

## The Joy of Takings

Michael M. Berger\*

When I graduated from Washington University Law School about half-a-century ago, I never dreamed that I would spend my career studying, litigating, and teaching cutting-edge constitutional law. Yet, that has been my reality. True, it is a specialized niche of constitutional law, but it has been—and continues to be—on the cutting edge.

My particular edge concerns real property: specifically, the right of property owners to make productive use of their land without undue government interference—or, to put it in the vernacular, takings law. I got there in a way that almost looks planned. I wish I had been that clever, but it was more a case of the dominoes falling in a consistent pattern. So, pay attention. Despite what they tell you in law school, this is how it works in the real world.

It all started in my second year of law school, when I retrieved one of those ubiquitous notes from a bulletin board. A professor needed some research assistance. The professor was Dan Mandelker and his field was land use. I spent two years doing research for him related to land use and planning, and taking his advanced land use course along the way. Although Dan and I have differed over the substance of takings law, I learned much about constitutional issues from those land use cases that had been overlooked in the formal Constitutional Law course (as it was taught then—and continues to be in many law schools).<sup>1</sup>

---

\* Partner, Manatt, Phelps & Phillips, LLP, resident in the Los Angeles office; co-chair of the firm's Appellate Practice Group; Adjunct Professor of Law, Washington University in St. Louis.

1. See Michael M. Berger, *Supreme Bait & Switch: The Ripeness Ruse in Regulatory Takings*, 3 WASH. U. J.L. & POL'Y 99, 99 n.1 (2000). Although many property courses now cover takings law, I understand that many constitutional law professors continue to ignore the last phrase of the Fifth Amendment.

After graduation, Professor Mandelker introduced me to Professor George Lefcoe at the University of Southern California, where I was accepted into a graduate program leading to a Masters of Law Degree in real property. The major part of my LL.M. program consisted of a thesis on some real property topic. Discussions with Professor Lefcoe revealed that there was a substantial—and growing—amount of litigation involving the relationship between airports and their neighbors. Luckily (from the standpoint of being able to do empirical research), much of it was in Southern California. Specifically, airport neighbors were claiming that aircraft operations were taking their properties (or interests in them) without payment of compensation. The result was that I wrote a lengthy article discussing virtually every airport v. neighbor case that had been reported in the United States, augmented by interviews with lawyers handling such litigation from coast to coast.<sup>2</sup>

That was my first contact with takings law, and the joy was unalloyed. As something of a young amateur scholar, I was able to focus complete attention on a legal field in which there was much confusion. True, there were two decisions of the U.S. Supreme Court that should have shown the way (at least in the airport context),<sup>3</sup> but state courts were uncertain and had begun going in divergent ways.<sup>4</sup> By building on the solid foundation of the Supreme Court decisions, I was able to create a pretty well fleshed out theory dealing with the relationship between airports and their neighbors.<sup>5</sup>

---

2. Michael M. Berger, *Nobody Loves an Airport*, 43 S. CAL. L. REV. 631 (1970).

3. *Griggs v. Allegheny Cty.*, 369 U.S. 84 (1962); *United States v. Causby*, 328 U.S. 256 (1946). Although *Causby* involved an airport owned by the United States and used by U.S. military aircraft, *Griggs* was a civilian airport serving commercial airlines. Between them, these Supreme Court decisions made clear that the airport operator was responsible for damage caused to neighbors by airport construction and operation.

4. They were actively aided and abetted by counsel representing various airports who kept stirring the pot with specious arguments and fomenting confusion. For earlier discussions of such ploys, see, for example, Michael M. Berger, *Property, Democracy, & the Constitution*, 5 BRIGHAM-KANNER PROP. RTS. CONF. J. 45, 87 n.230 and accompanying text (2016); Michael M. Berger, *Strong and Informed Advocacy Can Shape the Law: A Personal Journey*, 4 BRIGHAM-KANNER PROP. RTS. CONF. J. 1, 3–5 (2015); Michael M. Berger, *The California Supreme Court—A Shield Against Governmental Overreaching: Nestle v. City of Santa Monica*, 9 CAL. W. L. REV. 199, 244–52 (1973).

5. The original graduate thesis cited in note 2, *supra*, was later augmented by the following: Jerold A. Fadem & Michael M. Berger, *A Noisy Airport is a Damned Nuisance*, 3 SW. L. REV. 39 (1971); Michael M. Berger, *You Know I Can't Hear You When the Planes Are*

The unanticipated beauty of the Master's Degree was that I ended up taking a job as an associate (and soon thereafter a partner) in the Los Angeles law firm handling the largest volume of airport noise litigation and, from that vantage point, using my graduate thesis in actual legal practice for about the next two decades. In fact, I argued every airport noise case considered by the California Supreme Court after my admission to the Bar except one<sup>6</sup>—and in that missing one, I appeared as amicus curiae and presented the arguments that eventually persuaded the court.<sup>7</sup> The joy that had begun with unrestricted research had converted itself into successful litigation.<sup>8</sup>

But the true joy of a takings practice that has lasted this long lies in the constantly changing character of the kinds of cases that raise takings issues and the ingenuity of the government lawyers (and, for quite a while, a compliant judiciary that too often bought those arguments). That may seem counterintuitive. But the joy in facing radically incorrect arguments that are accepted by trial courts is that cases enter the appellate product stream very quickly and are evaluated on appeal based on the facts as alleged in the complaint, rather than dealing with the confusion that sometimes arises from

---

*Flying*, 4 URB. LAW. 1 (1972); Michael M. Berger, *The California Supreme Court—A Shield Against Governmental Overreaching: Nestle v. City of Santa Monica*, 9 CAL. W. L. REV. 199 (1973); Michael M. Berger, *Airport Operator Liability: Continuing Liability for Continuous Tortfeasors*, 9 L.A. LAW. 27 (Dec. 1986); Michael M. Berger, *Airport Noise in the 1980s: It's Time for Airport Operators to Acknowledge the Injury They Inflict On Neighbors*, INST. ON PLAN., ZONING, & EMINENT DOMAIN, ch. 10 (Sw. Legal Found. 1987).

6. I briefed and argued each of the following: *Nestle v. City of Santa Monica*, 496 P.2d 480 (Cal. 1972) (government agencies are liable for nuisance); *City of San Jose v. Superior Court*, 525 P.2d 701 (Cal. 1974) (claim for airport noise damage may be filed on behalf of class; but class lawsuit not appropriate, as each parcel is unique); *Britt v. Superior Court*, 574 P.2d 766 (Cal. 1978) (statute of limitations must be liberally applied so as to permit trial); *Greater Westchester Homeowners Ass'n v. City of Los Angeles*, 603 P.2d 1329 (Cal. 1979) (victims of airport nuisance may recover damages for emotional disturbance).

7. *Baker v. Burbank-Glendale-Pasadena Airport Auth.*, 705 P.2d 866, 865 (Cal. 1985).

8. See also *City of Inglewood v. City of Los Angeles*, 451 F.2d 948 (9th Cir. 1972) (class action on behalf of neighboring city; neighbors held to be third party beneficiaries of promises made by airport operator to federal government in exchange for grants); *City of Los Angeles v. Decker*, 558 P.2d 545 (Cal. 1977) (misconduct for government lawyer to misrepresent facts to jury).

having to deal with conflicting factual testimony (not to mention all the time wasted in trial court litigation).<sup>9</sup>

Try this one, that was actually made—at first in writing and then repeated in court with a straight face—in an airport noise case:

Standing by itself, Los Angeles International Airport is basically a mass of concrete and steel. *Any* problems with respect to the Plaintiff only arise when jet aircraft land and take off from the Airport. Therefore, it is the jet aircraft's use of the airport that actually generates Plaintiff's cause of action for negligence, *not* the operation, management and control of the Airport by the Defendant.<sup>10</sup>

This argument was made two decades after the U.S. Supreme Court clearly explained that liability for damage inflicted on neighbors rested on the airport operator, as the one that decided to build an airport in the first place and then decided where to build it and how much land to acquire for it. In the Court's view, once an airport is built, the airplanes that use it are as much on tracks as railroad trains: they have no choice but to land and take off as the runways direct them.<sup>11</sup> And yet it took decades before some significant airport operators acknowledged the verity of that concept and stopped fighting with their neighbors.

Another story from the annals of airport litigation demonstrates some of the chicanery that takes the place of legal analysis and argument. In 1972, the California Supreme Court decided *Nestle v. City of Santa Monica*.<sup>12</sup> The key holding was that airport operators could be liable to their neighbors under settled theories of nuisance law for the noxious by-products of aircraft using their facilities.<sup>13</sup> The City of Los Angeles, which was not a party to the litigation, went into

---

9. No intent to denigrate trial lawyers, but as an appellate lawyer/quondam scholar, my focus has always been on the legal issues. The faster we can get to appellate courts that have the jurisdiction to enter binding judgments on the law, the better we appellate-types like it.

10. Defendant's Memorandum of Points and Authorities in Support of Motion for Summary Judgment, *Malandrinos v. City of Los Angeles*, No. 138136 at 33–34 (L.A. Super. Ct. 1983).

11. *Griggs v. Allegheny Cty.*, 369 U.S. 84, 89 (1962).

12. *Nestle v. City of Santa Monica*, 496 P.2d 480 (Cal. 1972).

13. *Id.*

panic mode (or at least some parts of its internal apparatus did), as shown in the letter quoted here. Its City Attorney prepared a “confidential” letter (said to be covered by the attorney-client privilege) to the Los Angeles City Council, analyzing the *Nestle* opinion and projecting its impact on the much greater operations under the control of Los Angeles—primarily Los Angeles International Airport. In that letter, the City Attorney purported to “advise” his client that the impact of nuisance liability at LAX would be so massive that the airport needed to close. In his words:

It would therefore appear that the only prudent course for the city to follow is to advise all the airlines using Los Angeles International Airport and the Federal Aviation Administration that in 30 days the airport will suspend operations . . . .<sup>14</sup>

Notwithstanding the “confidential” nature of this communication, a copy of the letter was leaked to the *Los Angeles Herald-Examiner* which, believing that it had a real scoop on its hands, put out an “Extra” edition of that evening’s paper with the headline:

L.A. AIRPORT FACES  
SHUTDOWN IN 30 DAYS.<sup>15</sup>

After weeks of hearings and press conferences, the Los Angeles City Attorney conceded that it had all been a “ploy”—an attempt to stampede the Supreme Court into reconsidering *Nestle*.<sup>16</sup> (Spoiler alert: it didn’t work, although it spooked a lot of ordinary folk—not to mention the editors at the *Herald-Examiner*).

But it was not only airport operators that acted in this fashion. Power tends to do things to people. Give them the ability to say that they are acting in the interest of the public good and Lord Acton’s aphorism about power’s corrosive effects takes on added weight. Take what should be routine planning and zoning issues. In today’s world, planning and zoning documents are not simply drawn hastily on the backs of napkins, nor do they do no more than follow the

---

14. Quoted in L.A. HERALD-EXAMINER, May 2, 1972, at 1, col. 8.

15. *Id.*

16. See Editorial, *Nuisance Suits and Our Airports*, L.A. TIMES, May 8, 1972, p. 2, at 6, col. 1.

tracks of neighborhood bovines.<sup>17</sup> They are the product of hearings (sometimes, many hearings) with input from all sorts of interest groups and individuals before the city council (or board of supervisors or whatever the local governing body is called) formally adopts such documents. When adopted, a city's general (or comprehensive or master) plan has been likened to the "constitution" for the area,<sup>18</sup> "or perhaps more accurately [to] a charter for future development,"<sup>19</sup> "located at the top of 'the hierarchy of local government law regulating land use.'"<sup>20</sup>

But what happens if, after all that effort, the governing body doesn't really like the way its planning and zoning efforts work in some specific area and its members decide to change the official plans on their own, *ad hoc*, disregarding all that careful planning? Such a situation arose in Monterey, California. The property was a 37.6-acre, roughly rectangular parcel of land on the Pacific Ocean coast at the City's northern end. Many years before the current owner bought it, the City zoned the property for multi-family residential use, in keeping with the commercial, industrial, and multi-family residential uses virtually surrounding it—allowing 29 units per acre, or more than 1,000 homes for the entire parcel.<sup>21</sup>

But the owners didn't want to build 1,000 units. Or anything close. Rather, in 1981, they submitted an application for only a 344-home development—one third of that allowed by the zoning. The City's Planning Commission rejected the proposal, complaining (oxymoronically in light of its own zoning ordinance) that the development was too dense. But the City went beyond mere denial. It did some additional off-the-cuff planning, advising that a proposal for

---

17. Urban mythology has it, for example, that the streets in Boston were laid out by meandering cows. *Boston Cow Paths*, CELEBRATE BOS., <http://www.celebrateboston.com/strange/cow-paths.htm>.

18. *O'Loane v. O'Rourke*, 42 Cal. Rptr. 283 (Ct. App. 1965).

19. *Leshar Communications, Inc. v. City of Walnut Creek*, 802 P.2d 317, 322 (Cal. 1990).

20. *DeVita v. County of Napa*, 889 P.2d 1019, 1024 (Cal. 1995). Land use planning employs a number of tools that can be viewed hierarchically. At the top is a municipality's most potent, called either a general or comprehensive or master plan. Beneath that plan are various zoning ordinances and planning documents. But the controlling document is always the general plan.

21. All of the facts concerning this development are recited in the Supreme Court's decision. *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999).

264 units—that comes to 7 units per acre for those who are mathematically challenged—would be received favorably.<sup>22</sup>

The owners, at considerable expense, redesigned the project accordingly, keeping in constant contact with the City's planners to ensure that their new plan would be in keeping with City desires. In 1983, they submitted their plan for the 264 units the City said it wanted. However, the City Planning Commission again turned down the application. This time, the City asked for a 224-unit development.<sup>23</sup>

The owners then complied with the City's 224-home demand. But when they took that one to City Hall, in early 1984, the same Planning Commission that solicited this proposal said "no." The owners appealed to the City Council, which remanded the matter to the Planning Commission with directions to consider a 190-unit development, representing a further fifteen-percent reduction in homes and a corresponding fifteen-percent reduction in ground coverage. To review the bidding, that is zoning for more than 1,000 units and plan submissions for 344 units, 264 units, 224 units, and finally 190 units.<sup>24</sup>

But the City would not approve even the highly restricted 190-unit design. Why? The City thought it had a trump card up its municipal sleeve: an endangered insect called the Smith's Blue Butterfly. After five years of planning and re-planning, the City said that there was nowhere on the entire thirty-seven plus acres on which anything could be built because the property was said to be needed (1) to protect the viewshed from the adjacent freeway,<sup>25</sup> (2) to provide buffer zones for the surrounding properties, or (3) to provide habitat for that endangered butterfly.<sup>26</sup> One intriguing thing about that butterfly is that not one of them had ever been seen on this property. Ever.<sup>27</sup> The City simply ordered the property preserved (on the if-

---

22. *Id.*

23. *Id.*

24. The facts surrounding this development may also be found in the intermediate appellate opinion. *Del Monte Dunes at Monterey, Ltd. v. City of Monterey*, 95 F.3d 1422 (9th Cir. 1996).

25. That is, the ability of freeway drivers to gaze at the coast as they speed by.

26. *Del Monte Dunes*, 95 F.3d at 1433–34.

27. *Del Monte Dunes*, 526 U.S. at 695.

you-build-it-they-will-come theory of the movie “Field of Dreams”) and left the owner holding a very empty bag. Eventually, the case resulted in a substantial verdict for the property owner which was affirmed by both the court of appeals<sup>28</sup> and the U.S. Supreme Court.<sup>29</sup>

There are also government agencies that feel that it is legitimate to seek to balance their budgets on the backs of whichever convenient fish happens to have jumped into the barrel at the wrong time. The City of Patterson, California, for example, required builders of homes to assist lower income families to buy homes by including some “affordable housing” in their projects. As with many such regulations, this one allowed each developer to buy out of the requirement (some might call it ransom) for a fee of \$734 per house (that the City promised to use to build housing elsewhere).<sup>30</sup> That could be raised, but only if the increase was “reasonably justified.” Three years later, the City increased the fee—to \$20,946 per house.<sup>31</sup> With a straight face, the City claimed that monstrous increase was “reasonably justified.” Even in California (and California courts have not been notably sympathetic toward land developers), that wouldn’t fly.<sup>32</sup> But entities and lawyers who make arguments that cannot be said with a straight face bring some enjoyment to those who practice on the opposite side.

Or how about an agency of the federal government, urging in serious mien that a property owner should not even be allowed to appear in court to defend against the government’s action without first paying a fine of \$686,443.53 (plus interest)?<sup>33</sup> No one—except a panel of the Ninth Circuit Court of Appeals (the most often reversed court in the country)—could swallow that. The U.S. Supreme Court unanimously reversed.<sup>34</sup>

Another aspect of my personal joy has been the ability to share my feelings about this sometimes arcane field of the law with students: at law schools, at continuing legal education programs for

---

28. *Del Monte Dunes*, 95 F.3d 1422.

29. *Del Monte Dunes*, 526 U.S. 687.

30. *Bldg. Indus. Assn. v. City of Patterson*, 90 Cal. Rptr. 3d 63, 65 (Ct. App. 2009).

31. *Id.*

32. *Id.*

33. *Horne v. Dep’t of Agric.*, 133 S. Ct. 2053 (2013).

34. *Id.*



practicing lawyers, and in scholarly journals. I have taught aspects of takings and land use law at the University of Miami Law School, Washington University Law School, and the University of Southern California Law School. The number of continuing education courses in which I have participated has stretched from Honolulu, Hawaii to Oxford (England, not Mississippi). There have been scores of law review articles.<sup>35</sup> Even after all these years, I still get a kick out of explaining that takings law is neither as simple nor as complex as some people seem to believe.<sup>36</sup> It is just different, and it is based on an express constitutional guarantee. Part of what I have enjoyed most has been correcting some of these erroneous beliefs.<sup>37</sup>

Other times, the joy of the practice has been meeting people. Take Frank Kottschade. Frank was a home builder in Rochester, Minnesota. He had been involved in the local real estate business and in organizations of fellow developers long enough to have become familiar with some of the legal concepts that defined, and sometimes hamstrung, his ability to do his job. One of those was the so-called ripeness doctrine, discussed in the following text.

When expressed generally, the ripeness concept sounds benign. It holds only that a case should not be adjudicated in court until it is ripe enough to be there—until all necessary preconditions have been

---

35. I was on a panel last year with a respected professor from a major law school and was told that he had written more than seventy articles. I found that number striking until I looked at my own CV and realized that I too had written more than seventy articles—and carried on a full-time law practice at the same time.

36. See articles cited *infra*, note 37.

37. Some have expressed the simplistic thought that as long as the government acts for a good reason there can be no taking, while others have spun more complex theories. All are discussed in these articles: Michael M. Berger, *Property, Democracy, & the Constitution*, 5 BRIGHAM-KANNER PROP. RTS. CONF. J. 45 (2016); Michael M. Berger, *My Head Is Spinning: and Now a Word from the Sponsor of Del Monte Dunes*, 9 CAL. LAND USE L. & POL'Y REP. 1 (Sept. 1999); Michael M. Berger & Gideon Kanner, *The Need for Takings Law Reform: A View From the Trenches—A Response to Taking Stock of the Takings Debate*, 38 SANTA CLARA L. REV. 837 (1998); Michael M. Berger & Gideon Kanner, *Thoughts on the White River Junction Manifesto: A Reply to the "Gang of Five's" Views on Just Compensation for Regulatory Taking of Property*, 19 LOY. L.A. L. REV. 685 (1986); Michael M. Berger, *Is an 'Innovative Scheme' a New Label For Confiscating Private Property?*, 51 L.A. B.J. 222 (1975); Michael M. Berger, *Do Planners Really Chafe at Being Fair?*, 41 LAND USE L. & ZONING DIG., Apr. 1989, No. 4, at 3; Michael M. Berger, *The State's Police Power Is Not (Yet) the Power of a Police State*, 35 LAND USE L. & ZONING DIG., May 1983, No. 5, at 4.

satisfied.<sup>38</sup> As applied to land development cases, however, the courts have created a virulent weapon that has been employed to radically restrict the provision of needed housing.<sup>39</sup> The most harshly applied part of this doctrine holds that a property owner cannot seek constitutional redress in federal court until he has sought—and been denied—compensation in state court under parallel provisions of state constitutional law.<sup>40</sup>

Many people thought that was unfair. Indeed, more than once Congress sought to change that rule, only to see majority votes in both houses frustrated by filibusters.<sup>41</sup> Frank Kottschade volunteered for what was essentially a suicide mission. He cast himself in the classic role of the soldier who throws himself on the grenade to save the platoon. He had a housing project that had been turned down by the city council on grounds that could almost certainly have been overturned in state court. Yet he decided to have a case developed that might reach the Supreme Court and allow the ripeness rule to be dealt with once and for all, in the only court that could deal with it.<sup>42</sup>

Frank's plan was simple. Given the state of the law, his federal district court complaint would be quickly dismissed as a matter of law, followed by an equally swift affirmation by the court of appeals. At that point, he would be able to roll the dice for the low percentage

---

38. See, e.g., RICHARD H. FALLON, JR. ET AL., *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* § 2.5 (7th ed. 2015).

39. This body of land use law has been described by scholars on both sides of the issue as well as trial and appellate courts in terms such as “misleading,” “deceptive,” “absurd,” “pernicious,” “draconian,” and “a procedural morass.” Citations to these and numerous other critiques of the land use variant of “ripeness” are collected in Michael M. Berger & Gideon Kanner, *Shell Game! You Can't Get There from Here. Supreme Court Ripeness Jurisprudence in Takings Cases at Long Last Reaches the Self-Parody Stage*, 36 URB. LAW. 671, 702–04 (2004).

40. *Williamson County Reg. Plan. Commn. v. Hamilton Bank*, 473 U.S. 172 (1985). See authorities collected in Michael M. Berger, *The Ripeness Game: Why Are We Still Forced to Play?*, 30 TOURO L. REV. 297 (2014).

41. See John Delaney & Duane Desiderio, *Who Will Clean Up the “Ripeness Mess”? A Call for Reform So Takings Plaintiffs Can Enter the Federal Courthouse*, 31 URB. LAW. 195 (1999) (discussing companion bills introduced in the House (HR 1534) and Senate (S 2271) during the 105th Congress from 1997 to 1998. The House bill received a majority vote of 248 to 178, but the Senate bill received only 52 votes—a majority, but not enough to override a filibuster).

42. The rule had been created by the Supreme Court, thus essentially eliminating the likelihood (or even the ability) of any lower court to overturn it.

shot of being one of the seventy-five or so cases accepted for review each year by the Supreme Court. The district court cooperated, as did the court of appeals.<sup>43</sup> It was a good plan. The court of appeals understood completely what was going on, but concluded that if change were to come, it would have to come from the Supreme Court, “not us.”<sup>44</sup>

The Supreme Court petition followed, supported by numerous private entities as well as briefs filed on behalf of numerous members of Congress, who complained that this ripeness issue was a serious matter of federal court jurisdiction, on which a majority of Congress wanted action<sup>45</sup>—action that was stymied by Senate procedures. If you are at all familiar with these cases, you know that certiorari was denied. As I said, although the entire process was a delight (other than the final outcome), the real joy may have been in meeting and associating with someone like Frank Kottschade, someone who was willing to put his own money (not to mention a perfectly good residential development) on the line for a principle in which he believed, that is that the federal courts should be available for vindication of the constitutional rights of property owners, just like other citizens with other constitutional issues.

As technology develops, the law may be coming full circle. The latest development in the field of land use is closely related to the place where I began: invasive machinery flying overhead. In today’s argot: drones.<sup>46</sup> The fascinating thing about drones is that although the technology has changed to the point where an autonomous flying device can be held in one’s hand and controlled like a child’s toy, the legal issues raised are quite similar to the ones raised by manned aircraft all those decades ago. People worry about drones trespassing

---

43. *Kottschade v. City of Rochester*, 319 F.3d 1038 (8th Cir. 2003).

44. *Id.* at 1041.

45. See U.S. CONST. art. III. See Brief Amicus Curiae of the Honorable Steve Chabot, Chair, Subcommittee on the Constitution, Committee on the Judiciary, U.S. House of Representatives, in Support of Appellant Frank Kottschade in *Kottschade v. City of Rochester*, 124 S. Ct. 178 (2003) (explaining recent legislative efforts to reach a procedural solution to the ripeness problem, until they ended in filibusters; he asked the Court for guidance and none was provided).

46. See Michael M. Berger, *Some Thoughts on Drones*, 30 PRAC. REAL EST. LAW., No. 5, Sept. 2014, at 57; Wendie L. Kellington & Michael M. Berger, *Why Land Use Lawyers Care About the Law of Unmanned Systems*, 37 ZONING & PLAN. L. REP., No. 6, June 2014, at 1.

on private property, spying on private individuals and the like. Issues of local and federal control are omnipresent. The law dealing with airplane nuisances is based on the premise that someone (almost always a government agency) will own and operate the airport from which the craft operate. Drone technology is different. Drones can be launched from your window, or your porch, or your back yard. Unless the government restricts their operational locale, which it has not done—yet. Thus, drones present as many issues of local land use and takings law as they do of federal regulatory law. This ride has just begun, but it will surely prove to be just as interesting as the ones that have gone before.

In concluding, we should at least note the rising wave of virtual reality and its impact on the real world. Heard of Pokémon GO? Unless you have been vacationing on Mars, you probably have. It is a generation beyond drones because it is not even real. And yet it is. How it will impact land use and takings law is something that I probably should leave to someone in the next generation to discuss. I am too technophobic even to think about it