I. PENN CENTRAL CLEANUP

Would the scheme of landmark preservation that was at stake in *Penn Central* have been authorized under the Standard State Zoning Enabling Act? Thoughts on the difference between *Penn Central*’s ‘reverse spot-zoning’ argument and its ‘uniform according to district’ argument.

II. THE 1987 “TETRALOGY” (CONT’D)

1. 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.

2. 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?

III. LUCAS AND PALAZZOLO

For a view of the area in question in *Lucas* click [here](#)

For a typical house in the development, click [here](#)

1. *Lucas* (1992): (5-1-3) Scalia for the court, Rhenquist, Thomas, O’Connor and White; Kennedy in separate concurrence; Blackmun and Stevens in dissent, Souter with a separate statement.
   a. Where landowner is totally deprived of value s/he must be compensated unless the regulation deals with a nuisance.
   b. Was this landowner totally deprived of value? If not, can we make sense of the scope of the “nuisance exception”? That’s basically Souter’s argument.
   c. Where does the idea of “total deprivation of value” come from?
      i. 1789–91?
      ii. 1868?
      iii. 1897? *Chicago, Burlington & Quincy*
   d. Where does the “nuisance exception” come from?
i. 1789–91?
ii. 1868?
iii. 1897? *Chicago, Burlington & Quincy*

e. The opinion is notable for its frank recognition that the distinction between harm-producing and benefit-conferring is so malleable as to be meaningless. Coase has arrived at the Supreme Court.

f. It is also notable for its frank recognition, at least in a footnote, that total deprivation of value is dependant on the denominator of the fraction, and that the concept therefore must be controversial.

g. Kennedy: Wants to make clear that the nuisance exception extends beyond common-law nuisance.

h. Blackmun: Is furious: “Today the Court launches a missile to kill a mouse.” To which Scalia replies: “After accusing us of ‘launch[ing] a missile to kill a mouse’ . . . , JUSTICE BLACKMUN expends a good deal of throw-weight of his own upon a noncombatant.”

i. Case not ripe

ii. What’s so great about common-law nuisance?

iii. Background principles must take into account the colonial and early US experience (Mill Acts)

i. Stevens:

   i. Arbitrary nature of the total deprivation rule

   ii. Basically same point about nuisance (*Mugler v Kansas* a particularly good case)

2. How much practical effect will this have? According to Fishel (p. 61), the state settled on remand by purchasing the land. A neighbor offered $315,000 for one of the lots to protect his view, with a promise to keep it unbuilt. The state preferred to sell both lots to a developer for $785,000. (I.e., $392,500 per lot or $77,500 more than the neighbor was willing to pay for it.)

3. Palazzolo v. Rhode Island (2001) (5–4, Kennedy for the majority, joined by Rhenquist, Thomas, Scalia, O’Connor, concurrences by Scalia and O’Connor, dissents by Stevens [mostly, he agreed on the ripeness issue], Ginsburg, Souter, Breyer, who also noted his agreement with O’Connor on the acquisition-timing question)

   For a map of the area in Pallazzolo click [here](#).

   a. Holdings:

   i. Case is ripe. The ground of this is basically that two applications for a special exception and a categorical regulation are enough.

   ii. Post regulation acquisition did not bar a takings claim

   iii. Because the petitioner has 18 acres on which he can build one residence, he’s not been totally deprived of value. Case is remanded for *Penn Central* determination.

   b. O’Connor vs. Scalia: When one bought is one factor to be taken into account vs. it’s never a factor.
c. Ginsburg (with Souter and Breyer) dissented on the ripeness grounds. The argument was basically that P.’s failure to apply for development permission on the 18-acres rendered his *Lucas* argument untenable.

d. Breyer also made clear that he agreed with O'Connor.

e. Stevens dissents on the timing question. Only the victim of the taking can sue for it. Is his analogy to the action for mesne profits (the taking of fruit by a trespasser) correct? “A new owner may maintain an ejectment action against a trespasser who has lodged himself in the owner’s orchard but surely could not recover damages for fruit a trespasser spirited from the orchard before he acquired the property.”

f. Palazzolo v. State, 2005 WL 1645974, No. WM 88-0297 (R.I. Super., July 5, 2005), on remand holds that P. has no *Penn Central* claim and that his proposed development would be a public nuisance (with at least mutterings about the doctrine of the public trust being part of the background law).