

SOME DUE PROCESS ISSUES IN LAND USE

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Takings and Due Process

The Fifth Amendment, applicable only to the federal government,¹ prohibits the government (1) from depriving persons of their property without due process of law, and (2) taking private property except for public use and without payment of its fair value.² The Fourteenth Amendment, applicable to the states, limits the power of state government. It expressly incorporates due process limitation over private property rights and implicitly incorporates the just compensation limitation. *Dolan v. City of Tigard*, 512 U.S. 374,406-407 (1994).

In the early takings cases, the Supreme Court limited the Takings Clause to actual appropriation of property.³ *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922) changed this view. By relating the due process limitations on the police power to the Takings Clause, the Court brought together two strands of the law.

In *Pennsylvania Coal Co.*, Justice Holmes stated: “while property may be regulated to a certain extent, if regulation goes too far it will be recognized as taking.” *Id.* at 415. The Court held that the due process limitations on the police power required the state to exercise its taking authority whenever its regulatory authority “went too far.” *Id.* at 413.⁴ Justice Brandeis, dissenting, also understood the case in this way. *Id.* at 418.

Since *Pennsylvania Coal Co.*, courts have relied on due process restrictions on police power to determine whether the government has in fact “taken” property. For example, in the seminal zoning cases, the Court looked at zoning in the light of the Due Process Clause. *Village of Euclid v. Amber Realty Co.*, 272 U.S. 365,384-386, 395 (1926). See *Nectow v. City of Cambridge*, 277 U.S. 183,187-189 (1928). “[T]he governmental power to interfere by zoning

¹The Takings Clause does not apply directly to the states. *Pumpelly v. Green Bay and Mississippi Canal Co.*, 80 U.S. (13 Wall.) 166,177 (1872); *Barron v. Mayor and City Council of Baltimore*, 32 U.S. (7 Pet.) 243 (1837).

²The Fifth Amendment provides: “No person shall ... be deprived of ... property without due process of law; nor shall private property be taken for public use without just compensation.”

³“[T]he Takings Clause has always been understood as referring only to a direct appropriation and not to consequential injuries resulting from the exercise of lawful power. **It has never been supposed to have any bearing upon or to inhibit laws that indirectly work harm and loss to individuals.**” *Legal Tender Cases*, 79 U.S. (12 Wall.) 576,551 (1871).

⁴Justice Holmes asserted that due process limitations imposed on the police power required the government to appropriate an individual’s property under the Takings Clause rather than regulate it for the general good when the line was crossed. “As applied to this case, the statute is admitted to destroy previously existing rights of property and contract. The question is whether the police power can be stretched so far. Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law. 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**. One fact for consideration in determining such limits is the extent of the diminution. **When it reaches a certain magnitude, in most if not in all cases there must be an exercise of eminent domain and compensation to sustain the act.**”(emphasis added).

regulations with the general rights of a landowner by restricting the character of his use **is limited by the due process requirement that such a restriction must bear a substantial relation to the public health, safety, morals, conveniences or the general welfare of the community.**" *Id.* at 187-188. (Emphasis added). In *Agins v. City of Tiburon*, 447 U.S. 255 (1980), the Court trying to summarize its takings cases, describes a two part test. The Court cites *Nectow* as authority for the first test. "The application of a general zoning law to particular property effects a taking if the ordinance does not **substantially advance legitimate state interests.**" This is the traditional substantive due process limitation on the police power. (Emphasis supplied). *Agins, supra.* at 260.

Justice Stevens, dissenting in *Dolan v. City of Tigard*, 512 U.S. 374,406-407 (1994), describes this interweaving of substantive due process principles with the Takings Clause doctrine. "The so-called 'regulatory takings' doctrine that the Holmes dictum kindled has an obvious kinship with the line of substantive due process cases that *Lochner* [*Lochner v. New York*, 198 U.S. 45, (1905)] exemplified. Besides having similar ancestry, both doctrines are potentially open-ended sources of judicial power to invalidate state economic regulations that Members of this Court view as unwise or unfair. Each provision establishes a tense balance between the needs of the larger society and the claims of the individual."⁵ See *San Diego Gas & Electric Co. v. City of San Diego*, 450 U.S. 621,636-661 (1981).

In *Dolan*, the Court cites *Chicago, B.&Q.R. Co. v. Chicago*, 166 U.S. 226, 239 (1897) for the proposition that the Takings Clause applies to the states. *Id.* at 383-384. Interestingly enough, *Chicago*, referring to the "substance" of due process of law, held that a state "may not, by any of its agencies **disregard the prohibitions of the Fourteenth Amendment.** Its judicial authorities may keep within the letter of the statute prescribing forms of procedure in the courts and give the parties interested the fullest opportunity to be heard, and yet it might be that its final action would be inconsistent with that amendment. **In determining what is due process of law regard must be had to substance, not to form.**" *Chicago, B. & Q.R. Co., supra.* at 234-235 (1897) (emphasis added).

Justice Holmes' apparently simple statement of legal principle creates complicated problems. Concepts of substantive due process have shaped "takings law" since his decision in *Pennsylvania Coal*. Some of the problems associated with substantive due process have affected the courts' decisions in takings cases. A significant problem with this approach is the lack of standards. See *Nestor Colon Medina & Sucesores, Inc. v. Custodio*, 964 F.2d 32,45 (1st Cir. 1992). Another is finding the dividing line between legislative and judicial roles. The consequence of Justice Holmes ruling is that states pay for the effects of regulations if the regulations extend beyond judicially determined limits of due process principles. Where is the

⁵Later cases have interpreted the Fourteenth Amendment's substantive protection against uncompensated deprivations of private property by the States as though it incorporated the text of the Fifth Amendment's Takings Clause. See, e.g., *Keystone Bituminous Coal Assn. v. DeBenedictis*, 480 U.S. 470, 481, n. 10, 107 S.Ct. 1232, 1240, n. 10, 94 L.Ed.2d 472 (1987).

line drawn between the farthest permissible reaches of the police power and the brakes imposed by the court?

The issue of where to draw the line between government's regulation of private property and the constitution's limits on the government power continues to create debate. The debate surfaced even in *Pennsylvania Coal*. See *Pennsylvania Coal Co. v. Mahon*, 260 U.S. at 418.⁶ The Court has been forthright talking about the problem. With only a few bright lines, [in cases where the state has actually appropriated a traditional part of the traditional bundle of property rights,⁷] the Court has had to resort to an *ad hoc* analysis to declare when the constitution turns regulation into confiscation. Justice Holmes set the stage for the problem: "As we already have said this is a question of degree -- and therefore cannot be disposed of by general propositions." *Pennsylvania Coal Co. v. Mahon*, *supra*. at 416. See *United States v. Central Eureka Mining Co.*, 357 U.S. 155, 168 (1958); *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 124 (1978); *Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979); *Agins v. City of Tiburon*, 447 U.S. at 260-261; *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015 (1992); *Dolan v. City of Tigard*, 512 U.S. 374 (1994).

The lower courts have applied these substantive due process principles to their takings analysis. See, e.g. 24 New England Law Review, 1129, 1142 (1990). Substantive due process doctrine has even been found to be a separate and independent source of law for takings cases. See Takings, Land-Development Conditions and Regulatory Takings after Dolan and

⁶ The dissent by Justice Brandeis articulates the tension. "Coal in place is land, and the right of the owner to use his land is not absolute. He may not so use it as to create a public nuisance, and uses, once harmless, may, owing to changed conditions, seriously threaten the public welfare. Whenever they do, the Legislature has power to prohibit such uses without paying compensation; and the power to prohibit extends alike to the manner, the character and the purpose of the use. **Are we justified in declaring that the Legislature of Pennsylvania has, in restricting the right to mine anthracite, exercised this power so arbitrarily as to violate the Fourteenth Amendment?**" Later, he said: "Nor is a restriction imposed through exercise of the police power inappropriate as a means, merely because the same end might be effected through exercise of the power of eminent domain, or otherwise at public expense. Every restriction upon the height of buildings might be secured through acquiring by eminent domain the right of each owner to build above the limiting height; but it is settled that the state need not resort to that power." *Id* at 418.

⁷ See *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 427-433.

Lucas, Chapter 14, “*Substantive Due Process and Land Use: The Alternative to a Takings Claim*, Bley, K. (1996 ABA). See, e.g., *Sinaloa Lake Owners Ass’n v. City of Simi Valley*, 882 F.2d 1398 (9th Cir.1989) overruled by *Armendariz v. Penman*, 75 F.3d 1311 (9th Cir. 1996). However, these cases are now moving in yet a different direction.

A shift in the Court’s treatment of substantive due process in civil rights cases seems to have found its way into takings law. In *Graham v. O’Connor*, 490 U.S. 386 (1989), the Court held that claims of excessive police force had to be brought under the specific provisions of the Fourth Amendment and not under the more general provisions of the Fourteenth Amendment. In *Albright v. Oliver*, 510 U.S. 266 (1994), the Court in a plurality opinion held that **where a particular amendment provides an explicit textual source of constitutional protection against a particular sort of governmental conduct, “that Amendment, not the more generalized notion of “substantive due process” must be the guide for analyzing the limitations on government.**⁸ In *Armendariz v. Penman*, *supra*, the Ninth Circuit, relying on *Graham*, *supra*, decided in a takings/demolition case that since the Takings Clause provides an explicit source of constitutional protection against the government’s conduct, substantive due process had no place in the analysis. *Armendariz*, 75 F.3d at 1325; see *Patel v. Penman*, 103 F.3d 868 (9th Cir. 1996). This position virtually eliminates a substantive due process claim in takings cases except for the situations in which the government’s conduct “shocks the conscience” or is “*in and of itself* ... egregiously unacceptable, outrageous, or conscience-shocking.” *Amsden v. Moran*, 904 F.2d 748,754 (1st Cir.1990) (emphasis in original). The First Circuit has followed this interpretation for decades.

Substantive Due Process In the First Circuit

”Wordplay aside, we agree with Judge Friendly that, in the circumscribed precincts patrolled by substantive due process it is only when some basic and fundamental principle has been transgressed that ‘the constitutional line has been crossed.’ As distinguished from its procedural cousin, then, a substantive due process inquiry focuses on ‘what’ the government has done, as opposed to ‘how and when’ the government did it” *Amsden v. Moran*, 904 F.2d 748,754 (1st Cir. 1990).

The First Circuit has repeatedly found that rejections of proposed land development projects and denials of permits do not amount to a federal constitutional violation. See *Steele Hill Development v. Town of Sanbornton*, 469 F.2d 956, 960 (1st Cir.1972); *Creative Environments, Inc. v. Estabrook*, 680 F.2d 822 (1st Cir. 1982), cert. denied 459 U.S. 989 (1982);

⁸Interestingly enough, this case was decided in the same term as *Dolan* in which Justice Rehnquist for the Court said: “the dissent suggests that this case is actually grounded in “substantive” due process, rather than in the view that the Takings Clause of the Fifth Amendment was made applicable to the States by the Fourteenth Amendment. But there is no doubt that later cases have held that the Fourteenth Amendment does make the Takings Clause of the Fifth Amendment applicable to the States ...” This statement in *Dolan* has been interpreted as rejecting the suggestion that substantive due process limitations govern takings cases. *Macri v. King County*, ___ F.3d ___ (9th Cir. 1997). However, Justice Rehnquist’s assertion does not actually say that. By that time the principles underlying the due process clause had already become part of the established body of takings law.

Sucesion Suarez v. Gelabert, 701 F.2d 231 (1st Cir., 1983); *Roy v. City of Augusta*, 712 F.2d 1517 (1st Cir. 1983); *Chiplin Enterprises, Inc. v. City of Lebanon*, 712 F.2d 1524 (1st Cir. 1983); *Cloutier v. Town of Epping*, 714 F.2d 1184 (1st Cir. 1983); *Alton Land Trust v. Town of Alton*, 745 F.2d 730 (1st Cir. 1984); *Raskiewicz v. Town of New Boston*, 754 F.2d 38, 44 (1st Cir. 1985), cert. denied, 474 U.S. 845 (1985); *Chongris v. Board of Appeals*, 811 F.2d 36 (1st Cir. 1987), cert. denied, 483 U.S. 1021 (1987); *Amsden v. Moran*, 904 F.2d 748,754 (1st Cir. 1990); *Rumford Pharmacy, Inc. v. City of East Providence*, 970 F.2d 996 (1st Cir. 1992); *PFZ Properties, Inc. v. Rodriguez*, 928 F.2d 28 (1st Cir. 1991), cert. dismissed 503 U.S. 257 (1992); *Nestor Colon Medina & Sucesores, Inc. v. Custodio*, 964 F.2d 32 (1st Cir. 1992); *Licari v. Ferruzzi*, 22 F.3d 344 (1st Cir.1994).

The following guidelines have emerged.

A regulatory board does not violate constitutional due process requirements merely by making decisions “for erroneous reasons” or by making “demands which arguably exceed its authority under the relevant state statutes.” *Amsden*, 904 F.2d 748, 757 (quoting *Creative Env'ts.*, 680 F.2d at 832 n.9); *Chiplin Enters. v. City of Lebanon*, 712 F.2d 1524, 1528 (1st Cir.1983).

"[F]ederal courts do not sit as a super zoning board or a zoning board of appeals." *Raskiewicz v. Town of New Boston*, 754 F.2d at 44. "[A] court does not sit as a super zoning board with power to act *de novo*, but rather has, in the absence of alleged racial or economic discrimination ... a limited role of review." *Steele Hill Development v. Town of Sanbornton*, 469 F.2d supra at 960.

The threshold for establishing the requisite 'abuse of government power' is a high one indeed. "*Nestor Colon Medina & Sucesores, Inc. v. Custodio*, 964 F.2d at 45." A viable substantive due process claim requires proof that the state action was "in and of itself ... egregiously unacceptable, outrageous, or conscience-shocking." *Amsden v. Moran*, 904 F.2d at 754 (1st Cir.1990), cert. denied, 498 U.S. 1041 (1991). But see *Smithfield Concerned Citizens v. Town of Smithfield*, 907 F.2d 239,243 (1st Cir.1990) -- a facial challenge to a zoning ordinance.

The court may find a substantive due process violation when the government's conduct causes a "deprivation of an identified liberty or property interest protected by the Fourteenth Amendment." *Cruz-Erao v. Rivera-Montana*, 212 F.3d 617, 622 (1st Cir. 2000); *Nestor Colon Medina & Sucesores, Inc. v. Custodio*, 964 F.2d at 40-43 (First Amendment rights. See *Reno v. Flores*, 507 U.S. 292,301-02 (1993).

Substantive Due Process in the Massachusetts Courts

The Massachusetts Courts have accepted the First Circuit's reasoning. In *Freeman v. Planning Board of West Boylston*, 419 Mass. 548 (1995), cert. denied 516 U.S. 931 (1995), the SJC, reviewing a jury verdict for the plaintiffs in a land use case, reversed the trial court. Finding that the lower court had instructed the jury based on applicable First Circuit substantive due process standards, the Court held that the evidence was insufficient as a matter of law. While some believe that the Court left the door open to adopt a less stringent standard than that of the

First Circuit. 40 Feb. B.B.J. 13, Connolly and Clendenen (1996),⁹ the Court has not seen it that way.

In *Wyman v. Zoning Board of Appeals of Grafton*, 47 Mass. App. Ct. 635 cited *Freeman* and the applicable First Circuit cases apparently approving the First Circuit analysis. "Much of the complaint and much of the *Wyman* brief on appeal assert denials of due process and equal protection of the laws. **That is altogether out of focus as the zoning enabling act, G.L. c. 40A, affords adequate administrative and judicial remedies for errors in administration of the zoning law. Due process or equal protection claims are very seldom the means to seek review of the actions of land use agencies, with the door only slightly ajar for relief in "truly horrendous situations."** *Freeman v. Planning Bd. of W. Boylston*, 419 Mass. 548, 560-561, 646 N.E.2d 139, cert. denied, 516 U.S. 931, 116 S.Ct. 337, 133 L.Ed.2d 235 (1995). *Nestor Colon Medina & Sucesores, Inc. v. Custodio*, 964 F.2d 32, 45 (1st Cir.1992). This case is not such a one. At worst, the building inspector and the ZBA may have misconceived their authority and duty, a question reviewable under G.L. c. 40A, § 17. **Judgment on the pleadings ... was rightly allowed on the constitutional claims.**

The Appeals Court has expressly followed the First Circuit's reasoning. *Rosenfeld v. Board of Health of Chilmark*, 27 Mass App. Ct. 621,628 (1989); *Tortura v. Inspector of Buildings of Tewksbury*, 41 Mass. App. Ct. 120 (1996).

Procedural Due Process Claims

Procedural due process claims seem to be raised in most of the land use cases. They generally meet the same fate as their substantive counterpart. Developers establish a procedural due process claim only if they prove that (1) they had a property interest, defined by state law, and (2) that they were deprived of that interest under the color of state law, without adequate process. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428 (1982); *Licari v. Ferruzzi*, 22 F.3d supra at 347 (1st Cir.1994). In permit/license cases, developers typically don't have a property interest because of the permissive scope of most of the statutes under which most permits and licenses are issued and the discretion regulatory boards have in making determinations about permits and licenses. See, e.g., *Chongris v. Board of Appeals of the Town of Andover*, 811 F.2d 36, 43 (1st Cir.1987); *Take Five Vending, Ltd. v. Town of Provincetown*, 415 Mass. 741, 746-47 (1993).

"[I]t is necessary to ask what process the State provided, and whether it was constitutionally adequate. This inquiry would examine the procedural safeguards built into the

⁹The authors believed that the Court's language in the decision left the door open. See *Freeman* at 559, n.13 acknowledging that the circuits were split but not deciding with which circuit it agreed.

statutory or administrative procedure ... effecting the deprivation, and any remedies for erroneous deprivations provided by statute or tort law." *Zinermon v. Burch*, 494 U.S. 113, 126 (1990).

The court determines the adequacy of the procedures by (1) balancing the government's interest against the private interest affected by the action, (2) the risk of an erroneous deprivation, and (3) the value of additional safeguards. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). Doing so, the court looks at the adequacy of the notice. It must be reasonable under the circumstances. *Mullane v. Hanover Bank & Trust Co.*, 339 U.S. 306,313-314 (1950).

"[W]here state procedures -- though arguably imperfect -- provide a suitable form of pre-deprivation hearing coupled with the availability of meaningful judicial review, the Fourteenth Amendment guarantee of procedural due process is not embarrassed." *Chongris v. Board of Appeals*, 811 F.2d 36, 40 (1st Cir.) *cert. denied* 483 U.S. 1021, 107 S.Ct. 3266, 97 L.Ed.2d 765 (1987); *Daniels v. Williams*, 474 U.S. 327, 339 (1986) (Stevens, J. concurring) (if state law provides a constitutionally unobjectionable system of recovery for the deprivation of property, and there is no other challenge to the state's procedures, a valid § 1983 claim is not stated).

Even if the regulatory board illegally departs from mandatory license and permit procedures, the failure to provide pre-deprivation processes does not **necessarily** violate the Due Process Clause. See *Parratt v. Taylor*, 451 U.S. 527, 543, (1981); *PFZ Properties, Inc. v. Rodriguez*, 928 F.2d 28, 31 (1st Cir. 1991). The question then is whether post-deprivation processes were available to the plaintiffs to remedy the alleged constitutional violation.

In *Creative Environments v. Estabrook*, 680 F.2d 822, 832 n.9 the court said: "where a state has provided reasonable remedies to rectify a legal error by a local administrative body ... due process has been provided", *cert denied*, 459 U.S. 989 (1982). See also *Zinermon v. Burch*, 494 U.S. 113, 126 (1990) ("The constitutional violation actionable under § 1983 is not complete when the deprivation occurs; it is not complete unless and until the State fails to provide due process."); *Licari*, 22 F.3d at 347. But see *Hroch v. City of Omaha*, 4 F.3d 693 (8th Cir. 1993) (*Parratt* is not be controlling where the issue is the **adequacy** of the pre-termination procedures regardless of whether post deprivation remedies are available.) *Miller v. Town of Hull, Mass.*, 878 F.2d 523, 531 (1st Cir.1989) (the holding in *Creative Environments* was not "that the availability of state administrative and court remedies barred [§ 1983 claims]" but that the "run of the mill dispute between a developer and a town planning agency do[es] not state a due process claim" and that "a different situation may be presented, in some instances, particularly in the realm of equal protection, involving gross abuse of power, invidious discrimination or fundamentally unfair procedures ... [or] ... fundamental constitutional rights").

In the procedural due process cases the First Circuit has been as reluctant as it has been in substantive due process to overturn local decisions. "Appellants claim that they were deprived of their property right to the permits without due process of law because the [board] took several years to act finally on the permits, did not give a sufficient hearing to appellants, considered ex parte evidence and did not make sufficient findings of fact or conclusions of law. These deficiencies allegedly violated the requirements of Puerto Rico and federal constitutional law ... In *PFZ Properties, Inc. v. Rodriguez*, 928 F.2d 28 (1st Cir.1991), *cert. dismissed*, 503 U.S. 257, 112 S.Ct. 1151, 117 L.Ed.2d 400 (1992), we rejected a procedural due process claim on facts very similar to those at issue here." *Nestor Colon Medina & Sucesores, Inc. v. Custodio*, 964 F.2d at 40.

Demolitions

Property Rights, Demolition and Nuisance

Typically no one has a property interest in a building which constitutes a nuisance. *McKenzie v. City of Chicago*, 118 F.3d 552,557-8 (7th Cir. 1997). See *Lucas v. South Carolina Coastal Commission*, 505 U.S. 1003 (1992). Demolition is an application of the police power to curb or abate nuisances. A building in deteriorated condition posing a threat to the public health and safety is a nuisance. *City of Worcester v. Sigel*, 37 Mass. App. Ct. 764, 767 (1994). See generally, McQuillin, *Municipal Corporations*, § 24.23 (3rd Ed.). No person has a property right in maintaining a nuisance.

“All rights of property are held subject to such reasonable control and regulation of the mode of keeping and use as the Legislature, under the police power vested in them by the Constitution of the Commonwealth, may think necessary for the prevention of injuries to the rights of others and the security of the public health. In the exercise of this power the Legislature may not only provide that certain kinds of property (either absolute, or when held in such manner or under such circumstances as to be injurious dangerous or noxious) may be seized and confiscated upon legal process after notice and hearing, but may also, when necessary to insure the public safety, authorize them to be summarily destroyed by the municipal authorities without previous notice to the owner, **as in the familiar cases of pulling down buildings to prevent spreading of conflagration or the impending fall of the buildings themselves**, throwing overboard decaying or infected food or abating other nuisances dangerous to health.” *Blair v. Forhand*, 100 Mass. 136, 139-140 (1868).

“The exercise of the police power by the destruction of property, which is itself a public nuisance, or the provision of its use in a particular way, whereby its value became depreciated, is very different from taking property for public use, or from depriving a person of his property without due process of law.” *Mugler v. Kansas*, 123 U.S. 623 (1887).

In *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), the Court recognized that the government could deprive property of **all** value if it acts against the "background principles of the state law of property and nuisance." *Id.* at 1029, 1031. The Court warned that the government "must do more than proffer [its] declaration that the uses [the owner] desires are inconsistent with the public interest, or the conclusory assertion that they violate a common law maxim such as *sic utere tuo ut alienum non laedas*."¹⁰ Since a property owner does not, at common law, have the right to use the property in a manner creating a nuisance, destruction of that nuisance is not a taking of property. The common law of nuisance sets the outer limit of property rights and boundaries within which the police power can operate. The *Lucas* case, while appearing to state new law, really only reiterated old principles stating the relationship between the police power over nuisances, the right to damages when the police power goes too far.

¹⁰"Use your own property in such a manner as not to injure another."

This limitation on the police power raises the issue of regulatory takings. While the police power is an inherent sovereign power of the state, if the exercise of the power "goes too far," it will be recognized as a taking. *Pennsylvania Coal Company v. Mahon*, 260 U.S. 393 (1922).

"The essential distinction between an exercise of the State's eminent domain power which is compensable, and an exercise of the police power which is not, is that in the exercise of eminent domain a property interest is taken from the owner and applied to the public use because such use is beneficial to the public, while in the exercise of the police power an owner's property interest is restricted or infringed upon to prevent its use in a manner detrimental to the public interest ... (citations omitted). To determine whether particular governmental actions have effected a taking, we must focus 'on the character of the action and on the nature and extent of the interference with' the plaintiff's property rights ... (citations omitted)." *Davidson v. Com*, 8 Mass. App. Ct. 541,548 (1979). See *McQuillin Mun. Corp.*, Section 24.23 (3d Ed.). The nature and extent of the interference with property rights may convert even a meritorious exercise of the police power into a taking requiring compensation. *Commissioner of Natural Resources v. S. Volpe & Co.*, 349 Mass. 104, 107-112; *Davidson v. Com.*, *supra* at 550.

The Court's treatment of nuisances reflects historic concern that **actual public necessity measures the extent of the city's right to demolish property**. If the city demolishes a building that is not in fact a nuisance, i.e., without police power justification, the municipality opens itself to a takings claim because it will have "gone too far." The Court's warning in *Lucas* that it will not accept "conclusory assertions," creates an invitation to challenge the municipality's factual support for demolition. Destruction of property is a drastic remedy and should be a last resort.

If the property owner convinces the court that the property was not in fact a nuisance, or did not in fact meet the statutory criteria, the city will face a claim for a taking. See, e.g., *Armendariz v. Penman*, 31 F.3d 860, 866 (9th Cir., 1994) rehearing *en banc* 75 F.3d 1311 (1996) (An issue was whether the "emergency need to demolish the building was in fact an emergency.). The SJC long ago gave this same warning. "Rights of property are not, indeed, to be invaded under the guise of police regulations for the preservation of public order, the protection of public health, or to guard against threatened nuisances. If it appears that the real object and purposes of the regulation are other than these, courts will interfere to protect just rights of the citizen in his property." *Train v. Boston Disinfecting Co.*, 144 Mass. 523, 11 N.E. 929,936 (1887). See *Lopes v. Peabody*, 417 Mass. 299, 306-307 at n12 and 13 for the Court's reflection on burden of proof of nuisance in regulatory takings.

Statutory Remedies for Wrongful Demolition/Takings

G.L. c. 143, § 10, by incorporating the provisions of G.L. c. 139, § 2, creates a remedy for persons aggrieved by an order to demolish a building. The statute provides: "The jury may affirm, annul or alter the such order, and the court shall render judgment in conformity with said verdict, which shall take effect as an original order." If the order of the building inspector is annulled, the plaintiff "shall recover from the town damages, if any, and costs." See *Worcester v. Eisenbeiser*, 7 Mass. App. Ct. 345 (1979). The award of damages, if the jury annuls the building inspector's order, is referred to because of the limitation placed on the court's the remedial

powers to enjoin the demolition. After granting the remedy established by G.L. c. 139, § 2, Section 10, states: “provided, that no provision of said section two shall be construed so as to hinder, delay or prevent the local inspector acting and proceeding under section nine. Section nine grants the building inspector the right to take down the building and, “if the public safety so requires, said local inspector may at once enter the structure, the land on which stands or the abutting lender buildings, with such assistance as he may require, and secure or remove the same ...”

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A property owner may raise a claim for inverse condemnation. This follows from the *Lucas* principle. If, as he alleges, there was no nuisance to justify the demolition, the destruction of property is a taking for which the owner would be entitled to damages. See generally *McQuillin Mun. Corp.*, Sections 24.561 (3d Ed.).

G.L. c. 79, § 10, provides: “When the real estate of any person has been taken for the public use or has been damaged by the construction, maintenance, operation, alteration, repair or discontinuance of a public improvement or has been entered for a public purpose **but such taking, entry or damage was not effected by or in accordance with a formal vote or order of the board of officers of a body politic or corporate duly authorized by law** ... the damages therefor may be recovered under this chapter.” G.L. c. 79, § 10, provides for a one-year statute of limitations. This **seems** to be the remedy which a plaintiff would invoke to assert a claim for inverse condemnation based on wrongful demolition. **However, Chapter 143 places an obstacle in the path to an action under Chapter 79.**

G.L. c. 143, § 9A, provides: “*If, by any act done by an officer of a city or town for the purpose of making safe or taking down any dangerous structure, any real estate **other than such structure or the parcel of land upon which it stands** is taken, used or injured, any person owning an interest in such real estate **and not having an interest in such dangerous structure** may recover damages for such taking, use or injury from such city or town in a petition for the assessment thereof under Chapter 79 filed in the superior court for the County in which such real estate is situated within one year after such taking, used or injury ...*” This statute by implication appears to deny the owner of demolished property from filing any inverse condemnation claim under Chapter 79. This creates an issue both in statutory construction and under the Fifth Amendment.

Is Chapter 79 the Exclusive Remedy for Takings Claims?

The statutory construction issue arises because of G.L. c. 79, § 45, which provides: “No real estate shall be taken for public use by the formal vote or order of any board of officers except under this chapter or chapter eighty A, **and no damages shall be assessed for the taking or seizure of property for public purpose or for injury thereto by any authority of law, except under this chapter** or chapter eighty A, notwithstanding any general or special act

hitherto enacted; provided, that nothing contained in this chapter or in chapter eighty A shall be construed as amending or in anyway affecting chapter two hundred and fifty-three.” Section 45 appears to bar any claim for a taking except under the procedures of Chapter 79. However, Chapter 143, § 9A, enacted later, appears to bar the owner of demolished property from raising a claim under Chapter 79.

The statutory history and judicial interpretation of Section 9A and of Chapter 79 generally, evince a legislative intent to create uniform procedures for eminent domain proceedings. *Inhabitants of Town of Watertown v. Dana*, 255 Mass. 67,71 (1926). In *Amory v. Commonwealth*, 321 Mass. 240, 72 N.E.2d 549,553, the Court said: “As showing the legislative intent that this section shall be given the broadest possible scope, is expressly provided that it is to be applied ‘notwithstanding any general or special act hitherto enacted’ under which the takings might have been made. The section is an important part of G.L. c. 79, which was enacted not only for the purpose of establishing uniformity in the taking of land for public purpose but also in order to secure uniformity in the assessment of damages.” Chapter 79 has been held to create the exclusive remedy for assessment of damages in takings cases. *Connell v. Algonquin and Gas Transmission Co.*, 174 F. Supp. 453 (D.C. R.I., 1959).

G.L. c. 79 was re-codified in its present form by St. 1918, c. 257. G.L. c. 143, § 9A, was added by St. 1945, c. 697, Section 2A *et seq.* St. 1945,c. 697,Section 2B, apparently not codified, stated: “The provisions of Section nine A of chapter [143] of the General Laws, inserted by Section 2A of this act, shall also apply in case the acts of an officer of the city or town are done for the purpose of making safe or taking down any dangerous structure under any special law or any ordinance or by-law.” Section 9A, enacted some 27 years after the re-codification of chapter 79, appears to exclude owners of demolished buildings from the otherwise exclusive procedures in chapter 79, for demolition cases. If this interpretation is correct, it means that plaintiff’s claim for inverse condemnation does not arise under Chapter 79 but only under Chapter 143. A complaint filed under G.L. c. 79 by the owner of a demolished building should be dismissed under this interpretation. But this raises the question of the adequacy of Chapter 143, § 10, as a remedy .

The Adequacy of State Remedies Under a Fifth Amendment Analysis

In *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985), the Court created two bars to inverse condemnation claims. First, when challenging the application of a regulation or procedure to plaintiff (an “as applied” challenge), a plaintiff must obtain a final decision from local land-use authorities. Second, before a plaintiff is able to state a claim under the Fifth Amendment for a taking, the plaintiff must first seek compensation from state courts if the state has an adequate remedy. The “final decision” requirement is imposed because without a final decision from local or state government, a court cannot know the extent of the taking or if the regulation at issue went “too far.” Requiring a plaintiff to seek compensation from the state courts, arises because of the nature of the Fifth Amendment. It does not prohibit takings. It prohibits taking without compensation. There is no violation of the Fifth Amendment unless the state fails to provide that compensation. A plaintiff cannot claim this unless he files an appropriate preceding in state court. *See also MacDonald*,

Sommer & Frates v. Yolo County, 477 U.S. 340 (1986).

The First Circuit has applied these two conditions precedent in a number of cases. See, e.g., *Culebras Enterprises Corp. v. Rios*, 813 F.2d 506 (1987); *Ochoa Realty Corp. v. FAIA*, 815 F.2d 813 (1987); *Gilbert v. City of Cambridge*, 932 F.2d 51 (1991) cert denied 502 U.S. 866, rehearing denied 502 U.S. 1051. The First Circuit has expressly held that the Massachusetts inverse condemnation provisions are adequate under Fifth Amendment taking's analysis. *Gilbert v. City of Cambridge*, *supra*. Relying on *Williamson*, *supra* at 194-197 the court stated that **so long as the state provides an adequate process and resort to the process holds out a realistic promise of obtaining just compensation, a plaintiff must resort to the process before having a Fifth Amendment claim**. See also *Ackerley Communications of Massachusetts, Inc.*, 692 Supp. F.1 (D. Mass., 1988), reversed on other grounds 878 F.2d 513 (1989).

While the First Circuit has found G.L. c. 79, § 10, to be an adequate remedy under the Fifth Amendment, the *Gilbert* case was not a demolition case. Therefore, the plaintiff's claims did not arise under the provisions of G.L. c. 143, § 9. The question remains whether Chapter 143, § 10, provides an adequate remedy for Fifth Amendment purposes.

G.L. c. 143, § 10, does provide a remedy. If this remedy is adequate under a Fifth Amendment analysis, then an owner's inverse condemnation claim will be barred because he failed to use the exclusive remedy made available by the Legislature. See *Aubuchon v. Commonwealth of Massachusetts and Michael J. Gallant*, 933 F. Supp. 90 (Gorton, J., 1996). In this case concerning a Fitchburg demolition, the City prevailed, in part, on the court's finding: "Plaintiff here has not **and cannot allege** that available remedies under Massachusetts law are inadequate to redress any deprivation caused by the City officials' issuance and execution of the demolition order. That is because G.L. c. 143, § 10, and G.L. c. 139, § 2, permit an aggrieved property owner to appeal an order to remove a dangerous structure to Superior Court for jury trial in which the jury may affirm, annul or alter the demolition order. If the jury annuls the demolition order, the successful plaintiff is entitled to recover damages and costs. See G.L. c. 139, § 2." (Emphasis added).

Based upon *Aubuchon*, an owner doesn't have an inverse condemnation claim if he did not utilize existing state procedures under G.L. c. 143 to bring his claim. He is barred by these same state procedures from raising the claim under Chapter 79. This conclusion is supported by the Court's decision in *Preseault v. I.C.C.*, 494 U.S. 1 (1990) where the Court relying on *Williamson*, *supra* at 195, and *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 127-128 found that "takings claims against the Federal Government are premature until the property owner has availed itself of the process provided by the Tucker Act."

Due Process Limitations/Takings

The constitution imposes due process limitations on the exercise of the police power to control or abate nuisances or demolish buildings. A municipality must give the owner, mortgagee, and other interested persons both: (1) adequate notice and a hearing; and (2) enough time make the building safe. See, for example, *Miles v. District of Columbia*, 510 F.2d

188 (D.C.Cir. 1975); *Traylor v. Amarillo, Texas*, 492 F.2d 1156 (5th Cir. 1974); see *Sterling v. Environmental Control Board of New York City*, 793 F.2d 52 (2nd Cir. 1986) decision after rehearing 795 F.2d 8, cert. denied 479 U.S. 987 (1986), in which the Court held that service by posting and mailing violated due process. See discussion *supra*. See also *Kornblum v. St. Louis County, Mo.*, 72 F.3d 661 (8th Cir. 1995) cert. denied 516 U.S. 1189 (1996). In *Kornblum*, the Court held that **due process required notice to prospective purchasers of condemned property**. In *Armendariz v. Penman, supra*, the Court held that if there is no true emergency reason to demolish, due process requires a pre-deprivation hearing.

Demolition in Massachusetts Courts

A building in deteriorated condition, posing a threat to public health and safety, constitutes a nuisance. *City of Worcester v. Sigel*, 37 Mass. App. Ct. 764,767 (1994). The General Laws, G.L. c. 111, Section 127B; G.L. c. 139, § 1-3B; G.L. c. 143, §§ 6-14, define the municipal police power to demolish buildings which, meeting the standards of the statutes, constitute nuisances. The legislature has the authority to declare what property or conduct constitutes a nuisance.¹¹

“It is well settled that it is within the competence of the legislative branch of the government to determine whether a given condition is injurious to the public and should be deemed to be a public nuisance. *Commonwealth v. Alger*, 7 Cush. 53, 85; *Opinion of the Justices*, 251 Mass. 569, 597, 147 N. E. 681. Legislation providing that certain things are nuisances per se is a legitimate exercise of the police power, since it is in the interest of the public health, safety, morals and general welfare. *Train v. Boston Disinfecting Co.*, 144 Mass. 523, 530, 11 N. E. 929, 59 Am. Rep. 113. A state has the constitutional power to decree that any place maintained for the illegal manufacture or sale of intoxicating liquors shall be deemed a common nuisance, and to make provisions for its abatement. *Mugler v. Kansas*, 123 U. S. 623, 670, 673, 8 S. Ct. 273, 31 L. Ed. 205. The exercise of this power by the state is not within the principles relating to property taken under the right of eminent domain.” *Reale v. Judges of Superior Court of the Commonwealth*, 265 Mass. 135 (1928).

¹¹*Blair v. Forehand*, 100 Mass. 136,139-140 (1868); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1029-1031 (1992).

The legislative criteria are not judicially review able. The legislature “may determine when that which is otherwise property shall cease to be such if it be kept against the law (citations omitted) ... Where anything is declared a nuisance, by legislation, **it is not competent for a party to show that it is not in fact one**...” *Train v. Boston Disinfecting Co.*, 144 Mass. 523, 11 NE 929,936 (1887).¹² Of course, the jury can still find that the statutory standards or criteria were not met or that the authority granted by the statute was exercised unreasonably. See *Di Maggio v. Mystic Building Wrecking Co., Inc.*, 340 Mass. 686, 691-692 (1960).

The traditional powers of government permit it to take or destroy property which is a nuisance. See *Di Maggio v. Mystic Building Wrecking Co., Inc.*, 340 Mass. 686, 691-692 (1960), “*By the Boston building code the Legislature, acting within the police power, has given broad jurisdiction (cf. Forbes v. Kane, 316 Mass. 207, 215-216, 55 N.E.2d 220) to the commissioner to determine this matter (I. e. whether particular buildings are unsafe) affecting the public health and safety. The jurisdiction is subject, however, to statutory safeguards against its unreasonable exercise, designed to satisfy the requirements of due process. His jurisdiction depends not upon his being right in his decision but upon the legislative grant to him of power to decide the matter subject to the statutory review.*”

¹² “Usually the statement that a nuisance is ‘absolute’ or ‘per se’ means only that it does not arise out of negligent conduct. So far as the idea has any validity, it apparently is restricted to three types of cases. Certain public nuisances are designated specifically by statute. Within constitutional limitations, the declaration of the legislature is conclusive, and will preclude any inquiry into their unreasonable character.” The Law of Torts, Prosser, 4th Ed. (1975), Chapter 15, Section 87, p. 582.

From the cases and general principles of law several points appear. First, the liability of the municipality depends on whether it has complied with the applicable statute. Compliance is of two kinds -- procedural and substantive. Did the city follow the statutory procedure? And, did the municipal agents make the findings required by the statute?

In *Worcester v. Eisenbeiser*, 7 Mass. App. Ct. 345 (1979), the city demolished a building using G.L. c.139, §§ 1-3. That statute provides that the owner shall be ordered to remove the nuisance at his own expense and only upon "failure by the owner or occupant to comply with such order may the city cause the removal of the nuisance." In *Eisenbeiser*, the city issued an order declaring the building to be dilapidated and ordered it to be demolished. It did not inform the owner, **as required by the statute**, that he could remove the nuisance or correct the problem himself. The Court upheld the jury's nullification of the city's order. The Court noted¹³ that the city didn't have to be bound by this procedure. It could have relied on Chapter 143, § 9, but did not do so.

In *Bryant v. Boston*, 11 Mass. App. Ct. 450, 453, the Court noted: "**The city's authority, in turn, depended on whether it had complied with the provisions of the statute under which it acted.**" (Emphasis added.) See *City of Woburn v. Busa*, 9 Mass. App. Ct. 903 (1980); *Berger v. City of Quincey*, 14 Mass. App. Ct. 964 (1982); In *Morais v. City of Lowell*, 50 Mass. App. Ct. 540, 542 (2000), the Court quoting from *Di Maggio v. Mystic Bldg Wrecking Co.*, 340 Mass 686, 692 (1960) stated: "*The authority of a building inspector to determine whether a building is unsafe is subject to 'statutory safeguards against unreasonable exercise, designed to satisfy the requirements of due process.'*"

If the city has an insufficient record to support the demolition, the city is open to a takings claim. The findings which support the decision to demolish must be detailed enough and have sufficient persuasive force to convince a judge/jury that public health and safety actually require demolition. **The building should meet the statutory test for buildings which can be demolished.** See G.L. c. 111, Section 127B; G.L. c. 139, § 1-3B; G.L. c. 143, §§ 6-14.

Each of the organs of municipal government responsible for demolitions must comply with the procedures strictly but must also find specific facts to support the reasonableness of the demolition. The Council/Board of Selectmen should take evidence and make specific findings after the hearing required by G.L. c. 139, §§ 1-3B. The building or sanitary code inspectors' reports must have detailed findings. The survey team report, G.L. c. 143, § 8, should also be detailed in describing the dangerous conditions of the building. Since G.L. c. 143 references particular concern about fire hazards, the city should always be prepared to show how the building creates fire hazards.

The Massachusetts demolition statutes raise due process issues if the municipality notifies only those persons the statute requires. Each of the statutes require notice to different persons. G.L. c. 111, § 127B, requires notice to owners, mortgagees, and tenants. See 105 CMR § 410.831-950 for content of notice, the right to appeal. G.L. c. 139, § 1, requires notice to

¹³ *Ibid.* at 349, footnote 1.

the owner only. Both statutes permit service pursuant to G.L. c. 111, § 124. That statute allows service at the last and usual place of abode on the owner, occupant, or agent. G.L. c. 143, § 6, requires notice to owner, lessee or mortgagee in possession. To the extent that a statute omits service upon any person with a property interest, it raises the due process issue.

A case in point is *E.F.Y. Realty Corp. v. City of Lynn, Massachusetts*, 2000 WL 1473141, Mass. L. Rptr. 320 (2000). Here the court stated: “[It] is undisputed that [the mortgagee] never received notice prior to demolition, [even though] the law does not impose a statutory obligation on the City or any defendant to notify the mortgagee of the intended demolition of the property. However, that does not necessarily establish that the defendants had no duty to notify the mortgagee prior to demolition. This Court is not convinced there is no such legal duty owed to a mortgagee. While the statute does not specifically require such notice be provided to the mortgagee, the lack of such a [statutory] requirement does not automatically entitle the defendant to summary judgment. ...The [defendants] are alleged to have violated the plaintiff’s constitutional rights when they failed to notify the plaintiff mortgagee ...The defendants claim they are entitled to qualified immunity because the alleged constitutional violation, failure to provide due process by failing to notify the owner and mortgagee before demolishing the building, was not clearly established by the time of demolition. However ... this Court determines that the right to due process owed to a property owner and mortgagee was sufficiently established to warrant denial of the defendants’ motion concerning federal constitutional violations. See *Teschke v. Keller*, 38 Mass. App. Ct 627, 633 (decided 6/12/95) citing *Christian v. Mooney*, 400 Mass. 753, 761 (1987); appeal dismissed and cert. denied sub. nom. *Christian v. Bewkes*, 484 U.S. 1053 (1988), and *Mennonite Bd. Of Missions v. Adams*, 462 U.S. 791 (1983).” *E.F.Y. Realty Corp. v. City of Lynn*, supra.

In *Morais v. City of Lowell*, 50 Mass. App. Ct. 540 (2000), the Court viewed the city’s failure to give proper notice in negligence terms. The Court said:

“The essence of [the plaintiffs’] complaint is that they were entitled to prior notice by the city before it ordered their building vacated. We first determine whether the city had a duty to provide such notice. The authority of a building inspector to determine whether a building is unsafe is subject to “statutory safeguards against its unreasonable exercise, designed to satisfy the requirements of due process.” *DiMaggio v. Mystic Bldg. Wrecking Co.*, 340 Mass. 686, 692, 166 N.E.2d 213 (1960) (examining whether owner was afforded due notice of an order by Boston building commissioner to demolish his building pursuant to a municipal building code then in effect, similar to G.L. c. 143). *General Laws c. 143, §§ 6, prescribes the duties of a local inspector upon being informed that a building is dangerous, and G.L. c. 139, §§ 1 & 3, provide for actions by a city to abate building-related nuisances. Both statutes provide for notice to an owner and an opportunity to make the property safe, or to eliminate the nuisance.”*

The Court concluded that the city had a “special” duty to give notice under the two statutes under which it acted. *“We conclude that the duty created by the notice requirements of c. 139 and c. 143 is a special duty running directly to the plaintiffs in this case, ‘different from that owed to the public at large.’* (citation omitted). **The failure to perform that duty deprived the plaintiffs of the opportunity--provided by statute--to make the building safe. It is for that reason the special duty of notice is a necessary prerequisite to the performance of the city’s duty to the general public ... [The] public demolition statutes in Massachusetts require the local building department to notify the owner before a building is demolished as a public danger.”**

If the city only complies with the statutory notice requirements, it will violate due process protections. In my opinion any person with an interest in the property should receive notice.¹⁴

In a doubtful case the city can protect itself by seeking judicial relief. A judgment ordering or permitting the demolition of the building should protect the city. Judicial enforcement is available under or all three statutes. See G.L. c. 111, §§ 127B-127C, et seq; G.L. c. 139, § 6-13; G.L. c. 143, § 12.

Each statute, G.L. C. 111, Section 127B; G.L. c. 139, § 1-3B; G.L. c. 143, §§ 6-14, gives separate and independent power to municipalities and each has different procedures, preconditions and notice requirements. A city ignores the procedural details at its peril. Municipal attorneys must carefully consider whether the statutory procedures sufficiently protect the city from procedural due process claims. In most cases counsel must supplement the statutory process to assure that all interested persons with a recognized property interest get notice reasonably calculated to meet Fourteenth Amendment standards. In the author's opinion the statutes do not meet this test.

The best way to avoid notice issues is to run the title to learn the names of each person who has an interest in the property. Following the *Kornblum* case, the municipality should record a "notice of pending demolition" at the registry of deeds. Serve all notices sufficiently in advance of the demolition to provide a reasonable opportunity to be heard.

Armendariz v. Penman, 31 F.3d 860 (9th Cir. 1994) after rehearing *en banc* 75 F.3d 1311 (1996) presents a serious issue for municipal counsel.

Owners of rental housing sued the city solicitor, the mayor and planner under 42 U.S.C. § 1983. Plaintiffs alleged substantive and procedural due process violations, equal protection violations and regulatory takings. The city defendants claimed qualified immunity. The plaintiffs asserted that the defendants intentionally closed buildings in a particular section of San Bernadino to disperse tenants in a high crime area and to raze the buildings in preparation for a shopping center.

Defendants moved for summary judgment on qualified immunity grounds. The court held:

(a) Plaintiffs stated a claim for violations of procedural due process. The claim turned on whether a real emergency existed eliminating the constitutional right to a **pre**-deprivation hearing.

(b) Plaintiffs did not state a substantive due process claim. However, the Court's basis

¹⁴For statutory notice issues see *Bryant v. Boston*, 11 Mass. App. Ct. 450, 454 (1981).

for his holding creates other constitutional problems for cities. Since a particular constitutional amendment provided an explicit textual source of constitutional protection, that amendment, and not substantive due process protected the plaintiffs. If plaintiffs' allegations were true, the Fourth and Fifth Amendments protect them from the city. The court cited *Alexander v. San Francisco*, 29 F.3d 1355, 1361 (9th Cir. 1994). "[A]n administrative search [to] determine compliance with the health and building codes may not be converted into an instrument which serves the very different needs of law enforcement officials." *Armendariz, supra* at 75 F.3d 1320. The Fifth Amendment protects plaintiffs from government acts taking their property for a private use. Since the claims arise under the Fourth and Fifth Amendments, plaintiffs had no claim under substantive due process.

(c) The plaintiffs stated an equal protection claim. They alleged that the city created two classes of people for code enforcement purposes -- property owners whose property the city wanted and all others. The Court concluded that this distinction, if true, was irrational. Therefore, the equal protection claim survived the motion.

Code enforcement programs, and demolition in particular, are often part of long term planning strategy. The *Armendariz* case suggests that a town must have the facts essential to support demolition. The planning motives of city officials should not be the basis for demolition without objectively grounded facts to support code enforcement and demolition.

Recent federal cases have addressed a wide number of procedural due process issues in the demolition context.

1. *McKenzie v. City of Chicago*, 973 F.Supp. 815 (N.D. Ill. 1997), overruled 118 F.3d 552 (7th Cir. 1997), also *McKenzie v. City of Chicago*, 964 F.Supp.1183;
2. *Kruse v. Village of Chagrin Falls, Ohio*, 74 F. 3d 694 (6th Cir. 1996);
3. *Hroch v. City of Omaha*, (8th Cir. 1993);
4. *Catanzaro v. Weiden*, 188 F.3d 56 (2nd Cir. 1999);
5. *Pierce v. City of Divernon, Ill.*, 17 F.3d 1074 (7th Cir.1994);
6. *Freeman v. City of Dallas*, 186 F.3d 601 (5th Cir. 1999);
7. *Swann v. City of Dallas*, 922 F.Supp. 1184 (N.D. Tex. 1996), aff'd. without opinion, 131 F.3d 140 (5th Cir. 1997);
8. *Fruman v. City of Detroit*, 1 F.Supp. 665 (E.D. Mich. 1998); and
9. *Aubuchon v. City of Fitchburg*, 933 F. Supp. 90 (1996).

In these cases the courts carefully scrutinized the city's conduct – the alleged factual bases for the demolition, the actual motive(s), the quality of and necessity of pre-termination procedures, whether there was in fact an emergency and the quality of the city's notice to

interested parties.

Conclusions

The municipality should comply strictly with the procedures and standards described in the statute it invokes to demolish private property. The agency involved has to determine whether the facts demonstrate the reasonable examine the title to the property to learn the names of everyone with a property interest in the building. Each interested person must get adequate notice of the proposed demolition to satisfy Due Process.

This article is only a summary about one aspect of the law. The summary presents information about the law through the date of its publication. Legislatures amend statutes. Courts interpret the law and statutes and by doing so affect legal rights and duties. This article is not intended as, and cannot be substituted for, legal advice which always must be tailored to each unique circumstance. Therefore, you should always consult a lawyer before simple relying on opinions or statements in this summary.