

§ 2:8. Imposing the public trust on private property

There need be no hesitation on the part of the environmental advocate to seek to curtail the private use of any property which is cloaked with the public interest.¹² The landowner's right to just compensation for property taken by the due process provisions of the Fifth Amendment to the Constitution must be balanced against the overwhelming right of the people to the full benefit, use and enjoyment of national

8. *Davenport v Buffington*, 97 F 234 (1899, CA8 Ind Terr).

9. *Supra* at 236.

10. *Supra* at 236. See also *Allen v Hickel*, 424 F2d 944, 947 (1970, App DC).

See also *Smith v Corporation of Washington*, 21 How 135, 15 L Ed 858 (1857, US); *Hague v Committee for Industrial Organization*, 101 F2d 774 (1939, CA3 NJ), mod on other grounds 307 US 496, 83 L Ed 1423, 59 S Ct 954.

11. 146 F2d 564 (1945, CA6 Tenn), cert den 324 US 871, 89 L Ed 1425, 65 S Ct 1016, reh den 324 US 891, 89 L Ed 1438, 65 S Ct 1024.

12. *Nebbia v New York*, 291 US 502, 525, 78 L Ed 940, 54 S Ct 505, 89 ALR 1469 (1934).

The fundamental criteria for evaluating regulations which deprive a landowner of the complete freedom to use his property as he wishes is whether the regulation affecting the property confers a benefit on the public commensurate with its burden on private property.¹⁸ Private property may be regulated in the public interest where the benefit to the public is solely preservation or protection of architectural, historic, or aesthetic values.¹⁹

§ 2:9. Case study: Defenders of Florissant, Inc. v Park Land Company²⁰

The Florissant fossil beds, located a short distance west of Colorado Springs, Colorado, are found in an ancient lake bed of more than 6,000 acres where seeds, leaves, plants and insects from the Oligocene period (34 million years ago) are remarkably preserved in paper-thin layers of volcanic shale which, unfortunately, disintegrate when left exposed to weather unless properly protected.¹ A number of bills had

18. *West Hartford Methodist Church v Zoning Board of Appeals*, 143 Conn 263, 121 A2d 640, 642, 643 (1956); *Milwaukee Co. of Jehovah's Witnesses v Mullen*, 214 Or 281, 330 P2d 5, 17, 74 ALR2d 347 (1958), app dismd and cert den 359 US 436, 3 L Ed 2d 932, 79 S Ct 940.

19. *Berman v Parker*, 348 US 26, 33, 99 L Ed 27, 75 S Ct 98 (1954); *People v Stover*, 12 NY2d 462, 467, 240 NYS2d 734, 191 NE2d 272 (1963), app dismd 375 US 42, 11 L Ed 2d 107, 84 S Ct 147; *Manhattan Club v Landmarks Preservation Com.* 51 Misc 2d 556, 559, 273 NYS2d 848 (1966); *Oregon City v Hartke*, 240 Or 35, 400 P2d 255, 262 (1965).

The decree in *Defenders of Florissant, Inc. v Park Land Co.* (1969, DC Colo), § 2:9, *infra*, which restricted the defendants' use of the fossil rich portion of the land to only those uses consistent with maintaining the unique, national, natural resource treasure, the Florissant Fossil Beds, as an object of scientific investigation and national recreation, did not constitute a taking without due process or just compensation in violation of the Fifth Amendment of the United States Constitution.

The Supreme Court of California has held that a zoning ordinance otherwise a proper exercise of the police power, that restricted the plaintiff's use of their ocean front property to beach recreational purposes and to the operation of beach facilities for recreational activities for an admission fee, where the only structures permitted thereon were lifeguard towers, open smooth wire fences and small signs was not an unconstitutional taking of property. *McCarthy v Manhattan Beach*, 41 Cal 2d 879, 264 P2d 932 (1953), cert den 348 US 817, 99 L Ed 644, 75 S Ct 29.

20. *Defenders of Florissant, Inc. v Park Land Co.* (1969, DC Colo) No. C-1539 (D Colo, July 9, 1969) No. 340-69 (10 Cir., July 10, 1969) No. 403-69 (10 Cir., July 29, 1969).

1. 113 Cong Rec 3613 (1967).

Dr. Estella R. Leopold, paleontologist with the United States Geological Survey, who at the present time is the principal investigator of the Florissant fossils, stated, "no site equivalent to the Florissant Fossil Beds in diversity of fossil species or fossil density has been found in the United States or Western Hemisphere . . ."

The original National Park Service report on the Florissant Fossil Beds, made in April, 1962, stated: "The insect fossils at Florissant are of primary significance. They represent the evolution and modernization of insects better than any other known site in America. In addition, the fossil flora, emphasized dramatically by the petrified tree stumps and in more subtle tones by the great variety of leaf fossils, greatly adds to the primary values. The site itself has great significance in being a classic location known to many scientists—it has historic significance to the geologist, the paleontologist, the entomologist, the botanist; it is the home source for the numerous fossil insects and

natural resource treasures as trusts for the People, not only of this generation, but of those generations yet unborn.

The balance must be struck while keeping in mind that all private property and privileges are held subject to limitations that may reasonably be imposed upon them in the public interest.¹³ The Constitution does not secure to anyone liberty to conduct his business in such fashion as to inflict injury upon the public at large, or upon any substantial group of the people.¹⁴ The owner's right to undisturbed possession of his property must sometimes give way to an overriding social interest.

Mere use by the general public is not an adequate universal test for determining what constitutes a public use.¹⁵ There are exceptional times and places in which the very foundations of the public welfare cannot be laid without concessions from individuals one to another which under other circumstances might be left wholly to voluntary consent.

There is ample precedent for restrictive regulation of private property in the absence of eminent domain proceedings and without just compensation. The regulation and control of the uses to which property may be put often constitutes a taking where the effect of such regulation is so complete as to deprive the owner of all or most of his interest in the property.¹⁶ However, the mere fact that the regulation deprives the property owner of the most profitable use of his property is not enough to constitute a taking within the meaning of the Fifth Amendment protection and establish the owner's right to just compensation.¹⁷

13. *Air Line Pilots Asso., International v Quesada*, 276 F2d 892, 896 (1960, CA2 NY).

14. *Nebbia v New York*, 291 US 502, 538, 539, 78 L Ed 940, 54 S Ct 505, 89 ALR 1469 (1934).

15. *Gilbert v United States*, 366 F2d 923, 933 (1966, CA9 Cal), cert den 388 US 922, 18 L Ed 2d 1370, 87 S Ct 2123.

"In discussing what constitutes a public use (the Supreme Court) recognized the inadequacy of use by the general public as a universal test. While emphasizing the great caution necessary to be shown, it proved that there might be exceptional times and places in which the very foundations of public welfare could not be laid without requiring concessions from individuals to each other upon due compensation which, under other circumstances, would be left wholly to voluntary consent." *Strickley v Highland Boy-Gold Mining Co.* 200 US 527, 531, 50 L Ed 581, 26 S Ct 301 (1906).

16. *United States v General Motors Corp.* 323 US 373, 378, 89 L Ed 311, 65 S Ct 357, 156 ALR 390 (1945).

17. *Goldblatt v Hempstead*, 369 US 590, 592, 8 L Ed 2d 130, 82 S Ct 987 (1962); *United States v Central Eureka Mining Co.* 357 US 155, 168, 2 L Ed 2d 1228, 78 S Ct 1097 (1958), reh den 358 US 858, 3 L Ed 2d 91, 79 S Ct 9.

Thus, in *Hadacheck v Sebastian*, 239 US 394, 60 L Ed 348, 36 S Ct 143 (1915), a restriction on the use of property that caused a ". . . diminution in value from \$800,000 to \$60,000 was upheld."

". . . [T]he prohibition of its use in a particular way, whereby its value becomes 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 US 623, 669, 31 L Ed 205, 8 S Ct 273 (1887).

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