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Constitutional Issues in the Environmental Regulation of Real Property

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CONSTITUTIONAL ISSUES IN THE ENVIRONMENTAL REGULATION OF REAL PROPERTY*

By FRED P. BOSSELMAN

It wasn't very many years ago when the average real property practitioner didn't even own a set of the Federal Decisions, much less a copy of the United States Code or the Code of Federal Regulations. Since then we have seen what Professor Donald Hagman has called the "quiet federalization" of land use law. As federal issues have become more deeply involved in real property matters, the activities of the United States Supreme Court have become more and more relevant to real property practitioners. This was especially evident this past term when the Supreme Court showed a far greater degree of involvement in decisions affecting real property than in any previous term in its history.

Probably the most interesting constitutional issue, before the Court for argument next fall and decisions during the next term, involves the right of Congress to insist that the states impose transportation and land use controls to meet air quality standards. Four of the circuits split on the question of whether the imposition of such requirements violates states rights under the Tenth Amendment, thereby reviving what had been a dead issue under the Warren Court and its predecessors to New Deal days.

The Court gave some indication of its deep split on the issue in a decision issued at the end of the current term.[1] In this case the states challenged the 1974 amendments to the federal Fair Labor Standards Act, which made all of the Act's requirements applicable to employees of state and local governments. The Supreme Court held the federal statute invalid, stating:

> There are attributes of sovereignty attaching to every state government which may not be impaired by Congress, not because Congress may lack an affirmative grant of legislative authority to reach the matter, but because the Constitution prohibits it from exercising the authority in that manner.[2]

The majority opinion, speaking for four Justices, held that the imposition of a minimum wage on state and local employees would impair the states' ability to function effectively within a federal system and restrict the states' power to exercise functions essential to separate independent existence.

Justice Blackmun concurred in the result, but said:

> I may misinterpret the Court's opinion, but it seems to me that it adopts a balancing approach, and does not outlaw federal power in areas such as

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*Based upon presentation to the Real Property Division, at Atlanta, Georgia on August 10, 1976.

[1]National League of Cities v. Usery, 96 S. Ct. 2465 (1976).

[2]*Id.*, 2471.

> environmental protection, where the federal interest is demonstrably greater and where state facility compliance with imposed federal standards would be essential.[3]

Mr. Justice Brennan, speaking for himself, and Justices White and Marshall, issued a stinging dissent, saying among other things:

> Today's repudiation of this unbroken line of precedents that firmly reject my brethren's ill conceived abstraction can only be regarded as a transparent cover for invalidating a congressional judgment with which they disagree.[4]

The result, Brennan said, is "a catastrophic judicial body blow at Congress' power under the Commerce Clause." Finally, Mr. Justice Stevens dissented in a brief opinion of his own. In the course of his dissent he cited many activities of state government that he thought the federal government could regulate, including the amount of soft coal burned in the state capitol furnace.

This strong split in the Court suggests that the outcome of cases involving the power to require the states to impose land use and transportation controls under the clean air act will be similarly heated. Justice Blackmun's separate opinion indicates that he might have agreed with the dissent if the issue were one of environmental regulation. The upcoming cases do not, however, involve mere efforts of the federal government to require the states to comply with environmental regulations; rather, the federal statute requires the states to adopt and enforce its own regulations of private citizens in order to achieve federal goals. The circuit courts that held this requirement invalid pointed out that the federal government had power to authorize the EPA to impose these regulations directly, but that the statute was in effect requiring the states to do the federal government's dirty work for it. If the federal statute is held unconstitutional for this reason, it will force Congress to further reexamine the Clean Air Act, thus disturbing a series of hard-fought compromises reached in the current Congress.

During the past term the Supreme Court considered three cases in which local regulations of real property were attacked as unconstitutional on three separate grounds. In each case the local government's position was upheld. Because in each of the three fact situations the regulations seemed rather arbitrary, one is led to the conclusion that the Supreme Court is unwilling to get involved with local regulations of real property.

The first of the cases is *Young v. American Mini-theatres, Inc.*, decided June 24, 1976.[5] This case involved a zoning ordinance of the city of Detroit, which sought to regulate "adult theatres," defined as theatres presenting "material distinguished or characterized by an emphasis on matter depicting, describing or related to specified sexual activities or specified anatomical areas." The ordinance prohibited the location of adult theatres within 1,000 feet of any two other regulated uses (which includes taverns, hotels, and adult book stores) or within 500 feet of a residential area. Speaking for the majority, Justice Stevens defined the

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[3]National League of Cities v. Usery, 96 S. Ct. at 2476 (1976).
[4]*Id.* at 2481.
[5]96 S. Ct. 2440 (1976).

principal issue as whether the statutory classification is unconstitutional because it is based on the content of communication protected by the First Amendment. Thus, the majority treated this primarily as an obscenity case and concluded that this type of pornographic activity, while protected under the First Amendment, had something of a second-class status, stating:

> Even though the First Amendment protects communication in this area from total suppression, we hold that the state may legitimately use the content of these materials as the basis of placing them in a different classification from other motion pictures.[6]

Having reached that decision, they then concluded that the regulation was clearly valid because the city could have imposed the same requirement on all movie theatres if it had chosen to do so. ". . . the City's interest in attempting to preserve the quality of urban life," said Justice Stevens, "is one that must be accorded high respect."[7]

Justice Powell concurred in parts of the Stevens' opinion, but viewed the case primarily as a test of the constitutionality of a zoning regulation. "The constraints of the ordinance with respect to location may indeed create economic loss for some who are engaged in this business. But in this respect they are affected no differently than any other commercial enterprise that suffers economic detriment as a result of land use regulation. The cases are legion that sustain zoning against claims of serious economic damage." He went on to distinguish a decision from the previous term holding invalid an ordinance of the city of Jacksonville prohibiting the showing of films containing nudity by drive-in theaters.[8] He said that the Jacksonville ordinance was not part of a comprehensive zoning ordinance, but a specific ordinance designed to regulate nuisances, "a misconceived attempt directly to regulate content of expression. The Detroit zoning ordinance, in contrast, affects expression only incidentally and in furtherance of governmental interests wholly unrelated to the regulation of expression."[9] Four Justices dissented in two opinions; one by Justice Stewart strongly criticizing Stevens' new policy of giving pornographic speech a second-class status, and a second by Justice Blackmun holding the ordinance invalid on the ground of vagueness.

The fact that the Court was willing to uphold this obviously nonsensical regulation designed to discriminate against adult movie houses, and that the Court did not require any sort of justification for the city's decision that 1,000 feet was necessary to separate the uses, indicates a clear disposition on the part of all of the Justices to avoid involvement in this type of local controversy even though its effects can be quite serious.

This attitude of the Court was buttressed by its decision the following day in *City of New Orleans v. Dukes.*[10] This case involved a challenge to a local ordinance that on its face seemed even more arbitrary than the Detroit ordinance. The New Orleans city council had prohibited the sale

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[6]96 S. Ct. at 2452.
[7]96 S. Ct. at 2453.
[8]Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975).
[9]96 S. Ct. at 2458.
[10]96 S. Ct. 2513 (1976).

of foods from pushcarts in the French Quarter, but provided an exemption for "vendors who have continually operated the same business within the area for 8 years prior to January 1, 1972." At that time there were only three pushcart operators in the French Quarter; two who had been there over 8 years and a third, Nancy Dukes, who had been there only 2 years.

Nancy Dukes challenged the ordinance as violating her rights under equal protection of the law. The Fifth Circuit ruled in her favor, but the Supreme Court reversed in a per curiam opinion, saying:

> The record makes abundantly clear that the amended ordinance, including the 'grandfather provision,' is solely an economic regulation aimed at enhancing the vital role of the French Quarter's tourist-oriented charm in the economy of New Orleans. When local economic regulation is challenged solely as violating the equal protection clause, this Court consistently defers to legislative determinations as to the desirability of particular statutory discriminations. Unless a classification trammels fundamental personal rights or is drawn upon inherently suspect distinctions such as race, religion, or alienage, our decisions presume the constitutionality of the statutory discriminations and require only that the classification challenged be rationally related to a legitimate state interest. . . . In the local economic sphere, it is only the invidious discrimination, the wholly arbitrary act, which cannot stand consistently with the Fourteenth Amendment.[11]

The Court of Appeals had found that there was "no rational basis" for distinguishing between the two pushcart operators, but the Supreme Court disagreed. "The City could rationally choose initially to eliminate vendors of more recent vintage. This gradual approach to the problem is not constitutionally impermissible." The city could have concluded, the Court said, "that newer businesses were less likely to have built up substantial reliance interests in continued operation" in the French Quarter than the two pushcart operators who had been operating in the area for over 20 years and "had themselves become part of the distinctive character and charm that distinguishes" the French Quarter.

Although neither the Detroit nor New Orleans cases involved regulations that use the term "environmental," they were both upheld by the Court on the ground that local regulations designed to maintain existing environmental qualities of the neighborhood were entitled to a very strong presumption of validity. Obviously the Court must have been aware of the risk that the powers upheld in these two cases could be easily abused. In neither case, however, did any member of the Court express serious concern about the effect of this type of regulation on property rights.

The third case upholding a challenge to local regulation of real property was *City of Eastlake v. Forest City Enterprises, Inc.*[12] The city charter of the city of Eastlake, Ohio required that "any change to the existing land uses or any change whatsoever to any ordinance" should not take effect until "the same be approved by a 55 percent favorable vote of all votes cast of the qualified electors of the City of Eastlake at the next

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[11]96 S. Ct. at 2516.

[12]96 S. Ct. 2358 (1976).

regular municipal election . . . or at a special election falling on the generally established day of the primary election . . . ." The Ohio Supreme Court had held this charter provision invalid as a violation of the Fourteenth Amendment due process clause, but the Supreme Court reversed and held the charter provision valid, with Justices Powell, Stevens and Brennan dissenting.

Plaintiff had eight acres zoned for light industrial use and sought rezoning to high density residential. The council approved his request but the voters failed to pass it at the referendum. Plaintiff argued that this was an invalid delegation of authority to the voters by the city council without any appropriate standards. The Court in an opinion by the Chief Justice said that no delegation was involved. "We deal with a power reserved by the people to themselves." The city could not validly delegate the legislative power to "a narrow segment of the community" through procedures such as frontage consents, said the Court, but such procedures are "not to be equated with decision-making by the people through the referendum process." The Court relied heavily on its decision in *James v. Valtierra*[13] upholding a mandatory referendum requirement for public housing in California. In that case Mr. Justice Black had said that the referendum procedure was a classic demonstration of devotion to democracy.

The *Eastlake*[14] decision again demonstrates the Court's unwillingness to get involved in local disputes over the use of real property. The Chief Justice noted that it was only the procedure that was being challenged and not the substantive result. "There is, of course, no contention in this case that the existing zoning classification renders respondent's property valueless or otherwise diminishes its value below the value when respondent acquired it." The Court made clear that "if the substantive result of the referendum is arbitrary and capricious, bearing no relation to the police power, then the fact that the voters of Eastlake wish it so would not save the restriction." However, in view of the decisions upholding the Detroit and New Orleans regulations despite their apparent capriciousness, it is apparent that the Court's determination of what is arbitrary and capricious is heavily weighted in favor of the local government.

Indirectly the Court also dampened the hopes of civil rights activists wishing to challenge exclusionary land use regulations. In a case upholding civil service examinations for policemen in the District of Columbia, the Court held that the mere fact that more black applicants failed the tests than white applicants could not create a presumption that the tests were racially biased.[15] However, in dicta the Court went far beyond the holding of the decision. In a footnote it cited a series of lower court decisions that ". . . rested on or expressed the view that proof of discriminatory racial purpose is unnecessary in making out an equal protection violation. . ."[16] and expressed its disagreement with that principle. The cases cited in the footnote included most of the major exclusionary

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[13]404 U.S. 811 (1970).
[14]96 S. Ct. 2358 (1976).
[15]Washington v. Davis, 96 S. Ct. 2040 (1976).
[16]96 S. Ct. at 2050, footnote 12.

zoning decisions in the federal circuit courts, and in particular included *Metropolitan Housing Development Corporation v. Village of Arlington Heights.*[17] This case will give the Court an opportunity to expound further on its views, but attorneys for the property owner are not optimistic. It is an unenviable position to be forced to argue a case that the Court has implicitly overruled in a footnote in the previous term. In any event the Court's attitude is certainly consistent with its decisions in the environmental area. The moral for property owners is apparently to stay on good terms with the city council!

The Court also issued a number of significant opinions involving major federal environmental legislation. Most of these opinions dealt with the NEPA and not specifically with constitutional issues. They are relevant, however, since the National Environmental Policy Act has apparently obtained a sort of quasi-constitutional status not dissimilar from that of the Sherman Act. That is to say, its simple language has become so sacrosanct politically that Congress is afraid to tamper significantly with it.

The Court issued two very significant opinions in the interpretation of NEPA. The first was *Flint Ridge Development Co. v. Scenic Rivers Association of Oklahoma.*[18] Here the Court held that the Secretary of HUD did not need to prepare an environmental impact statement before granting approval of a registration statement filed under the Interstate Land Sales Full Disclosure Act. The Court found that the Disclosure Act gave the Secretary no discretion to delay approval of a statement beyond thirty days. The Court said that "it is inconceivable that an environmental impact statement could, in thirty days, be drafted, circulated, commented upon, and then reviewed and revised in light of the comments." Given the impossibility of preparing an impact statement within a thirty-day period, the Court held that where a clear and unavoidable conflict in statutory authority exists, NEPA must give way.

In its final environmental decision of the term, *Kleppe v. Sierra Club,*[19] the Court rejected a challenge by the Sierra Club and other environmental groups to the Interior Department's procedures for preparing environmental impact statements on coal mining in Montana. The Interior Department had decided to prepare a national program impact statement and then to prepare detailed environmental impact statements for each individual coal mine. The environmental groups argued that the national Environmental Policy Act required the preparation of a "regional impact statement" that would review the environmental impact of mining on the northern Great Plains region. The District of Columbia Court of Appeals ruled in favor of the environmental groups and established a four-part test for reviewing the appropriateness of the scope of environmental impact statements.

The Supreme Court, however, disagreed and held that the Interior Department's decision to prepare a national impact statement and local impact statements was consistent with the statutory requirements. The implication in the Court's decision is rather broad. First, the opinion

[17] 517 F.2d 409 (1975), *cert. granted,* 96 S. Ct. 560 (1976).
[18] 96 S. Ct. 2430 (1976).
[19] 96 S. Ct. 2718 (1976).

strongly chastised the Court of Appeals for departing from the statutory language and asserting judicial authority to determine the "point during the germination process of a potential proposal at which an impact statement should be prepared." The Supreme Court suggests that it would leave the judgment wholly in the hands of the Interior Department. However, dicta in the opinion stated that NEPA clearly required the preparation of the national impact statement on the coal leasing program, which the Interior Department had already conceded. Therefore an agency's decision to prepare no impact statement at all might be scrutinized rather closely by the Court.

Justices Marshall and Brennan dissented in part. In an interesting footnote Justice Marshall said he distinguished the *Flint Ridge* case[20] because it involved a private developer's application: "Flint Ridge concerned federal approval of private action rather than federal initiation of its own project, at issue here. . . . When the Federal agency is initiating its own proposal, NEPA is more demanding."

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[20]Flint Ridge Development Co. v. Scenic Rivers Association of Oklahoma, 96 S. Ct. 2430 (1976), *supra* note 18.