

## OPENING REMARKS: THE FUTURE OF LAND USE REGULATION

### PANELIST

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### INTRODUCTION

Lynda L. Butler, *Chancellor Professor of Law and Director, Property Rights Project, William & Mary Law School*

BUTLER. Good morning. Welcome to the Fourteenth Annual Brigham-Kanner Property Rights Conference. We are going to begin our first panel by focusing on the work of David Callies, our recipient of the Brigham-Kanner Prize. We will use his scholarship as a springboard to discuss issues concerning the future of land use regulation. David will speak first, and then each panelist will speak for about fifteen minutes. At the end, we will have about fifteen minutes for questions and answers. Panelists, if you see me waving, that means it's time to move on so the next person has time. Now let's welcome David.

CALLIES. I understand I have about an hour and a quarter to speak, so relax—that's class time in Hawai'i, which is what I'm used to speaking at.

I want to reserve two minutes for rebuttal just in case my colleagues take the opportunity to say something they think I'm not going to be able to respond to; I'll do my best.

Thank you all for coming. I thank the William & Mary Law School, Lynda Butler, and everybody for the invitation and for the wonderful award last night. It was a wonderful evening for me, and I hope everyone else enjoyed it as well.

I have spent a lot of time in the area of regulatory takings, almost accidentally. This, of course, is the odd sort of theory that Justice Holmes sprung on the legal world in *Pennsylvania Coal Co. v. Mahon*.<sup>1</sup> Before that case, eminent domain and physical takings were protected by the Fifth Amendment and were never connected to the

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1. See *Pa. Coal Co. v. Mahon*, 260 U.S. 393 (1922).

exercise of police power. And after that, the theory of regulatory takings was born.

The Supreme Court then abandoned the field for about fifty years, leading my former partner, the late Fred Bosselman, and I to write something with a gentleman named John Banta called *The Taking Issue*.<sup>2</sup> At that time, I was representing mainly governmental interests, and the truth of the matter was that since the Supreme Court hadn't said anything about regulatory takings in fifty years, we had a suggestion: Let's do away with regulatory takings. The Supreme Court hasn't said anything about it, so why don't we just do away with it?

Well, of course, the Supreme Court did say something thereafter—in a sort of ridiculous April Fools' decision that dealt with a bunch of students who were turfing the area around their residence and with the city that passed an ordinance that provided no more than three people, unrelated by blood or marriage, could live in the same house.<sup>3</sup> That provoked a sort of odd decision on April Fools' Day, and everybody thought it was very appropriate that this decision came down then, because it was very foolish. The Supreme Court then went on from that case to decide a trilogy of cases: lots of things about regulatory takings, total takings under *Lucas*,<sup>4</sup> partial takings under *Penn Central*,<sup>5</sup> and then land-development conditions in the cases that came after.<sup>6</sup> So we do have regulatory takings. It's a matter of its reach and what it does.

I would like to share a quick anecdote. My former partner, Fred Bosselman, was invited to Harvard to speak. By the way, *The Taking Issue* got its name because John Banta and I could not come up with a name after two days, despite the fact that Fred Bosselman was asking us to. So he said, "Okay, I'll fix you guys. It's going to be 'The Taking Issue.'" And there we have it.

So, Fred shows up on campus to give his lecture at Harvard. The posters read that the famous alum Fred Bosselman was coming back

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2. See generally FRED P. BOSSELMAN, DAVID L. CALLIES & JOHN BANTA, COUNCIL ON ENVTL. QUALITY, *THE TAKING ISSUE: AN ANALYSIS OF THE CONSTITUTIONAL LIMITS OF LAND USE CONTROL* (1973).

3. See *Vill. of Belle Terre v. Boraas*, 416 U.S. 1 (1974).

4. See *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992).

5. See *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978).

6. See *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987).

to give a speech, and listed the title of his book. The book was sort of reddish and tannish, and “The Taking Issue” was in modest print at the bottom of the front cover. The Constitution was prominently displayed on the front of that cover, commencing as it does, in very large script, “We the People of the United States.” So all the posters read that everyone should come and see the wonderful lecture by Fred Bosselman, author of “We the People.” You think people know what you’re going to talk about, and then out it comes. And people really have no idea, and it’s not all that important.

So, to some extent, that’s why I’m here. I hope it’s at least reasonably articulate this morning.

I have a couple of remarks. A number of years ago I took the liberty—having been in the law business at that point close to fifty years (now, it’s an even fifty years)—I suggested ten things were going to happen with respect to takings<sup>7</sup>:

- (1) I said that land development conditions would continue to come under even more scrutiny for nexus and proportionality. Then we had the *City of San Jose* case from California,<sup>8</sup> where the Court does not seem to appreciate the difference between regulation of land use and rules that make landowners produce something. Then *Koontz* came along.<sup>9</sup> So we certainly do have more security about land development conditions.
- (2) Of course, we’ll continued to be confused by the difference between legislative and administrative/quasi-judicial exactions.<sup>10</sup> The court still hasn’t dealt with that, and it’s probably one of the last unresolved issues in the regulatory taking area.
- (3) There will be more use of consensual tools like development agreements.<sup>11</sup> It’s happening in California, but it’s not happening in a whole lot of other places. There are hundreds

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7. David L. Callies, *Through a Glass Clearly: Predicting the Future in Land Use Takings Law*, 54 WASHBURN L.J. 43, 44 (2014) [hereinafter Callies, *Through a Glass*].

8. *See* Cal. Bldg. Indus. Ass’n v. City of San Jose, 136 S. Ct. 928 (2016).

9. *Koontz v. St. John’s River Water Mgmt.*, 570 U.S. 595 (2013).

10. Callies, *Through a Glass*, *supra* note 7, at 44.

11. *Id.* at 45.

and hundreds of agreements (as Mike Berger will confirm, I'm sure) with respect to communities getting together with commercial enterprises and developers, and working on development agreements. Hawai'i has had a statute like California's in place for thirty-five years, and so far we've had two development agreements. So, as Larry Tribe once observed, those of us that use crystal balls may have to get used to eating ground glass.<sup>12</sup>

- (4) The Supreme Court continues to reexamine its decisions with respect to *Kelo*.<sup>13</sup> That hasn't happened either. We haven't had a recent eminent domain case, and I thought there would be at least one coming up.
- (5) The courts will continue to wrestle with exceptions to per se government takings, and the public trust doctrine will be an issue.<sup>14</sup> That's coming up more and more as exceptions to *Lucas*, safe havens for total takings under *Lucas*.<sup>15</sup>
- (6) If a government is passing a regulation that is essentially abating a nuisance or has got to do with the background principles of common law property, custom and the public trust doctrine seem to be safe havens for government when it enacts a total-taking regulation.<sup>16</sup> And the public trust threatens to do a lot that way. In Hawai'i we have a pending case where the argument is that the summit of a mountain is subject to the public trust doctrine.<sup>17</sup> It's the farthest out attempt to recognize how far the public trust doctrine can be extended. Our Supreme Court will be dealing with that in the next year, and lots of folks are watching it outside of Hawai'i.
- (7) The Court will cut back the application of the ripeness rule.<sup>18</sup> That's been happening in many circuits around the

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12. *Tribe: As U.S. Drifts, Courts No Guiding Light*, 65 AM. B. ASS'N J. 1468, 1468 (1979).

13. Callies, *Through a Glass*, *supra* note 7, at 45.

14. *Id.* at 45.

15. *See generally* *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992).

16. *See* Callies, *Through a Glass*, *supra* note 7, at 45.

17. *In re Contested Case Hearing Re Conservation District Use Application (CDUA) HA-3568 for the Thirty Meter Telescope at the Mauna Kea Science Reserve, Ka'ohe Mauka, Hamakua, Hawai'i*, BLNR-CC-16-002 (Sept. 20, 2016), <https://dlnr.hawaii.gov/mk/files/2016/09/TMT-Doc-276-Notice-of-Contested-Case-Hearing.pdf>.

18. Indeed, the Court has accepted *Knick v. Township of Scott*, 862 F.3d 310 (3d Cir. 2017), *cert. granted*, 138 S. Ct. 1262 (Mar. 5, 2018) (No. 17-647), for decision this term.

- country, much thanks to some of the work being done by the Pacific Legal Foundation. And I suspect that it will increase.
- (8) Partial takings cases will be decided more on the merits but with mixed results.<sup>19</sup> We're not getting a lot of partial takings cases, even though ripeness is, again, not as important as it used to be.
- (10) And finally, the Court needs to and will resolve the so-called "relevant parcel" or denominator issue, both with respect to partial and total regulatory takings.<sup>20</sup> We all know by now, with all the webinars and conferences dealing with it, the Supreme Court has decided the *Murr* case.<sup>21</sup> You've got to watch what you wish for. We do have rules—sort of—and they are very strange. In the course of his opinion, Justice Kennedy managed to nearly drive a stake into the whole area of property rights, and I'm sure my colleagues will be talking about that at some length.<sup>22</sup>

So, thank you for your kind attention. It's a pleasure to be here. I have reserved two minutes for rebuttal.

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19. See Callies, *Through a Glass*, *supra* note 7, at 45.

20. *Id.*

21. See *Murr v. Wisconsin*, 137 S. Ct. 1933 (2017).

22. *Id.* at 1939–50.