DISCRETIONARY LAND USE CONTROLS

Avoiding Invitations to Abuse of Discretion

VARIANCES
SPECIAL USE PERMITS
FLOATING ZONES
PLANNED UNIT DEVELOPMENT
SITE PLAN REVIEW
DEVELOPMENT AGREEMENTS
DESIGN REVIEW
CONDITIONAL ZONING

Brian W. Blaesser

Discretionary Land Use Controls

Avoiding Invitations to Abuse of Discretion

by Brian W. Blaesser

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To Grażyna, Brandon, Alan,
and my parents

Foreword

Brian Blaesser's timely book is important and unique because it explains to those people moving through the American land use system the practical ways of successfully dealing with government's discretionary land use controls. This book is necessary because the author has seen it all. So, too, I suspect, has the reader. We all have, though we may not always wish to admit it. We've seen the planning commission staffer who bends the application of an environmental guideline to the breaking point, even though it drives up the cost of middle-class housing in a proposal that comports with all aspects of the master plan, zoning ordinance, and subdivision regulations. We've encountered the developer who seeks a commercial rezoning by promising to abide by a master plan's buffer area height limit and then, once the site is rezoned, returns a few years later and convinces a pliant local council that only by quadrupling the allowed height on his site will commercial development be desirable. And we've come across the elected or appointed officials who render a land use decision based not on the facts and law before them but on the volume of the voters in the hearing room.

Land use is political because it's all about where and how people will live, work, and play. Therefore, we need land use controls to set out the rules of the game. Problems arise, however, when the rules are either so vague as to mean virtually anything, opening the door wide to arbitrariness and lack of predictability, or so strict as to become a substitute for thought and judgment. Land use becomes land abuse when vagueness or strictness of the rules leads to absurd or unfair results.

Brian Blaesser's step-by-step critique on how to avoid abuse by government is a welcome antidote to the too-frequent tendency of planning and zoning officials to let the discretionary nature of certain land use controls get the best of them. By explaining in plain terms the proper and improper ways of applying such standard legal techniques as special uses, floating zones, site plan reviews, and the like, the author conveys not only the rules through real world examples but also the sense of

the law.

Everyone in the land use game's iron triangle-property owner (or developer), neighbor (or community group), and government (local, state, or federal)-needs to be reminded that we need written law for a reason: to provide sufficient certainty and consistency in the relations among the triangle's members. Think of the iron triangle as the engine driving the land use machine. Discretion is the oil necessary to keep the engine, fueled by the law, running smoothly. Too little discretion, and the engine grinds to a halt; too much, and it becomes a slippery mess. Only through accountability of each member of the triangle to the other two can discretionary land use controls be kept in good running order.

In the end, it is the Constitution that ensures accountability. Unlike guidelines, regulations, ordinances, and statutes, Constitutions (federal and state) are not easily amended. And unlike most other rules and laws, Constitutions not only establish balance among governmental branches but also, most importantly, make clear that individual rights are not subservient to the state or the majority will. The Due Process and Takings Clauses, like the rest of the Bill of Rights, have one overarching aim-to protect the individual from abuse by government. As Justice Brennan reminded us in a land use case in 1981, if a policeman must know the Constitution, then why not a planner?

The government may dislike the Takings Clause, the developer may dislike the government, and the neighbor may dislike the developer, but each member of land use's iron triangle has at least one thing in common-they must abide by the Constitution. After all, the Constitution was never meant to make things easy; it was meant to make things right.

In Brian Blaesser's book, developers and planners are provided a clear guide through the discretionary thicket. He explains how discretionary land use techniques, case examples, and the law intersect in the work-a-day world

of planning and zoning. There is much to be learned here about how to make things, if not easier, at least more right.

Washington, D.C.
January 12, 1997
Gus Bauman
Former Litigation Counsel,
National Association of Home Builders (NAHB)
and Former Chairman, Maryland National
Capital Park & Planning Commission

Preface to Seventeenth Edition (2014)

This seventeen edition, in addition to the general update, includes some new sections and, in Chapter 8, a new Part X on climate change regulations. Regardless of what side one takes in the scientific debate about global warming, the reality is that the federal, state and local governments are undertaking initiatives to address concerns about climate change and global warming. Two key strategies for addressing climate change are *adaptation* and *mitigation*. Because state and local government climate change regulations have the most effect upon real estate development, this new Part focuses on state and local government initiatives. It discusses certain types of state and local climate change regulations directed at local land use that implicate key legal principles discussed in Chapter 1, and their potential to run afoul of constitutional limitations.

Readers will find of particular interest one type of climate change regulation being used in coastal areas—the "rolling easement". The idea is that, as the coastal shoreline erodes and sea levels rise, the mean high water line (and, correspondingly, the mean low water line) moves landward, and more land becomes publicly owned tidelands, reducing the land area of privately owned coastal properties. The "rolling easement" is designed to protect lands in the public trust as the sea level rises and "rolls" or migrates inland. Needless to say, coastal property owners resist regulations that reduce their property in this way, and in a challenge brought by a property owner whose house was to be removed because of the application of the rolling easement, the Texas Supreme Court held that there is no rolling easement under Texas law. The court's decision and its reasoning make the future viability of rolling easements uncertain, certainly in Texas. This new Part also discusses other adaptation measures in coastal areas, such as setbacks and exactions, and municipal mitigation strategies to reduce green gas house emissions (GHGs).

Summarizing some highlights in other chapters, I discuss in Chapter 1 a post-*Lingle* decision, in which the

Preface to Sixteenth Edition (2013)

One of the themes of this sixteenth edition of the book is "clarification"—that is, judicial clarification on a number of fronts, most notably by the U.S. Supreme Court.

As a result of the Supreme Court's decision in *Koontz v. St. Johns River Water Management District*, the Court finally confirmed two viewpoints that I have argued over the years regarding the constitutional test for exactions—namely, the *Nollan/Dolan* Dual Nexus test applies to monetary exactions as well has dedication of land, and that this test should apply equally to *ad hoc* exactions and legislatively imposed exactions. The Court ruled that all development exactions—whether the required dedication of land, the payment of a fee in lieu of dedication, or the imposition of a development impact fee—must be able to meet the *Nollan-Dolan* standard requiring that the exaction assessed have a rational nexus to the regulatory purposes of the permitting program under which it is imposed, and be roughly proportional to the impact of the development for which approval is sought. In reaching its decision, the Court explained that *Nollan* and *Dolan* standard involved a "special application" of the unconstitutional conditions doctrine that "forbids burdening the Constitution's enumerated rights by coercively withholding benefits from those who exercise them." As discussed in Chapter 1, this decision is of immense importance to property owners and developers.

Another Supreme Court decision, *Arkansas Game and Fish Commission v. United States*, involved a takings claim based on the flooding of woodlands from the U.S. Army Corps of Engineers' periodic releases of water from an upstream dam. The Court made clear that there was no categorical takings exemption for temporary flooding, ruling that "government-induced flooding temporary in duration gains no automatic exemption from Takings Clause inspection."

On variances, in Chapter 2, the update discusses the common law rule in some jurisdictions that while a particular use of land may not be expressly allowed under a zoning ordinance, it is nevertheless permissible if it can be

said to be accessory to a use that is, in fact, expressly permitted (i.e., either by-right or because it is a lawful nonconforming use). Chapter 3 on special (conditional) uses has a new section that discusses the concept of a special use that requires a variance from one or more of the conditions of the special use. In the Chapter 4 update, I discuss a case that provides a tale of caution for the developer who wishes to utilize a floating zone for its development project. The discussion in Chapter 5 presents an example of one of the categories of abuse of discretion that I defined in Chapter 1, namely government actions or regulations that "convert" a by-right use to a "conditional use". In this example, the vehicle for this category of abuse of discretion is site plan review.

Because the potential for government abuse of discretion in decision making can depend upon whether a local legislative body is deemed to act in a legislative or an administrative capacity, it is always interesting when a court tries to define the difference between these two decision making capacities. In Chapter 6, in the context of planned unit developments, I discuss the Utah Supreme Court's not entirely convincing "guidelines" for distinguishing between legislative and administrative decisions. The Chapter 7 update includes an important case concerning development agreements. The holding of the case articulates the principle that even though a developer may "contract" to undertake certain infrastructure improvements for a project, if that project is later downsized so as to alter the proportional effect of the public need created by the development, the *Nollan-Dolan* Dual Nexus test is applicable and requires an appropriate adjustment in the exactions imposed. Finally, in Chapter 8, I discuss the new LEED v4 that is currently in the beta testing phase and clarify certain aspects of LEED-ND.

I hope the substantive clarifications and updates presented in this latest edition will be helpful to practitioners as they seek to obtain entitlements within the complex regulatory framework of discretionary land use and development controls.

Brian W. Blaesser
Boston, Massachusetts
October 24, 2013

Preface to Fifteenth Edition (2012)

This fifteenth edition of the book discusses a number of interesting developments in takings law, site plan review and vested rights. In this edition, I also take aim at the concept of "Transect zoning" which has captured the imagination of local governments in their adoption of new land use and development regulations.

In Chapter 1, I note a Federal Circuit takings case that explains that in establishing the economic impact of government action, the plaintiff does not have the burden of establishing the absence of any mitigating factors. Rather, it is the government who has the burden of establishing offsetting benefits to rebut the plaintiff's economic impact case. I also discuss a body of case law that has developed around property owners' takings claims in response to the federal government's efforts to create a national network of public recreational trails by converting long unused railroad rights-of-way to public recreational hiking and biking trails under the authority of the Rails-to-Trails Act. These cases have established the proposition that if a railroad received only a railroad purpose easement, and if the recreational trail use and railbanking authorized under the Act exceed the scope of that easement and thereby prevented expiration of the easement and reversionary interests from vesting in the fee owners, then the conversion of the right-of way to public use constitutes a permanent physical taking of the property of the owners who hold the underlying fee simple estate.

A developer who has an approved site plan may believe that he is immune from any subsequently adopted changes in zoning that affect use, dimensional or other requirements in a zoning district. Whether or not that is true, depends upon the vested rights doctrine of the particular state. In Chapter 5, I discuss a case that explains why a developer who receives a site plan approval should be cautious about proposing changes to the site plan that could be deemed "substantial" and which could result in loss of protection under the state's vested rights statute against subsequent changes in zoning.

In Chapter 7, I address another issue involving vested rights. A developer who secures a vested right to an

entitlement may assume that this vested right is transferable to a subsequent party who purchases the property with that entitlement. Again, however, the transferability of the vested right to build in accordance with the prior zoning requirements after the zoning ordinance is amended, depends upon the vested rights law in each state. I discuss a Georgia case in which the transferability of the vested right depended upon *when* the purchase occurs, and contrast that rule with the rules in other states.

In Chapter 8, I discuss local governments' love affair with the New Urbanists' "Transect zoning" and question the use of the Transect's T-zones to replace existing zoning districts, or the decision to organize the form-based code around the Transect—an ecological concept applied to urbanism, in which human environments can be described on a scale from most urban to most rural. The Transect, as defined by the New Urbanists, is divided into tiers—Core (most urban), Town Center, General, Edge (aka Sub-Urban) and Rural. Local government planners, guided by New Urbanist consultants, view the Transect as the means to retrofit urban and suburban sprawl and restore the physical structure of the community unit (5-10 minute pedestrian sheds). I discuss why I question the necessity and meaningfulness of importing into development regulations a concept that is premised on a plainly nostalgic late 19th century urban form that does not take into account the complex, unpredictable factors that are shaping urban form today.

With this latest edition, I again endeavor to provide insight and practical advice to practitioners who seek to obtain entitlements within the complex regulatory framework of discretionary land use and development controls.

Brian W. Blaesser
Boston, Massachusetts
October 16, 2012

Preface to Fourteenth Edition (2011)

Preparing this fourteenth edition of the book led me to consider the "presumption of validity" accorded by courts to local legislative body decisions, and the outcome-determining impact that this presumption has in land use disputes. Typically, this presumption means that the property owner or developer who is denied approval of a project by a local legislative body has the often heavy burden of overcoming the presumption that the decision by the "legislative " body was valid. Sometimes, however, the presumption of validity works to the property owner's advantage. In Chapter 5, I discuss a case in which a city council argued that its overturning of a site plan review approval of a "by-right" use should be accorded the presumption of validity. But the court pointed out that the presumption of validity belonged to the by-right *use* of the applicant and the city council could not put a "presumptively valid" mantle on the site plan review decision it made in disregard of the applicable standards. Unfortunately, more often than not, the courts bestow the mantle of presumptive validity on decisions by local legislative bodies because they are deemed "legislative" when, in actuality, they are administrative-type decisions that require findings of fact and conclusions. Presumptive validity may even trump a finding of void for vagueness. For example, in Chapter 1, in a case involving what I have described as the "new generation" of tree preservation ordinances, the New Jersey Supreme Court left undisturbed the lower courts' finding that a tree removal ordinance was void for vagueness. Nevertheless, the court applied the deferential "presumption of validity' to uphold the ordinance as rationally related to its "broad environmental goals".

In my discussion of conditional zoning in Chapter 7, I have argued that if there is no clear evidence that an extraneous promise was the sole motivation for a rezoning, then a unilateral "gift" to a municipality from a developer should not invalidate the rezoning. But in this edition of the book, I describe a situation where the facts regarding a "donation" paid to government by a property

owner/developer in exchange for rezoning may indicate that the donation is not voluntary at all, and may constitute an unconstitutional development exaction. The example of this problem comes from Illinois, where some municipalities are beginning to utilize a new conditional zoning technique in response to concerns about rezoning proposals by *non*-sales tax producing uses. It is known as a "fee in lieu of sales tax" that is enforced by the recording of a covenant obligating the use to pay an annual "donation" to make up for what the municipality believes is the sales tax revenue that it would otherwise have received.

Highlights of other issues addressed in this update are: Chapter 1: Application of the *Nollan/Dolan* dual nexus test to exactions, and the difficulty for developers in establishing class-of-one equal protection claims when differences between development projects can be readily asserted. Chapter 2: New standards for variances and the problem of self-created hardship. Chapter 3: Municipal authority to authorize, by special use permit, uses that are not specified as special uses in the zoning ordinance. Chapter 4: Municipal use of a "floating zone" to moot litigation by neighbors opposing a nonconforming use. Chapter 5: Site plan review and the presumption of validity to by-right uses. Chapter 6: Arbitrary denials of PUD approvals. Chapter 8: New and updated LEED rating systems.

With this latest edition, I continue my effort to provide insight and practical advice to practitioners who seek to obtain entitlements within the complex regulatory framework of discretionary land use and development controls.

Brian W. Blaesser
Boston, Massachusetts
September 25, 2011

Preface to Thirteenth Edition (2010)

This thirteenth edition highlights the U.S. Supreme Court's decision last term in the *Stop the Beach Renourishment* case, involving the Supreme Court's review of the Florida Supreme Court's decision interpreting the Florida Beach and Shore Preservation Act. The Act established state responsibility for managing and protecting Florida beaches from erosion and provided funding for "beach nourishment" projects. The Act fixes the shoreline boundary and suspends operation of the common law rule of accretion, but preserves littoral rights of access, view, and use *after* an erosion control line (ECL) is recorded. The question before the Florida Supreme Court was: "On its face, does the Beach and Shore Preservation Act unconstitutionally deprive upland owners of littoral rights without just compensation?" The Florida Supreme Court held that it did not. On appeal to the Supreme Court, the petitioners sought the Court's review of the question of whether the Florida Supreme Court's ruling constituted a "judicial taking," arguing that the court had invoked "nonexistent rules of state substantive law" to reverse 100 years of uniform holdings that littoral rights are constitutionally protected.

The case raised the question of whether a state court decision interpreting state law can constitute an unconstitutional taking, or whether its decision is exempt from the requirements of the Takings Clause. This question, to which I devote a new section (§ 1:30) in Chapter 1, had never before been decided by the U.S. Supreme Court. The Court, in a unanimous 8-0 decision written by Justice Scalia, affirmed the Florida Supreme Court's decision that the state's Beach and Shore Preservation Act did not itself effect a taking of Petitioner members' littoral rights in violation of the Fifth and Fourteenth Amendments. Justice Scalia's analysis centered on the "background principles" of Florida property law that defeated the Petitioner's takings claim. However, on the question of judicial takings, Justice Scalia concluded that that judicial action could constitute a taking under the Takings Clause, and was joined in that view by Chief Justice Roberts and Justices

Thomas and Alito. In Justice Scalia's view, state courts should not be immune from claims brought under the Takings Clause—concerned as it is with *state* action—regardless of who the state actor is. Because the concurring opinions did not categorically reject the concept of judicial takings, Justice Scalia's opinion may be viewed as having laid the foundation for an eventual majority of the Justices to decide to recognize the judicial takings doctrine.

A pervasive theme in the updated chapters of this edition is what I believe to be a dual phenomenon evident in local government regulation of land use and development around the country today. That is that local governments are increasingly adopting form-based codes, with their detailed and prescriptive approach to shaping the physical "form" of development and redevelopment, while at the same time routinely relying upon discretionary review procedures to decide both ordinary and complex issues of the "use" of land in development and redevelopment projects. One of the legal issues common to both the prescriptive approach and the discretionary approach to regulating development is "vagueness" in the language used to guide the decision making power delegated to administrative bodies, and "vagueness" in the language of standards, with both approaches resulting in due process problems.

For example, in the case of vague standards, I report in Chapter 1 on a Washington case in which a city argued in defense of its vague regulations that standards, in fact, can be vague and that they can be developed "during the application process"! In the case of form-based codes, as discussed in Chapter 8, their concern with the relationship between buildings and the "public realm," can lead to due process problems when the extent of the "public realm" as an area subject to public control is defined in vague and expansive terms, and the guidance given to those charged with administering the code to achieve the New Urbanist social goal of fostering community through the design of spatial relationships, is also vague.

Other substantive issues addressed in this update are: recent applications of the *Nollan / Dolan* dual nexus test to exactions (Chapter 1); variances and self-imposed hardship (Chapter 2); special permits and the findings-of-fact requirement (Chapter 3); site plan review and vague standards (Chapter 5); opposition of owners *within* an existing

PUD to the original developer's subsequent proposal to amend the PUD (Chapter 6); the consequences of failing to incorporate into a development agreement all agreements or contracts with the local government that were entered into prior to the execution of the development agreement (Chapter 7); the new Minimum Program Requirements for LEED 2009, and two new LEED for Retail rating systems: LEED 2009 for Retail: New Construction (NC); and LEED 2009 for Retail: Commercial Interiors (CI) (Chapter 8).

This latest edition continues my effort to provide practitioners with the substantive updates and practical advice necessary to secure entitlements under the complex mix of government discretionary and prescriptive land use and development controls.

Brian W. Blaesser
Boston, Massachusetts
September 27, 2010