Introduction

I am extremely pleased and honored to have been asked by the editor of the At the Cutting Edge series, Dwight Merriam, to offer this introduction to yet another fine collection of articles. This is a great concept—taking the best of the best from the “hot topics” presentations at the meetings of the American Bar Association’s Section of State and Local Government Law and republishing them after their initial publication in the preeminent quarterly scholarly journal, The Urban Lawyer. What the Section set out to do—to make its “cutting-edge” scholarship available to a much wider audience—it has fully achieved in the past and continues to do so with this volume.

As a land use control law teacher and attorney for 50 years, it is readily apparent to me that what is offered in At the Cutting Edge 2014 comprehensively covers the subjects that are of the greatest importance and interest today. These eight articles, as you will soon learn when reading them, go right to the heart of the controversies and often unresolved issues currently facing us in land use law. More important, what is striking about the treatment of the subject matter in these articles is that good, practical advice is provided along with the insights that you would expect from a rigorous intellectual analysis.

The first article is by Daniel P. Dalton with the latest on RLUIPA, The Religious Land Use and Institutional Persons Act—Recent Decisions and Developments. Dalton is one of the most experienced RLUIPA lawyers in the country. He represents religious plaintiffs exclusively and up until this year had never lost a case (that recent loss is on appeal). He knows the subject matter, and although he has the perspective of a trial lawyer who takes sides, he has given us a comprehensive and evenhanded treatment. Dalton, as you would expect, covers all of the important RLUIPA cases and issues. His discussion of the unsettled question of ripeness in RLUIPA cases is especially good. Unlike many writers who take the obvious route and discuss only judicial decisions, Dalton goes beyond that to report on several important settlements. Much of the action in RLUIPA litigation today is not in what the courts decide, but how the parties resolve the conflict. He sums up RLUIPA with this:
While the progress being made by these courts is evident, several of the aforementioned cases demonstrate that uncertainty and ambiguity remain with respect to many areas of RLUIPA interpretation. This uncertainty and ambiguity will surely lead to more litigation in the coming years, and will provide further opportunity for federal courts across the country to evolve the realm of RLUIPA jurisprudence.

Next up is none other than Professor Robert H. Freilich, maybe the best-known land use lawyer and law professor in the country, with his law partner, Neil Popowitz, telling us “How Local Governments Can Resolve Koontz’s Prohibitions on Ad Hoc Land Use Restrictions.” What could be more timely and important than having the answer to that question? The U.S. Supreme Court’s decision in June 2013 in *Koontz v. St. Johns River Water Management District* has been the hottest of hot topics this last year. I won’t give you any “spoiler alert” with regard to this thoughtful piece. The introduction to a book is not the place to completely give away all that is revealed therein. But I will tell you that the authors do a masterful job of pulling together so many aspects of the impact of this decision. They start by revisiting the classic work in the field of local land use bargaining, *The Zoning Game*, written in 1966 by Dick Babcock. Here we are, almost a half century later, and that book seems so real today in the context of Koontz. Freilich and Popowitz offer this bromide: “Ad hoc review of development projects based on broad general legislative authorizations will need to be replaced by legislation with definitive standards.”

The discussion of *Koontz* is continued by Michael Kamprath in the next article, “A Look at *Koontz v. St. Johns River Water Management District*,” in which he provides us probably the best summary of the case and its background, including a map of the site worth a thousand words. He is successful in highlighting the most important and remarkable aspects of the Court’s decision, including what the Court did not decide, such as the applicability of the Nollan/Dolan standards to legislative exactions. You may wish to read this article before that of Freilich and Popowitz because of its broader focus.

You should not be put off by the title of Jeffrey Kleeger’s article: “Overcoming Neoliberal Hegemony Will Be Difficult: Community Development and the Social Welfare Obligation Norm—A Response to Jerrold A. Long.” Kleeger is an associate professor in the criminal justice and law programs of the Justice Studies Department in the College of Arts & Sciences at Florida Gulf Coast University, Ft. Myers, Florida, and he is writ-
ing in response to an article in *The Urban Lawyer* by Prof. Jerrold A. Long on the evolution of law in the context of neoliberal hegemony. Neoliberal hegemony is, for those of us who don’t deal with such terminology on a daily basis, the privatization of law. If your daily fare is the mundane stuff of judicial decisions and treatise treatment of the meat and potatoes of land use law, such as the standard of practical difficulty and unnecessary hardship for variances, you will greatly enjoy this piece, which will treat you to the truly intellectual side of our work. For example, he asks the question we all ask ourselves now and again: “Is private self-interest consistent with the concept of the public good?”

Kleeger deftly juxtaposes Max Weber’s model of administrative law and bureaucratic decision-making with what most of us see as the ideal in land use law of participatory democracy. They are antithetical perspectives, but Kleeger concludes that it is “culture, custom, tradition and generalized public opinion” that are critical in determining what is “good and just” and what should be acceptable to us as legitimate use of law in land use decision-making.

To bring you back down to the ground, Mark M. Murakami, Bethany C. K. Ace, and Robert H. Thomas, lawyers practicing together in the law firm of Damon Key in Honolulu, cover “Recent Developments in Eminent Domain: Public Use.” In looking at the decisions of the past year, they take up the Sisyphean effort to discern what *Kelo* means, particularly as to what is a public use. Of interest to many readers will be their treatment of the pipeline takings cases that have emerged in recent years with the expansion of oil and natural gas production through hydraulic fracturing.

The threesome have some fun in addressing a subject that is usually interesting but sometimes dry. For example, they have a section titled “Quick Takes,” which has a double meaning for those with some knowledge of eminent domain: “This section is not about the ‘quick take’ procedures in many jurisdictions, but gives short summaries of eminent domain cases that are of interest.” Insider eminent domain jokes are hard to come by.

In this article, typical of most of the “hot topics” articles first presented at informal sessions of the Section, there is reporting on interesting sidelights that you will not otherwise see in a law review article. One example is when the authors relate the judge’s decision on an eminent domain claim with regard to the Keystone XL pipeline. The court’s decision came by smartphone:
Dear Counsel,
My rulings as follows:
Transcanada’s MSJ is GRANTED
Transcanada’s NEMSJ is GRANTED
Crawford’s Plea to the Jurisdiction is DENIED
Mr. Freeman would you please forward orders consistent with my ruling for my signature?
Sent from my iPhone

The Section of State and Local Government Law prides itself on bringing along young lawyers, and one of the rising stars is Sorell Negro of Robinson & Cole LLP in Hartford, Connecticut, who won the Section’s “Up and Comer” Award in 2013 as the country’s outstanding young state and local government lawyer. Negro’s article, “Recent Developments in Coastal Adaptation to Climate Change,” is of special importance in the face of global climate change. She starts her article with a quote from New York Governor Cuomo’s 2013 State of the State address:

[T]here is a 100-year flood every two years now. It’s inarguable that the sea is warmer and that there is a changing weather pattern, and the time to act is now. . . . We must understand the needs of coastal communities.

Adaptation planning is different from mitigation planning. The former recognizes the inevitability of climate change and its impact. The latter attempts to reduce or eliminate change. Negro reports on the many significant developments in law and public policy over the past year, discussing the controversies that made their way to court and reporting on those decisions and how they will impact all of us involved in federal, state, and local government law. The article is as up-to-date as you can get, with coverage of post-Sandy initiatives and the recent Koontz decision.

In the penultimate position is the perennial pontification of Ed Sullivan, “Recent Developments in Comprehensive Planning.” The hot topics presentations, The Urban Lawyer, and the At the Cutting Edge series would be incomplete without Sullivan’s review. Joining him this year as co-author, as she did in the last edition of At the Cutting Edge, is his heir apparent, Jennifer Bragar, who has already distinguished herself as bright, talented, and perceptive. Luckily for all of us, the Sullivan comprehensive planning franchise is protected, someday to be perpetuated under new management.

The article does what it always does—tells us everything we need to and
should know about the status of comprehensive planning all across the country. The discussion follows what has now become the traditional taxonomy of the unitary/planning factor/planning mandate view. That has worked for years and continues to work today. Sullivan and Bragar find that “the comprehensive plan is given increasing respect” and they hope that “this trend will continue to bring rationality to planning and its implementation.”

Robert Thomas goes it alone, without his two compatriots from paradise, in the last piece, “Recent Developments in Regulatory Takings,” in which he does what he says he will do in the title. This last year was a busy one, with the U.S. Supreme Court handing down three takings cases, the first time it has done so since the 1987 Trilogy. Thomas does a great job of helping us understand what is important about those three cases, and he goes on to many other decisions of interest around the country. Thomas’s command of the law in this area is almost without equal. Maybe there are a few others who keep on top of these cases as he does, but if you follow his widely read and much-admired blog, www.inversecondemnation.com, you will know that he is reporting on these cases virtually every day. What he has done in this article is to distill, from those hundreds and hundreds of decisions and reports, the ones readers really need to know about and to appreciate their importance.

Thomas even goes so far as to report on the Ralph’s Grocery decision by the California Supreme Court, in which the court held that a privately owned walkway in front of a large grocery store was a venue for public speech even though it was not a “public forum.” He takes note of the fact that none of the opinions in the case talked about takings, even though an earlier precedential decision in PruneYard Shopping Center was very much a takings case. He concludes: “That perhaps tells you what the California Supreme Court thinks of takings arguments.”

So ends this enjoyable and educational collection of topical, timely, well-written, and worthwhile articles from the State and Local Government Law Section. I commend this volume to your reading and I hope you will gain as much from it as I have.

Julian Conrad Juergensmeyer
Professor and Ben F. Johnson, Jr. Chair in Law
Georgia State University, College of Law
Atlanta, Georgia
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