

**THIS IS THE ONE**

**2010  
EDITION**

# **THE IDIOTS GUIDE**

to

## **PLANNING LAW**

March 26, 2010

Mark Bentley, Esq., AICP

***The trouble with  
land is that  
they're not  
making it  
anymore.***



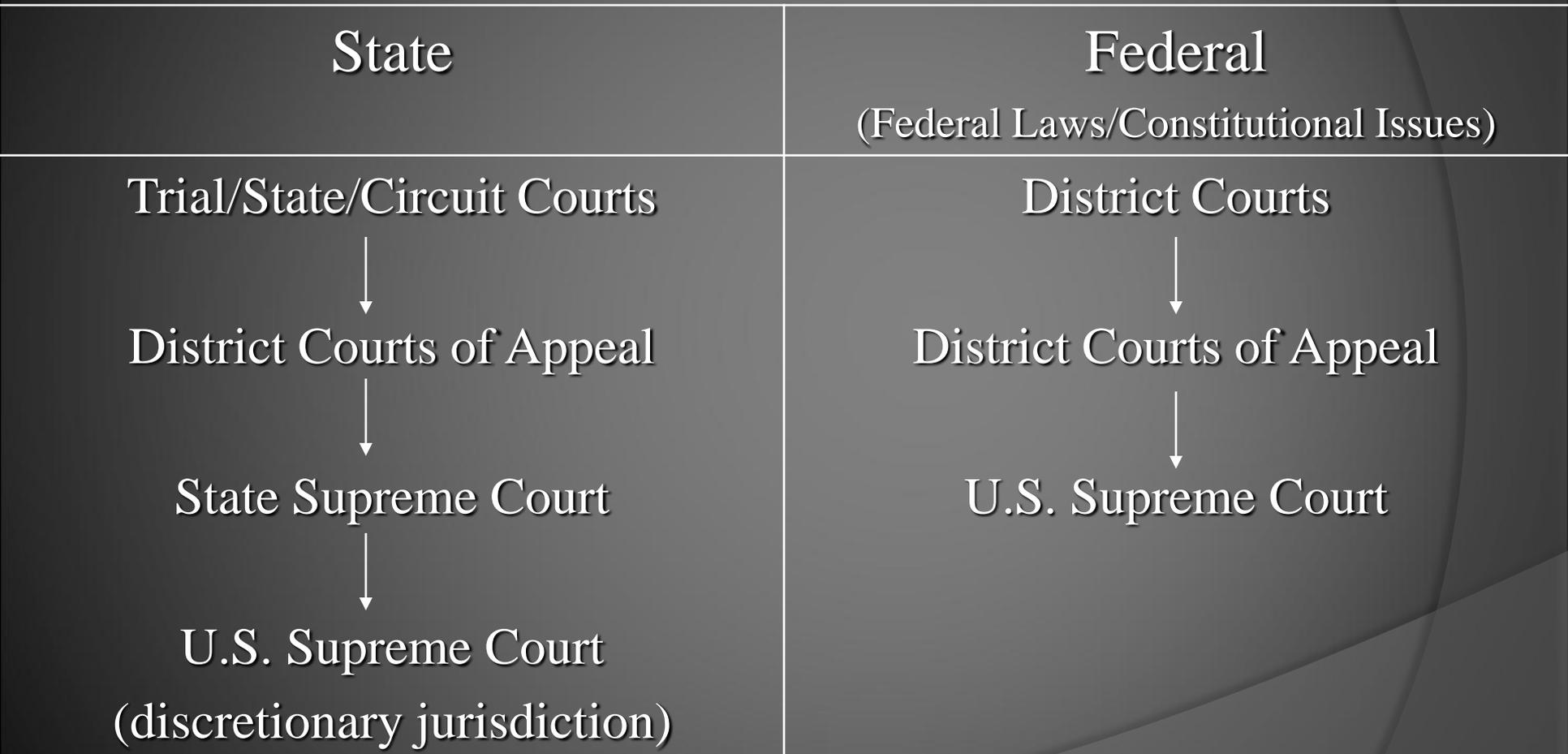
# Should A Planner Know the Constitution?

**“After all, if a policeman must know the Constitution, then why not a planner?”**

- *Supreme Court Justice William Brennan, Jr. dissenting in San Diego Gas & Electric Co. v. San Diego, 450 U.S. 621 (1981).*

# Fundamental Legal Framework

## Court System Structure



# Zoning

# Nuisance

## “Precursor to Zoning Regulations”

Two Types of Nuisance:

1) **Private Nuisance** – consists of a wrongful interference with the use or enjoyment of the land of another. Ex: Gas station pollutes individual adjacent property.

2) **Public Nuisance** – an unreasonable interference with the right common to the general public, including activities injurious to the health, safety, moral or comfort of the public. Ex: Power plant pollutes environment affecting public at large.

# *Ambler v. Village of Euclid (1926)*

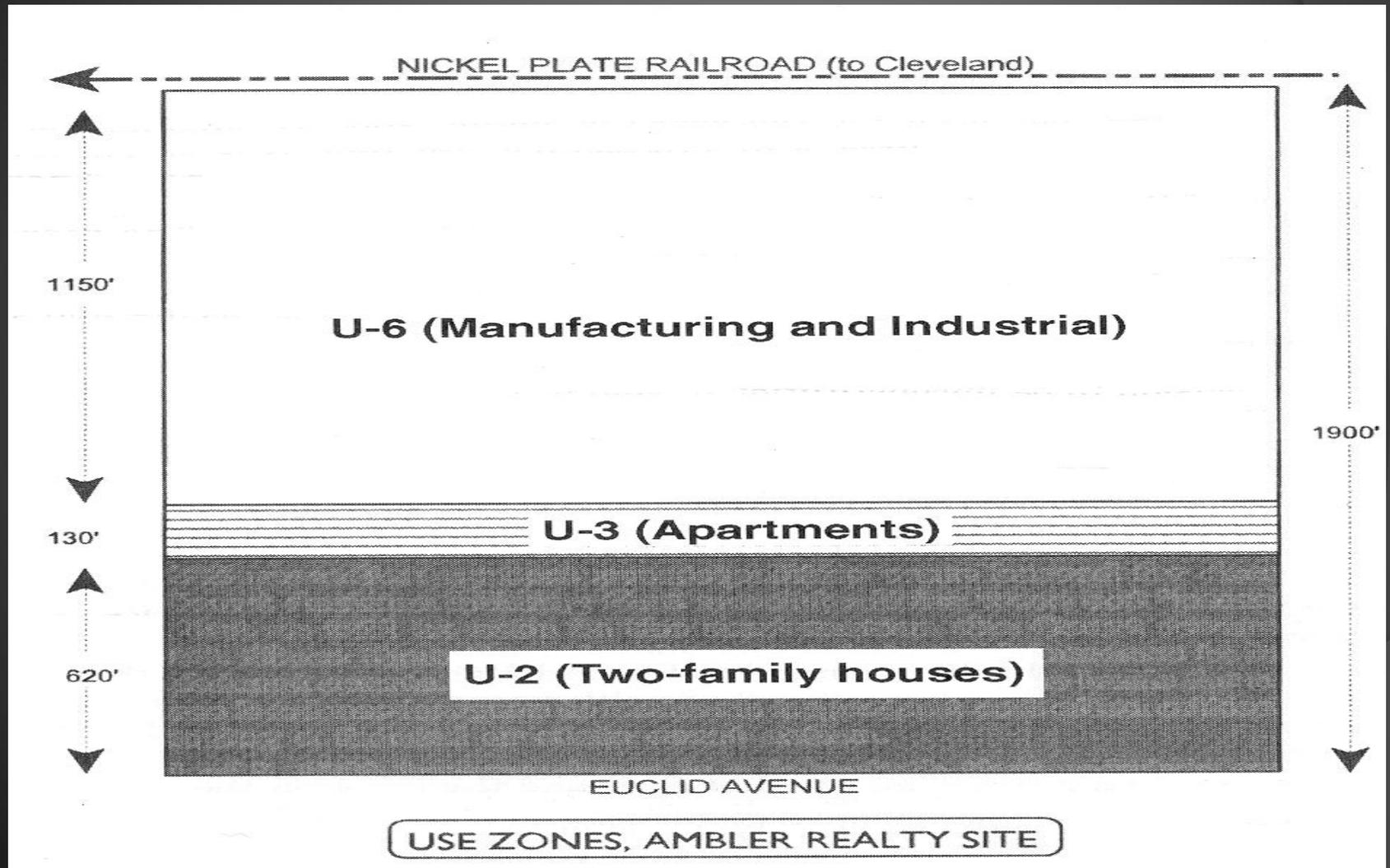
The Case:

Ambler owned 68 acres in the Village of Euclid.

Euclid developed a zoning ordinance to help preserve the character of the Village and implemented various use categories.

Ambler sued and asserted a claim that the zoning ordinance substantially reduced the value of the parcel by limiting its use; depriving Ambler of liberty and property without due process.

# *Ambler v. Village of Euclid (1926)*



# *Ambler v. Village of Euclid (1926)*

Issue:

Was the zoning ordinance arbitrary and without a rational basis for its implementation?

Holding:

Supreme Court held Ambler would have to show that the ordinance had no rational basis.

Zoning is a form of nuisance control and therefore serves a reasonable police power measure.

# The Standard State Zoning Enabling Act

- ◎ 1926 – United States Commerce Department promulgates the Standard State Zoning Enabling Act.
- ◎ Model for most of the early zoning and enabling legislation in the United States.

# Forms of Land Use Approvals

- 1) Zoning Regulations
- 2) Special Exception/Conditional Use/  
Special Use
- 3) Variance
- 4) Nonconforming Use

# Zoning Regulations

- ⊙ Allows uses that are permitted “as of right.”
- ⊙ Zoning is quasi-judicial.
- ⊙ Requires:
  - Notice
  - Due Process
  - Cross Examination
  - Decision Must Be Based On Substantial Competent Evidence

# Special Exceptions/Conditional Use/ Special Use

- ⦿ All of these are the same thing.
- ⦿ Use is permitted subject to certain criteria or performance standards contained in a zoning code.

# Variance

- ⦿ Requires satisfaction of all criteria as follows:
- ⦿ Criteria:
  - Unnecessary hardship, practical difficulties;
  - Unique circumstances; and
  - Self-created and economic hardships do not qualify as legal basis for variance.
- ⦿ Use variances generally prohibited – its unlawful legislative authority for a quasi-judicial board to carve out other uses in standard zoning district (*i.e., commercial use in residential zoning district*).

# Nonconforming Use

- ⦿ Uses or characteristics of use that become incompatible with the zoning code as a result of the adoption of new codes.
- ⦿ Public policy is to amortize incompatible uses.
- ⦿ Emerging Trend – party challenging a nonconforming use must prove a clear intent to abandon the nonconforming use before termination of the use occurs.

# Eminent Domain

“Fundamental power of the sovereign to take private property for a public use without the owner’s consent.”

# US Constitution

## **Fifth Amendment:**

**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...**

# US Constitution

## Fourteenth Amendment:

... nor shall any State deprive any person of ..., or property, without due process of law...

# Takings Law Analysis

## 1. Regulatory Cases (Lucas, Tahoe-Sierra)

- a. Test: A “Per Se” Categorical Taking Exists if:
  1. The government’s action results in the denial of all economically viable use of the property in the reasonably foreseeable future.
  2. Test - If it is not a “per se” taking, the Penn Central factors must be applied against the facts of the case to determine whether a taking has occurred.

# Takings Law Analysis

## 1.a.2. Test – *Penn Central*

- a. The analysis must consider the parcel as a whole;
  1. Physical dimension, size and shape of property;
  2. Functional dimension - extent to which an owner may use or dispose of property; and
  3. Temporal dimension - duration of the property interest (fee simple, life estate, etc.).

# Takings Law Analysis

## 1.a.2. Test – *Penn Central*

- b. The economic impact of the regulations on the landowner;
- c. The extent to which the regulation interferes with distinct investment backed expectations; and
- d. The character of the governmental action.

# Takings Law Analysis

## 2. Exactions Cases (Nollan, Dolan)

a. Test: A taking exists if there is a Lack of Essential Nexus/Rough Proportionality

1. Is there an “essential nexus” between the government’s actions and its stated objectives (i.e., is there a nexus or connection between the effect of the regulation and the governmental interest sought to be achieved); and if
  - (a) No: a taking exists; and if
  - (b) Yes: go to 2.

# Takings Law Analysis

2. Is there a “rough proportionality” between the government’s alleged interest and the permit condition sought to be imposed?
  - a. “No precise mathematical calculation is required, but the government must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development;”  
and if No: a taking exists.

# Takings Law Analysis

## 3. Physical Invasion Cases (Loretto)

- a. An automatic “per se” taking exists if the government encroaches or invades private property rights; unlike a regulatory taking, it can relate to only part of property or limited interest, such as a temporary easement. Only issue to be determined is amount of compensation.

United States  
Supreme Court  
Takings Law

# *LORETTO V. TELEPROMPTER MANHATTAN*

- ⦿ Manhattan Teleprompter installed cable television wires on a structure owned by Loretto, pursuant to enacted law.
- ⦿ Issue – Whether minor, but permanent, physical invasion of Loretto's property constitutes a taking?
- ⦿ Yes – Permanent invasion of private residence was held to be an unconstitutional physical taking of private property.

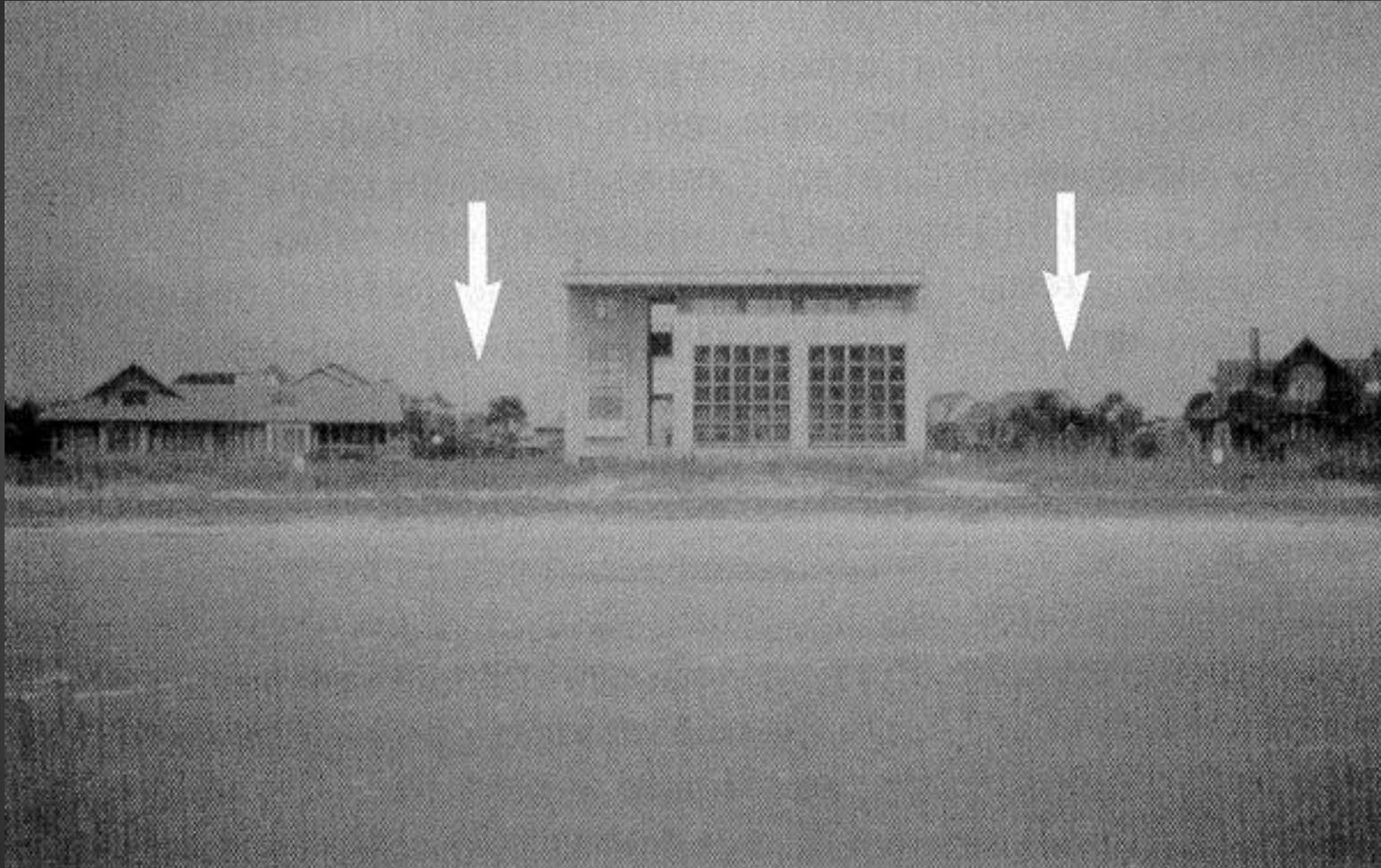
# *FIRST ENGLISH EVANGELICAL*



# *FIRST ENGLISH EVANGELICAL*

- ⦿ Owner was denied all use of property after a flood and the government's subsequent adoption of an ordinance prohibiting reconstruction on the property.
- ⦿ Issue – Whether a property owner may recover damages for during the time before the Court determines if a regulation constitutes a “taking”?
- ⦿ Yes – An owner may recover damages for the time that elapses prior to determination of a taking.
  - ⦿ Prior Law – Could only invalidate ordinance; not recover damages.

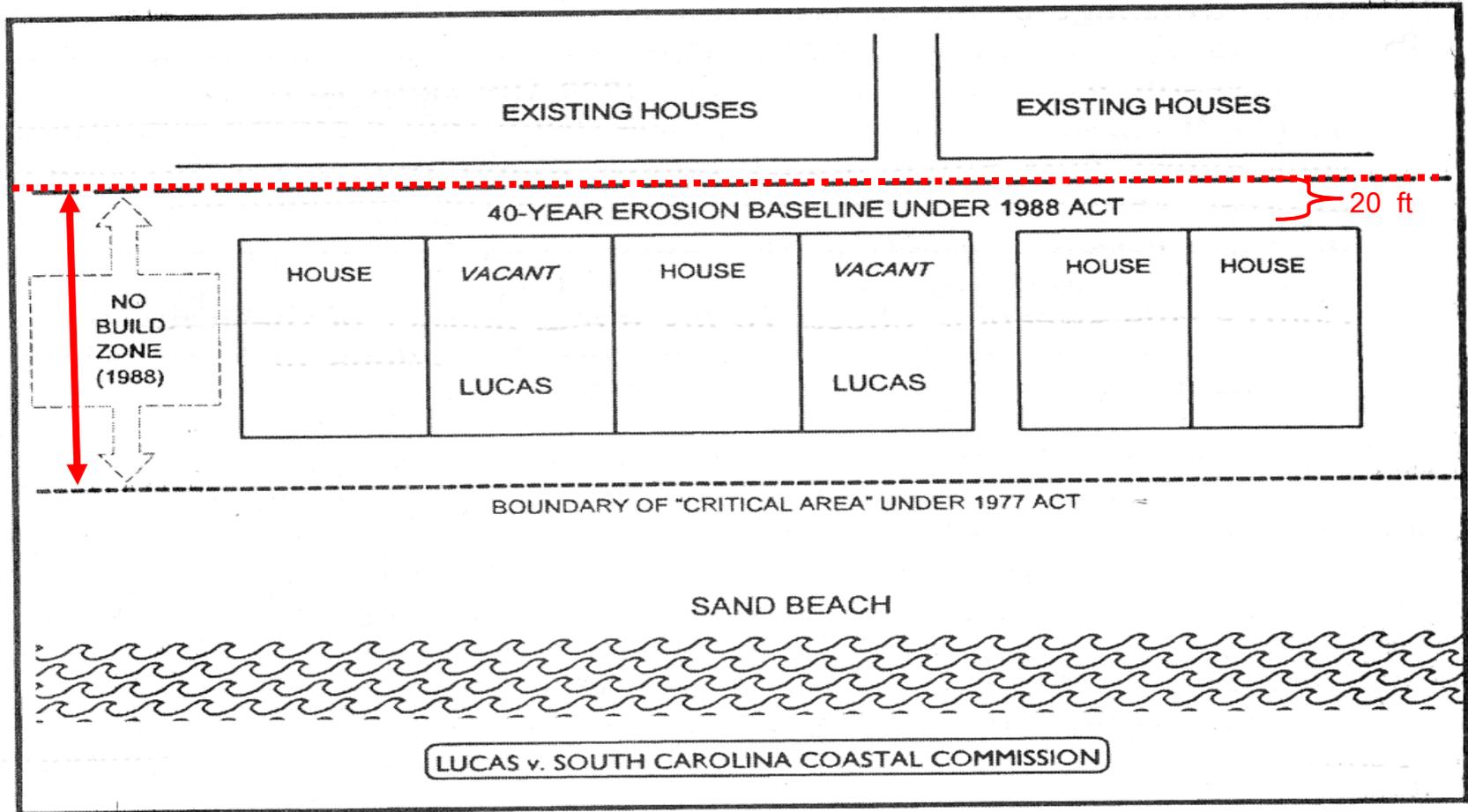
# *LUCAS v. S.C. COASTAL COMMISSION*



# *LUCAS*

- ◎ South Carolina adopted a 20' “dead zone” prohibiting construction seaward passed the baselines.
- ◎ Issue – Whether the “dead zone” which deprived the owner the opportunity to construct a home, was a taking?

# LUCAS



# *LUCAS*

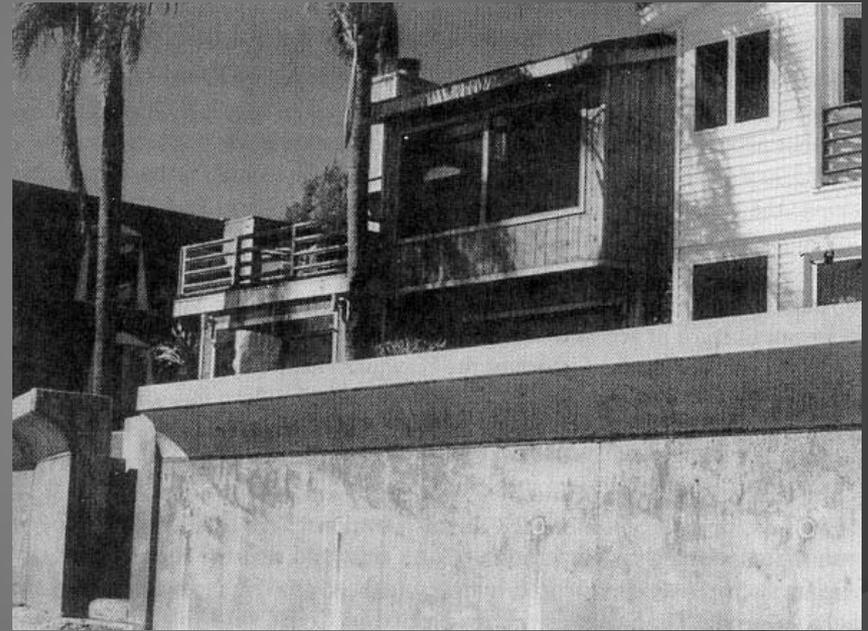
- ⦿ The U.S. Supreme Court held:
  - ⦿ Yes – Law depriving owner of all potential development on his or her property is a total taking.

*A Photographic Update on  
Lucas v. South Carolina Coastal Council: A Photographic Essay*  
Author: William A. Fischel  
Updated: March 30, 2000



Photo 1 (March 11, 2000)

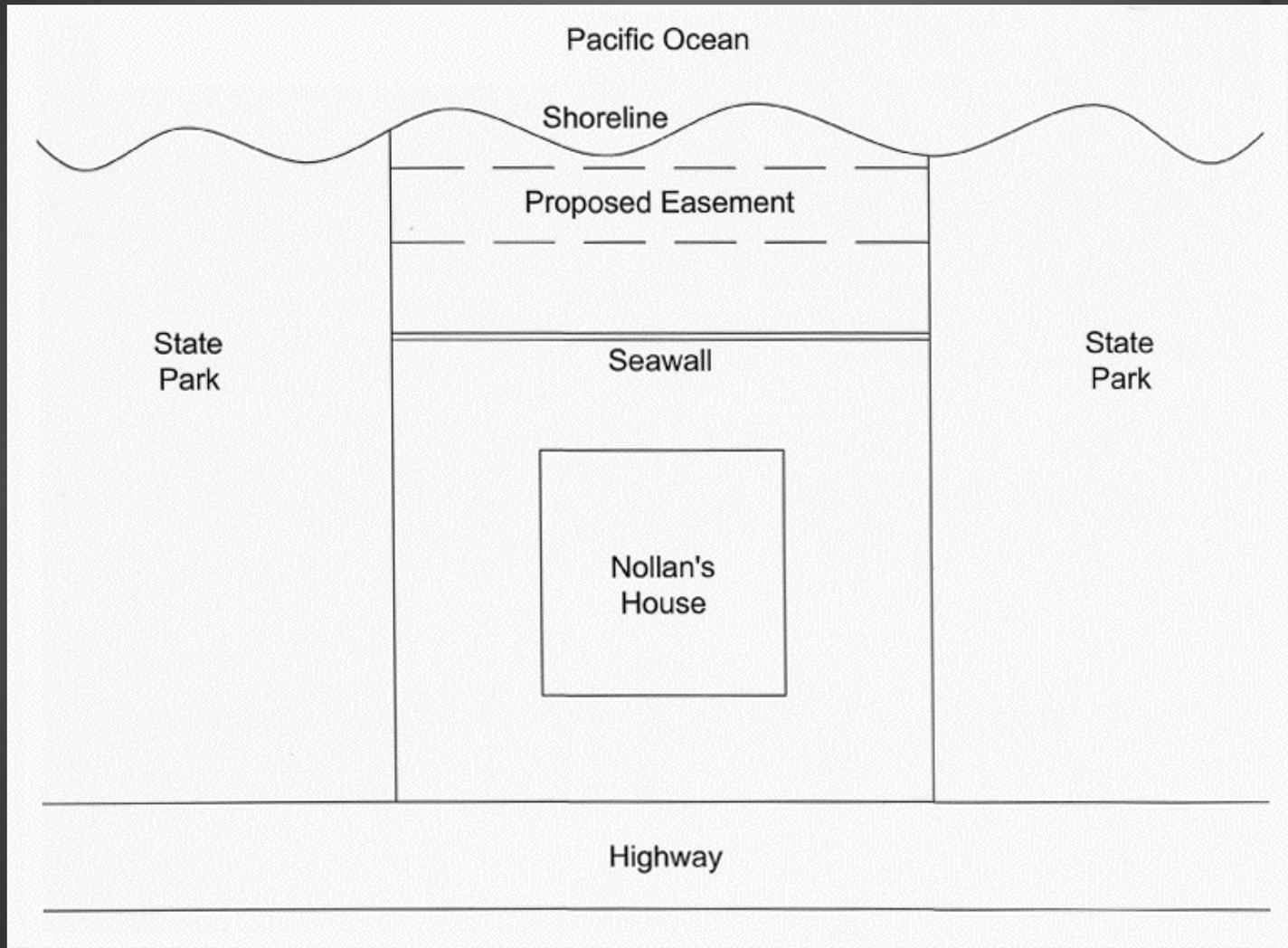
# ***NOLLAN v. CALIFORNIA COASTAL COM'N.***



# *NOLLAN*

- ⦿ Law requiring owner to grant easement in exchange for permit must have an “essential nexus” between condition and governmental purpose.
- ⦿ Alleged purpose of easement to eliminate psychological barrier by public to using beach, did not have essential nexus to State taking a lateral beach easement.

# *NOLLAN*



# *NOLLAN*



# *DOLAN v. CITY OF TIGARD*



# *DOLAN*

- ⦿ City required dedication of greenway and bikepath as a condition to expand hardware store.
- ⦿ Government must prove rough proportionality between its need and impact of development.
- ⦿ Mere conclusion is not enough and government must quantify the need.

# *PALAZZOLO v. RHODE ISLAND*



# *PALAZZOLO*

- ⦿ When determining whether a taking exists, the Court must look at the entire property, not just the portion that was denied use.
- ⦿ Buyers who know that permits may not be obtained under existing conditions and laws, may still file suit in inverse condemnation in the future.

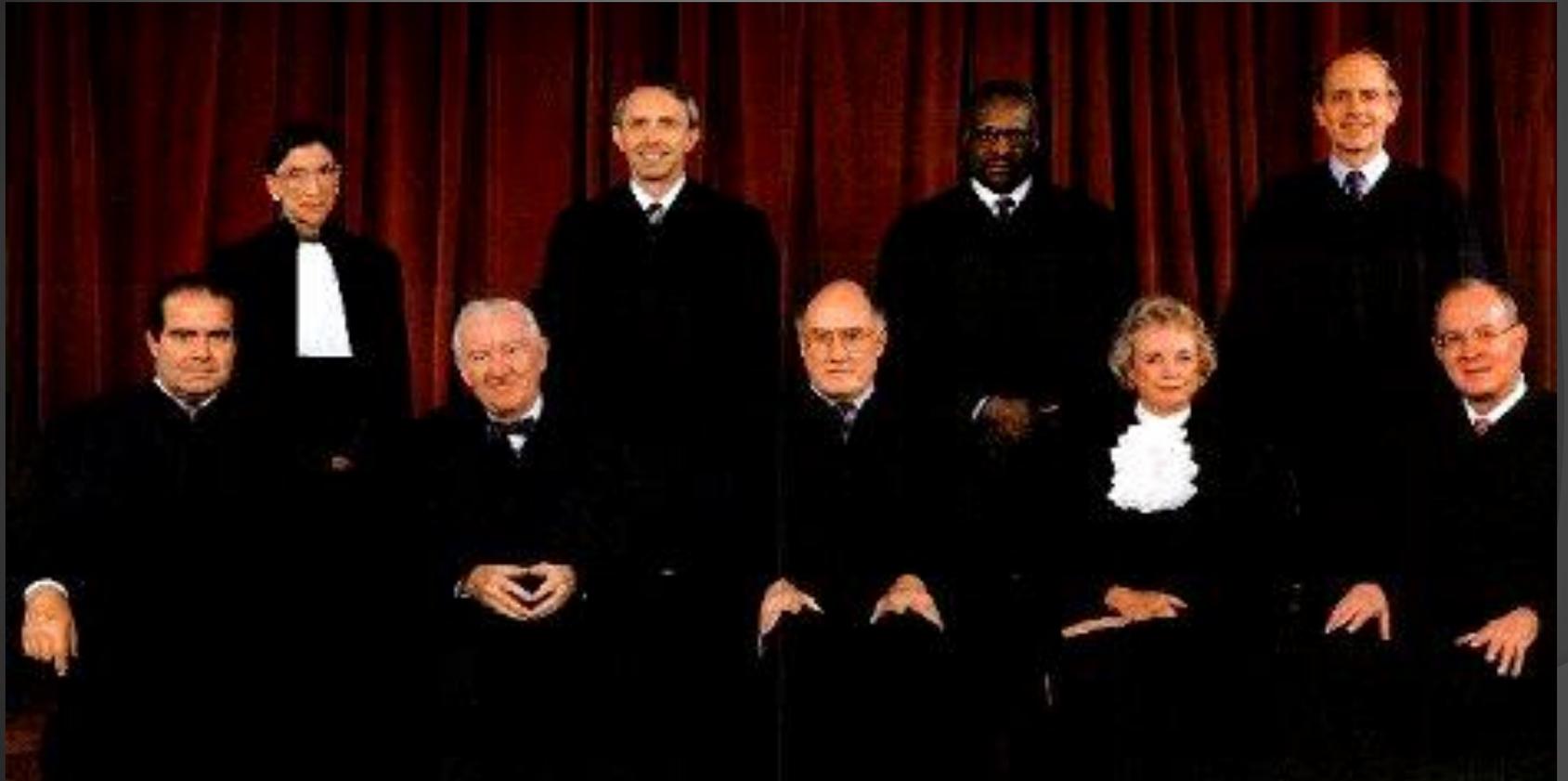
# *TAHOE-SIERRA PRESERVATION COUNCIL*



# *TAHOE-SIERRA PRESERVATION COUNCIL*

- ⦿ Moratorium on development during comprehensive planning stage was not a taking.
- ⦿ Moratoria do not constitute an automatic taking, but could be under *Penn Central* regulatory takings analysis.

# 2005 U.S. Supreme Court



# *Kelo*



# *Kelo*



# *Kelo*



- Susette Kelo (Council voted to evict June 5)
- Cristafaro (Council voted to evict June 5)
- Beyer (settled June 2)
- Von Winkle (settled June 5)
- Dery and Brelesky (settled May 31)
- The Italian Dramatic Club (allowed to remain)

# *Kelo v. City of New London (2005)*

## Issue:

Whether the taking by condemnation of unblighted homes for the purpose of transferring ownership to a private developer to accomplish a large scale redevelopment project constituted a public use under the 5<sup>th</sup> Amendment.

# *Kelo v. City of New London, cont*

- ⦿ Government taking of private property to give to another to promote economic development under state law authorizing eminent domain does not violate the public use provision of the 5<sup>th</sup> Amendment takings clause.
- ⦿ Determination of blight and need for economic rejuvenation is entitled to deference by the Court.
- ⦿ Government's pursuit of public purpose may often benefit private parties.

# Results of *Kelo*

- ⊙ 42 states have enacted legislative reform.
- ⊙ Since *Kelo* no state high court has held economic development as a public use.
- ⊙ Evidence – of blight, thorough planning and procedure, private influence – coming to play an important role in power-to-take cases.
- ⊙ Owners challenging takings for government or utility use have been largely unsuccessful.
- ⊙ Confusion whether public use cases should be dismissed out of hand, or if owners should have an opportunity to prove private purpose.

# US Constitution

## First Amendment:

Congress shall make no law ... respecting the establishment of religion .. or abridging the freedom of speech...



# First Amendment Impacts

- ◎ Signs – *Metromedia v. City of San Diego*
  - Ordinance permitting onsite commercial signage related to goods or services offered at the location, but banning other commercial and non-commercial advertising on the property, violated 1<sup>st</sup> Amendment.
  - Was not content neutral regulation:
    - Time
    - Place
    - Manner

# First Amendment Impacts

- ◎ Adult Uses – *Young v. American Mini Theatre*
  - 1000' separation between similar uses, and residential uses is legal.
  - Government must provide location and reasonable restrictions on time, place, and manner for adult uses.
- ◎ *City of Renton v. Playtime Theatres*
  - City may rely on similar studies in other cities to support their regulation.

# Religious Land Use and Institutionalized Persons Act of 2000 “RLUIPA”

Law:

“No government shall impose or implement a land use regulation in a manner that imposes a substantial burden on...religious exercise...”

- *42 U.S.C.A. §2000cc*

# “RLUIPA”

Persons Subject to Land Use Regulation Must Establish:

- 1) Regulation imposes a *substantial burden*;
- 2) On the “religious exercise;”
- 3) Of a person, institution, or assembly.

Land use regulation must place churches on equal footing with non-religious assembly uses.

Sample  
AICP Exam  
Questions

# Sample Question 1

Which of the following takings cases was concerned with the denial of an application to build on a barrier island?

- A) *Lucas v. South Carolina Coastal Council* (1992)
- B) *Nollan v. California Coastal Commission* (1987)
- C) *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles* (1987)
- D) *Dolan v. City of Tigard* (1994)

# Answer to Sample Question 1

**Answer: A.** *Lucas v. South Carolina Coastal Council* (1992).

# Sample Question 2

Which of the following court cases is/are concerned with takings:

- A) *Nollan v. California Coastal Commission* (1987)
- B) *Associated Homebuilders v. City of Livermore* (1976)
- C) *First English Evangelical Lutheran Church v. County of Los Angeles* (1987)
- D) *Lucas v. South Carolina Coastal Council* (1992)

# Answer to Sample Question 2

**Answer: A, C, and D.** *Nollan v. California Coastal Commission* (1987); *First English Evangelical Lutheran Church v. County of Los Angeles* (1987); *Lucas v. South Carolina Coastal Council* (1992).

# Sample Question 3

Which of the following means that government has the right to take private property for public purposes such as the building of roads?

- A) Taking
- B) Eminent Domain
- C) Police Power
- D) Evacuation

# Answer to Sample Question 3

**Answer: B. Eminent Domain**

# Sample Question 4

Which of the following is true about the holding of the landmark law case *Village of Euclid v. Ambler Realty Co.* (1926)?

- A) It established eminent domain as a legal process.
- B) The case upheld zoning as constitutional and as being within the police power of the state.
- C) The case led to the creation of a State Zoning Enabling Act.
- D) The case led to the creation of a Model Land Development Code.

# Answer to Sample Question 4

**Answer: B.** The case upheld zoning as constitutional and as being within the police power of the state.

# Sample Question 5

In which of the following court cases did the Supreme Court rule that a sign ordinance reached "too far into the realm of protected speech?"

- A) *City of Ladue v. Gilleo* (1994)
- B) *Young v. American Mini Theatres* (1976)
- C) *Metromedia, Inc. v. City of San Diego* (1981)
- D) *Members of the City Council of Los Angeles v. Taxpayers for Vincent* (1984)

# Answer to Sample Question 5

**Answer: C.** *Metromedia, Inc. v. City of San Diego* (1981).

# Sample Question 6

These regulations control the manner in which blocks of land over a certain size may be converted into building lots.

- A) Zoning Ordinances
- B) Subdivision Regulations
- C) Building Codes
- D) Comprehensive Plans

# Answer to Sample Question 6

**Answer: B. Subdivision Regulations**

# Sample Question 7

The power given to local government to intervene in the lives of private citizens for the protection of public health, safety, and welfare is called:

- A) Zoning
- B) Police Power
- C) Subdivision Ordinance
- D) Eminent Domain

# Answer to Sample Question 7

**Answer: B. Police Power**

# Sample Question 8

The 2005 *Kelo v. New London* decision of the U.S. Supreme Court addressed the issue of:

- A) Eminent Domain
- B) Growth Management
- C) Right of Way
- D) Coming to the Nuisance

# Answer to Sample Question 8

**Answer: A. Eminent Domain**

# Sample Question 9

If a combination of frontage requirements and floodplain development regulations preclude building on a piece of property, what might the property owner seek in order to be able to build on the lot?

- A) A variance in the frontage requirement.
- B) A special use permit.
- C) A zoning change.
- D) A variance in the floodplain development regulations.

# Answer to Sample Question 9

**Answer: A.** A variance in the frontage requirement.

*The End*