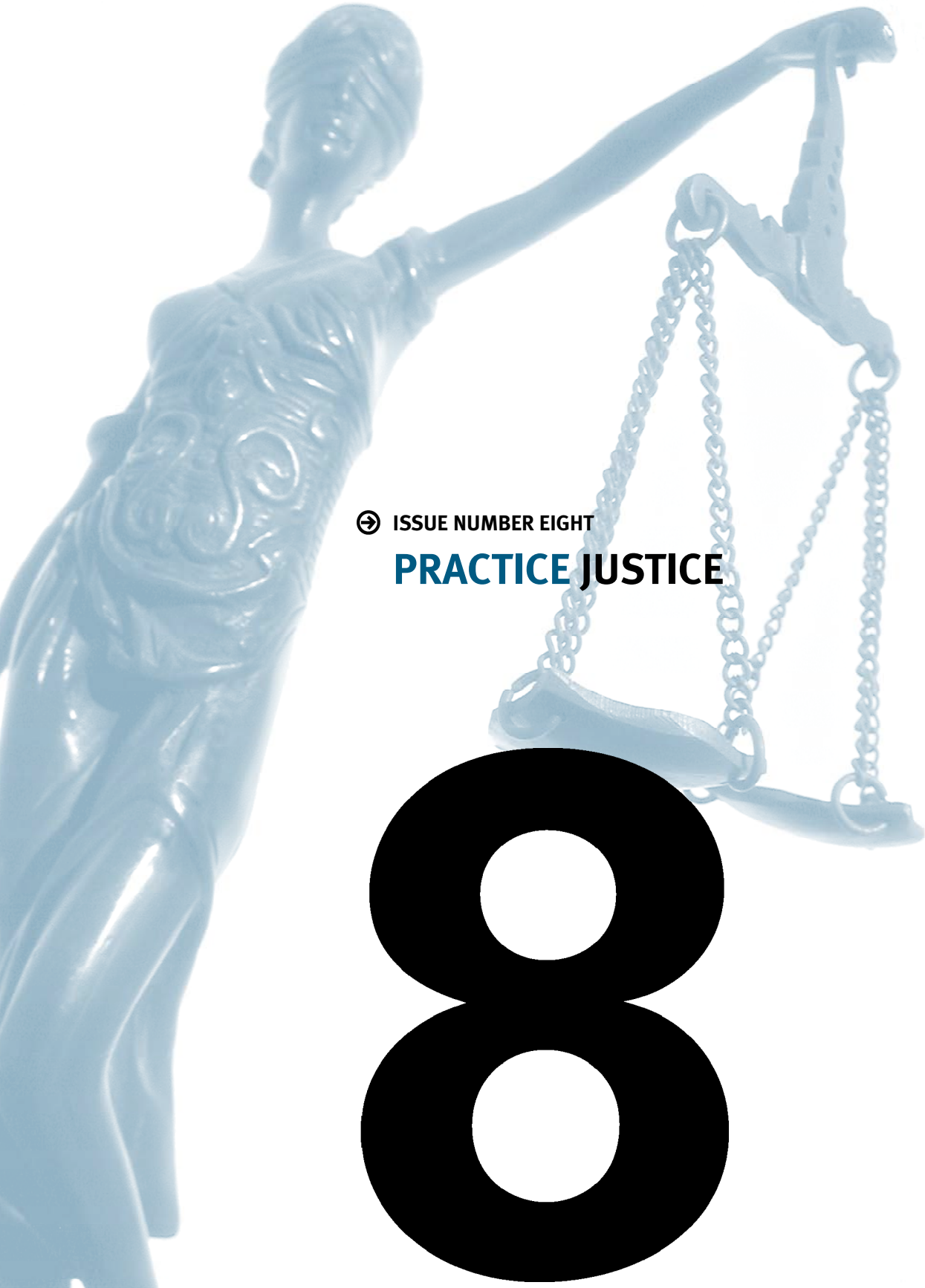
ZONINGPRACTICE August 2005
AMERICAN PLANNING ASSOCIATION



ISSUE NUMBER EIGHT

PRACTICE JUSTICE

8

Score Four for Planning: The 2005 Supreme Court Decisions

By Lora Anne Lucero, AICP

Not since perhaps 1987—when the U.S. Supreme Court had a blockbuster year in the land-use and planning arena with *Keystone Bituminous Coal Assn.*, *Granite Rock Co.*, *First English*, and *Nollan*—have the Justices provided so much food for thought to planners and others concerned about land-use law as they did this term.

Taking Justice William J. Brennan's admonition in 1981 to heart—"If a policeman must know the Constitution, then why not a planner?"—a description of the four cases decided this year follows in this issue of *Zoning Practice*, as does a discussion on why planners should take note of each.

LINGLE

On May 23, the U.S. Supreme Court said, "Today we correct course." In the *Lingle v. Chevron* [125 S. Ct. 2074 (May 23, 2005)] decision, written by Justice Sandra Day O'Connor and joined by all the other Justices, the Supreme Court jettisoned the "substantially advances" test that made its way into regulatory takings law a quarter century ago in *Agins v. City of Tiburon* [447 U.S. 255 (1980)]. In the process, they provided much-needed clarity in takings jurisprudence.

THE FACTS

The controversy arose in Hawaii when that state's legislature passed Act 257 in June 1997. Among other things, the statute limits the amount of rent an oil company may charge a lessee-dealer to 15 percent of the dealer's gross profits from gasoline sales. Chevron U.S.A. Inc. was the largest refiner and marketer of gasoline in Hawaii at the time, controlling 60 percent of the market for gasoline produced or refined in-state and 30 percent of the wholesale market on the island of Oahu. The legislature was concerned about the effects of this market concentration on retail gasoline prices and thought the rent cap would help.

Chevron sued the state, claiming that Act 257 effected an unconstitutional regulatory taking because it did not substantially advance a legitimate governmental purpose. Hawaii responded that Chevron was using the wrong test. The "substantially advances" test is a due process test, the state argued, not a takings test. The substantially advances test requires the court to take a closer look at the legislation passed by local and state governments—a higher level of scrutiny than the more deferential rational basis test the courts use when they review regulatory takings claims.

After a trial with the battle of the economists (one for the state and one for Chevron), the trial court and the Ninth Circuit Court of Appeals concluded that Chevron was right. Act 257 did not substantially advance any legitimate state interest. Hawaii asked the U.S. Supreme Court to review the decision.

Hawaii Chapter of APA

Chevron station on Maui Island, Hawaii.

ARGUED BY APA

Although it was not a typical land-use case, the American Planning Association filed an amicus brief, drafted by Professor Tom Roberts of Wake Forest Law School and Ed Sullivan of Garvey Schubert Barer in Portland, Oregon, because of the importance of the outcome on future regulatory takings cases. APA urged the Court to jettison the "substantially advances" test in regulatory takings cases.

> "The adoption of legislation, particularly at the local government level, aided by the planning process, involves the participation of all segments of the community working to define the public interest. Allowing judges to second-guess legislation will undermine the public's role in the democratic process. Intermediate judicial scrutiny is neither needed nor justified to protect those who are well represented in legislative halls."

THE COURT'S DECISION

Justice O'Connor acknowledged that "the language the Court selected [in the *Agins* opinion] was regrettably imprecise." The "substantially advances" test, she said, asks whether a regulation of private property is effective in achieving some legitimate public purpose.

> "An inquiry of this nature has some logic in the context of a due process challenge, for a regulation that fails to serve any legitimate governmental objective may be so arbitrary or irrational that it runs afoul of the Due Process Clause . . . . But such a test is not a valid method of discerning whether private property has been 'taken' for purposes of the Fifth Amendment . . . . Instead of addressing a challenged regulation's effect on private property, the 'substantially advances' inquiry probes the regulation's underlying validity."

By removing the "substantially advances" test as a valid method of identifying regulatory takings, courts will not be sec-

ASK THE AUTHOR JOIN US ONLINE!

From September 19 to 30, go online to participate in our "Ask the Author" forum, an interactive feature of Zoning Practice. *Lora Anne Lucero, AICP, will be available to answer questions about this article. Go to the APA website at www.planning.org and follow the links to the Ask the Author section. From there, just submit your questions about the article using an e-mail link. The author will reply, posting the answers cumulatively on the website for the benefit of all subscribers. This feature will be available for selected issues of* Zoning Practice *at announced times. After each online discussion is closed, the answers will be saved in an online archive available through the APA* Zoning Practice *web pages.*

About the Author
Lora Anne Lucero, AICP, is staff attorney to the American Planning Association's Amicus Curiae Committee and interim editor of *Planning & Environmental Law*.

ond-guessing the wisdom of the legislation enacted by state legislatures and city councils. One wonders if we will see more due process challenges now, with the elimination of the "substantially advances" test in takings cases.

Justice O'Connor's *Lingle* opinion is a must-read for planners. Although the decision will likely have a greater impact on the work of land-use attorneys, planners will find that the decision changes the dynamics between applicants and zoning boards, perhaps taking some of the steam out of frivolous threats to file a regulatory takings claim against the city.

KELO

The Fifth Amendment of the U.S. Constitution provides: "[N]or shall private property be taken for public use, without just compensation." This year, the Supreme Court was asked to consider whether economic development is a "public use" for which the power of eminent domain may be exercised. None of the land-use/planning cases on the Supreme Court's docket this term have captured as much media attention as *Kelo v. City of New London* [125 S. Ct. 2655 (June 23, 2005)]. Perhaps Justice O'Connor's scathing dissent has received more air time and ink than the majority's opinion written by Justice John Paul Stevens.

The facts in this case were misplaced in much of the news coverage since the *Kelo* opinion was announced June 23, but they were an important reason why the Supreme Court decided not to expand or restrict the power of eminent domain.

THE FACTS

Since the closure of the Naval Undersea Warfare Center in 1996, New London, Connecticut, has lost more than 1,500 jobs. By 1998, the city's unemployment rate was nearly double that of the state, which designated New London a "distressed municipality."

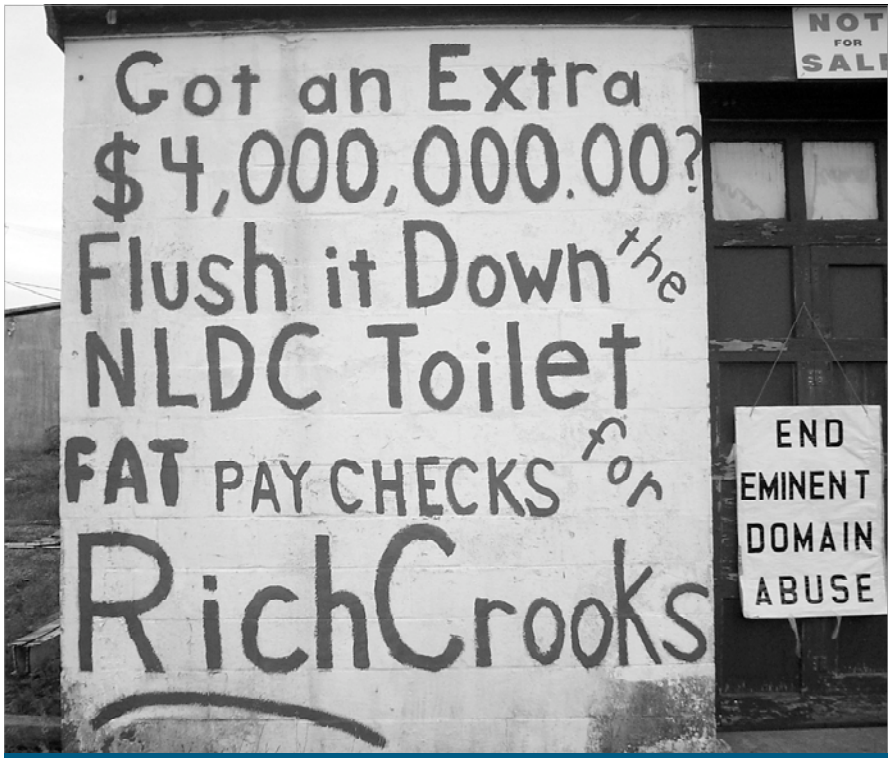

American Planning Association

The home of Suzette Kelo.

A private, nonprofit development agency was enlisted to assist the city in planning for the revitalization of the Fort Trumbull area in New London. In February 1998, a pharmaceutical company announced it would build a $300 million research facility adjacent to Fort Trumbull. Hoping the facility would be a catalyst for further revitalization, the city held neighborhood meetings and prepared an economic development plan. The state committed more than $15 million to the effort.

The state reviewed and approved the economic development plan, which called for a waterfront conference hotel, restaurants and shopping, and marinas with a pedestrian riverwalk. On one parcel, 90,000 square feet of research and development office space was planned to complement the pharmaceutical research facility. Negotiations with the majority of property owners were successful, but nine owners refused to sell and condemnation proceedings were initiated.

The property owners argued their properties were not blighted and said the taking violated the "public use" requirement of the Fifth Amendment. The city argued that its plan for economic development of the Fort Trumbull area was a proper public use.
The Connecticut Supreme Court ruled that all



American Planning Association

A hand-painted sign in New London illustrates the passion and intensity behind governmental use of eminent domain. NLDC stands for "New London Development Corporation."

of the proposed takings were valid and that economic development qualified as a valid public use.

ARGUED BY APA

Suzette Kelo and the organizations that supported her position asked the Supreme Court to either declare that economic development is never, under any circumstance, a "public use" for the purposes of condemnation or, alternatively, to create a higher standard of judicial review for these types of questions so that courts would look with greater scrutiny at economic development projects.

The American Planning Association, its Connecticut chapter, and the National Congress for Community Economic Development joined together to urge the Supreme Court to retain its long history of jurisprudence applying a deferential standard of review to public use determinations. The APA amicus brief was written by Professor Thomas W. Merrill of Columbia University and John D. Echeverria of the Georgetown Environmental Law & Policy Institute.

APA wrote:

> "Eminent domain is concededly an unsettling power, and is subject to misuse or overuse if not properly constrained. But eminent domain is disruptive for all who experience it, not just those who might be able to persuade a reviewing court that a particular condemnation is not 'public' enough. The dangers of eminent domain should be addressed by assuring that it remains a second-best alternative to market exchange as a means of acquiring resources, by encouraging careful planning and public participation in decisions to invoke eminent domain, and by building on current legislative requirements that mandate additional compensation beyond the constitutional minimum for persons who experience uncompensated subjective losses and consequential damages . . . ."
>
> "Another source of protection for all property owners is to assure, to the extent possible, that eminent domain is exercised only in conjunction with a process of land-use planning that includes broad public participation and a careful consideration of alternatives to eminent domain.
>
> Integrating the decision to use eminent domain into a sound planning process has a number of desirable consequences. Such a process can help minimize the use of eminent domain, by identifying alternatives to proposed development projects, such as relocating or re-sizing projects, or perhaps forgoing them altogether. It can also reduce public concerns about the use of eminent domain by providing a forum in which the reasons for opposition can be considered, offering explanations for the proposed course of action and possible alternatives, and perhaps instilling a greater degree of understanding on the part of both the proponents and opponents of the proposed project . . ."

THE COURT'S DECISION

The Court's majority opinion mentioned "planning," "plan," and "planner" 39 times. Justice Stevens, along with Justices Stephen G. Breyer, David H. Souter, Ruth Bader Ginsburg, and Anthony M. Kennedy, concluded that "The city has carefully formulated an economic development plan that it believes will provide appreciable benefits to the community . . . . Given the comprehensive character of the plan, and the thorough deliberation that preceded its adoption . . . [the] plan unquestionably serves a public purpose." For more than a century, the Court has "wisely eschewed rigid formulas and intrusive scrutiny in favor of affording legislatures broad latitude in determining what public needs justify the use of the takings power." The Court was unwilling to "second-guess the city's considered judgments about the efficacy of its development plan" or to "second-guess the city's determinations as to what lands it needs to acquire in order to effectuate the project."

The court's ruling, Justice Kennedy said in his concurring opinion, does not "alter the fact that transfers intended to confer benefits on particular, favored private entities, and with only incidental or pretextual public benefits, are forbidden by the Public Use Clause." Those types of condemnations have always been unconstitutional, and they remain unconstitutional. The *Kelo v. City of New London* decision might be the Supreme Court's strongest validation of the important role of planning since *Euclid* [*Village of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365 (1926)] nearly 80 years ago.

What should planners take away from this opinion? First, plans are important because if they are comprehensive and preceded by thorough deliberation—including public participation and public input—then they serve a public purpose and the public interest. The Supreme Court is telling lower courts that they should look to the community's plan to discern what is in the public interest. Second, the courts will refrain from second-guessing the decision of the local and state elected officials about such matters. But the Supreme Court also cautions us that if a condemnation occurs that transfers

American Planning Association

Homes and blighted property in New London's Fort Trumbull area.

American Planning Association

(Left) Developable land on the now-famous site in New London; (Right) Sparse development along new London's Thames River (in the background).

property from one private owner to another private owner "outside the confines of an integrated development plan," it would certainly raise a suspicion that the condemnation was for a private purpose and not for a public use. *Kelo* is a good decision for planners and the communities they serve.

CITY OF RANCHO PALOS VERDES

What remedies are available to a property owner if a municipality violates the Telecommunications Act of 1996 (TCA)? The Supreme Court answered this question in *City of Rancho Palos Verdes v. Abrams* [125 S.Ct. 1453 (March 22, 2005)].

Planners know that the TCA prohibits local governments from:

- unreasonably discriminating among providers of functionally equivalent services § 332(c)(7)(B)(i)(I);
- taking actions that "prohibit or have the effect of prohibiting the provisions of personal wireless services," § 332(c)(7)(B)(i)(II); or
- limiting the placement of wireless facilities "on the basis of the environmental effects of radio frequency emissions," § 332(c)(7)(B)(iv).

Furthermore, local governments must:

- act on requests for authorization to locate wireless facilities "within a reasonable period of time," § 332(c)(7)(B)(ii); and
- explain each decision denying such a request "in writing and supported by substantial evidence contained in a written record," § 332(c)(7)(B)(iii), and "any person adversely affected by any final action or failure to act" may bring an action in court within 30 days after such action or failure to act, § 332(c)(7)(B)(v).

Mark Abrams took the City of Rancho Palos Verdes, California, to court because the city denied him a conditional use permit for the second antenna tower he wanted to build on his residential hillside property. He successfully argued that the city had violated the TCA and the district court ordered the city to issue him a permit for the tower. When Abrams asked the court for money damages and attorneys fees pursuant to 42 U.S.C. § 1983, the court refused because the TCA does not provide a remedy of such damages and fees.

Although Abrams won the right to build his second tower, he appealed the issue of the damages and fees to the Ninth Circuit Court of Appeals, which agreed with him, ruling that remedies from both the TCA and § 1983 are available to successful plaintiffs. They sent the case back to the district court for a determination of money damages and attorneys fees. The city then asked the U.S. Supreme Court to review the case.

What is 42 U.S.C. § 1983? A person states a claim under 42 U.S.C. § 1983 if he alleges that the defendant deprived him of a constitu-

tional right while acting "under color" of state law. More importantly, § 1983 provides money damages and § 1988 provides attorneys fees to the successful litigant, which is different from the American Rule where litigants generally cover their own litigation costs.

Section 1983 was passed by Congress in 1871 but was rarely used until nearly 90 years later, when the U.S. Supreme Court gave private litigants a federal court remedy as a first resort rather than only in default of (or after) state action. [*Monroe v. Pape*, 365 U.S. 167 (1961)] Today, § 1983 actions most commonly involve First Amendment issues like freedom of speech; Fourth Amendment issues like search and seizure or use of force; Eighth Amendment issues like cruel and unusual punishment; and Fourteenth Amendment claims of due process violations. But in this case, the Supreme Court was asked to decide whether Abrams was entitled to a § 1983 remedy for a violation of the Telecommunications Act.

Tauno Novek

Antennas obstruct views of the ocean in this community.

ARGUED BY APA

The American Planning Association joined many other organizations, including National League of Cities, National Association of Counties, International City/County Management Association, and others to show the Court the potentially serious impacts to local governments if property owners could claim money damages and attorneys fees for violations of the TCA. APA's amicus brief was drafted by Richard Ruda and James I. Crowley of the State and Local Legal Center in Washington, D.C.

> "There are thousands of counties, municipalities, and townships in the United States, including many with few inhabitants, limited resources, and no full-time counsel. Faced with the threat of large claims for attorneys fees and damages by well-financed corporations represented by high-priced counsel, local governments may be deterred from vigorously protecting visual, aesthetic, and safety concerns. Such a result would defeat Congress's intention to allow local governments to retain 'the flexibility to treat facilities that create different visual, aesthetic, or safety concerns differently to the extent permitted under generally applicable zoning requirements.' (H.R. Conf. Rep. No. 458, 104th Cong., 2d Sess. 208 1996.)"

In addition to the potential serious fiscal impacts, APA noted that the TCA provides a swift review of potential violations (30 days) while property owners would presumably have four years to bring a claim for damages under § 1983. Congress patterned the TCA remedies after the state review mechanisms and took a deferential stance toward state and local zoning processes. APA discussed the State Zoning Enabling Act in detail to show the Court why Congress drafted the TCA the way it did.

> "Resulting delays in obtaining final judgments—whether from a longer limitations period or slower judicial decision-making—can harm local governments and the public. Such delays will slow the roll-out of personal wireless facilities and increase the adverse fiscal consequences that § 1983 damages and § 1988 attorneys fee liability poses to local governments."

THE COURT'S DECISION

In a unanimous decision written by Justice Antonin Scalia, the Supreme Court concluded that Congress did not intend for the judicial remedy provided by § 332(c)(7) to coexist with an alternative remedy available in a § 1983 action. This is a good decision for local governments and for planners because it means property owners who successfully challenge municipalities and counties on violations of the TCA can ask the court to remedy the violation and issue the permit but cannot obtain money damages and attorneys fees.

SAN REMO

Which court should decide what? And when? That was the conundrum presented to the U.S. Supreme Court in *San Remo Hotel, L.P. v. City and County of San Francisco* [125 S. Ct. 2491 (June 20, 2005)].

To set the stage, one must remember that the American judicial system is made up of both the federal courts (which include trial and appellate courts divided into 13 circuits) and the state courts (which also include trial and appellate courts and the state supreme courts). Above it all is the United States Supreme Court.

Generally, the federal courts handle cases involving federal laws and the U.S. Constitution while the state courts handle cases involving state laws and the state constitutions. Decisions from a trial court might be appealed to an appellate court so there is an opportunity to review and correct mistakes. But imagine the chaos that would ensue if a litigant, dissatisfied with the decision from one court, could simply take her case to another court, not to review the first court's decision, but to make her arguments anew. What a boon for the lawyers, but a mess for everyone else who want some closure and finality to these disputes.

The Founding Fathers anticipated such mischief when they included the "full faith and credit clause" in the U.S. Constitution. Article IV, § 1 demands that

> "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts,

Records and Proceedings shall be proved, and the Effect thereof."

Congress passed the full faith and credit statute in 1790 to implement Article IV, § 1. The modern version of the statute, 28 U.S.C.
§ 1738, provides that "judicial proceedings . . . shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State . . ."

In this case, the owner of the San Remo Hotel in San Francisco asked the Supreme Court to make an exception to the full faith and credit statute. He wanted to bring his federal takings claims into federal court after the state court had already entered a final judgment denying him just compensation. San Remo's argument went this way: Since takings claims based on the U.S. Constitution against a state or local government cannot be brought into federal court until the property owner has been denied just compensation in state court (see *Williamson County v. Hamilton Bank* [473 U.S. 172 (1985)]), a federal takings claim might never be heard in federal court unless the state court's decision is disregarded. San Remo argued that the federal courts should hear the takings claim anew. The U.S. Supreme Court, in a decision written by

Simone Sehle

San Francisco's San Remo Hotel.

Justice Stevens in which all the Justices joined, rejected San Remo's argument.

ARGUED BY APA

The American Planning Association filed an amicus curiae brief to share with the Court why it would be unfair to communities if developers were given two bites at the litigation apple. APA joined the Community Rights Counsel, the California State Association of Counties, and the League of California Cities in filing the brief written by Timothy J. Dowling and Douglas T. -Kendall of the Community Rights Counsel in Washington, D.C.

> "Ninety percent of American municipalities have less than 10,000 people and cannot afford a full-time municipal lawyer. For these municipalities, defending against a single takings suit by a wealthy developer can result in debilitating costs. For example, Hudson, Ohio, a community of 22,000, had to spend more than $400,000 in an ultimately successful effort to defend against a challenge to the city's growth management ordinance spearheaded by the Home Builders Association of Greater Akron. . . . Litigation costs for small communities have soared in recent years." APA acknowledged that "Landowners deserve a fair forum and a full hearing for their constitutional claims." But once a landowner has received a fair hearing, to grant a request for a second hearing in a different forum "would unfairly put two hammers to the heads of local officials."

THE COURT'S DECISION

The Court agreed with the position advanced by APA and others and refused to create an exception to the full faith and credit statute. Congress had not expressed an intent to create such an exception when it passed the full faith and credit act, the Court said, and the "weighty interests in finality and comity trump the interest in giving losing litigants access to an additional appellate tribunal."

Justice Stevens concluded his opinion by stating, "State courts are fully competent to adjudicate constitutional challenges to local land-use decisions. Indeed, state courts undoubtedly have more experience than federal courts do in resolving the complex factual, technical, and legal questions related to zoning and land-use regulations."

CONCLUSION

Four cases and four very different outcomes, and each a "win" for planners and the planning profession. The first jettisoned a troublesome test from future regulatory takings cases (*Lingle v. Chevron*); the second held the course and made no changes to the eminent domain clause (*Kelo v. City of New London*); the third clarified that there are no money damages and attorneys fees available for challenges of zoning decisions made pursuant to the Telecommunications Act (*City of Rancho Palos Verdes v. Abrams*); and the fourth said there will not be two bites at the litigation apple. When a state court makes a final decision on a federal takings claim, there will be no further pursuit of a higher court. (*San Remo Hotel, L.P. v. City and County of San Francisco*)

Electronic copies of the Supreme Court decisions are available to *Zoning Practice* subscribers by contacting Michael Davidson, editor, *Zoning Practice*, at the American Planning Association, 122 South Michigan Avenue, Suite 1600, Chicago, IL 60603, or by sending an e-mail to mdavidson@planning.org. The full opinion of each can be found on APA's website at www.planning.org/amicusbriefs/ along with the amicus curiae brief APA filed in each case.

Cover photo by Michael Park. The scales of justice.

VOL. 22, NO. 8

***Zoning Practice* is a monthly publication of the American Planning Association. Subscriptions are available for $65 (U.S.) and $90 (foreign). W. Paul Farmer, AICP, Executive Director; William R. Klein, AICP, Director of Research.**

Zoning Practice (ISSN 1548–0135) is produced at APA. Jim Schwab, AICP, and Michael Davidson, Editors; Barry Bain, AICP, Fay Dolnick, Megan Lewis, AICP, Marya Morris, AICP, Rebecca Retzlaff, AICP, Lynn M. Ross, AICP, Sarah K. Wiebenson, Reporters; Julie Von Bergen, Assistant Editor; Lisa Barton, Design and Production.

Printed on recycled paper, including 50-70% recyded fiber and 10% postconsumer waste.

ZONING PRACTICE
AMERICAN PLANNING ASSOCIATION

122 S. Michigan Ave.
Suite 1600
Chicago, Il 60603

1776 Massachusetts Ave., N.W.
Washington D.C. 20036

HAS THE SUPREME COURT CHANGED ZONING?

8