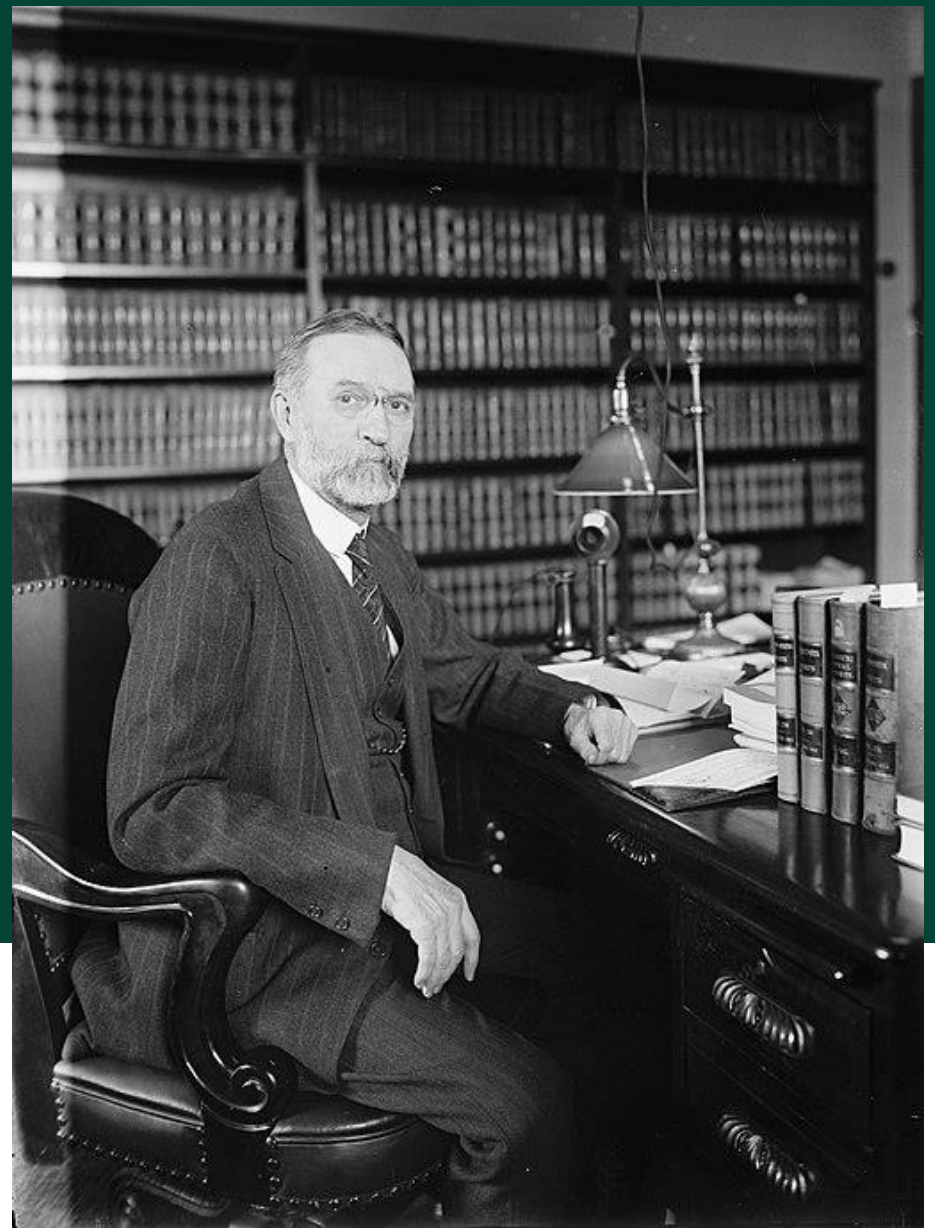


LAND USE 101

Institute for Local Government Lawyers

International Municipal Lawyers Association
88th Annual Conference
September 27, 2023
LaQuinta, California

PRESENTER

David Warner, Principal Counsel

THE MARYLAND-NATIONAL CAPITAL
Park and Planning Commission

INTRODUCTION

A primer on the basics of Land Use Law in the United States.

WHAT WE WILL COVER

- Property Rights under the United States Constitution
- History of Government Regulation of Private Property
- Planning
- Zoning
- Subdivision
- Modern Legal Issues

Property Rights

United States and State Constitutions



PROPERTY RIGHTS - ORIGINS

- **John Locke – Rooted in Laws of Nature**
- **Thomas Hobbes – Only exists if political authority grants rights**
- **Thomas Jefferson – "… endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness."**
- **Federalist 54 – James Madison "Government is instituted no less for protection of the property, than of the persons of individuals"**



PROPERTY RIGHTS – U.S. CONSTITUTION

Fifth Amendment

"No person shall be … deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

14th Amendment

"No state shall … deprive any person of life, liberty, or property, without due process of law; …"

Chicago, Burlington & Quincy Railroad Co. v. City of Chicago, 166 U.S. 226 (1897)

"The legislature may prescribe a form of procedure to be observed in the taking of private property for public use, but it is not due process of law if provision be not made for compensation."

PROPERTY RIGHTS – STATE CONSTITUTIONS

Vermont

"…whenever any particular man's property is taken for the use of the public, the owner ought to receive an equivalent in money." Vt. Const. of 1777, ch. I, art. II.

Georgia

"… private property shall not be taken or damaged for public purposes without just and adequate compensation being first paid." Ga. Const, (2023), Art. I, Sec. 3, Para. 1(a).

Missouri

"That private property shall not be taken for private use with or without compensation, unless by consent of the owner, except for private ways of necessity, and except for drains and ditches across the lands of others for agricultural and sanitary purposes, in the manner prescribed by law; and that when an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be public shall be judicially determined without regard to any legislative declaration that the use is public." Const. of 1875, Art. I, Sec. 20.

What do you mean, “Take?”

- *Pumpelly v. Green Bay & Mississippi Canal Co.*, 80 U.S. 166 (1871)

  Government cannot just flood your property and claim that it did not “take” it.

- *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922)

  “The general rule, at least, is that, while property may be regulated to a certain extent, if regulation goes too far, it will be recognized as a taking.”

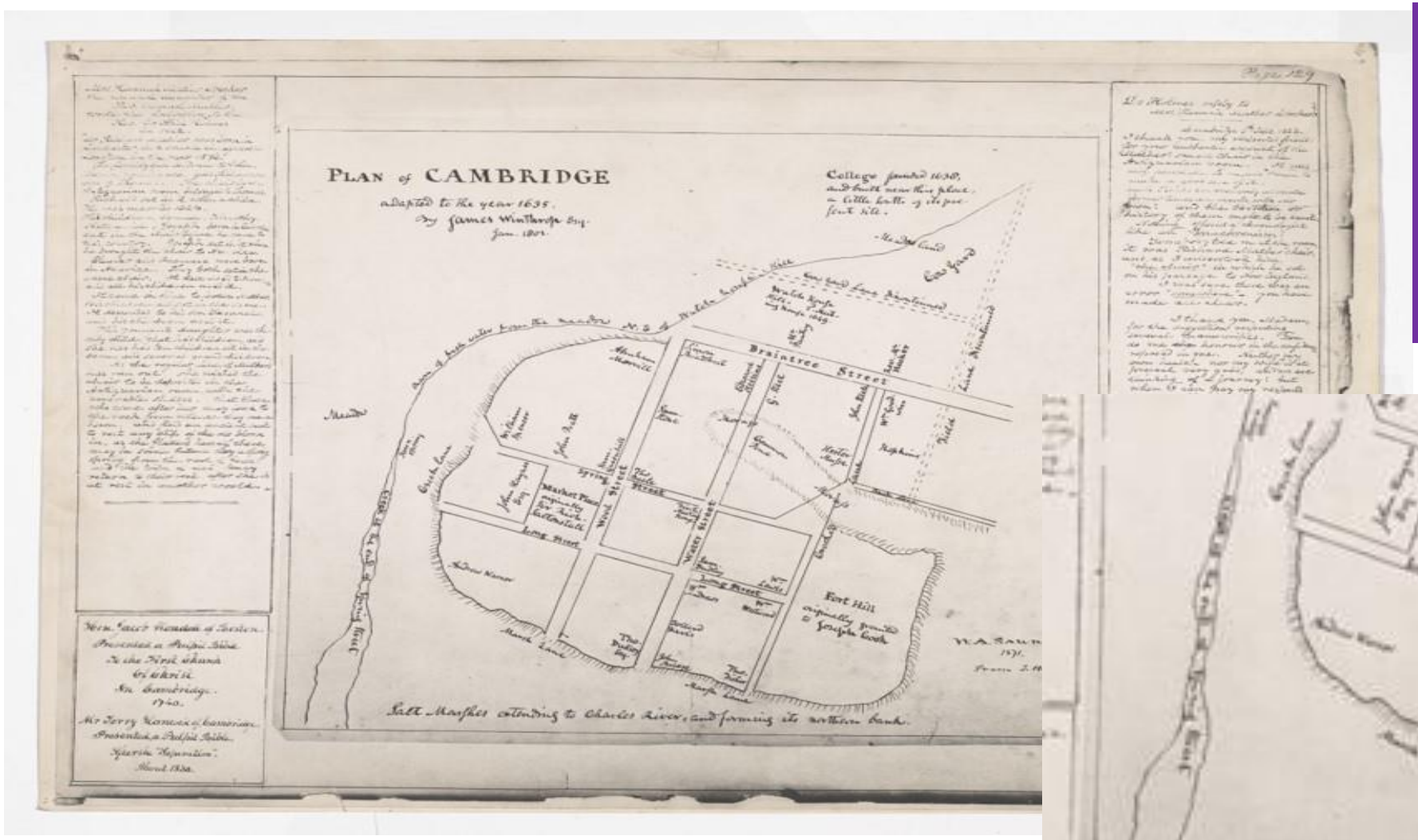


Government Regulation

A Long History



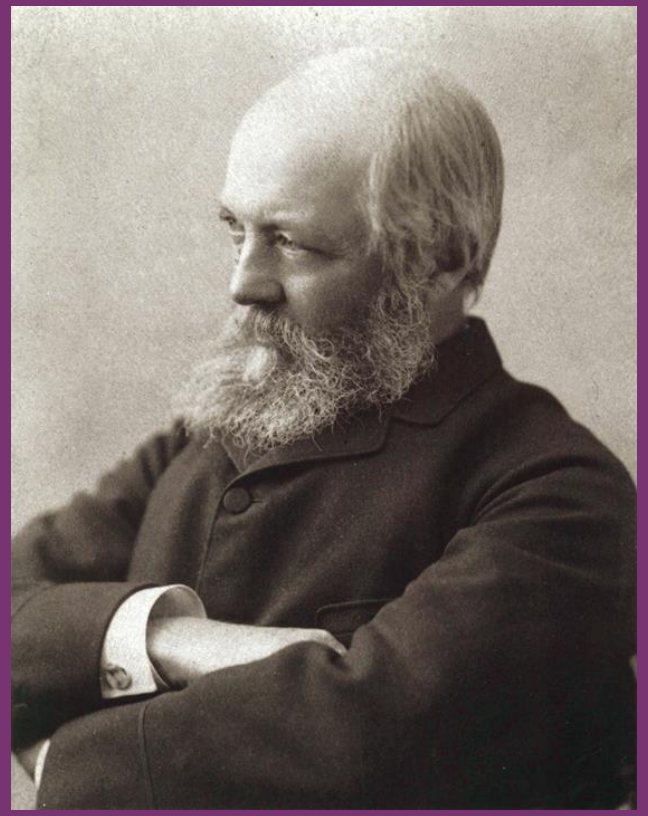
PLANNING – AS OLD AS DIRT



In its broadest sense, planning is older than recorded history. 1 Williams & Taylor, *American Land Planning Law* § 1:5 (3rd Ed. 2003)

Urbanization required better planning

- Sanitation Systems
- “City Beautiful”
- “City Practical”
- Federal model planning code
- New Deal expansion



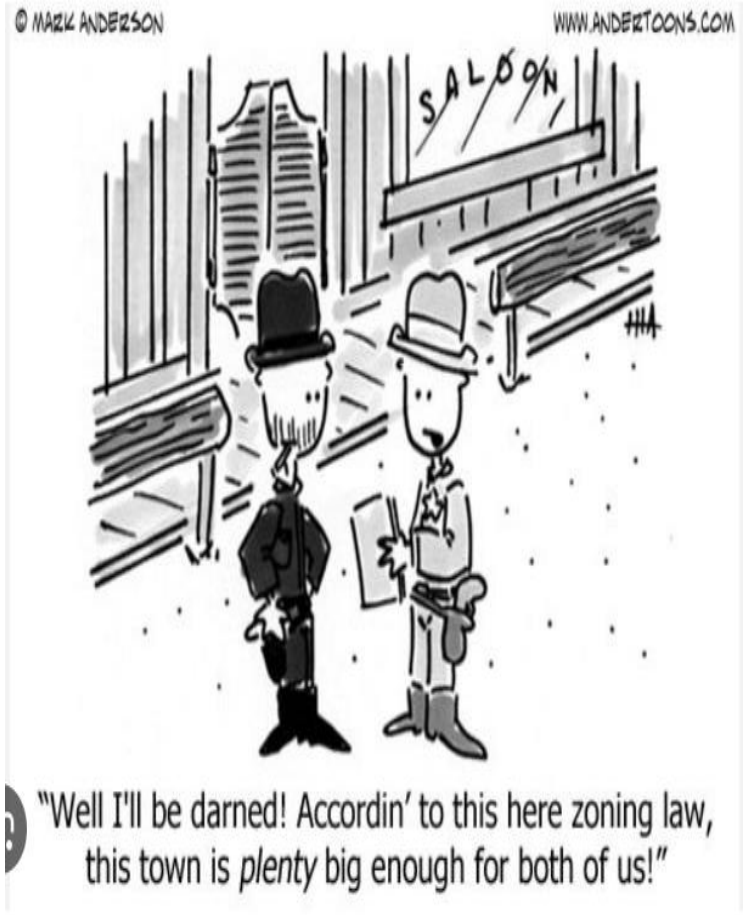
ADDRESSING LAND USE CONFLICTS

- Early water rights disputes
- Urbanization accelerates competing interests
- My right to use my property vs. your right to quiet enjoyment
  - ➡ Often settled through the courts
  - ➡ Private Nuisances
  - ➡ Public Nuisances

There has to be a better way?



EARLY EFFORTS TO ZONE



- Cities experiment with setbacks, height limits, prohibited uses, etc.
- New York (1916) adopts first comprehensive zoning ordinance
- Federal model zoning code (1924)
- By mid-1920's more than 400 local governments have zoning ordinances

BUT WAS IT CONSTITUTIONAL?

- 10th Amendment
  - ➡ "The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people."
- Police Power
  - ➡ State's authority to pass laws to protect the public's health, safety, and welfare
- *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).
  - ➡ Yes!



SUBDIVISION CONTROLS

Expansions of multi-lot developments, especially after World War II, necessitated controls to ensure planning goals were met and adequate public facilities existed to serve the new developments.



- **A recorded plat of subdivision ensures future purchasers that the development will be adequately served by necessary facilities and improvements.**
- **The lotting pattern and internal design should accommodate the uses proposed.**
- **Adequate public facilities to serve the development should exist or be adequately financed:**
  - Schools
  - Transportation (Auto, Bike, Ped)
  - Parks and Recreation
  - Public Safety (Police, Fire EMS)
  - Sewer, Water, Stormwater
  - Utilities

IMPLEMENTATION

Planning



The Planning Process

1. Where are we now?

2. Where are we going?

3. Where do we want to be?

4. How do we get there?

5. How are we Doing?

Community Profile



Descriptive Information

Community Values

Trend Analysis



Trend Data

Identify issues

Probable Scenarios

Community Vision



Vision Statement

Preferred Scenario

Comprehensive Plan



Goals, Objectives and Policies

Map Series

Plan Implementation



Amendments

Land Development Regulations

Evaluation & Appraisal

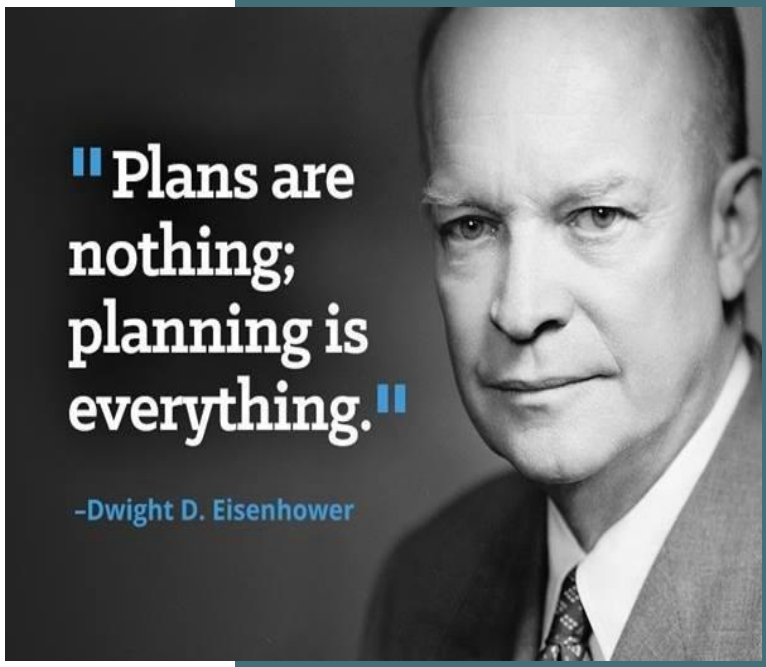
Credit: Dwight Merriam and Susan Trevarthen

WHAT DOES A PLAN DO?

Plans are developed to guide the implementation of land use controls and zoning in a rational way that is beneficial to the public.
Juergensmeyer & Roberts, *Land Use Planning and Development Regulation Law* § 2:9 (3d Ed. 2013)

Planning concerns the development of a community, not just its uses, but also its civic beauty and other matters affecting the public. Yoakley, *Zoning Law and Practice*, § 1-2 (4th Ed. 1978)

"Imposing land use regulations, such as zoning, without any guidance could easily result in arbitrary and conflicting laws that will not further community goals. Plans, therefore, represent the first step towards the enactment of more finite laws." - David Warner



LEGAL EFFECT OF PLANS

Edward J. Sullivan, Jennifer M. Bragar, Recent Developments in Comprehensive Planning Law, 46 Urb.Law 685 (Summer, 2014)

Plans come in many names (General, Comprehensive, Master, Sector, Special, Functional, etc.)

- **Unitary View**
  - ➡ **"Planning is neither essential nor possibly even relevant to zoning and land use regulation. The local zoning ordinance is dispositive."**
- **Planning Factor View**
  - ➡ **"[A] plan is relevant, but not necessarily dispositive of the validity of a land use regulation."**
- **Planning Mandate View**
  - ➡ **"Planning is essential to land use regulation"**



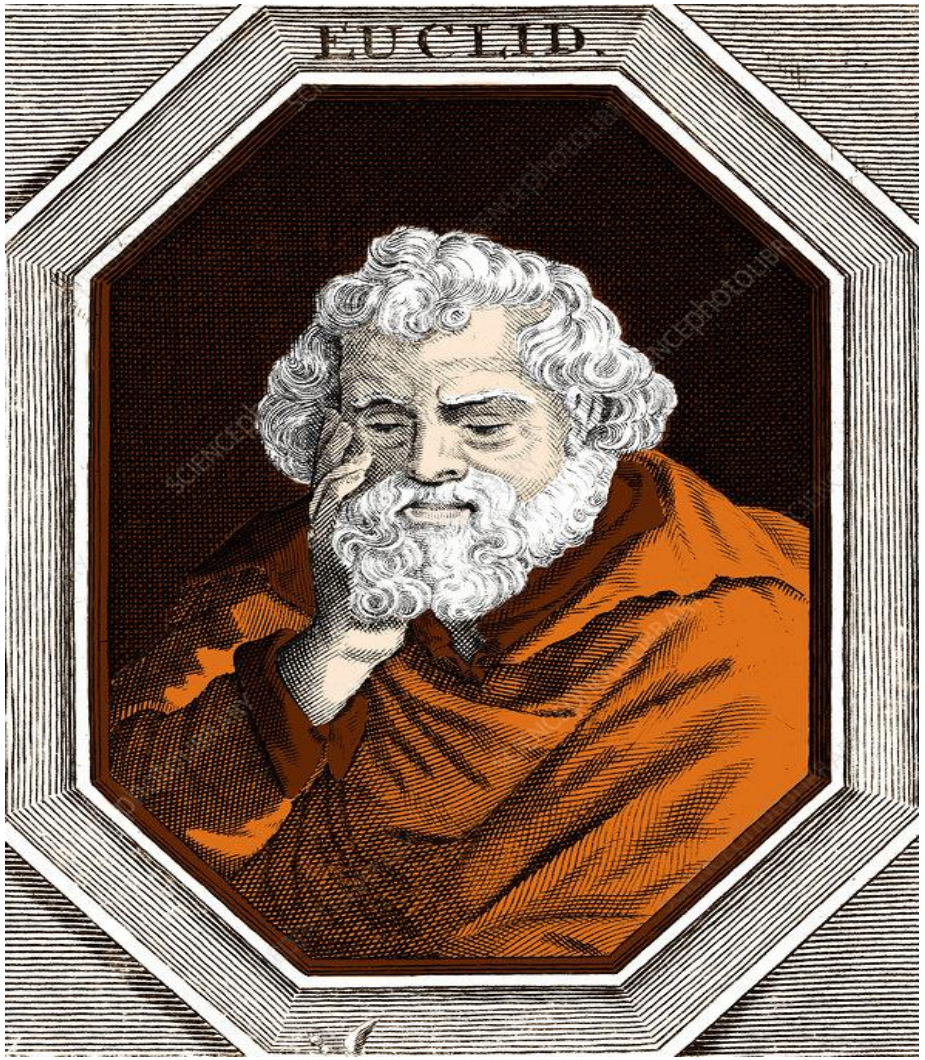
DIFFERENT STATES; DIFFERENT APPROACHES

- “The regional plan shall be made with the general purpose of guiding and accomplishing a coordinated, adjusted, efficient and economic development of the region…” Tenn. T. C. A. § 13-3-302
- “The governing authority of each municipality and county may provide for the preparation, adoption, amendment, extension and carrying out of a comprehensive plan for the purpose of bringing about coordinated physical development in accordance with present and future needs…” MS Code § 17-1-11 (2017)
- “A zoning ordinance shall be consistent with a city or county general plan only if both of the following conditions are met:(1) The city or county has officially adopted such a plan.(2) The various land uses authorized by the ordinance are compatible with the objectives, policies, general land uses, and programs specified in the plan.” Cal. Gov. Code § 65860

IMPLEMENTATION

Zoning

Euclidian Zoning



- **“Generally, by means of Euclidean zoning, a municipality divides an area geographically into particular use districts, specifying certain uses for each district.**
- **Each district or zone is dedicated to a particular purpose, either residential, commercial, or industrial, and the zones appear on the municipality's official zoning map.**
- **Euclidian zoning is designed to achieve stability in land use planning and zoning and to be a comparatively inflexible, self-executing mechanism which, once in place, allows for little modification beyond self-contained procedures for predetermined exceptions or variances.”**

  People's Counsel for Baltimore Cty. v. Loyola Coll. in Maryland, **406 Md. 54, 70, 956 A.2d 166, 176 (2008)**

(Not named for the famous Greek mathematician)



- **Examples of Euclidian Zoning Categories**
  - **Residential**
  - **Commercial**
  - **Industrial**
  - **Agricultural**
  - **Maritime**
  - **Open Space**

Residential Zones

- **Rural Residential**
- **Residential Estate**
- **Residential Single-Family Detached**
- **Residential Single-Family Attached**
- **Residential Multi-Family**



Commercial Zones

- Commercial Shopping Center
- Commercial Office
- Commercial Neighborhood
- Commercial Service



- **Industrial Employment**
- **Industrial Warehouse**
- **Industrial Light**
- **Industrial Heavy**



Industrial Zones

Mixed-Use Zones



- Town Activity Center
- Local Transit-Oriented
- Downtown
- Regional Transit-Oriented

Bulk Regulations

SUBTITLE 5. R1 – RESIDENTIAL DISTRICTS

§ 18-4-501. Bulk regulations.

Except as provided otherwise in this article, the following bulk regulations are applicable in an R1 District:

Minimum lot size	40,000 square feet
Maximum coverage by structures	25% of gross area
Minimum width at front building restriction line; for waterfront lots the building restriction line is measured from the rear lot line	125 feet
Minimum setbacks for principal structures:	
Front lot line	40 feet
Rear lot line	35 feet
Side lot line	15 feet
Combined side lot lines	40 feet
Corner side lot line	40 feet

Variance vs. Conditional Use (Special Exception)

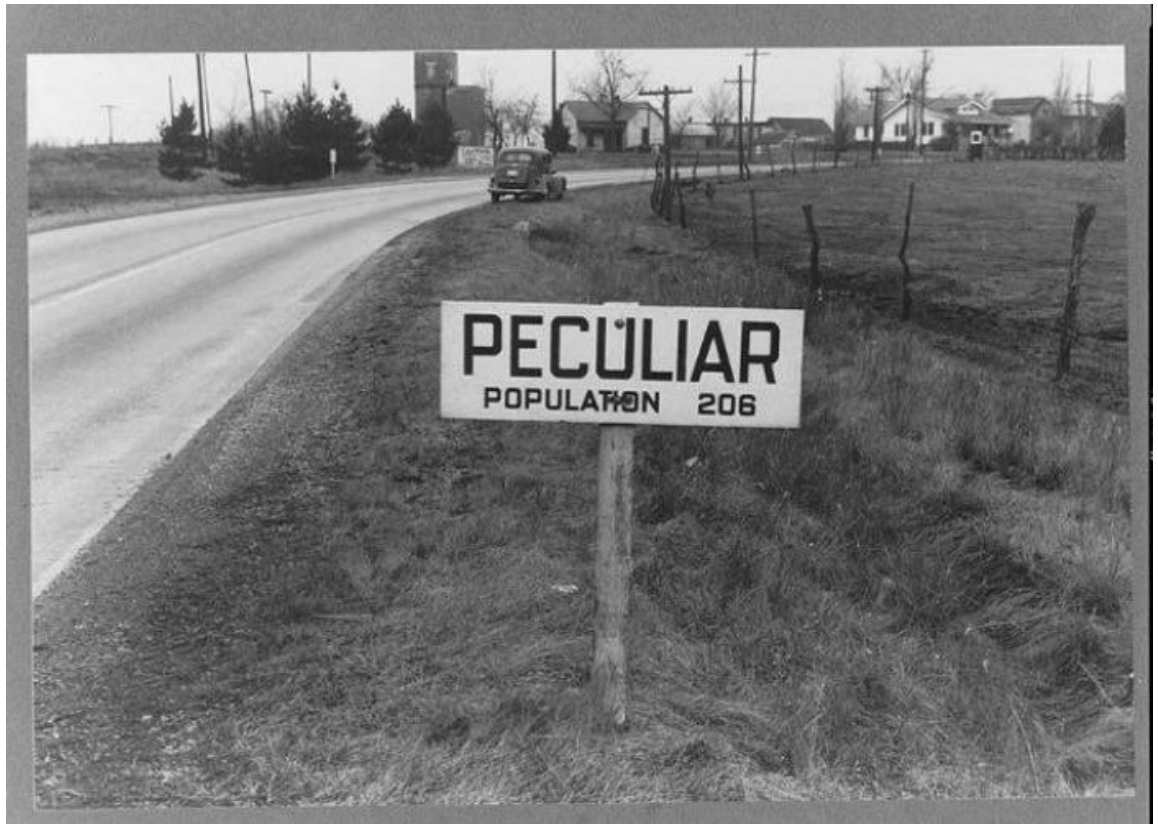
A variance is something the Zoning Ordinance says is <u>not okay</u> but may make an exception.

A conditional use is something the Zoning Ordinance says <u>is okay</u>, but only under certain conditions

"The variance and exception are designed to meet two entirely different needs. The variance contemplates a departure from the terms of the ordinance in order to preclude confiscation of property, while the exception contemplates a permitted use once the prescribed conditions therefor are met." *Cromwell v. Ward*, 102 Md. App. 691, 699–700, 651 A.2d 424, 428 (1995)

Variance

- “Variance” means a modification only of density, bulk, dimensional, or area requirements in the zoning law that is not contrary to the public interest, and where, owing to conditions **peculiar to the property** and not because of any action taken by the applicant, a literal enforcement of the zoning law would result in unnecessary hardship or practical difficulty, as specified in the zoning law. Md. Code Ann., Land Use Article § 1-101(s).



Conditional Use/Special Exception

- **A use which has been legislatively predetermined to be conditionally compatible with the uses permitted as of right in a particular zone, the condition being that a zoning body must, in each case, decide under specified statutory standards whether the presumptive compatibility in fact exists. *Creswell v. Baltimore Aviation Serv., Inc.*, 257 Md. 712, 719, 264 A.2d 838, 842 (1970)**

  - **General Standards—Cannot be detrimental to public health, safety, or welfare; the location, nature, and height of each building will be compatible with the orderly development of the district; must be consistent with the jurisdiction's comprehensive plan.**
  - **Specific Standards—Commercial Kennel must be on a property with at least 5 acres, enclosed structure must be 100 feet from any residence**

Table of Uses

Permitted and Special Exception Uses	Residential Agriculture	Residential Low Density	R1	R5
Single-family detached	P	P	P	P
Single-family attached				P
Golf Course	P	P	P	P
Kennels, Commercial	SE	SE		
Rifle, pistol, skeet	SE	SE		
Solar energy generating facility	P	SE		

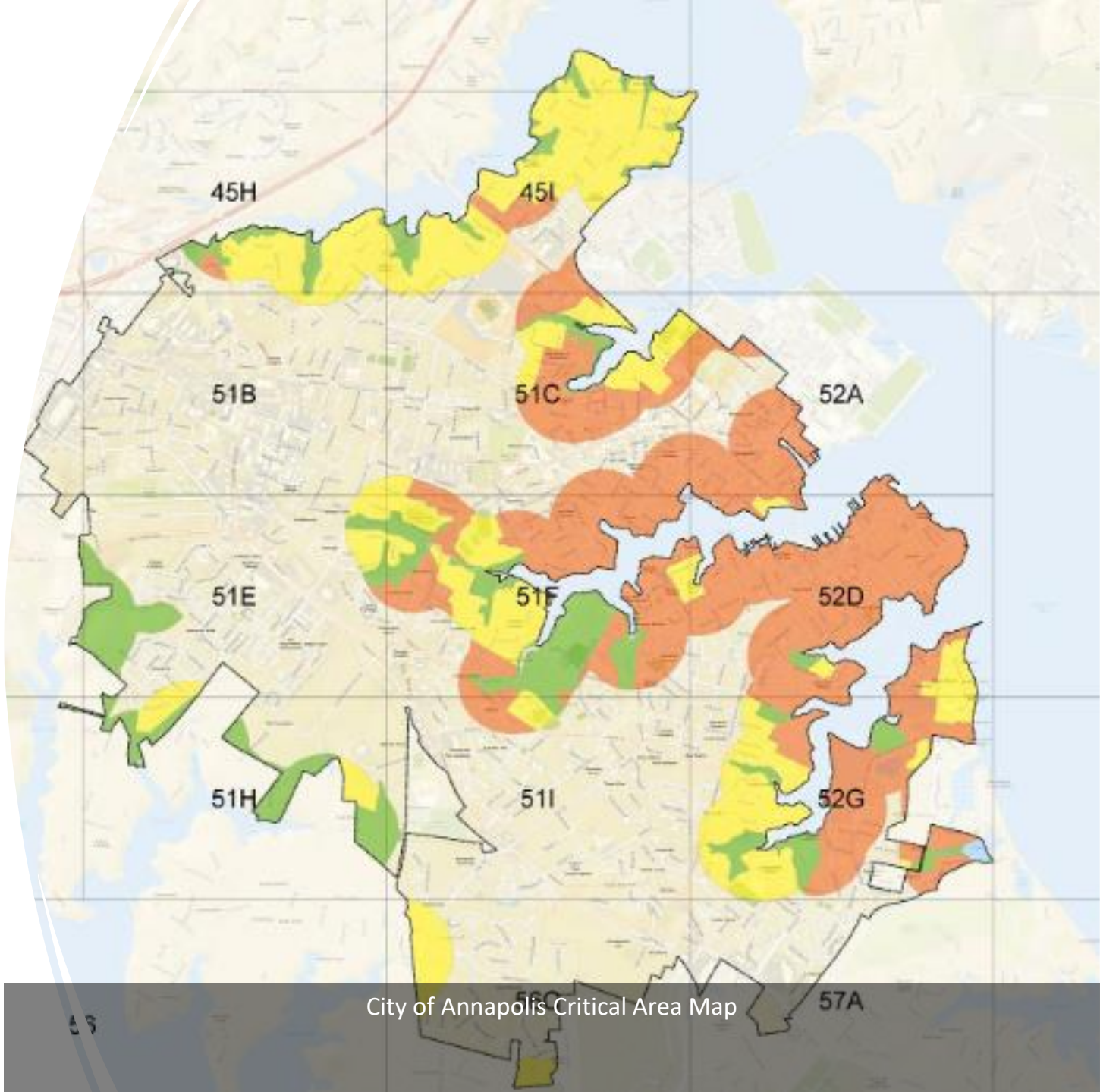
Table of Uses – Like the "Sorting Hat"

- "The local legislature, when it determines to adopt or amend the text of a zoning ordinance with regard to designating various uses as allowed only by special exception in various zones, considers in a generic sense that certain adverse effects, at least in type, potentially associated with (inherent to, if you will) these uses are likely to occur wherever in the particular zone they may be located. In that sense, the local legislature puts on its "Sorting Hat"[33] and separates permitted uses, special exceptions, and all other uses. That is why the uses are designated special exception uses, not permitted uses." *People's Counsel for Baltimore Cty. v. Loyola Coll. in Maryland*, 406 Md. 54, 106 (2008).

    - [33] In the Harry Potter series of books, the "Sorting Hat" is a magical artifact that is used to determine in which house (Gryffindor, Hufflepuff, Ravenclaw or Slytherin) first-year students at Hogwarts School of Wizardry and Witchcraft are to be assigned. After being placed on a student's head, the Sorting Hat measures the inherent qualities of the student and assigns him or her to the appropriate house. Id. at 106 n.33 (citing J.K. Rowling, *Harry Potter and the Sorcerer's Stone* (1998)).

Overlay Zones

- Transit-Oriented Overlay
- Development-District Overlay
- Historic Conservation Overlay
- Aviation Policy Area



City of Annapolis Critical Area Map

Rezoning

- **Original Zoning**
- **Comprehensive Zoning**
- **Piecemeal Rezoning/Zoning Map Amendment**
- **Text Amendments**

- "Local zoning authorities implement their delegated zoning authority through establishment of original zoning through adoption of a [an original] zoning map, comprehensive rezoning of substantial areas of the jurisdiction through a legislative-type process initiated by the local government, and piecemeal rezoning of individual properties (by application of the owner or contract purchaser) through a quasi-judicial process." Ctny. Council of Prince George's Cty. v. Zimmer Dev. Co., 444 Md. 490, 508, 120 A.3d 677, 687 (2015)

Comprehensive Zoning

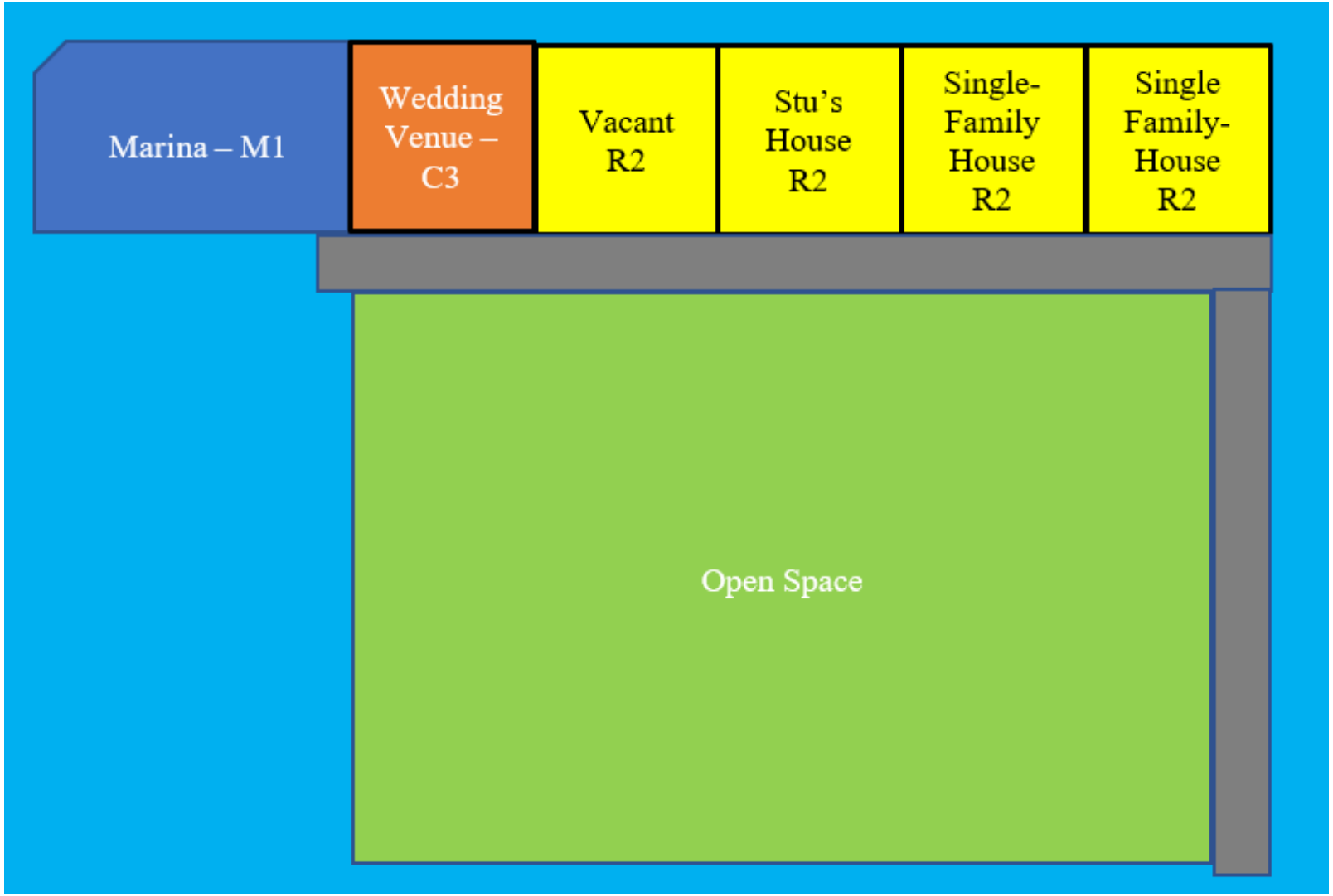
- “Comprehensive zoning is fundamentally legislative and no significant quasi-judicial function is involved. As comprehensive zoning encompasses a large geographical area, the process is initiated generally by a local government, rather than by a property owner or owners. When local zoning authorities devise comprehensive zoning ordinances, the “focus is not on a single piece of property, but rather on a considerable number of properties as they relate to each other and to the surrounding area. These are not adjudicative determinations affecting one property owned by one person, *but instead are classically legislative determinations* designed to affect local and regional needs and all property owners within the planning area.”

  Anne Arundel Cty. v. Bell, 442 Md. 539, 553, 113 A.3d 639, 647–48 (2015)

Piecemeal Rezoning/Zoning Map Amendment

- Change/Mistake Rule—“While, in recent years, we have had occasion to enunciate a number of important principles applicable to the law of zoning, perhaps none is more rudimentary than the strong presumption of the correctness of original zoning and of comprehensive rezoning. To sustain a piecemeal change in circumstances such as those present here, strong evidence of mistake in the original zoning or comprehensive rezoning or evidence of substantial change in the character of the neighborhood must be produced.”

  Stratakis v. Beauchamp, 268 Md. 643, 652–53 (1973).



Piecemeal Rezoning

Zoning Map Amendment

Text Amendment

Uses	Commercial, Light	Industrial, Light
Used auto sales		P
Storage for online used auto sales	~~P~~ SE	

Floating Zones

- Legislative response to rigidity of Euclidean zones
- Used to allow the development of specialized or mixed uses (e.g., golf course or resort community, town center, planned unit development)
- Two-step process
  - Legislature assigns specific purpose or class of purposes for the zone
  - Property owner initiates rezoning process (change/mistake not required)
- Planning considerations are normally accorded greater weight in assessing rezonings for floating zones than Euclidean zones.

  Cnty. Council of Prince George's Cty. v. Zimmer Dev. Co., 444 Md. 490, 515–17 (2015).

Nonconforming Uses

A lawfully existing use of a structure or of land that does not conform to the use regulations applicable to the district in which it is located. Baltimore City Zoning Code, § 18-201(d).

The goal is to eliminate the use:

- Amortization
- Ability to intensify
- Allowed to repair and maintain
- Reconstruct due to calamity

IMPLEMENTATION

Subdivision

SUBDIVISION

Although "subdivision" technically refers to the division and consolidation of parcels of land, or the land that has been divided or consolidated, the regulations controlling how, when, and under what circumstances subdivision may occur are used to promote development that is beneficial to the community.

- **Subdivision controls aim to ensure that developments will be able to support the uses for which the land is zoned.**
- **Among the considerations addressed are the aesthetic planning of the neighborhood, safety and convenience of streets and walkways, access by police and fire protection authorities, adequacy of utilities and other infrastructure, and the off-site effect of the development. 1 Kushner, *Subdivision Law and Growth Mgmt.* § 1:5 (2d ed. 2012).**
- **Subdivision regulations attempt to respond to issues that are not so well-addressed through zoning.**



LAND USE EXACTIONS

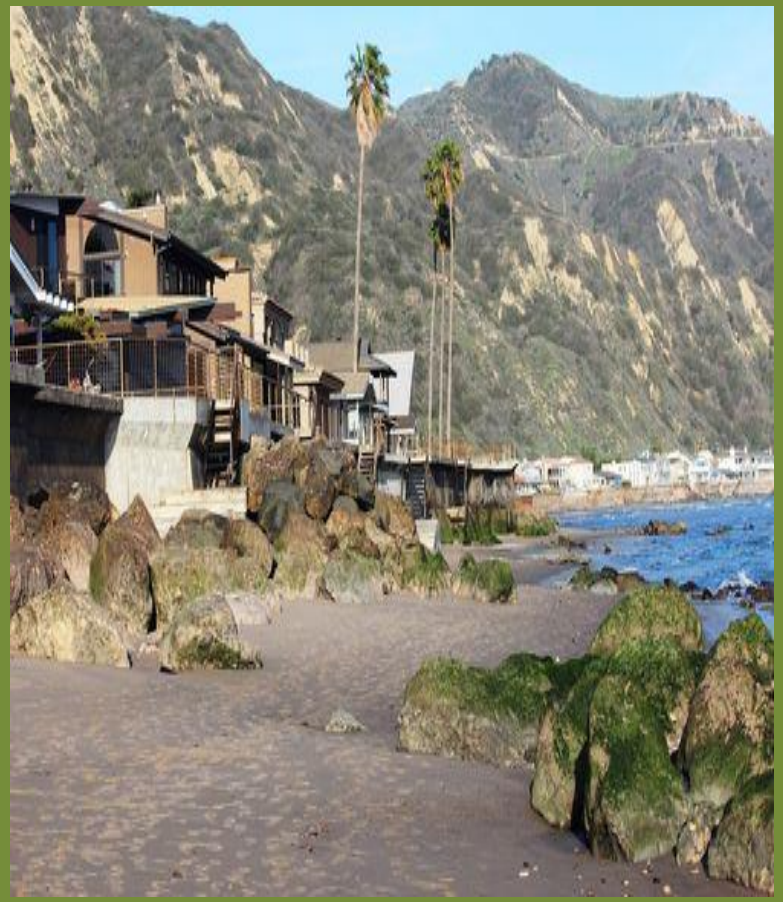
- A requirement imposed by a local government that a developer dedicate real property for a public facility or pay a fee to mitigate the impacts of the project, as a condition of receiving a discretionary land-use approval. Exaction, Black's Law Dictionary (11th ed. 2019).

- "Essential Nexus" and "Rough Proportionality"

  - *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987).

  - *Dolan v. City of Tigard*, 512 U.S. 374 (1994).

  - *Koontz v. St. Johns River Water Management District*, 570 U.S. 595 (2013).

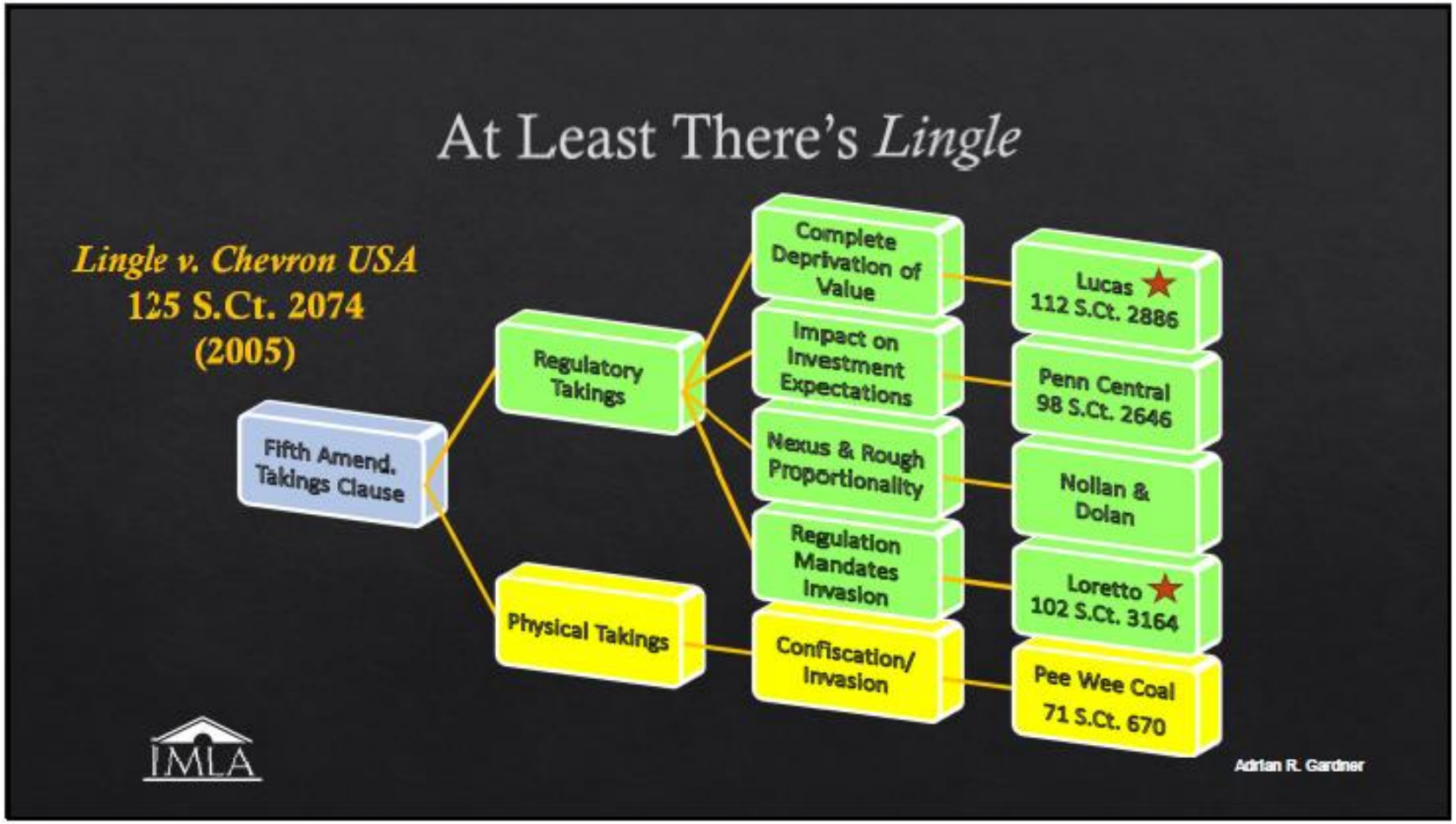


FUNDAMENTAL QUESTIONS

Is the government forcing some people alone to bear the public burdens which should be shared by everyone?

- Is the government taking title to the property?
- Does the government action entitle someone else to take title to the property?
- Does the government's regulation entitle someone else to occupy the property?
- Does the government regulation deprive the property owner of all economically viable use of tis property?
- Is the government exacting money in lieu of requiring dedication?





And most recently, *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 210 L. Ed. 2d 369 (2021)

FINAL THOUGHTS

Constitutional and Statutory Requirements Necessitate the Adoption of Adequate Procedures for Zoning and Land Use Hearings

Subject Property	Owner of the property
	Those with a contractual interest in the property
	Adjacent and nearby property owners
	Attorneys
	Community organizations
	Elected and appointed officials
	Staff
Hearing Procedures	Right to speak; time limits
	Right to cross examine
	Right to submit written testimony; record of the case
	APA; Open meeting laws

Sample Order of Hearing

The Order of Presentation shall be as follows:

A. Chair briefly describes the agenda item and opens the public hearing
B. Chair considers any preliminary matters or motions
C. Staff presentation
D. Applicant presentation
E. Opponent presentation
F. Public testimony by persons other than the Applicant or Opponent
G. Rebuttal by Applicant
H. Surebuttal by Opponent
I. Summation by Opponent
J. Summation by Applicant
K. Chair closes the hearing
L. Planning Board deliberation
M. Decision



"A smorgasboard of banality and despair" – Colin Robinson

A LAND USE LAWYER'S APPROACH

- Property owners begin with the unencumbered right to the use and quiet enjoyment of their property…
- The government has the right to regulate that property, and even take it …
  - ➡ If there is a law or regulation that provides such authority …
  - ➡ And constitutional rights are not violated.



THANK YOU



David S. Warner, Esq.
Principal Counsel
Maryland-National Capital Park and Planning Commission
County Administration Building
14741 Governor Oden Bowie Drive
Upper Marlboro, MD 20772
david.warner@mncppc.org
202 603 9466

Visit our website: https://www.mncppc.org