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A TRIP BACK IN TIME, INCLUDING JUDGE CHARLES D. BREITEL'S RATIONALE FOR HIS *FRED FRENCH AND PENN CENTRAL DECISIONS*

*Frank Schnidman**

Participation in The Taking Issue Conference at Touro Law Center October 3-4, 2013 was truly a trip back in time. Forty years ago, after serving as the Staff Director of the New York State Joint Legislative Committee on Metropolitan and Regional Areas Study and dealing with comprehensive revision of New York State's planning legislation, I was in Washington, D.C. as a consultant to the Council of State Governments, the National Legislative Conference and the National Governor's Conference. While in Washington, I followed, analyzed, and reported on the activities surrounding the Land Use Policy and Planning Assistance Act (S.B. 268) that was under discussion by the 93rd United States Congress, and the subsequent proposals that were introduced in the 94th Congress. Such responsibilities brought me into contact with the President's Council on Environmental Quality ("CEQ"), the Conservation Foundation ("CF"), the Urban Land Institute ("ULI"), as well as many state and

Note from the author: In order to get a better understanding of the critical issues forty years ago, see Congressional Research Service, "Readings on Land Use Policy: A Selection of Recent Articles and Studies on Land Use Policy Issues and Activities in the United States" (Washington, D.C.: US Government Printing Office, 1975) 642 pages. And, when another popular report from the era was released, the 318-page "The Use of Land: A Citizen's Policy Guide to Urban Growth," the article in the New York Times on Sunday, May 20, 1973 read: "Authority Over Land Use Is Termed a Public Right."

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local organizations. In addition, since the legislation was actually a planning grant program to the states, I continued to closely follow the activities of a number of states, including Hawaii, Washington, Oregon, California, Florida, New York and Vermont. It was during this time that I researched and wrote the small paperback book, *A Legislator's Guide to Land Management*,¹ which the Council of State Governments distributed to more than 7,600 state elected officials and their staffs.

I had the honor and privilege of working with so many truly dedicated professionals, including Fred Bosselman. It was Fred Bosselman that introduced me to Richard Babcock, and in 1977 I began a decade of co-chairing the American Law Institute-American Bar Association ("ALI-ABA") Land Use Litigation continuing legal education course of study with Richard Babcock. In 1985, after Richard Babcock retired, I combined this program with Fred's Land Planning and Regulation of Development course and Gideon Kaner's Eminent Domain course, co-chairing with Fred and Gideon the new Land Use Institute course. Fred stayed on as co-chair until he left active practice and began teaching law at IIT Chicago-Kent College of Law in 1991. Gideon and I still co-chair the Land Use Institute course, and we have been individually or jointly chairing ALI-ABA courses for more than thirty-seven years.

I mention the ALI-ABA courses because that was not only a common project that I had with Fred each year, but it was also the opportunity to keep my fingers on the pulse of what was happening in land use planning and litigation across the United States. And, it was in 1979 that I convinced recently retired New York State Court of Appeals Chief Judge Charles David Breitel to serve as the Keynote Speaker at the 1979 Land Use Litigation program in Philadelphia. At the time, Judge Breitel, who retired in 1978, was a member of the Lincoln Institute of Land Policy's ("LILP") Transfer of Development Rights Study Group, a group that I had organized for LILP Executive Director Arlo Woolery. Judge Breitel served more as an observer of the group rather than a participant, and I was, therefore, pleased that he agreed to speak at the Land Use Litigation course.

His remarks, "Land Affected with a Public Interest,"² appear in this volume because they are truly significant in assisting Taking

¹ FRANK SCHNIDMAN, *A LEGISLATOR'S GUIDE TO LAND MANAGEMENT* (1974).

² Judge Breitel presented the Keynote Address at the ALI-ABA Land Use Litigation course of study in Philadelphia, PA, on October 12, 1979.

Issue historians better understand the thinking that went into the New York Court of Appeals' *Fred French*³ and *Penn Central*⁴ decisions.

Forty years ago, Fred's *The Quiet Revolution in Land Use Control*⁵ and his *The Taking Issue*⁶ volumes were cutting edge in educating a generation of land use professionals who are now quickly passing from the active scene. It had only been a few years since the first Earth Day, a few years since the passage of the National Environmental Policy Act, a few years since the United States landed men on the moon! Congress was debating national land use legislation, the environmental movement was in its infancy, the states were experimenting with taking back some of the regulatory authority delegated to local government under adaptations of the U.S. Department of Commerce's Standard Zoning Enabling Act,⁷ and the United States Supreme Court had not yet returned to examining Taking Issue land use cases.

So, step back in time. Try to remember the legal scene in the mid-1970s, or imagine it based upon what you learned in law or planning school. Clear your mind of decades of state, federal and Supreme Court cases on the Taking Issue. Relax and focus on the words of Judge Charles D. Breitel. First, read his brief biography to better understand the man, and then read his words. He was a thoughtful man, an observer of politics and the legal system, and a prophet when it came to the presentation he gave in 1979 in Philadelphia to a group of land use attorneys seeking to better understand the evolving nature of the Taking Issue.

³ Fred F. French Investing Co. v. City of New York, 350 N.E.2d 381 (N.Y. 1976).

⁴ Penn Cent. Transp. Co. v. City of New York, 366 N.E.2d 1271 (N.Y. 1977), *aff'd*, 438 U.S. 104 (1978).

⁵ FRED BOSSELMAN & DAVID CALLIES, COUNCIL ON ENVTL. QUALITY, *THE QUIET REVOLUTION IN LAND USE CONTROL* (1971).

⁶ FRED P. BOSSELMAN, DAVID L. CALLIES & JOHN BANTA, COUNCIL ON ENVTL. QUALITY, *THE TAKING ISSUE: AN ANALYSIS OF THE CONSTITUTIONAL LIMITS OF LAND USE CONTROL* (1973).

⁷ DEP'T OF COMMERCE, *A STANDARD STATE ZONING ENABLING ACT UNDER WHICH MUNICIPALITIES MAY ADOPT ZONING REGULATIONS* (rev. ed. 1926).

“LAND AFFECTED WITH A PUBLIC INTEREST”*

*Honorable Charles D. Breitel***

Mr. Schnidman has indicated in his introduction that my main thesis is not so much the “how” – as a matter of fact, it would be folly for me to address a group of this kind on the “how.” You all know much more about it than I do. And yet, there is a value in hearing from somebody, I think, who has been the subject of how lawyers have exercised the “how” and to what extent it has been satisfactory, and to what extent it may have not been satisfactory.

My thesis, if I have one, could be described, first, that all land and its improvements are affected with the public interest. This is a drastic statement to make, and I alone am responsible for it. By that, I mean that all land and the improvements on them have ceased to be recognizable by the simple concepts that we used in another time. Now, you have heard that before – that the simple concepts no longer apply. I am extrapolating that principle to a much broader base. On the other hand, I could also offer it as a thesis – and this is a tough one – that litigation in land use today is because of the changes that have occurred and the principles that are involved as being much more than a litigator applying rules of legal precedents and supplying the basic economic facts and other facts of the case that lawyers are always presenting – I would say that a litigator in the land use field has to be a “statesman.”

The reason for this is the whole change in our society – it is

* These remarks were presented by Judge Breitel as the Keynote Address at the ALI-ABA Land Use Litigation Course of Study in Philadelphia, PA, on October 12, 1979.

** Charles David Breitel (1908-1991) was a graduate of the University of Michigan and of Columbia University School of Law. He was admitted to the Bar of the State of New York in 1933. He served on the staff of Thomas E. Dewey, first in the New York City Special Prosecutor of Rackets Office, and then in the District Attorney of New York County Office. He also briefly was in private practice with Dewey. When Dewey became Governor in 1943, Breitel became Counsel to the Governor and served until 1950 when he was appointed to fill a vacancy in the New York Supreme Court. He served for two years and then was elected to the Appellate Division, First Department where he served between 1952 and 1966, moving to the Court of Appeals as an Associate Judge from 1967 to 1972, when he became Chief Judge, a position he held until mandatory retirement in 1978 at the age of 80. Presidents Eisenhower, Kennedy and Johnson appointed Judge Breitel to federal judicial commissions. He was active in numerous legal associations, including serving as the Vice President of the Association of the Bar of the City of New York. He served as Chairman of the Twentieth Century Fund’s Task Force on the Future of New York City. He was also the author of numerous law review articles.

not just in land use. Let me give you a better illustration. In the field of public corporations, and by that I mean corporations that are owned by public people – I do not mean governmental corporations – the idea of corporate governance being responsible for social and economic effects in the whole society is a marked change. We are no longer surprised that the Securities Exchange Commission and that other persons argue, urge or require that there be public members on boards of directors. The corporations no longer can justify their existence by the fact that they produce profits for their stockholders – they have a social responsibility.

Let me give you another illustration that comes a little bit closer to a natural resource like land. Many years ago, in the 19th century, the New York Legislature adopted a statute that granted, just like a deed, to the Niagara Falls Power Company in perpetuity the right to use the flowing waters of the Niagara River, Niagara Falls, that now produces so much power. The right to use the flowing waters in perpetuity was for very small rental. It was done exactly as if the State had the power to grant a fee absolute in the flowing waters to the Niagara Falls Power Company. By the middle of this century, the courts held a state never had the power to grant any kind of title to the flowing waters of a navigable stream. The flowing waters belong to the people and were not susceptible of passage of title any more than the atmosphere might be.

I do not say that land has reached that point, but it begins to give you an idea that we approach land with that kind of interest, and so that the old concepts of private property in regard to land not only have already changed, but the change in the future will be greater.

Now, why has this been so? It has been because we have recognized that no man in society, no asset in society, is capable of the kind of capture that goes back to old common law thinking. No kind of capture so that you can completely occupy it and make it your own the way you might the food that you eat and eventually digest. And because of that, we recognize that there is an interaction and an interdependence that everything that society permits us to have . . . and incidentally, on the horizon, we have problems of world assets and you now hear voices talking about the oil resources in other parts of the world of maybe being world assets and not something that the particular countries happen to lay upon these subsurface resources have a title interest in the same nature that they may have title to other things.

Now, why do I say all these things and why do I think it is important that lawyers recognize it. In the first place, let me give you an elementary principle as I see it about advocacy. Ultimately, the lawyer performs its function by assisting the court in deciding the case before it justly. It sounds a little bit twisted, does it not? My duty as a lawyer says the lawyer is to represent my client's case and win it the best I know how. Of course, that is true. But how does he succeed in that unless he also can persuade the court that what his clients seeks is the just result that the court would or should apply. Now, courts do not always know everything. In fact, I have heard that it is most often that they do not and therefore, the lawyers' function is to supply that additional education that will provide the court with the basis for making that just decision.

We cannot do that in the land use field unless we recognize the scope of the changes that have occurred. Now a trite statement is that zoning, originally which was our first regulatory land controls after common law nuisance principles, was simply designed to permit people to develop the kinds of neighborhoods and communities that they wish to have within certain reasonable grounds. That is so long as there is lots of land, lots of possible places for communities, lots of places for people to go and find homes. And then think of where we come today to cases like *Mount Laurel*,⁸ the issues raised by *Belle Terre*,⁹ the problem even suggested in *Berenson v. Town of Newcastle*¹⁰ where we must be concerned with regional developments. The relationship of all of this to the demographic problems of exclusion of the poor or the not so poor but no so rich, or of races or other ethnic groups where we go well beyond the particular community, well beyond the concept of zoning simply designed to produce good communities, and, of course, even commercial and industrial zoning, are all part of the same thing.

So that now we are talking in terms of regional concerns so that a community by itself cannot establish standards just to make itself almost as if it were an enclave, a parochial area begot. The concern has to be devoted to other problems that exist in the society, and that is not the end of it. I mentioned already a matter of economic and racial exclusion. Then, we have landmarking – the sites, the buildings – this has nothing to do with the earlier concepts that we

⁸ 336 A.2d 713 (N.J. 1975).

⁹ 416 U.S. 1 (1974).

¹⁰ 341 N.E.2d 236 (N.Y. 1975).

have applied. Historic districts and, then of course, we have very serious environmental concerns from wetlands to nuclear sites. The latter can be analogized to nuisance by a very great stretch.

Now what is the result of all of this? The result of all of this is that the so-called “rights in private property” are seriously limited. And yet, lawyers to this day will argue in cases in which these questions come up. What I have referred to before in opinions I have written is what was really a matter addressed by Mr. Justice Holmes in the *Pennsylvania Coal*¹¹ case, that a regulation when severe enough amounts to a taking.¹² Think of that as it applied to the fields I now refer to.

On the other hand, we have already said, and the lawyers on the other side will always point to it, that under the police power you can impose whatever regulations are required for the public welfare, provided they are reasonable and the owner of the property has some way of getting a reasonable return. And that is perfectly obvious, I would think, that neither of these principles will satisfy the kinds of concerns we have in cases today or the cases that we will have in the future. Even this morning’s discussion, for example, about the First Amendment issues with adult entertainment, begin to suggest a part of that problem. And I will not try to be a third voice in a very good discussion we had this morning. But, there is a larger public concern beyond that just of those that would be exploiters in that field and the interest of the community, the particular community if you like, in having one kind of an environment as compared with another.

Now, what I have said was also illustrated by Mr. Schnidman in his introduction when he said I would not talk about the cases in which I wrote the decision, and I do not intend to, but two of them had a very pointed exposure in this respect, and they are the *Fred French*¹³ case and the *Penn Central*¹⁴ case. In *Fred French*, the City of New York by ordinance, and then into zoning ordinance, had decided that the private park at the Tudor City apartment complex should forever remain open to the public, and that the owners had the obligation of maintaining the park and keeping it open to the public, and for this they offered no compensation.¹⁵ This would look very

¹¹ 260 U.S. 393 (1922).

¹² *Id.* at 415.

¹³ *Fred F. French Investing Co.*, 350 N.E.2d 381.

¹⁴ *Penn Cent.*, 366 N.E.2d 1271.

¹⁵ *Fred F. French Investing Co.*, 350 N.E.2d at 382-83, 386.

easily like meeting the proposition that if it is excessive regulation then it amounts to a taking, and that is exactly what the owners argued because they would have loved to gotten the money for the value of the park in the 42nd Street district on the eastside. And so, they were claiming inverse condemnation.¹⁶

By the way, I said they were offered no compensation, but they were offered something. They were offered transferable development rights that could be used anywhere in Manhattan, in the Midtown area where they could find a likely site.¹⁷ The Court of Appeals struck it down and said that this amounted not to a taking.¹⁸ On the other hand, it was an illegal exercise of dominion over a private property and the exchange offered was inadequate and too speculative.¹⁹

Now, in the *Penn Central* case, there is your public interest against your private interest, and the *Penn Central* case deals with a landmark; transferable development rights were also offered and a restriction on any change substantially in the use of the Grand Central Station which still is capable of a return, but nothing like the exploitable value if they could put a huge high rise office building in its place, preserving a part of the facade and so on.²⁰ There, the transferable development rights were allocable to other properties owned by the railroad.²¹ They owned much of the Park Avenue and 42nd Street area, where they could use them.

Incidentally, this part of the case was never addressed by the Supreme Court of the United States. When the case came up that was sustained on the ground that this would approximate some of the loss of economic benefit that the owners would have if they were free to exploit the land they own. On the other hand, we said very daringly that the owner was not entitled to receive the kind of value attributable to any other normally improved land because Grand Central Station, and the railroad associated with it for over 100 years, had been the beneficiary of all sorts of public and social benefits.²² The Supreme Court unfortunately never commented upon that to tell us

¹⁶ *Id.* at 382.

¹⁷ *Id.* at 387.

¹⁸ *Id.* at 386.

¹⁹ *Id.* at 387.

²⁰ *Penn. Cent.*, 366 N.E.2d at 1273.

²¹ *Id.* at 1277.

²² *Id.* at 1274.

whether we were wrong or whether we were right. Maybe they were “scaredy cats,” I do not know. But you see, there again, there was this tip of balance between a public right against a private right, not satisfied by talking in terms of police power, not satisfied by terms of excessive regulation, because obviously in both cases the amount of intrusion over the rights of the owner was markedly greater – therefore, was “excessive” as compared with anything that we have tolerated by way of regulation before, which came under the terms of zoning in the community interests, sanitation, building codes and the like. So that you could see that there has to be that movement. Now the Supreme Court, for example, in the *Penn Central* case, sustained it on the ground that it was an exercise of the police power.²³

We have other, much more troublesome scenarios. Think of wetlands and other environmental concerns where the restrictions under a rubric of police power and public welfare go so far as to virtually deprive the owner of all use of his land, except the privilege of paying taxes. So it means that there is another principle up already, that there is a change just the same as we had changes in these other areas.

Now what does it mean to the lawyer? It means for the lawyer, that when you have these problems, that you come to the court not only with the development of facts as we normally categorize facts, but almost with what used to be called a “Brandeis Brief”; a development of all the economic, political, demographic, sociological and First Amendment, Second Amendment, Third Amendment – all of the primary Constitutional rights of the first Ten Amendments, with the parts to capitulate some of the fundamentals of American society. And unless you proffer that kind of background, you leave the court without the help you can give it that may be better for your clients and otherwise. I can tell you that in both the *Fred French* case and the *Penn Central* case there was little help from the lawyers from that point of view. Oh, they did a marvelous job in the traditional sense of arguing about excessive regulation, the right to compensation and the exercise of police power, why it was important to keep Tudor City Park as a park and it was, all the buildings were rising higher and higher all around there.

By the way, our sustaining of the transferable development rights in the *Penn Central* case, actually in the final proof was justi-

²³ *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 138 (1978).

fied, although the Court did not know whether it would be or not. The railroad sold development rights for the old airlines terminal building across the street from Grand Central to the Philip Morris Company that was putting up a high rise, for \$2.5 million.²⁴ But you see, these are the things that the lawyer must do to help us judges—I still say us, though I am an ex—in the handling of these very difficult problems.

But if you think that the changes we have had are relatively small ones, maybe big to you, but I mean small as compared to what I have said, mistake it not – it is a change in our whole attitude, our kind of “society.”

I have another peculiar figure of speech. I once owned a house of my own in a suburb of a city and I was very much as absolute an owner as anybody can be in American society in the 20th Century. And I no longer own it. I now own a cooperative apartment in an apartment house. You know how much that is like owning a private home?

I tell you all of us have become cooperative owners in our society. And that is the whole difference, and that is why I come back to the point of my beginning – that to be a good land use lawyer you have to be statesman.

Thank you very much.

²⁴ NEW YORK CITY DEPARTMENT OF CITY PLANNING, GRAND CENTRAL SUBDISTRICT 11 (1991), *available at* http://www.nyc.gov/html/dcp/pdf/history_project/grand_central_subdistrict.pdf.