The Property Rights Challenge: What's A Planner To Do?

by Irving Schiffman

The protection of property rights — a subject that had not been of great political or judicial importance since the 1930s — has become the domestic political movement of the 1990s. Its advocacy in courts and legislatures threatens to impose serious limitations on environmental and land use policies nationwide.

Much of the recent controversy over property rights revolves around the issue of ownership of land and the constraints imposed upon its use and development.

Whether the subject is building in wetland areas, the imposition of development fees, limitations imposed on logging, restricting development on farm land, or the preservation of wildlife habitat and open space, the underlying issue is the same: to what extent can or should the government interfere with a landowner's right to do what he or she wants to do with his or her property? Indeed, this question has now become the central legal (as well as political) issue in the making of planning and environmental policy.

The issue is of particular importance and the subject of increasing controversy in the rural and urbanizing communities of America. Here, officials are wrestling with the challenge of how they can organize, control, and coordinate the process of development so as to protect the environmental, cultural, aesthetic, and fiscal character of the locality — while meeting the need for new housing, industrial facilities, and commercial growth.

Decisions concerning how land is to be used and the conditions under which it can be developed are, of course, critical components of this growth management process. Such decisions, however, impinge directly on the control which property owners can exercise over their holdings and raise questions concerning the extent to which the use of land can be regulated consistent with the Fifth and Fourteenth Amendments to the United States Constitution.

Local Autonomy in Land Use Control

Historically, cities and counties have been allowed a great deal of autonomy in their governance of land use. Indeed, as environmental concerns grew in the 1970s, state legislatures frequently responded by strengthening the planning and regulatory capabilities of local governments and by expanding the criteria to be utilized in decision-making.

Local planning officials were also able to count on the support of a sympathetic judiciary in their efforts to carry out the planning and land use function. Favorable court decisions reflected the belief that the Constitution should not be interpreted in a rigid manner that would deny communities the flexibility and legal protection needed to implement necessary and community supported planning objectives.

Changes in Planning Law

In 1987, however, local land use regulations began to come under closer judicial scrutiny. In a series of decisions the United States Supreme Court shifted the focus of review in land use cases from determining whether the generally permissive due process criteria of the Fourteenth Amendment had been met to deciding whether the more stringent standards of the Fifth Amendment's "taking clause" had been satisfied. The Court found development conditions and zoning controls failed to meet "taking clause" standards, even though due process criteria were satisfied. *The Supreme Court & "Takings," p.13*

This change is significant because courts traditionally have been quite reluctant to strike down land use control ordinances for failing to meet due process criteria, particularly since the individual challenging the ordinance has the burden of overcoming the presumption that the ordinance is constitutional. The Supreme Court has also made it clear that while local governments could rescind land use regulations held to be invalid, they would remain liable for the payment of monetary damages for the period of time that the invalid land use controls were in effect.

The Consequences for Planning

This change in direction in planning law has caused some to question the continued legitimacy of key aspects of the planning process, particularly controls that require property dedications and those that go beyond directly protecting human health and safety. With respect to the latter, regulations designed to conserve wetlands, open space, historic districts, grazing lands, coastal areas, and the like now appear to be subject to heightened judicial scrutiny.

In addition, the unsettling of decades of consistently favorable judicial decisions has caused planners to lose some of the constitutionally-based leverage which they bring to the bargaining table —while the bargaining power of project applicants has been correspondingly strengthened. Eventually, this combination of official caution and property owner assertiveness may lead to a "fear-of-litigation" relaxation of existing controls and narrowing of community planning objectives.

Adding to the concern of local governments is the fact that opponents of land use regulation have now moved beyond the courts and taken their struggle to the Congress and the state legislatures. In Congress, efforts are underway to weaken both the Endangered Species Act and the Clean Water Act to make them less protective of wildlife habitat and wetlands. In addition, complementary legislation would require the government to compensate landowners

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when regulations under the two laws cause a diminution in the value of affected property.

Outside of the nation's capital, in just the past five years, legislatures in 17 states have passed laws to protect property rights and another 24 have considered such legislation. Most of the laws enacted simply require agencies to conduct "takings impact assessments" before carrying out regulatory actions, but two states — Mississippi and Texas — require invalidation or compensation for any state or local regulation that reduces property values. A 1995 Florida statute allows courts to order compensation if "inordinate" state or local regulation reduces the value of property or prevents owners from making the money they reasonably expected. Various forms of so-called "property rights" laws are pending in almost every state legislature.

As the courts and legislatures have become more hostile to planning and environmental regulation, local governments find that ensuring quality development, while protecting wildlife habitat, wetlands, historic areas, and other environmental and cultural assets, has become a much more challenging task. If such values are to be protected, city and county officials may have to do so themselves, and in a less favorable legal and political environment.

What's A Planner To Do?

The changed legal and political environment within which planners and local officials must now operate requires a rethinking of a number of planning practices. While local officials cannot afford to retreat from important community planning objectives, neither can they ignore the increased concern with protection of property rights. Thought must be given to how plan policies can be achieved with the least infringement on ownership rights. This will require the adoption of implementation strategies that are diverse and innovative, and which skillfully combine regulatory, incentive, and voluntary approaches. Toward this end, those responsible for carrying out community planning may wish to consider the following practice guidelines:

1. Know the Law. Although recent court decisions have tended to limit the flexibility of planning policy-makers, much of the previously established case law regarding land use controls remains in effect (e.g., the ability of localities to reduce or increase densities to meet planning objectives; to require bicycle lanes in new subdivisions; or to preserve historic areas). Local officials continue to possess a great deal of discretionary authority to regulate land use and to protect environmental values.

It is important that planners, legislators, and planning commissioners keep informed regarding the true scope of their authority, and that they not be misled by project applicants who seek to expand the significance of recent decisions far beyond their legitimate interpretation.

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2. Enhance Public Participation in the Planning Process. In an uncertain legal and political environment it is more important than ever that the goals and objectives of the planning process be fully supported by all elements of the community. Through the use of focus groups, public meetings, surveys, and other techniques, residents should be provided an early and continuous voice in the planning process.

Participation should include consideration of specific implementation strategies as well as more general policy directions — and participants should have a clear understanding of the relationship between plan objectives and implementation techniques. As part of the process, officials should consider the drafting of a vision statement, a consensus document outlining the community's vision for its future. *[Editor's Note: For more on visioning, see Mike Chandler's column on p. 17].*

3. Be Prepared to Justify Development Conditions. Consistent with the Supreme Court's Nollan and Dolan decisions, courts are now more closely examining how specific controls further legitimate plan policies — and are striking down requirements that do not show a clear relationship between project impacts and development fees or conditions. Thus, local governments have an increased burden to justify constraints placed on project approvals. This will require a more professional approach to land use regulations and subdivision exactions.

In carrying out the land use control function, planning officials should be prepared to make findings which directly link the control techniques which are to be imposed (e.g., impact fees; dedication requirements; zoning limitations; or development conditions) with the objectives and policies of the master plan. In addition, local governments should consider requiring project applicants to submit more detailed analyses of the impacts of their projects so that the government can establish the required close connection between the project impact and the conditions imposed.

4. Expand the Range of Implementation Techniques. The greater the assortment of implementation strategies from which a locality can select, the more flexibility it will have in carrying out plan objectives. A community which has adopted such techniques as agricultural buffers, cluster development, transfer of development rights, overlay zones, performance zoning, and mixed-use development, is able to consider a variety of methods to achieve plan objectives that leave property owners with sufficient economic value to avoid a takings claims. For example, development may be possible in ecologically sensitive areas if housing is clustered and separated from the most delicate areas by natural or man-made buffers, or if an overlay zone is established which sets special conditions that development in the zone must meet.

5. Establish and Maintain a Capital Improvement Program. This multi-year program, often adopted in conjunction with the municipal plan, sets forth the major capital improvement needs of the city or county. It typically includes information on where capital improvements will be located, when they will be provided, and

how they will be financed. Through regulation, development can be phased to coincide with the extension of essential services pursuant to the capital improvement program schedule. In many communities, developers can seek to accelerate this process by agreeing to provide facilities ahead of schedule at their own expense or by installing oversized facilities on a reimbursement basis.

6. Place Greater Focus on Incentive and Voluntary Approaches. In many cases, plan objectives can be met without unilaterally imposing controls by giving developers something they want in exchange for something the community desires. Thus, affordable housing, usable open space, design amenities, and other benefits can be obtained in return for such incentives as density bonuses, streamlining the application process, or reductions in development fees.

Landowners can also be encouraged to take advantage of the tax relief and preservation opportunities available through the voluntary use of private or public land trusts.

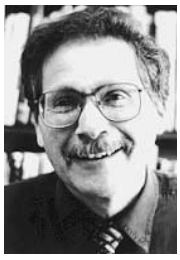
7. Streamline the Permit Process. In almost every community some of the opposition to planning controls is due to citizen anger and frustration at the time and expense involved in obtaining the necessary permits, or in getting a yes or no answer from the responsible officials. Local governments should review the process by which land use applications are handled and determine ways in which the process can be simplified, and made less costly (particularly for small parcels) and less time-consuming.

8. Increase Public Ownership and Interest in Land. Local officials should take advantage of opportunities to purchase property of outstanding ecological or historical importance for parkland, landmark, or recreation purposes. Communities in a position to purchase development rights, particularly for agricultural land, can preserve the agricultural use while keeping the land in private ownership and on the tax roles. In addition, developable land owned by the government can be transferred to the private sector with conditions restricting its use without raising a takings issue. Finally, where appropriate, public land can be exchanged for private land with conservation value.

9. Increase the Public Speaking Roles of Commissioners and Local Officials. In recent days, opponents of planning and environmental regulation have been outspoken in their opposition, frequently drowning out the assertions of those who appreciate the importance of planning and recognize the consequences of the unregulated exercise of property rights. It is important that planning opponents not have the field to themselves, and that community residents get to hear all sides of the property rights issue.

Planners, commissioners, elected officials, and others should take advantage of opportunities provided by the media, fraternal associations, and public meetings to discuss the purpose of local planning and its contribution to the welfare of the community. They should remind their audience that land ownership entails responsibilities as well as rights.

10. Maintain Educational Programs for Commissioners. As the planning process becomes more complex, commissioners need to be fully informed so that they can effectively participate in the process and communicate with the public. If at all possible, arrangements should be made for commissioners to receive training upon appointment. Subsequently, commissioners should be encouraged to attend state and regional planning meetings and workshops, and learn about other communities where innovative planning and land use approaches are underway. ◆



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The Supreme Court & "Takings"

Four recent U.S. Supreme Court decisions are credited with establishing closer judicial scrutiny over land use regulation:

In *Nollan v. California Coastal Commission* (1987) the Court ruled that a beach access dedication requirement imposed by the Coastal Commission as a condition to its approval to construct a beach house violated the Fifth Amendment's takings clause. The Court held that there was a lack of "nexus," that is, substantial relationship, between the alleged impact of the project — obstruction of the ocean view — and the easement requirement for physical access to the beach.

In *Dolan v. City of Tigard* (1994) the Court went a step further and held that the city violated the takings clause when it granted a permit to expand a business on the condition that the owner dedicate ten percent of the property for a bike path and storm water management purposes. While the Court found the "nexus" requirement of *Nollan* to have been met, it ruled that the city failed to make "an individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development."

In *Lucas v. South Carolina Coastal Council* (1992) the Court held that a regulation which leaves a landowner without an economically viable use of his property violates the takings clause unless it can be justified by the state's common law principles of nuisance. In effect, the Court limited such restrictive land use controls to those related to the state's historic interest in protecting human health and safety as opposed to regulations designed to deal with environmental, economic, or aesthetic concerns.

In *First English Evangelical Church v. Los Angeles County* (1987), the Court held that, pursuant to the Fifth Amendment's takings clause, local governments are liable for the payment of monetary damages for the period of time that an invalid land use control was in effect.