

Planning and Land Use Law AICP Exam Prep

March 2019



Introduction

- Planning is subject to the Constitution's limits on the regulation of certain personal liberties.
- In California, planning is also subject to:
 - California Constitution, Article 11, § 7 ("A county or city may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws.")
 - Government Code, sections 65000 et seq. (Planning and Zoning Law) (regulates the general plan, aka, "constitution for all future development")
- Legal basis for all land use regulation is the police power of an agency to protect the public health, safety, and welfare of its residents. (*Berman v. Parker* (1954))
- A land use regulation is within the police power if it's reasonably related to the public welfare. (*Associated Home Builders, Inc. v. City of Livermore* (1976))

Legal Foundations of Planning and Zoning

- United States Constitution
- State Constitutions
- Federal Laws
- State Statutes
- Local Ordinances
- Case Law – Federal and State

Constitutional
Issues &
Legal
Concepts

- Due Process
- Equal Protection
- Takings
- Eminent Domain
- Zoning

Due Process

- Source: 5th Amendment in U.S. Const.; due process applies to the state govts through the 14th A
- 2 kinds of due process:
 - **Procedural**: govt must give parties notice and an opportunity to be heard in a fundamentally fair hearing by an impartial tribunal
 - **Substantive**: regulation must have a "rational relationship" to a "legitimate governmental purpose"

Due Process

- **5th Amendment:** No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, **nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.**
- **14th Amendment, Section 1:** All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; **nor shall any State deprive any person of life, liberty, or property, without due process of law;** nor deny to any person within its jurisdiction the equal protection of the laws.

Procedural Due Process

- Requires reasonable notice and an opportunity to be heard by an impartial decision maker for administrative proceedings that affect life, liberty, or property interests (i.e., having a hearing for issuance or revocation of a CUP)
- Constitution doesn't require govt to afford PDP unless it deprives an individual of an interest in **life, liberty, or property**. These substantive rights (life, liberty, and property) are protected and cannot be deprived except pursuant to constitutionally adequate procedures.
- PDP doesn't protect everything that might be described as a "benefit" or "interest"
 - To have a protectable property interest, a person must have a **legitimate claim of entitlement** to that interest. The question is whether the party has a "**clear entitlement**" to the property interest at stake to warrant due process protection. (E.G., if the govt had no choice but to grant a permit if the applicant met certain criteria established by regulation, then a protected property interest is involved and PDP protections must be provided.)

Procedural Due Process

- What is required to satisfy procedural due process?
 - **General rule:** Governmental proceedings must be conducted in an orderly, fundamentally fair, and impartial manner.
 - **Adequate notice**; requirements are found in state enabling laws and local zoning ordinances; party whose property is at issue and the party who has applied for a permit (sometimes the same person) must get notice
 - **Unbiased decision maker**; free from conflicts of interest and bias; no ex parte contacts (aka, decision maker cannot make contact outside of the public hearing process with a party involved or potentially involved in a matter)
 - **Opportunity to be heard**, but agency can place reasonable time restrictions on presentations and testimony
 - Right to present **evidence** at public hearing
 - Right to a **prompt decision**

Substantive Due Process

- State and local agencies have the police power to enable them to regulate land use for the purposes of promoting public health, welfare, safety, and morals. But the power to regulate land uses is qualified by doctrine of “substantive due process.”
- SDP protects against arbitrary government action
- SDP violation require some form of outrageous or egregious conduct; abuse of governmental power that “shocks the conscience”
- Procedural irregularities, violations of state law, and unfairness ordinarily aren’t SDP violations

Substantive Due Process

- **Test:** courts require that governmental regulation bear a “rational relationship” to a “legitimate” governmental purpose.
- Rational Relationship -
 - Regulation only needs to be “reasonable, not arbitrary” (*Village of Belle Terre v. Boraas* (1974) 416 U.S. 1)
 - A conceivable, believable, reasonable relationship
- Legitimate Governmental Purpose -
 - Protection of health, safety, welfare, morals, property values, quiet enjoyment, etc.

Substantive Due Process

Village of Belle Terre v. Boraas (1974) 416 U.S. 1

- Village had an ordinance restricting land use to single-family homes. The ordinance strictly defined “family” as one or more related persons or not more than two unrelated people. Boraas owned a house and leased it to unrelated people in violation of the Village’s ordinance. Boraas sued, claiming the ordinance violated the due process and equal protection clauses by interfering with the right to travel and by expressing impermissible social preferences.
- Court held that the ordinance did not violate due process and is rationally related to a permissible governmental objective.

Key
Constitutional
Concepts:
Equal
Protection –
14th Admt.

What is “equal protection”?

- “...nor shall any State...deny to any person within its jurisdiction the equal protection of the laws.” (14th Amendment)
- 14th A prohibits discrimination by state govts
- Persons who are similarly situated with respect to the legitimate purpose of a law must be treated alike under the law
- Land use regulations may not deprive a person of equal protection of the laws
- E.G., if a city has an ordinance prohibiting individuals from soliciting employment in an unauthorized location, the ordinance can’t be selectively enforced against certain individuals or classes of individuals; ordinance must be equally enforced against all persons committing the violation

Equal Protection

Moore v. City of East Cleveland (1977) 431
U.S. 494

- Ordinance strictly defined “family” for purposes of limiting household sizes to avoid traffic congestion, overcrowding, and undue financial burdens on school systems
- Ordinance violated equal protection because it impacted fundamental right of families to live together

Police Power

What is the “Police Power”?

- Sovereign power of the state to regulate and control private behavior to protect and promote the greater public health, safety, morals, and welfare
- Police power must be delegated by the state to counties and municipalities (e.g., California Constitution, art. 11, § 7)
- Agency’s police power is broad, but not absolute; police power cannot conflict with a state’s general laws
- Federal law preempts state law, even when the laws conflict, but in the absence of federal law, or when a state law would provide more protections than what is available under federal law, the state law prevails

Police Power

What is “public welfare”?

“The concept of the public welfare is broad and inclusive. . . . The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled.”

Berman v. Parker (1954) 348 U.S. 26, 33

Takings

What is a "Taking"?

- General premise: no private property shall be taken for public use without the payment of just compensation to the injured party; property owners are not entitled to the "highest and best use" (U.S. Constitution, 5th A [Takings Clause]; Cal. Constitution, art. I, § 19)
- Deprivation of all economically viable use is an unconstitutional takings (*Lucas v. S. Carolina Coastal Comm.* (1992))
- 2 kinds: physical and regulatory takings
 - Physical (direct takings): government exercises power of **eminent domain** to take possession of private property for public use upon payment of just compensation
 - Regulatory (indirect takings): occurs where the landowner continues to own the land, but a regulation restricts the use of the property (e.g., height restriction, zoning)

Regulatory Takings

Agins v. City of Tiburon (1980) 447 U.S. 255

- Facts: Agins bought land for residential development; the city adopted zoning ordinances that put Agins' property in a single-family dwelling and open-space zone, with density restrictions permitting Agins to build between one and five single-family residences on their tract; Agins sued, claiming regulatory takings under 5th and 14th Amendments
- Court held that government regulation of private property "**effects a taking if [it] does not substantially advance legitimate state interests**"
- City's zoning ordinance was not a regulatory taking
- City's ordinance substantially advanced the legitimate governmental goal of discouraging premature and unnecessary conversion of open-space land to urban uses and are proper exercises of the city's police power to protect its residents from urbanization

Regulatory Takings

Lingle v. Chevron (2005) 544 U.S. 528

- Facts: Hawaii passed an act that limited the rent that oil companies can charge dealers who lease company-owned service stations. The idea was to help curb gas prices. Chevron sued, claiming the act was a regulatory taking under the Takings Clause.
- Previous to this case, the courts were divided as to which test was to be used to analyze a regulatory takings. One test analyzed takings under the **Takings Clause** (asking whether the statute substantially advances a legitimate state interest); the other test analyzed it under **Due Process Clause** (asking whether the legislature could have rationally believed the statute would substantially advance a legitimate state interest).
- Court said that the “substantially advances” language is appropriate in the due process context, not takings law (which was the subject of *Lingle*).
- **Test:** Regulatory actions generally will be deemed a per se taking of private property:
 - 1) where government requires an owner to suffer a **permanent invasion** of their property (this came from *Loretto v. Teleprompter Manhattan CATV Corp.* (1982); **OR**
 - 2) where regulations completely **deprive an owner of “all economically beneficial use”** of her property (this case came from *Lucas v. South Carolina Coastal Council* (1992)).

Regulatory Takings

- ***Lingle v. Chevron*** (2005)
 - Outside of these two categories, courts must use the ***Penn Central*** factors to determine whether a regulation has resulted in a taking.

Penn Central Transportation Co. v. New York City (1978) 438 U.S. 104:

- Facts: city rejected developer's plans for modern office tower atop Grand Central Station because it would destroy the historic and aesthetic features
- Court held there was no taking when the government designated the Grand Central Terminal building as a historical landmark and precluding expansion of the building
- ***Penn Central* factors:**
 - The regulation's economic impact on the party claiming the regulatory taking
 - The extent to which the regulation interferes with distinct investment-backed expectations, AND
 - The character of the government action

These factors help identify regulations whose effects are functionally comparable to government appropriation or invasion of private property.

Regulatory Takings



Grand Central Terminal, NYC

Ad Hoc Takings / Exactions

What are exactions?

- Government makes a demand for money or property in exchange for approval of a permit or right to develop property.
- ***Nollan*** and ***Dolan*** establish specific rules for determining when an exaction is an impermissible taking under the 5th A. These cases have limited the extent in which public agencies may condition development.
- ***Nollan v. Cal. Coastal Commission*** (1987) 483 U.S. 825 – exaction must have an “**essential nexus**” with the public harm sought to be addressed; land use restriction must be tied to the harm
 - Govt approved the development of a beach front parcel on the condition that the property owner dedicate a strip of its property as an easement to allow public access across the beach in front of the new home
 - **Govt’s mandate didn’t have an essential nexus** with between the project’s impacts (obstruction of ocean view by the new house) and the easement condition (physical access across the beach); government could have placed height limitations on the project

Ad Hoc Takings / Exactions

What are exactions?

- *Dolan v. City of Tigard* (1994) 512 U.S. 374 – extends *Nollan* test through rule of “**rough proportionality**”; the level of the exaction must be proportional to project impacts; question of magnitude of the exaction
 - Dolan wanted to expand the size of her plumbing store and pave her parking lot. City had required Dolan to dedicate part of her property for a storm drain and a bike/ped path
 - Court held that the exactions had a nexus to the project because project would create impervious surfaces; but the City failed to show that the project’s construction impacts on flooding and traffic merited the drain and path
 - The degree of the takings was not roughly proportional to the development’s impact

Eminent Domain

5th Amendment: No person shall ... be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Eminent Domain

Berman v. Parker (1954) 348 U.S. 26

- Concept of public welfare is broad and inclusive.
- Public welfare includes “spiritual values as well as physical, and aesthetic values as well as monetary.”
- Once there is a public purpose, the legislature has discretion to take all parcels needed to avoid “piecemeal approach” to implementing redevelopment plan.

Eminent Domain

Susette Kelo v. City of New London (2005) 545 U.S. 469

- Facts: case involved condemnation of privately owned property for use as part of a redevelopment plan; Kelo challenged the city's regulation of property on grounds of private property rights
- Court held that the general benefits a community enjoyed from economic growth (that would result from condemnation and redevelopment) qualified the redevelopment plan as a **permissible "public use" under the Takings Clause** (5th A), even though the city did not intend to open the land for use by the general public

1st Amendment

- **1st Amendment**: Congress shall make no law respecting an **establishment of religion**, or prohibiting the free exercise thereof; or abridging the **freedom of speech**, or of the press; or the right of the people **peaceably to assemble**, and to petition the Government for a redress of grievances.
- 1st Amendment protects:
 - Freedom of Speech
 - Religious Freedom

1st Amendment

City of Renton v. Playtime Theatres (1986) 475 U.S. 41

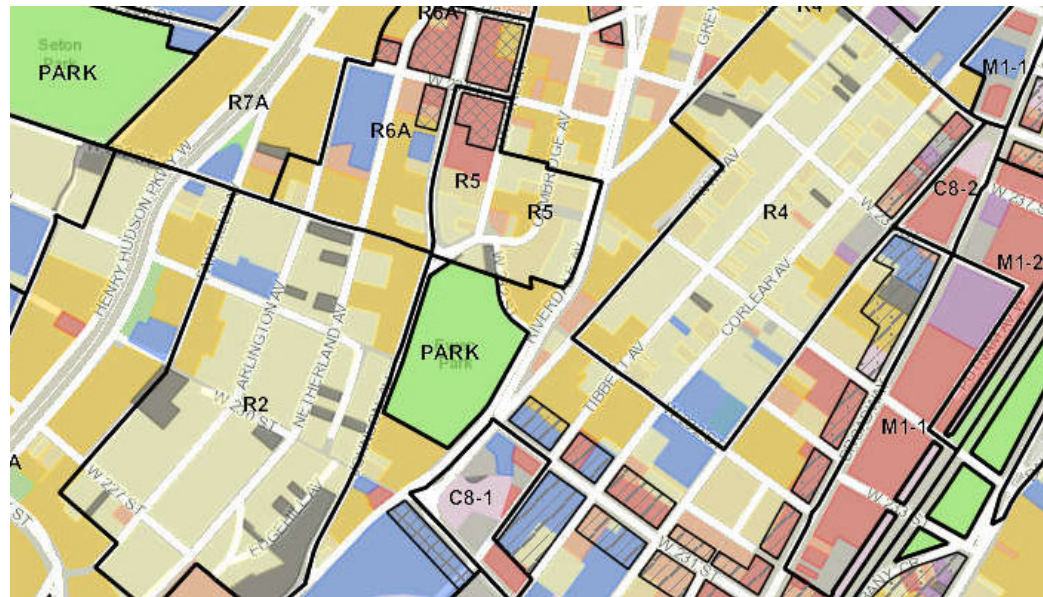
- Facts: city passed an adult business zoning law that prevented businesses from locating within 1,000 feet of any residential area, school, park or church; city claimed the zoning was meant to prevent the secondary effects of such businesses; theatre sued
- Supreme Court upheld the zoning. The ordinance was not aimed at the content of the films shown at the theatre, but rather at the secondary effects of such theatres in the surrounding community
- In other words, a govt's regulation of adult businesses must be "content neutral" and give "reasonable time, place or manner restrictions"; but govts can regulate the secondary effects of free speech, such as increased crime and decreased property values

1st Amendment

- The 1st Amendment also protects the **freedom of religion**
- Under the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), the govt **protects religious institutions from undue burdensome or discriminatory land use regulations**. In passing the Act, Congress found zoning authorities often were placing excessive burdens on the ability of congregations to exercise their faiths in violation of the Constitution.
- Key provisions:
 - Prevents infringement of religious exercise
 - Religious institutions must be treated as well as comparable secular institutions
 - The Act bars discrimination among religions
 - The Act forbids laws that unreasonably limit houses of worship

Origins of Zoning

- During the 1920s, the authority of local agencies to control zoning was rooted in a need to control the location and proximity of uses; needed to control ad hoc private development
- Sources of authority: police power; 10th Amendment of U.S. Constit.; Cal. Constit.



Validity of Zoning

***Village of Euclid v. Ambler Realty* (1926) 272 U.S. 365**

- First case to uphold zoning authority against a constitutional challenge
- Facts: Ambler Realty owned land in Euclid, a Cleveland suburb; Euclid adopted a zoning ordinance regulating land use (there were 6 land uses); Amber Realty sued, claiming the ordinance substantially reduced property value by limiting the use of their land
- Court upheld the zoning ordinance.
- No violation of due process or equal protection
- Enacting and enforcing a zoning ordinance that creates various geographic districts and excludes certain uses from such districts is a valid exercise of the police power. There is a valid government interest in keeping the character of the neighborhood and in regulating where certain land uses should occur.

Other Cases

- 1887 – *Mugler v. Kansas*: 14th Amendment/Due Process case; held that Kansas could prohibit the sale of alcohol based on local police power
- 1909 – *Welch v. Swasey*: Boston can impose different height limits on building in different districts
- 1912 – *Eubank v. City of Richmond*: zoning ordinance establishing building setback lines was held unconstitutional and not valid use of police power; violated due process of law
- 1915 – *Hadacheck v. Sebastian*: upheld prohibition on establishing a brick kiln within a recently-annexed 3-mile area
- 1922 – *Pennsylvania Coal Co. v. Mahon*: Supreme Ct indicated for first time that a land use regulation might be a taking if it goes too far

Other Cases

- 1954 – *Berman v. Parker*: Wash, D.C., took private property and resold to developer to achieve objectives of redevelopment plan; established aesthetics and redevelopment as valid public purposes for exercising eminent domain.
- 1968 – *Jones v. Mayer*: discrimination in selling homes is illegal based on the 13th Amendment and federal law abolishing slavery
- 1968 – *Cheney v. Village 2 at New Hope*: legitimized planning unit development (PUD) process
- 1971 – *Citizens for Preserve Overton Park v. Volpe*: established hard look doctrine in NEPA
- 1971 – *Calvert Cliffs' Coordinating Committee v. Atomic Energy Comm'n*: made NEPA requirements judicially enforceable
- 1972 – *Golden v. Planning Board of the Town of Ramapo*: NY state Court of Appeals case upholding growth control plan based on availability of public services; case stressed the importance of the comprehensive plan and set the scene for nationwide growth management plans

Other Cases

- 1972 – *Sierra Club v. Morton*: Sierra Club failed to have standing to sue in this particular enviro suit
- 1972 – *Just v. Marinette County*: integrated public trust theories into a modern regulatory scheme; shoreland zoning ordinance along navigable streams and other water bodies was upheld
- 1973 – *Fasano v. Bd. of Commissioners of Washington Co., Oregon*: case involved spot zoning, which must meet requirements: 1) there's a public need for the requested change, 2) need must be served by changing the zoning of the particular parcel compared to other available property; required zoning to be consistent with comprehensive plans
- 1974 – *Village of Belle Terre v. Boraas*: Supreme Ct upheld restrictive definition of a "family" as being no more than 2 unrelated people; prevented unrelated college students from living together in single-family dwellings
- 1975 – *South Burlington County NAACP v. Township of Mt. Laurel I*: NJ Supreme Ct held that zoning must promote general welfare and must provide for the opportunity to accommodate affordable housing

Other Cases

- 1976 – *Young v. American Mini Theaters*: first sexually-oriented business case; zoning for adult businesses doesn't automatically infringe on 1st Amendment rights
- 1976 – *Hills v. Dorothy Gautreaux*: Chicago Housing Authority and HUD had to spread out concentration of public housing (scattered site housing), including into white suburbs that weren't necessarily within Chicago; argued under the Civil Rights Act of 1964
- 1977 – *Village of Arlington Heights v. Metropolitan Housing Development*: discriminatory intent is required to invalidate zoning actions with racially disproportionate impacts; overturned denial of rezoning to allow for multi-family residences in a single-family zoned area
- 1978 – *TVA v. Hill (Secretary of Interior)*: Court enforced full implementation and enforcement of federal Endangered Species Act; halted the Tellico Dam, which was almost completely built, because of endangered Snail Darter was found

Other Cases

- 1980 – *Agins v. City of Tiburon*: there is a takings when: 1) regulation deprives property of all economically viable use, and 2) when regulation does not have a legitimate govt interest; open space zoning ordinance did not result in a takings
- 1980 – *Central Hudson v. Public Service Comm'n*: 1st Amendment case which overruled commission's ban on utility's ads to increase electric usage
- 1981 – *Metromedia v. City of San Diego*: ordinance that substantially restricted on-site and off-site billboards was ruled unconstitutional under 1st A
- 1982 – *Loretto v. Teleprompter Manhattan CATV Corp*: state law required landlords to allow cable company to install cable TV facilities on their property; any physical occupation is a taking no matter how de minimus
- 1983 – *South Burlington County NAACP v. Township of Mt. Laurel II*: agencies must provide fair share of affordable housing in their region

Other Cases

- 1985 – *City of Cleburne v. Cleburne Living Center*: Supreme Ct case which ruled the city illegally denied special use permits for group homes based on neighbor's unfounded fears
- 1986 – *City of Renton v. Playtime Theaters*: upheld requirement of minimum distance between adult movie theater and residential zone, church, park, or school
- 1978 – *First English Evangelical Church of Glendale v. Los Angeles County*: 5th A's just compensation clause requires compensation for temporary takings which occur as a result of regulations that are ultimately invalidated
- 1992 – *Lucas v. South Carolina Coastal Council*: defined regulatory taking; compensation must be paid when all economically beneficial use of land is taken unless uses are disallowed by state law
- 1994 – *City of Ladue v. Gilleo*: Supreme Ct rules that the display of a homeowner's sign was protected by the 1st Amendment

Other Cases

- 1995 – *Babbitt v. Sweet Home Chap. of Communities for a Great OR*: applied the federal ESA to land development; Secretary of Interior’s definition of “harm” under ESA is valid
- 2002 – *Tahoe-Sierra Preservation Council v. TRPA*: sanctioned the use of moratoria and reaffirmed the “parcel-as-a-whole” rule for takings review; moratoria is not a per se taking under 5th A, but should be analyzed under multi-factor Penn Central test
- 2006 – *Massachusetts v. EPA*: EPA must provide reasonable justification for why it wouldn’t regulate greenhouse gases
- 2006 – *Rapanos v. US*: Army Corps of Engineers must determine if there’s a significant nexus between a wetland and a navigable waterway; this pulled back ACOE’s jurisdiction re: wetlands

Sample Questions

Sample Question

This Supreme Court decision removed the "substantially advances" test for takings cases:

- A. Village of Euclid v. Ambler Realty Co. (1926)
- B. Agins v. City of Tiburon (1980)
- C. Lucas v. South Carolina Coastal Council (1992)
- D. Lingle v. Chevron USA (2005)

Answer: D. Agins v Tiburon had created the "substantially advances" test, but Lingle v Chevron removed it. Remember the key take-aways from case law.

Sample Questions

Sample Question

The landmark case *Agins v. City of Tiburon* (1980) established a test: a regulation is a taking if it can be shown that it:

- I. Prompts a property owner to file a lawsuit.
 - II. Deprives property of all economically viable use.
 - III. Creates a nuisance on the affected property.
 - IV. Fails to advance a legitimate governmental interest.
- A. I and II
 - B. II and IV
 - C. II and III
 - D. III and IV

Answer: B. Another example of a question focused on the details of the ruling.

Sample Questions

Sample Question

Which of the following court case(s) is/are concerned with takings:

- I. Renton v. Playtime Theatres Inc.
 - II. Pennsylvania Coal Co. v. Mahon
 - III. Metromedia, Inc. v. City of San Diego
 - IV. Agins v. City of Tiburon
- A. I only
 - B. II only
 - C. I and III
 - D. II and IV

Answer: D. Court case questions can be important to mark, or make notes from, since they can overlap somewhat.



Good Luck!!