Smart Growth: Urban Growth Management and Land-Use Regulation Law in America

Author(s): James A. Kushner

Source: *The Urban Lawyer*, Spring 2000, Vol. 32, No. 2 (Spring 2000), pp. 211-238

Published by: American Bar Association

Stable URL: https://www.jstor.org/stable/27895239

JSTOR is a not-for-profit service that helps scholars, researchers, and students discover, use, and build upon a wide range of content in a trusted digital archive. We use information technology and tools to increase productivity and facilitate new forms of scholarship. For more information about JSTOR, please contact support@jstor.org.

Your use of the JSTOR archive indicates your acceptance of the Terms & Conditions of Use, available at https://about.jstor.org/terms

American Bar Association is collaborating with JSTOR to digitize, preserve and extend access to *The Urban Lawyer*

This content downloaded from
149.10.125.20 on Fri, 04 Feb 2022 15:51:57 UTC
All use subject to https://about.jstor.org/terms

Smart Growth: Urban Growth Management and Land-Use Regulation Law in America

James A. Kushner*

Professor of Law, Southwestern University School of Law;
L.L.B., J.D., University of Maryland, 1968;
B.B.A., University of Miami, Coral Gables, Florida, 1967.

I. Introduction: Land-Use Law Practice, Indeterminacy Vagueness, and Discretion

LAND USE IS A WONDERFUL FIELD in which to practice, not only because it is financially rewarding or because work translates into physical monuments to one's labors. The lasting impact of the land-use practitioner on community design is more tangible and public than are entertainment awards, and that public impact is similar in stature to the size of plaintiff verdicts, or conviction or acquittal rates for members of the criminal bar. Land-use law practice is wonderful not only because you may have a greater impact on the quality of life than one practicing another legal specialty, but because like no other field, you achieve based on ability. Land-use practice is like the I.B.O.C. automobile racing circuit where instead of racing Fords against Chevys, or Ferraris against Porsches, everyone drives a Firebird, and the best driver has the advantage.

The combination of vague principles and the extraordinary degree of discretion in the decision-making process makes lawyering ability a critical factor in the land-use field. Exhibit A in the vague principle category is the Takings Clause according to the U.S. Supreme Court.

*Professor Kushner is the author of SUBDIVISION LAW AND GROWTH MANAGEMENT LAW (West 1991 and Supp. 1999), and co-author of DANIEL P. SELMI & JAMES A. KUSHNER, LAND USE REGULATION: CASES AND MATERIALS (1999). This article is based upon the author's remarks at the Institute on Planning, Zoning, and Eminent Domain presented by the Municipal Legal Studies Center of the Southwestern Legal Foundation in cooperation with the American Bar Association Section of State and Local Government Law, San Francisco, October 28, 1999. The author acknowledges the helpful and critical comments of Norman Karlin and Jacqueline F. Kushner on a draft of this article. The author, however, must take full responsibility for the ideas advanced.

This content downloaded from 149.10.125.20 on Fri, 04 Feb 2022 15:51:57 UTC
All use subject to https://about.jstor.org/terms

Land-use discretion is like no other field. Multiple permits are sought before a series of agencies, such as planning commissions, boards of adjustment, and boards of zoning appeals, followed by administrative appeals to city councils and county legislatures or boards of supervisors, followed by a few more bites of the apple before trial and appellate courts. More than other specialties, the quality of lawyering can have an extraordinary impact on results for your client.

What is truly amazing about land-use practice is there are seldom ever any losers. Of course, you get to gripe about the lack of fairness in the regulatory process, or the soaking of developers with cost inflating exactions and regulations that drive up the price of housing, or the destruction of the environment and the senseless community design fostered by government. But everyone is ecstatic over every decision from virtually every court.

This article will assess whether the current state of the law supports growth management and Smart Growth initiatives and whether the ostensible indeterminacy and controversy over interpreting U.S. Supreme Court land regulation cases threatens current regulatory strategies aimed at generating sustainable communities.

II. *Nollan*

For an example of a decision cheered by property owners and regulators, see *Nollan v. California Coastal Commission.*[1] From the landowner point of view, *Nollan* represents a victory for the landowner against big extortionate government and a sea change for pro-property rights advocates. The regulators see *Nollan* a bit differently. Try and come up with a hypothetical extension of the "essential nexus" principle which requires the condition to advance a police power interest, outside of a permit condition for a lateral easement along a beach, lake, or river. Except for *Nollan,* every exaction case, even those conditions that border on the ridiculous, easily satisfy the standard that the purpose and effect of the condition could arguably advance a police power interest.[2]

Only one case has invalidated a condition based on *Nollan,* and that case misinterpreted the Supreme Court's ruling. In *Rohn v. City of Visalia,*[3] the California Court of Appeals interpreted *Nollan* to bar a rezoning condition obligating a landowner to dedicate a strip of land amounting to 14 percent of the lot to allow the city to correct a poorly

1. 483 U.S. 825 (1987).
2. JAMES A. KUSHNER, SUBDIVISION LAW AND GROWTH MANAGEMENT ch. 6 (West 1991 & Supp. 1999).
3. 263 Cal. Rptr. 319 (Cal. Ct. App. 1989).

This content downloaded from
149.10.125.20 on Fri, 04 Feb 2022 15:51:57 UTC
All use subject to https://about.jstor.org/terms

designed street intersection alignment. If one were to look for a good-hearted permit condition, *Rohn* is one of the more righteous ever to be imposed. The essential nexus with traffic safety could not have been in doubt. Of course, *Rohn* may have been decided correctly for the wrong reason. It is more than arguable that the need for the realignment was not generated by the developer and thus the condition violated even the deferential standard of reasonableness under the pre-*Nollan,* California *Walnut Creek*[4] decision and the near universal rational nexus standard.[5]

Nollan, as defined by *Rohn,* may actually have a negative impact on landowners. The court refused to consider the number of trips that would be generated by the conversion of a home to offices. Instead, *Rohn* ruled that as the property was zoned for multifamily housing, the project would be treated as generating no impact because if apartments were built they would generate as much or more traffic than the proposed office use. Using the existing zoning as a baseline to determine project impacts is bizarre. A parcel of land zoned for a regional shopping mall could not be charged for necessary traffic improvements, transit, affordable housing, or even water, sewer facilities, or necessary off-site flood control.[6]

The message of *Rohn* would appear to suggest that land should be zoned at a low level of intensity. Higher intensity or density development might be available as a floating planned unit development zone, allowing the imposition of exactions.[7] Current planning law allows development by PUD, but its extension, at least in the Visalia area, might not be a welcome effect of *Rohn,* a decision that was at first celebrated as a property rights victory.

As an example of the vagueness or opaqueness of land-use doctrine, it is arguable that *Rohn* should be limited to the facts of the case, a conditional rezoning. *Rohn* does not even suggest that communities are prevented from applying traditional, state-mandated subdivision review where standards for infrastructure conditions are established by objective regulations or ordinances. For projects not being subdivided, the same result can be achieved through the adoption of a site plan ordi-

4. Associated Home Builders of the Greater East Bay, Inc. v. Walnut Creek, 484 P.2d 606 (Cal.), *appeal dismissed,* 404 U.S. 878 (1971).

5. KUSHNER, *supra* note 2, at § 6.08.

6. *See also* Committee to Preserve Brighton Beach v. Council of New York, 625 N.Y.S.2d 134 (N.Y. App. Div. 1995) (review of large development project under environmental impact review statute could use "as of right" development as a base line to measure impacts rather than considering all impacts).

7. KUSHNER, *supra* note 2, at § 7.03[1].

This content downloaded from
149.10.125.20 on Fri, 04 Feb 2022 15:51:57 UTC
All use subject to https://about.jstor.org/terms

nance that could exempt, for example, a single-family home for which street access and utility connections are available.[8]

The Eighth Circuit, in *Goss v. Little Rock,*[9] addressed the issue raised in *Rohn* of the appropriate baseline for determining rough proportionality in a context frequently encountered in subdivision review where the approval is not based on a specific project design that includes the building plans or the identity of prospective industrial or commercial tenants or purchasers. Where a rezoning is sought, the applicant may or may not have a specific future plan for development, yet the rezoning may permit a number of different uses and each might generate a different demand for infrastructure. Should infrastructure conditions be based on the highest intensity of development allowed under the proposed rezoning classification? In *Goss,* the Eighth Circuit held that basing the condition on the speculative likelihood that the owner would build a mini-mall, one of the most intensive traffic-generating uses permitted under the proposed zone change, was not consistent with *Dolan. Goss* counsels that in cases of conditional rezoning, regulators hold off rezoning until a structure and use-specific development is offered and impose an additional condition requiring the owner to restrict future use of the property to that contained in the project plan. Of course, communities must define the undertaking as an authorized development agreement[10] and carefully avoid the label of contract zoning.[11]

Nollan appears not to be very significant. The mention by Justice Scalia of a higher scrutiny in property cases has yet to be realized. It appears to have been interpreted by the Court as too reminiscent of *Lochner v. New York*[12] and the discredited doctrine of substantive due process whereby the Court substitutes its discretion and wisdom for that of the legislature. The dreams of reversing the presumption of validity and even the institution of zoning appear premature.

III. *Dolan*

Another ruling cheered by all is *Dolan v. City of Tigard.*[13] The landowner was victorious in challenging a dedication for flood control and the provision for a pedestrian/bicycle path imposed as a condition to enlarging a business parking lot. The Court quantified the required

8. *Id.* § 7.08.
9. 151 F.3d 861 (8th Cir. 1998), *cert. denied,* 119 S. Ct. 1355 (1999).
10. KUSHNER, *supra* note 2, at § 10.05.
11. *E.g.*, State *ex rel.* Zupancic v. Schimenz, 174 N.W.2d 533 (Wis. 1970) (government may not contract away its police powers).
12. 198 U.S. 45 (1905).
13. 512 U.S. 374 (1994).

This content downloaded from
149.10.125.20 on Fri, 04 Feb 2022 15:51:57 UTC
All use subject to https://about.jstor.org/terms

nexus between the project's impacts and developer exactions. The Court required "rough proportionality" and that the proportionality be measured by an "individualized determination."[14] Most courts and commentators have interpreted *Dolan* as being no change from prior state law doctrines.[15] *Dolan* may only invalidate outrageous exactions, exactions that should have been invalidated under correct interpretation of the prior standards. Many see *Dolan,* like *Nollan,* as realistically only a problem for street widenings and other dedications.[16] Most believe the case inapplicable to onsite conditions not involving dedications[17] and to the increasingly popular impact fee.[18] To the extent that *Dolan* discourages aggressive conditioning, the impact of the ruling in many communities may be the denial of the application and the frustration of the landowner's project as an alternative to litigation over whether an exaction is too pricey. The only real winner in *Dolan* may be the consultants who may expect more traffic, school, and utility studies to meet the "individualized determination" standard.[19] Does the term "individualized" mean proportional to the number of dwelling units or square footage? Or might the court require substantial evidence of whether the average family size and sewage flow is individualized to the community experience, and whether the fee or exaction is proportional to the cost of facility expansion needed to accommodate the

14. *Id.*

15. KUSHNER, *supra* note 2, at § 6.08[5].

16. Robert H. Freilich & David W. Bushek, *Thou Shalt Not Take Title Without Adequate Planning: The Takings Equation After* Dolan v. City of Tigard, 27 URB. LAW. 187 (1995). In *Sparks v. Douglas County,* 863 P.2d 142 (Wash. Ct. App. 1993), the court rejected a condition requiring dedication of a strip of land for street widening where adequate capacity existed and no evidence was presented suggesting that the projected 25 cars per hour to be generated by the project would render the existing road less safe from overcrowding. *Sparks* establishes a powerful motivation to impose an impact fee system as under the ruling some developers enjoy a free ride as long as existing capacity is adequate while others are forced to finance capacity expansion to accommodate the traffic they hope to generate. On appeal, however, the Washington Supreme Court reversed the lower court. The county planning agency had prepared a report which documented deficiencies in right-of-way width and in the surfacing of adjoining streets, and calculated the increase in traffic. The report also calculated the specific need for the conditions and the cumulative impact of a series of separate subdivisions. The supreme court found that the report constituted substantial evidence satisfying the *Dolan* rough proportionality standard. Sparks v. Douglas County, 904 P.2d 738 (Wash. 1995).

17. *E.g.,* Clark v. City of Albany, 904 P.2d 185 (Or. Ct. App. 1995) (fast food restaurant site plan conditions requiring street improvements and building adjacent sidewalks were exactions subject to *Dolan* while requiring designation of a traffic-free area, provision of storm drainage plan, and construction of storm drain not exactions but mere conditions not subject to rough proportionality test which is not limited to dedications and the transfer of title).

18. KUSHNER, *supra* note 2, at § 6.08[5].

19. *Dolan,* 512 U.S. at 389–90.

This content downloaded from
149.10.125.20 on Fri, 04 Feb 2022 15:51:57 UTC
All use subject to https://about.jstor.org/terms

generated demand? The Court implied that *Dolan* set minimum standards and that the states were free to be more rigorous in their quest for fairness.[20] The aftermath of *Dolan* finds that all the states are simply using *Dolan* as the rule.[21]

IV. *Lucas*

If standardization and uniformity were a goal, the Supreme Court would receive high grades for its work in *Dolan.* The grade for *Lucas v. South Carolina Coastal Commission*[22] would be at best a "C" and that would depend on who is interpreting the opinion. The Court set out to establish a more objective standard for regulatory takings, as it had done in *Loretto v. Telepromter Manhattan CATV Corp.,*[23] with the use of a per se rule of invalidation for physical invasion takings. Arguably, the Court also sought to reduce taking claims to a more objective standard in *Nollan* and *Dolan.* In *Lucas,* by recognizing exceptions, the Court appears to miss the mark. The Court first ruled that regulation that denies all economic use of land is a per se regulatory taking. The per se test, however, is subject to two exceptions. First, regulation that denies economic uses may be sustained if based upon the state's internal law of nuisance and if the regulation is designed to abate a nuisance.[24] In addition, the Court marked out another exception for restrictions on the land that arise from preexisting property law defining the nature of the owner's title.[25] For example, public access rights protected under the state's public trust doctrine may justify regulation despite the denial of an economically beneficial use.

V. The Converse of *Lucas*

An interesting and reoccurring issue in subdivision review is not whether some economic use exists under *Lucas,* but whether a taking requires some diminution of value. In *Hendler v. United States,*[26] the

20. *Id.*
21. KUSHNER, *supra* note 2, at § 6.08[5].
22. 505 U.S. 1003 (1992).
23. 458 U.S. 419 (1982).
24. *Lucas,* 505 U.S. at 1022–23, 1029–31.
25. *See id.* at 1027–32. *See also* Virginia Beach v. Bell, 498 S.E.2d 414 (Va. 1998), *cert. denied,* 119 S. Ct. 73 (1998)(building on the language in *Lucas* that the Takings Clause does not reach regulation where the restriction arises from preexisting property law, the court apparently interpreted *Lucas* to apply only to regulations imposed subsequent to the landowner taking title, sustaining the city's Coastal Primary Sand Dune Zoning Ordinance as it predated the owner's title so that the owner's title or the "bundle of rights" acquired did not include the right to develop the parcel without restrictions).
26. Hendler v. United States, 175 F.3d 1374 (Fed. Cir. 1999) (action constituted special benefit to property owners which outweighed the value of easements).

This content downloaded from
149.10.125.20 on Fri, 04 Feb 2022 15:51:57 UTC
All use subject to https://about.jstor.org/terms

Federal Circuit established an exception to the near-per se physical occupation rule, and presumably the excessive regulatory takings doctrine, that where an alleged taking is not shown to have a negative economic impact on the property, there can be no taking.[27] The Federal Circuit's ruling establishes that an alleged government activity or regulation that carries a reciprocity of advantage[28] whereby the landowner's property increases in value as a result of the action, or where the value is not reduced by the action, is not a taking. In *Hendler,* the alleged physical occupation was based upon entry on land to install groundwater monitoring wells and conduct monitoring activities to abate a nuisance resulting from groundwater contamination. The theory, which has not been addressed by the Supreme Court, could arguably manifest in the reversal of the result, if not the principles, of the Court's rulings in *Loretto* (where cable-ready apartments are more valuable), *Nollan* (where a lateral easement would have been of value to beachfront owners as well as the public), and *Dolan* (where the Dolan's would no longer need to have paid taxes, insurance, maintained the creek bed, nor had to deal with occasional flooding under the permit condition).

VI. *Penn Central*

Lucas will generate litigation questioning the interpretation of state nuisance and public trust doctrine and questioning whether state courts and legislatures are free to expand those doctrines.[29] Like obscenity,[30] the Court has taken the vagaries of the *Penn Central Transportation Co. v. New York*[31] ad hoc balancing test and replaced it with an unknown standard that will differ in every state. Future Supreme Court regulatory takings cases may very well establish law only for the state from where the case arose.

The debate over whether *Lucas* represents a win for the property folks or the regulators is as rancorous as the takings debate itself.[32]

27. *Id.*

28. Linda J. Oswald, *The Role of "Harm/Benefit" and "Average Reciprocity of Advantage" Rules in a Comprehensive Takings Analysis,* 50 VAND. L. REV. 1449 (1997).

29. *See Lucas,* 505 U.S. at 1028–29 (suggesting possible limitation to preexisting established standards or possibly standards established at the time of purchase of the land). *See also* Paul Saraham, *Wetlands Protection Post-*Lucas*: Implications of the Public Trust Doctrine on Takings Analysis,* 13 VA. ENVT. L.J. 537 (1994) (recommends growth of trust doctrine).

30. Miller v. California, 413 U.S. 15 (1973) (basing test on local community standards of decency).

31. 438 U.S. 104 (1978).

32. *Compare* Norman Williams, *A Narrow Escape?,* 16 ZONING & PLAN. L. REP. 113, 122 (1993) (Parts I & II) (*Lucas* inconsistent with traditional zoning jurispru-

This content downloaded from
149.10.125.20 on Fri, 04 Feb 2022 15:51:57 UTC
All use subject to https://about.jstor.org/terms

Lucas, the developer, is certainly happy, having sold his two lots to the state for the equivalent of proceeds from the lottery before the land was ravaged by Hurricane Floyd.[33] The regulators and their academic commentators, however, stress that *Lucas* poses no threat to enforcement of environmental legislation.[34] Indeed, it appears that *Lucas* stands as a powerful precedent to validate virtually all mainstream zoning and land development regulation and offers sufficient deference to sustain all but the most aggressive forms of growth management.

A most interesting question after *Lucas* is what happens in those cases where regulation wipes out something less than all economic use. What if 99 percent of the value is eliminated but the regulations allow some viable use?[35] The regulators can argue that Justice Scalia was seeking to objectify takings and develop a per se rule. The total loss standard closely meets that goal. Most commentators[36] and courts[37] viewing the issue have concluded that the landowner can still fall back on the *Penn Central* ad hoc balancing test, a test that is now more

dence), *with* Jack H. Archer & Terrance W. Stone, *The Interaction of the Public Trust and the Takings Doctrines: Protecting Wetlands and Critical Coastal Areas,* 20 VT. L. REV. 81 (1995) (hopeful that *Lucas* will allow even greater levels of environmental regulation under an expanding public trust doctrine), *and* Dwight H. Merriam, *No Norman, the Sky Is Not Falling In,* 16 ZONING & PLAN. L. REV. 137 (1993) (*Lucas* is of slight impact and significance), *and* Glenn P. Sugameli, *Takings Issues in Light of* Lucas v. South Carolina Coastal Council*: A Decision Full of Sound and Fury Signifying Nothing,* 12 VA. ENVTL. L.J. 439 (1993).

33. James L. Huffman, Dolan v. City of Tigard*: Another Step in the Right Direction,* 25 ENVT. L.143, 151 n.59 (1995) (citing Bruce Smith, *S.C. Settles Challenge to Coastal Rules: Man Barred from Building on Beachfront Property Accepts $1.5 Million Deal,* CHARLOTTE OBSERVER, July 8, 1993, at IC).

34. Archer & Stone, *supra* note 32.

35. Florida Rock Indus. v. United States, 18 F.3d 1560 (Fed. Cir. 1994), *cert. denied,* 513 U.S. 1109 (1995) (substantial loss of investment-backed expectations).

36. KUSHNER, *supra* note 2, at § 3.05.

37. *See Lucas,* 505 U.S. at 1019, n.8 (dictum); Forest Properties, Inc. v. United States, 177 F.3d 1360 (Fed. Cir. 1999); Garneau v. City of Seattle, 147 F.3d 802 (9th Cir. 1998); Dodd v. Hood River County, 136 F.3d 1219 (9th Cir. 1998), *cert. denied,* 119 S. Ct. 278 (1998); Front Royal Indus. Park Corp. v. Front Royal, 135 F.3d 275 (4th Cir. 1998); Bayou Des Familles Dev. Corp. v. United States, 130 F.3d 1034, 1038 (Fed. Cir. 1997); M. & J. Coal Co. v. United States, 47 F.3d 1148 (Fed. Cir. 1995), *cert. denied,* 516 U.S. 808 (1995); Tahoe-Sierra Preservation Council v. Tahoe Reg'l Planning Agency, 34 F. Supp. 2d 1226 (D. Nev. 1999); Hendler v. United States, 36 Fed. Cl. 574 (1996); Kavanau v. Santa Monica Rent Control Bd., 941 P.2d 851 (Cal.), *cert. denied,* 522 U.S. 1077 (1997); Steinbergh v. City of Cambridge, 604 N.E.2d 1269 (Mass. 1992), *cert. denied,* 508 U.S. 909 (1993); Martin County v. Section 28 Partnership, Ltd., 676 So. 2d 532 (Fla. Dist. Ct. App. 1996), *cert. denied,* 520 U.S. 1196 (1997); Zeman v. City of Minneapolis, 552 N.W.2d 548 (Minn. 1996); Gazza v. State Dep't of Envtl. Conservation, 679 N.E.2d 1035 (N.Y.), *cert. denied,* 522 U.S. 813 (1997); Mock v. Department of Envtl. Resources, 623 A.2d 940 (Pa. Commw. Ct. 1993), *aff'd mem. per curiam,* 667 A.2d 212 (Pa. 1995), *cert. denied,* 517 U.S. 1216 (1996); Whitehead Oil Co. v. City of Lincoln, 515 N.W.2d 401, 407 (Neb. 1994); Alegria v. Keeney, 687 A.2d 1249 (R.I. 1997); McQueen v. South Carolina Coastal Council, 496 S.E.2d 643 (S.C. Ct. App. 1998), *cert. granted,* (S.C. Mar. 18, 1999).

This content downloaded from
149.10.125.20 on Fri, 04 Feb 2022 15:51:57 UTC
All use subject to https://about.jstor.org/terms

rigorous after Justice Scalia criticized the old model of sustaining regulation simply because it may tend to avoid harm.[38]

Interestingly, *Lucas* failed to even mention any interface between *Lucas* and *Penn Central.* Indeed, the post-*Lucas* decisions of the Supreme Court in describing the current takings doctrine do not even mention *Penn Central.*[39]

VII. *Del Monte Dunes*

In the latest edition of that doctrine, *City of Monterey v. Del Monte Dunes,*[40] the opinion of the majority in Part III cites seven cases representing the Court's regulatory takings liability doctrine.[41] *Penn Central* is notably missing, suggesting it is indeed discarded as a model. In Part IV.B.3, the majority cites *Lucas* as providing the "essentially ad hoc, factual inquiries" for takings claims, quoting *Penn Central* in parentheses merely as the source of the quote.[42] These cryptic discussions may suggest that *Lucas* is the sole test of excessive regulation. If so, *Lucas* might reflect an enormous gain for regulator discretion, possibly to compensate for the inexcusable dilemma that communities were placed in by *First English Evangelical Lutheran Church v. County of Los Angeles,*[43] where the Court rendered local government exposed to liability for temporary taking damages should a court ever rule that a community's regulation exceeds the unknowable standard of ad hoc balancing. Compared to recent hypertechnical rulings of the Court under the Tenth Amendment intergovernmental immunities doctrine invalidating modest congressional initiatives,[44] by its own rulings, the

38. *Compare Lucas,* 505 U.S. at 1024–25 (Justice Scalia critical of balancing), *with* 505 U.S. at 1019, n. 8 (dictum of Justice Scalia endorsing the continued availability of balancing).

39. For other post-*Lucas* taking cases exhibiting disrespect for *Penn Central, see* Eastern Enters. v. Apfel, 524 U.S. 498, 522 (1998) (finding retroactive retirement health benefits charge on former employers a taking, citing *Penn Central* only in passing to note a presumption that physical invasion takings-like regulation is disfavored); Phillips v. Washington Legal Found., 524 U.S. 156 (1998) (interest on lawyer trust accounts is property of the client and subject to a physical invasion-type taking claim where state law diverts interest to fund legal services for the poor); Suitum v. Tahoe Regional Planning Agency, 520 U.S. 725 (1997) (need not apply for transferable development rights in lieu of development permission to trigger ripeness and finality).

40. 526 U.S. 687, 119 S. Ct. 1624 (1999).

41. *Monterey,* 119 S. Ct. at 1636.

42. *Id.* at 1644.

43. 482 U.S. 304 (1987).

44. College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666 (1999) (Eleventh Amendment bars trademark infringement action in federal court, Tenth Amendment in state court, and refusing to find that violation pattern evidences a basis to find the alleged property deprivation by the state to fall within Congress' § 5 powers under the Fourteenth Amendment); Florida Prepaid Postsecond-

This content downloaded from
149.10.125.20 on Fri, 04 Feb 2022 15:51:57 UTC
All use subject to https://about.jstor.org/terms

Court appears unconcerned with the interference of takings doctrine with state autonomy.

City of Monterey also determined the completely noncontroversial question that only existed in the sometimes bizarre Ninth Circuit that *Dolan* is restricted solely to reviewing exactions or conditions on permits and has no relevance to excessive regulatory taking claims.[45]

Another non-issue resolved by *City of Monterey* is that a jury is available to establish valuation in inverse condemnation cases in federal courts.[46] The conclusion is hardly a shocker if you look at Seventh Amendment decisions,[47] but the *Monterey* ruling is of slight relevance to land developers or regulators as the ruling is restricted to cases such as *City of Monterey* where the state, at the time of the regulation, before *First English,* lacked a state procedure for recovering in inverse condemnation.[48] As a result of the *First English* mandate, California, and all other states, now offer an inverse condemnation remedy. *Monterey* has no impact there or most anywhere. As the federal courts require de facto exhaustion of state administrative and judicial procedures under the doctrines of ripeness and finality,[49] takings claims must be litigated in state court. Due to issue preclusion and res judicata, those claims cannot be relitigated before a federal jury.[50] Because the Court in a five to four ruling concluded that excessive regulation takings claims are more like tort cases than condemnation cases[51] will continue to be controversial for common law historians and scholars, the ruling should continue to be irrelevant for practitioners.

---

ary Educ. Expense Bd. v. College Sav. Bank, 527 U.S. 627 (1999) (state patent law violations not subject to private lawsuit as interferences with property not proportional to remedy of abrogating sovereignty); Alden v. Maine, 527 U.S. 706 (1999) (Congress violates Tenth Amendment by recruiting state courts to enforce rights under federal statute, unless within the Fourteenth Amendment § 5 exception, based on consent, or involves litigation by the federal government to enforce the law); Printz v. United States, 521 U.S. 898 (1997) (Congress may not recruit state officials to administer federal regulatory program because it would interfere with Tenth Amendment sovereign immunity); New York v. United States, 505 U.S. 144 (1992) (Congress could not recruit state legislature and mandate regulation as a means of carrying out federal regulatory authority).

45. *Monterey,* 119 S. Ct. at 1635.

46. *Id.* at 1637–38.

47. *E.g.,* Lorillard v. Pons, 434 U.S. 575 (1978); Curtis v. Loether, 415 U.S. 189 (1974).

48. *Monterey,* 119 S. Ct. at 1633–34.

49. Williamson County Reg'l Planning Comm'n v. Hamilton Bank, 473 U.S. 172 (1985).

50. Robert H. Freilich & Jason M. Divelbiss, *The Public Interest is Vindicated:* City of Monterey v. Del Monte Dunes, 31 URB. LAW. 371, 386–88 (1999).

51. *Monterey,* 119 S. Ct. at 1643–45.

This content downloaded from
149.10.125.20 on Fri, 04 Feb 2022 15:51:57 UTC
All use subject to https://about.jstor.org/terms

VIII. The Denominator Problem

Another taking issue that has yet to be resolved is the denominator problem. The problem arises where a developer starts with large acreage and gradually develops small projects so that a small number of acres of wetlands, or other problematic acreage, remain undeveloped. Will the developer be able to argue that the denial of a permit for the remaining acres is a total *Lucas* wipeout? Or will the Court use the large acreage and find less than a total denial of economic use?[52] Will the Court allow a strategic use of *Lucas* where a landowner carves up property for development and separate ownership, intentionally retaining a remnant for which development is not likely to be approved so that the owner can claim a *Lucas* wipeout? Or will it rule such strategy to be an act of noncompensable bad faith?

IX. The Land-Use Litigation Scorecard

Land-use practice is on a jurisprudentially equal playing field where the firmament of takings rulings offer the property rights' practitioners an exciting arsenal of strategies and causes of action while simultaneously providing a foundation that regulators can point to as embracing today's regulatory environment. In land use, every case seems to result in a victory for every observer.

It certainly is remarkable that every form of environmental regulation and every variation on growth management initiatives has been judicially endorsed in rulings that look to the taking doctrine or the state's police powers. Despite the ostensible sea change of the Supreme Court in the direction of protecting the landowner, there has never before existed the firm jurisprudential foundation that supports the institution of zoning and growth management that exists today. This is particularly the case where such regulatory initiatives are based on a comprehensive planning process.

X. The Significance of State Law

It is ironic that, despite property owners enjoying an unbeaten recent record before the High Court, virtually the only changes in subdivision,

52. *Compare* Loveladies Harbor, Inc. v. United States, 28 F.3d 1171 (Fed. Cir. 1994) (finding a taking upon denial of permit to fill 11.5 acre parcel and refusing to measure loss according to the original 250 acre parcel that was substantially developed), *with* Karam v. State Dep't of Envtl. Protection, 705 A.2d 1221 (N.J. Super. Ct. App. Div. 1998) (practical approach to denominator problem, here considering both parcels as common ownership, deed conditioned on upland and riparian lands remaining as a single unit, each purchased at same time in a single contract, transferred as a single unit and assessed for taxes as a single unit), *aff'd per curiam,* 723 A.2d 943 (N.J. 1999) (substantially for the reasons expressed by the appellate division).

This content downloaded from
149.10.125.20 on Fri, 04 Feb 2022 15:51:57 UTC
All use subject to https://about.jstor.org/terms

zoning, land regulation, and growth management law that have significantly aided landowners have been achieved from state legislative victories, particularly early vesting statutes,[53] permit streamlining initiatives,[54] limits on moratoria,[55] and state takings legislation.[56]

Most recent changes in policy reflect legislative initiatives that are local and idiosyncratic as compared to the ostensible global impact of the universal applicability of federal statutes and the U.S. Supreme Court's interpretation of the Constitution. With the exception of federal antitrust enforcement,[57] and compliance with the *Interstate Land Sales Full Disclosure Act,*[58] it is the state legislatures, rather than the federal government, including the U.S. Supreme Court, that drive land-use theory and practice.

XI. Affordable Housing and Regional General Welfare

Most growth management initiatives continue to find endorsements from the courts. Interestingly, challenges based on big constitutional claims as under the Takings Clause have not been victorious. Instead, the few successful challenges are more likely to be based on state statutory provisions, such as where a restraint was found to be a moratorium and failed to meet the state's criteria for imposition or interfered with the development of affordable housing as in *Building Industry Association of San Diego v. City of Oceanside.*[59]

In *Oceanside,* the City of Oceanside General Plan contained four relevant elements. First, the plan contained an interim growth management element requiring that projects with negative fiscal impacts be approved by a supermajority of the planning commission and city council, and only if there were offsetting benefits. Second, the plan contained a public facilities and management element to influence the timing of development and avoid adverse environmental, fiscal, or social impacts.

53. KUSHNER, *supra* note 2, at ch. 10.
54. *Id.* § 8.04.
55. *Id.* § 2.04.
56. Robert P. Butts, *Private Property Rights in Florida: Is Legislation the Best Alternative?,* 12 J. LAND & ENVTL. L. 247 (1997); Robert C. Ellickson, *Takings Legislation: A Comment,* 20 HARV. J.L. PUB. POL'Y 75 (1996); Patrick F. Hubbard, *"Takings Reform" and the Process of State Legislative Change in the Context of a "National Movement,"* 50 S.C.L. REV. 93 (1998); Douglas T. Kendall & Charles P. Lord, *The Takings Project: A Critical Analysis and Assessment of the Progress So Far,* 25 B.C. ENVTL. AFF. L. REV. 509 (1998); Carol M. Rose, *A Dozen Propositions on Private Property, Public Rights, and the New Takings Legislation,* 53 WASH. & LEE L. REV. 265 (1996).
57. KUSHNER, *supra* note 2, at § 3.09.
58. 15 U.S.C. §§ 1701–20 (1994).
59. 33 Cal. Rptr. 2d 137 (Cal. Ct. App. 1994).

This content downloaded from
149.10.125.20 on Fri, 04 Feb 2022 15:51:57 UTC
All use subject to https://about.jstor.org/terms

The public facilities and management element divided the city into four sectors and gave development priority to sectors with adequate available services. Third, the land-use element called for a timing mechanism to regulate residential development but did not establish one. Finally, the plan contained a housing element which followed the statutorily required standard that the community make adequate provision for the housing needs of all economic segments of the community.[60]

Since the 1970s, Oceanside had been experiencing rapid development and population growth, which an expert claimed made it difficult for the city to keep up. Although evidence was conflicting and the city's infrastructure was in rather good shape, there was testimony that significant deficiencies existed in the road system, emergency services, schools, libraries, recreation, drainage, and the sewer system.

In 1987, the voters approved by initiative, Proposition A, establishing a residential development control system setting annual allotments for dwelling unit development. The allotments were for 1,000 units in year one and 800 thereafter, allowing up to a 10 percent adjustment to redress prior year excesses or deficits. The allotments exempted: (1) a single project per developer of four or less dwellings; (2) fourplexes—or less—on a single lot; (3) single-family dwellings on single lots; (4) rehabilitation or conversion of existing dwellings; (5) units within redevelopment areas; (6) government subsidized affordable housing (but not exempting affordable housing built with density bonuses); and (7) single family dwellings on lots averaging more than 10,000 square feet or projects with a score of 70 percent or better under the project evaluation system.

In addition, Proposition A established a point system to evaluate projects. A residential Development Evaluation Board composed of members of the planning commission would evaluate projects and assign points based upon public facilities and services and site and architectural quality.

Under the "A" criteria, points were assigned for the availability of facilities and services. The "B" criteria provided for the assignment of points based on the quality of the site and architectural design. A project had to receive a score of 51 percent on the "A" criteria and 70 percent on the "B" criteria to be eligible for an annual allocation. The board made recommendations and the allocations were awarded by the city council.

Note that under California Evidence Code § 669.5, because the growth restriction limits residential development, the statute shifted the

60. *Id.*

This content downloaded from
149.10.125.20 on Fri, 04 Feb 2022 15:51:57 UTC
All use subject to https://about.jstor.org/terms

traditional presumption of validity to the state to justify the constraint as necessary to protect the health, safety, or welfare of the community.[61]

The court invalidated Proposition A on the basis of conflict with the city's general plan and three state statutes.

In *Lesher Communications, Inc. v. Walnut Creek,*[62] the California Supreme Court ruled that a ballot initiative traffic control ordinance was void for failure to indicate an intent to amend the general plan to allow curtailing growth at congested principal intersections. The initiative-approved ordinance was rendered inconsistent with the plan despite the ordinance being but a timing regulation. An adopted ordinance must be consistent with the city's general plan. The *Oceanside* court ruled that the implementation ordinance was more restrictive than the public facilities and management element and thus constituted an inconsistency. It would appear that the court might have permitted Proposition A as the timing mechanism called for in the land-use element.

The *Oceanside* ruling would appear to present an extraordinarily strict version of plan and zoning consistency. In addition, the court found that Proposition A conflicted with the housing element of the general plan which called for the statutory standard that the community make adequate provision for the housing needs of all economic segments of the community.[63] This may appear to be a hypertechnical consistency ruling as the permit scheme exempted affordable housing. On the other hand, the ruling is an excellent victory for developers, as well as advocates for affordable housing, as the Oceanside scheme was invalidated because it favored expensive single-family homes and discouraged apartments that required more expensive services and facilities, particularly schools.

The proposition was also found to be inconsistent with three statutory provisions contained in the California Government Code, including section 65008 that prohibits discrimination against developments intended for those of low or moderate income.[64] Inconsistency was also found with section 65913.1 which requires the zoning of vacant land for residential use with appropriate standards to meet the plan's housing needs.[65] Oceanside was not zoned for apartments which were indirectly being discouraged through the allocation system.[66]

61. CAL. EVID. CODE § 669.5 (West 1995).
62. 802 P.2d 317 (Cal. 1990).
63. CAL. GOV'T CODE §§ 65302(c), 65580–65589.8 (West 1997 & Supp. 1999).
64. *Id.* § 65008.
65. *Id.* § 65913.1.
66. In footnote 16, the court indicated that it would not consider an after-the-fact letter from the California Department of Housing and Community Development finding

This content downloaded from
149.10.125.20 on Fri, 04 Feb 2022 15:51:57 UTC
All use subject to https://about.jstor.org/terms

The court found Proposition A to conflict with section 65915, which requires that communities offer density bonuses or an equivalent financial value to developers who construct 25 percent of units for persons or families of low or moderate income, or 10 percent of units for lower income households.[67]

Finally, the court compared Proposition A with the moratorium in *Associated Home Builders of the Greater Eastbay, Inc. v. City of Livermore.*[68] The court found that a total ban on development pending provision of adequate services sustained in *Livermore* was more equitable and defensible than a scheme like Proposition A that encouraged more expensive housing and excluded less expensive housing.

Legislative inclusionary zoning legislation can trump legislatively enacted or popularly established growth management initiatives. *Oceanside* allowed the court to take a shot at environmentalism and exclusivity, to advance capitalism, and to dress its ruling in the rhetoric of democratic values of concern for the politically powerless. It can be very effective to enter the courtroom with not only good law and a virtuous client, but with an invitation to the court to advance public policy for which the court is both passionate and compassionate.

New Jersey's *Mount Laurel*[69] decision, a classic example of that recipe, requires that each developing community make possible through its land-use controls the development of its fair share of the regional supply of affordable housing. However, the *Mount Laurel* doctrine may have been weakened in several recent cases. In *Christian Activities Council v. Town Council of Glastonbury,*[70] the Connecticut Supreme Court seriously weakened the affordable housing land-use appeal law. The court sustained the denial of a zone change that would have permitted development of affordable housing. The request called for rezoning a 33.42 acre parcel that was owned by a public water district for development of twenty-six single-family dwellings, from the current "reserved land" zoning classification that established a one acre minimum lot size to "rural residence" that would have permitted homes on half acre lots. The town's comprehensive plan called for "fringe suburban"[71] development at that same density.

---

the city's general plan housing element adequate and finding the provision of adequate sites for such development. *Oceanside,* 33 Cal. Rptr. 2d at 154 n.16.

67. CAL. GOV'T CODE § 65915 (West Supp. 1997 & Supp. 1999).

68. 557 P.2d 473 (Cal. 1976).

69. Southern Burlington County NAACP v. Mount Laurel, 336 A.2d 713 (N.J. 1975), *appeal dismissed,* 423 U.S. 808 (1975).

70. 735 A.2d 231 (Conn. 1999).

71. *Id.*

This content downloaded from
149.10.125.20 on Fri, 04 Feb 2022 15:51:57 UTC
All use subject to https://about.jstor.org/terms

Although the court imposed the burden of proof and production of sufficient evidence to support the decision and the reasons for it on the town, it only required that the town demonstrate a reason for the denial. The town merely cited concerns over traffic safety, water supply preservation, and open space as balanced against the need for affordable housing. While the trial court emphasized the concern for a potential source of water in approving the rezoning denial, the supreme court focused on the concern for open space as a valid justification. The court addressed the issue of site specific concerns and ruled that it justified the application denial where no changes to the proposed development can protect the identified public interest concern.

The court seemed to grant what amounts to at least the traditional deference given to zoning classifications because the town had recently approved another affordable housing project and had made substantial progress on meeting its goals established under a regional allocation compact. It is likely that the majority believed that providing discretion to a municipality that is making progress would be effective in encouraging an aggressive start by other communities, perhaps more than the message of reversing the exclusion by one town. A dissenting opinion charged that the majority "rips the soul out of affordable housing in the [state]."[72] The dissent argued that the evidence reflected generalizations and anecdotal evidence and speculative theorizing. The dissent accused the majority of establishing a defense based on the availability of some other site and placing on the challenger the burden of demonstrating the unavailability of alternative sites.

In *Shire Inn, Inc. v. Borough of Avon-by-the-Sea,*[73] where a New Jersey intermediate appellate court denied a builder's remedy, accepting the borough's finding that conversion of a prior nonconforming hotel into a twenty-six unit rooming house was not consonant with sound land-use principles and practices. This is a very deferential standard of review. Indeed, the denial would appear to be suspect as the de minimis accommodation would not likely carry any significant environmental impact. The court appeared to decide the case because of the traditional prior nonconforming use doctrine that prevents expanding a use that violates current zoning or replaces it with another use. Instead the court should have seen the issue as one under *Mount Laurel* and insisted on a greater showing of a compelling interest.

Although mandatory planning obligations in a few states carry an inclusionary effect, there have been but modest extensions of the anti-

72. *Id.*
73. 729 A.2d 473 (N.J. Super. Ct. App. Div. 1999).

This content downloaded from
149.10.125.20 on Fri, 04 Feb 2022 15:51:57 UTC
All use subject to https://about.jstor.org/terms

snob zoning principles condemning exclusionary zoning through substantive due process-type *Mount Laurel* doctrine. The majority of states have remained silent or have enacted modest initiatives such as density bonuses to encourage affordable housing development.[74] Most states have accepted excessive regulation and have left the provision of adequate housing to the vicissitudes of the private market and the dwindling supply of government subsidized housing.[75]

Michigan, which has been playing around with judicial exclusionary remedies, has prohibited the most egregious forms of exclusionary zoning by statute.[76] The law prohibits both ordinances and zoning decisions that have the effect of totally prohibiting the establishment of a particular type of land use within a city or village where there exists a demonstrated need and where the use may be appropriately located.

Idaho, by statute, following the California approach, requires that comprehensive plans must include a housing element assessing the need for housing and allows for low-cost housing. The housing element must provide sites for manufactured housing and mobile homes sufficient to assure a competitive market. The plan must be adequate to address the needs of the community.[77] Although the state previously had sent mixed signals on the issue of mandatory consistency between zoning and comprehensive plans,[78] it would appear that Idaho in its housing element legislation, as well as through judicial interpretation of its general planning law,[79] requires that zoning conform to the more restrictive requirements of the comprehensive plan. The mandatory nature of the housing element requirements would appear to provide litigation strategies to challenge plans and zoning failing to meet the

74. *See* OR. REV. STAT. § 197.314 (Supp. 1998) (manufactured housing permitted in urban growth boundary single family zones with maximum lot size of one acre, authorizing local adoption of aesthetics regulations requiring pitched roof or roof and siding of color, material, and appearance of that commonly used in surrounding dwellings or in community).

75. Robert W. Burchell & David Listokin, *Influences on United States Housing Policy,* 6 HOUS. POL'Y DEBATE 559 (1995) (from 1980 to 1990 new budget authority fell by 60%, from roughly $25 billion to $10 billion, and annual subsidized starts fell by 90%, from 175,000 to 20,000).

76. MICH. COMP. LAWS ANN. § 125.592 (West 1997); Mount Elliot Cemetery Ass'n v. City of Troy, 171 F.3d 398 (6th Cir. 1999).

77. IDAHO CODE § 67–6508(l) (Supp. 1997).

78. *Compare* Balser v. Kootenai County Bd. of Comm'rs, 714 P.2d 6 (Idaho 1986) (consistency a discretionary political act), *with* Bone v. City of Lewiston, 693 P.2d 1046 (Idaho 1984) (need not amend zoning map to conform to suitable projected land uses disclosed in plan where plan is more permissive, but must consider plan in making zone change).

79. *Bone*, 693 P.2d at 1046.

This content downloaded from
149.10.125.20 on Fri, 04 Feb 2022 15:51:57 UTC
All use subject to https://about.jstor.org/terms

statutory standard.[80] Alternatively, courts might entertain challenges to permits for other land uses for failure to have an adequate comprehensive plan.

XII. Growth Management to Smart Growth

There has been no flood of litigation challenging growth management. The reason may be because most challenges have been expensive and have resulted in the endorsement of regulatory initiatives rather than their abolition. Or perhaps because the controls, except where imposed in a draconian fashion prohibiting all growth,[81] are more of a theoretical evil as either they do not work, or they are employed in such a haphazard fashion that growth is merely channeled to alternative sites in adjacent towns or the next county.[82] The devices of subdivision[83] and site plan review,[84] interim development moratoria,[85] building permit caps,[86] downzoning of substantial land to reduce development intensity,[87] urban growth boundaries,[88] agricultural preservation,[89] timed sequential zoning,[90] computerized development monitoring systems,[91]

80. *But see* Hernandez v. City of Encinitas, 33 Cal. Rptr. 2d 875 (Cal. Ct. App. 1994) (obligation satisfied by adequate number of lots zoned to accommodate the needs disclosed in the housing element).

81. *See, e.g.,* Boca Raton v. Boca Villas Corp., 371 So. 2d 154 (Fla. Dist. Ct. App. 1979) (per curiam), *cert. denied,* 449 U.S. 824 (1980) (seeking to cap growth at the current population).

82. William W. Buzbee, *Urban Sprawl, Federalism, and the Problem of Institutional Complexity,* 68 FORDHAM L. REV. 57 (1999); James A. Kushner, *Growth Management and the City,* 12 YALE L. POL'Y REV. 68 (1994); Richard T. LeGates, *The Emergence of Flexible Growth Management Systems in the San Francisco Bay Area,* 24 LOY. L.A.L. REV. 1035 (1991).

83. *See generally* KUSHNER, *supra* note 2.

84. *Id.* § 7.08.

85. Associated Home Builders of the Greater Eastbay, Inc. v. City of Livermore, 557 P.2d 473 (Cal. 1976); KUSHNER, *supra* note 2, at § 2.04.

86. Schenck v. City of Hudson, 114 F.3d 590 (6th Cir. 1997) (slow growth ordinance setting an annual cap on zoning certificates despite subdivision approval not violative of substantive due process as rationally related to valid purpose where set according to the available infrastructure; priority for affordable housing, housing for the elderly, or disabled, pre-approved subdivisions, and large areas served by utilities and streets and the remainder by lottery); Construction Indus. Ass'n v. City of Petaluma, 522 F.2d 897 (9th Cir. 1975), *cert. denied,* 424 U.S. 934 (1976); KUSHNER, *supra* note 2, at § 2.05.

87. Norbeck Village Joint Venture v. Montgomery County Council, 254 A.2d 700 (Md. 1969) (sustaining downzoning and the denial of sewer service); KUSHNER, *supra* note 2, at § 2.06.

88. KUSHNER, *supra* note 2, at § 2.08.

89. *Id.* § 2.10.

90. *Id.* § 2.13.

91. William S. Hart Union High Sch. Dist. v. Regional Planning Comm'n, 277 Cal. Rptr. 645 (Cal. Ct. App. 1991) (albeit finding schools component preempted by state impact fee enabling legislation), *criticized in* KUSHNER, *supra* note 2, at § 2.14. *See also* James A. Kushner, *DMS: The Development Monitoring System Is the Latest Technique for Subdivision Review and Growth Management,* 11 ZONING & PLAN. L. REP. 33 (1988).

This content downloaded from
149.10.125.20 on Fri, 04 Feb 2022 15:51:57 UTC
All use subject to https://about.jstor.org/terms

statewide planning,[92] growth-inducing impact assessments,[93] and requirements of adequate public services[94] or concurrency[95] are all now judicially accepted and about as American as apple pie or Euclidean zoning.[96] Of course, growth management implementation techniques should be based on comprehensive planning and should utilize realistic population forecasts.[97]

Growth Management has been renamed "Smart Growth." It is a much friendlier term. Smart Growth is championed by Vice President Gore and involves a comprehensive planning process that preserves open space and encourages the concentration of development.[98] Smart Growth can also involve carrots rather than sticks, such as where public infrastructure funding under a capital improvements budget is targeted to those areas where growth is encouraged. Smart Growth would appear to be an attractive label to market growth management and might include the use of urban growth boundaries, clustering, transferable development rights, and mixed land uses. Smart Growth might be seen as a means to facilitate the development of "New Urbanism,"[99] walk-

92. KUSHNER, *supra* note 2, at § 2.15.

93. *In re* WalMart Stores, Inc., 702 A.2d 397 (Vt. 1997) (sustaining environmental board denial of building permit due to the failure to submit secondary-growth studies; project impact on market competition was a relevant factor for the board to consider; growth includes economic as well as population, and impacts on municipal tax revenues was relevant as is the town's ability to accommodate secondary growth; applicant's own case studies demonstrate secondary growth impacts; despite projection of mere six additional students for schools, growth impact study needed as insufficient evidence to support claims); KUSHNER, *supra* note 2, at § 2.16.

94. KUSHNER, *supra* note 2, at § 2.12.

95. *Id.*

96. *See* Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926) (endorsing the institution of zoning).

97. Rancourt v. Town of Barnstead, 523 A.2d 55 (N.H. 1986).

98. *Current Developments, Gore Outlines Plans to Encourage "Smart Growth,"* 26 HOUS. & DEV. REP. 261 (1998) (urging pursuit of "smart growth" initiatives and the reduction of urban sprawl, specifically recommending transit and elimination of policies that encourage auto use and policies encouraging the extension of sewer lines to undeveloped areas). *See* MD. CODE ANN., STATE FIN. & PROC. §§ 5–7B-01 to 5–7B-04 (Michie Supp. 1998) (smart growth law restricts use of state funded infrastructure to locally designated growth areas suitable for development, and as of Oct. 1, 1998, only available in areas previously eligible for priority funding, where average density is at least two dwelling units per acre in an area served by sewers). *See generally* URBAN LAND INST., SMART GROWTH: ECONOMY, COMMUNITY, ENVIRONMENT (1998); Duane J. Desiderio, *Growing Too Smart—Takings Implications of Smart Growth Policies,* 13 NAT. RESOURCES & ENV'T. 330 (1998); John W. Frece & Andrea Leahy-Fucheck, *Smart Growth and Neighborhood Conservation,* 13 NAT. RESOURCES & ENV'T. 319 (1998) (priority infrastructure finance priority areas in Maryland).

99. *See Current Developments, County Planning Processes Help Smart Growth Efforts,* 26 HOUS. & DEV. REP. 728 (1999).

This content downloaded from
149.10.125.20 on Fri, 04 Feb 2022 15:51:57 UTC
All use subject to https://about.jstor.org/terms

able neighborhoods served by public transit.[100] Supported by liberals and conservatives,[101] Smart Growth initiatives are emerging almost everywhere before receptive state legislatures or on citizen-generated ballot measures.[102] Opponents of Smart Growth and those who are skeptical should not fear; Dumb Growth still rules.

Restrictions on growth management may also arise from state limits on interim growth moratoria. This was the situation in *Toll Brothers, Inc. v. West Windsor Township,*[103] a New Jersey appellate court ruling invalidating a timed growth control ordinance as being a moratorium under the state statute. The ordinance established various zones and allowed development of between 20 and 50 percent of the zoned allowable density, with the larger percentages allowed where infill was sought. The owner was able to develop as an "additional right" between 6 and 10 percent of the balance of the allowable density each year commencing after a period of between two and ten years, with the longer periods applying to those districts which allowed the larger initial infill allotments. The developer was permitted to advance the exercise of its additional rights by constructing all necessary roads to service the district. The scheme was invalidated as an illegal moratorium violating the state statute requiring a finding by a qualified health professional of a clear imminent danger to the health of inhabitants and the requirement that such moratoria must be limited to a six-month term. The statute, however, was directed at stop-gap interim replanning moratoria.

Interestingly, this very argument was rejected quite elegantly by the New York Court of Appeals in *Golden.*[104] It would certainly appear that the *Toll Brothers* interpretation would be the death knell for *Golden-*

100. MICHAEL N. CORBETT, A BETTER PLACE TO LIVE: NEW DESIGNS FOR TOMORROW'S COMMUNITIES (1981); PETER KATZ, THE NEW URBANISM: TOWARDS AN ARCHITECTURE OF COMMUNITY (1994).

101. Mark Arax, *Putting the Breaks on Growth Bypassed by the States Economic Rebound, The Central Valley Finds That Increased Development Just Brings More Municipal Debt. Some Cities Are Questioning Benefits of Building Boom,* L.A. TIMES, Oct. 6, 1991, at 1A, 1999 WL 26182971.

102. Patricia E. Salkin, *Smart Growth at Century's End: The State of the States,* 31 URB. LAW. 601 (1999).

103. 712 A.2d 266 (N.J. Super. Ct. App Div. 1998). *But cf.* Gisler v. Deschutes County, 945 P.2d 1051 (Or. Ct. App. 1997) (sustaining county development code conditioning subdivision approval on connection to municipal sewer system and the regulation was not preempted by state planning goal that prohibited counties from allowing sewer hookups or extensions outside the urban growth boundary. Nor was the regulation invalidated due to the lack of subdivision approval authority because the application is outside the urban growth boundary where utility connections are prohibited. The court also held that the denial did not constitute an illegal moratorium).

104. Golden v. Planning Bd., 285 N.E.2d 291 (N.Y.), *appeal dismissed,* 409 U.S. 1003 (1972).

This content downloaded from
149.10.125.20 on Fri, 04 Feb 2022 15:51:57 UTC
All use subject to https://about.jstor.org/terms

style timed sequential zoning. The court distinguished *Golden,* finding that New York did not have a moratorium statute like New Jersey's. The court overlooked the fact that the law did not impose a freeze, as owners could speed up the development process by making road improvements.

A different view of the case suggests that all timing or adequacy of facilities ordinances are moratoria. An even broader reading suggests that any denial of development that is within zoning limits constitutes an illegal moratorium. As New Jersey authorizes subdivision regulation, the mere denial of a subdivision as authorized under state law for inadequate supporting facilities should not be found to be a moratorium. Thus, the New Jersey intermediate appellate court in *Toll Brothers* has implied that local governments in New Jersey, if they wish to control growth, must restrict themselves to the traditional techniques of subdivision and site plan review and may not adopt any innovative timing or concurrency initiatives. The *Toll Brothers* scheme was not linked to the adequacy of facilities, and thus its reasoning would arguably not extend to *Golden* and concurrency. The *Toll Brothers* distinction of *Golden*, based merely on the lack of a moratoria statute in New York, however, might suggest a broader application of the decision, threatening local adequacy of facilities initiatives in New Jersey. Certainly, this is a strange result in a jurisdiction that has taken such pride in experimenting with novel solutions to urban problems. The New Jersey Supreme Court refused to review the ruling.

XIII. Urban Growth Boundaries

State court decisions continue to uphold and enforce urban growth boundary legislation.[105] No taking challenges have emerged and, if *Lu-*

105. Hummel v. Land Conservation & Dev. Comm'n, 954 P.2d 824 (Or. Ct. App. 1998) (periodic urban growth boundary and planning process is sequential and interactive and later decisions may potentially require a reworking of previous decisions or previously acknowledged work tasks, thus no error in approval of expanded urban growth boundary to include 3,491 acres, most of which was unbuildable, as allegedly needed to provide services and could be reduced if later found not to be in compliance with statewide planning goals); King County v. Central Puget Sound Growth Management Hearings Bd., 979 P.2d 374 (Wash. 1999) (county-wide planning agency designation of urban growth areas binding on county adoption of comprehensive plans under *Growth Management Act* (GMA) although adopted plan may still be challenged by citizen appeal and will not stand if violates the GMA even if adopted by agency, in which case the provision should be stricken as well from the county-wide plan, remanding to determine compliance); Association of Rural Residents v. Kitsap County, 974 P.2d 863 (Wash. Ct. App. 1999) (invalidating approved development outside of mandatorily established interim urban growth area; for purposes of doctrine of limiting development to within the urban growth boundary term "urban growth" was not impermissibly vague despite development permitted by zoning; interim urban growth area temporarily halted until planning process continued).

This content downloaded from
149.10.125.20 on Fri, 04 Feb 2022 15:51:57 UTC
All use subject to https://about.jstor.org/terms

cas is king, an agricultural or forestry zone should not arise to a taking. Indeed, an important theme is that the takings doctrine is a sheep in wolf's clothing. Growth Management and other regulatory initiatives, as in the case of *Oceanside* and *Toll Brothers,* are frequently invalidated on state law grounds. This may be the case in finding a lack of enabling authority,[106] in Dillon's Law general law cities,[107] or a restrictive interpretation of home rule powers such as on a theory of state preemption whereby the state legislature has regulated the subject,[108] or where the state court finds the subject to be a matter of statewide concern,[109] thereby disabling local regulatory authority. The Takings Clause has generated the most attention and the most pages in law reviews, but it has not proven to be anything like the impact of Warren Court due process or equal protection doctrine. The driving force and doctrine in growth management and land-use law generally remains not *Lucas* or *Dolan,* but *Euclid,*[110] the 1926 ruling of the U.S. Supreme Court endorsing zoning and establishing extreme deference for local planning.

When you consider *Lucas* and the shifting focus of takings claims to state law property principles such as nuisance, and the *Hamilton Bank*[111] doctrine of finality, requiring the exhaustion of state administrative and judicial remedies, the Supreme Court has effectively turned land use and development over to the states. The answer to the Takings Clause riddle may become a model for the Court in approaching the interpretation of other provisions of the Constitution. As the Court pursues constitutional devolution, shrinking its caseload and jurisdiction, the Court itself may serve as a model for other agencies of the federal government.

106. Potomac Greens Assocs. Partnership v. City Council, 761 F. Supp. 416 (E.D. Va. 1991) (enabling authority to exact offsite street improvements lacking), *vacated for mootness,* 6 F.3d 173 (4th Cir. 1993).

107. *Id;* Albrecht Realty Co. v. New Castle, 167 N.Y.S.2d 843 (Sup. Ct. 1975) (One hundred twelve annual residential unit cap lacked enabling authority with charter city reviewed under Dillon's rule).

108. Wambat Realty Corp. v. State, 362 N.E.2d 581 (N.Y. 1977) (state agency environmental protection of state park controls over local planning and zoning).

109. Miami Beach v. Fleetwood Hotel, Inc., 261 So. 2d 801 (Fla. 1972) (rent control as part of landlord and tenant regulation a matter of statewide concern); Kaiser Hawaii Kai Dev. Co. v. City of Honolulu, 777 P.2d 244 (Haw. 1989) (zoning a matter of statewide concern where local initiative conflicts with state requirement of comprehensive planning-based zoning).

110. Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).

111. Williamson County Reg'l Planning Comm'n v. Hamilton Bank, 473 U.S. 172 (1985).

This content downloaded from
149.10.125.20 on Fri, 04 Feb 2022 15:51:57 UTC
All use subject to https://about.jstor.org/terms

XIV. Adequate Public Facilities

Requiring adequate public facilities to support development is now a basic assumption of comprehensive planning.[112] It is generally assumed that *Ramapo*-style timed sequential zoning, permitting development upon the extension of facilities and supported by comprehensive planning and an aggressive capital facilities extension plan with a committed budget, as endorsed by the New York Court of Appeals in *Golden v. Planning Board,*[113] is a legitimate exercise of the police powers.

Concurrency, as required by Florida statute, establishes a goal of providing adequate facilities prior to development.[114] Under the Los Angeles County Development Monitoring System (DMS), projects may not be approved absent a demonstration of adequate infrastructure capacity according to a computer system that matches infrastructure capacity levels with the cumulative demand generated by all built and pending projects. Although the DMS has been judicially approved,[115] it has not been replicated.

XV. Subdivision

Subdivision policy is increasingly rendered state-idiosyncratic due to unique statutory standards. Those states or local communities adopting concurrency laws may permit exactions that might not meet the standards of *Nollan* and *Dolan.* In order to avoid *Dolan* and its rough proportionality standard, courts would have to characterize the extension of facilities to a capacity in excess of that demanded by the project as a voluntary undertaking by the developer so as to increase the pace of development. Alternatively, recognizing that streets, utility lines, and schools must meet certain minimum capacity standards, the courts might consider an exaction that is not mathematically equal to projected demand but based on the need of the community to increase current infrastructure capacity to the next feasible expansion level as within the roughly proportionate standard. How do you finance an elementary school where a developer generates demand only for one-half of a class-

112. Pardee Constr. Co. v. City of Camarillo, 690 P.2d 701 (Cal. 1984) (rate of development permit limit valid despite prior finding of developer's vested right to proceed); Dateline Builders, Inc. v. City of Santa Rosa, 194 Cal. Rptr. 258 (Cal. Ct. App. 1983); Beck v. Town of Raymond, 394 A.2d 847 (N.H. 1978) (endorsing reasonable growth).

113. 285 N.E.2d 291 (N.Y.), *appeal dismissed,* 409 U.S. 1003 (1972).

114. FLA. STAT. ANN. § 163.3180 (West Supp. 1999).

115. William S. Hart Union High Sch. Dist. v. Regional Planning Comm'n, 277 Cal. Rptr. 645 (Cal. Ct. App. 1991) (enforceable although school component found preempted by the state's school impact fee legislation).

This content downloaded from
149.10.125.20 on Fri, 04 Feb 2022 15:51:57 UTC
All use subject to https://about.jstor.org/terms

room? If exacting a full classroom addition is interpreted as violating the *Dolan* rough proportionality requirement, the result may be project denials for inadequate infrastructure. A catch-22 is presented to states that prohibit subdivision denial for inadequate infrastructure but instead are required to approve subject to conditions to mitigate the problem.[116] The constitutional *Dolan* claim would appear to preempt the state statute and thus leave the court or agency free to deny the plat. Assuming the plat could legally be denied, the problem of charging the developer for a greater capacity of infrastructure than is technically generated by the project might trigger the dictum in *Nollan* that a condition would be valid if it is designed to mitigate a problem that would justify permit denial. Of course, satisfying *Nollan* does not guarantee compliance with *Dolan,* as the City of Tigard learned the hard way.[117] *Dolan* may result in an increase in permit denials. Realistically, these problems will result in more developers voluntarily extending facilities and should generate more compromises through the execution of developer agreements that resolve infrastructure finance issues at the outset of the project.

The Eighth Circuit, in *Goss v. City of Little Rock,*[118] found that a condition on rezoning requiring the owner to dedicate 22 percent of the property for highway use was a taking for lack of rough proportionality evidence, despite suggesting that the city could pursue its legitimate interests by denying the rezoning. This might suggest the rejection of Justice Scalia's dictum in *Nollan.*

XVI. The Rise of Equal Protection?—*Olech*

In *Willowbrook v. Olech,*[119] a challenge by a property owner who was required to grant a 33-foot easement as a condition of connecting to the municipal water supply in lieu of the usual 15-foot easement, the Court found that an equal protection claim was cognizable. The Court, in a per curiam opinion, endorsed the theory that equal protection will protect even a class of one, where a person is treated in a discriminatory

116. Krawski v. Planning Comm'n, 575 A.2d 1036 (Conn. Ct. App. 1990); Campanelli, Inc. v. Planning Bd., 261 N.E.2d 65 (Mass. 1970); Miles v. Planning Bd., 558 N.E.2d 1150 (Mass. App. Ct. 1990); Heintz v. Edwards, 604 N.Y.S.2d 374 (Sup. Ct. App. Div. 1993); Western Land Equities, Inc. v. City of Logan, 617 P.2d 388 (Utah 1980) (claimed inadequate sidewalks could be modified by mitigation replanning).

117. The City of Tigard paid $1.5 million to the Dolans and promised dedication-less project approval. Dave Hunnicut, *OIA Legal Center Looking for* Dolan *Cases,* LOOKING FORWARD, Jan./Feb. 1998, at 6 (newsletter of pro-property rights "Oregonians in Action Education Center," the legal representative of the Dolans).

118. Goss v. Little Rock, 151 F.3d 861 (8th Cir. 1998), *cert. denied,* 119 S. Ct. 1355 (1999).

119. Willowbrook v. Olech, 68 U.S.L.W. 4157 (U.S. Feb. 23, 2000).

This content downloaded from
149.10.125.20 on Fri, 04 Feb 2022 15:51:57 UTC
All use subject to https://about.jstor.org/terms

manner. In addition, the Court's opinion indicated that a claim can similarly be based on allegations that government action is irrational and wholly arbitrary. The Court ruled that the government's subjective motivation is not a part of these equal protection claims. The Court expressly refused to reach an alternative theory that vindictive government action claims based on hostility present an alternative cognizable equal protection claim. In a footnote, the Court indicated that the class-of-one claim would extend as well to a class-of-five, as it appears that there were five landowners treated like the petitioner. Justice Breyer concurred in the result reached, noting that the government is concerned that every ordinary violation of state law will establish an equal protection claim. Justice Breyer argued that due to a record that the condition imposed reflected vindictive action that would violate equal protection, the Court need not have reached the class-of-one issue as it did, thereby converting every zoning decision where landowners are treated differently to an equal protection claim. The "vindictive action"-based claim theory has frequently been advanced as a substantive due process theory,[120] but appears to be a potential new weapon in the landowner's arsenal. The Rehnquist Court has been very activist in interpreting the Equal Protection Clause, both in reducing authority to utilize affirmative action,[121] and in expanding protection to a wide array of groups and individuals.[122] At just over 500 words, *Olech* may be both the shortest decision of the Term and the decision most likely to generate the most litigation and scholarly commentary. Under each of the models, the government's burden would be under the standard "rational basis" test. Although *Olech* should elevate the Equal Protection Clause to the clause of choice to challenge local government regulation, along with takings and due process challenges, the Supreme Court is likely to respond by extending justiciability concepts such as ripeness and finality to bar most claims and require that matters be pursued in state administrative and judicial forums.[123] Interestingly, the Court's ruling in *Olech* reflects the developed law in most states.[124] Nevertheless,

120. De Blasio v. Zoning Bd. of Adjustment, 53 F.3d 592 (3d Cir. 1995); Bello v. Walker, 840 F.2d 1124 (3d Cir.), *cert. denied,* 488 U.S. 851, 868 (1988).

121. Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995).

122. *E.g.,* Romer v. Evans, 517 U.S. 620 (1996)(sexual orientation bias barred by equal protection); City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432 (1985)(heightened rational basis scrutiny for disabled). *See generally* JAMES A. KUSHNER, GOVERNMENT DISCRIMINATION: EQUAL PROTECTION LAW AND LITIGATION (West 1988 & Supp. 1999).

123. J. KUSHNER, SUBDIVISION LAW AND GROWTH MANAGEMENT § 8.10 (1991 & Supp. 1999).

124. *Id.* § 3.07.

This content downloaded from
149.10.125.20 on Fri, 04 Feb 2022 15:51:57 UTC
All use subject to https://about.jstor.org/terms

Olech can be expected to become as well-known in federal and state courtrooms as *Lucas* and *Dolan.*

XVII. Vesting Tentative Maps

California invented the "Vesting Tentative Map," in allowing developers who are willing to commit to a particular architectural design and submit the plans for specific buildings with the tentative or preliminary plat application. However, California has joined at least eleven states in offering vesting at preliminary or tentative tract approval,[125] thus preventing the application of newly established standards or attaching costly additional permit conditions. Another dozen states are providing by statute or judicial decision for vesting at the time of application submission to prevent the subsequent modification of review standards.[126] For example, California Government Code § 66474.2 provides that only those ordinances, policies, and standards in effect at the time the tentative map application is complete may be considered in reviewing an application, except for policies for which proceedings by way of ordinance, resolution, or motion have been initiated with notice published and policy approved at the time of the decision on the tentative map, or where the map applicant initiated or requested the change in policy.[127] It appears to be an even better result than if the developer had sought a vesting tentative map.[128] However, while new exactions or subdivision review standards cannot be changed, building code requirements may vest only with the vesting tentative map approval.

XVIII. Permit Streamlining

California has joined at least a dozen jurisdictions that have passed streamlining legislation forcing prompt administrative review by providing for automatic approval upon the failure to hold hearings or render a decision on an application within a set period.[129]

One development in permit streamlining is the aftermath of the California Supreme Court's ruling in *Bickel v. City of Piedmont,*[130] that held

125. KUSHNER, *supra* note 2, at § 10.03[2][c] n.56. *See, e.g.,* Kaufman & Broad Central Valley, Inc. v. City of Modesto, 30 Cal. Rptr. 2d 904 (Cal. Ct. App. 1994) (limiting capital facilities fee despite escalator condition to facilities identified; if not the rate at time vesting tentative subdivision map application deemed complete).

126. KUSHNER, *supra* note 2, at § 10.03[2][c] n.52.

127. CAL. GOV'T CODE § 66474.2 (West 1997).

128. *See* Kaufman & Broad Central Valley, Inc. v. City of Modesto, 30 Cal. Rptr. 2d 904 (Cal. Ct. App. 1994).

129. KUSHNER, *supra* note 2, at § 8.04.

130. 946 P.2d 427 (Cal. 1997).

This content downloaded from
149.10.125.20 on Fri, 04 Feb 2022 15:51:57 UTC
All use subject to https://about.jstor.org/terms

that if a permit applicant consents to a continuance beyond the allowable time period to allow submission of their revised plans, time limits for mandatory decisions on the application are waived, precluding automatic approval. The waiver principle has been superseded by statute. California Government Code §§ 65940.5 and 65950 eliminated common law waiver.[131] Section 65957 provides for a one-time extension, if mutual agreement, for up to ninety days, except as to section 65950.1, providing that after an extension under the environmental impact reporting law, the decision must be made within ninety days of a an environmental impact report certification.[132]

XIX. Conclusion

In conclusion, although the score cards depict a pattern of property owners winning cases, the institution of zoning, deference for local planning autonomy, and the regulatory state has never been on stronger footing. Courts are endorsing most varieties of growth management and other new regulatory or infrastructure finance vehicles.

At the end of the twentieth century, American land-use jurisprudence reflects a legal framework upon which legislatures can embark on Smart Growth policies and enact a full range of growth management strategies to assure that communities are well-planned and supported by adequate facilities. This framework is but a process and does not promise that communities will be planned either efficiently or equitably. Whether urbanization is managed to improve the quality of life and to preserve our heritage is firmly in the hands of the people through their elected representatives. Whether America's cities are revitalized into user friendly and attractive places where people want to be is up to the creativity and leadership of the community of private developers and the wisdom of members of city councils, boards of supervisors, county legislatures, planning commissions, and planning boards. Policymakers and private developers collectively choose whether zoning, subdivision, and other more sophisticated forms of growth management are utilized to favor low density sprawling inaccessible satellite suburbs, connected by clogged highways, and sharing polluted air, or whether a more accessible, higher density, and environmentally friendly community can be produced: one that offers an improved quality of life and enhanced access to employment, shopping, and entertainment. In short,

131. CAL. GOV'T CODE §§ 65940.5, 65950 (West Supp. 1999). *See* DeBerard Properties, Ltd. v. Lim, 976 P.2d 843 (Cal. 1999) .

132. CAL. GOV'T CODE §§ 65950.1, 65957 (West Supp. 1999).

This content downloaded from
149.10.125.20 on Fri, 04 Feb 2022 15:51:57 UTC
All use subject to https://about.jstor.org/terms

can land-use regulation in the twenty-first century serve the interests of the environment, the poor, and cities, as well as regulation in the twentieth century has served the affluent and the interests of individuality and privacy? The legacy of the twentieth century is the legal foundation, the scientific theories of urban planning, and the public agencies to carry out rational planning. It remains for the twenty-first century to respond to my criticism of current growth management—that growth management is not planning on a regional scale that focuses on preservation and revitalization of communities nor does it address the urban design of the city.[133] Growth Management, or Smart Growth, like sustainability[134] cannot simply be a function of average density and the number of annual permits that can be issued.

The next generation of growth management challenges will focus on the efficiency of delivering municipal services, the integration of land-use controls with transportation planning, the adoption of principles of environmental sustainability[135] and of principles of social sustainability. Social sustainability will include an infrastructure providing attractive living spaces, access to employment, shopping, recreation, and the aesthetic, cultural, historic, educational, spiritual, and emotional resources necessary to sustain urban life.

133. Kushner, *Growth Management and the City, supra* note 82.
134. SIM VAN DER RYN & PETER CALTHORPE, SUSTAINABLE GROWTH (1986).
135. James A. Kushner, *A Comparative Vision of the Convergence of Ecology, Empowerment, and the Quest for a Just Society,* 52 U. MIAMI L. REV. 301 (1999).

This content downloaded from
149.10.125.20 on Fri, 04 Feb 2022 15:51:57 UTC
All use subject to https://about.jstor.org/terms