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DUE PROCESS IN LOCAL LAND USE DECISION MAKING:
IS THE IMPERFECT WAY OF DOING BUSINESS GOOD ENOUGH
OR SHOULD WE RADICALLY REFORM IT?

by

MICHAEL ASIMOW



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DUE PROCESS IN LOCAL LAND USE DECISION MAKING: IS THE IMPERFECT WAY OF DOING BUSINESS GOOD ENOUGH OR SHOULD WE RADICALLY REFORM IT?

By Michael Asimow and Edward J. Sullivan, with an Introduction by Dwight H. Merriam

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Introduction

By Dwight H. Merriam

As I look back over the genesis of the debate which follows, I am reminded of Russell Crowe as Maximus in *Gladiator* when he gives his final orders to his troops about to engage the Germanic barbarians in battle: "On my signal, unleash hell."

I cannot say who is the barbarian and who is the Roman, but it is obvious that Michael Asimow unleashed hell as far as Ed Sullivan is concerned when Michael chose to take on, to slaughter really, the way land use business is done locally. I was an innocent by-stander. The American Bar Association Section on Administrative Law put together a panel entitled "When Local Government Makes Land Use and Environmental Decisions: Due Process or Political Smackdown?" for the August 2005 Annual Meeting in Chicago, inviting the Section on State and Local Government Law to co-sponsor and

participate. With a title like that, it was clear someone had a point of view.

As a Council Member in State and Local Government, I got roped into being Michael's sparring partner or, maybe more aptly, his punching bag.¹ You see, Michael thinks there is essentially no due process at the local level. We ought to give up pretending there is local protection, he says, and turn to state courts as the exclusive arbiter of due process. I, as someone who has built a long and lucrative career on the "system" as it is, think it is best left alone and that it works well enough for what we need to get done. That is what I said on the panel. I dutifully took my drubbing.

The day before the panel, I was reading over Michael's prepared remarks and handed them to Ed to have a look, since Michael had chosen in those remarks² to characterize Oregon's practice and Ed is the country's maven on all things Oregon. My first thought in watching and

hearing Ed's reaction to Michael's thesis was whether I could remember all of the steps for effective cardio-pulmonary resuscitation. Let's see, head back, support the back of the neck, open the airway, check pulse, check breathing...how many breaths before how many chest compressions ...? I was addled. Just before my now-27-year-old son, Jonathan, was born, I took a CPR refresher course in the Navy, while I was in Lamaze classes, and I have been utterly confused since. Were Ed's first from-the-gut retort with reddened face and animal grunts the end of it, there would be no debate of the decade for this publication. The hot blood of an Irishman does not cool quickly.

The next day at the panel Ed lay in wait. I had no idea he would strike, but like a tiger in the tall grass, he slumped inconspicuously in a row toward the back, not moving, not showing any expression. The speakers spoke. Michael made his points. I responded dutifully as directed. Now, questions from the audience? Ed rose and went after Michael's points one by one. The exchange was something several steps beyond "lively debate." No question about it, the sharpness on both sides, like the sound of steel blade against steel blade, left some of us a little uncomfortable.

At the end of the session and the next day, there was a sense that while the issues had been joined, there was no closure. Fortuitously, Michael and Ed, without coordinating, had both gone off on their own to refine their thoughts. Michael reshaped some of his views based in part on what Ed had said, holding to his central thesis that procedural and substantive due process don't work in land use cases. Ed similarly refined his rebuttal.

Ed first wrote an article for this publication as a free-standing piece. I suggested to Michael and Ed that we reshape the debate as joint article and they graciously agreed. All three of us thank Contributing Editor, Patricia Salkin, for providing the forum for this insightful point-counterpoint.

I hope you enjoy reading this colloquy as much as several of us have learned from the developing dialogue between these two highly experienced, articulate and energized advocates.

The Failure of Due Process in Local Land Use Proceedings

By Michael Asimow

Procedural and substantive due process do not work well when applied to the land use planning area.

First, despite a contrary assumption in case law and land use treatises, due process probably does not ap-

ply to most land use cases. Moreover, due process is beset by confusing distinctions and difficult, result-oriented balancing tests. When the U. S. Supreme Court grants a desperately needed review of a land use due process case, it will either hold due process inapplicable to most land use cases or, more likely, will hold that state law judicial review provides all the process that is due.

Second, many zoning disputes are intensely political. While local ordinances and judicial standards define the decision-making process, the developer and opposition often play according to political rather than legal rules. As a result, the notion of a due process hearing doesn't fit very well.

Third, applying procedural due process principles—particularly those relating to separation of functions and decision maker impartiality—to land use decision making can tie local government in knots, especially small municipalities. That's been happening in my home state of California.

For these reasons, I want to suggest a different approach to protecting the procedural and substantive interests of private parties embroiled in local land use disputes. I believe that state court judicial review under state law standards should supplant procedural and substantive due process review in land use cases.³

A. Introduction: Due Process in Land Use Planning Cases

Under existing law, procedural and substantive due process constraints are generally considered to apply to land use applications.⁴ I am talking about zoning variances, conditional (or special) use permits, subdivision approvals, building permits of all sorts, environmental permits (such as water pollution or coastal development), and a wide array of other required applications for land uses that are regulated by local government.

Both unsuccessful applicants and persons who oppose successful applications have frequently challenged the decisions under procedural due process and substantive due process in federal and state courts. Most courts assume with little discussion that procedural and substantive due process constraints are applicable; they then determine whether either was violated. Several federal courts have expressed irritation at being treated like a board of zoning appeals.⁵

To simplify: procedural due process requires that government provide an acceptable level of procedural protection, including at least adequate notice, a fair hearing, a statement of reasons, and an impartial de-

cision maker. Substantive due process mandates that land use decisions be rational, not arbitrary.

B. The Incoherence of Procedural Due Process and Substantive Due Process in Land Use Cases.

Despite the general assumption that procedural due process and substantive due process can and should apply to land use disputes, I suggest that due process presents both legal and practical difficulties.

1. Legal Problems.

Recent developments suggest that procedural due process might not apply to many, perhaps most, zoning application disputes. I predict that the U. S. Supreme Court soon will rule that zoning application decisions cannot be challenged under procedural due process.

a. "Property?"

Procedural due process applies where a government entity deprives a person of "property." The term "property" has had an interesting evolution in due process cases. There are two kinds of "property" for procedural due process purposes—"old" and "new."

"Old" property is what we learned about in law school—real or personal property or money. When local government denies a land owner a variance from the zoning ordinance to build a second story on his house, it has not deprived the owner of the land. It has only denied a particular use of that land. Probably such a denial does not deprive the owner of "old property," though this point is unsettled.⁶ It is even clearer that granting the variance will not deprive an aggrieved neighbor of his or her "old property."

"New" property means an "entitlement" to some government benefit or status. For example, it is well established that government employees under civil service laws have a "property" interest in their jobs because they cannot be fired without "good cause."⁷ Students have a "property" interest in staying in school because they cannot be expelled unless they violate school rules. Doctors have a property interest in their medical licenses because they cannot be revoked except for violation of specific rules or statutes. Welfare recipients have a "property" interest in welfare payments because they are entitled to the payments if they meet specific statutory criteria. Thus, civil service employees, students, professional licensees, or welfare recipients are entitled to a procedural due process hearing before government strips them of their job, school enrollment, license, or payment stream.

The key point about "new" property is that if the benefit or status is discretionary rather than an entitle-

ment, it is not property. Thus, under the leading *Roth* case, a government at-will employee has no property interest in his job and can be fired without a hearing.⁸ In the recent *Castle Rock* case,⁹ the Court held that a spouse who had obtained a domestic violence restraining order had no "property" interest in police enforcement of the order despite mandatory language in the statute. In short, whether a particular status or benefit is an entitlement or whether it is discretionary is critical to the application of procedural due process.

Now, how about applications for land use permission? It seems to me that many land use ordinances involve a mixture of legal standards and discretionary language with the scale tipped to the discretionary side.¹⁰ For example, under typical statutory language, an applicant should receive a variance "as will not be contrary to the public interest, where, owing to special conditions, a literal enforcement of the provisions of the ordinance will result in unnecessary hardship, and so that the spirit of the ordinance shall be observed and substantial justice done."¹¹

Similarly, conditional or special use permits allow certain land uses on the basis of a site-specific review; for example, a funeral home in a residential zone. Generally, the use must be "compatible with the surrounding area" and many ordinances require them to be in the "public interest," serve the "public welfare," or be "in harmony with the general purpose and intent"

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of the zoning ordinance.¹² Some statutes do not contain explicitly discretionary language but require the agency to balance a long list of factors. How to strike this balance obviously involves an exercise of discretion.

In my view, the standards for granting various sorts of land use permission typically involve discretion rather than entitlement. They are deliberately drafted to allow the decision makers plenty of flexibility to exercise wisdom and common sense and reach politically acceptable results. They do not seem to create a statutory entitlement to the desired land use, even if specific statutory conditions are met.¹³

Whether zoning applications under discretionary standards trigger procedural due process is not settled. It may be that "old" property rather than "new" property standards apply. If so, the variance seeking landowner could treat a denial of permission as a deprivation of property, even if the standard for decision is discretionary. Or it may be that the application triggers "new" property analysis, and the court will discover sufficiently clear statutory criteria ("unnecessary hardship") to trigger an entitlement. Still, Supreme Court precedent is fairly clear: discretion defeats procedural due process.

It is also unclear whether the entitlement/discretionary distinction applies to a substantive due process claim. There is a circuit split on this question with many cases requiring that a challenger establish an entitlement to the benefit sought in order to trigger a substantive due process claim.¹⁴

b. Application v. Revocation

Does due process apply to a *rejected application* for permission, as opposed to the revocation of an existing permission? The answer to this question is unclear. Historically, the courts drew no such distinction. For example, procedural due process has been applied to a rejected application for welfare benefits as well as a termination of existing benefits.¹⁵ However, the Supreme Court is sending unmistakable signals that a rejected application may not be a "deprivation" of property.¹⁶ Under that line of reasoning, only the revocation of an existing status is a "deprivation." Without a "deprivation," neither procedural due process nor substantive due process can apply.

In *American Manufacturers Mutual*,¹⁷ Chief Justice Rehnquist came close to assembling a majority for that view. In that case, the Pennsylvania workers' compensation law entitled an employee to payment of reasonable and necessary medical expenses arising out of an on-the-job injury. However, if the employer or insurance company believed that a particular medical pro-

cedure was not reasonable and necessary, it could refuse to pay until the issue was determined through a hearing procedure. In dictum, Rehnquist's opinion indicated that an employee had no property interest in the benefits because the employee had not yet established that the expenses were reasonable and necessary.

It is unclear whether *American Manufacturers* means that due process is inapplicable to a rejected application in a land use case. It is possible to distinguish the case on the facts. Justice Ginsburg's concurring opinion, which provided the fifth vote, is narrower than the Court's opinion. My bet is that the Supreme Court will soon rule that a rejected application does not "deprive" the applicant of property.

c. The Legislative-Adjudicative Distinction

Procedural due process applies only to adjudicatory, not legislative, decisions.¹⁸ This distinction traces back to a couple of old Colorado property tax disputes. In *Londoner v. Denver*,¹⁹ the Court held that a taxpayer in a special assessment case was entitled to an administrative hearing to contest his assessment. But in the subsequent *Bi-Metallic* case,²⁰ the Court held that Denver taxpayers were not entitled to a hearing when the assessment of the entire city was increased. The precise way to distinguish the two cases is debatable, but the conventional explanation is that the *Londoner* decision was adjudicatory in nature, because the taxpayer raised *individualized* grounds for questioning his assessment. In contrast, the *Bi-Metallic* decision was legislative in nature because the government's action applied in a *generalized* manner to all taxpayers in the city.

This distinction plagues land use law.²¹ One problem with the adjudicative/legislative distinction is what I call asymmetric due process. On one side is an individual who applies to develop property. On the other side are the neighbors or an entire community opposing the development? Is this dispute individualized or generalized? In fact, it is both, depending on whether it is viewed from the point of view of the individual applicant or the generalized opposition.²² Perhaps the same decision is individualized when the application is denied or generalized when it is granted. States answer the individualized/generalized question by resorting to existing precedents, but run into confusion when a particular type of application will not fit within those precedents.

d. *Mathews* Balancing

Once it is determined that procedural due process applies, the issue is what process is actually due. Generally the challenger wants some specific procedural protection or a hearing early on in the process. Under *Mathews v. Eldridge*,²³ the court must balance the

strength of the private interest in the case, the likelihood that the requested procedure will enhance the accuracy of the decision, and the government's interest in not providing the procedure. The results of Mathews balancing are unpredictable and one often suspects that the decisions are result-oriented.

In land use cases, the always-problematic *Mathews* balancing is particularly difficult because the hearings often involve a developer up against an entire angry neighborhood. It is simply not possible to employ all the elements of an administrative trial-type hearing in such an environment. As a result, *Mathews* balancing can produce a process that seems more like rulemaking than adjudication. For example, the court might find itself balancing away the oath, oral testimony, subpoenas, cross examination, ex parte contacts, separation of function, an unbiased decision maker, and the exclusive record rule.²⁴

2. What Offends Substantive Due Process?

Generally speaking, substantive due process barely exists anymore in cases involving economic rights because courts give nearly total deference to legislative and administrative decisions.²⁵ Nevertheless, substantive due process enjoys a spectral existence in land use cases; it is frequently invoked in land use planning cases, although seldom with much success.²⁶ Apparently, a government denies a person substantive due process in a land use case when the decision is arbitrary. But what do we mean by "arbitrary"? There are plenty of competing definitions.²⁷ Does it mean that the decision "shocks the conscience"? That it seems "irrational"? That there is no rational basis for it?²⁸ Does it mean that the decision maker had an "improper motive"? What if the reason for the decision was pure politics, dressed up as something else? We should not be surprised when a city council's decision to deny a development request is political in nature, given that elected officials are making the decision and angry neighbors vote in council elections.²⁹

3. Political Problems

In my view, heavily contested zoning applications are political contests as well as legal disputes.³⁰ In that respect, they differ sharply from other procedural due process cases, such as those involving civil service employment, student enrollment, professional licenses, or welfare. These typical procedural due process cases lend themselves to a court-like trial-type hearing conducted by an impartial decision maker, but land use cases do not.

a. Political Behavior in Land Use Cases

Let us assume that a planning or zoning board has granted a developer's application for permission to build a mall. The final decision is going to be made by elected officials such as a city council or county board of supervisors. Elected officials feel they must retain the final call in such cases because, in many localities, these are the most important political issues they confront. There will be a major battle between the developer and the neighbors who oppose development. It is likely that both sides will engage in a range of political action strategies in addition to conventional legal strategies. For example:

- Both sides may engage in ex parte contacts with decision makers, especially elected officials. Such contacts are routine, and proper in most jurisdictions, before a disputed case is set for a hearing. Even after that point, elected officials are going to talk to their constituents rather than turn them away. Typically, the disputes are compromised and the decision makers engage in ex parte communications with the competing sides to broker the compromise.
- Personal or social relationships (by developers and by neighbors) with the planners or the elected officials are common, especially in small towns. Developers, architects, and other experts tend to be repeat players who develop good relationships with planning staff.
- Opponents engage in grass roots organizing to maximize their financial and political clout. They employ phone trees to assemble a financial war chest and to turn out a big crowd at the meeting. Developers will try to respond in kind.³¹
- Both sides will mount a media campaign. Opponents will use local print and perhaps electronic media to criticize the environmental impact of the development and, oftentimes, to smear the developer.³² The developer will respond in kind by touting the economic benefits of the development. Both sides will employ public relations consultants, letter writing campaigns, front groups, and so on.³³
- When elected officials are making the decision, either side may make strategic campaign contributions in hopes of influencing the result.³⁴ Elected officials may give campaign speeches that suggest prejudgment of the decision.³⁵

Not all such tactics are employed in every heavily contested land use case. I do not condone violating procedural rules, and I do not impugn the ethics of land use decision makers. I am saying that we delude ourselves if we think that heavily politicized land use planning disputes can be treated like the sort of judicial-like trials that are mandated in other procedural due process contexts.

b. Problems of Taking Procedural Due Process Seriously

In my home state of California, recent court decisions vigorously apply procedural due process to land use disputes. These cases superimpose the same kinds of procedural requirements in land use cases that would apply in other procedural due process cases such as discharge of civil service employees or revocation of professional licenses. This has created serious practical problems, especially for small cities and counties where land use decision makers are largely inexperienced, work part time, and have little assistance. I have not researched whether this trend toward more court-like proceedings has happened in other states, but would be interested in hearing from readers on this point.

For example, in many circumstances, procedural due process requires that an agency separate prosecutorial from adjudicatory functions.³⁶ That means that persons such as prosecutors, investigators, or advocates who have been engaged in an adversarial capacity should not also serve as decision makers or as off-record advisers to decision makers in the same case.

In *Nightlife*,³⁷ the holder of an adult entertainment license sought to renew its license. An attorney in the city attorney's office opposed the renewal applicant at every turn, raising a variety of obstacles, and also represented the city in related litigation. At the hearing, that same attorney sat with the hearing officer and furnished ex parte advice. The court held that this violated due process.

The reality is, however, that in small cities, there may be nobody available to advise decision makers other than those who have worked on the case. The non-lawyer, inexperienced, part-time decision makers need staff advice to do their jobs. Moreover, in many situations, those who have worked on the application are not true adversaries at all; instead, they are neutral as between the applicant and opponents and are simply making sure the process functions as intended.³⁸

Procedural due process requires that decision makers not have a financial interest in the decision. In *Haas*,³⁹ a small city had no staff hearing officers. So it hired local attorneys to act as pro-tempore hearing officers. The

California Supreme Court held that this method of selection violated due process because the attorneys might tilt in favor of the city in order to get future appointments. Thus the city had to either hire a full-time hearing officer, even though there was not enough work to keep one busy, or disqualify pro-tempore hearing officers from being hired in subsequent cases.

Procedural due process requires that decision makers not prejudice their cases. In *Nasha*,⁴⁰ an elected member of a neighborhood zoning board wrote a column in a neighborhood association newsletter that led to the claim that he might have prejudged the issues in a pending dispute. This required him to be disqualified from participation in the decision. Regardless, elected officials have to maintain contact with their constituents.

Procedural due process normally requires that parties have the right to confront and cross-examine opposing witnesses, though this requirement has seldom been applied in the land use area. In an important Illinois case, *Village of Lisle*,⁴¹ the court applied this requirement to a public hearing involving, among other issues, an application for a special use permit. The hearing was conducted before a packed auditorium. The court held that it would violate due process to deny opponents the right to cross examine the expert witnesses who supported the applicant. The court seemed little concerned with the costs and delays that would be engendered by its decision or by the utility of requiring cross examination in a dispute that concerned economic issues and policy determinations rather than credibility.

C. Alternatives to Substantive Due Process and Procedural Due Process in Land Use Cases

A line of U. S. Supreme Court procedural due process cases could be applied to land use decision making. In these cases, the Court assumed, without deciding, that procedural due process applied to an agency decision. However, the Court did not require the agency to provide a trial-type hearing before or after taking action. Instead, procedural due process is satisfied by *state court review of the merits of the decision under state law*. I suggest that this approach might work in land use cases. Consider these Supreme Court precedents:

- a. **Government contract disputes:** Government believes that a private party has breached a contract so it terminates the contract and refuses to pay. It could be argued that this decision deprives the private party of "property" (i.e., money) and thus entitles the party to a procedural due process hearing *before* the government terminates the contract. Not so, said the Supreme Court. Review by a *state court*

*of the merits of the contract dispute satisfies procedural due process requirements, even though it might take years to get into court.*⁴²

- b. **Paddling students:** A high school teacher paddles students as a disciplinary measure. The Court held that corporal punishment deprives the student of liberty. Nevertheless, the teacher did not have to provide a hearing prior to paddling the student. State court review in a tort action considering whether the force used was unreasonable satisfies procedural due process.⁴³
- c. **Destruction of prisoner's property:** A prison guard destroys a prisoner's property either negligently or deliberately. This is a deprivation of property. A subsequent state court action for conversion provides all the needed procedural due process.⁴⁴

None of these situations is exactly like land use disputes, but each represents a utilitarian calculus by the Supreme Court that the trial-type hearing model just does not work well in a particular area and that subsequent state court review can provide a remedy for persons who have been treated wrongly by the state. I suggest that the Court might well apply this approach to land use cases. It might assume, rather than decide, that procedural due process and substantive due process are applicable to a disputed land use decision; but it would not *actually* apply procedural due process and substantive due process if a state court has the authority to review the land use decision on procedural and substantive grounds.

Local law provides procedures for resolving land use disputes.⁴⁵ These procedures may be more like rulemaking than adjudication—for example, calling for notice and a public hearing⁴⁶—or they may call for a trial-type hearing.⁴⁷ State courts can review whether this procedure was followed. However, the reviewing court would *not* require that a trial-type hearing occur as a matter of procedural due process, because procedural due process would be satisfied if an agency complies with the procedures required by state or local law.⁴⁸

Similarly, state court judicial review is normally available to challenge the substance of a land use decision. For example, state courts review the decision for errors of law. State courts review whether the decision is contrary to the substantive standards laid down by state law or whether it is unsupported by substantial evidence. In most states, courts will consider whether a decision is arbitrary and capricious rather

than rational. This substantive judicial review would be a substitute for attacking a land use decision under the nebulous standards of substantive due process.⁴⁹

A variation of this approach might be to utilize a statewide agency to consider appeals from local land use decisions, like Oregon's Land Use Board of Appeals.⁵⁰ If that agency provided both procedural and substantive review, such review might be treated as an acceptable alternative to procedural due process and substantive due process requirements.

For a number of reasons, reliance on judicial review of local land use decisions in a state court or a state agency under state law might be an attractive alternative to considering the same issues in state or federal courts under procedural or substantive due process standards.

First, this approach would cut right through the complexities of existing law. Thus it would not be necessary for the court to decide whether the decision in question was discretionary or an entitlement or whether the issue involved "old" property rather than "new" property. The court would not need to distinguish applications from revocations or to distinguish adjudication from legislation. These distinctions would be unimportant in a regime based on state law review since state law normally provides for judicial review of all government decisions. Nor would the courts be required to engage in a result-oriented *Mathews* balancing to evaluate the need for a particular procedure, since state procedures are all that is due. Finally, the courts would be spared the question of figuring out just what, if anything, substantive due process actually calls for in land use cases and then applying that nebulous standard to an obviously politically-motivated decision, since state law substantive review would replace substantive due process review.

Second, it would be easy for the legislature to change state law procedural rules if they turned out to furnish inadequate protection for private parties or if they proved to be too demanding for small cities. In fact, this approach would encourage states to reform their procedural rules in zoning cases.⁵¹ In contrast, of course, procedural due process requirements cannot be altered by the legislature.

Third, this approach would avoid the problem of adapting the procedural due process trial-type model to political struggles for which it is ill-adapted. At the same time, it would avoid the problem of cases that apply procedural due process too rigorously, causing serious administrative problems to zoning administrators.

Fourth, this approach would keep zoning cases out of the federal courts and prevent federal judges from serving as a zoning board of appeals. Instead, it would keep these local planning and zoning disputes within the state court system and assure that they will be decided by judges who are more likely to be familiar with the legal and political issues presented by a particular dispute.

Some may see a downside to the substitution of state court judicial review for due process. A due process violation triggers a right to collect monetary damages from local government.⁵² State court judicial review probably does not enable a prevailing party to collect monetary damages, unless the government action amounts to a taking. In some cases, monetary damages are important; for example, an illegal zoning decision might have driven a developer into bankruptcy. Simply reversing the erroneous local government decision would do such a person little good; only monetary damages could compensate for the loss. Recovery of damages arising out of a procedural due process or substantive due process land use planning claim is probably quite infrequent, but it is a possibility. The loss of this remedy must be balanced against the advantages of the approach I suggest.

D. Conclusion

All of us believe in the rule of law and we treasure the procedural protections afforded by due process. But these due process models, so vital in other sectors such as government employment, professional licensing, or welfare, may not work well in the politicized environment of land use decision making. Indeed, such models may well be eradicated by a Supreme Court decision holding procedural due process and substantive due process inapplicable to land use applications. As a result, we should consider whether a different approach might provide the necessary protection for private interests against unfair or arbitrary government actions or actions taken without appropriate procedure. Review by state courts under state law might provide such protection without the dysfunctional aspects of existing constitutional law. In any event, the time has come for a new look at due process in land use cases.

Whatever!—Due Process in Land Use Cases: A Reply to Professor Asimow

By Edward J. Sullivan

A. Introduction

Academicians sometimes present controversial papers to spark debate so that a topic may be explored and considered in depth. If the debate is joined well, a dialectical reasoning process may expose ideas and their

shortcomings. Thesis and antithesis clash and results in a synthesis to which opposing parties may agree—or so the theory goes.

The ABA program presented an opportunity for Professor Emeritus Michael Asimow to present some well-deserved criticisms of land use decision making at the local level and judicial review. Professor Asimow also decries the frequent attempts to constitutionalize arguments in these cases—arguments which generally amount to disagreement over policy, procedural error, or violations of “rights” not recognized by the federal or state constitutions.

However, Professor Asimow goes further to suggest plenary state court review of such decisions is the solution without adequately dealing with the more difficult questions of substance and procedure necessarily involved in such review. Moreover, neither his original presentation nor his discourse in this article consider or analyze adequately previous efforts to bring a cogent and consistent system of review to these areas of local government decision making.

Public bodies make thousands of land use decisions each year, affecting citizens more profoundly than those made in the ethereal atmosphere of formal state or federal administrative decision processes. I am not convinced by Professor Asimow’s latest refinements to his thesis and continue to believe, as I did when I heard his remarks in August, that there remains much with which to agree, and disagree, over his approach.

B. Professor Asimow’s Thesis

Professor Asimow criticizes the typical approach taken by advocates in the local government decision making process regarding decisions with which their clients disagree. For reasons of political and legal history, many such advocates “constitutionalize” their arguments, choosing particularly the due process clause of the Fourteenth Amendment to the federal Constitution as their weapon of choice. The constitutional armory is fairly limited indeed, for it is the rare local government decision that implicates the First Amendment, results in a “taking” of property, or might violate the Commerce Clause. These are the other “usual suspects” in a constitutional challenge.

As noted above, the principal point of departure for most constitutional challenges to local land use decisions is the due process clause of the Fourteenth Amendment. Ignoring local criteria, state enabling legislation and state constitutional claims, many advocates head straight for federal due process jurisprudence, for so much has been written and a citation can be found for almost any position.

Professor Asimow makes two other important points. First, he terms local land use decisions "intensely political in nature," so that political, rather than legal, rules apply. Second, he says that "applying procedural due process principles ... can tie local governments in knots." Both of these claims are controversial and, I submit, fundamentally untenable.

Professor Asimow gives several reasons to demonstrate that the due process clause is generally not an effective remedy for those seeking to challenge local government decisions:

- (1) Most courts can evade a decision in these cases by finding no "property interest" involved in the underlying decision. One seeking discretionary development approval does not yet have that approval; hence, no vested property interest recognized by the due process clause exists, whether the claim under that clause be procedural or substantive.⁵³
- (2) Whether a property interest exists is a matter of state, rather than federal, law—property may be seen as an entitlement and thus having constitutional protection, or a benefit, depending upon the discretion of the decision maker.⁵⁴ To make matters more confusing, the United States Supreme Court has not determined whether a property interest is recognized under either or both headings of the due process clause, i.e., procedural or substantive.

Professor Asimow concludes that an application for most permits or a zone change is usually discretionary, does not normally involve an "entitlement," and generally may be denied without implicating due process review.

Professor Asimow also suggests that there is no clear distinction between local government decisions that are quasi-judicial (i.e., typically proceeded by notice hearing and subject to substantive standards) and those that are quasi-legislative (i.e., without such a process and subject to a more deferential review). Because both involve some element of discretion, a distinction may not be useful in any event for due process purposes.

However, there may be a discernible legislative/quasi-judicial distinction, which may well have an effect on the kind of judicial review involved. That distinction has been around in Oregon since *Fasano v. Board of County Commissioners*⁵⁵ without any major difficulty. The practice in Oregon is that the policy is set out through a rulemaking-like process in the local comprehensive plan and land use regulations, which are applied to particular lands through a trial-type administrative process with statutorily-applied procedures.

Professor Asimow then approaches the Holy Grail of frequent land use litigation involving the due process clause—a substantive due process claim that a local government decision is "arbitrary, capricious, or unreasonable," "shocks the conscience of the court," or is "invidious" or "irrational," or some other vague combination of an invitation for a judge to remake the local decision. Not surprisingly, Professor Asimow finds a multitude of applications of substantive due process without any uniformity.

However, instead of analyzing the correctness of the existence and scope of substantive due process, Professor Asimow leaves the reader empty-handed. In his ABA presentation, Professor Asimow contended that some courts supply substantive and procedural due process without requiring the showing of a property right and concludes that judicially supplied remedies under the due process clause to land use proceedings may be inappropriate since "those hearings are best seen as political brawls rather than adjudicatory cases." In this article, Professor Asimow tones down his rhetoric so that the difficulty of providing traditional adjudicative processes to local land use proceedings, where the issues are "politicized," is the main emphasis. The hopelessness of reform and the relegation of change to a balkanized state-by-state process, without any general theory of either substance or process, characterize Professor Asimow's latest views on the subject.

The solution proposed by Professor Asimow is to concentrate on state court review of local decisions as the basis of state substantive and procedural standards, suggesting that this review cuts through distinctions between entitlement and discretion, and legislative and quasi-judicial decisions, and obviates the use of substantive due process standards. Thus the standards for local government decision making depend on the legislative and court systems of the several states, rather than a uniform federal due process standard. In particular, Professor Asimow cites with approval Judge Posner's decision in *Coniston Corp. v. Village of Hoffman Estates*,⁵⁶ to the effect that land use disputes generally do not belong in a federal court on a due process theory for violation of state law.

C. Antithesis and Agreement

There is more than a little to agree upon in Professor Asimow's series of propositions. His premise that practitioners have sought to "constitutionalize" disagreements with local government decision making by the invocation of the due process clause of the Fourteenth Amendment appears to be correct. Whether

through an assertion of entitlement, or being loathe to interfere with the discretionary operations of another branch of government, or through the legislative/quasi-judicial distinctions, courts, especially at the federal level, will almost always find a way out of becoming a super zoning board of appeals.⁵⁷ Aside from the flexible (dare we say "double-jointed?") nature of procedural due process which, if applied at all, turns on distinctions that are used, or not, in accordance with no set principles, there is the separate question of substantive due process.

As most law students know, substantive due process is a concept invented by the elder Justice Harlan in *Mugler v. Kansas*.⁵⁸ *Mugler*, and subsequent cases, gave the doctrine of substantive due process respectability, invited judges to examine the means and ends by which the legislative bodies operate, and added a further review criterion, i.e. whether the law would be "unduly oppressive" on the plaintiff. The doctrine had a lively history of judges deciding public policy matters, while concealing their political and economic preferences in constitutional jargon.

After a constitutional crisis brought the national government to a virtually standstill in the mid-1930s, when the Supreme Court overturned portions of the New Deal, President Franklin Roosevelt threatened to "pack" the court. Although he was not able to do so, Roosevelt was able to name seven new justices within 18 months, a result which changed the direction of the court and spelled the end—almost—of substantive due process. While rising from the grave on occasion when no other constitutional ground comes to mind, as in the privacy and family cases, the U.S. Supreme Court avoids that doctrine because of its past associations in masking their personal judicial preferences.

The trouble is that the same Court used substantive due process to decide the first four land use cases in the mid-1920s, and then did not take another such case for almost 50 years. Because substantive due process allows a court to choose the result of its liking and justify the same by a constitutional incantation, that such a regulation, or its application, is "arbitrary and capricious," "unreasonable," or other similar empty formula, most lower federal and state courts used that formula because it followed what precedent there was in the land use field, allowed lawyers to argue the cases as creatively as they wished, and did not tax judicial consciences over whether the correct result had been reached.

Professor Asimow appears to be correct in the general direction of his result. Perhaps hooked on the narcotic effect of the use of the due process clause, par-

ticularly substantive due process, practitioners believe they can present their case more ably than their opponents and, because every case is different and limited to its circumstances, there is no incentive to do the heavy lifting of providing legislatively for procedural and substantive standards that a trial or appellate court may apply in a way that precedent may be meaningful.

State and local governments might well have benefited from criticism from the academy in reforming the standards and procedures of land use law, which, like environmental law, is a branch of administrative law. Such criticism might have inspired these areas with the need for rule making, statutory (rather than a constitutional) notions of contested cases and the need for local procedures and effective judicial review. Professor Asimow is right in suggesting that resort to the due process clause as a basis for challenging local decisions obscures and frustrates the need for substantive and procedural reform of those processes at the state level.

D. Antithesis and Disagreement

In his ABA presentation, Professor Asimow was critical without reservation of local land use decision making. It was Professor Asimow who presented the "smackdown" position, from the session title. It was Professor Asimow who used the term "brawls" to describe the local decision making process and later judicial review. While the words are no longer there, I continue to find his alternative approach unacceptable.

Moreover, Professor Asimow's other two claims bear more scrutiny. First, while local land use decisions are frequently controversial and "political," that does not mean that there are no generally applicable rules for the conduct of those proceedings or that they should be relegated to whatever procedures may be conjured up in each state.

The call for reform of local administrative decision making and judicial review thereof in the land use field is not made for the first time by Professor Asimow. Interest in the area has been apparent in the works of Charles Haar, Richard Babcock, and Daniel Mandelker dating from at least 1955 and culminating in the American Planning Association's *Growing Smart*TM report recommending a replacement for the two standard planning and zoning acts, drafted in the 1920s and adopted by many states, with a wholly new code which establishes the local plan as the standard, leaves room for the option of using additional standards, establishes procedures for local government actions, and provides for judicial review of that actions.

These recommendations have caused a number of state legislatures to revise their state enabling legislation and

establish a credible and transparent decision-making process, in addition to appropriate judicial review.⁵⁹ These efforts, rather than simply stating that whatever satisfies any state court, have a much better chance of bearing fruit in reforming local decision making.

The final claim deals with the concern that application of "due process principles" will tie local governments in knots. As with the original ABA presentation, Professor Asimow's examples generally originate in California. Aside from the question as to whether that state is an adequate exemplar of due process, Professor Asimow seems already to have answered the question—neither procedural nor substantive due process are generally applicable to land use proceedings. If due process does not apply, neither do due process "principles." Concerns such as ex parte contacts, bias, and political contributions are not new to local government decision making and can be dealt with legislatively. In Oregon for example, ex parte contacts and political contributions must be reported and this extra-record knowledge and potential predisposition can be dealt with on the record of the local proceeding, these problems do not require a constitutional solution.

E. Conclusion

Professor Asimow is correct in his premise that due process is both inconsistent and ineffective as applied to local land use decisions. If anything, he may not have gone far enough in his observations on substantive due process. After the famous footnote 4 in *U.S. v. Carolene Products*,⁶⁰ the use of substantive due process to economic and social regulations has ended in all but a narrow band of cases.

Still, notwithstanding the difficulties of confronting and dealing with the often-intense passions manifest in local land use proceedings, the task is not impossible. Professor Asimow is correct in criticizing the frequent resort to the due process clause by parties disappointed with the results of those proceedings. He is not correct, however, in abandoning these important decisions to the vagaries of state courts. The task of academics is to help us practitioners to conceptualize the land use process, to propose and criticize those concepts, and to come up with a workable means by which that process operates. We have lost 80 years already by wandering in the vast and empty wasteland of due process. We can say "Whatever!" with the Valley Girl and let each state deal with the matter. Or we can encourage states to have a comprehensive plan against which to judge its regulations, and changes to the same, and provide procedures by which policy-making (through the adoption of the plan and imple-

menting regulations) and policy-application (through rezoning, conditional uses, variances and other forms of individualized permits are granted or denied). It seems to me that Whatever! is not a viable option.

NOTES

1. Other panelists were Claire Manning and moderator Ed Schoenbaum.
2. Those remarks were subsequently revised to remove the critical remarks regarding the Oregon planning system.
3. My objective in organizing the panel was to surface these ideas in the land use community and to get some informed critique. My co-panelists, Dwight Merriam and Claire Manning, and moderator Ed Schoenbaum, responded to my presentation with many thoughtful comments. The quality of the audience's response went far beyond my expectations. I asked people to tell me what they really thought, and they did exactly that. I feel particularly fortunate that a giant in the land use field like Ed Sullivan not only delivered an oral critique of my presentation but also took the trouble to prepare a written response. Ed Sullivan was critical of material in the written handout that accompanied my panel presentation. That handout was the work of a student research assistant and was intended to assist me in preparing my presentation. It was supplied to the ABA and distributed to audience members to satisfy the requirement that written materials accompany a CLE presentation. My opinions are expressed in this article, not in the handout. I regret this confusion.

I want to raise some legal and practical concerns about reliance on due process as a check on the local land use process and I'm looking for feedback. This article is not a finished work of scholarship, it has not been exhaustively researched, and my ideas and proposals are tentative.

4. Under the 14th Amendment, "nor shall any State deprive any person of life, liberty, or property, without due process of law..." All state constitutions contain cognate provisions. This article does not consider other constitutional challenges to zoning decisions such as the takings clause, equal protection, or First Amendment. This article focuses on permission cases, putting aside cases in which local government revokes a previously granted permission.
5. The First Circuit wrote: "Such a claim [that the board distorted state law] is too typical of the run of the mill dispute between a developer and a town planning agency ... to rise to the level of a due process violation ... the conventional planning dispute ... is a matter primarily of concern to the state and does not implicate the Constitution ... a federal court, after all, 'should not ... sit as a zoning board of appeals.'" *Creative Environments, Inc. v. Estabrook*, 680 F.2d 822, 833 (1st Cir. 1982). According to the Fourth Circuit, "Resolving the routine land-use disputes that inevitably and constantly arise among developers, local residents, and municipal officials is simply not the business of the federal courts. There is no sanction for casual federal intervention into what 'has always been an intensely local area of the law.'" *Gardner v. Baltimore Mayor & City Council*, 969 F.2d 63, 67-68 (4th Cir. 1992). And the Seventh Circuit: "Federal courts are not boards of zoning appeals. This message, oft-repeated, has not penetrated the consciousness of property owners who believe that federal judges are more hospitable to their claims than are state judges... Well, we are not cooperating. Litigants who neglect or disdain their state remedies are out of court, period." *River Park, Inc. v. City of Highland Park*, 23 F.3d 164, 165 (7th Cir. 1994).

6. See *RRL Realty Corp. v. Village of Southampton*, 870 F.2d 911, 914-18 (2d Cir. 1989) (discussing whether the "property" interest is the ownership of land or the application for a permit); *River Park, Inc. v. City of Highland Park*, 23 F.3d 164, 166 (7th Cir. 1994) (denial of application deprives land owner of "old property" for due process purposes, but no adjudicatory process is "due"). For a vigorous argument that denial of a discretionary land use application deprives an owner of "old" property, see Kenneth B. Bley & Tina R. Axelrad, *The Search for Constitutionally Protected "Property" in Land-Use Law*, 29 Urban Lwyr. 251 (1997).
7. See, e.g., *Cleveland Bd. of Education v. Loudermill*, 470 U.S. 532, 105 S. Ct. 1487, 84 L. Ed. 2d 494, 23 Ed. Law Rep. 473 (1985).
8. *Board of Regents v. Roth*, 408 U.S. 564, 92 S. Ct. 2701, 33 L. Ed. 2d 548 (1972).
9. *Town of Castle Rock v. Gonzales*, 125 S. Ct. 2796, 162 L. Ed. 2d 658 (2005).
10. See James Longtin, *California Land Use* § 1.60 (2d ed. 1986 and 2005 update) (listing vague standards found acceptable under various California land use ordinances).
11. U. S. Dep't of Commerce, A Standard State Zoning Enabling Act (1926) § 7 ¶3, quoted in Daniel R. Mandelker, *Land Use Law* § 6.41 (5th ed. 2003 and current supplement). In Los Angeles, the grant of a variance may "not be materially detrimental to the public welfare." City of Los Angeles Municipal Code § 12.27D.
12. Standard Zoning Enabling Act § 7, cited in note 10. The use must be "desirable to the public convenience and welfare." City of Los Angeles Municipal Code § 12.24E.
13. See, e.g., *RRL Realty Corp. v. Village of Southampton*, 870 F.2d 911, 918 (2d Cir. 1989) ("an entitlement does not arise simply because it is likely that broad discretion will be favorably exercised"); *Gardner v. Baltimore Mayor & City Council*, 969 F.2d 63, 68 (4th Cir. 1992) ("whether a property-holder possesses a legitimate claim of entitlement to a permit or approval turns on whether, under state and municipal law, the local agency lacks all discretion to deny issuance of the permit or to withhold its approval. Any significant discretion conferred upon the local agency defeats the claim of a property interest"); *Triomphe Investors v. City of Northwood*, 49 F.3d 198, 202-03 (6th Cir. 1995) (use of word "may" entails discretion so applicant has no entitlement). See generally Sidney A. Shapiro & Richard E. Levy, *Government Benefits and the Rule of Law: Toward a Standards-Based Theory of Due Process*, 57 Admin. L. Rev. 107, 113-19 (2005).
14. See, e.g., *Gardner v. Baltimore Mayor & City Council*, 969 F.2d 63, 68 (4th Cir. 1992). Contra: *Bateson v. Geisse*, 857 F.2d 1300 (9th Cir. 1988). See Bley & Axelrad, note 6, for a strong argument that no entitlement should be required to establish a substantive due process claim.
15. See, e.g., *Mallette v. Arlington County Employees' Supplemental Retirement System II*, 91 F.3d 630, 637-40 (4th Cir. 1996) ("as far as we can tell, every lower federal court that has considered the issue has rejected the 'application/revocation distinction'").
16. Chief Justice Rehnquist foreshadowed this development by his comments dissenting from denial of certiorari. *Peer v. Griffith*, 445 U.S. 970, 100 S. Ct. 1348, 64 L. Ed. 2d 247 (1980) (describing lower court's extension of *Goldberg* to benefit applications as a "significant step" that "merits plenary consideration by the full Court").
17. *American Manufacturers Mutual Insurance Co. v. Sullivan*, 526 U.S. 40, 119 S. Ct. 977, 143 L. Ed. 2d 130, 134 Ed. Law Rep. 461 (1999).
18. Sometimes the terms used to describe the type of dispute to which procedural due process applies are "quasi-adjudicatory" or "administrative" or "executive" action. Sometimes the terms "adjudicative" and "legislative" are preceded by "quasi."
19. 210 U.S. 373, 28 S. Ct. 708, 52 L. Ed. 1103 (1908).
20. *Bi-Metallic Investment Co. v. State Bd. of Equalization*, 239 U.S. 441, 36 S. Ct. 141, 60 L. Ed. 372 (1915).
21. So confusing is the area that Professor Mandelker's leading treatise devotes only a single page to the issue and makes no effort to summarize the case law. Mandelker, note 11 at § 2.42.
22. See *Coniston Corp. v. Village of Hoffman Estates*, 844 F.2d 461, 468, 10 Fed. R. Serv. 3d 1294 (7th Cir. 1988) (zoning decisions are inherently legislative not adjudicative—decision by village board of trustees turning down a site plan is legislative).
23. 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976).
24. See, e.g., *Mohilef v. Janovici*, 51 Cal. App. 4th 267, 58 Cal. Rptr. 2d 721 (2d Dist. 1996).
25. Substantive due process is, of course, quite significant with respect to personal rights. See, e.g., Laurence H. Tribe, *American Constitutional Law* § 8-7 (2d ed. 1988); John E. Nowak & Ronald D. Rotunda, *Constitutional Law* § 11.4 (5th ed. 1985).
26. See Edward J. Sullivan and Carrie Richter, *Out of the Chaos: Towards a National System of Land-Use Procedures*, 34 Urban Lawyer 464-67 (2002) (although discredited, substantive due process lives on in land use cases); *RRL Realty Corp. v. Village of Southampton*, 870 F.2d 911, 914-20 (2d Cir. 1989) (critical summary of cases on substantive due process in land use and questioning whether substantive due process applies in absence of entitlement). But see *Bateson v. Geisse*, 857 F.2d 1300 (9th Cir. 1988) (awarding damages for substantive due process violation—City denies building permit after applicant had met all substantive conditions for issuance of permit).
27. Mandelker, note 11 at §§ 2.39-2.40.
28. See, e.g., *Mikesha v. City of Galveston*, 419 F.3d 431 (5th Cir. 2005).
29. See, e.g., *Coniston Corp. v. Village of Hoffman Estates*, 844 F.2d 461, 466 (7th Cir. 1988) ("[N]othing is more common in zoning disputes than selfish opposition to zoning changes. The Constitution does not forbid government to yield to such opposition...").
30. The Fourth Circuit wrote: "The formulation and application of land-use policies, therefore, frequently involve heated political battles, which typically pit local residents opposed to development against developers and local merchants supporting it. Further, community input is inescapably an integral element of this system. Subdivision control is an inherently discretionary system that allows—indeed, sanctions—compromise and negotiation between developers and the planners who represent the community." *Gardner v. Baltimore Mayor & City Council*, 969 F.2d 63, 67 (4th Cir. 1992).
31. See Dwight H. Merriam, *The Complete Guide to Zoning*, ch. 9 (2005).
32. James Olmstead, *Handling the Land Use Case: A User's Manual for the Public Interest Attorney*, 19 J. of Environmental Law and Litigation 23, 51-52, 59-60 (2005).
33. See *Cadiz Land Co. v. Rail Cycle, L.P.*, 83 Cal. App. 4th 74, 99 Cal. Rptr. 2d 378, 412-13 (4th Dist. 2000).

34. *See Woodland Hills Residents Ass'n, Inc. v. City Council*, 26 Cal. 3d 938, 164 Cal. Rptr. 255, 609 P.2d 1029 (1980) (precluding judicial disqualification of officials because they received campaign contributions).
35. *See City of Fairfield v. Superior Court*, 14 Cal. 3d 768, 122 Cal. Rptr. 543, 549-52, 537 P.2d 375 (1975) ("A councilman has not only a right but an obligation to discuss issues of vital concern with his constituents, and to state his views on matters of public importance.")
36. *See Goldberg v. Kelly*, 397 U.S. 254, 90 S. Ct. 1011, 25 L. Ed. 2d 287 (1970) (welfare worker can serve as decision maker but "should not ... have participated in making the decision under review"); *Walker v. City of Berkeley*, 951 F.2d 182 (9th Cir. 1991); Michael Asimow, *When the Curtain Falls: Separation of Functions in the Federal Administrative Agencies*, 81 Colum. L. Rev. 759, 779-88 (1981).
37. *Nightlife Partners v. City of Beverly Hills*, 108 Cal. App. 4th 81, 133 Cal. Rptr. 2d 234 (2d Dist. 2003).
38. For these reasons, the federal Administrative Procedure Act's provisions on separation of functions are inapplicable to initial licensing determinations. 5 U.S.C. § 554(d)(A).
39. *Haas v. City of San Bernardino*, 27 Cal. 4th 1017, 119 Cal. Rptr. 2d 341, 45 P.3d 280 (2002).
40. *Nasha L.L.C. v. City of Los Angeles*, 125 Cal. App. 4th 470, 22 Cal. Rptr. 3d 772 (2d Dist. 2004).
41. *People ex rel Klaeren v. Village of Lisle*, 202 Ill. 2d 164, 269 Ill. Dec. 426, 781 N.E.2d 223 (2002). *See also Weyerhaeuser v. Pierce County*, 124 Wash. 2d 26, 873 P.2d 498 (1994), broadly applying a provision in a local ordinance calling for cross-examination in land use. For additional authorities at least suggesting that cross-examination in land use cases is required, see Olmstead, note 32 at 70, n.25.
42. *Lujan v. G&G Fire Sprinklers, Inc.*, 532 U.S. 189, 121 S. Ct. 1446, 149 L. Ed. 2d 391 (2001).
43. *Ingraham v. Wright*, 430 U.S. 651, 97 S. Ct. 1401, 51 L. Ed. 2d 711 (1977).
44. *Parratt v. Taylor*, 451 U.S. 527, 101 S. Ct. 1908, 68 L. Ed. 2d 420 (1981) (overruled on other grounds by *Daniels v. Williams*, 474 U.S. 327, 106 S. Ct. 662, 88 L. Ed. 2d 662 (1986)); *Hudson v. Palmer*, 468 U.S. 517, 104 S. Ct. 3194, 82 L. Ed. 2d 393 (1984).
45. The court might wish to require that such procedures at least meet the minimal requirements of rulemaking procedure: notice, opportunity to comment, and a reasoned decision.
46. *See, e.g., City of Los Angeles Municipal Code* §§ 12.24D, 12.27C, 17.06A2, A3. These provisions call for notice and public hearings in variance, conditional use permit, and subdivision permit cases. They state that "evidence shall be taken" or that the decision making body shall "hear testimony" of interested parties.
47. *See, e.g., American Law Institute, Model Land Development Code* § 2-304 (1975) which calls for hearings that would meet and exceed procedural due process criteria.
48. *See River Park, Inc. v. City of Highland Park*, 23 F.3d 164, 166-67 (7th Cir. 1994) (state law and state courts, not due process or federal courts, determine what procedures are due in land use cases). Of course, a state court would be free to interpret the state constitution to require more demanding versions of procedural due process and substantive due process than is required under federal law. California, for example, has done so. *See People v. Ramirez*, 158 Cal. Rptr. 316 (Cal. 1979); *Saleeby v. State Bar*, 39 Cal. 3d 547, 216 Cal. Rptr. 367, 702 P.2d 525 (1985) (refusing to follow the "entitlement" requirement in the *Roth* case and requiring procedural due process hearings even though agency's decision is discretionary). In most cases, however, state courts interpret state constitutional provisions consistently with identical provisions in the federal constitution.
49. *See, e.g., Sunrise Corp. v. City of Myrtle Beach*, 420 F.3d 322, 328 (4th Cir. 2005) (availability of state court review of substantive violations of state zoning law nullifies substantive due process claim); *Triomphe Investors v. City of Northwood*, 49 F.3d 198, 201-02 (6th Cir. 1995) (substantive due process standard is much narrower than state court judicial review under arbitrary and capricious test). This analysis does not apply to claims under other constitutional provisions, such as freedom of speech or religion, a taking, or equal protection.
50. *See Sullivan & Richter*, note 26.
51. *Id.* at 458-61 (2002) (describing the American Planning Association's *Growing Smart Legislative Guidebook* and its cutting edge proposals for substantive and procedural reform of the land use process).
52. 42 U.S.C. § 1983.
53. *See Mathews v. Eldridge*, 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976).
54. *See Board of Regents v. Roth*, 408 U.S. 564, 92 S. Ct. 2701, 33 L. Ed. 2d 548 (1972).
55. 264 Or. 574, 507 P.2d 23 (1973).
56. 844 F.2d 461, 10 Fed. R. Serv. 3d 1294 (7th Cir. 1988).
57. *Creative Environments, Inc. v. Estabrook*, 680 F.2d 822, 833 (1982).
58. 123 U.S. 623, 8 S. Ct. 273, 31 L. Ed. 205 (1887).
59. *See Sullivan and Richter, Out of the Chaos: Towards A National System of Land Use Procedures*, 34 Urban Law. 449 (2002).
60. 304 U.S. 144, 58 S. Ct. 778, 82 L. Ed. 1234 (1938).

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NOTED IN BRIEF

U.S. Supreme Court Holds that Violation of Telecommunications Act Does Not Give Rise to Action under Section 1983

In *City of Rancho Palos Verdes, Cal. v. Abrams*, 125 S. Ct. 1453, 161 L. Ed. 2d 316, 73 U.S.L.W. 4217, 05 C.D.O.S. 2405, 2005 Daily Journal D.A.R. 3348, 18

Fla. L. Weekly Fed. S 187, 35 Communications Reg. (P & F) 952, 2005 WL 645209 (U.S. 2005), the United States Supreme Court held that a violation of the federal Telecommunications Act does not give rise to an action under 42 U.S.C. 1983. The Court found an express private remedy in the Telecommunications Act, and concluded that Congress did not intend this express remedy to coexist with an alternative remedy available in a Section 1983 action. The Court stated

that enforcement of the substantive provisions of the Telecommunications Act through Section 1983 “would distort the scheme of expedited judicial review and limited remedies” created by the TCA’s remedial provisions. 125 S.Ct. at 1454. “[T]he TCA—by providing a judicial remedy different from 1983 in [the statute] itself—precluded resort to 1983.” *Id.* The Court added, “1983 does not provide an avenue for relief every time a state actor violates federal law.” 125 S.Ct. at 1458.

A town’s refusal to rezone land from residential to commercial was not arbitrary and capricious, even though the comprehensive plan called for the area to be rezoned to commercial at some future point. *Borsuk v. Town of St. John*, 820 N.E.2d 118, 2005 WL 14930 (Ind. 2005). “The comprehensive plan is an important ground, but not the sole ground, on which the Indiana Code says such decisions should be made.” 820 N.E.2d at 120. “A comprehensive plan is a community’s long-range vision for physical development, but implementing the plan as regards a given piece of real estate may not be the best course of action for the community on a given day.” 820 N.E.2d at 121. A municipality must consider all the factors enumerated in the statute, including the comprehensive plan, and make a balanced determination. In this case, the evidence indicated that the plan commission and town council paid reasonable regard to each of the various statutory factors. Their concerns regarding traffic, insufficient roads, and nearby property values provided a rational basis for refusing to rezone the property to allow construction of a gas station. The Supreme Court of Indiana also found that the rezoning denial was not an unconstitutional taking because the property owner currently derived rental income from a residence on the property. “A rented residence is certainly an economically viable use of land.” 820 N.E.2d at 124.

As a matter of first impression, the Supreme Court of Virginia held that a nonconforming use established in one part but not all of a building prior to enactment of a zoning ordinance does not give rise to a grandfathered right to extend the nonconforming use throughout the building unless, at the time the ordinance was enacted, the design of the building clearly indicated that such use was intended throughout. *Patton v. City of Galax*, 269 Va. 219, 609 S.E.2d 41, 2005 WL 486763 (2005). In this case, landowners established that the use of the second floor of their building for residential apartments was a permitted nonconforming use grandfathered under the city zoning ordinance, but they did not establish that such use could be extended to the first floor. “In order to extend the use of the second floor for residential apartments to the first floor, it was not sufficient for the Pattons to show that the intended renovations of the first

floor will not alter the manner in which the first floor is arranged or designed. Rather, they were required to prove that the first floor was ‘arranged or designed for such use at the time of adoption or amendment of’ the zoning ordinance. Because the record does not contain an adequate description of the interior layout of the first floor, we cannot state with any certainty what its arrangement and design might be. However, because it is undisputed that the first floor has been used principally for commercial retail purposes, the chancellor’s determination that the first floor was not subject to grandfathering for use as residential apartments is not plainly wrong or without support in the evidence. Accordingly, we hold that the chancellor did not err in awarding the injunction against the Pattons to prohibit them from using the first floor of the structure on their property for residential apartments without a conditional use permit.” 609 S.E.2d at 46.

A county zoning code did not permit construction of an access road to transport mined raw materials across land zoned for residential use. *Capelle v. Orange County*, 269 Va. 60, 607 S.E.2d 103, 2005 WL 77211 (2005). The mining operation was located in an agricultural zone and was permitted by a special use permit. However, the proposed access road would go through a “limited residential” zoning district, in which mining was not a permitted activity. The Supreme Court of Virginia held that “because a mining operation is not a permitted use, or a use allowed by special permit in a limited residential zoning district, the access road to the mining operation, which is an accessory use to the main use, also is prohibited in a limited residential zoning district.” 269 Va. at 66, 607 S.E.2d at 106. “Accordingly, we conclude that the circuit court erred in holding that the County Code permitted the proposed access road as an accessory use in the limited residential district incident to the special use permit for mining in the agricultural district.” 269 Va. at 67, 607 S.E.2d at 107.

Under Hawaii statutes, a wireless communications company was not required to obtain a county special permit for a “stealth” antenna located inside a garage and false chimney attached to a single-family farm residence in a state land use agricultural district. *T-Mobile USA, Inc. v. County of Hawaii Planning Com’n*, 106 Haw. 343, 104 P.3d 930, 2005 WL 44660 (2005). As an initial matter, the Supreme Court of Hawaii held that the garage and chimney, as utilized, were not permitted uses under the statute governing agricultural land use. “[T]he chimney and garage themselves are permitted as accessory to a farm dwelling; however, utilizing the chimney to conceal the antenna and the garage to house the communication equipment are not permitted uses under . . . the statute.” 106 Hawaii at 351, 104 P.3d at 938. In contrast, the

court found that under the circumstances of the case, the residence, garage and chimney constituted a permitted "communications equipment building" under the statute, and thus did not require a county special permit.

A board of appeals erred as a matter of law when it concluded that a landowner's failure to build pursuant to a building permit constituted a self-created hardship that precluded a later application for an "undue hardship dimensional variance." *Phaiah v. Town of Fayette*, 2005 ME 20, 866 A.2d 863, 2005 WL 189681 (Me. 2005). "[T]here is no authority for the proposition that a property owner must build on his property, even after having been granted a building permit. To hold otherwise would mean that failure to act on a previously issued building permit could operate to bar any subsequent attempts to build on the property. We have never held that an owner who is granted a building permit is required to build on the property." 866 A.2d at 867. On a separate issue, the Supreme Judicial Court of Maine found that the board had issued contradictory findings on the question of whether the property could yield a reasonable return without the dimensional variance. "[T]he preprinted portion of the Board's conclusions agreeing that the land in question cannot yield a reasonable return contradicts the handwritten portion indicating that nevertheless, the return sought by Phaiah is far more than the reasonable return permitted by the statute. Whether the Board intended the handwritten sentence following the preprinted language to constitute dicta, or a further conclusion and thus an independent basis on which Phaiah's variance could be denied, is ambiguous at best. We therefore vacate ... with regard to the reasonable return requirement and remand the matter for the Board to clarify its findings in that regard." 866 A.2d at 867.

Landowners did not present a timely challenge to the conditions attached to their subdivision approvals, and their declaratory judgment action was therefore time-barred. *Sold, Inc. v. Town of Gorham*, 2005 ME 24, 868 A.2d 172, 2005 WL 292181 (Me. 2005). None of the conditional approvals were challenged within the statutory thirty-day period for appealing municipal administrative actions. When the time to file an appeal expired, the conditional approvals became final and were not subject to challenge. "A declaratory judgment action cannot be used to revive a cause of action that is otherwise barred by the passage of time ... The declaratory judgment law ... does not provide a self-help device for parties who have failed to timely appeal a municipal administrative decision to gain an extension or revival of the time to appeal and reopen a decision that has otherwise become final." 868 A.2d at 176. "[T]he declaratory judgment law may be used for certain anticipatory challenges to applications of state or local ordinances or administrative regulations so long as the other prerequisites of a justiciable

controversy exist ... However, the declaratory judgment law does not authorize a party to bring an after-the-fact challenge to the application of an ordinance or regulation to a particular approval in an administrative adjudicatory action, when the time for appeal of the administrative adjudicatory action has expired." 868 A.2d at 177.

A county board of supervisors failed to satisfy statutory public hearing notice requirements before enacting comprehensive amendments to the county zoning ordinance and map. *Gas Mart Corp. v. Board of Sup's of Loudoun County*, 269 Va. 334, 611 S.E.2d 340 (2005). First, the public notices did not provide a legally adequate "descriptive summary." The Supreme Court of Virginia stated: "The name of the policies ... provides the only clue regarding the Board's proposed action. There is no description or summary of the content of those policies, and the notices do not indicate the particular areas of the County that would be affected by the proposed policies. Clearly, the lone statement fails to cover the main points in a manner that informs the public regarding the content of the policies and the affected areas of the County." 611 S.E.2d at 347. The court also found that the public notices were invalid because they contained an inadequate and inaccurate description of the areas proposed for rezoning. "[T]he Board failed to state any specific geographic boundaries or landmarks that would have allowed the public to ascertain the areas that would be affected by these amendments. Thus, landowners were compelled to try to determine what the Board meant by 'most of ... the western portion of the County.' ... We said in [*Glazebrook v. Bd. of Supervisors*, 266 Va. 550, 556, 587 S.E.2d 589, 592 (2003)] that a citizen must be able 'reasonably [to] determine, from the notice, whether he or she was affected by the proposed amendments.' ... A citizen could not reasonably make that determination from the description at issue in the present case." 611 S.E.2d at 347.

The Georgia Constitution provides even broader protection to speech than the First Amendment in that it requires a government to adopt the least restrictive means of achieving its goals. Under this test, a government must "draw its regulations to suppress no more speech than is necessary to achieve its goals." *Coffey v. Fayette County*, 279 Ga. 111, 610 S.E.2d 41 (2005), quoting *Statesboro Pub. Co. v. City of Sylvania*, 271 Ga. 92, 95-6, 516 S.E.2d 296 (1999). In the *Coffey* case, a county adopted a sign ordinance that restricted non-commercial signs in residential areas to one sign per lot and to a size of no more than six square feet. A trial court upheld the ordinance, but the Supreme Court of Georgia reversed and remanded the case because the trial court did not apply the correct standard under the Georgia and Federal Constitutions.

A ZBA did not err when it denied a landowner's request for a rehearing. *Tarason v. Town of South Berwick*, 2005 ME 30, 868 A.2d 230 (Me. 2005). Neither the town's zoning ordinance nor the Maine statute governing boards of appeals required that, as a matter of right, the landowner be permitted a rehearing of his appeal. Whether the ZBA permitted a rehearing was entirely discretionary.

A billboard company's First Amendment challenge to a sign permit ordinance was not ripe for review because it never obtained a final, written denial of its permit applications. *National Advertising Co. v. City of Miami*, 402 F.3d 1335 (11th Cir. 2005), petition for cert. filed, 74 U.S.L.W. 3260 (U.S. Oct. 17, 2005). "Although National's initial request for a permit was not granted by the clerks in Miami's zoning department ... '[a] challenge to the application of a city ordinance does not automatically mature at the zoning counter. ... National 'at a minimum ... had the obligation to obtain a conclusive response from someone with the knowledge and authority to speak for the City regarding the application of the zoning scheme' to National's permits." 402 F.3d at 1340, quoting *Digital Props, Inc. v. City of Plantation*, 121 F.3d 586, 590 (11th Cir. 1997). "A zoning clerk's verbal statement or written notation on National's application that its proposed billboards were 'too tall' or 'in the wrong zone' is not conclusive evidence of a denial and does not amount to evidence of a dispute of 'sufficient concreteness' for judicial review." 402 F.3d at 1340.

Lack of ripeness defeated constitutional and statutory claims made by homeowners in a single-family zone who hosted regularly scheduled prayer meetings of more than twenty-five non-family members, and who had been issued a cease and desist order. *Murphy v. New Milford Zoning Commission*, 402 F.3d 342 (2nd Cir. 2005). Their suit included claims under the First Amendment, the Religious Land Use and Institutionalized Persons Act, and the Connecticut Act Concerning Religious Freedom. The Second Circuit found that "[c]ritical to our decision today, the Murphys did not appeal the cease and desist order to the Zoning Board of Appeals, where they could have sought a variance from the zoning regulations." 402 F.3d at 345. Therefore, the Second Circuit held that none of the claims were ripe for judicial intervention

under the first prong of *Williamson County*. "We recognize that the Supreme Court developed the *Williamson County* ripeness test in the context of a regulatory takings challenge. Nevertheless, it has not been so strictly confined. ... Following the view of ... other circuits, we have applied prong-one ripeness to land use disputes implicating more than just Fifth Amendment takings claims. ... The *Williamson County* ripeness test is a fact-sensitive inquiry that may, when circumstances warrant, be applicable to various types of land use challenges." 402 F.3d at 349-350. The court continued: "Had the Murphys appealed the cease and desist order to the Zoning Board of Appeals and requested variance relief from that body ... things may very well have been different. ... [T]he Murphys may have been able to obtain a variance ... by showing that a literal enforcement of the zoning requirements would work an unusual hardship. ... Nevertheless, they failed to submit a single variance application in this matter. This failure, just as in *Williamson County*, deprives us of any certainty as to what use of the Murphys' property would be permitted. Hence, the Murphys' claims are not ripe." 402 F.3d at 352-3.

Vermont's environmental land use statute was preempted by the Interstate Commerce Commission Termination Act of 1959 with regard to a rail carrier seeking to build transloading facilities on its property. *Green Mountain R.R. Corp. v. Vermont*, 404 F.3d 638 (2d Cir. 2005), cert. denied, 126 S. Ct. 547 (U.S. 2005). Construction of the railroad's facilities was therefore not subject to the requirements of the Vermont statute, which mandates pre-construction permits for land development. The Termination Act contains an express preemption clause which has not been interpreted to preempt all state and local regulation. However, various federal courts have found that the Act preempts most pre-construction permit requirements imposed by states and localities. "Like the regulations and ordinances consistently struck down by federal courts and by the Transportation Board, [the Vermont statute] mandates a pre-construction permit. ... We need not draw a line that divides local regulations between those that are preempted and those that are not, because in this case preemption is clear" 404 F.3d at 643.