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## Land Use Law: Marred by Public Agency Abuse

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## Chapter 4: Proposals

### Land Use Law: Marred by Public Agency Abuse

Rodney L. Cobb\*

Too often, land use law resembles a legal war rather than a set of laws designed to foster the livability of American communities. A minority of public agencies,<sup>1</sup> abusing their powers in the land use law arena, has unfortunately contributed to giving land use law its battle-scarred complexion.<sup>2</sup> There exists a plethora of literature written by advocates of landowners or developers, commenting on these abuses and seeking various legal remedies and solutions. This article, however, is written by an advocate for land use planning and focuses on how these abuses by public agencies impact on public interest planning programs and ultimately on all private interests. After an overview of these public agency abuses, their general and specific impacts are explained along with why and how the abuses should be addressed. In spirit, this article is written in celebration of the stellar career of Daniel R. Mandelker, one of America's leading gurus on land use law, who I know well to be concerned both about land use law's fairness to landowners and its effectiveness for everyone's interests in our communities.

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\* Rodney Cobb is Staff Attorney for the American Planning Association and the Editor of the *Land Use Law and Zoning Digest*. The author's views and statements in this article are not presented as those of the American Planning Association.

1. In this article "public agencies" refers to local, state, or federal agencies that deal with the built and natural environment. This may refer to administrative agencies or to the local legislature as well. While the vast majority of public agencies are of local government, many state and federal agencies act to protect natural resources.

2. Saber rattling and mutual intimidation appears common in today's land use law arena. For example, earlier this year the newly elected Board of Supervisors of Loudon County, Virginia showed its resolve to slow development and reserved nearly one million dollars to defend itself against "almost certain challenges by home builders." In a recent letter to the Board, an attorney for the Northern Virginia Building Industry Association said the group "intends to and will protect its interests as required." Maria Glod, *Loudon's New Board Budgets for Sprawl Fight*, WASHINGTON POST, Jan. 6, 2000, at A1.

## I. PUBLIC AGENCY ABUSES IN LAND USE LAW

A thorough survey of these abuses and a discussion of the related legal remedies is a subject worthy of a large book or a multi-volume treatise rather than this article; but a general description of the abuses is needed to provide some context for addressing the abuses. It must be noted that if abuse is perceived, and how often it occurs, can depend on one's perspective (a landowner, a law professor, a planner, a developer, a judge, a municipal attorney, a developer's attorney, among others).<sup>3</sup> On the other hand, for almost all actors in the land use law arena, hearing the facts of case of *City of Monterey*<sup>4</sup> was similar to hearing fingernails scratching across a blackboard. During a five-year period, the landowner sought approval of the city to develop its 37.6 acres of oceanfront land originally for one thousand housing units. The landowner prepared nineteen site plans, and the city formally rejected its proposals five times including the final offer to build less than two hundred housing units. The Ninth Circuit Court of Appeals found that the city "unfairly intended to forestall any reasonable development of the Dunes."<sup>5</sup> The landowner eventually sold the property. In oral arguments before the U.S. Supreme Court, the Justices repeatedly emphasized the "five times."<sup>6</sup> While few public agency actions are plainly abuses, the City of Monterey's actions clearly crossed the line between exercises of public authority and an abuse of power. For the purposes of this article, public agency abuses refer to actions similar to those in *Monterey*, in which, most observers would agree, the agency should have known that its actions

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3. In the interest of disclosing the author's perspectives rather than being autobiographical, the following is a list of the capacities in which the author has served in the land use law arena: a developers' attorney, a municipal planning director, a planning commissioner, an adjunct law professor, a state zoning specialist, chair of a state river zoning board, a staff attorney for the American Planning Association, and editor of Land Use Law and Zoning Digest. In the latter capacity, the author has read the majority of America's state and federal land use law cases for the last fifteen years at the court of appeals level and higher. Serving in these capacities, the author has personally observed hundreds of local public agency decisions and participated in scores of public agency decisions.

4. *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999).

5. *Del Monte Dunes at Monterey, Ltd. v. City of Monterey*, 95 F.3d 1422, 1431-32 (9th Cir. 1996).

6. Oral Argument, at 4, 16, 18. *Del Monte Dunes*, 526 U.S. 687, available at 1998 WL 721087.

were not appropriate uses of their authority.

It is possible for public agencies to abuse their powers not only in making decisions on rezonings or permit requests but also in the entire range of activities, including planning studies, plan development, adoption of implementation measures such as land use regulations, appeals of land use decisions, and land use litigation. Three of the more broad contexts in which these abuses occur are:

1. Public agency's improper banishment of affordable housing and other land uses perceived to be undesirable;<sup>7</sup>
2. the fracas over who will pay for the impacts of new developments; and
3. severe regulations that do not allow development at all or to a small degree.

Many of the public programs that allow no or too little development are preservation or conservation responses to the spreading of our cities into rural and environmentally sensitive areas. Today more federal, state, and local public programs focus on a variety of public purposes including farmland preservation, aquifer protection, prevention of flooding, wetland protection, shoreline protection, and habitat conservation for endangered species.<sup>8</sup> While conservation and protection are needed in these programs to various degrees, some regulations have prohibited uses to the extent of abusing landowners' rights. In other words, some of the resource protection programs' regulations clearly should not have been enacted without allowing some additional use of the property.<sup>9</sup>

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7. This is referred to the "NIMBY" syndrome as reflected in the report: ADVISORY COMMISSION ON REGULATORY BARRIERS TO AFFORDABLE HOUSING, "NOT IN MY BACK YARD," REMOVING BARRIERS TO AFFORDABLE HOUSING (1991). This phenomenon is also referred to by a number of other acronyms such as "LULUS" for "locally undesirable land uses" and "NIMTOS" for "not in my term of office."

8. The principal legal claim in this context is that the regulation causes a violation of the Fifth Amendment Takings Clause (applicable to the states through the fourteenth Amendment), "[N]or shall private property be taken for public use, without just compensation." U.S. Courts amend, V. See *infra* notes 9-12 and accompanying text for a discussion of impact of public agency abuse on courts.

9. See *Lucas v. South Carolina Coastal Council*, 424 S.E.2d 484 (S.C. 1992) *on remand from Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992) (state court determined that development of two barrier reef lots was not a nuisance and thus state prohibition of

The second major context in which abuses have occurred is also related to increasing urbanization. As the urban fringe grew and new infrastructure and other services were demanded, many public coffers were strained and public agencies increasingly turned to landowners and developers to up the ante to get development approval. Money, land, easements, open space dedication, fire trucks, school impact fees, park fees, and many other matters have been required of landowners and developers in this context.<sup>10</sup> The means of the public agency demands have been many including an item of site plan negotiations, a requirement imposed on an ad hoc basis as a condition to the permit, or impact fees set by formula in an ordinance. Impact fees have been required for a long menu of public appetites including parks, schools, streets, utility lines, and more recently in lieu of developers building low and moderate-income family housing.<sup>11</sup> Unfortunately the contest of providing infrastructure and services for new development has proven to be fertile ground for public agency abuses as a minority of public agencies have focused on perceived public needs rather than the fairness of demands of developers and the relationship of the demands to the need created by the project currently proposed.

The third general context for public agency abuses, excluding specific uses, has been the most notorious historically. Rather than prohibiting all or almost all uses, this context is one in which public agencies target specific uses or categories of uses for exclusion such as: less expensive single-family housing (in general, mobile homes, manufactured homes), multifamily housing, group homes, billboards, adult uses, and many other, thought to be undesirable for single-family neighborhoods or an entire community. In terms of specific facts, inappropriate exclusion may result from many public agency

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development was a total taking).

10. See generally AMERICAN BAR ASSOCIATION EXACTIONS, IMPACT FEES AND DEDICATIONS: SHAPING LAND-USE DEVELOPMENT AND FUNDING INFRASTRUCTURE IN THE DOLAN ERA (Robert H. Freilich & David W. Bushek eds., 1995).

11. *Id.* at 125. THEODORE C. TAUB, EXACTIONS, LINKAGES, AND REGULATORY TAKINGS: THE DEVELOPERS' PERSPECTIVE. See also DANIEL R. MANDELKER, THE CONSTITUTIONALITY OF INCLUSIONARY ZONING: AN OVERVIEW (1990). See generally, INCLUSIONARY ZONING MOVES DOWNTOWN 31 (Dwight Merriam et al. eds., 1985).

actions such as delay tactics designed to prohibit development,<sup>12</sup> the laying out of the zoning districts and text that do not allow certain uses, or the rushed amendment of an ordinance when the prior ordinance allowed a proposed land use that the agency wants to exclude.<sup>13</sup>

## II. GENERAL IMPACTS ON LAND USE LAW

Our history of land use law is, in a sense, like focusing binoculars away from public needs and in on the abuses. The everyday conduct by a majority of communities conducting planning and administering land use regulations and other programs in good faith is not newsworthy. It is not highlighted in litigation; it does not stick in the memory of many observers. Wrongdoing, however, makes an impression. It sells news. It brings in legal fees; it clogs up the courts. In a sense, righting the wrongs of government abuse plays well on our strings of independence and anti-authoritarian nature still ingrained in citizens of this nation born in revolution. In more recent decades, finding and reporting public wrongdoing is chic after Watergate and the War in Vietnam that fostered the nation's distrust in the public decisions.

Similarly, the more often an actor in the land use arena experiences or observes public agency abuse, the more likely one's image of public agencies is to be changed. Certainly, for landowners who have been the victims of the abuse, the image of local government can change quickly. Individuals who most closely share those experiences of the abused landowners are the professionals, lawyers, and planners who represent them.<sup>14</sup> These professionals seek to gain public approval of development proposals and share the experience of abuse by a minority of public agencies. The persons next most keenly aware of this abuse are those professionals who see public agencies partially or completely through the lens of court cases: land use law attorneys and professors who teach land use law,

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12. *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999).

13. This may include any land use perceived to be undesirable and occurs, for example, sometimes when the first adult use is proposed in a small town. See Eric D. Kelly, *Local Regulation of Lawful Sex Businesses*, 51 LAND USE L. & ZONING DIG. 3 (1999).

14. RICHARD F. BABCOCK, *THE ZONING GAME* (1969).

and judges who deal with the cases about these abuses. To many landowners, planners, attorneys, judges, and professors, the wrongdoing tends to become their psychic image of public agencies in the land use arena.

For professionals who experience their clients abuse by public agencies and some observers, trying to fight and correct these abuses becomes at least a minor theme of their careers. Movements and organizations are formed to fight the abuses.<sup>15</sup> Their image of public agencies effects many of their activities in the realm of land use law. They write articles, speak at seminars, hold seminars on the abuses by local government, and create websites. Essentially these abuses have created a strong active advocacy system against public agencies and many public interest programs.

Furthermore, the abuses by a minority of communities have even seriously eroded the vitality of advocacy for public interest programs. Knowing and seeing the abuses makes it much more appealing for planning and legal advocates to represent both public and private clients and certainly these abuses create work for legal advocates. Over time many once public interest-oriented attorneys now represent almost exclusively private clients. Often seeing these abuses by a minority of public agencies tends to lead even planning advocates to the conclusion that although planning can reap some important benefits for society, the power of public agencies to plan and regulate must be tempered with measures to prevent the potential for agency abuse of landowners. For example, Daniel R. Mandelker, has been a proponent of not just planning but mandatory planning,<sup>16</sup> now focuses on both making planning more effective and protecting individuals against public agency abuse by allowing more access to the courts in takings issues<sup>17</sup> and by shifting legal presumptions of validity and constitutionality away from public agencies<sup>18</sup> when a

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15. Harvey M. Jacobs, *The Anti-Environmental "Wise Use" Movement in America*, 47 LAND USE L. & ZONING DIG. 3 (1995).

16. Daniel R. Mandelker, *Should State Government Mandate Local Planning?...Yes*, 44 PLANNING 14 (1978).

17. Professor Mandelker testified in favor of H.R. 1534, allowing more access to federal courts for takings claimants before the House Judiciary and Senate Judiciary Committees in 1998.

18. See Daniel R. Mandelker & A. Dan Tarlock, *Two Cheers for Shifting the Presumption*

public agency's political process does not operate fairly in distributing burdens and benefits.<sup>19</sup>

### III. SPECIFIC IMPACTS OF THESE ABUSES ON LAND USE LAW

#### A. COURTS

Through the decades of land use law, the abuses by a minority of public agencies has increasingly influenced America's case law. As the architects of America's case law, judges are among those in the best position to see, and to be influenced by, evidence of public agency abuse. For decades after the constitutionality of zoning was affirmed in 1926 by the case of *Village of Euclid v. Ambler Realty Company*,<sup>20</sup> the courts deferred largely to public agency actions, giving them the presumption of validity. In the early 1960s, however, observers and courts began to become increasingly aware of public agency abuses in the context of exclusionary zoning and politically whimsical decisions. Beginning in the 1970s the late Professor Norman Williams, Jr. noted that the courts had become more active in land use cases. He called this role "a sophisticated judicial review" and described it as "a wiser, more skeptical and more realistic view of local government and to the various parties in interest."<sup>21</sup> In the late 1960s and early 1970s, Pennsylvania took the lead in trying to resolve exclusion as an abuse of the zoning authority.<sup>22</sup> In 1975 the New Jersey Supreme Court issued its landmark decision addressing the abuse of an exclusion by a suburban community of affordable housing and requiring the acceptance of a developing community's fair share of the regional housing need.<sup>23</sup>

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*of Validity: A Reply to Professor Hopperton*, 24 B.C. ENVTL. AFF. L. REV. 103 (1996); Daniel R. Mandelker and A. Dan Tarlock, *Shifting the Presumption of Constitutionality in Land-Use Law*, 24 URB. LAW. 1 (1992); Daniel R. Mandelker, *The Shifting Presumption of Constitutionality in Land Use Law*, 4 J. OF PLANNING LIT 383 (1989).

19. Mandelker & Tarlock (1992), *supra* note 18, at 23.

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

21. AMERICAN LAND PLANNING LAW § 5.05, at 107 (1988 Supp. 1999). For a more detailed description of the shifts in the state courts, see generally, *id.* at Chapters 5 and 6, showing that many states had become suspicious of public agency actions by the early 1970s.

22. See DAVID H. MOSKOWITZ, EXCLUSIONARY ZONING LITIGATION 185-222 (1977).

23. *Southern Burlington NAACP v. Township of Mt. Laurel*, 336 A.2d 713 (N.J. 1975).

In the 1980s, after almost a half century of near complete dormancy in land use law, the U.S. Supreme Court expanded its role in land use cases in a way that yielded some strong counter measures against public agency abuse that surprised many observers. The era of the takings issue began. In 1981, in the case of *San Diego Gas and Electric Co. v. City of San Diego*,<sup>24</sup> U.S. Supreme Court Justice Brennan noted that a municipal attorney had said concerning the remedy for an unconstitutional takings “[i]f all else fails, merely amend the regulation and start over again.”<sup>25</sup> Justice Brennan called for a money damages remedy for unconstitutional temporary takings noting that “[t]he general notion of compensating landowners for regulations which go too far has received much attention in land -use planning literature.”<sup>26</sup>

Justice Brennan’s comments harbingered the Supreme Court’s landmark activism against public agency takings. In 1987 the Supreme Court stated that money damages must be paid for temporary takings by public agencies.<sup>27</sup> The same year, the Court clarified that a public agency’s requirement of a lateral easement for the public’s beach access must have an essential nexus to a substantial state interest when a property interest is required of a landowner.<sup>28</sup> In 1990 the Court created a new category of automatic or per se takings (meaning that it was unnecessary to apply the traditional takings tests) when it found that a regulation caused a total deprivation of all economical use of property unless a nuisance is being prevented or the regulation is consistent with principles of state property law.<sup>29</sup> In 1994, in the case of *Dolan v. City of Tigard*,<sup>30</sup> the Court added to the *Nollan* nexus test that for a public agency to

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24. *San Diego Gas and Electric Co. v. City of San Diego*, 450 U.S. 621 (1981).

25. *Id.* at 655 n.22 (1981) (Brennan, J., dissenting).

26. *Id.* at 669 n.25.

27. *First Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987).

28. *Nollan v. California Coastal Comm’n*, 483 U.S. 825 (1987) (holding that required beach access as a permit condition was an unconstitutional taking).

29. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992) (remanding a state’s prohibition of building on two barrier reef lots to state court to assess whether a nuisance was being prevented).

30. *Dolan v. City of Tigard*, 512 U.S. 374 (1994) (holding that a requirement of land for a floodplain protections and adjacent land for bikepath was an unconstitutional taking because the impact was not proportionate to the impact of a hardware stores expansion).

require a property owner to give an easement for public use, the public agency must show the requirement to be roughly proportionate to the anticipated impacts of the proposed development.<sup>31</sup>

Although some state courts had already become more activist against public agency actions such as exclusionary zoning,<sup>32</sup> more state courts now followed the U.S. Supreme Court's lead in further protecting private property rights against excessive regulations or exaction requirements. As Mandelker and Tarlock note, "[S]tate courts, perhaps because they are closer to the ground, are less willing to wink at what they perceive as a flawed political process."<sup>33</sup> In addition, they said that "recent 'federalization' of land-use law has given state courts a variety to justify more intense scrutiny [of public agency actions]."<sup>34</sup> They continued by explaining that, "[t]he First, Fifth, and Fourteenth Amendments are applied with varying degrees of precision and rigor by state courts along with doctrines that are a mix of federal and state constitutional law and legislation."<sup>35</sup> The Washington Court of Appeals, for example, shows an amazing determination to expand the protection of the U.S. Supreme Court's rough proportionality test in *Dolan* beyond exactions.<sup>36</sup>

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31. *Id.* at 391.

32. *See supra* notes 22 and 23 and related text.

33. Mandelker & Tarlock (1992), *supra* note 18, at 3.

34. *Id.*

35. *Id.*

36. The Washington Court of Appeals applied the *Dolan* test to a half street improvement not involving an exaction, *Benchmark Land Co. v. City of Battle Ground*, 972 P.2d 944 (Wash. Ct. App. 1999). The case was appealed to the Washington Supreme Court. On May 24, 1999 in *City of Monterey v. Del Monte Dunces*, the U.S. Supreme Court stated, in response to the Ninth Circuit's application of the *Dolan* test to site plan denials, that the rough proportionality test does not apply "beyond the special context of exactions – land use decisions conditioning approval of development on the dedication of property to public use." 526 U.S. at 702. In light of this statement, the Washington Supreme Court remanded the *Benchmark* to the Washington Court of Appeals in light of the Court's statement about the *Dolan* test and the case is pending.

In another case on June 21, the Washington Court of Appeals noted that if the best available sciences are not applied to developing policies and regulations for protecting critical areas, as required by Washington's Growth Management Act, WAS. REV. CODE ANN. 36.70A (West 1991), then the *Nollan/Dolan* test may be violated. *Honesty in Evtl. Analysis and Legislation v. Central Puget Sound Growth Management Hearings Bd.*, 979 P.2d 864, 871 (Wash. App. 1999) Then the appeals court went on to say, "[w]hile the United States Supreme Court has said that the nexus and rough proportionality rules do not apply to outright denial of a project, we decline to adopt the dicta that *Nollan* and *Dolan* may be applied only to dedications of land required to allow a development to proceed." *Id.*

### B. Legislation

The judicial response to public agency abuse has had a loud echo in the hallowed halls of state capitals and Congress. State legislators and members of Congress, who do not see a steady stream of abuses in court cases, nevertheless hear fresh horror stories of public agency abuses in legislative debates. In Congress, the proposals for legislation to protect landowners from public agency abuses have been varied and include better access to federal courts for landowners' taking claims<sup>37</sup> and challenges to many federal environmental statutes is perennial, with many proposals claiming justification based on the statutes' harsh impacts on private property rights. Similarly, the strong trend in federal statutes preempting local regulations is, to some degree, related to preventing excessive agency regulation of religious institutions,<sup>38</sup> group homes,<sup>39</sup> telecommunication facilities,<sup>40</sup> signs,<sup>41</sup> airports,<sup>42</sup> and manufactured housing.<sup>43</sup>

State legislators have reacted even more dramatically than members of Congress to public agency abuses. They, like their counterparts in state courts, are closer to the ground<sup>44</sup> than federal lawmakers. In addition, state legislators are likely to sense a high degree of responsibility to deal with public agency abuses that arise in the local exercise of state powers delegated by the state lawmakers to local agencies in enabling legislation. As a result, state lawmakers have adopted an astonishing variety of new statutes to alleviate local agency abuses.<sup>45</sup>

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37. The Private Property Rights Act of 1999, H.R. 2372, is currently pending in Congress and calls for greater access to federal courts for landowners' takings claims.

38. Religious Freedom Restoration Act, 42 U.S.C. § 2000bb (1993), overturned in *City of Boerne v. Flores*, 521 U.S. 507 (1997).

39. *See* Federal Fair Housing Act, 47 U.S.C. § 3601-3619, 3604(a).

40. *See* Telecommunications Act of 1996, 42 U.S.C. § 332(c)(7).

41. *See* DANIEL R. MANDELKER ET AL., *FEDERAL LAND USE LAW* (1999), § 2.10 Federal Preemption of Local Land Use Regulations.

42. *Id.*

43. *Id.*

44. *See supra* note 32 and related text.

45. These laws cover topics such as protecting nonconforming uses, CONN. GEN. STAT. § 8-2 (1997), state imposed uniform site development standards, N.J. STAT. ANN. § 40:55D-1 - 29 (West 1991), deemed approval of proposed developments if decisions are not rendered by

The most remarkable responses in the 1980s and 1990s have been the unprecedented proposals and adoptions of takings legislation fueled by the newly-minted federal takings jurisprudence.<sup>46</sup> Until recently, the takings legislation did three things: required or encouraged assessment of impact of public agency actions on private property rights, required or encouraged compensation for diminutions in value of private property, or required or encouraged mediation. More recently, under the aegis of takings legislation, Arizona adopted “takings legislation” that requires landowner approval for rezoning of their property.<sup>47</sup>

#### IV. SOLVING PUBLIC AGENCY ABUSES

##### A. REALIZATION

The first step toward solutions is the realization of fallout of public agency abuses. An important part of this realization is that only a minority of communities intentionally abuse the rights of landowners.<sup>48</sup> In other words, a minority of public agencies are creating havoc in land use law for the vast majority of public agencies who are acting in good faith to do the best jobs they can for creating or maintaining a livable built and natural environment in America. The abusive public agencies, rather than acting in isolation,

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public agencies within time limits, 53 PA. CONS. STAT. ANN. § 10908(9) (West 1997), conflict of interest statutes, CONN. GEN. STAT. § 8-11 (1997), anti-exclusionary statutes for needed and reasonable land uses, MICH. COMP. LAWS § 125.227a (1997), statutes allowing certain uses in single-family zones (such as group homes, NEV. REV. STAT. § 278.021 (1999), or child day care services, MICH. COMP. LAWS § 125.216g) (1997), and statutes requiring communities to plan for and promote the building of affordable housing, OR. REV. STAT. § 197.295-307 (1997) and CAL. GOVT. CODE § 69515 (1994). In addition, many states have adopted impact fee legislation protecting private interests. See, for a survey and discussion of impact fee legislation that addresses both public and private interests, Martin L. Leitner and Susan P. Schoettle, *A Survey of State Impact Fee Enabling Legislation*, in EXACTIONS, IMPACT FEES AND DEDICATIONS: SHAPING LAND-USE DEVELOPMENT AND FUNDING INFRASTRUCTURE IN THE DOLAN ERA 60 (Robert H. Freilich & David W. Bushek eds., 1995).

46. See Harvey M. Jacobs, *The Impact of State Property Rights Laws: Those Laws and My Land*, 50 LAND USE L. & ZONING DIG. 3 (1998). See also Robert H. Freilich and Roxanne Doyle, *Taking Legislation: Misguided and Dangerous*, 46 LAND USE L. & ZONING DIG. 3 (1994).

47. ARIZ. REV. STAT. § 11-829(A) (1998).

48. There are a few exceptions. For example, more than a minority of communities exclude affordable housing from many communities.

are in many ways linked with all other public agencies. Specifically, the few abusive public agencies have greatly harmed the public perception as to the worthiness of public agencies to deal with the public interest in the built and natural environment. This minority of abusive public agencies has undermined the advocacy system for land use planning and regulation. They have created an increasingly strong advocacy system against all public agencies and land use planning;<sup>49</sup> and they have seriously undermined political, moral, and financial support for many essential public interest programs. In the courts the abuse has created formidable case law that applies to, intimidates, and chills the effectiveness of all public agencies. To deal with this case law in litigation, many public agencies that act in good faith must misdirect human, financial, and all types of resources away from fulfilling their charge to deal effectively with American's interest in land use related resources. Similarly, in some instances the abuses have caused a talent drain that has affected the quality of performance of public agencies and discouraged some quite talented citizens from public service with public agencies because the potential for civil rights actions against them as individuals is intimidating. The intimidation of all public agencies, the costs of litigation, and actual damages from court decisions spawned from this abuse has grown. Many of the remaining advocacy groups and associations in America have spent vast resources trying to prevent the untoward law from spreading as case law in other jurisdictions.<sup>50</sup>

In addition, the abuses take a tremendous toll on the quality of the built and natural environment that the minority of abusive agencies, as well as all public agencies, have the duty to try to deal with effectively. Because all public agencies have to deal with the fallout of the abusive agencies, their scarce resources for implementing public interest programs are diminished.

The greatest threat of harm from these abuses is to America's future. Other than the courts, the other set of principal architects of American's land use law that determines the effectiveness of all public agencies are federal and state legislatures. The effectiveness of

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49. See Jacobs, *supra* note 15.

50. This author serves as staff to the American Planning Association Board's Amicus Curiae Brief Committee.

public agencies to deal with the built and natural environment is especially precarious in state legislatures where lawmakers decide the terms of planning enabling legislation. Here a public agency's reputation and integrity with respect to land use planning and regulation is critical for all Americans. The risk is heightened because a majority of the states have badly outdated 1920s' legislation to apply in comprehensive land use planning.<sup>51</sup> This legislation is critical because it provides the framework for the public agency effort to deal with urban sprawl. At issue is essentially whether the built and natural environment will be designed by the beneficial development rules of comprehensive land use planning rather than the harmful development rules that result in urban sprawl.

Under the rules intrinsic to urban sprawl, many metropolitan centers are suffering as jobs and affluent Americans have moved outward leaving behind those who cannot move. These rules of the development game came from many directions, were all unintended, and yet converge on the edge of the latest suburb to continue the sprawl unnecessarily abandoning and cloning built environments and consuming land and other natural resources.<sup>52</sup> Waste, as well as the disparities of social, employment, and housing opportunities, abound.

Rather than design by sprawl, planning statute reform is the way to interject some rational development rules. This legislation can encourage the use of comprehensive land use planning to spend public dollars efficiently on new infrastructure that will not be abandoned, it can match housing with jobs to link residential and business areas by transportation that makes sense for both privileged and under-privileged Americans.<sup>53</sup>

What planning statute reform does is better the odds that the

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51. Rodney L. Cobb, *Toward Modern Statutes: A Survey of State Laws on Local Land-Use Planning*, in PLANNING COMMUNITIES FOR THE 21<sup>ST</sup> CENTURY 7 (SPECIAL REPORT OF THE AMERICAN PLANNING ASSOCIATION'S GROWING SMART<sup>SM</sup> PROJECT (1999)).

52. Bruce Katz & Jennifer Bradley, *Divided We Sprawl*, ATLANTIC MONTHLY, Dec. 1999, at 26.

53. Oregon is a good example. Portland encourages higher densities in its more central area, promotes a variety of housing, sets some urban growth limits, and is escaping paralyzing traffic with a light rail system that serves the Portland area. There has been no new construction to increase road capacity in Portland in the last two decades. Oregon was once losing thirty thousand acres of agriculture per year and now that has decreased to two thousand acres per year. See The Sierra Club, *The Sierra Club Rates the States*, in SOLVING SPRAWL (1999).

irrational development rules of sprawl will be displaced by the rational development rules of comprehensive planning. After planning statute reform, more communities will simply be conducting effective planning that designs the urban and rural areas with rational development rules. For example, a state with a reformed law will have all or near one hundred percent of its public agencies planning, and the new law will guide the local planning to address thoroughly all types of housing and coordinate such with jobs and transportation.

Legislative reform thus is needed in all states independent of how the state's population may be changing overall. Ten coastal states with rapidly increasing populations have vastly updated their planning legislation, but half of the states have legislation authorizing local planning similar to 1920s' model legislation.<sup>54</sup> These states, however, suffer because they are designed by sprawl even if they are not fast growing states. For example, Pennsylvania has had a stable population since the 1960s, and before that it was merely slow-growing.<sup>55</sup> However, the first fifty-five thousand people in Lancaster City, Pennsylvania from nineteenth century development, occupied seven square miles but its next fifty-five thousand people from post World War II sprawl consumed seventy Square miles.<sup>56</sup> This is a tenfold increase in land consumption for Lancaster City caused by a population simply moving around in a state that, as a whole, maintained a stable population.

Not surprisingly, twelve states have recently commissioned or completed state-sponsored studies of how to deal with smart growth issues.<sup>57</sup> These and other states' decisions to reform state planning legislation will determine much about the quality of our futures—how America will develop, how long affluent persons will spend in traffic, whether disadvantaged persons will have housing or jobs or

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54. See Cobb *supra* note 50.

55. U.S. Census Bureau, Selected Historical Census Data, Population and Housing Counts, Table 16. Population 1790 to 1990, (March 1, 2000), available at <<http://www.census.gov/population/censusdata/table-16.pdf>>.

56. Telephone Interview with Paul Thibault, Chairman, Lancaster County Commissioner, Lancaster, Pennsylvania (Dec. 7, 1999).

57. Stuart Meck, *Executive Summary: Status of State Planning Reform in PLANNING COMMUNITIES FOR THE 21<sup>ST</sup> CENTURY 2*, SPECIAL REPORT OF THE AMERICAN PLANNING ASSOCIATION'S GROWING SMART<sup>SM</sup> PROJECT (1999).

good schools, and whether we will sprawl physically and ideologically or will have a sense of community, oneness as a country, and as a democracy.<sup>58</sup>

Thus, public agencies have duties to perform that are critical to the quality of life in America. They need modernized statutes to meet these challenges. However, state legislators may be reluctant to give public agencies new, innovative tools to deal with urban sprawl and to meet the other thorny challenges at stake in statutory reform. Continued public agency abuses will not only block critically needed statutory reform but will cause lawmakers to continue taking away legislative powers from public agencies, further undermining the ability of all public agencies to perform their duties at this critical juncture in America's desperate bout with urban sprawl.<sup>59</sup>

### *B. Lasting Solutions*

Because so much is at stake, solutions to the abuse must be found. The real lasting solutions are those that prevent the abuses in the first instance rather than focusing on correcting the abuses. Victims of the abuse should not have to sue to get rights or to be treated fairly their rights should not have been violated in the first instance. Public agencies that commit these abuses must have a sense of urgency about stopping these actions. They must fully realize that they are responsible for the harsh impacts of their actions on everyone's interests, as discussed above. Many agencies have a history of litigation with landowners, but the agencies must still treat all private parties as they would like to be treated if they were in the landowners' shoes no matter what the history of transactions with the applicant.<sup>60</sup>

Beyond this initial solution, governments appointing the public

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58. See Katz & Bradley, *supra* note 52, at 42 (arguing against sprawl because of the attendant loss of sense of place, lack of commitment to community, discouragement of free association, and undermining of participation in democracy—a “cultural agrophobia that depletes public life”).

59. Public agency abuses have made discussions about giving full or new authorities to public agencies much more of a challenge in designing model statutes in the American Planning Association's Growing Smart<sup>SM</sup> Project. See Meck, *supra* note 57.

60. This applies to all aspects of the public agency actions including laying out of zones, enforcement of regulations, and even litigation strategies.

agencies would be wise to train or retrain agency members to make sure that abuse, its consequences, and fairness are thoroughly understood in all aspects of their duties. In doing so, governmental leaders should make it clear that the abuses are not tolerable, per se, and for continued membership in the public agencies. Because the training's purpose is to prevent abuses, it should be routine with all public agencies and each new member.<sup>61</sup>

In some senses, however, municipalities are arms of state governments and solutions beyond training may be in order for state legislatures. Parallel to the training, some states may want to adopt measures that can be used if the abuses continue. For example, if a public agency of a local government continues to abuse the rights of landowners, then the state, via legislation, may want to reserve the right to appoint a hearing officer to conduct the public agency's business.<sup>62</sup>

The timing and design of other solutions are even more intricate. A "meat axe" approach to legislative solutions to agency abuses is not sufficient when surgery is needed. Unfortunately, many discussions, about withholding needed planning or regulatory tools unfold along the lines of: We know that there are abuses, thus the planning or regulatory authority should be withdrawn,<sup>63</sup> not given, or allowed to be used only under narrow circumstances. Alas, we all have too much at stake to design solutions, legislative or otherwise, to perceived abuses based on generalizations or horror stories. If only a minority of public agencies are abusing a specific power, then training should suffice. Yet, to cut back on the authority to plan and

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61. See, e.g., NEV. REV. STAT. § 278.0265 (1999) (requiring a governing board of a regional planning commission to "prescribe an appropriate course of at least 12 hours of training in land-use planning"). In addition, APA's Growing Smart<sup>SM</sup> Project, a multi-year effort to draft the next generation of model planning and zoning statutes for the U.S., § 7-105(8), also requires the local planning agency to conduct both initial and ongoing training and continuing education programs for commissioners on how to meet their duties.

62. BABCOCK, *supra* note 14, said that "[t]here is among professionals—lawyers, planners, and, indeed, politicians—an increasing restlessness with the layman's power over land-use regulation." *Id.* at 38. Some states have moved significantly toward the use of hearings officers. For example, over seventy-five percent of the population of the State of Washington have hearing officers make their public land use decisions. See WASH. REV. CODE § 36.70.970 (2000). Telephone Conversation with Ronald L. McConnell, McConnell/Burke Inc. (Mar. 1, 2000). McConnell serves as a hearings officer for twelve Washington municipalities.

63. ARIZ. REV. STAT. § 11-829(A) (1998).

regulate will hit all public agencies, the majority of whom do not abuse their powers and need these authorities to effectively plan and regulate.

For these reasons, before a legislature adopts a statute intended to curb public agencies' abuse—perhaps withdrawing or setting conditions on its planning or regulatory powers—the lawmakers should assess the abuses and the related public interests. For example, aspects of the abuses that should be objectively assessed are the frequency of abuses, the number and percentage of public agencies that commit the abuses, the impact of the abuse on private landowners, and the frequency of litigation. In addition, alternative solutions should be assessed in terms of how well they would stop the abuses and the extent of their impacts on the agency's effectiveness in dealing with everyone's interests in the built and natural environment. The considered impacts on a public agency's functions should include the value of the authority to protect public interests and the chilling effect on the agency's effectiveness. For example, takings legislation specifying that takings for which monetary damages must be paid,<sup>64</sup> would have an obvious chilling effect on a public agency's effectiveness.<sup>65</sup>

If a study of the abuses proves that they are widespread and it is obvious that training would not help the victims of the abuse, perhaps innovative legislation can prevent the abuse without sacrificing the other public interests involved. For example, exclusionary single-family zoning is not an abuse that can be said to be committed by only a minority of public agencies.<sup>66</sup> At the same time, completely

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64. See Jacobs & Freilich, *supra* note 46.

65. *Id.* The chilling of public interests has played a key role in the overturning of taking legislation in Washington and Arizona. See Telephone Interview with Frank Bangs, Jr. Attorney, Lewis and Roca, LLP, Tucson, Arizona (Feb. 25, 2000), Private Property Rights Protection Act, §§ 37-220-222 renumbered as §§ 221-223 (1992) repealed by Referendum Proposition 300, 1994 (concerning Arizona); Telephone Interview with Steve Lundin, Washington House of Representatives Legislative Counsel, (Mar. 2, 2000), Wash. Rev. Code Ann. § 64.42.005-.009 (West 1995) repealed by Initiative Measure No. 164, Wash. Leg. Session 1995/1996 (concerning Washington). Currently the Missouri General Assembly is considering takings legislation that calls for a compensable taking to occur with a twenty percent diminution of value in land because of a regulatory program. See H.B. 1798 (Mo. 2000).

66. See Richard F. Babcock, *The Egregious Invalidity of the Exclusive Single-Family Zone*, 35 LAND USE L. & ZONING DIG. 4 (1983). See also Norman Williams, Jr. et al., *The*

doing away with single-family zoning is not a realistic option. To resolve this dilemma legislators can adopt a statute requiring developing communities to have their regional fair share of housing for low income families to the case law which evolved in New Jersey in the *Mt. Laurel* cases<sup>67</sup> and in statutes adopted by California and Oregon.<sup>68</sup> Other statutes that may curb some prevalent abuses with no or minimal impact on the public agency's effectiveness are those that address delays in public agency decisions.<sup>69</sup>

Members of the legal profession tend to, have a Pavlovian tendency to regard the courts as solutions to a variety of legal, social, political, ethical issues. So why not use the courts to solve public agency abuse? Generalizations are dangerous when incorporated into in any answer to the question because there are many types of abuse and not all of them are intentional.<sup>70</sup> In short, the havoc from our current litigious postures must cease. There appear to be no reasons why courts should be the first resort rather than the last resort for solving public agency abuse. Yet, there are many reasons why all concerned should try to avoid litigation if at all possible.<sup>71</sup> Victims of abuse should not have to sue to get the fairness, rights, and respect owed them by public agencies. Litigation is a legal war and it, like violence, begets itself.

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*Strategy on Exclusionary Zoning: Towards What Rationale and What Remedy?*, 6 LAND USE CONTROLS ANNUAL 177 (1972). See generally CHARLES M. HAAR AND JEROLD S. KAYDEN, ZONING AND THE AMERICAN DREAM: PROMISES STILL TO KEEP (1989).

67. See *Southern Burlington County NAACP v. Township of Mt. Laurel (II)*, 456 A.2d 390 (N.J. 1983); *Southern Burlington County NAACP v. Township of Mt. Laurel (I)*, 336 A.2d 713 (N.J. 1975).

68. See *supra* note 45.

69. *Id.*

70. These comments on the limitations of courts are made with all due respect and admiration to Daniel Mandelker's scholarly writings on presumption shifting. See Mandelker (1989) and Mandelker & Tarlock (1992, 1996), *supra* note 18.

71. Of course, abatement of land use litigation not involving public agency abuse may prove to be more difficult but should be addressed. See *infra* note 72. The combinations of litigants in land use litigation are endless. Even a simplified model of this litigation involves three parties: public agencies, applicants for development permits, and the neighbors. Neighbors often sue both public agencies and applicants. Sometimes applicants sue neighbors in "slapp" suits strategic litigation against public participants (sometimes the public participants are other third parties such as environmental groups). Outside of the model of these three types of litigants, many other types of litigants are involved in land use law. Sometimes, for example, one government will sue another over annexation or to affirm that the other government's land use in the plaintiff governments jurisdiction is subject to its zoning.

What if there were a perfect legal system with refined legal tests for every type of abuse and easy access to the courts? Courts are not legislatures or architects of public land use policy. Moreover, litigation followed as a solution benefits only professionals who gain from litigation. With courts as a first resort the face of land use law would still closely resemble war. A lack of mutual trust, threats, high legal costs on both sides, and litigation delays would continue. Litigation is part of the problem and blocks long term solutions outside of the courtroom. The point is not that any entities other than the abusive public agencies are responsible. The point is that public agencies cannot implement real long term solutions alone now that the legal shoving match seems the pastime of the century's end.<sup>72</sup>

Getting, thinking, and staying out of the "litigation box" that today's current land use law resembles will take time. It has to start with all the participants resolving to strive in good faith to eventually find solutions outside of the court room. As the late Richard Babcock noted, "What is required from all participants, laymen, planners, lawyers, and judges is an effort to turn zoning from the petty parochial device it now is to a viable tool of land use policy."<sup>73</sup>

The second goal is to reach a point where public agencies and those they serve are not mutually distrustful and fresh from the last round of legal contests.<sup>74</sup> Realistically, the public sector must begin to implement the solutions above before their former victims will vaguely consider trusting them. That is, the implementation will have well established before victims take their legal counsel off the speed dial on their cell phones. This trust can begin to be built by the governments and their public agencies by heavily consulting and

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72. See Glod, *supra* note 2.

73. BABCOCK, *supra* note 14, at 111. In addition, staying outside of the courtroom must involve others. "The problem is the no-growthers and radical environmentalists who have become adroit at manipulating the system," Howard said in a phone interview from his Washington, D.C., office. "You can never get a final decision about what you can or cannot do." Howard said that in some instances property owners have waited up to twenty years for courts to decide whether a case really should be heard by local planners." Jim Dalglish, *Property Rights and Local Control at Odds in Congress*, THE HERALD-PALLADIUM, Feb. 28, 2000 (St. Joseph-Benton Harbor Michigan) (Jerry Howard, is a Senior Staff Vice President with the National Association of Home Builders).

74. Mediation is even a preferred solution to litigation if mediation itself will not detract from the priority of preventing abuses and litigious mind sets.

involving private landowners and builders in designing legislation and actually training public agency employees. The public sector must start here to convince private individuals that their intent is sincere, that the resolve to stop the abuses is permanent, and that the public sector knows that everyone loses when public agencies abuse their powers.

### CONCLUSION

In a real sense, land use law is held hostage and undermined by public agencies abusing their powers. The burden to solve this problem is initially on those public agencies that have been abusing their powers. Eventually, the abuses will be stopped one way or another. If public agencies stop the abuses, the chances to stay out of courts are maximized, a general restoration of faith in public agencies as caretakers of our futures in the built and natural environment can occur, and the potential for legislative reform and for all public agencies to be effective in their duties is maximized. To the degree that the agencies continue the abuses, courts and legislatures will correct the abuses, but public agencies will lose much of their legislative authority to regulate. Similarly, statutory reform will occur less often because a lack of faith in public agencies and the built and natural environment will more frequently unfurl according to the harmful development rules of urban sprawl rather than the beneficial development rules of comprehensive urban planning. In the latter scenario land use law will more closely resemble war, in the former scenario it will more closely resemble its public purposes.

The responsibility is clearly on the abusive public agencies to stop the abuse in order that land use law can reorient to its original positive purposes rather than focusing on the dark side of land use law—public agency abuses. These agencies and all other parties in the land use law arena, however, must act quickly because the litigation train has much momentum, and it will take the efforts of more than just the public agencies to put land use law on the right track toward America's best future.