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Recent Developments in Land Use, Planning and Zoning Law

When *Lochner* Met *Dolan*: The Attempted Transformation of American Land-Use Law by Constitutional Interpretation

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I. Introduction

IN WAYS GREAT AND SMALL, the language of the U.S. Constitution has importance to the everyday workings of American society. The definition of the rights of individuals and the structure of government depends upon constitutional interpretation for meaning and direction. However, the words of this fundamental legal and social document do not convey an unchanging and precise blueprint for setting the limits of governmental authority and the edge of individual autonomy.¹ With

1. Justice Sutherland addressed the issue of constitutional meaning in the landmark case of *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926). He wrote that the social regulation of human conduct changes over time in tandem with the alterations in the "complex conditions of our day." *Id.* at 387. As conditions change, a regulation, which would have been rejected as arbitrary and oppressive fifty or one hundred years prior would be uniformly sustained as being wise, necessary and valid under existing conditions. However, in his mind, the essential meaning of the Constitution never varied; rather its contextual application would shift with societal developments. Sutherland's distinction between "meaning" and "application" actually minimized the significance of judicial interpretation and asserted an essential consistency in the Constitution. *Id.* Such a view would not be surprising for a modern-day textual originalist but it seems incongruous for a justice who frequently joined in striking down legislation under the banner of substantive due process.

regard to the community's control of land use, these matters of constitutional imprecision and redefinition are particularly perplexing for government, landowners, and residents alike. Often, the simplicity of the U.S. Constitution's language belies the infinite complexity of its subject. Relatively simple words such as these conceal complicated ideas, which must be applied in a myriad of differing situations.

When is property "taken" and when is an owner denied property without "due process"? The answers to these questions are at the same time profound and mundane touching upon matters of complex, constitutional theory and applying to the everyday operation of local land-use regulation. The answers to these questions have major significance both to state and local governments as they attempt to deal with continuing demands of community development and to private landowners and developers. As with most constitutional questions, their resolution reflects a judicial choice among competing arguments and value positions. On federal constitutional matters, the U.S. Supreme Court serves as the final arbiter of these contending views on constitutional principle. During the last three decades, the Court has issued a number of opinions in the field of property owners' rights generally thought to reinvigorate the "Takings" Clause of the Fifth Amendment. This enhanced sympathy for the landowner's perspective has been the result of the belief that, in earlier parts of the twentieth century, property rights had not been accorded the appropriate level of respect as had other personal liberties.² In a lengthening chain of decisions,³ the Court has attempted to give new meaning to the takings concept, trying to set forth a clearer idea of when government has gone, as Justice Oliver Wendell Holmes, Jr. put it, "too far" and must pay compensation for its regulatory actions.⁴

2. The application of low level due process scrutiny to local government land-use regulation led to the conclusion that most zoning classifications would be unassailable if they were imposed as part of a comprehensive zoning scheme. Heightened scrutiny in constitutional terms was only available for governmental classifications, which affected fundamental liberties or imposed a suspect classification. Adverse economic impacts were to be sustained as just a cost of living in a civilized society under the average reciprocity of advantage theory.

3. See *San Diego Gas and Elec. Co. v. City of San Diego*, 450 U.S. 621 (1981); *Agins v. City of Tiburon*, 447 U.S. 55 (1980); *Williamson County Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985); *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987); *Keystone Bituminous Coal Ass'n*, 480 U.S. 470 (1987); *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *E. Enters. v. Apfel*, 524 U.S. 498 (1998); *Del Monte Dunes at Monterey, Ltd. v. City of Monterey*, 526 U.S. 687 (1999).

4. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922).

While the Supreme Court will set forth new constitutional interpretations in occasional decisions, it is the task of the lower federal and state courts to refine and apply this doctrine in an ever-expanding number of cases. These courts actually give our Constitution its meaning through numerous specific applications. The Supreme Court might set the aspects of constitutional doctrine, the lower courts animate the doctrine in ways that have direct effects on society. This article will examine recent judicial interpretations testing the constitutionality of regulatory takings and development exactions. In particular, it will discuss current cases applying the Supreme Court's rulings in *Agins v. City of Tiburon*, *Nollan v. California Coastal Commission*, and *Dolan v. City of Tigard*.

II. Seeking Recourse in the Constitution to Stem

Unreasonable Governmental Action: The Revival of Due Process Review

The emergence of a more critical form of constitutional thought toward the public regulation of land and community development came at the end of a century which reinforced governmental power to act in the economy and in society. It has followed an increasingly visible and vocal sentiment that environmental regulation and land-use control has been unreasonable, unfair and even abusive to some landowners.⁵ While the definition of "unreasonable" regulation can widely vary depending upon one's point of view, recently litigated cases have highlighted examples of significant delay,⁶ unequal demands,⁷ excessive and unfair exactions,⁸ and severe and adverse regulatory changes.⁹ However, it also may be possible that some property owners consider other governmental decisions and actions to be unreasonable or abusive when

5. See e.g., Rodney L. Cobb, *Land Use Law: Marred by Public Agency Abuse*, LAND USE L. & ZONING DIG. 3 (Nov. 2000). Cobb identifies three broad contexts in which agency land-use abuses occur: (1) public agency's improper banishment of affordable housing and other land uses perceived to be undesirable, (2) conflicts over who will pay for the impacts of new development, and (3) severe regulations that do not allow development at all or only to a small degree. *Id.* at 4. These comments resonate because the author was then staff attorney for the American Planning Association and editor of the LAND USE LAW AND ZONING DIGEST.

6. *Del Monte Dunes at Monterey, Ltd. v. City of Monterey*, 526 U.S. 687 (1999) (5 year delay, 19 site plans, and density reduction from 1,000 to fewer than 200).

7. *Vill. of Willowbrook v. Olech*, 528 U.S. 562 (2000) (village requirement of a 33-foot easement dedication as a condition for municipal water supply hookup when it had required only a 15-foot easement from other landowners for a similar connection).

8. *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987); *Dolan v. City of Tigard*, 512 U.S. 374 (1994).

9. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).

they represent genuine policy differences or changing views on matters affecting the community's development.¹⁰ It is also conceivable that private landowners may act unreasonably by breaching commitments previously made to adhere to legitimate rules.¹¹ One of the most important challenges for establishing public policy and law in this field is in distinguishing between "unreasonable" and abusive government actions from actions that change previous policies and represent less financially lucrative outcomes. Separating the "unreasonable" and abusive governmental actions from those that change previous policies and represent less financially lucrative outcomes is actually one of the most important challenges for establishing public policy and law in this field. With the image of governmental regulatory abuse prevalent in contemporary political discourse¹² and occasionally even in Supreme Court opinions,¹³ it is not surprising that property owner advocates press for adjustments in legal rules both to advance their clients' specific interests and to eliminate future episodes of unreasonable and abusive government regulation. One current strategy is to advance an argument that a particularly unreasonable land-use decision violates the constitutional

10. Is the down zoning to a lower density of a rural area of a county pursuant to the adoption of new anti-sprawl public policy in the county an example of governmental abuse or genuine policy difference. For instance, in Loudoun County, Virginia the Planning Commission proposed, as part of a slow-growth agenda, to revise the county's comprehensive plan to reduce the number of homes that could be built in the county over the next 20 years by 23,800. This move, amending the "theoretical build out analysis," was suggested in conjunction with a number of other environmental, transportation and affordable housing policy initiatives. Even with this reduction, the comprehensive plan would still anticipate the housing stock to more than double to a total of 135,700 units within 20 years. See Michael Laris, *Loudoun Blueprint Reins in Growth: 20-Year Plan Cuts Houses, Stresses Environment*, WASH. POST, May 2, 2001, at B1.

11. See Jerold S. Kayden, *Using and Misusing Zoning Law to Design Cities: An Empirical Study of New York City's Privately Owned Public Spaces (Part 2)*, 53 LAND USE L. & ZONING DIG. 3 (Mar. 2001).

12. Anti-government sentiment in the United States in the last 20 years has spawned the creation of political movements and voluntary organization whose principal aim is the reduction of governmental influence over the lives and affairs of individuals and firms. See Harvey M. Jacobs, *The Anti-Environmental "Wise Use" Movement in America*, 47 LAND USE L. & ZONING DIG. No. 3 (Feb. 1995). The spill-over effects of this sentiment transcend from one level of government to another—linking the federal government's actions in Waco, Texas. with planning and zoning decisions at the county level of government.

13. Justice Scalia noted in the *Nollan* case that the Court regarded the Fifth Amendment's Property Clause "to be more than a pleading requirement, and compliance with it to be more than an exercise in cleverness and imagination." 483 U.S. 825, 841 (1987). Justice Scalia was also heard at the oral argument in the *Del Monte Dunes* case characterizing the landowner who had complied with nearly every planning department request and who had filed numerous revised development plans over a period of years as being "jerked around" by the local government.

precepts prohibiting the uncompensated “taking” of property embodied in the Fifth Amendment.

Unfortunately, this recent process of doctrinal elaboration has resulted in the blurring of two lines of constitutional thought about property regulation: substantive due process and regulatory takings theory. From the earliest twentieth century land-use cases, a substantive due process line of analysis was applied to determine whether a particular governmental regulation violated the due process values of excessive or irrational regulation. The well-known cases of *Mugler v. Kansas*,¹⁴ *Welsh v. Swasey*,¹⁵ *Reinman v. Little Rock*,¹⁶ and *Hadacheck v. Sebastian*¹⁷ represent early examples of this trend as does the landmark zoning decision, *Euclid v. Ambler Realty*.¹⁸ All of these early twentieth century U.S. Supreme Court decisions upheld local land-use regulations having substantial and severe implications on existing landowners while also serving important police power objectives. Following in the doctrinal line of *Lochner v. New York*,¹⁹ this substantive due process approach had been used in a number of twentieth century cases testing the constitutionality of a wide range of government regulations of property rights with extremely mixed results.²⁰ In most cases, when a regulation was correlated with the achievement of health, safety, or other traditional police power goals, it was sustained even during the period

14. 123 U.S. 623 (1887). *Mugler* involved state regulation of the alcoholic beverage business. The Supreme Court recognized under their police powers, state legislatures had broad authority to enact legislation to protect the public health, morals, and safety. However, the Court employed substantive due process review to evaluate the relationship of a law to its stated purposes. This represented a departure from earlier practice of a large measure of judicial non-interference into state legislative judgments. While the *Mugler* court found such a relationship to exist in the state's interest in protecting its citizens from alcoholic beverages, it did set in motion a theme of constitutional review that would expose legislative judgments to close judicial scrutiny. See JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 407–08 (6th ed. 2000).

15. 214 U.S. 91 (1909) (upholding the constitutionality of Boston's height restrictions).

16. 237 U.S. 171 (1915) (upholding the constitutionality of Little Rock's ordinance prohibiting livery stables from certain residential areas of the city).

17. 239 U.S. 394 (1915) (upholding Los Angeles ordinance banning existing brick manufacturing operations in emerging residential areas).

18. *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).

19. 198 U.S. 49 (1905).

20. *Mugler v. Kan.*, 123 U.S. 623 (1887) (upholding a Kansas statute prohibiting the manufacture of alcoholic beverages in the state); *Buchanan v. Warley*, 245 U.S. 60 (1917) (striking down racially based zoning); *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922) (striking down the Pennsylvania Kohler Act preventing subsidence caused by coal mining); *Nectow v. City of Cambridge*, 277 U.S. 183 (1928) (invalidating a zoning boundary line decision as arbitrary); *Vill. of Belle Terre v. Boraas*, 416 U.S. 1 (1974) (upholding zoning ordinance limiting the number of unrelated persons who could live together as a “family”); *Moore v. City of East Cleveland*, 431 U.S. 494 (1977) (striking down zoning rule prohibiting habitation by nonsibling grandchildren).

of *Lochner* review. The key points to be derived from these *Lochner* era decisions were that (1) the framework of analysis was that of early twentieth century substantive due process and (2) the effect of a finding of an unconstitutional due process violation was the invalidation of the regulation, not a mandate to pay "just compensation."²¹ Substantive due process cases, fitting this traditional mold, have become less and less frequent due to a number of factors.²² Interestingly, modern Supreme Court cases have managed to interpret excessive or unreasonable land-use regulation as a sub-category of Fifth Amendment takings law.²³ This transformation of substantive due process analysis has resulted in a confusing branch of the emerging regulatory takings doctrine—one with more questions than definitive answers. Understanding the modern origins of this development is worthy of attention.

A. *The Substantive Due Process Form of a Regulatory Taking*

Confusion over the U.S. Supreme Court's takings law may be attributable to a number of factors,²⁴ not the least of which is the brief, eight-page 1980 decision in *Agins v. City of Tiburon*.²⁵ Arising at a time when the Supreme Court would begin to show greater sympathy for the plight of unfairly regulated landowners, the *Agins* case involved a five-acre parcel of undeveloped land in Tiburon, California, atop a ridge overlooking San Francisco Bay. Although the owners had hoped to build

21. In fact, even the landmark decision often identified as the ideological origin of the modern regulatory takings doctrine, *Pennsylvania Coal Co. v. Mahon*, could be viewed in the substantive due process tradition. See Robert Brauneis, *The Foundation of Our Regulatory Takings Jurisprudence: The Myth and Meaning of Justice Holmes's Opinion in Pennsylvania Coal Co. v. Mahon*, 106 YALE L.J. 613 (1996).

22. The reasons often given for the scarcity of substantive due process attacks on land-use control measures include: (1) the necessity in most courts of having an entitlement or property interest to the land use approval, (2) the application of a relaxed standard of review, and (3) a general aversion of some courts to become embroiled in the review of municipal zoning ordinances.

23. This transformation of substantive due process into a taking claim may reflect the judicial memory of the *Lochner* precedent and the resulting hesitation of federal courts to employ the substantive due process theory to strike down social and economic legislation. In fact, some federal circuits will not analyze a statute or ordinance under substantive process when a more specific constitutional provision such as the Fifth Amendment could apply. See e.g., *Macri v. King County*, 126 F.3d 1125 (9th Cir. 1997). But see *Tri-County Indus. Inc. v. Dist. of Columbia*, 104 F.3d 455 (D.C. Cir. 1997), and *Pearson v. City of Grand Blanc*, 961 F.2d 1211 (6th Cir. 1992). Contrary to this position, it is equally conceivable that the Takings Clause could be but one subcategory of a due process violation.

24. For a candid discussion of the U.S. Supreme Court's less than harmonious regulatory takings precedent, see Gideon Kanner, *Hunting the Snark not the Quark: Has the U.S. Supreme Court Been Competent in its Effort to Formulate Coherent Regulatory Takings Law*, 30 URB. LAW. 307 (1998).

25. 447 U.S. 255 (1980).

as many as twenty single-family homes on the land, the city adopted zoning which limited it to a total of one to five units. After the rezoning, the landowners filed an unsuccessful \$2 million inverse condemnation claim against the city which was ultimately dismissed.²⁶ Thereafter, they petitioned the U.S. Supreme Court to challenge a decision by the California Supreme Court, which held that “inverse condemnation is an inappropriate and undesirable remedy in cases in which unconstitutional regulation is alleged.”²⁷ In fact, this California opinion had focused on the question of appropriate remedy for “excessive regulation in violation of the Fifth Amendment to the United States Constitution. . . .”²⁸ It concluded that judicial invalidation was the proper remedy rather than a conversion of the police power regulation into an act of eminent domain. This it found to be consistent with “well established precedent.”²⁹

Upon reaching the U.S. Supreme Court, Justice Powell framed the *Agins* case as a question of whether the Tiburon zoning ordinance took *Agins*’ property without paying just compensation. However, the landowners would not receive Supreme Court review of their taking claim since it was premature. Since the *Agins* plaintiffs had commenced litigation without making an application for the use or improvement of their property nor seeking a definitive statement as to the number of dwelling units that would be permitted, Justice Powell found that there was no “concrete controversy regarding the application of the specific zoning provisions.”³⁰ It would seem that the dismissal of the *Agins*’ “as applied” challenge on ripeness grounds would have ended things—but it did not. The Court’s opinion then inexplicably announced the now-familiar two-pronged takings test when it said,

The application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests, see *Nectow v. Cambridge*, 277 U.S. 183, 188 . . . , or denies an owner economically viable use of his land, see *Penn Central Transp. Co. v. New York*, 438 U.S. 104, 138 n. 36 . . . (1978).³¹

Finally, Justice Powell then applied both prongs of this test to the facts before it and concluded that the Tiburon ordinance satisfied both elements. With this conclusion, the Court never even reached the cer-

26. *Agins v. City of Tiburon*, 598 P.2d 25, 28 (1979).

27. 598 P.2d 25, 29 (1979).

28. *Id.* at 28. In reaching this result, the California Supreme Court relied upon “a leading authority” in *NICHOLS ON EMINENT DOMAIN. Id.*

29. *Id.* at 266, 598 P.2d at 29.

30. 447 U.S. 255, 260 (1980).

31. *Id.* at 260.

tified issue of defining the appropriate remedy for constitutional takings violation.³²

A number of factors make the *Agins* Court's articulation of this two-part takings test surprising, if not mystifying. First, the Court announced the takings test without being asked to do so by either party before it.³³ Thus, Justice Powell's new takings law standard emanated from unexpressed ideas of the Court itself and not from arguments made by the litigants. The Court gave no hint why a substantive due process sounding claim should constitute a compensable Fifth Amendment taking. Second, the Court in *Agins* stated this takings formulation within two years after the Court's important decision in *Penn Central Transportation Co. v. City of New York*.³⁴ The *Penn Central* case had set forth the relevant regulatory takings analysis, yet the *Agins* Court chose not to utilize the explicit factors laid out in it. The absence of a significant *Penn Central* decision is inexplicable.

Third, Justice Powell introduced a novel "substantially advance legitimate state interests" standard as a decisional principle for finding a Fifth Amendment taking of property without just compensation. The 1928 case of *Nectow v. City of Cambridge*³⁵ was cited as exclusively supporting precedent for this standard, but *Nectow*, like the contemporaneous *Euclid v. Ambler Realty*,³⁶ is a substantive due process invalidation decision—not a takings case. The Supreme Court in *Nectow* merely agreed with the decision made below that a growing district boundary was irrational and illogical. With the expansion in interest in landowner's rights, the *Agins* language has become a frequently cited

32. Justice Powell noted that,

The State Supreme Court determined that the appellants could not recover damages for inverse condemnation even if the zoning ordinances constituted a taking. The court stated that only mandamus and declaratory judgment are remedies available to such a landowner. Because no taking has occurred, we need not consider whether a State may limit the remedies available to a person whose land has been taken without just compensation.

Id. at 263. In the end, the heart of the California Supreme Court's decision—and the part from which the *Agins* appealed—was not even considered by the U.S. Supreme Court. Seven years later, the court would reach this issue and agree with the petitioners in *First English Evangelical Lutheran Church of Glendale v. Los Angeles County*, 482 U.S. 304 (1987).

33. See Brief for Appellee, *Agins v. City of Tiburon*, 447 U.S. 255, 100 S. Ct. 2138 (1980)(No. 79-602); Brief for Appellant, *Agins v. City of Tiburon*, 447 U.S. 255, 100 S. Ct. 2138 (1980)(No. 79-602).

34. 438 U.S. 104 (1978).

35. 277 U.S. 183 (1928). In the course of Justice Brennan's *Penn Central* survey of prior land-use regulation cases, there was mention of the *Nectow* decision. This review was merely descriptive and unrelated to the multi-factor balancing test that the *Penn Central* case has become known for.

36. 272 U.S. 365 (1926).

shorthand definition of a regulatory taking, one which focuses upon the legitimacy of the regulation rather than its economic impact.

B. The Development of the Agins "Substantially Advance" Prong of Regulatory Takings

In the years since the Supreme Court's 1980 decision in *Agins*, the two-pronged takings test has been repeatedly cited by the Supreme Court and the lower federal court as part of its accepted regulatory takings jurisprudence.³⁷ The second prong, denial of economically viable use of land, later found amplification in 1992 in *Lucas v. South Carolina Coastal Council*. However, the first prong, the "substantially advance" analysis—has not received sufficient explanation of its proper connection to the Fifth Amendment Takings Clause rather than to the substantive due process principles from which it sprang. A review of recent case decisions reveals that the *Agins* "substantial relationship" takings test is being advanced by advocates for land development interests on a steady basis. This phenomena may have been encouraged by the Supreme Court's 1999 approval of the Ninth Circuit in *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*,³⁸ which upheld a jury award of \$ 1983 damages. In this case, the trial judge's jury instruction had been designed to frame the jury's decision in terms of the *Agins* two-pronged takings test.³⁹ *Del Monte Dunes*, a development permit denial case, may prompt future federal litigation challenging adverse municipal land-use decisions. Such a trend in cases would ask judges and juries to interpret and apply the *Agins* test in numerous, concrete cases. If this trend were

37. *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 119 S. Ct. 1624, 1636 (1999); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1016 (1992); *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 485 (1987); and *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 834 (1987).

38. 526 U.S. at 687, 711, 119 S. Ct. 1624, 1634 (1999).

39. Interestingly, the Supreme Court found no impropriety or inconsistency in the fact that the trial judge reserved the separate substantive due process claim for the court and ruled on that legal issue, while allowing the takings claim to proceed to the jury. *Id.* at 1637. This suggests that at least two separate characterizations of a permit denial claim are possible—takings and substantive due process—and that one can be reserved for a jury while the other may be properly reserved for judicial resolution.

In *Bamber v. U.S.*, 45 Fed. Cl. 162 (1999), a bank president, allegedly forced to resign from his position by federal savings and loan regulators, filed suit against the United States asserting a regulatory taking under the *Agins* test. The claims court dismissed this action ruling that the plaintiff's claims did not state a cause of action. The court reviewed the *Agins* "substantially advance" test and concluded that it "has not had a fruitful life," finding that "the only examples of which this court is aware, in which this approach has clearly been outcome determinative, have been the decisions in [*Nollan*] and [*Dolan*]. Neither decision helps plaintiff. . . ." *Id.* at 165. Limiting the doctrine to regulatory attempts to extort private real property interests, the court rejected the plaintiff's taking claim.

to continue, it would create a more activist role for the federal judiciary in policing state and local government land-use matters. This litigation actually would accomplish two separate things: (1) it would involve courts in a much closer analysis of the suggested rationales for governmental action and (2) it would give them the power to invalidate and penalize those regulatory and other actions that could not be clearly and persuasively related to the achievement of legitimate government objectives. In this way, such a modern jurisprudential change would convert substantive due process review into a branch of the Takings Clause and by so doing, it would enforce due process values with Fifth Amendment financial sanctions. With this result, the "due process taking" recognized by the *Agins* precedent would actually go beyond the impact of judicial invalidation of decisions made during the *Lochner* era.

C. The Recent Litigation Pattern

The *Del Monte Dunes* decision might leave the impression that many cases are successfully challenging municipal land-use control activity. Generally, application of the *Agins* taking test has *not* resulted in many regulations being found to be unconstitutional takings. The argument has even been made unsuccessfully in unusual, nonland-use control settings.⁴⁰ In fact, in some cases judges have been so hostile to multifaceted claims of unconstitutionality that they not only dismiss the actions but also grant attorney fees and litigation costs to the local government defending the action.⁴¹ Other courts have avoided a detailed consideration of the *Agins* "substantial relationship" test by basing a grant of summary judgment on the failure of the plaintiff to satisfy ripeness requirements imposed by the *Williamson County Regional Planning Commission* decision⁴² or by finding the absence of a property interest in the plaintiff. It is clear that most federal courts consider the *Agins* "substantial relationship" theory to be an independent strand of regulatory takings doctrine under the Fifth Amendment, often stating that the *Agins* principle is "well-settled."⁴³ However, there appears to

40. *Greenspring Racquet Club, Inc. v. Baltimore County, Maryland*, 77 F. Supp. 2d 699 (D. Md. 1999) (taking due process and equal protection attacks dismissed and \$33,522 in attorney fees awarded to the county).

41. 473 U.S. 172 (1985) (failure to seek a state compensation remedy prior to filing a federal lawsuit).

42. *American Federated Gen. Agency, Inc. v. City of Ridgeland, Mississippi*, 72 F. Supp. 2d 695, 706 (S.D. Miss. 1999). The Supreme Court's decision in *Keystone Bituminous Coal* reinforced this view of the takings law by citing the *Agins* test and carefully examining the public purposes which lay behind the Pennsylvania law.

43. In *Del Monte Dunes*, the trial court reserved for his own determination the separate question of whether the city's denial of developmental approval violated the

be some confusion on a number of issues including (1) the relationship between the two prongs of the *Agins*' takings test, are they cumulative or independent alternatives; (2) the relationship between traditional substantive due process analysis and the "substantial relationship" prong of the *Agins*' takings test⁴⁴; (3) the degree of deference to be accorded to state and local government justifications for decision making; and (4) the requisite "nexus" between the governmental regulation and legitimate state interests.⁴⁵ Three recent state and federal court decisions reflect this confusion and also the hesitation of many courts to use the *Agins*' test aggressively.

In *Bonnie Briar Syndicate, Inc. v. Town of Mamaroneck*,⁴⁶ the New York Court of Appeals considered a constitutional takings challenge to a 1994 municipal rezoning of a 150-acre, private golf course from residential to exclusively recreational use. At approximately the same time, the property owner had submitted a preliminary subdivision plan for the construction of seventy-one residential units for the golf course property. The rezoning to recreational use effectively prohibited the residential project. Through its legislative rezoning, the town had chosen to reject the development proposal and to implement three, well-documented local goals of (1) preserving open space, (2) providing recreational opportunities, and (3) mitigating flooding of both coastal and flood plain areas.⁴⁷

Following the rezoning, the plaintiffs initiated litigation attacking the local regulatory change as a taking, claiming that the rezoning was not sufficiently related to the three stated public purposes and that the zoning changes deprived them of all economically viable uses of their land.⁴⁸ Abandoning the economic deprivation argument, plaintiffs asked that the focus be on the "substantially advance" portion of the *Agins* test and invited the court of appeals to analyze the closeness of the causal nexus between the town's expressed objectives and the re-

Due Process Clause. Although the jury found a violation of the *Agins* takings test, the trial court sustained the city against an attack on its decision based on the Due Process Clause. 119 S. Ct. 1624, 1637 (1999).

44. Identifying the requisite test for evaluating the constitutionality of a regulatory action such as a permit denial is likely to be the crucial aspect of the new substantive due process taking theory. Advocates, including those in *Del Monte Dunes*, attempted to have courts adopt an enhanced or heightened "nexus" requirement between the regulation and the government's purpose as found in the *Nollan* and the *Dolan* cases. As Justice Kennedy observed in *Del Monte Dunes*, the *Dolan* rough proportionality test would be "inapposite to a case such as [*Del Monte Dunes*]." 119 S. Ct. at 1635.

45. 94 N.Y.2d 96 (Ct. App. 1999).

46. *Id.* at 104.

47. *Id.*

48. *Id.*

zoning decision.⁴⁹ Viewing this as a request to impose a heightened standard of review found in the “essential nexus” standards derived from the *Nollan* and *Dolan* decisions, the court explicitly rejected the suggestion.⁵⁰ Grounding its decision on the jury instruction approved in *City of Monterey v. Del Monte Dunes*, the New York court defined the “substantially advance” test as a determination of whether the regulatory action “bears a reasonable relationship to [the public] objective.”⁵¹ Within the context of the *Bonnie Briar* case, the court of appeals found that the municipal rezoning action did bear the reasonable relationship to the enumerated public purposes and therefore satisfied the *Agins*’ test.⁵² This decision is significant in that (1) it rejected an intrusive form of judicial review of local government motivation in making a land-use change when there is a long documented study of the problems, (2) it accepted a careful and lengthy municipal process of study and documentation of the public interests at stake, and (3) it refused to strike down a policy response that “was more stringent than one might reasonably conclude was necessary to further public objectives.”⁵³ In retrospect, the New York Court of Appeals decision in *Bonnie Briar* retained the rhetoric of the *Agins*’ takings test but infused it with a deferential substantive due process standard of review. The court signaled that it would not use *Agins* as a means of reactivating a “heightened” form of review nor a shifting of the usual burden of proof to the regulator. It also was respectful of local government legislative rezoning processes, at least when they were based on thorough policy development.

The *Bonnie Briar* case is not alone in taking this position. In *Jim Sowell Construction Co. v. City of Coppell, Texas*,⁵⁴ the district court ruled that a downzoning of a parcel of land previously zoned for multifamily use did not constitute a taking of property under the *Agins* “substantially advance” takings test.⁵⁵ This case presented a highly controversial issue with the plaintiffs claiming that the city’s rezoning was actually racially motivated and designed to exclude African-Americans and other minorities from the jurisdiction and that all of the city’s other

49. 94 N.Y.2d at 106. The court grounded its position on a reading of the Supreme Court’s *Del Monte Dunes* case, which limited the more stringent nexus review to exaction situations only and not to general regulation of land-use matters.

50. *Id.* at 108.

51. *Id.*

52. *Id.*

53. 66 No. 3:96-CV-06-D, 2000 U.S. Dist. LEXIS 9869, at *1 (N.D. Tex. July 12, 2000).

54. *Id.*

55. *Id.* at *19.

justifications were contrived, pretextual, and “ex post facto.”⁵⁶ Importantly, the court assigned the burden of proving that the land-use decision did not substantially advance legitimate state interests to the plaintiffs who were obligated to “designate specific facts showing that there is a genuine issue for trial.”⁵⁷ The plaintiffs failed to carry this important burden with any evidence in the record⁵⁸ and so they had also failed in demonstrating that the city’s decisions were arbitrary or that they were taken for collateral purposes.

Although addressing the issues presented in terms of the *Agins* formulation, the court refused to require a heightened level of judicial scrutiny embodied in the *Nollan* “essential nexus” test or the *Dolan* “rough proportionality” test. These more rigorous tests of regulatory justification were reserved to cases imposing land-use exactions, in conformity with prior Fifth Circuit precedent.⁵⁹ This appears to be a common position reinforced by Justice Kennedy’s comments in the *Del Monte Dunes* case rejecting *Dolan* rough proportionality review in denial of development cases. Furthermore, the court found that the city’s evidence demonstrated that “its decisions in fact substantially advanced legitimate state interests.”⁶⁰ This evidence, derived from the testimony of the city’s planning director and an expert witness, was considered adequate even though the court believed that the plaintiff had failed its burden. This case stands for the proposition that a plaintiff, arguing for a regulatory taking under the *Agins* rule, must present concrete evidence of municipal motivation that is not consistent with legitimate police power reasoning. No heightened scrutiny or careful analysis of municipal justification was applied in the *Jim Sowell Construction Co.* case and it appears that for this court, minimum rationality due process review was sufficient.⁶¹

There are some instances where the *Agins* “substantially advance” takings test is being applied in a more rigorous fashion. The case of *Tandy Corporation v. City of Livonia*⁶² is one such example. In *Tandy*, the owner of a 14-acre parcel purchased the land only after it was rezoned from professional office use to general commercial use.⁶³

56. *Id.* at *17.

57. *Id.* at *22.

58. *Texas Manufactured Hous. Ass’n v. City of Nederland*, 101 F.3d 1095, 1105 (5th Cir. 1996).

59. 2000 U.S. Dist. LEXIS 9869 at *22.

60. For a similar view, see also *Gosnell v. City of Troy*, 59 F.3d 654, 658 (7th Cir. 1995); *Santa Monica Beach, Ltd. v. Superior Court of Los Angeles County*, 19 Cal. 4th 952, 81 Cal. Rptr. 2d 93, 968 P.2d 993, 1001 (Cal. 1999).

61. 81 F. Supp. 2d 800 (E.D. Mich. 1999).

62. *Id.* at 802.

63. *Id.*

Tandy, the buyer, intended to construct an "Incredible Universe" computer and retail electronics store on the site.⁶⁴ For unrelated economic reasons, Tandy decided not to complete the Incredible Universe store and it entered into a sales agreement to sell the property, at a profit,⁶⁵ to another developer who intended to develop the site as a commercial enterprise. Shortly after Tandy's agreement, the city council, "of its own initiative,"⁶⁶ proposed that the Tandy property be rezoned back to the office use classification it had previously had. After consideration by the planning commission which resulted in a recommendation supporting the rezoning and a public hearing held by the city council, the elected officials voted to restore the office use designation. A lawsuit was then filed by Tandy in spite of the fact that it had sold the property, in its rezoned condition, for a profit of roughly \$300,000.⁶⁷

Tandy alleged that the city had committed separate constitutional violations based upon (1) substantive due process and (2) regulatory takings theory. In deciding the motion for summary judgment, the *Tandy* court merged the due process claim into the *Agins* regulatory takings "substantially advance" analysis. This analytical consolidation led the court to admit that it considered the required nexus between the regulatory action and the suggested legitimate state interest were "markedly" different for the two constitutional claims.⁶⁸ For the substantive due process claim the plaintiff had a heavy burden of proving that there was "no rational relationship" between regulatory means and proper governmental ends. On the other hand, for the regulatory takings claim, the plaintiff's burden was "somewhat lessened" in that the plaintiff need show that the zoning change does not "substantially advance" the proffered state interest.

Following an extensive examination of the city's multiple justifications for the rezoning, the court concluded that as a matter of law the city had failed both standards.⁶⁹ This conclusion was the result of the

64. Tandy had paid \$6.1 million for the commercially zoned parcel and it later signed a purchase agreement to sell the property for \$7.25 million. The agreement contemplated that the land would be developed as commercial property. *Id.* at 804.

65. *Id.*

66. *Id.* at 806.

67. *Id.* at 811, note 6.

68. *Id.* at 814.

69. The court rejected the three reasons given by the Livonia Planning Commission and one reason offered by a city council member during deliberations on the rezoning ordinance. A fifth rationale suggested by another city council member, whether there had been an improvement in the professional office market in Livonia justifying the zoning change to permit only office use, was left for trial since a factual dispute remained on the issue. This searching and critical inquiry into some arguably plausible reasons for the city's rezoning decision shows a court in full second-guessing mode of the Livonia's choices. For instance, the city stated one reason for the office use des-

court's searching and critical exploration into the proffered explanations given by the city. The level of critique was deep and skeptical of most of the justifications for the rezoning back to professional office use.⁷⁰ This level of judicial intervention appears to be a tremendous departure from the extremely deferential substantive due process review of land-use decision making in past years. Furthermore, under the guise of undertaking regulatory takings review, the district court tested the city council's legislative revision with a critical analysis worthy of administrative law's substantial evidence test applied to certain agency decisions. The *Tandy* case stands in stark contrast to the contemporaneous *Bonnie Briar* and *Jim Sowell Construction Company* cases decided by other courts. The contrast reveals that while many courts have not used the *Agins* "substantially advance" test as a means of closely policing municipal land-use practices, others will employ this constitutional doctrine as authorization for highly intrusive review.

III. Limits on the Power of Government to Require Land Exactions from Developers

The Supreme Court has shown special interest in the area of development exactions as a form of conditional land-use regulation. The Court, in *Nollan v. California Coastal Commission*, established the rule for determining the constitutionality of such exactions as requiring an essential nexus between the nature of the condition and some public need generated by the development proposal. The later case of *Dolan v. City of Tigard* extended this nexus measure to determine whether there is a "rough proportionality" between the quantum of the exaction and the harms caused by the regulated activity. Both of these cases represented instances where the state or local government was exercising its regulatory authority to force a landowner to contribute a land interest or easement to the public as a condition of approval. While there has been a long tradition of imposing these regulatory conditions as part of subdivision regulation, the expanded use of exactions, broadly defined,

ignation was that it wished to promote a use of the Tandy tract that was "compatible and harmonious" with surrounding land. While agreeing with this characterization, the court rejected the city's explanation by concluding that commercial development was also compatible with the existing uses. Similarly, the court rejected the city's reason that it wished to continue the development of the Victor office park for professional offices rather than commercial uses. *Id.* at 812.

70. See e.g., *Ehrlich v. City of Culver City*, 911 P.2d 429 (Cal. 1996) (varied impact fees); *Strom v. City of Oakland*, 583 N.W.2d 311 (1998) (soil erosion site management); *Burton v. Clark County*, 958 P.2d 343 (1998) (road improvements); and *Curtis v. Town of South Thomaston*, 708 A.2d 657 (Me. 1998) (pond for fire protection).

has given rise to litigation challenging their imposition and demanding a higher level of judicial scrutiny following the *Nollan* and *Dolan* precedents.⁷¹

Recent cases reviewing land dedication requirements under the *Nollan/Dolan* tests show that the courts have not yet settled on a consistent jurisprudence for the application of the rough proportionality test, and there continues to be a variety of results in its application. For example, the Washington appellate courts have used *Dolan* to invalidate not only monetary payments, but also a city ordinance requiring a 30 percent set-aside requirement for open space land. On the other hand, the Maryland Court of Appeals refused to apply *Dolan*'s rough proportionality test to a required set-aside of recreational land for the use of subdivision residents in a strong opinion upholding subdivision controls by local government. Where applied in a Michigan appellate opinion to requirements for improving private roadway access, the court found that the rough proportionality test had been satisfied. In a Sixth Circuit opinion, a plaintiff who alleged suspect motives in a requirement for land conveyance to a neighbor was prevented by ripeness considerations to first go to state court on its takings claim, while being allowed to proceed on an equal protection claim. In Oregon, a local ordinance mandating that the applicant prepare a *Dolan* analysis was upheld. Finally, a federal district court refused to apply *Dolan* to New York City's watershed protection program, which limits development in the city's watershed. All in all, this review of recent cases reveals that exaction challenges are being litigated by landowners, but the results are mixed at best. The following discussion provides more detail on each of these decisions.

In *City of Annapolis v. Waterman*,⁷² the Watermans developed a 3-acre, three-phased subdivision beginning in the late 1970s. When obtaining subdivision approval of the first phase, they agreed to provide recreational space for residents in the first phase, in the amount of 2,375 square feet "in an appropriate location," when developing the later phases. When the third phase was submitted for subdivision approval, the city planning and zoning commission decided that a recreational easement containing 5,598 square feet and running across the rear of the eight units in that phase did not meet the recreational area requirement. The Watermans successfully challenged that denial in the circuit court, and afterward, based on newly enacted site planning requirements, the city council approved the subdivision with a limitation that

71. 745 A.2d 1000 (Md. 2000).

72. 112 F. Supp. 2d 342 (S.D. N.Y. 2000).

the required recreation area be located on a proposed single-family lot. Again, the Watermans brought the city to circuit court, which found that the conditions created an unconstitutional taking.

On appeal, in a strongly worded and comprehensive discussion of subdivision control, Maryland's highest court reversed the lower state courts, finding that the recreational space requirement as a condition to subdivision approval was not a regulatory taking. The court distinguished between required dedications of land in which the land is made open to the public generally, and the instant condition, which could be construed to require only that the residents of the subdivision would have the right to use the area. The court found that the *Dolan* rough proportionality test was applicable to the first, but not the second kind of exaction. The court then analyzed whether the condition created a loss of all viable economic use of the subdivision taken as a whole and found the condition to not be a taking.

In *Kittay v. Givliani*,⁷³ the bankruptcy trustee for a real estate development corporation brought a takings claim and other federal constitutional claims against New York City. The trustee claimed that the city's program to protect its watershed area, located upstream within more than eighty municipalities, created a taking of the bankrupt corporation's property. By Memorandum of Agreement with the municipalities and the state, and state regulation, the city prohibited activities that could cause degradation of the watershed. The regulations included permit variance procedures. On the city's motion to dismiss, the district court held that the plaintiff's as-applied claims were not ripe for adjudication because Kittay had not attempted to obtain a variance or other approvals. On the facial challenge, the court found that because the regulations by their very language provide for permit and variance procedures, Kittay could not argue that it has suffered a deprivation of the economic use of its property. The court refused to apply the *Nollan/Dolan* "rough proportionality" test, because the case did not involve a mandated dedication of property or physical taking.

*Forseth v. Village of Sussex*⁷⁴ represents another federal court challenge. In it, the Forseths attempted to develop 30 acres of land as a residential subdivision, obtaining preliminary plat approval from the Village of Sussex in 1993. Before they obtained approval of the final plat, a neighbor to the proposed subdivision, Mr. Tews, was elected

73. 199 F.3d 363 (7th Cir. 2000).

74. *Williams County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985).

president of the village board. The Forseths alleged that president Tews persuaded the U.S. Army Corp of Engineers to perform a wetland survey on their property, resulting in the discovery of more wetlands. They also allege that the village council required that the Forseths, as a condition of final plat approval, convey a portion of their property to Mr. Tews as a buffer strip, at a severely reduced price. All of these claims represented allegations of truly unreasonable municipal conduct.

After obtaining final plat approval, the Forseths filed suit in federal court asserting substantive due process, equal protection, and takings violations, as well as various state law claims. The takings claim argued that the conveyance to Mr. Tews represented an unconstitutional condition, and that the village's design and construction of its current drainage system failed to adequately control the flow of strong water runoff from adjacent subdivisions and thus increased the areas of wetlands within the development. The district court, apparently unwilling to become embroiled in this dispute, dismissed the federal claims as not ripe and refused to exercise supplemental jurisdiction over the state law claims. On appeal, the Seventh Circuit upheld the dismissal of the takings and substantive due process claims, finding them not ripe because the Forseths had failed to utilize their state law remedies as required by the *Williamson County* case.⁷⁵ On the equal protection claim, the court held that the allegations of malicious conduct of a governmental agent are independent from the takings claim and not subject to the *Williamson* ripeness requirement. Echoing the similar claims of outrageous municipal conduct made in *Olech v. Village of Willowbrook*, the court remanded this issue.

Some courts actually do apply the *Nollan/Dolan* tests to municipal practices. In *Dowerk v. Charter Township of Oxford*,⁷⁶ the Dowerk's owned a 10-acre parcel of land zoned for single-family residences, which was accessible only by an existing, unimproved private roadway. They sought building permits to construct homes and a variance to the requirement that existing private roads be brought up to current public standards. The landowner petitioned for the creation of a special assessment district to pay for the road costs, but upon objection by affected landowners, the township declined to create the district. Dowerk then brought suit claiming that the roadway improvement requirements were an unconstitutional taking. The Michigan court applied the *Nollan/Dolan* tests and found that the road requirements substantially fur-

75. 592 N.W.2d 724 (Mich. App. 1998).

76. *Id.* at 731.

thered a legitimate government interest in ensuring access to residential property by emergency vehicles. Although noting that the township does not require a dedication of land to public use, but only the upgrading of the private access road, the court applied *Dolan* to find that the roadway conditions impose a burden that is in at least rough proportion to the increased traffic and public safety concerns that would follow from the proposed development. Finally, the court pointed out that the plaintiff could still develop or sell the property as a single parcel without having to upgrade the road, and thus they failed to show the loss of all economic viability.

The court found no procedural due process violation in the township's refusal to create the special assessment district or to provide alternative avenues for complying with the roadway conditions. The township's decisions against the plaintiff were informed by input from both experts and interested parties and within its discretion accorded under state law. Ultimately, the court characterized the case as having to do "with allocating the costs of development. Although constitutional principles forbid forcing one person to absorb the costs of a public benefit, neither do they require forcing others to shoulder the burdens of one person's aspirations to develop real property."⁷⁷

A recent decision focused on the procedural aspects of implementing the *Dolan* decision. In *Lincoln City Chamber of Commerce v. City of Lincoln City*,⁷⁸ the chamber of commerce and the Legal Advocacy Group challenged city ordinances that required a report from any applicant asserting that it could not legally be required to provide road, drainage, and sidewalk easements for land improvements. This report had to be prepared by a qualified civil or traffic engineer and had to provide evidence as to whether the site plan, building permit, and use permits, required improvements that are not roughly proportional to the estimated impact of the development. The plaintiffs asserted that *Dolan* places the burden of proof on governmental bodies to demonstrate rough proportionality, and thus the ordinance requirement unconstitutionally shifted that burden to the applicants instead of the governmental bodies.

The court agreed with the Oregon Land Use Board of Appeals analysis of this case that *Dolan* was not concerned with "the burden of proof" in the conventional, evidentiary, and adversarial sense. Instead, the local government's task was to articulate and substantiate the req-

77. 991 P.2d 1080 (Or. App. 1999), *rev. denied*, 6 P.3d 1101 (Or. 2000).

78. 990 P.2d 429 (Wash. App. 1999), *rev. granted*, 10 P.3d 1071 (Wash. 2000).

visit facts and legal conclusions for its decision. The report requirement was simply an application requirement and did not eliminate or diminish the ultimate city responsibility to demonstrate findings that its conditions have roughly proportional to the impact of the improved developments. The ordinance requirements were found to not be facially unconstitutional, but the court left open the possibility that it could be found unconstitutional as applied in particular cases.

*Isla Verde International Holding, Inc. v. City of Camas*⁷⁹ was another challenge to subdivision open space and road access requirements before the Washington appellate court. Isla Verde had proposed a residential subdivision of fifty-one lots, which was approved subject to conditions that it set aside 30 percent (4 acres) of the subdivision as open space and that it provide a secondary access road for emergency purposes. The company challenged the subdivision conditions, and the trial court found that the road requirement violated due process and state statutes and that the open space set-aside requirement was an unconstitutional taking. Reversing the trial court invalidation of the road requirement, the court of appeals found that the requirement achieved a legitimate public purpose, which was reliable access for emergency vehicles, and that the secondary access road was reasonably necessary to achieve that access. It also found that the road condition was not unduly oppressive considering the nature of the harm to be avoided, the ineffectiveness of less drastic measures, and the lack of evidence regarding any extraordinary costs to the property owner.

The Washington court held that the dedication requirement was subject to a *Dolan* analysis, even though the property owner association, and not the local government, would retain ownership of the land set aside. Under *Dolan's* first prong, the court found an essential nexus between the public need to preserve open space for wildlife and recreation and the project's destruction of approximately 13 acres of open space. However, the condition failed the second prong of *Dolan* because there was insufficient evidence that the 30 percent set-aside was roughly proportional to the subdivision's impact. The appellate court upheld the trial court's refusal to allow the city to submit additional evidence on that issue, because it was not available at the city council proceeding.

Finally, in *Benchmark Land Co. v. City of Battle Ground*,⁸⁰ the city

79. 972 P.2d 944 (Wash. App. 1999), rev. granted, cause remanded by 989 P.2d 1140 (Wash. 1999), on remand, 14 P.3d 172 (Wash. App. 2000).

80. 14 P.3d at 174.

had conditioned plat approval for a 20-acre subdivision on payments for the provision of half-street improvements to a street adjoining the subdivision, although the street did not directly access the subdivision. On remand from the initial trial court decision, both the city and the landowner had performed traffic studies to consider the traffic impacts related to half-street improvements. Neither study concluded that the development would cause the street traffic to increase or the street to become more unsafe, although the city's study noted that the street did not meet current standards for width and lane configuration. The Washington appellate court in 1999 found that the condition was an unconstitutional taking under *Dolan*, specifically rejecting an argument that there is a constitutional distinction between the dedication of land and the payment of a fee. The Washington Supreme Court granted review and remanded the case to the court of appeals in light of *City of Monterey v. Del Monte Dunes*.

On remand, the appellate court affirmed its initial decision. The court rejected the city's argument that *Del Monte Dunes* clarified that only dedication of land as a condition to approval was subject to the *Dolan* test. While conceding that *Nollan* and *Dolan* "were unique in requiring dedications of real property," the court explained that in each case the government "required the developer to make an affirmative contribution to solve a public problem that existed, at least in part, outside the developed property."⁸¹ The court emphasized the similarity of exacting land and money and noted that the facts in *Del Monte Dunes* are distinguishable because the government there did not exact land or money. It explained that the attempted transfer of a public burden to some people alone, where the burdens should be borne by the public as a whole, requires the application of the *Dolan* "rough proportionality" test.⁸²

IV. Conclusion

The interests of individuals and those of the community frequently seem to be in tension. The individual landowner conceives of property rights as an aspect of his or her personal freedom and then considers the restrictions or prohibitions of regulation to be unreasonable or unlawful. Often, the needs of the community are perceived to be in opposition to the self-interest of the individual—caused by expanding regulatory aims and the financial pressures imposed upon local gov-

81. *Id.* at 175.

82.

ernment by rapid growth. The norms of local land-use regulation develop within a community influenced over time by state enabling authority changes and by local practices and traditions. Generally, these social demands are accepted by landowners as long as their development objectives can be accomplished. When local government acts in a way which blocks or frustrates these desires, the landowners may consider the land-use regulation to be unfair or unreasonable and they may challenge the legitimacy of the process or the restrictions. Such a challenge could take many forms: undertaking a publicity campaign to influence public opinion in support of the project, lobbying planning staff, local attorneys, and elected officials for a more favorable project treatment, having a more receptive law or policy formally adopted by the local government, seeking a legislative change in the state's enabling authority, and receiving assistance through judicial review. Each method has its costs and benefits.

The litigation method with a constitutional basis has a different nature. Such a method asks for court action based upon the interpretation and application of general constitutional principles to specific cases and it seeks to limit governmental action even when it is authorized and when it has been tacitly accepted in the past by those subject to control. Constitutional review asks judges to exercise principled power to invalidate actions taken by democratically elected officials and by their employees. With this monopoly on the authority of defining constitutional meaning, the courts must carefully decide when to intervene and what the relevant principle means. This article has described and analyzed emerging trends in the application of the Supreme Court's more recent due process and takings doctrine as it has been interpreted by the lower federal and the state courts. From this review it appears that landowner litigants have been encouraged by the Supreme Court's recent decisions and rhetoric, which have carried a more sympathetic tone to their views, and they have attempted to involve the lower federal and state courts in a more intensive policing of municipal land-use decision making. In analyzing this assortment of case decisions, it can hardly be said that these tribunals have applied the generally more landowner-oriented takings jurisprudence in an expansive and more aggressive fashion. Although invited to by plaintiffs, the courts have been reluctant to exercise the constitutional power by determining due process and takings violations; rather, choosing to reverse only the most egregiously unfair conduct while reinforcing most reasonable and defensible land-use control efforts. Increasingly, the message to state and local governments has been a supportive one yet one that requires a

clearer justification of public regulation to the legitimate purposes of government. By taking this approach, the courts have declined to be assertive in exercising their constitutional interpretive power in deciding the norms of regulatory behavior yet demanding greater discipline in the exercise of land-use control powers.