Pace Law Review

Volume 1
Issue 3 *1981*
Symposium on Historic Preservation Law

Article 11

April 1981

Address: A Symposium on Historic Preservation Law

Norman Williams Jr.

Recommended Citation
Norman Williams Jr., *Address: A Symposium on Historic Preservation Law*, 1 Pace L. Rev. 619 (1981)
DOI: https://doi.org/10.58948/2331-3528.1706
Available at: https://digitalcommons.pace.edu/plr/vol1/iss3/11

Address

NORMAN WILLIAMS, JR.*

I will sketch the background of the law that came into focus (and widespread attention) in the *Penn Central* case.[1] American zoning law is the largest body of law which is fairly closely on point; yet American land use law, of course, extends well beyond that, for police-power restrictions have also been invoked in subdivision control, the official map, and a few other areas. The total volume of reported litigation in American land use law has now (as of 1978) reached approximately 13,000 cases.

We are now in a period of a major transition in American land use law, and so we are seeing rather striking reversals in several basic areas of that law. While there was some evidence of this transition in the late Sixties, the change has been primarily the product of the Seventies.

American land use regulation has generally operated without compensation—for one simple reason. The first really relevant case, decided in 1899,[2] involved height limits around Copley Square in Boston, where the Legislature had authorized condemnation of air rights above a certain height. The Massachusetts Court upheld the condemnation as a proper exercise of eminent domain for a public use; taking the air rights was held to have created something in the nature of an easement, created by the statute and annexed to the park. However, the court went on to say that compensation was not necessary. Ever since then, American zoning has proceeded on the basis of that last sentence: municipalities have not insisted upon paying for what they could get for free. This is a short summary of the whole law.

In contemplating this area of the law, everyone's initial reaction is the same—that there is infinite confusion with few meaningful guidelines. My own present view is almost precisely the contrary. In this area of the law there is a fairly structured, albeit exceedingly complex, system, with its own internal rules which are usually followed. The outcome in a given situation is

fairly predictable, *if* you know four things—the type of plaintiff, the state, the date, and the nature of the land use conflict involved (the latter is clearly the least important of the four). If you know your way around, and the basic facts of the particular situation, you can expect to predict the outcome correctly, well, say, perhaps 80 percent of the time. However, to say that is to recognize that we are way short of perfection in predictability; we still have a fairly leaky system.

First, consider the type of plaintiff. Land use law involves a series of conflicts, in the judicial realm, among three parties in interest: 1) the developer, who usually wants some more intensive land use; 2) the neighbors, who would almost always like some less intensive land use than has already been authorized, and so are likely to be incensed at the thought of any further relaxation of the existing regulations; and 3) the "third-party nonbeneficiaries," those who are essentially excluded by the operation of the system, i.e., people who would like to move into a particular area but cannot do so because housing is too expensive there, in part because of the existing land use regulations.

It was in the 1970s that the third party nonbeneficiaries have come to the fore in reported law. Before that, each case could be classified as either a developer's case, where the developer was challenging a refusal to allow him to develop more intensively, or a neighbors' case, where the neighbors were challenging a local decision to permit a developer to develop more intensively. Incidentally, while the former get almost all the attention, there are several important states where the latter are more common.

Next, consider the date. In this century, American land use law has gone through four periods, varying primarily in the judicial attitudes toward claims made by developers.

In the first period, covering roughly the first two decades of the century, the developer's claims were almost always upheld, and municipal land use regulations struck down.

The second period was characterized by *Euclid*.[3] The basic principle of zoning was not upheld: a developer's industrial and commercial development rights could be taken away by zoning regulations, without compensation. However, in this period the situation was usually very different on challenges to the zoning of a particular tract: the developer usually won.[4] In effect, zoning

was all very well as long as you didn't use it much.

In the third period, the pendulum swung to the other extreme: the judges decided to turn the towns loose and see if they could provide a better environment. Under the prevailing "fairly debatable" test, municipalities usually prevailed over developers in lawsuits—so long as their lawyers were not struck dumb when asked to justify the zoning restriction involved. Moreover, while there was a lot of talk about protecting broader aspects of the "general welfare," the reference was to the welfare of the individual municipality.

The now-developing fourth period is more complex. It represents essentially a revulsion from the third period—a growing (and long-overdue) judicial scepticism on what the municipalities have been up to. It was high time for a revival of more active judicial review; and zoning restrictions are now widely evaluated in their regional context.

Now I am referring to "periods" here in a very special sense, for the various states have gone from the second to the third period, and now from the third to the fourth period, at very different rates of speed. New Jersey shifted sharply from the second to the third period in 1948 by adopting a new state constitution and, much more importantly, by appointing a new set of judges. At the other extreme, Illinois has never made this transition; the judges there seem happy that they are still in the second period, at least so far as their majority rule is concerned, and wouldn't think of leaving it. (They also have a minority rule, which is pure third-period.)

Next, consider the state. The variation in zoning and planning law among the various states has been enormous. In fact, some 13 states handle about 85 percent of the case law;[5] and in each of these major states, the zoning jurisprudence is quite distinctive, differing rather sharply from all the others.[6] The other states fall between the extremes in New Jersey (or California) and Illinois. The states that (in the third period) went all-out in upholding zoning regulations were California (above all), New Jersey, Massachusetts, and Maryland. These have been the states with the most advanced case law. Several other major states have tended to fluctuate back and forth—New York, Florida, Ohio, Michigan, and, above all, Pennsylvania. (No one tries to predict anything in Pennsylvania.) Rhode Island is close to

Illinois.

It must be remembered that American land use law is a matter of state constitutional law as developed by the state supreme courts. From 1928 until it came back into the field in 1974, the United States Supreme Court handled only one land use case. During those 46 years, the state courts knew what they were doing, but the United States Supreme Court gave no indication that it did.[7]

In this (fourth) period of major transition, several clearly defined currents are running, frequently in conflicting directions. In several ways the courts have been clearly and consciously moving to reduce local autonomy—to limit the power of municipalities to do what they were doing so successfully in the third period. The clearest example is the anti-exclusionary litigation, cluminating in the famous *Mount Laurel* case in New Jersey, which I helped to argue.[8] A second example has come in the interpretation of the comprehensive planning requirement; a third, in reviewing the criteria for variance.

In the anti-exclusionary cases, third party nonbeneficiaries have suddenly been getting a lot of judicial attention. The issues raised successfully in the 1970s seemed perfectly clear to some of us in the early 1950s.[9] A lot of others preferred not to think about it. Suddenly, in 1970, everyone became conscious of the issue, and the result has been the most striking aspect of land use law in the 1970s.

The sharp technical difference between the third and fourth periods can be stated simply. In the third period the courts extended the local powers to protect the environment not only on the traditional grounds of health and safety, but also on broader aspects of the general welfare, and began to define what that vague term meant. What is then meant was quite clearly the welfare of the individual municipality. Each municipality could protect its own general welfare, and the devil take the hindmost—and he did. In contrast, in the fourth period, general welfare is not a local but a regional matter. If a zoning restriction is challenged, it must be justified by an affirmative showing that the regulation contributes to the regional general welfare; if not, the regulation is invalid. This doctrine thus serves to limit town powers.

A second area where courts have restricted municipal auton-

omy involves the relation between zoning and planning. For a long time, in interpreting the comprehensive-plan doctrine, the courts essentially read out of zoning laws the requirement that zoning must be in accordance with the comprehensive plan.

While the courts have usually not overruled those older cases, judicial interest in the planning background of zoning, and in whether zoning conforms thereto, has been a major concern in the law of the 1970s. In a number of important cases, the courts have held zoning regulations invalid because they failed to conform to an existing comprehensive plan—a complete reversal of the previously prevailing policy.[10]

A third area where the courts have reduced local autonomy involves judicial review of variances. Many local zoning boards had been issuing variances essentially for the asking—and sometimes there was a strong suspicion that money was passed under the table. Now several major courts have been striking down variances if these were not accompanied by clear-cut documentation that they were granted in accordance with the criteria read into the statute by the courts.

The clear common denominator of all three trends is an increasing judicial scepticism about local decisions on land use, accompanied by an increasing judicial activism which looks into what is going on. In these three ways, municipalities have thus lost power. The courts realized that the municipalities were abusing their power, so this is a welcome change. Yet, at the same time, other trends have been pointing in the opposite direction: the courts have been upholding land use regulations based on environmental and aesthetic concerns, thereby strengthening the public power over land use. The state courts, like the federal, have substantially expanded the previously-understood area of permissible regulation by approving some fairly extreme environmental restrictions—some, in effect, requiring land to be kept open.

We can now turn to the special problem of aesthetics and the police power. A long-developing trend has culminated in increasing judicial respect for aesthetic criteria. The two principal legal issues in this context are the "taking issue" and the question of adequate standards. The "taking issue" is an aspect of substantive due process—whether an aesthetic regulation is too extreme a limitation on a developer's property rights and, there-

fore, invalid. The question of standards has now become the more important issue. For the longstanding reluctance of the courts to give full credence to aesthetics as a basis for police-power regulation without compensation is not merely obstructionist; it derives from concern for some quite serious problems, including the subjective nature of many aesthetic judgments.

If there is to be any sense of certainty in land use administration, and any serious attempt to provide equal treatment for different applicants, it is important to establish standards to define what is ugly or attractive, acceptable or unacceptable. In some cases, this is relatively easy: almost everyone would agree that a junkyard in the midst of a residential area is ugly. That is not a marginal case with room for reasonable differences of opinion. On the other hand, in looking at the design of a new subdivision of the standard type of tract housing, people may differ as to whether this is attractive or ugly. The legal question here is then no longer one of taking; the question is whether the regulations are administrable—whether it is possible to define sufficiently clear-cut criteria so that those who apply the criteria can give equal treatment to all who come before them, without fear or favor. That is not an easy matter.

These questions have come up in two major lines of cases, those concerned with sign regulation and with architectural control. The latter have usually involved historic districts, where a distinctive and valuable style of architecture extends over a substantial area.

A review of history on the specific question of the judicial attitudes towards aesthetics as a basis of police-power regulation is in order here, for these have also gone through a series of three periods, which are roughly analogous to (but by no means the same as) the four periods of land use generally.

1. The period when aesthetics was not regarded as a legitimate goal.

2. An era of legal fiction.

3. The move toward full recognition, together with the development of various intermediate rationales.

In the first of these periods, the prevailing judicial view was that aesthetics was not considered an appropriate area for public regulation; regulating public taste was simply none of the government's business. However, the fact was that people wanted

some aesthetic regulations, particularly on signs. Now when there is a collision between established legal doctrine and strongly-felt public opinion, it is not hard to guess who normally wins—the latter. Therefore, the law gave in on this point, and a second period began. In this period, aesthetics was recognized as an appropriate basis for public regulation of private property, but only if associated with some more familiar and conventional ground such as the protection of public safety. In *Cusack*, a classic case decided by the United States Supreme Court in 1917,[11] regulation of billboards was therefore upheld, not on aesthetic grounds, but as a matter of public safety. After all, a billboard might blow over and hit someone; or criminals might hide behind them, and the police would never think of looking *there*. Moreover, all sorts of immoral activity might go on behind the friendly shelter of a billboard. Such was the absurd legal fiction which made up the law until relatively recently.

The third period has been characterized by two trends. First, there has clearly been a strong movement toward fairly full recognition of aesthetics as a ground for police-power action quite as respectable as the more familiar grounds. Yet, at the same time, most courts have held back a little, for the valid reason that certain types of aesthetic regulation really are inherently arbitrary—and it is the function of the courts to avoid arbitrary regulation. And so, several intermediate rationales have been developed.

The most obvious of these, involving the union of economics and aesthetics, has come from the case law on historic districts. If the preservation of aesthetic values also represents a substantial local economic asset, for example by attracting tourists and conventions to a city, aesthetic regulation has been widely upheld on this basis. This was particularly important in the early historic district cases in New Orleans in the 1940s, but has been widely followed elsewhere.

The lowest common denominator test was enunciated in *Metuchen*.[12] Under this approach, there are many marginal issues where aesthetic restrictions may be dubious because there is room for legitimate differences of taste. On the other hand, there are many areas of regulation where there is a clear consensus; the junkyard in a residential area is an obvious example. There is really no need to worry one's head about how to deal

with the difficult marginal cases in order to uphold regulation of blatant aesthetic violations.

A second type of decisions involving landmark preservation has until now (1978) almost totally been in New York. Most of these legal problems have arisen under the clause in the New York City Landmarks Preservation Law that provides less-favored treatment for applicants who are partially or wholly tax exempt.[13] These cases should not be generalized as indicating disapproval of the landmark legislation as it affects fully tax-paying organizations.

A third group of aesthetic-regulation cases, involving "look-alike" or "look-different" restrictions on suburban sub-divisions, involves a totally different type of situation. For example, Fox Point, Wisconsin, prohibited, in an established area, any new house that looked too different from those in the vicinity; and this regulation was upheld in a resounding and quite silly opinion by the Wisconsin Supreme Court.[14] After that opinion came down, Fox Point amended its ordinance to provide that a house in a residential district must not: (a) look too different from, nor (b) look too much like, its neighbors. For many years in class I have asked someone to explain how to administer that ordinance; no one has yet volunteered. It is a caricature of the kind of public regulation which involves arbitrary whim and caprice. However, the New York Court of Appeals has indicated its willingness to accept this sort of regulation,[15] and so have several other courts recently. Maybe we are in a period where anything goes if it is silly enough.

Looking ahead, as to the taking issue, the outer limits of the police power are now clearly farther away than they were a few years ago. State courts have recently upheld some fairly extreme regulations on ecologically sensitive land—restrictions which would clearly have been invalidated previously. How much regulation is permissible? During a major transition in the law, with the states going in different directions, and with strongly opposing currents, predictions are uncertain. However, one situation is clear: in certain areas, including the ecologically sensitive area, the historic preservation area, and the amortization and nonconforming uses areas, municipalities should start making some arrangements to pay partial compensation for some forms of regulation. I agree with Professor John Costonis that we need an

intermediate system, combining regulation of the police-power with partial compensation.

Question 1. Can you give us some of your thoughts on *Penn Central?*

Penn Central[16] is not that big a change from long-standing precedent. If it had gone the other way, this would have been a revolutionary change—backwards.

Three or four important points were settled in this case. First, the highest court in the land has now said that historic preservation, and more specifically landmark preservation, is a worthy goal for public action. That is going to have considerable influence on other courts and on local action all over the country.

Second, the majority of the Court seemed to be concerned primarily with the problem raised in Judge Breitel's opinion, whether the protection of one single landmark, as contrasted with a large historic district, violated the general notion that one justification for restrictions imposed by zoning is that these apply over a large area and so provide some reciprocal advantages and disadvantages. Justice Brennan, for the majority, indicated some concern about this, and Justice Rehnquist pressed it hard in the dissent.[17] However, the majority clearly held that this is not a necessary basis for regulations.

The opinion also seemed clearly to reject the argument made by Penn Central that a developer can split up the various development rights involved in a piece of property, and then claim that if any one of these is abolished, that is taking.[18]

The Court also spoke favorably about the possibility of transferring development rights (TDR), and held that this should be taken into account in considering the effects of the restriction on the value of Penn Central's holdings. It is reasonable to assume that this holding will have considerable effect on the attitude toward TDR in the lower courts.

Finally, and most importantly, the Court also reaffirmed the basic principle in American land use law—what might be called "the nation-wide rule"—that so long as a landowner can still obtain some reasonable return from his land, land use restrictions may substantially reduce the potential value of a developer's land. This is hardly big news to anyone. In the *Euclid* case of 1926, fifty-two years ago, the effect of the restrictions was appar-

ently to cut three-fourths of the value of the land, and the court majority couldn't have cared less.[19] Once the reasonable-return rule was seriously challenged in *Penn Central*, it was important to have the Court reaffirm it clearly: a landowner has a constitutional right to some reasonable return from his land, though not necessarily to a higher return, if he can think of a more intensive use. If the Court had repudiated this, that would have reversed the whole trend of American land use law for the last fifty years.[20] It is hardly surprising that Justice Rehnquist wanted to do so; it was more surprising that Justice Stevens (normally the Court's most perceptive member on these questions) appeared to agree to this.

Address

NORMAN WILLIAMS, JR.

* LL.B., 1943, Yale Law School; B.A., 1938, Yale University; currently Professor of Law, Vermont Law School.

1. Penn Cent. Transp. Co. v. New York City, 438 U.S. 104 (1978).

2. Attorney General v. Williams, 174 Mass. 476, 55 N.E. 77 (1899), *aff'd*, 188 U.S. 491 (1903).

3. Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).

4. *See, e.g.*, Nectow v. Cambridge, 277 U.S. 183 (1928).

5. Seven in the Northeast (Massachusetts, Connecticut, Rhode Island, New York, New Jersey, Pennsylvania, and Maryland); three in the Midwest (Ohio, Michigan, and Illinois); plus Florida, Texas, and California.

6. For most of this period, all the states adopted the same standard enabling act with only minor variations. This does not seem to have had much influence on the situation.

7. The clearest example of this is in Village of Belle Terre v. Boraas, 416 U.S. 1 (1974). Mr. Justice Douglas cited only Supreme Court opinions (which is to say few zoning cases more recent than 1928) as if nothing had happened in the field during the intervening period.

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

9. *See, e.g.*, Williams, *Planning Law and Democratic Living*, 20 LAW AND CONTEMP. PROBS. 317 (1955).

10. *E.g.*, Coalition for Los Angeles County Planning in the Public Interest v. Board of Supervisors, 76 Cal. App. 3d 241, 142 Cal. Rptr. 766 (Dist. Ct. App. 1977); Baker v. City of Milwaukie, 271 Or. 500, 533 P.2d 772 (1975); Fasano v. Board of County Comm'rs, 264 Or. 574, 507 P.2d 23 (1973); Raabe v. City of Walker, 383 Mich. 165, 174 N.W.2d 789 (1970); Fallon v. Baker, 455 S.W.2d 572 (Ky. 1970); Dalton v. City and County of Honolulu, 51 Hawaii 400, 462 P.2d 199 (1969). For earlier illustrations of the same attitude, *see* Fritts v. City of Ashland, 348 S.W.2d 712 (Ky. 1969); Newark Milk and Cream Co. v. Township of Parsippany, 47 N.J. Super. 306, 135 A.2d 682 (Law Div. 1957).

11. Thomas Cusack Co. v. City of Chicago, 242 U.S. 526 (1917). Note that this case came a decade before Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).

12. United Advertising Corp. v. Borough of Metuchen, 42 N.J. 1, 198 A.2d 447 (1964).

13. *See, e.g.*, Society for Ethical Culture in the City of New York v. Spatt, 68 A.D.2d 112, 416 N.Y.S.2d 246 (1st Dep't 1979), *aff'd*, 51 N.Y.2d 449, 415 N.E.2d 922, 434 N.Y.S.2d 932 (1980); Penn Cent. Transp. Co. v. City of New York, 42 N.Y.2d 324, 366 N.E.2d 1271, 397 N.Y.S.2d 914 (1977), *aff'd*, 438 U.S. 104 (1978); Lutheran Church in America v. City of New York, 35 N.Y.2d 121, 316 N.E.2d 305, 359 N.Y.S.2d 7 (1974); Trustees of Sailors' Snug Harbor v. Platt, 35 Misc. 2d 933, 280 N.Y.S.2d 75 (Sup. Ct. New York County 1967), *rev'd*, 29 A.D.2d 376, 288 N.Y.S.2d 314 (1st Dep't 1968). *See also* Manhattan Club v. Landmarks Preservation Comm'n, 51 Misc. 2d 556, 273 N.Y.S.2d 848 (Sup. Ct. New York County 1966).

14. State *ex rel.* Saveland Park Holding Corp. v. Wieland, 269 Wis. 262, 69 N.W.2d 217, *cert. denied*, 350 U.S. 841 (1955). Fox Point is a wealthy suburb of Milwaukee.

15. *See, e.g.*, Old Farm Road v. Town of New Castle, 26 N.Y.2d 462, 259 N.E.2d 920, 311 N.Y.S.2d 500 (1970).

16. Penn Cent. Transp. Co. v. New York City, 438 U.S. at 133-35.

17. *Id.* at 138 (Rehnquist, J., dissenting). In the preparation of the National Trust's brief, on which I helped, we considered whether this argument should be spelled out at length. The decision was to omit any detailed argument along those lines. It did not seem to be a central point, and I agreed thoroughly with the decision not to put it in the brief. Yet that decision was a mistake. The obvious argument would have been easy to spell out, on the basis of well-established state law on the comprehensive plan requirement: the courts have previously recognized, as representative of a "comprehensive plan," arrangements quite analogous to those involved in the New York City landmarks law. (See, for example, my *American Land Planning Law*, v. 1, §§ 26.01-06 (1977)). The court did not have that documentation in the brief before them; nor did they discover it on their own. So the court simply had to answer that the regulation was all right.

18. One would have thought that *Euclid* settled that point: clearly the Court there upheld the complete abolition (as to various tracts involved) of the development rights for industry, commerce, and multiple dwellings. Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).

19. *Compare* Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926) *with* Hadacheck v. Sebastion, 239 U.S. 394 (1915).

20. This is unquestionably the rule in almost all other states, although it is not the rule prevailing in Illinois (it is the minority rule there). It was also briefly abandoned in New York during the Keating period. In the late sixties, Judge Keating led the Court of Appeals in a strong swing back toward a pro-developer position. The New York Court of Appeals has gradually recovered from that temporary right-wing deviation; the Keating law on land use is clearly no longer followed in New York, although it continues to generate a lot of confusion. 13