois, it has continued right up to date.

In a sharp change, the zoning case law in the third period, generally of the 1950's and 1960's, went far towards the opposite extreme. This was the period par excellence of judicial respect for municipal home rule. Clearly, in this period the leading courts decided that, in view of the mess created by the free market in land development, not much could be lost — and perhaps quite a lot could be gained — by turning the towns loose to do whatever they thought best about land use.

This new spirit was most clearly expressed in New Jersey zoning law,[15]

13. N.J. CONST. art. IV, § VII, cl. 11.

14. Nectow v. City of Cambridge, 277 U.S. 183 (1928) is a perfect example of the breed, particularly on Sutherland's quite explicit reversal of the presumption of validity.

15. After all, in thinking of most of New Jersey, it is relatively easy to document the proposition that little could be lost by shifting to a system of public regulation.

for that court has long taken the lead in such things, but has spread gradually across the country. In this period the presumption of validity was therefore given full rein; it was said that any restriction would be upheld as long as it was fairly debatable. In other words, if a lawyer defending a zoning restriction rose to speak on its behalf, and could not think of a thing to say, he was in real trouble; as long as he could keep making a noise like a lawyer, all would be well. Moreover, since more intensive land use can always be defended on the ground that it will bring in more tax revenue, there was always *something* to be said for the more intensive development.

As the scope of zoning expanded in this period, the courts often stated that land use controls could be used for broader purposes than merely to provide protection in the obvious cases involving public health and safety; and so it was frequently said that various other aspects of the general welfare could be dealt with — as for example aesthetic regulations, or the encouragement of good ratables. In this respect the law of this period may be stated more precisely; for general welfare was here interpreted to mean the "general welfare" of the particular municipality imposing the restrictions, with no concern at all for any broader regional impact of those restrictions.[16]

By the late 1960's it was becoming increasingly clear to almost everybody that the towns were abusing the free rein given to them by the courts in the third period, with various types of dubious restrictions — arbitrary and capricious as to developers, exclusionary as to third party non-beneficiaries, arbitrary as to neighbors. In part this was the inevitable result of the bias inherent in the system towards encouraging good ratables and discouraging bad ratables. In other instances it was simply the result of political favoritism, bribery, or narrow parochialism. The 1970's therefore saw a fourth period, with a striking rebirth of more activist and perceptive judicial review in land use law.

The parallel to the judicial activism of the Warren Court is obvious. The courts, now suspicious of what the towns were up to, insisted on looking carefully into the background of a given restriction, to be sure that in fact it bore some reasonable relationship to some legitimate goal — and was not merely a cover-up for something else, often something less legitimate. The courts therefore began to cut down sharply on municipal discretion to regulate land use, particularly in three areas — dealing with the planning background required for valid zoning, with the exclusionary issue, and with the too-loose granting of variances.

All three of these lines of cases have the same common denominator, judicial suspicion of the way land use decisions were made. However, the fourth period is more complicated than that, for at the same time in other types of cases the courts were markedly broadening the public power to regulate land use. This was the heyday of the environmental movement, when some fairly drastic environmental restrictions were upheld; and various aesthetic regulations were given greater respect at the same time. The fourth period therefore presents a mixed picture, with the courts cutting down mu-

16. There was a clear break away from this, presaging New Jersey's shift to a regional approach, in Kunzler v. Hoffman, 48 N.J. 277, 225 A.2d 321 (1966).

nicipal discretion in land use in certain types of cases, and giving more judicial support in others.

It is in the fourth period that the courts have explicitly drawn a distinction between certain types of uses which have a specially favored position in land use cases, as distinguished from mere commercial or industrial establishments which do not. Actually this policy had its origin back in the 1950's, with the judicial creation of a special role for schools and churches in residential districts. Since 1970 the same policy has been extended to other types of uses — particularly low- and moderate-income housing, and various types of quasi-family arrangements. When it comes to the restrictions on these, the usual presumption of validity no longer applies.

We are probably entering a fifth period in the late 1980's, as a result of the Supreme Court intervention in this field. For in a case from Los Angeles County,[17] the Court recently held that, if a court decided that a specific tract of land was too restrictively zoned, usually residential instead of commercial, the developer was entitled to collect damages. No one knows what the result of this will be, beyond the obvious point of a major shift of bargaining power to the developers.

In Different States.

Finally, there are striking variations between the land use case law in the various states; each state has its own distinctive personality, and actually there are no two that are very similar to each other.[18] What is striking is that within each state there is a consistent dominant philosophy expressed in land use cases, to which individual judges frequently conform without dissent, even if it is clear (from their other opinions) that they must disagree with the wording and philosophy in a given case. Moreover, the states also differ as to the particular type of remedy which is prevalent. In some states, land use litigation usually takes the form of challenges to the zoning regulations as mapped in the *Nectow* model[19] (as in Illinois, Maryland, and Pennsylvania); in others the question usually is whether a variance was or should have been properly given (as in New York and New Jersey), while in Rhode Island a second type of special-permit function dominates. The leading states may be classified into four groups, representing differences primarily in the treatment of developers in the third period.

In the pro-municipal states, the third period reigned supreme, and the courts almost always found in favor of the towns. California and New Jersey are the clearest examples of this, with California frequently going to bizarre extremes;[20] but the same spirit was expressed in Massachusetts and Maryland. It seems clear that the judges in these states do not spend much time at night worrying about the problems of the poor dear developer.

17. First English Evangelical Lutheran Church of Glendale v. Los Angeles County, 482 U.S. 304 (1987).

18. This is all the more striking because every state adopted the Standard Zoning Enabling Act.

19. Nectow v. City of Cambridge, 277 U.S. 183 (1928).

20. Standard examples include McCarthy v. City of Manhattan Beach, 41 Cal. 2d 879, 264 P.2d 932 (1953), *cert. denied*, 348 U.S. 817 (1954), and Livingston Rock and Gravel Co. v. County of Los Angeles, 43 Cal. 2d 121, 272 P.2d 4 (1954).

Second, there are the pro-developer states, predominantly Illinois. In the quite unique system of Illinois zoning law, the normal presumption of validity is reversed whenever there is an allegation that the effect of zoning restrictions is to cut down substantially on the value of land. Of course most developers do not go into zoning litigation unless there is some money at stake, and so what the Illinois rule means realistically is that the presumption of validity in zoning is reversed whenever a developer turns up in court. Rhode Island often seems to fall in the same category, with consistent special concern for the problems of developers.

A large group of states have been notably erratic in their zoning jurisprudence, with judicial attitudes varying sharply at different times. These include several of the biggest states — New York, Florida, Pennsylvania, Michigan, and Ohio. Each must be considered separately.

The New York Court of Appeals was of course (along with the Second Circuit) widely recognized as one of the finest courts in the country in the 1920's and 1930's, and that court took a strong lead on several matters involving land use controls.[21] In subsequent decades the New York court was moving gradually towards third-period respect for municipal discretion in land use. However, in the mid-1960's, under the influence of Judge Kenneth Keating, the New York Court took a sharp swerve to the right and adopted a strong pro-developer attitude, essentially by taking over Illinois zoning law and pretending it was nationwide law.[22] Fortunately, Keating remained on the court for only four years, and since 1968 New York land use law has been reverting to the more normal nationwide trend; yet occasionally, when a case seems to involve particularly tough treatment of a developer, some of the Keating language will reappear.

The situation in Florida is essentially similar to the one in New York — a long gradual development of pro-zoning attitudes, followed by a period of increased concern for developers' problems, followed by a reversion to the nationwide trend. However, while Florida law now appears to follow standard third-period language, the developer in fact does seem to win in an unusually large number of cases, which are found not to be "fairly debatable".

Pennsylvania zoning law is unique, in that predictability is practically nonexistent. One trend is striking; if, in a given year, the Pennsylvania court takes a strong position on one problem in zoning law, one may predict with some confidence that they will be saying exactly the opposite within 5 years. This has happened repeatedly.[23]

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21. See particularly Headley v. City of Rochester, 272 N.Y. 197, 5 N.E.2d 198 (1936).

22. Matter of Fulling v. Palumbo, 21 N.Y.2d 30, 286 N.Y.S.2d 249, 233 N.E.2d 272 (1967), on the criteria for valid zoning; and see Hoffman v. Harris, 17 N.Y.2d 138, 269 N.Y.S.2d 119, 216 N.E.2d 326 (1966), trying to upset the long-standing New York rule on hardship for use variances.

23. Compare Eves v. Lower Gwynedd Township, 401 Pa. 211, 164 A.2d 7 (1960) (strong statement on the planning requirement for valid zoning) with Donahue v. Whitemarsh Township, 412 Pa. 330, 194 A.2d 609 (1963) and Furniss v. Lower Merion Township, 412 Pa. 404, 194 A.2d 926 (1963) (no such requirement); and compare Appeal of Kit-Mar Builders, 439 Pa. 466, 268 A.2d 765 (1970) (3-acre zoning unconstitutional — or maybe 2-acre zoning is too, it is not clear which), with DeCaro v. Washington Township, 21 Pa. Commw. 252, 344 A.2d 725 (1975) (3-acre zoning valid) and Martin v. Millcreek Township, 50 Pa. Commw. 249, 413 A.2d 764 (1980) (10-acre zoning not exclusionary).

Up until the mid-1950's Michigan was the strongest pro-developer state, even outdoing Illinois by a comfortable margin. Since then there have been sharp fluctuations in attitude. As of the early 1970's, one could explain recent Michigan zoning law quite accurately by saying that the developers win the cases in the first half of each decade, and the towns win the cases in the second half of each decade; that is what actually happened in the 1950's, and again in the 1960's. However, the situation subsequently became more complicated. For a brief period in 1974 and 1975, when there were two vacancies on the Michigan court, a pro-developer group of judges took charge and reverted to the previous (pro-developer) Michigan law for the first half of each decade. After a year and a half of this, the vacant seats were filled, and the Michigan court shifted back to the normal nationwide trend.[24] The case of Michigan illustrates the extraordinary degree to which the complex pattern of decisions must be fine-tuned, in order to really establish predictability. It is no longer sufficient to know in which half of which decade a Michigan decision came down in order to guess which way it went; one needs to know the month and the year.

The other erratic state, Ohio, is rather a puzzler; for a long time I was trying to think of an accurate way to describe zoning jurisprudence in Ohio, which fluctuates wildly between very forward-looking and almost unbelievably reactionary attitudes.[25] I think I finally found a good analogy. In Phoenix, zoning creates so much legal business that the city has established two zoning boards; one takes the cases with the odd numbers on the docket, and the other takes the cases with even numbers on the docket. Similarly in Ohio, the developers win the cases with the odd docket numbers, and the towns win the cases with even docket numbers. If you don't believe it, try spending a month reading Ohio cases.

Finally, a couple of states with substantial zoning litigation belong in the good grey middle. In Connecticut and Texas, the judicial attitudes have generally followed the nationwide trend towards increasing respect for zoning decisions, but with a notable lack of perceptive analysis.[26]

Anyone working in this field will note the large number of leading cases that come from New Jersey, and probably wonder why. There are two reasons. First, New Jersey is the most intensively settled state; it has the largest number of persons per square mile living there. Second, over a long period

24. See the detailed discussion in 1 N. WILLIAMS, AMERICAN LAND PLANNING LAW § 6.08 (2d ed. 1988).

25. Compare Maurer v. Austin Square, Inc., 6 Ohio App. 2d 41, 215 N.E.2d 724 (1966), probably the best decision nationally upholding local retail zoning, with the incredible performance of the intermediate court in Greenhills Home Owners Co. v. Village of Greenhills, 202 N.E.2d 192 (Ohio App. 1964) (the habendum clause in a real estate deed is constitutionally inviolable), *rev'd*, 5 Ohio St. 2d 207, 215 N.E.2d 403 (1966), *cert. denied*, 385 U.S. 836 (1966).

26. A good example is Senior v. New Canaan, 146 Conn. 531, 153 A.2d 415 (1959), *appeal dismissed*, 363 U.S. 143 (1960). New Canaan had raised the lot size requirement for a large part of its area (up towards the Merritt Parkway) from 2 acres to 4 acres, thereby squarely raising the question of what is the real basis for such very large acreage requirements. The lower court (Court of Common Pleas, Fairfield County, Docket No. 67-827, Dec. 10, 1957, unreported) examined the record carefully, and concluded that the arguments used simply did not hold water. On appeal, the Connecticut Supreme Court simply announced a judge-made rule of law in favor of suburban sprawl, with the statement that large lot-size requirements are a type of regulation generally upheld.

the New Jersey court has (along with California) been the leading state court on all sorts of public law matters; the judges there have simply thought things through more carefully than they have in most other states.[27]

THE PREVAILING RULES OF LAW

Lest anyone think there are no rules of law prevailing amid this amiable chaos, I will summarize here the rules which do control in the state case law — primarily in developers' cases. These rules, about 10 in number, are spelled out below, by brief mention, and in oversimplified fashion.

1. In American law there is a normal presumption in favor of duly-adopted governmental action, primarily legislative but also administrative. If no evidence appears in the record to indicate arbitrary action, the restriction is automatically upheld. If the evidence is more or less evenly divided as to the reasonableness of a restriction, again it is upheld. It is held invalid only when the available evidence strongly suggests arbitrary action.

2. The subject matter must be a legitimate subject for governmental action, and not some non-legitimate goal. For example, almost everyone agrees it is appropriate to keep commerce and industry out of low-density residential areas; almost everyone agrees it is not legitimate for the law to exclude people on the basis of their ethnic background or the color of their skin. A large part of recent land-use litigation has been concerned with such basic questions on the legitimacy of various planning goals.

3. The means chosen to move towards the legitimate goal must be reasonably appropriate. This does not mean that, if the judge were acting as legislator, he would necessarily vote for the particular measure actually adopted. Instead, the test is whether, in the judge's view, a reasonable man might believe that this would be one way to proceed toward the chosen goal — whether or not he personally agrees. Or to put it another way, the judge must be convinced that the alleged goal and the means chosen are not in fact a cover-up, obviously designed to promote something else which is non-legitimate.

4. Under American law, any property owner has a constitutional right that whatever restrictions are adopted must leave him with some reasonable use of the land, and so an opportunity for some reasonable return, now or in the reasonably near future. Obviously this brings market criteria into zoning law; opinions can differ substantially on what is a reasonable use in the circumstances. What is reasonable in central Wyoming is not reasonable in central Manhattan. To take an obvious example, is permitting only continuance of agricultural operations a reasonable use at the edge of an expanding metropolitan area?

5. Conversely, assuming that the regulations do permit some reasonable use, the property owner has no *constitutional* right to insist upon a much larger capital gain on which his fondest hopes are focused.[28] The distinction between #4 and #5 is the distinction on which a large amount of zoning

27. A good example will be found in United Advertising Co. v. Metuchen, 42 N.J. 1, 198 A.2d 447 (1964), which came close to the heart of the problem on aesthetic regulations.

28. No matter how often the courts reaffirm this principle, and it happens repeatedly every

law has proceeded. Obviously there is room for a large difference of opinion here on what is a reasonable use in the circumstances. None the less, these tests do reduce the debate to manageable proportions.

6. Most state courts decide these cases on some balance of the equities of the social values involved. How this works out depends on what presumption is adopted in a given state. In Illinois, where this formulation is often explicitly recognized, the presumption is in favor of the developer, and the interpretation of the balancing test necessarily falls in line. Almost every place else, the reverse is true: a regulation is normally upheld, except in situations where there is a massive penalty to the developer with no visible (or only some just barely visible) public benefit.

7. A strong judicial prejudice in land use cases insists that both (a) public restrictions on A's use of his land and (b) relaxations thereof must be justified by a showing of some broad public benefit. Such action is void if it merely provides a favor to an individual or a small group.

8. The rules must be reasonably clear and definite, so that people can know what they are supposed to do.

9. Overly broad regulations — for example, a flat prohibition of all industrial activity, with no concern for the probable amount of actual impact — are often upheld, on the ground of the need for some administrative flexibility. However, this would not be true where any "fundamental values" or "suspect classifications" are involved.

In strict constitutional law, all the above come under the heading of substantive due process, or, perhaps, under the takings clause, assuming that that is based upon different criteria. However, two other major constitutional doctrines appear occasionally in planning law: the equal protection clause, and the rule against delegation of legislative power.

10. Under the equal protection clause, any classification for purposes of differential treatment must be reasonably related to some legitimate end to be achieved. Since differential regulation is the essence of zoning, one might expect that a large part of zoning law would be concerned with the reasonableness of such classifications. In fact, such cases have been remarkably rare, except where major constitutional questions of equal treatment arise, in cases involving racial and/or economic discrimination.

11. The rule against delegation of legislative power played an important role in the constitutional law of the 1930's, but had not been heard of much in recent Federal constitutional law. However, once (in the fourth period) the state courts began to review land use decisions rather carefully, it was not a plausible scenario that they would exercise careful control over legislative actions, but allow administrative decisions to go anywhere they wanted. Accordingly, in this period the courts have again been looking rather carefully into broad delegations of discretion to legislative agencies, to see whether there are sufficiently clear guidelines to lay down the basic policy which the administrators are supposed to follow. Anyone who reads the advance sheets will have noted the rapid increase of discussion on this point

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year, developer's lawyers will always argue the contrary, that any substantial reduction in value is invalid, or at least highly suspect constitutionally. They are correct in Illinois.

in recent years. The cases where the courts enforce rather strict standards, or at least more specific standards, are beginning to play an important role. Anyone dealing with this field should anticipate that this will continue in the future.[29] What this simply states is that planners must do their job more carefully, and must explain more explicitly.

The Supreme Court Intervenes.

The fact is that state courts, which handle the overwhelming majority of land use cases, do not normally use any of the traditional vocabulary of constitutional law — due process, taking, etc. Instead they normally rely on what the most distinguished judge in this field of law referred to as a "quasi-constitutional rule"[30] — whether or not the action is "arbitrary and capricious." Presumably this is part of their general policy of discouraging Federal constitutional review in land use cases. However, in the last 15 years the Supreme Court has been taking an active part in land use litigation, after nearly a half century of ignoring it; and the members of the Supreme Court have tended to think up and to emphasize different tests of their own, which so far have not played a significant role in the state litigation. Among these tests are the following:[31]

1. Land use regulations are all right if they do not go "too far."[32]

2. Land use restrictions often do, and occasionally *must*, provide some reciprocal benefit to the owner being restricted.

3. A developer may be prevented from doing a public harm, but may not be required to contribute a positive good.

4. The constitution guarantees a developer his "investment-backed expectations," or some "economically viable use" — whatever those phrases might mean.

5. There may be some sticks in the "bundle" which are so important as to be practically inviolate.

6. Land use regulations are merely "a narrow nuisance exception"[33] to the general constitutional protection of developers against a "taking." This

29. For recent decisions characterizing the problem of historic districts where clear aesthetic guidelines are particularly important, compare South of Second Associates v. Georgetown, 196 Colo. 89, 580 P.2d 807 (1978) (general standard on harmonious development held adequate, but regulations invalidated for other reasons) with Morristown Road Associates v. Bernardsville, 163 N.J. Super. 58, 394 A.2d 157 (Law Div. 1978) (somewhat more specific standards, derived from an A.I.A. report, held inadequate).

30. The phrase is from Justice Frederick Hall, in a dialogue with counsel during oral argument in *Mount Laurel I* (Southern Burlington County NAACP v. Mount Laurel, 67 N.J. 151, 336 A.2d 713 (1975), *appeal dismissed and cert. denied*, 423 U.S. 808 (1975)).

31. For my views in detail on these tests, see Williams & Ernst, *And Now We Are Here on a Darkling Plain*, 13 VT. L. REV. 635 (1989).

32. This is apparently the most popular of these phrases among the present Supreme Court justices and, in practical judicial administration, demonstrably the worst. Clearly it gives no basis at all for predictability on future decisions. Moreover, it tends to give a developer a real incentive to propose the maximum (i.e., the most damaging) deviation from what is permitted. The more intensive the proposed use is, the larger percentage reduction there will be in the hoped-for value and so, it will then be argued, the regulations should be regarded as over-restrictive and more vulnerable.

33. *See* Penn Central Transportation Co. v. New York City, 438 U.S. 104, 145-46 (1978) (Rehnquist, J., dissenting), and Keystone Bituminous Coal Association v. De Benedictis, 480 U.S. 470, 506 (1987) (Rehnquist, C.J., dissenting).

position, so far limited to a small minority on the Court, would apparently point to the overruling of most of modern land use law — and to the revival of the *Lochner* spirit, in contrast to the *Carolene Products* footnote.[34]

7. If a judge decides that a tract of land has been zoned too restrictively — e.g., residential instead of commercial on a main highway — the municipality must pay damages. As indicated above, this may change everything.

A Different Approach

Anyone familiar with this field of law will note at once that the approach to land use cases spelled out above differs substantially from that followed in a considerable part of the secondary literature, and in many of the casebooks. Some of the differences are as follows.

1. The conventional treatment is almost entirely concerned with developers' rights and developers' remedies, and pays relatively little attention to neighbors' rights and neighbors' remedies. The reason for this is probably obvious: most law professors who venture into this field have come from teaching Property I, where the whole emphasis is on the so-called "bundle of rights." When it comes to the public law of real property, attention is naturally focused on which parts of the "bundle" may be taken away from the potential developers, and under what conditions. The questions of neighbors' rights rarely comes up. This is a wholly unrealistic approach, for in several states more reported cases have been brought by neighbors than by developers; this is true in Massachusetts, it is true in Maryland, and in Connecticut it is a close question. What kind of plaintiff brings which kind of suits of course depends on prevailing judicial attitudes. If a court is favorable to developers' interests, it will have almost entirely developer's suits (as in Illinois); if a court is more interested in neighbors' rights, there will be almost entirely neighbors' suits (as in Maryland).

2. Some discussions are phrased in much more general terms. The controlling principle is said to be that zoning must promote public health, safety, morals, and welfare; and the courts then try to test specific proposals for development against this vague criterion — which simply leaves a court free to decide either way, depending on its basic attitudes. It is significant that Illinois and Rhode Island, the two courts which follow this approach most generally, are the two most developer-minded courts. The whole development of planning law in the 20th century has been in contrast to this: the more creative courts have focused on developing more specific rules of action, carrying out the above general principles in terms that are understandable and allow for some predictability. "General propositions do not decide concrete cases."[35]

There is one thing, and only one thing, of which we may be quite sure: the decade of the Nineties will bring a lot of change to land use law. How the various parties will fare — developers, neighbors, third-party beneficiaries — will be the interesting question.

34. Compare Lochner v. New York, 198 U.S. 45 (1905), with United States v. Carolene Products Co., 304 U.S. 144, 152 n. 4 (1938).

35. Lochner v. New York, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting).