

Western New England Law Review

Volume 77 (1984-1985)
Issue 4

Article 6

1-1-1985

LAND USE LAW—PROPERTY RIGHTS: LOST AND FOUND: EMINENT DOMAIN v. POLICE POWER—*Annicelli v. Town of South Kingstown*, ___ R.I. ___ 463 A.2d 133 (1983)

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Recommended Citation

Pauline W. Kozuch, *LAND USE LAW—PROPERTY RIGHTS: LOST AND FOUND: EMINENT DOMAIN v. POLICE POWER—Annicelli v. Town of South Kingstown*, ___ R.I. ___ 463 A.2d 133 (1983), 7 W. New Eng. L. Rev. 963 (1985), <http://digitalcommons.law.wne.edu/lawreview/vol7/iss4/6>

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LAND USE LAW—PROPERTY RIGHTS: LOST AND FOUND: EMINENT DOMAIN V. POLICE POWER—*Annicelli v. Town of South Kingstown*, __ R.I. __, 463 A.2d 133 (1983).

General propositions do not decide concrete cases. The decision will depend on judgment or intuition more subtle than any articulate major premise.

OLIVER WENDELL HOLMES 1841-1935
Lochner v. New York, 198 U.S. 45, 76 (1905).

I. INTRODUCTION

“DISCOVER RHODE ISLAND” proudly challenged the license plates of that state a few years ago. In the decade of the 1970’s, many out-of-state residents did just that. A beach home building boom advanced on the “Ocean State,”¹ limited only by an occasional economic recession during which mortgage money became unavailable for second home construction.

The mere sale of building lots did not have a detrimental effect on the environment. When new property owners broke ground, however, the antagonistic interests of two groups rose to the surface. One town’s attempt to deal with the conflicts is the subject of this note.

*Annicelli v. Town of South Kingstown*² exemplifies the Rhode Island Supreme Court’s attempt to resolve the problem of a landowner’s right to develop property. Ida Annicelli, a New Yorker, bought an oceanfront building lot. Her attempt to secure a building permit failed because of a zoning ordinance amendment³ which prohibited the construction of overnight dwellings, such as a single-family home, in a newly-designated high flood danger zone (HFD). She challenged the

1. The phrase currently appears on Rhode Island license plates.

2. *Annicelli v. Town of South Kingstown*, __ R.I. __, 463 A.2d 133 (1983).

3. Appendix for Appellee at Exhibit F, *Annicelli*, South Kingstown Zoning Amendment of May 29, 1975, E (14.53) *Uses and Structures Prohibited Within the HFD Zoning District*:

No residential dwelling designed or used for overnight human occupancy shall be constructed within the HFD Zoning District as defined herein. This prohibition shall apply even if the land . . . is above the base flood elevation.

amendment as unconstitutional, denying her the rights guaranteed by the 5th and 14th Amendments,⁴ and denounced its passage as an abuse of the town's police power.

The Town of South Kingstown presented a strong case for outlawing buildings on the fragile dunes where their location would be a threat to the living organisms in the salt water ponds on one side, and a danger to the inhabitants, who would be exposed to the vicissitudes of the open sea,⁵ on the other.

The Supreme Court of Rhode Island was forced to balance the constitutional rights of the individual property owner with the power of a municipal government to regulate activities in the public interest or welfare.⁶ The town claimed that the ordinance correctly expressed the council's duty under a government's police power⁷ to make regulations to protect the safety, health, and welfare of its people. Mrs. Anicelli claimed that, because she had lost all beneficial use of the small plot, the town should have exercised its power of eminent domain⁸ and

4. See *infra* notes 31-32.

5. See *infra* note 17.

6. 6 P. NICHOLS, LAW OF EMINENT DOMAIN, § 6.16[2] at §§ 6-104, 6-105 (J. Sachman rev. 3d ed. Supp. 1980). Nichols refers to the balancing as a recent trend.

7. E. FREUND, THE POLICE POWER, § 3 (1904, reprinted 1976):

From the mass of decisions, in which the nature of the power has been discussed, and its application either conceded or denied, it is possible to evolve at least two main attributes . . . which differentiate the police power . . . it aims directly to secure and promote the public welfare, and it does so by restraint and compulsion . . . not as a fixed quantity, but as the expression of social, economic and political conditions.

Under the police power, rights of property are impaired not because they become useful or necessary to the public, or because some public advantage can be gained by disregarding them, but because their free exercise is believed to be detrimental to public interests; it may be said that the state takes property by eminent domain because it is useful to the public, and under the police power because it is harmful. . . . *Id.* at § 511.

8. 6 P. NICHOLS, LAW OF EMINENT DOMAIN, § 601[1] at 6-10, 6-12 [hereinafter cited as Nichols]:

The taking of property by eminent domain was undoubtedly what was in the minds of the framers of the bill of rights . . . when they declared that private property should not be taken for public use without just compensation. . . . It is well settled that a taking of property within the meaning of the Constitution may be accomplished without formally divesting the owner of his title to the property or of any interest therein. Any substantial interference with the free use and enjoyment of property constitutes a taking within the meaning of the constitutional provision.

Constitutional rights rest on substance, not on form and the liability to pay compensation for property taken cannot be evaded by leaving title in the owner, while depriving him of the beneficial use of the property. . . . However, just how severe the interference . . . must be to constitute a taking, . . . is not a question which can be answered in such a way to furnish a concise rule readily applicable

condemned the land for the use and enjoyment of the general public. A condemnation action requires that compensation be paid to the landowner. Since South Kingstown did not compensate her, Mrs. Annicelli claimed a right to compensation under the theory of inverse condemnation.⁹

One might have expected the Supreme Court of Rhode Island to sustain South Kingstown's ordinance, the passage of which was intended to sustain the area's unique ecological status. Indeed, this important environmental goal has found much support in case law and scholarly comment.¹⁰ The Supreme Court of Rhode Island, however, affirmed without dissent, the lower court's finding of a confiscatory taking.¹¹

This article will present the background of *Annicelli* and the cases from which each party drew support. This note will then make some predictions as to which landowners will probably lose their challenges to zoning ordinances. It will also show *Annicelli's* effect on other owners, both indirectly and directly.¹²

The impact is already being felt. Annicelli was granted a hearing to determine fair market value of the property instead of the building permit she sought.¹³ That sounds like the end of the story, but stories have introductions, developments, climaxes, and conclusions. *Annicelli* is a climax.

II. BACKGROUND

The *Annicelli*¹⁴ case, which matched a Rhode Island property owner against a town and its zoning ordinances, started in May 1975 when Ida Annicelli¹⁵ signed a sales agreement to purchase an ocean-front building lot¹⁶ at Green Hill Beach for \$16,750.

The three-quarter acre plot was situated on what defendants

to all cases likely to arise. Each case must be decided on its own merits until, by the gradual process of judicial exclusion and inclusion, it is possible to say on which side of the line any given inquiry to private property rights may . . . fall. *Id.* at 6-15 (footnotes omitted).

9. See *infra* note 46.

10. See *infra* notes 17-19 and accompanying text.

11. *Annicelli*, __ R.I. at __, 463 A.2d at 134.

12. See *infra* notes 151-153 and accompanying text for subsequent zoning changes.

13. *Annicelli*, __ R.I. at __, 463 A.2d at 141.

14. *Id.*

15. Brief for the United States as Amicus Curiae at 7, note 4, *Annicelli*. Mrs. Annicelli's husband, an environmental engineer and lawyer "is in fact the beneficial owner of the property."

16. Brief for Appellee at 21, *Annicelli*. The property has ocean frontage of about 75 feet and a depth of 80 feet, abutting a planned roadway.

termed a "barrier beach"¹⁷ with dunes protecting not only salt water ponds, but also inland areas and residences beyond the pond.

What happened to Annicelli's application for a building permit does not surprise one when it is viewed in context with the record of past events. Long a resort area with seasonal homes, Green Hill has a history of being ravaged by storms and suffered the full force of hurricanes in 1938¹⁸ and in 1954.¹⁹ The latter, "Hurricane Carol," was as catastrophic to beach property as the earlier one and prompted the town to amend its zoning ordinance to create a "beach danger zone." The amendment prohibited all development along Green Hill's ocean-front and designated the land a conservation area.²⁰

17. Brief for Natural Defense Council, Inc., Conservation Law Foundation of Rhode Island, Ecology Action for Rhode Island, Save the Bay, Inc., League of Women Voters of Rhode Island at 70, (interpreting Coastal Resources Center, University of Rhode Island, *Rhode Island's Coastal Natural Areas: Priorities for Protection and Management* 13 (1975)), *Annicelli*.

A barrier beach complex consists basically of the beach, dune ridge, back barrier area or lowlands, and a bay/or coastal pond. Each plays a role in dissipating the energy of a storm or hurricane. The porous, sandy beach has the capacity to absorb great amounts of water as waves rush over the barrier. The dunes absorb the major impact of waves. A storm's energy is further absorbed by the back barrier areas and wetlands which sponge up floodwater that would otherwise flood upland areas. By the time a storm reaches the mainland behind the bay or pond, its energy and impact has been significantly lessened.

Barrier beaches, in their undeveloped state, are the mainland's first line of defense against storms—absorbing the impact and sparing the mainland communities and harbors from destruction. As the term "barrier" suggests, the primary function of a barrier beach is to protect other areas from the direct attack of the open ocean.

Id. (quoting from *National Park Service Cooperative Research Unit, University of Massachusetts, BARRIER ISLANDS HANDBOOK* (1979)). See also Table of Authorities, iv.

18. Brief for United States as Amicus Curiae at 16, *Annicelli*. The storm swept all existing houses from the beach. Forty-eight people died and property damage amounted to two and a half million dollars.

Appellee's expert real estate witness testified that property damage in 1938 substantially resulted from unsuitable construction and that properly constructed dwellings survived both hurricanes. Further, he testified that deaths in 1938 were caused by inadequate warnings of the impending storm. Brief for Appellee at 19, *Annicelli*.

19. Brief for the United States as Amicus Curiae at 17, *Annicelli*. No deaths occurred because of increased efficiency in predicting and tracking hurricanes. Early storm warnings had reduced loss of life, but limited escape routes might have become flooded and impassable. Also expressed was concern about the danger to rescuers and the strain on services if police were forced to man roadblocks to prevent looting.

Annicelli commented that "numerous buildings in the downtown Providence area [indicate] the height to which floodwaters rose in that area during those same hurricanes and yet the City of Providence would be laughed at if it tried to prohibit building in that area." Brief for Appellee at 19, *Annicelli*.

20. Brief of Natural Resources Defense Council, Inc., Conservation Law Foundation of Rhode Island, Ecology Action for Rhode Island, Save the Bay, Inc., League of Women Voters of Rhode Island as Amicus Curiae at p. 15 note 16, *Annicelli*.

Construction began anew after a 1966 amendment passed which allowed residential development again. Impetus for building came from the federal government's National Flood Insurance program.²¹ Much housing construction was taking place in the general area, but when new homes began appearing on the dunes, local residents protested. Several town meetings brought together bewildered, angry new landowners, who were anxious to start construction of vacation homes for personal and investment purposes, and frustrated, confused town residents, who saw potential harm from the trend, which could produce a hundred cottages on the mile and a half strip.²²

21. *Id.* Encouragement was based on 42 U.S.C. § 4002:

(a) The Congress finds that—

(1) annual losses throughout the Nation from floods . . . are increasing at an alarming rate . . . as a result of the accelerating development

(5) the Nation cannot afford . . . the increasing losses of property suffered by flood victims

(b) The purpose of this Act, therefore, is to—

(1) substantially increase the limits of coverage authorized under the National flood insurance program.

22. NARRAGANSETT TIMES, June 15, 1972, at 1, col. 1.

A mysteriously conceived proposal to ban construction of houses on Green Hill Barrier Beach—at least temporarily—produced a bitter confrontation Monday night between the South Kingstown Town Council and area property owners before being defeated, 3-2.

Many of the landowners complained that they spent thousands of dollars to buy property in the area, and that any building ban by the council would make their lots virtually worthless.

Some people said they learned of the proposal only an hour or so before meeting time and had to rush to town hall, many from out of town, to defend their summer property.

The council . . . appeared to disavow any knowledge of how the proposed ban on building was placed on the Monday agenda . . .

From 1954 to 1966 the area in question was zoned as a flood danger section, and buildings for overnight occupancy were prohibited there.

But for reasons no one has yet satisfactorily explained, the Flood Danger zoning was dropped in 1966 when the town adopted an updated zoning ordinance, and so in recent years home building in the area has been legal again.

Id. Aug. 10, 1972 at 1, col. 2-4:

600 Watch Green Hill Case Unfold Over 5 Hours

What the town will do . . . is a question which has . . . attracted regional and even nationwide attention

The crowd included television and radio reporters, news photographers, and writers from several newspapers, giving the proceedings an air of importance seldom achieved at any zoning hearing on the municipal level

Id., Sept. 14, 1972 at 5, col. 3-6:

After Weekend Scuffle, Green Hill Case Topic of Meeting Tuesday

Divergence of opinion resulted in a scuffle at the beach last Saturday when an argument broke out between 25 protest marchers opposed to further building

In 1972 the Rhode Island Coastal Resources Management Council,²³ concerned about the unsuitable development of the state's barrier beaches, initiated a moratorium on further building until it could study the possible impact and recommend guidelines for construction.²⁴ The Council published two reports on Rhode Island's barrier beaches and in May 1973 prepared a land use plan which included Green Hill and raised serious questions about the appropriateness of further construction.²⁵

On May 29, 1975, South Kingstown amended its zoning regulations. The town again prohibited residential dwellings in what became labeled a "high flood danger zone" (HFD).²⁶ One year later the town passed another amendment which revised the entire 1966 Ordinance and restated the establishment of an HFD zone.²⁷

Annicelli completed the purchase of the property on October 24, 1974, after the restrictive zoning ordinance had been enacted. The purchase agreement provided that she would assume responsibility for obtaining "all necessary building, sanitation, and coastal resources permits."²⁸ She promptly applied to the town building inspector for a

there and a property owner. One man alleged that he was bitten on the hand and another was scratched . . . incident pointed out how deep emotions are running.

23. 1971 R.I. PUB. LAWS, ch. 279, § 1, as amended § 46-23-1:

Legislative Findings-Creation.

The general assembly recognizes that the coastal resources of Rhode Island, a rich variety of natural, commercial, industrial, recreational, and aesthetic assets are of immediate and potential value to the present and future development of this state; that unplanned or poorly planned development of this basic natural environment has already damaged or destroyed . . . the state's coastal resources, . . . that it shall be the policy of this state to preserve, protect, develop, and where possible, restore the coastal resources of the state for this and succeeding generations through comprehensive and coordinated long-range planning and management. . . . these policies are necessary to protect the public health, safety and general welfare. . . . can be best achieved through the creation of a coastal resources management council as the principal mechanism for management of the state's coastal resources.

24. Brief for the United States as Amicus Curiae at 5, *Annicelli*.

25. *Id.* Reports described Green Hill Pond as a highly productive coastal pond behind the dunes, serving as a nursery area for finfish, a spawning area for winter flounder, a growing area for blue and green crabs, and one of few estuaries in the state supporting oyster production.

The study explained "eutrophication," a process by which growth of algae and similar plants increases due to the addition of certain nutrients to the pond from such sources as driveway runoffs, septic systems, and fertilizers. The study concluded that Green Hill Pond had exceeded its capacity to handle additional nutrients. *Id.* at 6, note 2.

26. *See supra* note 3.

27. Brief for Appellee at 1, *Annicelli*.

28. *Annicelli*, __ R.I. at __, 463 A.2d at 135.

single-family dwelling permit²⁹ and to the Rhode Island Department of Health for an individual sewage-disposal system. She received approval for the latter, but did not for the former as the amendment prohibited the proposed use.³⁰

On January 15, 1976, Annicelli filed an action in superior court for a declaratory judgment. She contended that the amendment creating a HFD zone on May 29, 1975, was unconstitutional on its face, violating provisions of the fifth and fourteenth amendments³¹ to the United States Constitution,³² and article I, section 16, of the Constitution of the State of Rhode Island.³³

The Superior Court of Rhode Island, sitting without a jury, tried the case on June 15, 1977, and did not hand down a decision until October 9, 1980. The court did not pass on the constitutionality of the zoning amendments, but did determine that as applied to Annicelli's lot, the amendment effectively confiscated private property resulting in an indirect taking for the public benefit without compensation.³⁴

South Kingstown appealed to the Supreme Court of Rhode Island, including two other issues resolved earlier in Annicelli's favor.³⁵

29. Brief for Defendant at 1, *Annicelli*. Application was made on November 19, 1975.

30. *Annicelli*, __ R.I. at __, 463 A.2d at 135. In addition, there were permitted uses by special exception which included:

[S]ingle beach cabanas, raising of animals, raising of crops, horticultural nursery or greenhouse, bathing beach, golf course, camp for boys and girls, marina, lunchroom or restaurant without entertainment or alcoholic beverages, commercial dock or pier, storage, repair or sales of boat accessories, commercial parking, vehicle storage, utility substation or pumping station, manufacture . . . of boats, any accessory use customarily incident to a use permitted as a special exception in the zoning district.

31. Brief of the United States as Amicus Curiae at 28, note 21, *Annicelli*. South Kingstown denied her the due process and equal protection guarantees of the fourteenth amendment, Annicelli claimed, because property outside the HFD, unburdened by the building restrictions, might pollute Green Hill Pond.

32. U.S. CONST. art. V: "[N]or shall private property be taken for public use, without just compensation."

art. XIV: "[N]or shall any State deprive any person of . . . property, without due process of law; . . ."

The 5th amendment prohibition applies to individual states through the 14th amendment. *Chicago B. & Q.R. Co. v. Chicago*, 166 U.S. 226, 239 (1897).

33. R.I. CONST. art. I,016: "Private property shall not be taken for public uses, without just compensation."

34. *Ida Annicelli v. Town of South Kingstown*, C.A. No. 76-7, Superior Court at 12 (1980).

35. Brief for Defendant at 4, *Annicelli*. First, the town had declared that Annicelli's petition for a declaratory judgment should have been dismissed because she had not exhausted the administrative remedies available to her when the building inspector initially denied her a building permit. The town said she should have appealed to the Zoning Board

II. ANALYSIS

A. *The Police Power Rejected*

The Supreme Court of Rhode Island faced the basic issue in *An-*

of Review. Title 54-24-16 and Section 20 of the General Laws of Rhode Island provide for appeals to the Board of Review from decisions of the Building Inspector. South Kingstown has its own zoning enabling act which is Chapter 101 of the Public Laws of January, 1973. Section 18 thereof was amended March 24, 1976 by Chapter 11 of the Public Laws of January 1976, and gave the local Zoning Board of Review similar powers.

Mrs. Annicelli did not appeal the denial to the Zoning Board of Review not only because the single family dwelling permit she requested represented a prohibited use in the HFD zone, even as a special exception, but also because the Zoning Board of Review had no power to grant ordinance variances. Annicelli contended that *Nardi v. City of Providence*, 89 R.I. 437, 153 A.2d 136 (1959) on which the town relied, did not apply. Brief for Defendant at 4-11, *Annicelli*. In 1925, Nardi purchased property located almost entirely in a business district. The municipality repealed the 1923 zoning in 1951, changing the land use to general residence and rendering 20,000 square feet commercially useless. Nardi said the reclassification violated his constitutional rights. The court held that mere enactment of the ordinance did not affect the property. Until he applied for a permit or relief by exception or variance, no actual controversy existed between the City of Providence and him on which a declaratory decree could issue.

Annicelli argued that *Frank Ansuini, Inc. v. City of Cranston*, 107 R.I. 63, 264 A.2d 910 (1970) controlled. In *Ansuini*, Cranston denied a residential developer approval for a residential plat because he would not donate seven percent of the land to the town for recreational purposes, as required by a 1965 zoning ordinance. He did not appeal to the Board of Review, but sought a declaratory judgment that the ordinance was invalid. The court declared the seven percent figure arbitrary and unconstitutional. It also recognized that the Board of Review, a municipal agency, had no authority to declare a regulation null and void. No reason existed, therefore, for Ansuini "to do that which would be futile." *Id.* at 73, 916. The court, reviewing the facts of *Annicelli*, concurred.

Another obstacle comprised South Kingstown's claim that Annicelli did not have standing to sue because the town passed the zoning ordinance in question between the signing of the sales agreement and the actual conveyance.

The contract theory explained in 6 CORBIN, CONTRACTS, § 1361 at 492 (1962), led to the conclusion that the risk of restrictions in ordinances should be passed on to the purchaser. The purchase agreement made no provision for rescission of the contract in the event of a zoning change, so Annicelli had standing as the equitable or beneficial owner of the land. *Annicelli*, ___ R.I. ___, 463 A.2d at 238.

Equitable conversion is that constructive alteration in the nature or character of property whereby, in equity, real estate is for certain purposes considered as personalty, or whereby personalty, for similar considerations, is regarded as real estate, and in either instance, it is deemed to be transmissible and descendible in its converted form. The doctrine of equitable conversion was adopted for the purpose of giving effect to the intention of the . . . contracting parties, and is not a fixed rule of law but proceeds on equitable principles that take into account the result to be accomplished. It is a mere fiction, resting on the principle that equity regards things which are directed to be done as having actually been done where nothing has intervened which ought to prevent performance. It merely means that where there is a mandate to sell property at a future date or to employ money for the purchase of land . . . [the] land, though not actually sold, may be treated as money, or money, though not actually paid out in the purchase of land, may be treated as land.

*nicelli vs. Town of South Kingstown*³⁶ of whether, in restricting uses of oceanfront land, the town had properly exercised its police power; i.e., to protect the health, safety, and welfare of the public. If not, the ordinance constituted an indirect, confiscatory taking of Annicelli's property without the just compensation required by eminent domain.³⁷

South Kingstown presented evidence that tended to show that the zoning restrictions met the standard set in *Goldstein v. Zoning Board of Warwick*,³⁸ which specified that limitations on property uses must have a reasonable relationship to public health, safety, morals, and

27 AM. JUR. 2d *Equitable Conversion* § 1 (footnotes omitted).

Where an equitable conversion is effected by an executory contract for the sale of land, the vendee is considered in equity as the trustee of the purchase price for the vendor, and the vendor, in turn, is regarded as holding the legal title in trust for the purchaser and as security for the purchase price. The vendee's interest under the contract is considered to be realty, and he is deemed to be the equitable owner of the property. On the other hand, the vendor's interest under the contract is considered to be personalty, he is deemed the owner of the purchase money, with an equitable lien on the property for the balance of the unpaid purchase price.

27 AM. JUR. 2d *Equitable Conversion* § 11 (footnotes omitted).

36. ___ R.I. ___, 463 A.2d 133. The town contended that the zoning amendments represented a proper exercise of the police power and did not deprive plaintiff of all beneficial use of the property.

37. Nichols, *infra* note 8.

It is fundamental that the power to appropriate private property for public use is an attribute of sovereignty and is essential to the existence of government. The power of eminent domain does not depend for its existence on a specific grant in the Constitution; it is inherent in sovereignty and exists in a sovereign state without any recognition thereof in the Constitution. It is founded on the law of necessity. The provisions found in most of the state constitutions relating to the taking of property for the public use do not by implication grant the power to the government of the state, but limit a power which would otherwise be without limit. . . .

The power of eminent domain is inalienable, and no legislature can bind itself or its successors not to exercise this power when public necessity and convenience require it. . . .

27 AM. JUR. 2d § 2 (footnotes omitted).

38. 101 R.I. 728, 731, 227 A.2d 195, 197 (1967) (petitioners owned land in a residential section, bounded on one side by a Howard Johnson restaurant and very near a large shopping complex. The town had denied them a variance to build a gas station on 2/3 of the plat. Evidence tended to prove the commercial nature of the surrounding property. Attempts to dispose of the property for residential purposes had proved fruitless. The city failed to present evidence that a gas station would depreciate land values and increase traffic. It gave no reason for denying the permit. Petitioners were allowed to build.

See also, *Sundlun v. Zoning Board of Review of City of Pawtucket*, 50 R.I. 108, 145 A. 451 (1929). The Board of Review of Pawtucket denied Sundlun a special exception to the zoning ordinances to construct a gasoline station in a residential district under a comprehensive plan to secure safety, to promote health, to lessen congestion in the streets, and accomplish other purposes. In reversing the denial, the Rhode Island Supreme Court

general welfare. The town pointed to the number of uses allowed or made possible by exception.³⁹

The town suggested further that the situation could be likened to that of *Sibson v. State*,⁴⁰ which involved filling a marshland. There, the court upheld a theory that denial of a permit to alter a marshland did not deprive the owner of a use. The owner would still own the same marsh with the same value. Similarly, Annicelli would still have all the uses usually associated with a beach. The town supported its suggestion with an oft-quoted comment in *Just v. Marinette County*⁴¹ that "an owner of land has no absolute and unlimited right to change the essential natural character of his land as to use it for a purpose for which it was unsuited in its natural state and which injures the rights of others."⁴²

Courts have taken divergent views as to the possible uses required to sustain a finding of "taking" of property. Some courts require close scrutiny because the denial of a zoning permit may have been caused by the failure of landowners to meet their burden of showing that no beneficial use remained for them.⁴³

noted that the neighborhood had changed in character so that "it would appear that the neighborhood has very little privacy to be invaded." *Id.* at 116, 145 A. at 454.

Many residents had organized to block approval and the court said that "[p]ublic notice of the hearing . . . is not given for the purpose of polling the neighborhood on the question involved." *Id.* at 117, 145 A. at 455.

39. See *supra* note 30.

40. 115 N.H. 124, 336 A.2d 239 (1975). Plaintiffs had already filled in two acres legally and built and sold a house for a sizable profit in 1972 before new regulations halted additional filling.

41. 56 Wis. 2d 7, 201 N.W.2d 761 (1972). Marinette County passed shoreland zoning in 1967 under a comprehensive plan to protect navigable waters and public rights from deterioration which would result from uncontrolled development.

The Justs purchased 36.4 acres with over 1000 feet of lake frontage before the new ordinance placed the land in a conservancy district. They had sold some parcels before the change. Later the Justs filled a large section without securing a conditional-use permit.

42. Also supportive of the view was *Candlestick Prop., Inc. v. San Francisco Bay C & D Com'n*, 11 Cal. App. 3d 557, 89 Cal. Rptr. 897 (1970). Plaintiff was the owner of a \$40,000 parcel of land which became submerged at high tide by the waters of San Francisco Bay. He took advantage of tidal changes to dispose of debris from inland construction projects. In upholding the police power to regulate the bay, the court pointed out that "resting on past conditions . . . [does] not cover and control present day conditions." *Id.* at 571, 89 Cal. Rptr. at 905. See also, *Spiegle v. Beach Haven*, 46 N.J. 479, 218 A.2d 129 (1966). The New Jersey Supreme Court affirmed a lower court decision that an ordinance prohibiting construction on the ocean side of an established building line constituted a reasonable exercise of police power. In *Spiegle*, plaintiffs had built houses on two of their four parcels which, therefore, would not be affected.

43. *Maple Leaf Investors v. State of Washington*, 88 Wash. 2d 726, 565 P.2d 1162 (1977) (cited by defendants as a case similar to *Annicelli*). Petitioners, 10 shareholders, purchased property in 1965 to develop a single-family residential tract. Seventy percent lay

Annicelli did not depend heavily on the issue of the reduction of property value, although both parties agreed that some diminution of value had occurred. An oceanfront building lot in a developing area constitutes a valuable parcel. A plot with dune grass, on which one could construct a boardwalk to gain access to the ocean for swimming, fishing, or sunbathing, would not entice an ordinary buyer. Defendants attempted to defuse the issue by citing cases in which a municipality exercised the police power constitutionally to deprive landowners of most of their land's value.⁴⁴

within the Cedar River Flood Control Zone, a designation made by legislative enactment in 1935 because recurring damage threatened the public health and safety. The Supreme Court of Washington sustained Washington's use of police power, noting that petitioners had notice from the time of purchase that the property might be subject to some restrictions. The owners offered no persuasive testimony that they could not make a profitable use of the property.

Brecciaroli v. Connecticut Comm'r of Env. Protec., 168 Conn. 349, 362 A.2d 948 (1975). Plaintiff owned 20.6 acres of land abutting a river in Guilford. Seventeen and one half acres were subsequently designated as tidal wetland. An application to place 4 feet of clean fill on 5.3 acres was denied. *Brecciaroli* was the first case alleging an unconstitutional taking of land without compensation heard by the court under the state's act to preserve wetlands and tidal marshes. Influenced by the language of the Environmental Protection Act of 1971 that the air, water and other natural resources are a public trust, the court could not say an unconstitutional taking had occurred merely because one specific use was denied. *Id.* at 357, 952.

44. *Penn Central Transp. Co. v. New York*, 438 U.S. 104 (1978) Owners could not obtain a \$3,000,000 annual lease which would allow a United Kingdom corporation to construct a multi-story office building over Grand Central Terminal. South Kingstown analogized *Penn Central* to *Annicelli*. Grand Central Terminal was designated a landmark under New York City's Landmarks Preservation Law which was enacted "to protect historic landmarks neighborhoods from precipitate decisions to destroy or fundamentally alter their character." The owner of such a designated landmark must get approval before exterior alterations are made.

In *Hadacheck v. Sebastian*, 239 U.S. 394, 405 (1915) Petitioner purchased eight acres in 1902 because of a very valuable bed of clay used to manufacture fine quality bricks on the premises. Excavations rendered the \$800,000 parcel unsuitable for residential purposes. An ordinance enjoined petitioner's further use of the land for brickmaking, reducing the value to \$60,000. The city had built up around the location and residents complained of discomfort and sickness from smoke, soot, and cinders.

The Supreme Court, in affirmation, found the ordinance a good faith police measure. "There must be progress, and if in its march private interests are in the way they must yield to the good of the community." *Id.* at 410.

Mugler v. Kansas, 123 U.S. 623 (1887). Courts and commentators still quote *Mugler* for the proposition that "[t]he exercise of the police power by destruction of property which is itself a public nuisance, or the prohibition of its use in a particular way, whereby its value becomes depreciated, is very different from taking property for public use, or from depriving a person of his property without due process of law."

Mugler, in 1887, built a brewery to manufacture beer at a cost of \$10,000. The state of Kansas passed an ordinance in 1880 prohibiting the manufacture and sale of intoxicating liquors, except for medical, scientific, and mechanical purposes. The appellee charged that the statute violated his constitutional rights to due process and equal protection of law.

The Supreme Court of Rhode Island sustained the lower court's ruling that South Kingstown had taken Annicelli's property for the benefit of the community⁴⁵ and vacated an order to issue a building permit. "Annicelli has in fact established an action in inverse condemnation⁴⁶ against the town and thus must be compensated for a construction 'taking.'"⁴⁷

In reaching its conclusion, the court engaged in the traditional balancing of the conflicting aims of the public's welfare and the landowner's right to use her property as she pleased.⁴⁸ The balance necessitated an assessment of the degree of damage done to the property owner.⁴⁹ The court also considered whether the "best use" doctrine should be applied; that is, that confiscation does not occur merely because landowners cannot put land to the use most desirable or profitable to them.⁵⁰

In the instant case the court adjudged the zoning ordinance to have denied all beneficial use of the property to Annicelli since only a much larger tract could take advantage of the exceptions. In other

The court held that if a state passes such legislation for the peace and security of society, the courts cannot, without "usurping legislative functions, override the will of the people as thus expressed by their legislature." *Id.* at 662. *See also*, *Goldblatt v. Hempstead*, 369 U.S. 590 (1962) (ordinance halted a 38 acre sand and gravel operation because the town viewed the huge crater that had been created as a safety hazard); *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 387 (1926) (changing industrial designation of 68 acres was reasonable to meet changing conditions).

45. *Annicelli*, __ R.I. __, 463 A.2d at 135.

46. 27 AM. JUR. 2d 478 (footnote omitted):

'Inverse condemnation' has been characterized as an action or eminent domain proceeding initiated by the property owner rather than the condemnor, and has been deemed to be available where property has been actually taken for public use without formal condemnation proceedings and where it appears that there is no intention or willingness of the taker to bring such proceedings. It has also been deemed to be available where property is taken for a public purpose by a municipality or other agency having the power of eminent domain under circumstances such that no procedure provided by statute affords an applicable or adequate remedy to the owner to obtain just compensation for his property in accordance with his constitutional right thereto.

47. *Annicelli*, __ R.I. at __, 463 A.2d at 135.

48. *Id.* at __, 463 A.2d at 139.

49. *Id.* at __, 463 A.2d at 140 (quoting *Just v. Marinette County*, 56 W. 27, 201 N.W.2d 761, 767 (1972)).

50. *Agins v. City of Tiburon*, 447 U.S. 255 (1980), serves as an example of property owners not being able to choose the "best use" of their properties. Appellants acquired five acres of unimproved land in Tiburon, California; the lot possessed a spectacular view of San Francisco Bay and a panorama of other scenic surroundings. A zoning ordinance placed the property in a classification with density limitations. A California court upheld the town's right to limit five acres of prime residential real estate to the construction of one to five houses, holding that a limitation on the best use was not a confiscation.

words, the court found suggested uses illusory for the fifty foot wide lot, which does not, in fact, reach the pond.⁵¹

The decision paralleled similar cases in other states.⁵² The cases drew a fine distinction between protective action required by a governmental unit under its police power to protect its citizens from harm and a regulation passed to benefit the public good. The latter requires

51. Brief for the United States as Amicus Curiae, *Annicelli* at 26, note 19. "[T]he Town's planner testified that the land might be used . . . for . . . commercial dock (on Green Hill Pond), marina . . . restroom. . . . Others testified that the land could possibly be used to grow beach grass, which was a good economic crop in high demand to stabilize dunes"

52. See *State v. Johnson*, 265 A.2d 711 (Me. 1970). Appellants owned a long strip of land across salt water marshes in the town of Wells, protected by the Maine Wetlands Act. Although the land flooded at high tide, it could be adapted for building if the grading were changed. A single justice while recognizing that the land was part of the state's valuable natural resources noted that without fill, the land had no value whatever to the owners. The court held "on the facts peculiar to the case" that "to leave appellants with commercially valueless land . . . is to charge them with more than their just share of the cost of this state-wide conservation program, granting fully its commendable purpose." *Id.* at 716. Another case favorable to *Annicelli* was *Dooley v. Town Plan and Zoning Com'r*, 151 Conn. 304, 197 A.2d 770 (1964). Fairfield created a flood plain district in 1961 which prohibited excavation or fill on about 404 acres of land, previously zoned residential, a half mile from the ocean. Builders' plans were underway. Permitted uses similar to those in the instant case included park, playground, marina, wildlife sanctuary, gardening, and restricted parking, precluding the landowner from getting a reasonable return on his property. *Id.* at 306, 197 A.2d at 771. *Morris County Land Improvement Co. v. The Township of Parsippany-Troy Hills*, 40 N.J. 539, 193 A.2d 232 (1963) was also supportive. Plaintiff owned 66 acres which consisted of a top layer of wet, unstable, brown muck and peat on the surface, a second stratum of from two to four feet of highly compressible clay and silt, and a bottom layer of sand and gravel. In order to support structures, the top two layers would have had to be removed and replaced with suitable fill; thus the area had remained unused. Plaintiff operated a sand and gravel business: he could no longer fill his land with excess material from his industrial operation after a new ordinance forbade any dumping. The court held that the ordinance, enacted to prevent private productive use and to maintain the natural state of the land, was invalid. *Id.* at 543, 193 A.2d at 235. The court also took note of *MacGibbon v. Board of Appeals of Duxbury*, 347 Mass. 690, 200 N.E.2d 254 (1964). Plaintiff owned seven acres of land, parts of which became flooded once or twice a month. A zoning amendment in 1960 restricted the filling of any marshland, wetland, or bog without proper authorization from the Board of Appeals, which twice denied *MacGibbon* permits to fill or excavate. The Supreme Judicial Court of Massachusetts directed the Board of Appeals to hold further proceedings, explaining the reason for its denial to the plaintiff.

It appears that the board, acting under the guise of zoning, intends to grant no special permits for any physical changes and improvements on any coastal wetlands in the town and thereby to protect and preserve them in their natural state.

The preservation of privately owned land in its natural, unspoiled state for the enjoyment and benefit of the public by preventing the owner from using it for any practical purpose is not within the scope and limits of any power or authority delegated to municipalities under the Zoning Enabling Act.

MacGibbon v. Board of Appeals of Duxbury, 356 Mass. 635, 640-41, 255 N.E.2d 347, 351 (1970).

that just compensation be paid to the property owner under the power of eminent domain. Testimony and the actual wording of the South Kingstown ordinance revealed a strong environmental goal of conserving open spaces and natural resources, a goal which would benefit the public good.⁵³

Courts often quote Justice Oliver Wendell Holmes' comments in *Penn. Coal Co. v. Mahon*,⁵⁴ when judicial action requires discriminating between the government's power to protect from harm and to gain a public benefit. He cautioned that the fifth amendment protection of private property seems so absolute that a tendency can develop whereby governments try to mold the facts to justify the use of police power regulation. "[A]t last . . . private property disappears."⁵⁵ Holmes issued a warning which courts have heeded for over fifty years:

We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change. As we have already said, this is a question of degree—and therefore cannot be disposed of by general propositions.⁵⁶

B. *The State of the Law*

The Supreme Court of Rhode Island had to decide whether the South Kingstown zoning ordinance was unconstitutional on its face, unconstitutional as applied to the Annicelli property, or a valid regulation to protect and preserve a community's natural assets.⁵⁷

53. *Annicelli*, __ R.I. at __, 463 A.2d at 140.

54. 260 U.S. 393 (1922). The Mahons contracted to purchase only the surface rights of land, while anthracite coal was to be mined below. Liability on the part of the coal company for damages was waived, reflected in the low price. The Mahons later attacked that contract. *Id.* at 405.

The coal company argued that the Mahons should repair damage to their house caused by depressions in the land, fill lawn and sidewalks, and if necessary, move out until the company completed mining coal because the lot had no right of support. Justice Holmes concluded that if private persons took the risk of acquiring only surface rights, the danger they suffered should not give them greater rights than they had purchased. The Mahons should not acquire a right of support by their house without paying for it.

55. *Id.* at 415.

56. *Id.* at 416.

57. The barrier beach is a beautiful and unique natural resource in its undeveloped state. Most states have no seacoast at all. Others have allowed a variety of construction as determined by the desires of the particular owners, or of state and local governing bodies. Although lacking the high rise hotels and condominiums of Florida, or even the profusion of waterfront motels found on Cape Code, Rhode Island's 40 miles of seacoast has been put to many other types of development.

The mansions gracing Newport's coastline occupy one end of the spectrum. Other

1. Taking

A threshold problem involves the definition of "taking." Bentham's social utilitarian theory⁵⁸ posited that property represents "a basis of expectations" founded on existing rules and that society likes to depend on rules. Only a general understanding of a taking exists, however, and the uncertainty about how individual situations will be judicially regarded is unsettling. Nichols⁵⁹ identified "taking" as a word to be broadly construed encompassing substantial interference with private property which lessens its value or the owner's right to its use or enjoyment. This could happen even though title and possession remained undisturbed. Van Alstyne edifies the concept in terms of Constitutional theory.⁶⁰ The right of a government to "take" property is not a grant of modern times.⁶¹

development contains oceanfront trailer parks and commercial establishments such as found in the Matunuck section of South Kingstown. One of these establishments fell victim to the vicious assault of spring storms in 1983 and its kitchen hung precariously over relentless waves which stole its foundation and still challenge its existence. The area is not a sheltered cove or bay; it is not stabilized with high elevations or substantial rock formations. It is a fringe of land doing constant battle with the Atlantic Ocean.

Whichever decision the court made, it could point to case law and academic support. The dilemma involving zoning ordinances in the debate between eminent domain and the police power has not lacked litigants or literati.

58. Bentham believed that an unpredictable redistribution of property is potentially destructive of society's well being. Michelman, *Property and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1212 (1968) [hereinafter cited as Michelman].

59. 2 P. NICHOLS, EMINENT DOMAIN § 6.3 (3d ed. 1964).

60. Van Alstyne, *Taking or Damaging By Police Power: The Search For Inverse Condemnation Criteria*, 44 S. CAL. L. REV. 1, 33 (1971) (hereinafter cited as Van Alstyne). "[A] legislative measure which so restricts the use of property that it cannot be used for any reasonable purpose goes . . . beyond regulation and must be recognized as a taking of property."

61. Note, *Just Compensation or Just Invalidity: The Availability of a Damages Remedy In Challenging Land Use Regulations*, 29 U.C.L.A. L. REV. 711, 712 n. 11 (1982) (quoting F. BOSSELMAN, D. CALLIES, & J. BANTA, THE TAKING ISSUE 56 (1973)) [hereinafter cited as Damages]:

The right of the sovereign to 'take' property by judicial process goes back at least some seven and a half centuries. Section 39 of the original Magna Carta (1215) provided that '[n]o freeman shall be . . . deprived of his freehold . . . unless by the lawful judgment of his peers and by the law of the land'.

One writer says that the term "taking" appears to cause substantial confusion to some courts, based on its incorrect interpretation in the well-known *Pennsylvania Coal* case. Note, *Eldridge v. City of Palo Alto: Aberration or New Direction in Land Use Law?* 28 HASTINGS L.J. 1569, 1603 (1977). The *Pennsylvania Coal* Court stated that "if a regulation goes too far it will be recognized as a taking." Later courts used the language to order compensation as a remedy. The writer urges it was a figure of speech merely indicating that a regulation was invalid. *Id.* at 1575 (interpreting *Penn. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922)).

See also *Fred F. French Investing Co. v. City of New York*, 39 N.Y.2d 587, 350

The Supreme Court has stated the need to focus on the character of the action and extent of the interferences with rights in the parcel as a whole.⁶²

Courts have considered the issue on a case-by-case basis, an approach not always favored. Friedman sanctions the criterion of fairness,⁶³ but does not seriously disagree with other writers.⁶⁴ Even if a uniform standard of fairness were accepted, the many factual situations would individualize its application.

2. Police Power

If the court does not find a taking then laws, regulations, and ordinances in question represent valid exercises of a governmental entity's police power.⁶⁵ Regulations are presumed to be constitutionally valid until shown to be arbitrary and unreasonable with no substantial

N.E.2d 381, 385 (1976). The court referred to *Pennsylvania Coal's* use of "taking" as only a metaphor rather than an indication that the case involved questions of eminent domain and just compensation. The court cited other cases as well.

62. *Penn. Central Transp. Co. v. New York City*, 438 U.S. at 130-31.

63. M. FRIEDMAN, *CAPITALISM AND FREEDOM*, 7-36 (1962) reprinted in *ECONOMIC FOUNDATIONS OF PROPERTY LAW* 77 at 103 (1975). Friedman abandons his former position favoring case-by-case adjudication of compensability cases for a test responsive to society's purpose which should be one of fairness.

64. *Van Alstyne*, *supra* note 60, at 28-29. Van Alstyne refers to a rational basis test which "accepts judicial responsibility for evaluating the reasonableness of a regulation, as applied, in light of all the surrounding circumstances."

An attempt to define the reach of police power "or trace its outer limits is fruitless, for each case must turn on its own facts." *Berman v. Parker*, 348 U.S. 26, 32 (1954).

"The importance of the case-by-case approach was a recurrent theme in the cases discussed by the *Eldridge* court." Note, *Eldridge v. City of Palo Alto: Aberration or New Direction in Land Use Law?* 8 *Hastings L.J.* 1569, 1602-05 (1977).

65. The following cases and authors are much quoted in the police power context:

There is no set formula to determine where regulation ends and taking begins. . . . The term "police power" connotes the time-tested conceptional limit of public encroachment upon private interests.

Goldblatt v. Town of Hempstead, 369 U.S. 590, 594 (1962).

As long recognized, some values are enjoyed under an implied limitation and must yield to the police power. But obviously the implied limitation must have its limits, or the contract and due process clauses are gone . . . So the question depends on the particular facts. . . .

Penn. Coal v. Mahon, 260 U.S. 393, 413 (1922).

The acknowledged police power of a State extends often to the destruction of property. . . . Without attempting to define what are the peculiar subjects or limits of this power, it may safely be affirmed that every law . . . for the preservation of the public peace, health, and morals must come within this category.

Mugler v. Kansas, 123 U.S. 623, 658 (1887).

See also *Berman v. Parker*, 348 U.S. 26, 32 (1954); *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 374 (1926); *Hadacheck v. Sebastian*, 239 U.S. 394, 410 (1915); *Michelman*, *supra* note 58 at 100; and *Van Alstyne*, *supra* note 60, at 27-28.

relationship to safety, health, and welfare.⁶⁶ The presumption allows some discretion to a court to discern a different "true purpose" for an ordinance and substitute its own judgment for that of a municipality.⁶⁷ A regulating entity may refer to an action however it wishes, but its appellation is not conclusive to the courts.⁶⁸

In many cases the courts have upheld public enactments, including zoning changes, as necessary to health, safety, and welfare, and therefore, a proper exercise of police power. In *McCarthy v. City of Manhattan Beach*⁶⁹ the city rezoned plaintiff's oceanfront land for beach recreation. A civil engineer defended home construction, but a judge viewing the site felt reasonable minds could differ on the safety issue. In *City of St. Paul v. Chicago, St. P., M. & O. Ry. Co.*⁷⁰ the court approved restrictions of building heights in a downtown revitalization project. The United States Supreme Court in *Berman v. Parker*⁷¹ affirmed condemnation in an urban renewal project. In *Tur-*

66. *Euclid v. Amber Realty*, 272 U.S. 365:

If the municipal council deemed any of the reasons which have been suggested [see n.10], or any other substantial reason, a sufficient reason for adopting the ordinance in question, it is not the province of the courts to take issue with the council. We have nothing to do with the question of wisdom or good policy of municipal ordinances. If they are not satisfying to a majority of the citizens, their recourse is to the ballot—not the courts.

Id. at 393.

"Traditional courts defer to local legislative judgment for several reasons: the separation of powers, a perceived lack of judicial expertise in land use matters, and the desire to allow local governmental flexibility in meeting changing conditions. . . ." Mandelker, *Land Use Takings: The Compensation Issue*, 8 HASTINGS CONST. L.Q. 491, 588-89, 593 (1981) (hereinafter cited as Mandelker) (footnote omitted). As long as a municipality asserts a laudable public purpose for a land use restriction, such as environmental protection, the traditional court will presume that the restriction is constitutionally valid.

67. Kolis, *Citadels of Privilege: Exclusionary Land Use Regulation and the Presumption of Constitutional Validity*, 8 HASTINGS CONST. L.Q. 594 (1977).

68. Note, *Damages supra* note 61 at n. 22 (referring to quotation in *Hughes v. Washington*, 389 U.S. 290, 298 (1967): "[T]he Constitution measures a taking of property not by what a state says, or by what it intends, but by what it *does*." (emphasis in original).

69. 41 Cal. 2d 879, 264 P.2d 932 (1953), *cert. den.* 348 U.S. 817 (1954). The court noted that prior to 1941, when the property was zoned for residences, plaintiffs, seeking industrial classification, had argued it could not be used profitably for houses.

70. 413 F.2d 762, 770 (1969). The City forbade structures on the railroad's property from rising above the level of a park on a bluff above. The court found that the public benefit exceeded the appellee's loss in market value.

71. 348 U.S. 26 (1954). Congress made a legislative determination that Washington, D.C. had to correct conditions existing in certain sections. Congress identified slum houses, many of which were beyond repair and lacked inside toilet facilities, electricity, and central heating. The Court upheld Congress' conclusion that a need existed to restructure the entire section as a whole, rather than by piecemeal condemnation of particular buildings, since the redevelopment plan would integrate parks, schools, churches, recreational sites, and shopping areas with the construction of new homes.

*ner v. County of Del Norte*⁷² the court outlawed rebuilding on land with a history of damaging floods. Despite a severe reduction in value, the court in *HFH, Ltd. v. Superior Court of Los Angeles County*⁷³ upheld zoning changes from industrial to agricultural to residential. The court required an expensive soil study in *Kopetzke v. San Mateo Bd. of Super.*⁷⁴ In *Pope v. City of Atlanta*⁷⁵ the court disallowed a property owner's construction of a tennis court because its surface would not absorb water. In *San Diego Gas & Electric Co. v. San Diego* the court upheld a zoning change from industrial to open spaces but left open the question of whether compensation would be the proper remedy if the ordinance were deemed confiscatory.⁷⁶

3. Eminent Domain

A property regulation not found to be a proper use of police power will likely trigger another governmental prerogative—eminent

72. 24 Cal. App. 3d 311, 101 Cal. Rptr. 93 (1972). Turner, owner of 31 acres on a river bank, received approval for a subdivision which would create 143 building lots, including roads, a water system, and a model home. In 1964 severe flooding swept away everything. The city initiated restrictive zoning based on studies of the United States Army Corps of Engineers. The court found the ordinance "no more stringent than existing danger demands." *Id.* at 314, 101 Cal. Rptr. at 96.

73. 125 Cal. Rptr. 365, 367, 542 P.2d 237, 239 (1975). HFH, a limited partnership, alleged that its unimproved property could be sold for \$400,000 as an industrial parcel, but only for \$75,000 as residential. Plaintiff had had the opportunity to sell previously when the land was designated industrial.

74. 396 F. Supp. 1004 (1975). The zoning classification placed oceanfront property in the most unstable soil group and was necessary to assure safety.

75. 242 Ga. 331, 249 S.E.2d 21 (1978). The tract in question bordered a river that was included within the Metropolitan River Protection Act. The property contained a home, a man-made lake, and a swimming pool, but the city disapproved a tennis court because of the cumulative effect such permits would cause.

76. 450 U.S. 621 (1981). The San Diego Gas & Electric Co. acquired a 412 acre parcel, costing \$1,770,000, as a possible site for a nuclear power plant in 1966. The company abandoned the plan after the discovery of an offshore fault affecting its feasibility. The city rezoned the land to preserve it as a parkland. Funding was not approved, however, so the land remained restrictively zoned. A superior court and the court of appeals ultimately granted the utility \$3 million plus interest in damages in an inverse condemnation suit. The California Supreme Court remanded the case for further consideration in light of the decision in *Agins v. City of Tiburon*, 447 U.S. 255 (1980). The *Agins* holding established that the exclusive remedy should be invalidation of the regulation and not a monetary award. Appellant appealed, claiming that property taken for public use required compensation under the fifth and fourteenth amendments. On retransfer, the court of appeals, considering *San Diego* and relying on *Agins*, refused compensation, but did not invalidate the zoning ordinance of the open space plan because of factual disputes in the superior court record. The United States Supreme Court, on review, interpreted the appellate court's action as an absence of final judgment and dismissed the appeal suggesting that appellant might seek relief in superior court. *Id.* at 633. *See also supra* notes 40-44.

domain.⁷⁷ It places a limitation on the sovereign's right to exercise power⁷⁸ and forces the "formality of ordinary condemnation proceedings."⁷⁹ The remedy most often granted in eminent domain cases comprises an injunction to restrain the unconstitutional invasion.⁸⁰ The problem that has resisted resolution is, of course, how to decide cases that contain elements of improper use of police power and eminent domain.⁸¹ Components of each become intermingled and difficult to identify.⁸² Nichols wanted to focus on taking of property because of the public's need to use it and utilizing police power to prevent a use detrimental to public interest."⁸³

Judicial concerns about the validity of a regulation include looking at the motive or reasonableness of its effect and being able to judge its impact.⁸⁴ The economic impact represents a factor to measure against any derivative community benefit,⁸⁵ along with a consideration of fairness, consistency, and alternatives.⁸⁶

Depreciation in value, of utmost concern to the landowner, impacts less on the judiciary. It often reinforces other conclusions about the uses allowed for the property and is not conclusive standing alone.⁸⁷ Possibly the courts mask its real force by verbalizing more accepted criteria.⁸⁸ In any case, it is an unusual plaintiff who fails to

77. NICHOLS, *supra* note 8.

78. Cabaniss, *Inverse Condemnation in Texas - Exploring the Serbonian Bog*, 44 TEX. L. REV. 1584, 1585 (1966) (footnote omitted) (hereinafter cited as Cabaniss).

79. *Id.*

80. *Id.* at 1591 (footnote omitted).

81. *Id.* at 1589. Cabaniss talks about "a gray area where these two competing powers meet at their fringes" and indicates that any "accurate prediction in advance of the outcome" is "virtually impossible."

82. *Id.* at 1589 (quoting NETHERTON, CONTROL OF HIGHWAY ACCESS 130 (1963)). Netherton noted that the increased use of both powers has expanded them conceptually and the differences in law are no longer clearly apparent.

83. 1 P. NICHOLS, EMINENT DOMAIN § 142 (3d ed. 1964).

84. Van Alstyne, *supra* note 60 at 9. Van Alstyne again discusses reasonableness, stating that landowners may not be required to prove the physical impossibility of adhering to the allowable land uses, but rather that a reasonable man would be unlikely to develop those uses. *Id.* at 34 (footnote omitted).

85. *Id.*

86. *Id.*

87. *Id.*

88. 1 R. ANDERSON, AMERICAN LAW OF ZONING § 2.22 at 93 (1968). "The prevalence with which judicial opinions examine comparative valuation data in determining the validity of land use regulations, however, makes it clear that financial impact may exert a significant influence on the court's views as to whether the public interest advanced [by the regulation] is worth the price."

estimate the loss.⁸⁹

Discerning any meaningful pattern requires careful study of past decisions in which ordinances were not valid. *Arverne Bay Const. Co. v. Thatcher*⁹⁰ established that a change in zoning cannot restrict any reasonable use. The court in *Holgate v. Zoning Bd. of Rev. of the City of Pawtucket*⁹¹ said zoning must consider changes in an area. The motivation behind the municipality's zoning was successfully challenged in *Yara Engineering Corp. v. City of Newark*.⁹²

89. Van Alstyne, *supra* note 60 at 13. Land use controls often result in "economic detriment" that is "directly perceivable, readily describable and conveniently provable."

Other theoretical treatments of the problem exist, one assigning names to the two divergent views: the "private marketeers" and the "police power enthusiasts." Private marketeers place maximum emphasis on property rights and would rely on the achievement of community goals through a consensus of the citizens. Police power enthusiasts believe that a regulation with any public purpose is valid and they wish "to be rid of the irritant of compensation." Costonis, "Fair" Compensation and the Accommodation Power, REGULATION V. COMPENSATION IN LAND USE CONTROL 3, 6 (1977) (hereinafter cited as Costonis).

One writer summarizes factors which are usually part of a case-by-case analysis: (1) whether or not the public or its agents physically used or occupied something belonging to the claimant; (2) the size of the harm sustained . . . or the degree to which his affected property has been devolved; (3) whether the claimant's loss is or is not outweighed by the public's concomitant gain; (4) whether the claimant has sustained any loss apart from restriction of his liberty to conduct some activity considered harmful to other people.

Michelman, *supra* note 58 at 1183-84.

90. 278 N.Y. 222, 15 N.E.2d 587 (1938). The borough denied application for a gasoline station variance in a formerly unrestricted zone of Brooklyn which was subsequently rezoned as residential. The court said the borough could not preserve unimproved properties for the distant future.

91. 74 R.I. 333, 60 A.2d 732 (1948). Denial of a gas station permit found no support from the court. New residences in the changing area would no longer, in fact, be "in harmony with the . . . general characteristics of the neighborhood."

92. 132 N.J.L. 370, 40 A.2d 559 (1945). Newark attempted to rescind a resolution to purchase swampland from plaintiff for a municipal airport and then passed a restrictive ordinance limiting the height of structures and trees in the area, reducing the land's industrial value.

See also Bydlen v. United States, 175 F. Supp. 891, 900 (Ct. Cl. 1959) (preserving a wilderness for its aesthetic values is a taking without compensation); Burrows v. City of Keene, 121 N.H. 590, 432 A.2d 15 (1981) (court rejected the method of preserving land by showing intention to buy, giving low appraisals, and then changing zoning). *HFH, Ltd. v. Superior Court of Los Angeles County*, 125 Cal. Rptr., 365, 379, 542 P.2d 237, 248 (1975) (Clark, J., dissenting) (strong dissent reacting to diminution of value. Justice Clark took exception to the majority's narrow view of "damage" as invasion or spoliation. In its ordinary sense damage could be applied to an 80 percent decrease in fair market value). *Fred P. French Inv. Co., Inc. v. City of New York*, 39 N.Y.2d 587, 350 N.E.2d 381 (1976) (designating private parks as open to public unacceptable).

4. Just Compensation

The U.S. Constitution provides the framework for considering the issue of just compensation.⁹³ How should a landowner be compensated for the "ultimate evil"?⁹⁴ Eminent domain requires that just compensation be paid for an action that a governmental unit initiated.⁹⁵ If a finding results that a taking occurred without formal action, the landowner takes the legal initiative with an inverse condemnation suit.⁹⁶ The theory sounds simple, but not unexpectedly the application has led to unhappy results. Regulatory legislation is sustained because the state can prevent one property owner from causing unreasonable injury to another.⁹⁷ The dual consideration of the rights of both parties arguably does not include monetary compensation.⁹⁸ There is general agreement that compensation must be made when the public helps itself to some benefit at private expense, but not when the public simply wants one of its members to cease being a nuisance.⁹⁹ If the regulation is not allowed to stand, at least as applied to a particular complainant, the landowner may make demand for compensation through inverse condemnation.¹⁰⁰ The situation created a "doctrinal tangle,"¹⁰¹ evidenced by the fact that the Supreme Court's

93. See *supra* note 32 for the constitutional guarantee.

94. *Fred. P. French Inv. Co., Inc. v. City of New York*, 39 N.Y.2d 587, 596-97, 350 N.E.2d 381, 387 (1976):

The ultimate evil of a deprivation of property, or better, a frustration of property rights, under the guise of an exercise of the police power is that it forces the owner to assume the cost of providing a benefit to the public without recoupment. There is no attempt to share the cost of the benefit among those benefited, that is, society at large. Instead, the accident of ownership determines who should bear the cost . . .

95. *Nichols*, *supra* note 8.

96. *Id.* See also *Cabaniss*, *supra* note 78, at 1584-85 (footnote omitted). "Inverse" connotes that the landowner, not the sovereign institutes the proceedings."

97. *Van Alstyne*, *supra* note 60 at 5. "Except in extreme cases many regulations are accepted as part of the cost of existence in society."

98. *Id.* "Governmental action under the guise of police power which is claimed to be arbitrary and confiscatory may be challenged by seeking injunctive or declaratory relief, or as a defense to enforcement proceedings . . . but does not generally give rise to a cause of action for compensatory damages." See also *DeMello v. Town of Plainville*, 170 Conn. 675, 680, 368 A.2d 71, 74 (1976).

99. *Michelman*, *supra* note 58 at 1196.

100. *Mandelker*, *supra* note 66 at 515. Such a demand in land use taking cases "certainly has intuitive appeal."

101. *J. Payne*, *From the Courts, Just Compensation in a Breadbox*, REAL ESTATE L.J. 264, 269 (1982-83). "It is impossible to extract from state court decisions any coherent or consistent approach to the question of whether, and under what circumstances, a monetary inverse condemnation remedy should be available to property owners challenging zoning and other land use regulations. *Supra* note 61, at 719.

most liberal members, Justices Brennan and Marshall, occupy opposite sides of the payment issues.

Historically, compensation existed within a narrow framework; in situations in which actual physical invasion of property occurred and a municipality imposed inequitable zoning actions on land that it planned to acquire in the future.¹⁰² The latter, referred to as "down-zoning," tended to deflate the compensation a municipality would have to pay later.¹⁰³

In recent years, landowners have urged judicial acceptance of the inverse condemnation remedy in place of injunctive relief following successful challenge of land use regulations.¹⁰⁴ Alarm is increasing about expansion of money damages and support continues for the invalidation of ordinance remedy. Commentators most frequently mention the possibility that the threat of paying monetary damages will cause governments to use more restraint than desirable to effectuate sound planning decisions.¹⁰⁵ Claims exist that allowing damage awards falls within the legislative realm.¹⁰⁶ Zoning changes are arguable predictable and the purchase price may reflect the impact.¹⁰⁷ Some

102. Note, *Eldridge v. City of Palo Alto: Aberration or New Directions in Land Use Law?* 28 HASTINGS L.J.; *supra* note 61 at 1594-95. See also *Eck v. City of Bismarck*, 283 N.W.2d 193 (N.D. 1979). Agricultural zoning imposed on 126 acres of residential property was not appropriately an inverse condemnation action because in every previous state case, property owners had alleged a taking or damaging from direct physical disturbance.

103. Scott, *An Introductory Interpretation, Regulation v. Compensation in Land Use Control: A Recommended Accommodation, A Critique and an Interpretation*, xii (1977). "[A] down-zoning ordinance nearly always reduces the owner's income or increases his costs."

"Often the effects of these regulations is to lower the value of the land as the threat of condemnation hangs over it." Van Alstyne, *supra* note 60 at 3.

104. Mandelker, *supra* note 66 at 492.

105. Costonis, *supra* note 89 at 4. "[The government] can retrench to the police power by liberalizing the overly restrictive measure, often at the cost, however, of compromising the measure's intended . . . result."

"[T]o insist on full compensation to every interest which is disproportionately burdened by a social measure dictated by efficiency would be to call a halt to the collective pursuit of efficiency." Michelman, *supra* note 58 at 1178.

"If a government entity . . . were held subject to a claim for inverse condemnation . . . the process of community planning would . . . grind to a halt. *Selby Realty Co. v. City of San Buenaventura*, 10 Cal.3d 110, 120, 514 P.2d 111, 117, 109 Cal. Rptr. 799, 805 (1973).

"[F]ears have been expressed that compensation allowed too liberally will seriously impede, if not stop, beneficial public improvements because of the greatly increased cost." *Bacich v. Board of Control*, 23 Cal.2d 343, 350, 144 P.2d 818, 820 (1943).

106. Note, *Damages* *supra* note 61 at 725.

107. *HFH, Ltd. v. Superior Court of Los Angeles County*, 125 Cal. Rptr. 365, 374, 542 P.2d 237, 246 (1975). The other side of that argument is that municipalities can predict and plan for compensation during the period in which landowners painstakingly take

describe the economic hardships as the price of living in an enlightened and progressive community.¹⁰⁸ Those desiring compensation see it as a method of being returned to the place they would have been¹⁰⁹ "but for" the ordinance. The fight to invalidate a regulation, however, is often long and expensive.¹¹⁰ Some trend watchers hope that the prospect of paying compensation will interject a positive restraint on the regulation of private property.¹¹¹ Michelman's provocative opinion bespeaks a need for governmental restraint. "Any measure which society cannot afford . . . is unwilling to finance under conditions of full compensation," he warns, "society cannot afford at all."¹¹²

In one case,¹¹³ the New York Court of Appeals unequivocally ruled against compensation. In an earlier decision,¹¹⁴ the California Supreme Court had taken the same stance. The fact that the Supreme Court of the United States reiterated the California pronouncements against money damages in neutral fashion led some to believe that our highest court would sustain all but the most severe ordinances.¹¹⁵ *The*

their appeals through proper public agencies and courts. Note, *Damages supra* note 61 at 731.

108. *HFH, Ltd. v. Superior Court of Los Angeles County*, 125 Cal. Rptr. 365, 542 P.,2d 237, 242 (1975).

109. *Cabaniss, supra* note 78 at 1585. "He may enforce his constitutional guarantee by an inverse-condemnation action to recover not only damages that would have been compensable originally, but also [those] that may have been only probable or speculative."

110. For a listing of cases which were lengthy battles, see Note, *Damages supra* note 61 at 732-34, 753 n.151.

111. J. Sax, *Takings, Private Property and Public Rights*, 81 YALE L.J. 149, 160 (1971).

112. Michelman, *supra* note 58 at 1181.

113. *Fred P. French Inv. Co., Inc. v. City of New York*, 39 N.Y.2d 587, 595, 350 N.E.2d 381, 386 (1976).

[T]his is often the beginnings of confusion, a purported 'regulation' may impose so onerous a burden on the property regulated that it has, in effect, deprived the owner of the reasonable income . . . or other private use of his property and thus has destroyed its economic value. In all but exceptional cases, nevertheless, such a regulation does not constitute a 'taking' and is therefore not compensable, but amounts to a deprivation or frustration of property rights without due process of law and is therefore invalid.

Id.

114. *Agins v. City of Tiburon*, 447 U.S. 255, 263. The U.S. Supreme Court found no taking and thus did not consider whether the Supreme Court of California's findings were correct; specifically, it held that "a landowner who challenges the constitutionality of a zoning ordinance may not sue in 'inverse condemnation' and thereby transmute an excessive use of the police power into a lawful taking for which compensation in eminent domain must be paid." It concluded that mandamus and a declaratory judgment constituted the sole remedies. *Id.* at 259.

115. Mandelker, *supra* note 66 at 503-04. Mandelker interpreted *Penn Central* and *Agins* as evidence of an acceptance of harsh land use restrictions, justified by widely distributed community benefits. He feared that lower courts, following the Supreme Court's lead,

*San Diego Gas & Electric Co. v. City of San Diego*¹¹⁶ may be the heir apparent to the complexities of the compensation problem.¹¹⁷

The five to four Supreme Court split in *San Diego* reflected a majority opinion that the California Court of Appeals had not made a final judgment on whether the city had taken property without just compensation.

The highest court deemed it inappropriate, therefore, to consider the damages question. Justice Brennan, joined by Justices Stewart, Marshall, and Powell, dissented on the basis that the court of appeals had indeed made a final decree.¹¹⁸ The California Supreme Court remanded the case for a possible retrial on disputed factual issues not covered previously. Justice Brennan believed the California court had settled the fifth amendment "taking" issue;¹¹⁹ the dissenters pointed out that the conclusion of the court of appeals contradicted Supreme Court precedent in regard to "takings" because police power regulations can destroy use and enjoyment of property for the benefit of the public as effectively as condemnation of physical invasion of property. The dissenters argued that de facto exercises of the police power exist.¹²⁰ Justice Brennan argued that the California court, therefore, could not deny just compensation when a municipality used the police power to take property for public use.

Payment should be made to the landowner from the date of "taking" and end if the ordinance is repealed.¹²¹ A state cannot make a

would have difficulty taking a critical look at a municipality's justifications for its land use programs and questioned whether the benefits exceeded the burdens.

116. 450 U.S. 621. See also note 76 and accompanying text.

117. Cunningham, *Introduction, Land Use Symposium*, 8 HASTINGS CONST. L.Q. 449, 450 (1981):

[I]t was widely expected (and in some quarters feared) that the case of *Agins* . . . the [Supreme] Court's first direct confrontation with compensatory taking in land regulatory matters would produce significant advancement in this little understood but much-discussed area of our law. Those hopes (or fears) were dashed by the inconclusive result of *Agins* and the [Hastings Constitutional Law] Quarterly moved . . . to . . . its heir apparent, *San Diego*. . . .

118. *San Diego Gas & Electric*, 450 U.S. at 632. In its conclusory opinion the court said: "Unlike the person whose property is taken in eminent domain, the individual who is deprived of his property due to the state's exercise of its police power is not entitled to compensation . . . the party's remedy is administrative mandamus." *Id.* at 639.

119. *Id.* at 642-43, 645-46.

120. *Id.* at 652. "From the property owner's point of view, it may matter little whether his land is condemned or flooded, or whether it is restricted by regulation to use in its natural state, if the effect in both cases is to deprive him of all beneficial use of it."

121. *Id.* at 653.

It is only fair that the public bear the cost of benefits received during the interim period between application of the regulation and the government entity's rescission of it. The payment of just compensation seems to place the landowner in the

policy judgment which would impair constitutional guarantees.¹²²

The majority in *San Diego* placed an obstruction in the path of a solution to the remedies problem. If one recognizes a choice only between compensation or no compensation, the adversaries must stand unyieldingly on opposite sides of the road,¹²³ unable to modify their positions.¹²⁴ Commentators often advance Brennan's proposal to rescind the ordinance¹²⁵ and pay interim damages for the period during which the ordinance was in effect.¹²⁶ Justice Rehnquist, voting with the majority on the final judgment issue, agreed with Brennan's damages proposal. Many commentators believe Rehnquist's comments really represent five to four support and that an award of interim damages may prove to be the arbitration award of the future.¹²⁷

same position monetarily as he would have occupied if his property had not been taken.

Id. at 656-57.

122. *Id.* at 661.

123. Sax, *supra* note 111 at 180-81. Sax feels that "the more useful question, raised by the . . . present compensation law, is whether it is necessary for every property owner to have the opportunity to profit from the use of his land as he wishes, and at every given moment of time."

124. Van Alstyne, *supra* note 60 at 70. "Much of the existing law of inverse condemnation, so far as it relates to claims of excessive use of the police power, exhibits an unfortunate tendency to treat relevant issues on an all-or-nothing basis. . . . Yet it is clear that a complete range of intermediate positions exists between these extremes." Deadlock inevitably arises from the competition between the two groups, Costonis states, suggesting that the stage be enlarged to include another theory—the accommodation power. Accommodation demands less than just compensation and rests on a standard of "reasonable beneficial use." Accommodation stresses *fair* compensation, a compromise between *best* use of property and *no* use. Costonis, *supra* note 89 at 4, 31, 32-42. "A court, it seems, must choose between denying all compensation and awarding 'just' compensation; the loss is either a 'taking' of 'property' or it is not. . . . [I]n this framework, we shall not be able to exploit the substitute ability [of other settlement]." Michelman, *supra* note 58 at 1253-54.

125. Beuscher, *Some Tentative Notes on the Integration of Police Power and Eminent Domain by Courts: So Called Inverse or Reverse Condemnation*, 1 URBAN LAW ANN. 12 (1968). A municipality faces the problem of whether a governmental unit "can free itself of liability for just compensation by the simple expedient of repealing or altering the regulation." Further, a municipality may be left with an unusable interest in the claimant's land. *Id.* at 13.

126. *HFH, Ltd. v. Superior Court of Los Angeles County*, 125 Cal. Rptr. 365, 378, 542 P.2d 237, 250 (1975) (Clark J., dissenting). "In the case of an invalid ordinance, the court in issuing mandate should . . . [award] interim damages, costs and attorney's fees."

McMurry discusses the problem, pointing out that an increasing number of jurisdictions recognize interim losses as compensable injuries. Note, *Damages*, *supra* note 61 at 734-37.

127. Cunningham, *supra* note 117, at 539.

No doubt most state courts will accept Justice Brennan's views, as stated in *San Diego*, to be the best evidence of the Supreme Court's current interpretation of the Fourteenth Amendment as applied to regulatory taking cases. Hence no state

C. *On the Predictability of Annicelli*

An analysis of court decisions concerning property rights and land regulations reveals a consistent attempt to balance competing interests. The various tests proposed separately to validate the constitutionality of a regulation under the protective shield of the police power seem capable of molding into one standard. The search for more definite guidelines led experts in the field to find one appropriate word to express the evaluative process. "Diminution in value" as a solitary standard frustrated those who looked at "purpose." "Degree of harm" done by an ordinance gave more latitude to the courts. "Intent" of the particular regulation lent a relevant focus. Many decisions were rendered with a finding of "reasonableness." Some commentators thought "fairness" more pragmatic. Van Alstyne suggested looking at the "cumulative impact,"¹²⁸ but that need not be the last word either. Any one of us could be the affected property owner with no wish to have our problem viewed narrowly by the constraints of a one-word appellation. Courts make determinations daily, giving thoughtful consideration to the health, safety, and general welfare of the public.¹²⁹ To accept a simplistic standard by which to judge a municipality's ordinances is to discourage the subtle judgment or intuition of the court.¹³⁰

Annicelli's thread of hope was a slender strand. In Rhode Island's earlier decisions, which mirrored the problems of other growing cities in the East, the courts focused their attention on ordinances dealing with health and morality.¹³¹ In *Annicelli*, the court placed re-

court will find itself compelled to award the full market value of land as compensation whenever a regulatory taking is found.

The possibility of a different damages remedy in a statutory action against local governments, based on Section 1983, with an inverse condemnation claim should not be overlooked. Note, *Damages*, *supra* note 61 at 723-24 (footnotes omitted). "A series of Court decisions has established that civil rights embrace property interests, that municipal corporations, the primary land use regulators, are 'persons' for Section 1983 purposes, and that local governments are not immune from damage liability flowing from constitutional violations."

128. Van Alstyne, *supra* note 60 at 37 (referring to the decision in *City of Phoenix v. Burke*, 9 Ariz. App. 395, 452 P.2d 722 (1969) (emphasis added). "Typically, although the court discussed each of the variables . . . none was singled out as a controlling feature of the case; the *cumulative impact* of all, however, was deemed to support the conclusion that the restriction in question was unconstitutional."

129. See Freund, *supra* note 7 and accompanying text.

130. See *supra* opening quotation.

131. Typical cases were *Harrington v. Bd. of Alderman of City of Providence*, 38 A. 1 (1897) (The court held that the municipality could enjoin landowners under the police power from maintaining a privy vault on premises once a sewer line abutted the street because the vaults constituted a menace to comfort and health); *Horton v. Old Colony Bill*

liance on cases involving variances granted for the construction of gas stations in transitional urban areas,¹³² not an encouraging similarity. Plaintiffs frequently won the disputes.¹³³ The arbitrary assignment of a percentage of developer's land to open spaces was only marginally analogous.¹³⁴ Saving a whole lake from destruction caused by sewage discharge would be expected,¹³⁵ yet such a case is tenuous support for one attempting to build in a flood danger zone near salt water ponds.

A more common ground articulated for setting aside an ordinance was a reaction to a municipality's attempt to preserve land in its natural state for essentially aesthetic reasons,¹³⁶ which raised the question of the community's good faith or real intent.¹³⁷ In an analytical framework, only *State v. Johnson*¹³⁸ escapes placement; surprisingly, the court did not uphold Maine's Wetland Act forbidding the filling of coastal marshland. The lesson learned is that municipalities that seek to keep attractive, undeveloped parcels of land for the enjoyment of the community, now and for future generations, cannot use the police power as a shield or guise to keep them.

A second lesson is evident if there is a common denominator in the cases on which the town of South Kingstown relied. In these decisions the courts had not overturned zoning ordinances. Some decisions were tied to a community's immediate need to prevent irreversible damage.¹³⁹ Some property owners had to defer to the city's need for renewal and to keep pace with social changes.¹⁴⁰ The

Posting Co., 90 A. 822 (1914) (An act regulating the location, size, kind, and subject matter of outdoor billboard advertising was reasonable and highly necessary to protect public safety, health, morals, and well-being of the city. The billboards provided a frequent source of disputes, not only for aesthetic reasons but also because their location and structure provided a place in which immoral activities occurred).

132. *Chevron Oil Co. v. Bd. of Appeals of Shelton*, 170 Conn. 146, 365 A.2d 387 (1976); *see also*, cases cited *supra* note 38.

133. *See supra* notes 90-91 and accompanying text.

134. *Frank Ansuini, Inc. v. City of Cranston*, 107 R.I. 63, 264 A.2d 910 (1970).

135. *Sundell v. Town of New London*, 119 N.H. 839, 409 A.2d 1315 (1979).

136. *Dooley v. Town Planning and Zoning Comm'r*, 151 Conn. 304, 197 A.2d 770 (1964); *Morris County Land Improvement Co. v. Township of Parsippany-Troy Hills*, 40 N.J. 539, 193 A.2d 232 (1963). *See also* *Bydlen v. United States*, 175 F. Supp. 891 (Ct. Cl. 1959).

137. *MacGibbon v. Bd. of Appeals of Duxbury*, 347 Mass. 690, 200 N.E.2d 254 (1964). *See also* *San Diego Gas & Electric v. San Diego*, 450 U.S. 621 (1981); *Burrows v. City of Keene*, 121 N.H. 590, 432 A.2d 15 (1981); *Yara Engineering Corp. v. City of Newark*, 132 N.J.L. 370, 40 A.2d 559 (1945).

138. 265 A.2d 711 (Me. 1970).

139. *Candlestick Prop. Inc. v. San Francisco Bay C & D Comm'n*, 11 Cal. App. 3d 557, 89 Cal. Rptr. 897 (1970).

140. *Berman v. Parker*, 348 U.S. 26 (1954); *City of St. Paul v. Chicago*, St. P., M. &

courts recognized the imminent threat of a danger to a landowner¹⁴¹ as well as the traditional morality or health disputes.¹⁴² Most significant in the overall picture, however, are decisions in another large category of complainants who lost. They were the "users," owners who had used the land for many years before the municipality imposed the restriction.¹⁴³ In addition were owners who might still be able to develop part of their land profitably.¹⁴⁴ Some had even deliberately ignored the law.¹⁴⁵ Another refinement in cases upholding zoning regulations was having had the opportunity to make use of land at one time in the past and failing to do so.¹⁴⁶ To these people, the message has been: You have had some beneficial use of your holding and there is no law that says your use can continue forever. One decision, *Penn Central*,¹⁴⁷ fits uncomfortably into a category. The architectural preservation of Grand Central Station seems "unfair" and "unreasonable" as balanced against the corporation's business judgment. The corporate competitive interest in both domestic and international trade seems as compelling as preventing the construction of one more high-rise building in a city of skyscrapers. The Supreme Court of Rhode Island may well have thought that leaving Annicelli's narrow strip of beach to nature preferable, but could not find it appropriate to take the lot as a compelling necessity for the health and safety of South Kingstown residents. As applied to the particular parcel it is not conclusive that a dwelling would cause injury to living organisms in the salt pond. It is speculative to say that her dwelling, if it floated free in a storm, would go inland and damage someone else's land. Since the court decided *Annicelli*, however, the coastal erosion at that location has quickened at an alarming pace. Ironically, a similar ordinance,

O. Ry. Co., 413 F.2d 762 (1969); *Loretto v. Teleprompter Manhattan CATV Corp.*, 53 N.Y.2d 124, 423 N.E.2d 320, 440 N.Y.S.2d 843 (1981).

141. *Turner v. County of Del Norte*, 24 Cal. App. 3d 34, 101 Cal. Rptr. 93 (1972); *McCarthy v. Manhattan Beach*, 41 Cal. 2d 879, 264 P.2d 932 (1953), *cert. den.*, 348 U.S. 917 (1954).

142. *Kansas v. Mugler*, 123 U.S. 623 (1887); *DeMello v. Town of Plainville*, 170 Conn. 675, 368 A.2d 71 (1976).

143. *Hadacheck v. Sebastian*, 239 U.S. 394 (1915); *Goldblatt v. Hempstead*, 369 U.S. 590 (1962).

144. *Just v. Marinette County*, 56 Wis. 2d 7, 201 N.W.2d 761 (1972); *Sibson v. State*, 115 N.H. 124, 336 A.2d 239 (1975); *Spiegle v. Beach Haven*, 46 N.J. 479, 218 A.2d 129 (1966); *Brecciaroli v. Connecticut Comm'r of Env. Protec.*, 168 Conn. 349, 362 A.2d 948 (1975). *See also Pope v. City of Atlanta*, 242 Ga. 331, 249 S.E.2d 21 (1978).

145. *State v. Capuano*, 120 R.I. 58, 384 A.2d 610 (1978); *Just v. Marinette County*, 56 Wis. 2d 7, 201 N.W.2d 761 (1972).

146. *HFH, Ltd. v. Superior Court of Los Angeles County*, 125 Cal. Rptr. 365, 542 P.2d 237 (1975).

147. 438 U.S. 104 (1978).

phrased in language more directly aimed at safety than environmental preservation, is more urgent today than in 1975.

In June 1984, Annicelli was awarded \$68,500 compensation. Annicelli could not have been returned to her former position. A decade of deliberation prevented that result. The federal government has long since retracted its grant of flood insurance to new construction in such zones. The amount of compensation represented the fair market value.¹⁴⁸

The town's position since the decision has evolved into one which supporters of intensive zoning feared.¹⁴⁹ Lacking funds to meet similar court challenges in the future,¹⁵⁰ the town amended the offending ordinance¹⁵¹ to allow single family detached dwellings as special exceptions in a high flood danger zone if they meet specific standards,¹⁵² if owners submit technical and scientific materials,¹⁵³ and file an Environmental Impact Statement.¹⁵⁴ The structures must be landward of a

148. *Annicelli* at ___, 463 A.2d at 141.

149. See Costonis, *supra*, note 105 and accompanying text.

150. NARRAGANSETT TIMES, Dec. 1, 1983, at 1, col. 4.

151. South Kingstown Zoning Amendment January 1984. See Article 2, 220 - *Schedule of District Regulations—Uses and Districts*, Single Family Detached Dwelling; and Article 5, 512 - *Special Exception in HFD Zoning Districts and Behind the Fore-dune Zone*: "The fore-dune line is an area extending from the spring highwater line (SHW) landward to the back barrier flat . . . The board may grant special exceptions for uses or structures in HFD zoning districts for construction behind the fore-dune zone as specifically allowed in this ordinance . . ."

152. *Id.* Article 5, 513 - *Conditions Imposed on Special Exception in HFD Zoning Districts and Behind the Fore-dune Zone*.

153. *Id.* Article 5, 512:

The board may require that in addition to the information required for a building permit that the applicant submit further information to include, but not be limited to, the following:

- A. A map, in duplicate, drawn to scale, showing high and low tide levels, line of mean high water mark, dimensions of the lot, existing structures and uses on the lot and adjacent lots, soil type, dunes and natural protective barriers, existing flood control and erosion control works, existing drainage elevations and contours of the ground including branch elevations, location and elevation of existing streets, water supply and sanitary facilities, and other pertinent information.
- B. A plan showing the dimensions, elevation, and nature of the proposed use; amount, area, and type of proposed fill; area and nature of proposed grading or dredging; proposed alteration of dunes, beaches, or other natural protective barriers; proposed roads, sewers, water, and other utilities; specifications for building construction and material including flood-proofing.

154. *Id.*

C. *Requirements of Environmental Impact Statement (EIS)*.

Prior to the granting of a special exception for any use within the HFD zoning district or behind the fore-dune zone, an Environmental Impact Statement (EIS) shall be filed with the application for the special exception. It is

foredune zone or the Coastal Resources Management Council's critical erosion area setback line.¹⁵⁵ New maps in the Tax Assessor's office reflect the changes. The town has established a formidable array of requirements, far from the solutions posed in *French*¹⁵⁶ involving general taxation, assessments for the public benefit, and other devices to ensure rudimentary fairness in the allocation of economic burdens.

The history of debate over Green Hill Beach was undoubtedly well known in our smallest state. The court construed the zoning ordinance in *Annicelli* as an attempt to preserve an area in its natural and beautiful state.¹⁵⁷ The court saw that Mrs. Annicelli had never had any opportunity to use or enjoy her small plot of ground.

IV. CONCLUSION

For eight years the courts did not answer the question of whether the Annicellis could build a vacation home on their oceanfront land. The amount of compensation was decided quickly, but provides little guidance for anyone else.

The new zoning amendments attempt to eliminate further compensation damages. If they are challenged, claimants can point to prior decisions which showed a town was trying to preserve a barrier beach for enhancement of the environment by heavily restricting its

found that the complexity and diversity of the natural environment within the HFD zoning district and foredune zone necessitates a detailed statement on anticipated alterations thereto in order to carry out the intent and provisions of this ordinance. The requirement for an Environmental Impact Statement shall be in addition to any other requirement provided by any other portion of this ordinance. (Special inclusions omitted).

Upon receipt of such an Environmental Impact Statement, the Zoning Board shall refer same to the Planning Board and Conservation Commission for an advisory opinion thereon. The Planning Board and Conservation Commission shall each submit a written report to the Zoning Board within forty-five (45) days of filing of the Environmental Impact Statement with the Zoning Board.

Where necessary the board may transmit the information described previously to a designated engineer or other expert person or agency for technical assistance in evaluating the proposed project in relation to flood heights and velocities, threatened erosion or wave action, the adequacy of the plans for flood and erosion protection and the adequacy of drainage facilities, and other technical matters.

155. *Id.* Article 5, § 513: "Structures shall be constructed landward of the foredune zone or landward of the CRMC critical erosion area setback line (§ 140(c)), whichever is greater."

156. *French*, 39 N.Y.2d at 599-600, 350 N.E.2d at 389. The New York court did not see a solution in drafting tighter measures.

157. ___ R.I. at ___, 463 A.2d at 141.

use, and to decisions that appeal to a right for some beneficial use of their land.

South Kingstown has "retrenched." A soil impact study can be very costly,¹⁵⁸ and its requirement, therefore, is burdensome. The position of the Coastal Management Resources Council will enter into future decisions. Time will tell whether the courts will hold the new ordinance constitutional or the special exception illusory. *Annicelli* constitutes no clear victory for landowners. A new battle with new weapons faces other landowners.

Pauline W. Kozuch

158. *Kopetzke v. County of San Mateo, Bd. of Super.*, 396 F.Supp. 1004. Estimates were \$15,000 for land worth that much in 1975. *See also*, footnote 74.