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Constitutional Principles Applied to Land Use Planning and Regulation: A Tenative Restatement

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CONSTITUTIONAL PRINCIPLES APPLIED TO LAND USE PLANNING AND REGULATION: A TENTATIVE RESTATEMENT*

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Five major land use cases dealing with constitutional questions were decided by the U.S. Supreme Court in the 1920's.[1] For 46 years, from 1927 to 1974 the U.S. Supreme Court was silent on land use issues, although numerous constitutional decisions on other topics in that period have considerable significance for land use planning and control.

The collapse of the real estate boom in 1927 and the near halt to development, which lasted virtually to the end of World War II contributed to the absence of constitutional issues. But two other factors were perhaps more important. First, the Court was obviously reluctant to get involved in land use planning and control cases, deferring to state courts in this field. Second, the character of the early decisions established fundamental constitutional guidelines for state courts to follow and thus supported subsequent denials of *certiorari* by the U.S. Supreme Court with respect to new cases.

From 1974 to mid-1977 the U.S. Supreme Court, still reluctant, has considered seven land use cases.[2] But the general stance of the

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1. The five cases were:
   a. Village of Euclid v. Ambler Realty Company, 272 U.S. 365 (1926);
   b. Zahn v. Board of Public Works of City of Los Angeles, 274 U.S. 325 (1927);
   c. Gorieb v. Fox, 274 U.S. 603 (1927);
   d. Nectow v. City of Cambridge, 277 U.S. 183 (1928);
   e. Washington *ex rel.* Seattle Trust Co. v. Roberge, 278 U.S. 116 (1928).

A tremendously important sixth case of this era should also be listed since it has been most important in the development of the "Taking Issue": Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922).

2. These seven cases were:
   a. Village of Belle Terre v. Boraas, 416 U.S. 1 (1974);
   b. Warth v. Seldin, 422 U.S. 490 (1975);
   c. Hills v. Gautreaux, 425 U.S. 284 (1976);
   d. City of Eastlake v. Forest City Enterprises, Inc. 426 U.S. 668 (1976);
   e. Young v. American Mini-theater, Inc., 427 U.S. 50 (1976);
   f. Village of Arlington Heights v. Metropolitan Housing Redevelopment Corp., 429 U.S. 252 (1977);
   g. Moore v. City of East Cleveland, ____U.S. ____, 97 S. Ct. 1932 (1977).

federal courts, including the Supreme Court, continues to be to avoid land use planning and control litigation.[3]

The states, on the other hand, have had neither the option of avoiding nor apparently the desire to minimize land use planning and control litigation. According to Norman Williams in his treatise *American Land Planning Law*,[4] the states have in about 50 years produced over 10,000 reported opinions dealing with land use controls. Seventy-five percent of these cases have arisen in 13 states,[5] primarily those which experienced most urban growth since the mid-twenties. Not all, but a substantial number of the cases have included constitutional challenges, often based on the allegation that exercise of the police power by local government involved a taking of property without compensation.

This tremendous volume of cases suggests two observations. First, land use control has not been readily accepted by many parties in interest. Second, the state courts have not been able to decide cases in such a manner as to establish principles that might have obviated subsequent challenges.

So many Americans, including George Washington and Benjamin Franklin, have established family fortunes on the basis of unearned increments and windfall profits gained from appreciation and the development and sale of real estate, that many others have the strong desire to repeat this experience. Thus, it is not surprising that landowners will fight any public actions that are perceived as diminishing opportunities and expectations for profits.

It has been said that we have regarded land as a commodity rather than as a resource for too long. Giving distinctive labels hardly solves the basic problems of profit expectation, however. Greed, which so often energizes our economic processes, is not exorcised by recognizing it as one of the seven deadly sins. If there is a chance of defeating the application of land use controls which appear to threaten profit potential, that chance will often appear to be worth taking, whatever the public interest may be.

Nevertheless, for all of the 10,000 reported land use cases, there are probably thousands more situations where controls have been

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3. *See* URBAN LAND INSTITUTE, ENVIRONMENTAL COMMENT (August 1976); THE COURTS AND LAND USE, and THE COURTS AND LAND USE II (1977). Brief summaries of the cases listed, *supra* notes 1 and 2, appear on pp. 6 and 7 of the August 1977 issue.

4. N. WILLIAMS, 1 AMERICAN LAND PLANNING LAW: LAND USE AND THE POLICE POWER 81 (1975).

5. Massachusetts, Rhode Island, Connecticut, New York, New Jersey, Pennsylvania, Maryland, Ohio, Michigan, Illinois, Florida, Texas and California. *Id.*

accepted and complied with. The controls may not have been foresighted: many urban areas have been plagued with strip cities, sprawl, exclusionary controls, and many other evils. But the fact is that our system has provided housing for 70 million people added to our population from 1950 to 1978, plus housing for the millions who relocated. This achievement is significant even though hindsight tells us we could have done better, we could have been fairer, and we could have built fewer ugly developments.

Professional planners, planning commissions, and those who follow their advice—as well as those who are concerned with America the ugly and shabby—tend to stress problem solving. In so doing, they reflect a liberal or progovernmental tradition as well as dominant planning values. It is, then, but a short step to regarding the trilogy "life, liberty and property" as rationalizations of selfish interests of ruling elites.

This deterministic interpretation of history, common at least since Charles A. Beard wrote *An Economic Interpretation of the Constitution,*[6] may minimize the extent to which property in fact provided an important foundation for civil liberties. At various times when the rights of Englishmen were being established in the British Constitution, it was men of property who were able to stand up to and resist the arbitrary and capricious actions of the several autocratic monarchs from Runnymeade to the American Revolution. As the Declaration of Independence declares, the signers laid life, liberty and property on the line.

In any case, those who advocate land use controls today are often less interested in individual property rights than in achieving more attractive land use. Thus, while conflict between individual interests and public interests is a frequent element in attempts to control land use, regulation to achieve social benefits (without too much concern for identifying those on whom the cost burdens may fall) has seemed an inexpensive method of proceeding. Land use planning has been premised on concepts of public good, but it has not been characterized by rigorous benefit-cost analyses nor by a concern for distributive questions of who benefits and who pays. Once the requirement that zoning be "in accordance with the comprehensive plan" was watered down,[7] those plans designated as "comprehensive"

6. C. BEARD, AN ECONOMIC INTERPRETATION OF THE CONSTITUTION (1913).

7. The Model Planning Law, recommended in the late 1920's by the U.S. Department of Commerce and adopted by most states, specified that zoning was to be "in accordance with the master plan." But courts did not insist on this logical relationship, accepting zoning actions as equivalent to or substitutes for the master plan. For a discussion of this situation

tended at best to be attractive, even if unreal, goal statements, rather than rigorous analyses of community needs and potentials. At worst, they were simply the sum of many *ad hoc* zoning decisions often accommodating development interests rather than spelling out community needs.[8] In the process property rights were considered important only as they provided a basis for potential litigation. Perhaps the attitude is reflected in the description of property rights as a bundle of sticks into which the "right to develop" is inserted by government action, rather than being inherent in fee simple ownership.[9]

EXPANSION OF LAND USE REGULATION

Whatever view one might hold with respect to the desirability of land use planning and control, it is safe to predict that the extent of public intervention will continue to increase and become more comprehensive. The 10,000 cases referred to by Norman Williams indicate that the dominant thrust of court decisions will be to sustain such intervention. On occasion particular regulations will be ruled *ultra vires,* or classified as "taking property without just compensation." Some government actions, in addition, may be considered inverse condemnations, and compensation will be required. Direct pressure toward more land use regulation will be exerted through zoning, subdivision controls, recent innovative techniques, and

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see Haar, *In Accordance with a Comprehensive Plan,* 68 HARV. L. REV. 1154 (1955). Only in very recent cases have courts in a few states begun to insist on zoning decisions being consistent with the comprehensive plan. For a brief summary of early developments *see* D. HAGMAN, URBAN PLANNING AND LAND DEVELOPMENT CONTROL LAW, Chs. 2 and 4 (1971). For reference to developing trends *see* D. HAGMAN, PUBLIC PLANNING AND CONTROL OF URBAN LAND DEVELOPMENT, Ch. 8 (1973).

8. Thus Professor Haar writes, *Id.* at 1173, "... the courts have taken a number of different approaches in testing zoning measures for consonance with the enabling act mandate of 'accordance with a comprehensive plan.' ... But all of them share a common defect: they emphasize the question whether the zoning ordinance is a comprehensive plan, not whether it is in accordance with a comprehensive plan. ..."

9. The "bundle of sticks" illustration of the diversity and severability of the various property rights is much overworked. But little attention has been devoted to the fundamental question of whether after feudal dues were abolished and fee simple ownership became dominant the bundle was full or only partially full. While one can cite Locke, Bentham, and even Blackstone to the effect that property rights are a product of society and of its laws, this tells us little or nothing as to whether the fee simple owner starts with all rights, and removing any one by societal or governmental non-voluntary action is a taking; or whether some rights such as the right to develop a particular environmentally sensitive tract is a privilege bestowed on the fee simple owner: an addition to his bundle of sticks. The Wisconsin Supreme Court in Just v. Marinette County, 56 Wis. 2d 7, 201 N.W. 2d 761 (1972), suggested the privilege argument, but in so doing denied both historical practice and judicial precedent. *See* discussion of this case, *infra,* at note 46.

indirect pressure through air and water pollution control and environmental management.

That regulatory evolution of land use control will continue is a major premise of this article. Does this mean that a concern for individual property rights is, therefore, useless and irrelevant? Not at all. It means, rather, that we must reexamine the constitutional issues involved and the way in which they are raised and analyzed. Individual rights, including property rights, are still of tremendous importance to American liberty and democracy. But we must ask how best these rights may be protected. The second premise of this article is that in land use litigation we have been asking the wrong questions, focusing on the wrong issues, and seeking too often simply to frustrate government's legitimate responsibility for land use planning to achieve an improved quality of life (i.e., the general welfare).

THE SEPARATE PATHS OF LEGAL DOCTRINES

A difficulty in applying constitutional doctrines to land use planning and control litigation arises from the fragmentation and compartmentalization of relevant thought on the subject. Practicing lawyers concerned with protecting clients' interests from the adverse effects of regulation and public attorneys defending regulation against constitutional challenge (or preparing ordinances that will minimize potential challenges) are highly specialized, but primarily interested in specific situations and particular appellate decisions which support their views of the law. Judges handling trials or appeals generally have little time to go beyond what the attorneys for the parties present. Paraphrasing, one might say that far too many opinions are "cabin'd, cribb'd, confin'd, bound in"[10] by limited concepts and jurisprudential theories. Much of the rich jurisprudential and philosophic literature exploring concepts of property and property rights is the result of academics writing for academics, for there seems little evidence of much direct influence on day-to-day dealing with land use regulation issues.

Far more influential have been the polemics of the hustings, that when supporting regulation, are premised on values associated with the "city beautiful," and when attacking regulation are premised on Blackstone or the rhetoric of the John Birch Society. Neither of these premises nor the arguments resting on them contribute much to the formulation of Twentieth Century concepts of property, its obligations, and appropriate control policies, nor to clarifying state/citizen relationships in the land use field.

10. SHAKESPEARE, MACBETH, Act III, Scene Four.

Forty years ago Professor Francis S. Philbrick wrote:

> Manifestly we need a modernized philosophy of property.... The first tenet of an adequate philosophy must be that property is the creature and dependent of law, including, of course, our constitutions.... [P]rivate property, though admitting that it can exist only by virtue of public protection, pleads payment of taxes as the whole price of that protection, and beyond that claims immunity from all social obligations.[11]

Writing almost thirty years later in 1965 Dean John E. Cribbet said: "We *still* need a modernized philosophy of property."[12] In discussing the duties and privileges of feudal land relationships, he quoted Professor Philbrick to the effect that it is regretable that there could not have been preserved the idea that all property was held subject to the performance of duties, not a few of them public, and concludes "It may be that the wrong concepts of feudalism survived...."[13]

SHIBBOLETHS

The "taking issue" has been overstressed as a basis for halting the application of land use controls to particular parcels or tracts. This emphasis represents a meat-ax approach in a situation calling for a scalpel. Bosselman and associates[14] should certainly have under-

11. Philbrick, *Changing Conceptions of Property in Law,* 86 U.PA. L. REV. 691, 728 (1938).

12. Cribbet, *Changing Concepts in the Law of Land Use,* 50 IOWA L. REV. 245, 246.

13. *Id.* at 247. From more than casual contact it has seemed to me that Continental law, specifically German law, by drawing more on the jurisprudential writings of legal scholars has been better able to adapt to changing social situations and needs. *See* Wengert, *Land Use Planning and Control in the German Federal Republic,* 15 NAT. RES. J. 511 (1975).

14. F. BOSSELMAN, D. CALLIES & J. BANTA, THE TAKING ISSUE: AN ANALYSIS OF THE CONSTITUTIONAL LIMITS OF LAND USE CONTROL (1973). This monograph argues convincingly that regulation of the uses of property, though not frequent, were accepted as proper exercises of government police power authority throughout the 19th Century. It also shows that the doctrine that regulation, if too severe, could become a taking was formulated primarily by Justice Holmes, first as a Justice on the high court of Massachusetts and then in his opinion in the landmark U.S. Supreme Court case of Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922). In the latter opinion Justice Holmes suggested that the public benefits sought had to be balanced against the private economic costs suffered by the land owner, and that if the costs were too great, then the diminishment in value was a taking of property and required compensation. He stated "If regulation goes too far it will be recognized as a taking.... This is a question of degree—and therefore cannot be disposed of by general propositions." *Id.* at 415-16. One result of this decision was thus to require case-by-case assessment of the impact of each land use regulation on each individual piece of property—a result which no doubt in part accounts for the tremendous volume of land use litigation on the taking issue in the state courts. Subsequent to the Pennsylvania Coal decision, the U.S. Supreme Court sustained zoning as a proper exercise of the police power, Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926). The Euclid decision, however, reinforced the case-by-case balancing established by Justice Holmes as the test of whether a

mined the belief that the *Pennsylvania Coal Company v. Mahon*[15] decision had its roots in Magna Charta; they showed, instead, the Holmesian origins of this doctrine which has dominated challenges to zoning and other land use controls. But traditional modes of thought persist and the "taking issue" as formulated by Holmes remains a significant weapon for attacking land use controls in most state courts.

We need also to reexamine the assumption that "just price" means market price defined in terms of maximum hypothetical use expectations. Valuation is not a black art. The literature on the subject as it relates to taxation, as it relates to estates, or to utility capitalization and rate setting is extensive, but it seems not to have had much influence on definitions of "just price" in challenges to land use regulations. In analogous situations the German Constitutional Court rejected market price as a basis for determining what the public owed a landowner, stressing the fact that much of the market price was a result of social action and asserting that it hardly seemed fair to have society pay for values it created.[16] If a market is going to be hypothesized, ought not "caveat emptor" enter into the valuation situation at some point?[17] How should the trade-offs of windfalls for wipeouts be dealt with? Do we really believe that there is an unqualified "right" to unearned increments?[18]

Individual rights will be better protected by stressing substantive in addition to procedural due process. At the same time, it will be necessary to get rid of sterile and counterproductive applications of separation of powers doctrines to local land use regulations. The classification of local land use regulations as "legislative" due the "presumption of validity" traditionally accorded by the judicial branch to actions of legislation is a fiction contrary to fact. More

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taking had occurred. The study by Bosselman and associates may over time contribute to a narrowing, if not to a complete redefinition of the taking issue. But presently, allegations of taking remain the major basis for attacking land use controls.

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

16. Wengert, *supra* note 13, at 523.

17. A case that might have come out differently if *"caveat emptor"* had been applied is Morris County Land Improvement Co. v. Parsippany-Troy Hills Township, 40 N.J. 539, 193 A.2d 232 (1963). The buyer of swampland, it should be argued, assumes the risk that it may have no uses except as swamp land. It might also be argued (really a question of fact) that the investment required to reclaim the swampland would have brought a substantial return in some other venture, i.e., the value of swampland is a function of improvement efforts and expenditures and rarely inheres in the land as such. Moreover, how could a regulation take what is not yet there, that is, development?

18. The equities in land use control situations are creatively explored in D. HAGMAN & D. MISCZYNSKI, WINDFALLS FOR WIPEOUTS: LAND VALUE CAPTURE AND COMPENSATION (1978).

importantly, deference to something arbitrarily called legislative action avoids consideration of "essential fairness" in governmental processes and forecloses an examination of the rational connection between the action taken and the situation dealt with. It thus minimizes the importance of a factual record as the basis for action and precludes a testing of action by ordinary standards of logic. Even where policy choices are necessary, the fact of choice does not convert action to legislation any more than choosing "A" instead of "B" as an employee is legislative in character.

In virtually all cases, it should be possible to show alternatives considered, their relationships and possible consequences, and then to explain the policy choice made in terms of impact on and relationship to specifically described public interests. The phrases here listed–alternatives, consequences, impact–are those of NEPA and suggest the possible importance of NEPA concepts for land planning and control.[19]

LESSONS FROM ADMINISTRATIVE LAW

Professor Kenneth Culp Davis defines administrative law as "the Law concerning the powers and procedures of administrative agencies, including especially the law governing judicial review of administrative action." The scope of administrative action, in his view, includes actions that affect "the rights of private parties through either adjudication, rule making, investigating, prosecuting, negotiating, settling, or informally acting." He states that "when the President, or a governor, or a municipal governing body, exercises powers of adjudication or rule making, he or it is to that extent an administrative agency." Administrative law is not limited to the regulatory agencies, but embraces all governmental machinery for carrying out governmental programs. But unlike European administrative law, American administrative law tends to concentrate on powers, authority, procedures, and judicial review.[20] The argument of this paper is that land use regulations (i.e., zoning, subdivision control, etc.) involve the exercise of substantial administrative discretion and for this reason the devloping principles of administrative law take on particular significance.[21]

The administrative process includes both adjudication and rule making, the two aspects of the process often being intricately inter-

19. National Environmental Policy Act (NEPA), 42 U.S.C. §4331 (1976).
20. K. DAVIS, ADMINISTRATIVE LAW TEXT 1 (3d ed. 1972).
21. K. DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY (1971).

woven. Thus basic questions with respect to fairness apply to both.[22]

The problem in administrative action, Davis argues, is to assure a reasonable exercise of needed discretionary power. The important question, also in land use regulation, is how the exercise of discretionary power might be limited by means of procedural safeguards to provide for "essential fairness." Two subsidiary questions are relevant. One is a traditional question, namely: "When is discretion arbitrary and capricious?" The other, and one which is only rarely raised, is: "When is discretionary action not reasonably related to the facts with which it is supposed to deal and upon which it is supposed to be based?" Answers to both questions involve exercises in rigorous logic applied to specific facts. Where scientific facts and data are available or can be secured to support particular decisions, simple declarations or generalized findings of facts (even when labeled legislative) should not be allowed to suffice as a basis for restriction of individual rights. There still are many areas of administrative regulation in which judgment must be the basis for action but facts are ascertainable, and the law should require that these facts be set forth and that actions taken represent logically tenable conclusions from the facts.

Policies and programs may be arbitrary and capricious simply because they have not adequately taken consequences into account or have not involved careful considerations of alternative ways to achieve particular ends. This, of course, is the emphasis of NEPA: assessment of consequences and alternatives based upon factual analysis as set forth in environmental impact statements.[23]

In land use regulation courts often accept such vague declarations as "just and reasonable," "public interest," "public convenience, interest or necessity," or other equally meaningless generalizations suggesting that these findings provide adequate statutory standards. Clearly, delegations based on vague and meaningless phrases are not much different from delegations without standards.

Davis suggests that state legislatures are less responsible than Congress, particularly in the closing hours of a session.[24] Thus, clarification of legislative intent is often slipshod, and safeguards protecting against arbitrary action are generally less developed. Few states maintain adequate legislative records so statutory construction is usually limited to application of the "plain meaning" rule. And safeguards

22. DAVIS, *supra* note 20, at 11, §1.05.
23. 42 U.S.C. §4331 (1976).
24. DAVIS, *supra* note 20, at 37, §2.06.

against arbitrary action are absent, while requirements for stated administrative standards are often ritualistic.

State courts have struck down a large number of legislative delegations to state administrative agencies, but it is noteworthy that delegations to local governments have rarely been challenged. Local governments exercising delegated powers, such as those involved in land use regulation and control, can be every bit as arbitrary and capricious as state agencies implementing a variety of state programs. This lack of attention to delegations to local governments has historical political explanations, but has very little logic behind it. As pointed out above, most state courts have been only too willing to defer to the judgments of city councils and county commissions by classifying their actions as legislative. The argument that since these are elected bodies, their function must be legislative is only partially valid since many state commissions and even department heads are also elected. The test, if it has any relevance, should be functional, with "essential fairness" as the desired goal. In any case, protection against arbitrariness does not lie in statutory standards alone but in procedural safeguards.

Davis stresses that what is needed is a consideration of both safeguards and standards in order to determine whether the total protection against arbitrary power is adequate.[25] A power to make rules is far more dangerous than a power to make rules after following procedures with party participation like those required by the Federal Administrative Procedure Act.[26] Even when the procedure is wholly informal, and even when the action is directed to a single party, the differences between fair procedure and lack of it should be assessed. Because of inadequate judicial (or other) surveillance, administrative action—including land use regulation—may be unguided by meaningful statutory standards, or even exercised in direct violation of legislative intent. Action is often unguided by administrative standards and may be unprotected by administrative procedural safeguards. Substantial authority may be delegated to subordinate officers with little or no supervision, and immune to judicial review.

As an ideal for the administrative process, Davis emphasizes the desirability of an open system, stressing that the crucial question is not simply what the statute may say but what in fact administrators do. In this regard the practice with respect to land use controls often leaves much to be desired. As a corrective, Davis recommends establishing a system which: first, seeks to protect against unnecessary and

25. *Id.* at 41, § 2.07.

26. 5 U.S.C. § § 551-59, 701-06, 1305, 3105 (1976), § § 3344, 6362, 7562 (Supp. 1978).

uncontrolled discretionary power; second, focuses on safeguards rather than on standards; third, requires administrators to develop announced standards in advance of action; fourth, requires that officers with discretionary power do as much as feasible to structure their discretion through published safeguards, and confine and guide discretion through published standards, principles, and rules; fifth, seeks not only to restrict undelegated power, but rather to stress the dangers in selective enforcement.[27]

The Administrative Procedure Act[28] and general traditions in administrative law distinguish between quasi-legislative and quasi-judicial action, or rule making and adjudication.[29] By custom, courts have been less likely to scrutinize the provisions of rules or rule making processes except to determine that the rules are within the scope of authority of the rule making agency and that they are not artibrary and capricious. To fall under the strictures of "arbitrary and capricious," rules and/or policy statements must by most tests be so outrageous as to violate the sense of propriety of even the most simple-minded citizen, or so contrary to fact as to be absurd.

The burden of proving that rules or policies are arbitrary and capricious, moreover, falls on the aggrieved citizen, and often requires a showing of malice or evil intent. This appears superficially logical, until one realizes that proof of evil or malicious intent requires investigatory power (and perhaps even subpoena power) beyond the capacity of the ordinary citizen. One may know that zoning decisions have been made by secret deals or are designed to favor friends or injure political opponents, but proving such allegations may be most difficult. Facts as to conspiracy and collusion between real estate developers, financial interests, and city council members can rarely be proved by ordinary litigants in the absence of open decisions, open procedures and open records tested by rigorous logic.

While legislation or rule making may involve choices as to alternate futures, one cannot escape the conclusion that policy at some point must be based on facts or perceptions of fact. The rule making process must, therefore, provide for correction of error by what

27. DAVIS, *supra* note 20, at 43, § 2.08.

28. 5 U.S.C. § § 551-59 (1976). Professor Davis accepts this distinction but qualifies his position considerably. *See* DAVIS, *supra* note 20, especially in Chs. 4-8, and *An Approach to Problems of Evidence in the Administrative Process,* 55 HARV. L. REV. 364 (1942).

29. *See* Sullivan, *Araby Revisited: The Evolving Concept of Procedural Due Process Before Land Use Regulation Bodies,* 15 SANTA CLARA LAW. 50 (1974) which discusses the position of the Oregon Supreme Court in Fasano v. Bd. of County Comm'n., 264 Ore. 574, 507 P.2d 23 (1973).

Justice Holmes in his dissent in *Abrams v. U.S.* called "the free trade of ideas."[30]

It is only in choosing among possible outcomes that the policy maker exercises judgment. Here opportunity for argument and persuasion becomes important. But the logic of and reasons for the choices made, as established in a written record, are important to an assessment by others of "essential fairness" of the decision. Policies deal with factual situations and thus the logical connection between policies and stated conditions is subject to proof and logical display. The focus of NEPA may usefully be kept in mind; NEPA recognizes that alternatives may be important and that alternatives chosen have consequences. Weighing of alternatives and assessment of consequences involve substantial fact questions subject to logical analysis and proof. In a sense, there is a kind of continuum ranging from the arbitrary and capricious policy, which simply springs from the beliefs and prejudices of policy makers, to a careful assessment of a factual record. The latter type of policy permits both a weighing of alternatives and a choice of the one that seems most effectively to accomplish goals sought, and that appears to have the most suitable externality effects–environmental, economic, and social.[31]

Land use controls must not be based simply on policy declarations or assertions of findings that are not based upon investigation and research. Most cities (all but the smallest) and many counties have professional planning staffs who should be held responsible for building a logical record for rational action.

The comments of the First Circuit Court of Appeals in *Steel Hill Development, Inc. v. Town of Sanbornton*[32] suggest a proper concern for a factual basis for land use controls. The Court said:

> We are disturbed by the admission here that there was never any professional or scientific study made as to why six, rather than four or eight, acres was reasonable to protect the values cherished by the people of Sanbornton. . . . Hopefully, Sanbornton has begun or soon will begin to plan with more precision for the future, taking advantage of numerous federal or state grants for which it might qualify. . . .

Another dimension of this problem of facts as the basis for decision concerns the issues of how and at what stage facts are to be

30. Abrams v. United States, 250 U.S. 616 (1919).

31. *See* N. WENGERT, THE POLITICAL ALLOCATION OF BENEFITS AND BURDENS: ECONOMIC EXTERNALITIES AND DUE PROCESS IN ENVIRONMENTAL PROTECTION (1976).

32. 469 F.2d 956, 962 (1st. Cir. 1972).

presented. When land use regulations are litigated, the factual situation was often not presented when the regulations were issued, or at the trial, but in Brandeis-type briefs on appeal. While having data presented by attorneys in appellate briefs may be better than having no factual data, this approach may conflict with the basic value of having facts presented as part of the trial subject to rebuttal and cross examination. With respect to administrative bodies such as planning commissions or city councils, the courts should insist that factual data be introduced in the record at the time policy decisions are made rather than by lawyers in appellate briefs. The snide footnote comments of the Circuit Court of Appeals in *Construction Industry Assn. of Sonoma County v. Petaluma*[33] may have been justified if the court had at the same time insisted that the factual material that the attorneys for the Contractors Association introduced in their brief be considered at the trial or earlier at an administrative hearing. What the Circuit Court failed to recognize, however, was that the conclusion should have led to remand the case for lack of factual studies by the regulating government.

Where regulations (rules) deal with detailed subject matter and have specifically identifiable impacts, the regulating agency should not be permitted to escape the requirement that "essential fairness" demands rationalization and justification. It is just not enough to simply label policies adopted as "legislative" and thus avoid the issues of reasonableness because of traditional deference to legislative decisions. Where courts conclude that facts do not seem to support adopted policies, they must not substitute their own judgments on sound policy, but should remand the matter to the regulatory body for appropriate record enriching proceedings. The emphasis on building a record in the process of issuing rules and regulations as well as in adjudication should include opportunity for opponents as well as advocates to establish a record before litigation is contemplated.

Professor Davis recognizes that the agency has a responsibility to weigh the evidence in rule making situations, but he also recognizes, as does the Administrative Procedures Act, that any action taken should be based upon the best available evidence. One might point out that the stress in many recent statutes requiring citizen participation and recognizing the importance of research in the on-going administrative process as a basis for policy making strengthens the

33. Construction Indus. Ass'n. of Sonoma County v. Petaluma, 522 F.2d 897 (9th Cir. 1975) *cert. den.* 424 U.S. 934 n. 12: "Appellees' brief is unnecessarily oversize (125 pages) mainly because it is rife with quotations from writers on regional planning, economic regulation and sociological policies and themes. These types of considerations are more appropriate for legislative bodies than for courts."

views here expressed. The importance of examining the chain of logic on which policy decisions or rules rest is crucial.

In *Environmental Defense Fund, Inc. v. Ruckelshaus*[34] the D.C. Circuit Court of Appeals recognized the scientific expertise of the Secretary of Agriculture, but found a flaw in the proceedings in that the Secretary had not explained his decision. The court declared:

> We stand on the threshold of a new era. . . .
>
> Judicial review must operate to ensure that the administrative process itself will confine and control the exercise of [policy or rule making] discretion. Courts should require administrative officers to articulate standards and principles that govern their discretionary decisions in as much detail as possible. Rules and regulations should be freely formulated by administrators and revised when necessary (footnotes omitted).

In remanding the case it seems apparent that the Court expected testable statements of reasons and a clarification of standards, declaring that "the task of formulating standards must not be abandoned now."[35]

LESSONS FROM ENVIRONMENTAL LAW–SUBSTANTIVE REVIEW

This subject has been alluded to in previous paragraphs. The discussion at this point, therefore, attempts a brief restatement of principles developed by the federal courts in NEPA litigation,[36] and then suggests that an analogous approach would represent a substantial step in achieving "essential fairness" in land use regulation. Moreover, this result might be achieved on the basis of constitutional "due process" standards without new legislation.

First, the stress of NEPA on the consideration of alternatives and consequences in assessing federal actions provides a clear mandate for judicial review of agency actions. If, in its impact statement, an agency presents three alternatives, the Courts have held that Congress did not intend that two of the three should be false and weakly developed: merely *pro forma* compliance with NEPA's requirements is not sufficient. Alternatives must, rather, be explored in good faith with equal degrees of detail and analytic rigor. Similarly, identification of consequences fo; each alternative must be thorough. The rationale for the alternative chosen must be lucid and tenable, with a clear record of the chain of reasoning behind the choice. Further-

34. 439 F.2d 584, 597, 598 (D.C. Cir. 1971).
35. *Id.* at 597.
36. National Environmental Policy Act, 42 U.S.C. §4331 (1976).

more, the issues of compliance with constitutional and statutory standards posed by these statements must be testable on review in court. Any other interpretation would simply depreciate the Congressional requirements to the level of preamble or vague policy, instead of establishing a new procedural approach to decisions affecting the environment.[37]

After some initial hesitancy, the federal courts had by 1972 begun to stress the necessity of substantive review. Thus in *Environmental Defense Fund v. Corps of Engineers* (the Gilham Dam case)[38] the Eighth Circuit Court of Appeals concluded:

> Given an agency obligation to carry out the substantive requirements of the Act, we believe that courts have an obligation to review substantive agency decisions on the merits. Whether we look to common law or the Administrative Procedure Act, absent 'legislative guidance as to reviewability, an administrative determination affecting legal rights is reviewable unless some special reason appears for not reviewing (citation omitted).' In the case of NEPA the court went on to say '... the prospect of substantive review should improve the quality of agency decisions....'
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> 'Where NEPA is involved, the reviewing court must first determine if the agency reached its decision after full, good faith consideration and balancing of environmental factors. The court must then determine ... whether the actual balance of costs and benefits that was struck was arbitrary or clearly gave insufficient weight to environmental values' [NEPA, sections 101(b) and 102(1)] ... (citation omitted).

In the Gilham Dam case the Circuit Court cited the Supreme Court decision in *Citizens to Preserve Overton Park v. Volpe*[39] as supportive of or analogous to its present decision. In *Overton Park* the Supreme Court had spelled out the kind of record that the agency must develop.[40]

In assessing the logical relation of the decision to the impact statement as a basis for remanding the case for further agency action, a Texas Federal District Court said:[41]

37. For an elaboration of the views here summarized *see* E. DALGIN & T. GUILBERT (eds.), FEDERAL ENVIRONMENTAL LAW 238-419 (1974); R. LIROFF, A NATIONAL POLICY FOR THE ENVIRONMENT (1976).

38. Environmental Defense Fund v. Corps of Engineers, 470 F.2d 289, 298-300 (8th Cir. 1972).

39. Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971).

40. *See also* Environmental Defense Fund v. Froehlke, 473 F.2d 346 (8th Cir. 1972) (decided two weeks after Gillham).

41. Sierra Club v. Froehlke, 359 F. Supp. 1289, 1364 (S.D. Texas 1973); *rev'd on other grounds, sub. nom.* Sierra Club v. Callaway, 499 F.2d 982 (5th Cir. 1974).

> Because the . . . impact statement and the record . . . indicate that the balance struck was "arbitrary" and "clearly gave insufficient weight to environmental values" . . . substantial in-depth revision by the Corps in this area will be required prior to the acceptance of either . . . impact statement.

The Eighth Circuit Court of Appeals in another 1972 case[42] commented on the utility of the impact statement: "[T]he complete formal impact statement represents an *accessible* means for opening up the agency decision-making process and subjecting it to critical evaluation. . . . [It] supplies a convenient record for the courts to use in reviewing agency decisions on the merits . . . [under] the substantive policies of NEPA."

A strong defense of substantive judicial review in environmental law cases was presented more recently in a lecture by Judge James L. Oakes (Circuit Judge, U.S. Court of Appeals for the Second Circuit) at a conference cosponsored by the Smithsonian Institution and the Environmental Law Institute, February 10-12, 1977 in Washington, D.C.

Judge Oakes said:[43]

> While broad delegations are nothing new in administrative law, founded largely as it is on the concept of "public interest," they take on special significance in the environmental [and I would add land use as a segment of environment] context. . . . Cases . . . tend to turn to a large extent on particular facts and on the attitudes of those in power [the mission oriented agencies], and the willingness of those not in power [the interest groups] to fight for their views, become more important than is perhaps healthy in a society that prides itself on being governed by laws rather than men.
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> In environmental cases . . . the courts have gone beyond traditional procedural review. They have made extra certain that all information is before the agency by broadly interpreting the case or controversy clause to permit standing . . . and by imposing procedural requirements not found in any statute, such as the cross-examination rights accorded participants in a legislative type hearing (International Harvester Co. v. Ruckelshaus, 478 F.2d 615, 3 ELR 20133 D.C. Cir. 1973). . . . The courts have not hesitated to remand to agencies for additional hearings and an extended record. . . . And, in the context of environmental impact statements (EIS) under NEPA, the courts have recognized the danger of pro forma agency compliance and have insisted that the agency instead "take a hard look at the environmental consequences and alternatives." . . .

42. Environmental Defense Fund v. Froehlke 473 F.2d 346, 351 (8th Cir. 1972).

43. Judge Oakes' comments appeared in article form in 7 ENVIR. L. REP. 50,029 (1977).

> . . . I do believe that a substantive judicial role is absolutely essential if judges are to meet their serious constitutional obligation to check abuses of executive discretion.

Judge Oakes referred to the discussion on this subject between two of his colleagues in *Ethyl Corp. v. EPA*[44] and summarized the views of Judge Leventhal to the effect that[45]

> . . . courts have an unavoidable responsibility, delegated to them by Congress, to ensure that administrative actions remain within statutory limits and are not arbitrary and capricious and that conscientious judges can become sufficiently conversant in quite technical fields . . . to make a determination of arbitrariness or rationality. . . .

In the same opinion in which Judge Leventhal discussed this issue, the majority opinion by Judge Skelly Wright emphasized that the court must review "the evidence relied upon and the evidence discarded" as well as "questions addressed by the agency and those bypassed."[46] Finally, Judge Oakes concluded:[47]

> If the EPA Administrator's substantive decision were allowed to stand unchallenged, we would have much less assurance of its wisdom than we do in a system in which that decision is closely scrutinized for flaws by the interested parties and the Court of Appeals and then, quite often, by the parties again in the Supreme Court. . . . [A]ware of what his decision must withstand, the Administrator will make extra sure it is as wise as possible and will take care to articulate his reasoning in terms that make the decision as defensible as possible.

The interest in the substance of administrative decisions is not limited to environmental law cases under NEPA. In the landmark case of *Southern Burlington County N.A.A.C.P. v. Township of Mount Laurel*[48] Justice Hall of the New Jersey Supreme Court stressed the court's concern for substantive due process (under the New Jersey constitution). On the basis of this concern the court proceeded to examine not only the procedure by which the Township of Mt. Laurel had adopted its master plan and zoning, but also the consequences of these land use controls. Justice Hall explicitly avoided speculating about the motives of the Township Board, but

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44. 541 F.2d 1, 67 (D.C. Cir. 1976).
45. Oakes, *supra* note 40.
46. 541 F.2d at 36 (D.C. Cir. 1976).
47. Oakes, *supra* note 40.
48. Southern Burlington County N.A.A.C.P. v. Township of Mount Laurel, 67 N.J. 151, 336 A.2d 713 (1975).

concluded that the effects of the adopted regulations were in fact discriminatory. It is his examination of effects and his clear recognition of a judicial responsibility to consider substantive issues that contribute to the landmark character of this decision.

THE NEED FOR EVIDENCE

In previous sections of this article it has been clearly implied that decisions must be based on evidence, on facts, on logic—all presented in a record available for examination and perhaps challenge. Due process in a scientific age could require no less. But two problems remain for comment, both of which have already been referred to.

The first concerns the location of the burden of proof; the second concerns the point in the proceedings at which the evidence is presented. Here, I cite no authorities, but simply offer two suggestions for comment and discussion: 1) a major part (if not all) of the initial burden of proof should lie with the government in environmental and land use control cases; 2) all available evidence relevant to the regulatory policy decision should be introduced as early as possible in the proceedings and be a matter of record.

The stress on government responsibility for proof is based on a recognition of the greater fiscal and technical resources available to government. It is also based on the belief that, in any case, such facts should have been accumulated as the basis for the challenged decision in the first instance, and thus by applying principles of discovery, such facts should be available to all litigants. In effect, this argues that due process ("essential fairness") requires preparation of a kind of impact statement even where NEPA does not apply. The suggestion that relevant evidence be introduced as early as possible is designed to permit examination by affected parties and allows for rebutting evidence and for cross examination.

These are not theoretical proposals, their importance being suggested by an examination of a much-cited Wisconsin land use and environmental law case—*Just v. Marriette County.*[49] Space limitations require a truncated summary of this case that led the Wisconsin Supreme Court to issue a ringing defense of the environment, ecological relationships, and the propriety of constraints on filling in swamp or wet lands.

The Wisconsin Legislature had enacted a statute establishing a county-administered program requiring permits for filling swamps or wet lands. Few would question the general applicability of state

49. Just v. Marinette, 56 Wis.2d, 201 N.W.2d 761 (1972).

police power with respect to the filling of swamps or wet lands, or the appropriateness of the delegation of responsibility to administer the permit program to counties. But the very fact that the statute established a permit system suggests that the Legislature was aware that not all filling was to be banned, and that in granting or denying a permit a weighing or balancing process to determine public interests and their relationship to private interests would be involved. One might, moreover, assume that this process would require evidence–hydrologic, geologic, soils and perhaps benefit-cost data.

The appellants, who sued to enjoin enforcement of the statute, failed to apply for a permit, whether from ignorance or in order to challenge the statute is not important. It is at this point where the problems of evidence first become apparent, for at the trial no evidence was introduced on the adverse impact which might result from filling approximately three acres of wet land.[50] A long-time resident, who was in the real estate business, testified to his impressions regarding the drainage of the tract. No witnesses indicated, however, that filling would damage ground water, pollute surface water, change the water regime, or otherwise adversely affect the environment. Whatever information on this subject was presented was not a matter of record, but reached the Supreme Court via the briefs of the parties, particularly the brief of the Attorney General as intervenor. This kind of procedure hardly meets tests of ordinary fairness, let alone the higher standards of due process and essential fairness one expects in judicial proceedings. It certainly is arguable that, rather than writing a much-cited essay on ecological interdependence, the Wisconsin Supreme Court would have served the public interest better if it had remanded the case to develop a record that would have shown whether specific damage to the public interest or private individuals would likely result from filling of three acres of swampland.[51]

In environmental and land use cases a factual, scientifically sound record is important, and establishing the location of the burden of presenting relevant evidence for that record is vital to restraining arbitrary power. At no point in the administrative process is the concern for restraint of arbitrary power more significant than in connection with land use plans, planning, and regulation. In land use administration amassing data and information for the wisest possible

50. Since the Justs did not apply for a permit, no record was made in connection with application. The first opportunity to establish a record would have been at the trial itself. But a careful review of the trial court record transcript indicates that no data on the scientific facts were introduced.

51. This problem is addressed in WENGERT, *supra* note 30.

decisions is critical. Clearly, these problems of evidence and proof demand attention of legal scholars seeking to analyze, within the context of fairness and due process, how the best and fullest technical information can be utilized in land use (and environmental) decisions. The impact assessment approach of NEPA represents a beginning—but only a beginning. The fears of little people being pushed around by big government can only be quieted when big government assumes its proper responsibilities, including that of using and presenting the best evidence and explaining decisions to the people involved.