REVERSING THE PRESUMPTION OF CONSTITUTIONALITY IN LAND USE LITIGATION: IS LEGISLATIVE ACTION NECESSARY?

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I. INTRODUCTION

For decades, courts protected land use regulation from constitutional attack by applying a presumption of constitutionality. Recent cases indicate the courts are no longer as willing to honor the presumption in land use litigation. They have identified interests they consider unprotected in the land use regulation process and protect these interests by reversing the presumption. This judicial development deserves applause.

A Commission on Housing appointed by President Reagan has proposed a more radical change in the presumption of constitutionality. The Commission studied land use regulation that affects the availability of housing and concluded that regulation often was too restrictive. To remedy this problem, its report recommended legislation that reverses the presumption in land use litigation. The Commission's model legislation provides that a zoning regulation "denying or limiting the development of housing" will be "deemed valid" only if "neces-

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sary to achieve a vital and pressing governmental interest."[1] The Commission also recommended that the governmental body have the burden to prove in litigation that it complies with this statutory standard.[2]

As compared with selective judicial reversal of the presumption, the Commission proposes a reversal of the presumption in land use cases through legislative action. This Article argues against adoption of the "vital and pressing" standard. It reviews cases in which courts have reversed the presumption and concludes the courts are capable of reversing the preemption when presumption reversal is necessary. The principal case in which they have not reversed the presumption is the case in which a developer challenges a land use regulation as a taking of property. Reversal of the presumption is not necessary in this case.

II. THE ORIGINS OF THE PRESUMPTION: *Carolene Products*

Although state courts are the primary interpreters of constitutional limits on land use law, a Supreme Court decision, *United States v. Carolene Products Co.*,[3] provides the basis for the presumption in constitutional law. In *Carolene Products*, the Court held that "the existence of facts supporting the legislative judgment is to be presumed."[4] Legislation affecting "ordinary commercial transactions" is not unconstitutional unless facts "made known or generally assumed" contradict the assumption that it rests upon a "rational basis" within legislative knowledge and experience.[5]

The Court qualified the presumption in a famous footnote.[6] It stated there may be a "narrower scope" for the presumption when legislation is within a specific constitutional prohibition, such as the first ten amendments. These amendments include the free speech clause,[7] which applies to land use regulation. The Court also stated it need not inquire whether "prejudice against discrete and insular minorities" also

1. THE REPORT OF THE PRESIDENT'S COMM'N ON HOUSING 200 (1982) [hereinafter cited as PRESIDENT'S COMM'N].

2. *Id.*

3. 304 U.S. 144.

4. *Id.* at 152.

5. *Id.*

6. *Id.* n.4.

7. "Congress shall make no law . . . abridging the freedom of speech, or of the press. . . ." U.S. CONST. amend. I.

calls "for a correspondingly more judicial inquiry."[8] As the Court's constitutional jurisprudence has developed, legislation affecting "discrete and insular minorities" receives more rigorous judicial review.[9] Land use regulation can fall within this category.

The *Carolene Products* footnote has dominated judicial review of the constitutionality of legislation for decades. The legislative "vital and pressing" standard recommended by the President's Commission is a direct attack on *Carolene Products*. The question is whether legislative reversal of the *Carolene Products* presumption is necessary in land use litigation.

III. JUDICIAL REVERSAL OF THE PRESUMPTION

The discussion that follows is a brief review of cases in which courts have reversed the presumption in land use cases, in fact if not in name. The discussion is not intended to be exhaustive. It indicates the wide range of land use cases in which the courts have provided more rigorous judicial review to protect "discrete and insular minorities" from restrictive land use regulation and to invalidate legislation that restricts basic constitutional rights.

This judicial revisionism has occurred in both the state and federal courts. It is by no means complete, and at the state level is limited to a few jurisdictions in some cases. That judicial revisionism is not complete should not argue against the ability of the courts to provide more vigorous judicial review in land use cases when they believe it is necessary.

A. *Racial Discrimination Cases*

Racial minorities are an obvious example of a "discrete and insular

8. 304 U.S. at 153 n.4.

9. Professor Ackerman has suggested that the *Carolene Products* footnote needs reformulation, primarily because it does not accurately distinguish groups disadvantaged in the political process who need constitutional protection. Ackerman, *Beyond* Carolene Products, 98 HARV. L. REV. 713 (1985). This article does not quarrel with Professor Ackerman's thesis, but concentrates on whether reversal of the presumption of constitutionality requires judicial or legislative action. The selective judicial reversal of the presumption of constitutionality that has occurred in land use cases is consistent with Professor Ackerman's reformulation of the *Carolene Products* footnote. *See also* Wonnell, *Economic Due Process and the Preservation of Competition*, 11 HASTINGS CONST. L Q. 91 (1985) (arguing against Supreme Court's abandonment of economic due process scrutiny of statutes that enforce monopoly conditions on lawful occupations)

minority" that may suffer legislative disadvantage in the land use regulation process.[10] The Court reversed the presumption to protect racial minorities in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*[11] It held that proof of a racially discriminatory intent in land use regulation violates the equal protection clause of the federal Constitution. Plaintiffs claimed a refusal to rezone by a practically all-white suburban municipality to allow the development of a federally-subsidized housing project was racially discriminatory. Although the Court did not uphold the racial discrimination claim in *Arlington Heights*,[12] and although the decision makes proof of racial discrimination in land use cases difficult, the Court held that the presumption of constitutionality is reversed when a racially discriminatory purpose is shown.[13]

The presumption is reversed in an important footnote.[14] The footnote states that proof of partial racial motivation shifts to the municipality "the burden of establishing that the same decision would have resulted even had the impermissible purpose not been considered."[15] The Court's presumption reversal in racial discrimination land use cases has doctrinal problems,[16] but follows the *Carolene Products* footnote by isolating land use regulation affecting "discrete and insular" racial minorities for more rigorous judicial review. Legislative racial discrimination violates the Equal Protection clause. It survives constitutional attack only if the municipality can show the discrimination is justified by a compelling governmental interest, which the courts seldom find.

B. *State Exclusionary Zoning Cases*

Racially discriminatory zoning is exclusionary because suburban municipalities use it to exclude racial minorities. Suburban zoning is exclusionary without necessarily being racially discriminatory if subur-

10. *But see* Ackerman, *supra* note 7.

11. 429 U.S. 252 (1977). *See* Mandelker, *Racial Discrimination and Exclusionary Zoning: A Perspective on* Arlington Heights, 55 TEX. L. REV. 1217 (1977).

12. 429 U.S. at 270-71.

13. *Id.* at 270 n.21.

14. *Id.*

15. *Id.*

16. *See, e.g.*, Calmore, *Fair Housing and the Black Poor: An Advocacy Guide*, 18 CLEARINGHOUSE REV. 609, 645 (1984) (same decision test invites after-the-fact rationalization that is no more than a pretext).

ban municipalities adopt land use regulations that restrict housing opportunities for lower income groups. Some state courts have struck down suburban exclusionary zoning in cases in which racial discrimination was not an issue.[17] These decisions applied substantive due process or equal protection provisions in state constitutions or "general welfare" provisions in zoning enabling statutes to require suburban zoning to provide housing opportunities for lower income groups.

State cases invalidating exclusionary zoning sometimes reverse the presumption of constitutionality. As the New Jersey Supreme Court held in a landmark exclusionary zoning case, municipalities must provide zoning opportunities to meet their fair share of regional housing needs. This duty includes a "presumptive obligation" to "affirmatively" provide a "reasonable opportunity" for low and moderate cost housing through land use regulation.[18] The "presumptive obligation" must be met "unless the particular municipality can sustain the heavy burden of demonstrating peculiar circumstances which dictate that it should not be required to do so."[19] New York also requires municipalities to meet regional housing needs. The presumption is reversed once an exclusionary effect together with a failure to balance local desires with regional housing need is shown.[20]

C. *Free Speech Cases*

The Supreme Court's decision to extend the free speech clause to commercial speech[21] opened the way for applying this clause to land use regulations. The Court has applied the free speech clause to land use regulations restricting billboards and adult sex businesses.[22] In

17 The New Jersey Supreme Court has taken the strongest position against suburban exclusionary zoning. *See* Southern Burlington NAACP v. Township of Mount Laurel, 92 N.J. 158, 456 A.2d 390 (1983) (*Mount Laurel* II). Decisions invalidating or expressing opposition to suburban exclusionary zoning have also been handed down in California, New York and Pennsylvania. *See* D. MANDELKER, LAND USE LAW §§ 7.11-7.18, 7.20 (1982 & Supp. 1985) [hereinafter cited as LAND USE LAW].

18. Southern Burlington NAACP v. Township of Mount Laurel, 67 N.J. 151, 179, 336 A.2d 713, 727-28, *appeal dismissed and cert. denied*, 423 U.S. 808 (1975) (*Mount Laurel* I).

19. *Id.*

20. Robert E. Kurzius, Inc. v. Incorporated Village of Upper Brookville, 51 N.Y. 2d 338, 345, 414 N.E.2d 680, 683-84, 434 N.Y.S.2d 180, 183-84 (1980), *cert. denied*, 450 U.S. 1042 (1981). *See generally* Berenson v. Town of New Castle, 38 N.Y.2d 102, 341 N.E.2d 236, 378 N.Y.S.2d 672 (1975).

21. Bigelow v. Virginia, 421 U.S. 809, 818 (1975).

22. LAND USE LAW, *supra* note 12, at §§ 5.38-5.40, 11.9-11.11.

these cases, the Court has frequently reviewed the constitutionality of legislation restricting commercial speech under criteria it adopted in *Central Hudson Gas & Electric Co. v. Public Service Commission*.[23] These criteria require that commercial speech not be misleading and that it must concern a lawful activity. The government interest in regulation must be substantial. If both these requirements are met, government regulation must directly advance the governmental interest asserted and must not be more extensive than necessary to serve that interest.

A reference to the statement of the presumption in *Carolene Products*[24] indicates the *Central Hudson* criteria for legislation restricting commercial speech accomplish a presumption reversal. *Carolene Products* asks only whether facts generally assumed support the legislative judgment. *Central Hudson* requires government regulation of commercial speech to directly advance a legitimate governmental interest in the least restrictive manner.[25]

This reversal of the presumption allows the Court to examine substantive due process and equal protection objections to land use regulations restricting commercial speech more rigorously. The legitimacy of a governmental purpose in land use regulation, for example, usually is resolved under the due process clause as a problem in substantive due process. The *Central Hudson* criteria convert the substantive due process inquiry into a free speech inquiry with the presumption reversed. *Metromedia, Inc. v. City of San Diego*[26] is an example. As part of its holding, the plurality opinion applied the *Central Hudson* criteria that regulations restricting commercial speech must directly advance a legitimate governmental interest in the least restrictive manner.[27] It held that a prohibition in the ordinance on commercial billboards met these criteria because it was justified by traffic safety and aesthetic considerations. Without the free speech overlay, courts usually reject substantive due process objections to a billboard prohibition by applying the presumption of constitutionality. *Metromedia* upheld the billboard prohibition, but only because the Court was satisfied the prohibition was justified with the presumption reversed. The Court did strike

23. 447 U.S. 557, 566 (1980).

24. *See* text accompanying notes 3-8.

25. *See* Mandelker, *The Free Speech Revolution in Land Use Control*, 60 CHI-KENT L. REV. 51 (1984).

26. 453 U.S. 490 (1981).

27. *Id.* at 507.

down the ordinance, but only because it found other restrictions in the ordinance that violated the free speech clause.[28]

D. *Unrelated Family and Group Home Cases*

Zoning ordinances that exclude unrelated families and group homes from residential districts invite presumption reversal. Unrelated families and individuals who live in group homes qualify as "discrete and insular" minorities. Their life style is different from the family life style contemplated in zoning districts dedicated to single family living. Group homes usually are established for the mentally retarded, the mentally disabled, and other disadvantaged groups. The life style of the unrelated family does not match the life style of the related nuclear family.

In *Village of Belle Terre v. Boraas*,[29] the Supreme Court upheld a municipal ordinance limiting the size of unrelated families against due process and equal protection objections by applying the presumption of constitutionality. Some state courts have not followed *Belle Terre*.[30] A California case, *City of Santa Barbara v. Adamson*,[31] is an example. Relying on a right of privacy guaranteed by the state constitution, the court applied an ends-and-means analysis similar to strict scrutiny equal protection review. It invalidated a zoning ordinance allowing no more than five unrelated persons to live together.

A number of state courts have also invalidated zoning restrictions on group homes, usually avoiding constitutional questions by holding these homes were permitted as a "family" use under the zoning ordinance.[32] In *City of Cleburne v. Cleburne Living Center*,[33] the Supreme Court invalidated a special use permit denial for a group home for the mentally retarded in a multifamily zoning district. The Court's decision was narrow. It refused to hold the mentally retarded were a quasi-suspect class entitled to heightened middle tier judicial review under

28. *Id.* at 521.

29. 416 U.S. 1 (1974).

30. LAND USE LAW, *supra* note 12, at § 5.3.

31. 27 Cal.3d 123, 610 P.2d 436, 164 Cal. Rptr. 539 (1980). *See also* State v. Baker, 81 N.J. 99, 405 A.2d 368 (1980).

32. LAND USE LAW, *supra* note 12, at § 5.5.

33. 105 S.Ct. 3249 (1985). For discussion of this case, see *The Supreme Court—Leading Cases*, 99 HARV. L. REV. 120, 161 (1985). *See also* Conner, *Zoning Discrimination Affecting Retarded Persons*, 29 WASH. U.J. OF URB. & CONTEMP. LAW 67 (1985).

the equal protection clause.[34] This holding would partly have reversed the presumption of constitutionality. Neither did the Court invalidate the zoning ordinance provision that required the special use permit.

What the Court did was to apply the relaxed rational relationship standard of equal protection judicial review it applies to legislation affecting economic interests. The Court applied this relaxed standard to hold the permit denial unconstitutional.[35] This holding is even more startling than a holding that middle tier equal protection review applies to the mentally retarded as a quasi-suspect class.[36] The Court has rarely applied the rational relationship standard to invalidate legislation under the equal protection clause. That it did so in *Cleburne* shows it may be taking the presumption of constitutionality less seriously, at least when land use regulation affects "discrete and insular minorities."[37]

This conclusion holds even though the Court's decision in *Cleburne* is limited. The special use requirement was blatantly arbitrary because it did not apply to similar group homes and because the reasons given by the city for denying the special use permit were not legitimate zoning reasons.[38] Even so, *Cleburne* may signal a change in the application of the presumption when a zoning ordinance restricts or excludes unwanted land uses that have minority status.

IV. THE DEVELOPER'S CASE: SHOULD A PRESUMPTION REVERSAL BE LEGISLATED?

This review of the cases indicates that courts have reversed the presumption of constitutionality when fundamental rights are restricted or "discrete and insular" minorities are disadvantaged by land use regula-

34. *See* Craig v. Boren, 429 U.S. 190 (1976) (classifications by gender must serve "important" governmental objectives and must be "substantially" related to achievement of those objectives).

35. A footnote to the Court's decision indicates it believes *Belle Terre* is still good constitutional law. *Cleburne*, 105 S.Ct. at 3254 n.8. This reaffirmance of *Belle Terre* is surprising. Zoning restrictions affecting unrelated families are as suspect as zoning restrictions affecting group homes.

36. For a state decision decided before *Cleburne* and holding in a group home case that the mentally retarded are a quasi-suspect class see Clark v. Manuel, 463 So.2d 1276 (La. 1985).

37. *See also* Town of Chesterfield v. Brooks, 126 N.H. 64, 489 A.2d 600 (1985) (holding middle-tier equal protection judicial review applies to all zoning regulations).

38. For example, one reason for denying the permit was the fears of neighbors concerning the group home residents. 105 S.Ct. at 3259.

tion. In what other cases would adoption of the legislative "vital and pressing" standard reverse the presumption? The clear case is one in which a developer owns land subject to a restrictive land use regulation and would like to develop his land for a more intensive use. The constitutional clause that protects the landowner in this situation is the taking of property clause.[39] Developers who believe a land use restriction is too restrictive can bring an action claiming it is a taking of property.

An explicit presumption does not apply under taking law as developed by the Supreme Court. The Court applies a number of taking "factors" that do not add up to a "set formula."[40] Although these factors are presumptively neutral and do not favor either government or developer, the Court has applied them in most cases to uphold land use regulation against taking claims.[41] Because the courts have selectively reversed the presumption when more rigorous review of land use regulation is required, the real argument of "vital and pressing" standard advocates is with judicial interpretation of the taking clause. Legislative adoption of this standard would effectively repeal the taking clause as it is now interpreted. The question is whether legislative repeal of taking jurisprudence to favor developers in land use litigation is necessary. Does the developer need protection in the political process in which land use regulations are adopted and administered? If he does, are there more acceptable alternatives to provide this protection that do not require a wholesale revision of taking jurisprudence?

An evaluation of the developer's need for protection requires an examination of the parties in interest in land use regulation and their ability to protect themselves from unfavorable political decisions in the land use regulation process.[42] Three parties in interest can be identified. The first is the developer who objects to a land use restriction that prohibits development he would like to carry out. The second are neighboring landowners who object to a zoning amendment granted to a developer and who bring an action to have it invalidated. The third

39. "No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." U.S. CONST. amend. V.

40. These factors are most fully elaborated in Penn Central Transp. Co. v. City of New York, 438 U.S. 104 (1978).

41. LAND USE LAW, *supra* note 12, at §§ 2.13-2.20.

42. For a more extensive discussion of the participants in the land use process see Williams, Smith, Siemon, Mandelker & Babcock, *The White River Junction Manifesto*, 9 VT. L. REV. 193, 199-208 (1984).

are racial and lower income minorities who are excluded from a community by exclusionary zoning ordinances.

Which of these parties is most in need of protection through presumption reversal? Excluded third-party minorities have no political voice in the land use regulation process of the exclusionary community and clearly qualify. Some courts, as noted earlier, protect third-party minorities by invalidating exclusionary zoning and by reversing the presumption of constitutionality.

Neighbors who wish to challenge rezonings for developers face difficulties in bringing court actions because they are usually unorganized and without resources. Unlike third-party minorities, neighboring landowners who challenge rezonings for developers have not had the presumption of constitutionality fully reversed. Neighbors are helped only by the judicial doctrine governing "spot zoning," the term given to a zoning amendment that changes a zoning regulation to permit a development a developer would like to carry out. The spot zoning rules do not entirely reverse the presumption of constitutionality, although they require the municipality to justify the zoning amendment in court.[43] Only Oregon reversed the presumption in spot zoning cases by characterizing zoning amendments as a quasi-judicial action and by shifting the burden to justify the change to the municipality.[44]

Although developers are sometimes subject to abuse in the land use regulation process, most observers believe they are least in need of protection in that process. Most communities welcome development, and gladly work with developers to adopt zoning ordinances and provide zoning amendments that will allow development to proceed. Unlike neighboring property owners and third-party minorities, developers participate actively in the local political process, where they usually are heavy campaign contributors. To the extent developers face problems in the land use regulation process, reforms in that process can protect them without requiring the radical reversal in land use law the vital and pressing standard would legislate.

The Report of the President's Commission does not justify the vital and pressing standard by the need to protect either third-party minorities who challenge exclusionary zoning, or neighboring property owners who challenge zoning amendments for developers. The Commission's Report justifies the standard by the need to "protect

43. LAND USE LAW, *supra* note 12, at §§ 6.23-6.27.

44. Fasano v. Board of County Comm'rs, 264 Ore. 574, 507 P.2d 23 (1973).

property rights and to increase the production of housing and lower its cost."[45] Both justifications indicate the presumption reversal legislated by the vital and pressing standard applies to developer litigation challenging restrictive zoning. This type of litigation protects the property rights of developers in the development of their property. It also aids the production of housing and lower housing costs because a court decision invalidating a restrictive zoning regulation makes more land available for housing development.

The vital and pressing standard could apply to litigation by third-party minorities who challenge exclusionary zoning, but the courts have been able to reverse the presumption in these cases without legislative assistance. The vital and pressing standard does not apply to litigation by neighbors who challenge rezonings for developers, and the Commission's statement of statutory intent indicates it should not apply in these cases. Reversing the presumption in cases challenging rezonings for developers restricts rather than protects property rights. It could also make housing less available and more costly if the rezoning was for more intensive housing development, such as multifamily housing. The presumption reversal legislated by the vital and pressing standard clearly is intended to apply primarily to litigation by developers challenging restrictive zoning regulations.

V. IF THE DEVELOPER NEEDS PROTECTION, HOW SHOULD THIS BE DONE?

Although developers are least in need of protection in the land use regulation process, they may be subject to abuse because of the way in which the zoning process is conducted. The local governing body adopts zoning amendments and the zoning amendment process usually is undisciplined. If the rezoning process is held to be legislative, the governing body need not provide adjudicative procedures, adopt standards for its decisions, or provide reasons if it denies a rezoning application. The developer cannot challenge the municipality's case against his rezoning through cross-examination before the governing body. He cannot appeal the governing body's decision if the rezoning is denied. His only recourse is to challenge the existing restrictive zoning as a taking of property.

Even if the developer secures a zoning amendment, he is at risk in the political process if the political composition of the governing body

45. PRESIDENT'S COMM'N, *supra* note 1.

changes. The new governing body may oppose his development and may revoke or modify the rezoning. A developer is protected against a zoning change only if he can claim a vested right or a zoning estoppel. Under the majority rule, a developer can claim a vested right or an estoppel only if he relies in good faith on a building permit by making substantial expenditures on his development.[46] Unfortunately, a developer may be unable to protect himself in this manner if a political change on the governing body occurs soon after he obtains a zoning amendment, especially if his development is a major one and will take a long time to complete.

A developer who is unhappy with a zoning amendment denial or a change in the zoning regulations may always litigate in court, where he may be successful. Successful litigation may still not give him what he wants. Most courts will not order affirmative relief requiring the municipality to adopt a zoning amendment allowing him to proceed with his development.[47] Only a few jurisdictions make affirmative relief of this kind available to the successful litigating developer.[48]

All of these problems are very real and require attention, but none are addressed by the legislative vital and pressing judicial review standard. Alternative reforms in the land use regulation process can remedy this set of problems and protect the developer from unfair decision making by zoning agencies. These reforms revise the decision making process in which zoning decisions are made rather than the substantive standards courts apply when reviewing zoning regulations. They also revise the remedies available in developer litigation.

Reforms of the decision making process are not difficult to implement and have been available for some time. The decision making process in land use regulation would be improved substantially if courts or state legislatures required zoning decisions to comply with the policies of the comprehensive plan and required quasi-judicial procedures for zoning amendments. These procedures would allow developers the right of cross-examination and would require governing bodies to state the reasons for their decisions in writing. Some states have adopted legislation that protects developers who receive final approval of a project from restrictive changes in land use regulations for a period of time.[49] Legislation also can be adopted providing an affirmative devel-

46. LAND USE LAW, *supra* note 12, at §§ 6.11-6.20.

47. *Id.* at § 8.17.

48. *Id.* at § 8.18.

49. *Id.* at § 6.21.

oper's remedy in land use litigation and courts holding the majority view that an affirmative remedy is not available can change their position. All of these reforms would help protect developers in the land use regulation and litigation process and none require modification or repeal of the presumption of constitutionality.

VI. CONCLUSION

The presumption of constitutionality reflects the judicial assumption that the political process can discipline decision making in land use regulation. The *Carolene Products* footnote would reverse the presumption only when land use regulation restricts the exercise of fundamental rights, such as the right of free speech, or when it disadvantages "discrete and insular minorities." Presumption reversal is justified in these cases. Many courts have followed the *Carolene Products* footnote by reversing the presumption in cases of this kind. Judicial willingness to reverse the presumption of constitutionality when reversal is required shows that legislative reversal in all land use litigation is not necessary.

Because developers do not qualify for more heightened judicial protection under the *Carolene Products* footnote, they are the principal beneficiaries of a vital and pressing standard that reverses the presumption in land use litigation. Developers sometimes are at risk, not because land use regulation enjoys a presumption of constitutionality, but because the decision making and litigation process can be unfair to them. Reforms in the decision making and litigation process can protect developers from unfair decision making. None of these reforms requires reversal of the presumptions of constitutionality. The case for the vital and pressing judicial review standard has not been made.