

I. MT. LAUREL NOTES

1. What happened as a result of all this (the Hall article and beyond)? Some lower- and middle-income housing is being built, not enough to meet the need but probably more than was being built during the *Mt. Laurel* era. The fear of the environmentalists that any attempt to increase the amount of housing, particularly cheaper housing, would lead to environmental disasters has not been realized. Many of the wealthier suburbs meet their fair share housing obligations by transferring money to the largely segregated New Jersey cities rather than by allowing lower- and middle-income housing to be built within their borders. I have little doubt that if the *Mt. Laurel* standard could have been made to work through judicial enforcement, it would have resulted both in more housing and in a more integrated New Jersey. The fact, however, is that it could not be made to work, and the reason why it could not be made to work may reflect something about the capacity of courts as institutions that goes beyond the immediate politics of New Jersey. On June 29, 2011, Governor Christie abolished the Council on Affordable Housing, and transferred its powers to the State Department of Community Development. On July 10, 2013, the NJ Supreme Court held the Governor's actions unconstitutional, ruling that such action could be accomplished only by the legislature. A State Development and Redevelopment Plan adopted in 2001 was revised, but the hearings on the revised plan encountered considerable opposition, particularly from environmental groups. The revised plan, scheduled to be adopted in 2012, was postponed because of Superstorm Sandy. New Jersey took a big hit from Superstorm Sandy. How and whether affordable housing is going to work into the substantial amount of redevelopment that will have to be done is anyone's guess.
2. Although New Jersey is unique in the extent to which the courts in that state were, at one point, willing to go to get local zoning ordinances to be more accommodating to low- and moderate-income housing, it is by no means the only state that has been willing to strike down blatantly exclusionary zoning. A number of states have interpreted their constitutions or their zoning enabling acts to require that local authorities consider needs broader than those within the borders of the town if there is a proper plaintiff, normally a property-owner who is seeking planning permission and has been denied it.
3. Few attempts to make a federal constitutional issue out of this have succeeded. There remains the possibility that such ordinances may violate the Civil Rights Act because a racially-exclusionary motive has been shown, and at least one lower court has held that the Federal Fair Housing Act may be violated by a zoning ordinance that has a racially exclusionary effect even if a racially exclusionary motive cannot be shown.
4. Another approach.
 - a. In 1973, the Second Circuit struck down a local ordinance that limited occupancy in certain residential districts to those related by blood marriage or adoption. The Supreme Court reversed. *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974).
 - b. In 1977, however, the same Court reversed decisions of the Ohio courts that had sustained a local ordinance that had limited certain residential areas to families more narrowly defined (the case involved a grandmother who was living with two grandsons who were the children of two different children of hers). *Moore v. City of East Cleveland*, 431 U.S. 496 (1977).

- c. Is the constitutional principle involved in *Village of Belle Terre* and *Moore* the same as that in *Mount Laurel I*?
- d. What is the distinction between *Village of Belle Terre* and *Moore*?

II. PENN CENTRAL

[Breuer Design](#)

[Breuer In N.Y. Times](#)

[Breuer Cartoon](#)

[Grand Central Main Concourse](#)

1. Would the legislation in this case be authorized under the enabling act as interpreted by the *Stoyanoff* court?
2. The court's summary of takings jurisprudence on pp. S519–20. Note particularly the concepts of “investment-backed” expectations and “physical intrusion.”
3. What are Penn Central's arguments?
 - a. Conceptual severance—*United States v. Causby* (Rhenquist, J., in dissent, buys this argument)
 - b. Significant diminution in value—*Euclid*
 - c. Reverse spot zoning—what's the answer to this?
 - d. Lack of uniformity—*Goldblatt*
 - e. Air-rights park—not *Causby*—gov acting in enterprise capacity
4. Does it go too far? The *Mahon* question.
 - a. No interference with present use.
 - b. We don't know how far they'll limit.
 - c. They've got transferable development rights.

III. THE 1987 “TETRALOGY”

1. *Keystone Bituminous Coal Ass'n v. DeBenedictis* (5–4). *Keystone Bituminous Coal Ass'n v. DeBenedictis* (5–4) involved legislation similar to that which had been struck down in *Pennsylvania Coal Co. v. Mahon* (1922). In effect, coal companies in Pennsylvania were required to leave sufficient coal in place, so as not to cause the subsidence of any land over which there were structures, even if they had already purchased from the landowner the right, known in Pennsylvania as the “support estate”, to cause such a subsidence. The Court, in an opinion by Stevens, J., held the statute constitutional.

- a. The case rather nicely poses the problem of what we called when we talked about *Penn Central* “conceptual severance.” What has been taken here?
- b. The case also introduces the concept of the “nuisance exception.”

The PA statute has been amended since 1987, and there is now a federal statute on the same topic. The complexities of these statutes are beyond the scope of this course.

2. In *Hodel v. Irving*, the Court held unconstitutional the portions of the Indian Land Consolidation Act that provided for the escheat without compensation to the Indian tribe of small fractional shares of land held by deceased members of the tribe that would otherwise pass by devise or descent and become further fractionated. The Court was unanimous in its judgment. The opinion for the Court by O'Connor, J.,

emphasizes the importance of passage of property at death as one of the “sticks in the bundle of rights” that the property-owner holds. The particular problem with which the Court dealt here remains with us. As a general matter the case seems inconsistent with *Andrus v. Allard* (p. S524) which held that the state could take eagle feathers out of the market in order to conserve the wildlife from which the property came. One or the other case will probably be confined to its facts, but it is by no means clear that it won’t be *Irving*.

3. In *First Evangelical Lutheran Church v. County of Los Angeles* (6–3), in an opinion by Rehnquist, C.J. (but the majority included Marshall and Brennan, JJ.), the Court held that where the County had denied all building permits in a flood-plain area after a disastrous flood had occurred, a property owner had stated a cause of action when he sued for damages for a regulatory taking. The principal issue in the case was whether the claim was ripe, granted that the plaintiff had made no application for a building permit. The Court held that it was, granted that the County had said that it would grant no building permits. That turned the case into a question whether a state could make the sole remedy for invalid regulations an action to declare them invalid. The Court held that it could not, because even if the plaintiff succeeded he would have been deprived of the use of his property during the interim period.
 - a. Where does the concept of “ripeness” come from? (It is raised in virtually all land-use cases.)
 - b. In what way does this raise the stakes for planners? (More recently see *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002).)
4. In *Nollan v. California Coastal Commission* (5–4), the Court, in an opinion by Scalia, J., held that the Commission could not condition the granting of a building permit on beachfront property on the grant by the landowner of a easement of public access across the beach in question. Even though the Commission could have denied the permit outright, it could not condition the granting of the permit on the grant by the landowner of something that was unrelated to the building they were about to build.
5. In 1994, in *Dolan v. City of Tigard*, 512 U.S. 374 (1994), the Court per Rehnquist, CJ, held (5–4), that the *Nollan* test not only required that there be a nexus between the required dedication but that there be “rough proportionality” of the burden on the property owner and the benefit that the city gets. The case held that the city’s requirement that landowner dedicate portion of her property lying within flood plain for improvement of storm drainage system and property adjacent to flood plain as bicycle/pedestrian pathway, as condition for building permit allowing her to pave the parking lot on her commercial property, did have nexus with legitimate public purposes but that findings relied upon by city to require landowner to dedicate portion of her property in flood plain as public greenway, did not show required reasonable relationship necessary to satisfy requirements of Fifth Amendment. Further, the city failed to meet its burden of demonstrating that additional number of vehicle and bicycle trips generated by proposed commercial development reasonably related to city’s requirement of dedication of pedestrian/bicycle pathway easement.
 - a. What constitutional doctrine is at stake here?
 - b. Possible limits on *Nollan* and *Dolan*?
 - c. Burden shifting under what circumstances?
 - d. What planning practices are likely to be affected?