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*53 PRETEXTUAL TAKINGS AND EXCLUSIONARY ZONING: DIFFERENT MEANS TO THE SAME PAROCHIAL END

Historically, local governments have utilized zoning ordinances as means to exclude undesirable land uses from their borders. A number of states have addressed the issue of exclusionary zoning by passing legislation that prohibits or severely curtails such ordinances. However, towns have begun to utilize different means to effectuate the same parochial objective. The towns will simply condemn the land under the subterfuge of the preservation of open space. This Article will discuss the history of land use controls, such as exclusionary zoning and condemnation, and demonstrate how they are used as a means to perpetuate NIMBYism. In particular, this Article focuses on condemnation due to the deference accorded the legislature by the courts. Four possible solutions are presented, but an objective, bipartisan land use review committee at the state level is the most effective solution.

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***55 INTRODUCTION**

In the summer of 2001, a real estate developer acquired approximately sixteen acres of property located in an area zoned for residential use in Mount Laurel, New Jersey, with the intention of developing twenty-three single-family residences.[1] Mount Laurel is infamously anti-development.[2] The town's restrictive zoning policies triggered years of exclusionary zoning litigation in the 1960s and 1970s,[3] culminating in the adoption of a statewide Fair Housing Act (FHA) in 1985.[4] Unsurprisingly, the town's residents objected to the new sixteen-acre development.[5] The residents asserted publicly that they were opposed to the new development due to their desire to stop an influx of new families with school-aged children.[6] The Mayor of Mount Laurel expressed concerns that the children would overcrowd the town's schools, resulting in a significant tax increase to the taxpayers.[7] Because Mount Laurel, chastened by the FHA, could no longer resort to traditional zoning techniques to prevent the new development,[8] it took an alternative route: the town condemned the sixteen-acre parcel for use as public open space.[9]

Although condemnation is most commonly thought of in the United States as a right established by the U.S. Constitution, it existed prior to the enactment of the Takings Clause.[10] Early cases justified the government's right to seize land as a sovereign's inherent ***56** right predicated on natural law.[11] The U.S. Supreme Court held, in *Kohl v. United States*, that the government's power to condemn "is essential to its independent existence and perpetuity" and necessary "for forts, armories, and arsenals, for navy-yards and light-houses, for custom-houses, post-offices, and court-houses, and for other public uses."[12]

The Fifth Amendment prohibits the taking of "private property ... for public use, without just compensation,"[13] but in recent years, the scope of "public use" has come under scrutiny.[14] Municipalities sometimes require the condemnation of land to build schools or for other purposes that ultimately serve a public need.[15] Those uses are clearly within the constitutional requirement of "public use."[16] The nonuse of land, such as preservation of open space for conservational purposes, has also been held to be a constitutionally valid public use.[17] In fact, the Supreme Court has held that a municipality's power to condemn land for the stated purpose of preservation of open space is facially valid.[18] This Article does not assert that land

should never be condemned to preserve open space; rather, it recognizes that the preservation of open space is an altruistic and necessary initiative.[19]

Despite its seemingly noble environmental purpose, condemnation for open space is often motivated less by a desire to conserve and more by a desire to exclude.[20] Municipalities such as Mount Laurel sometimes use their condemnation power in an insidious manner,[21] to ***57** halt the development of an unwanted project and exclude undesirables.[22] Homeowners often resist new development projects, fearing a reduction in the value of their property or change in the character of the community.[23] This fear is particularly pronounced because a home, "for the vast majority of residents, [is] the largest asset that they will ever own."[24] The phenomenon of such opposition to new developments has been termed NIMBY, an acronym for "not in my backyard."[25]

While conservation of open space is a valid environmental concern, condemnation for open space should not be used to mask NIMBYism. From this thesis, two questions naturally arise: (1) under what circumstances are pretextual takings used?; and (2) what preventive measures can be established to mitigate the use of pretextual takings? The issue of pretextual takings can be addressed either by the legislature or the judiciary;[26] however, this Article concludes that the solution is to statutorily create an objective, bipartisan state-level committee to review all requests for condemnation of land where the stated purpose is preservation of open space.

Part II of this Article will discuss land use controls and how local governments have utilized land use regulations, such as exclusionary zoning, to prevent undesirable development projects and keep out certain individuals.[27] Part II will also review the current state of the public use requirement under eminent domain laws, as well as the open space conservation movement.[28] Part III will consider why pretextual condemnations occur at the local governmental level and evaluate examples of condemnations resulting from local ***58** opposition to a development project.[29] Additionally, it will argue that condemnation should not be used as a vehicle for NIMBYism.[30] Part IV will propose judicial and legislative remedies to mitigate the use of condemnation for such parochial purposes.[31] Although either approach is preferable to the status quo, this Article ultimately concludes that a legislative solution most effectively balances the competing interests of property owners and community members.[32] Overall, this Article asserts that property should not be condemned as a result of local opposition and bad-faith motives.[33]

I. LAND USE CONTROLS

This Part provides an overview of two commonly used land use controls, zoning and condemnation, and examines how courts review a challenge to a municipality's use of such land use controls. The adequacy of responses from state legislatures and Congress will also be addressed. This Part concludes by discussing the importance of open space preservation to ensure the sustainability of natural resources and ecosystem services.

A. Exclusionary Zoning

Since the early 1900s, local governments have used their land use regulatory authority to exclude undesirable land uses from their borders.[34] To that end, local governments have enacted zoning ordinances that prevent the construction of multi-family housing while simultaneously requiring large single-family residences.[35] These types of zoning ordinances increase the construction costs of new homes and effectively prevent development of lower-income-family homes.[36] As a result, NIMBYs are able to sustain their purported subjective enjoyment of the community. At the same time, such exclusionary ***59** zoning ordinances preempt an increased demand for public services that would necessitate a corollary tax increase.[37]

Although the Supreme Court has upheld the validity of zoning as an exercise of state police power,[38] some states have determined that exclusionary zoning ordinances are arbitrary and unreasonable, and therefore beyond the scope of the municipal police power.[39] In *Mount Laurel I*, the Supreme Court of New Jersey held that municipalities could not enact zoning ordinances to exclude low- and moderate-income housing.[40] Following the court's ruling in *Mount Laurel I*, the township took no action to modify its existing exclusionary zoning ordinances, which resulted in the court issuing an order compelling the township to accommodate low-income families.[41] As in New Jersey, other states' courts have invalidated similar exclusionary zoning ordinances.[42]

Local governments have also enacted ordinances targeting other NIMBY issues, such as the construction of cell phone towers or storage of nuclear waste.[43] In response, Congress has attempted to preempt exclusionary practices by enacting statutes such as the ***60** Telecommunications Act of 1996 (TCA) and the Nuclear Waste Policy Act (NWPA).[44] The TCA provides procedural safeguards to mitigate the possibility that NIMBY issues factor into local governments' decisions for siting cell towers.[45] The NWPA is more stringent in its approach because it expressly provides for the siting of nuclear waste facilities, effectively preempting any local land use regulation.[46] Several states have also addressed the issue of exclusionary zoning by passing legislation that prohibits or severely curtails such ordinances.[47]

B. Eminent Domain

Inherent in a sovereign's police power is the right to take private property for public use without the consent of the owner.[48] The United States had the power to exercise eminent domain without providing compensation to the owners of the condemned property prior to the adoption of the Fifth Amendment.[49] The Fifth Amendment established a precedent for compensating a landowner should the federal government condemn his land for public use.[50] In general, courts defer to the state or local legislature's findings to ***61** determine whether the stated purpose of a taking falls within the public use requirement.[51] A court will not "substitute its judgment for a legislature's judgment" unless that judgment is "without reasonable foundation."[52] Essentially, courts will uphold the findings of the legislature so long as the condemnation is reasonably related to a conceivable state interest.[53] Ostensibly, absent clear evidence to the contrary, courts will generally uphold condemnations.[54]

C. An Expansive Understanding of Public Use

The Fifth Amendment of the U.S. Constitution establishes limitations on the government's eminent domain powers by requiring condemnation to ultimately benefit the public.[55] The public use requirement of the Fifth Amendment has never been thoroughly defined,[56] but it has been interpreted expansively to include uses that benefit the public, even if not directly used by the public, as well as nonuses, such as the preservation of open space.[57]

1. Public Use

Typical examples of eminent domain actions involve condemnation for a public use, such as for schools, public roads, or public utilities.[58] Courts have even determined that property that has not been deemed blighted may be condemned as part of an overall area that has been deemed blighted.[59] In these situations, the government physically seizes private property and uses it for some other purpose that benefits the public as a whole.

***62** In *Berman v. Parker*, Berman owned a department store in an area designated as blighted by the District of Columbia Redevelopment Act of 1945.[60] Although the store itself was not blighted, it was located in an area that was slated for redevelopment due to blighted conditions.[61] Ultimately, the Supreme Court held that Congress may condemn land for redevelopment purposes, even if that land itself is not blighted, so long as it is part of an overall project to redevelop a blighted area.[62] The Court supported its expansive interpretation of the public use requirement by reasoning that the public as a whole would benefit from the redevelopment of the blighted area.[63]

Similarly, in *Kelo v. City of New London*, the city of New London sought to redevelop approximately ninety acres of land to revitalize a blighted area and create jobs.[64] The city was able to successfully acquire a majority of the land needed for the project from existing landowners.[65] However, the plaintiffs refused to sell their land and the city had to condemn it.[66] There were no findings that the plaintiffs' land was blighted, but unfortunately for them, it was located in an area designated for redevelopment.[67] The city's redevelopment plans sought to transfer the land to private owners to build a private commercial research facility.[68]

In upholding the condemnation, the Supreme Court expanded upon its ruling in *Berman*, holding that blighted land may be condemned and transferred from private ownership *to another private owner* for redevelopment purposes.[69] The Court reaffirmed existing precedent that redevelopment and conveyance of condemned land into private ownership can have a "public purpose,"[70] specifically to create jobs and increase tax ***63** revenue.[71] As a result of the broad judicial interpretation of what constitutes a public use, courts will generally defer to a municipality's findings of a public use and uphold a

condemnation.[72]

2. Public Nonuse; Condemnation for Open Space

"Nonuses"-of-land cases typically arise when the government enacts legislation that prohibits the erection of any structure on land,[73] or when land is condemned and designated as open space.[74] The Supreme Court has held that such nonuse legislation meets the constitutional public use requirement.[75] In *Lucas v. South Carolina Coastal Council*, Lucas, a private landowner, acquired two residential lots two years prior to the enactment of a statute prohibiting him from building on his property.[76] Subsequently, Lucas filed suit, contending that the legislation effectuated a taking because it rendered his land valueless.[77] The Court held that the objective of the legislation was to confer a benefit to the public,[78] and because Lucas's land had been rendered valueless, he was entitled to just compensation.[79]

In *Aspen Creek Estates, Ltd. v. Town of Brookhaven*, the petitioner purchased a thirty-nine-acre parcel of farmland on Long Island with the intention of subdividing and building nineteen houses.[80] The land was part of 500 acres known as Manorville Farmland Protection Area.[81] Brookhaven also bid on the land to preserve it for open space, but ultimately lost out to Aspen Creek.[82] Shortly thereafter, Brookhaven declared that the land was to be preserved as open space, in part to ensure the continuation of agriculture in the town.[83] After Brookhaven commenced condemnation proceedings to acquire the land, Aspen Creek brought suit.[84] When the case reached a New York appellate court, the court held that "it is clear ... that [Brookhaven's] stated reasons for acquiring the ***64** property--preserving farmland and maintaining open space and scenic vistas--are all legitimate public purposes."[85] The court held that the stated objective of preserving the area's farmland was constitutional.[86]

In addition to judicial decisions upholding the validity of preservation of open space under the public use doctrine,[87] states have also enacted legislation expressly authorizing condemnation for open space public use.[88] For instance, Connecticut passed a statute requiring that at least 21% of the state's land be for open space.[89] New Jersey, seemingly in spite of the aims of its Fair Housing Act, has also enacted legislation that expressly authorizes the condemnation of land for the preservation of open space.[90]

D. Open Space Preservation

There are both public and private initiatives that set forth the altruistic objective of preserving open space for the benefit of society as a whole.[91] Increased population and limited land resources threaten the continued existence and availability of open space.[92] Over two million acres of forests, farms, and open space are lost every year in the United States due to development, such as suburbinzation.[93]

A Brookings Institute study concerning policy initiatives "to increase the amount of park and recreational space in urban areas, and to protect ecosystems and farmland on the metropolitan fringe"[94] detailed different mechanisms through which states effectuate the preservation of open space.[95] Generally, either a governmental agency or a nonprofit group purchases property outright.[96] In another approach, the entity may purchase the development rights on the property, precluding the transfer of title from the existing owner ***65** to any other purchaser.[97] As an incentive-based alternative, the state or local governments may grant tax deductions or credits if the landowner retains the property as open space.[98] Lastly, state or local legislatures may enact regulations to prohibit or encourage desired uses for the property.[99]

Historically, landscape architects have used open space to either effect metropolitan growth or provide non-urban-type amenities to urban residents.[100] But more recently, "many commentators and policy advocates have promoted the idea that open space of all kinds should be consciously used to shape our metropolitan areas."[101] Most state-sponsored programs for the preservation of open space, however, have identified a different objective, such as "an opportunistic approach to conserving land" or a "systematic pattern of open space protection that has revolved around the state's interest in the natural resources involved," as opposed to urban growth.[102] Regardless of the stated objective, the paramount importance of the preservation of open space seems obvious:[103] The rapidly increasing rate of development, rising real estate costs, change in land ownership, and decreasing federal funding risk depleting the nation's open space in the absence of immediate action.[104]

At the federal level, the U.S. Forest Service has initiated what is known as the Open Space Conservation Strategy

(Strategy),[105] which notes in its mission statement:

> Open space--forests, grasslands, farms, ranches, wetlands, riparian areas, and urban greenspaces--provides vital ecosystem services and benefits for society. Each day, we lose 6,000 acres of open space in the United States as more people choose to live at the urban fringe and in scenic, rural areas.[106]

The Strategy lists several benefits arising from the preservation of open space, including clean air and water, natural flood control, food, timber, wildlife habitat, endangered species recovery, scenic beauty, climate regulation, and increased property values.[107]

***66** Some states have also implemented open space initiatives.[108] For example, New York enacted an environmental conservation law that states:

> The quality of our environment is fundamental to our concern for the quality of life. It is hereby declared to be the policy of the State of New York to conserve, improve and protect its natural resources and environment and to prevent, abate, and control water, land, and air pollution, in order to enhance the health, safety and welfare of the people of the state and their overall economic and social well-being.[109]

Additionally, several other states have enacted similar legislation that declares the preservation of open space a fundamental concern for the general welfare of citizens.[110] Because the preservation of open space has been designated an objective of the state, it naturally satisfies the public use requirement for takings.[111]

II. THE POWER TO CONDEMN IS THE POWER TO EXCLUDE

This Part will discuss the history and purpose of reliance on local governments to implement land use controls. Further, it will demonstrate why local land use decisions may be self-motivated and require an objective third party to review such decisions and determine whether they are just and fair.

A. Locality of Land Use Controls and NIMBYism

Historically, zoning and other land use controls rely on local governments because local governments are more accustomed to the needs and requirements of their constituents than either the state or federal government.[112] The state legislature's role is merely to define the local government's authority.[113] However, some have questioned the effectiveness of this system because a local government's control is limited to the land within its borders, which results in the ineffective management of regional land use planning that has caused environmental damage.[114] To address those concerns, state legislatures have enacted measures to both restrict and expand the authority of local governments.[115]

In one respect, the local governments' authority was restricted by state legislatures' utilizing "preemptive measures, regional land use agencies, state directives, and other ***67** approaches."[116] However, these measures did not alter the states' reliance on local government to control land use issues.[117] In terms of developmental concerns, many state legislatures effectively expanded local governments' arsenal of local land use controls, evincing the need to rely on local governments to make local land use decisions.[118] Although local governments are more apt to make land use decisions that affect their constituents, that does not mean that such decisions are objective and fair.[119]

As rural communities develop into typical suburban communities, the residents of those newly formed communities eventually come to represent the political majority.[120] A trend has developed where new residents support initiatives to increase the value of their homes, while opposing measures that may diminish their homes' value.[121] This self-serving mindset has resulted in a pronounced NIMBY syndrome, which has been defined as the local residents' opposition to development projects within their community out of fears that the value of their homes will decline.[122] In addition to fears of a diminution in home values, homeowners are also concerned with "maximizing the subjective use value of their property."[123] Homeowners fear that development projects will introduce increased road congestion, crime, higher taxes, and the construction of aesthetically unpleasing structures.[124] Homeowners also fear an increase in the population of what they perceive to be a socially undesirable class of individuals, which may ultimately lead to reduced market value of homes in the

community,[125] or a decline in the homeowners' subjective enjoyment of the ***68** community.[126] NIMBYs often voice their opposition to development projects at zoning and planning board reviews,[127] but if the developers fail to acquiesce to these requests, NIMBYs will resort to other methods to halt or minimize projects,[128] including rezoning and condemnation.[129]

B. Homeowner Political Majoritarianism

Legal scholars have argued that, because local governments who condemn land must pay just compensation, and because funds expended for that compensation are directly attributable to the local residents, local decisions to condemn land would be self-regulated.[130] This is not always the case, however, because homeowners' interests generally prevail with regard to local land use decisions.[131] Most homeowners' objective is to preserve the value of their property,[132] a goal that may be adverse to what is best for the region.[133]

Take the hypothetical example of a developer with plans to construct a strip mall in an affluent town. A strip mall would create jobs and generate significant tax revenue for the town, but homeowners in the town fear an increase in traffic and ultimately lower property values associated with the new development. The officials of the local government, who are elected by the town's residents, commence condemnation proceedings in order to appease their constituents. The town, as a result, loses out on new jobs and increased tax revenue. This scenario would likely only occur on the local government level, where homeowner political majoritarianism is most influential.[134] If this scenario were to happen at the state level, the influence of a select few at the local level would not have the requisite political impact to ultimately sway the decision in their favor.[135] The decision would be made objectively, with the motive of bettering the community, and not subjectively, for the benefit of those who possess the ability to exert the most political influence.[136]

The Eighth Circuit Court of Appeals has acknowledged that there may be cases where land use decisions are "corrupted by the personal motives of local government ***69** officials."[137] Many theories exist as to why local governmental land use decisions tend to be biased or unfair.[138] The explanation may be as simple as the inability of a party opposing the decision to effectively voice its discontent.[139] Or it may be the result of willful misconduct rising to the level of corruption.[140] Whatever the reason, such decisions have culminated in a cloud of suspicion surrounding local governments' land use decisions,[141] and given rise to the argument that courts should not accord the same level of deference to local governments that they give to state legislatures.[142]

C. Examples of Pretextual Takings: Invidious Exclusion

This Part provides examples of municipalities utilizing eminent domain for the stated public use of the preservation of open space, but ultimately with the effect of keeping out "undesirables."[143] In most cases, municipalities do not openly admit the takings are predicated on NIMBYism. However, a convenient timing often exists between the announcement of the unwanted project, the resulting pronouncement of the need for the ***70** preservation of open space, and the subsequent taking, leading to the reasonable presumption that the municipality has conducted a pretextual taking.[144]

NIMBYism is harmful in many different contexts. NIMBYism can serve to keep out classes of people from a town or preclude important social services such as group homes and affordable housing.[145] NIMBYism, exhibited as a municipality's unfettered ability to simply take land, can also frustrate the basic tenet of property rights by unjustly taking a landowner's property to achieve an invidious purpose.[146] Furthermore, investment-based expectations are frustrated when developers' plans are thwarted, leading to the loss of considerable time and money.[147] Although NIMBYism may always exist, municipalities should not be able to invoke the grave power of condemnation for the parochial, Scrooge-like end of excluding families with children.[148]

***71** *1. Open Space Used to Exclude School-Aged Children*

NIMBYism is not a new concept for the citizens of Mount Laurel,[149] the site of one of the more brazen examples of an open space pretextual condemnation.[150] In *Mount Laurel Township v. Mipro Homes*, Mount Laurel sought to prevent the erection of additional single-family housing, citing fears of purported strains on governmental services due to a rapidly increasing population.[151] When the original development plans for the land in question called for an assisted-living facility for elderly residents,[152] Mount Laurel had no intentions of condemning the land.[153] But when the plan for the parcel changed to housing

for low- and moderate-income housing for families with school-aged children,[154] Mount Laurel enacted legislation to authorize the acquisition of the property for the preservation of open space.[155] A New Jersey appellate court held that the New Jersey Eminent Domain Act authorized condemnation for the preservation of open space, and absent a showing of "fraud, bad faith or manifest abuse," it would defer to Mount Laurel's decision to condemn the land.[156]

Mipro Homes differs markedly from most instances where a condemnation for open space "coincidentally" halts the development of an unwanted project. Instead, in *Mipro Homes*, the town was forthright in its motive for acquiring the property[157]--to halt development of the residential homes and keep out the new families with school-aged children.[158] Opponents of the ruling noted that Mipro had complied with all of Mount Laurel's rules and regulations regarding the development.[159] Patrick J. O'Keefe, chief executive officer of the New Jersey Builders Association, asked, "Why should towns bother expending time and money on adopting their plan in the first place?"[160] In a scathing dissent to the New Jersey Supreme Court's *per curiam* affirmance of *Mipro Homes*, Justice Robert Rivera-Soto noted:

> This case presents the unique and, in my view, egregious circumstance in which "the real purpose [of the condemnation] was to prevent yet another residential development in a township already under severe development pressure." In those particular circumstances, I must side with the trial court when it explained that, "if the Township desires to continue to purchase ***72** property for open space, it may do so. Those purchases may only be made from willing sellers, not by resort to condemnation of tracts under development from private owners unwilling to give up their properties and vested approvals."[161]

Public reaction mirrored that of Justice Rivera-Soto.[162] In an opinion letter in a local paper, the Vice President of an organization named as a co-defendant commented that "the [New Jersey] Supreme Court decided that homes for families are not a priority. This is another court decision that will affect the availability and affordability of all housing in New Jersey. Again, we ask 'where will people live?'"[163] Another article commented that the ruling would have a "chilling effect" on the real estate market.[164]

2. Open Space Condemnation Employed for Racial Discrimination

A subtler pretextual taking occurred in *Deerfield Park District v. Progress Development Corp.*[165] But pretextual takings are not a new occurrence; in 1959, the Progress Development Corporation (Progress) acquired approximately twenty-two acres of property slated for residential development.[166] Less than one year after the acquisition of the property, however, the Deerfield Park Board designated the property as park sites and commenced condemnation proceedings.[167] Progress alleged that Deerfield's decision to condemn the property was predicated on Deerfield's opposition to its plan to sell homes to African Americans.[168] The timing of the announcement of the plan to sell to African Americans and the commencement of the condemnation proceedings appeared to corroborate Progress's allegations; however, absent any confirmation by Deerfield, the court viewed it as mere conjecture.[169] The court noted that every private landowner's right to his land is subject to the sovereign's power of eminent domain and courts must defer to the judgment of the condemnor.[170] However, the court noted that it could interject its judgment to prevent "a clear abuse of the exercise of that right."[171] Ultimately the court held that Progress failed to substantiate its allegations of racial discrimination beyond mere conclusory statements and ***73** that the condemnation of the property for the purported purpose of a park was a valid public use.[172] Although there was no express admission, as in the *Mipro Homes* case,[173] newspaper articles published around the time of the condemnation seem to substantiate the allegations of an invidious taking.[174]

3. Open Space Used to Deter Senior Citizen Housing

In *Ramona Convent of the Holy Names v. City of Alhambra*, the city quashed a potential development project by changing the zoning designation on the petitioner's land from "Multiple Family" to "Open Space."[175] The petitioner, a Catholic girls' school, desired to sell a portion of its land[176] to a private developer, who planned to construct eighty-eight senior citizen residential units.[177] Alhambra denied the plans[178] to build the units and changed the zoning designation, citing its need for open space and the planned residential units' inconsistency with the land use and environmental requirements of the city's general plan.[179] Although the change in the zoning designation caused a substantial decrease in the value of the property,[180] the court held that the rezoning did not rise to the level of a taking because there was not a total diminution in value.[181]

74** ***4. Open Space Condemnation to Drive Away Affordable Housing

In *AvalonBay Communities, Inc. v. Town of Orange*, the town effectively denied a near-complete permit application for an affordable-housing development by issuing a moratorium on all planned residential developments.[182] In upholding the trial court's injunction against Orange's plan,[183] the court "found that the town had proceeded in bad faith and that the project plan was a pretext in an effort to thwart affordable housing on the AvalonBay parcel."[184] The court's conclusion rested on the suspicious timing of the city's announcement of its new plan, which lacked any substantive details[185]

III. JUDICIAL AND LEGISLATIVE TOOLS TO COMBAT PRETEXTUAL TAKINGS

This Part suggests both judicial and legislative solutions to mitigate the damages caused by parochial takings like the ones discussed above.[186] Although both options contain viable and sustainable solutions that would effectively address the issue,[187] this Article ***75** concludes that parochial takings should be addressed legislatively through the establishment of an objective, bipartisan land use review committee at the state level.

A. Judicial Solutions

1. Eradication of the Presumption of Rationality and Constitutionality

Courts generally defer to the findings of local governments when reviewing condemnation decisions.[188] Absent clear evidence of an abuse of legislative power to "cloak some sinister scheme,"[189] courts will grant a presumption of rationality and constitutionality when reviewing condemnation cases.[190] However, land use decisions made by local governments are often self-serving and not deserving of this presumption.[191] Furthermore, these land use decisions are often arbitrary and capricious in that they accommodate individual developers while ignoring important community impacts or even while discriminating against property owners.[192]

Not all local land use decisions, however, are afforded a presumption of rationality and constitutionality.[193] In fact, the U.S. Supreme Court has gone as far as to shift the presumption from constitutionality and rationality to a presumption of unconstitutionality and irrationality[194] in cases of exclusionary zoning ordinances due to their inherently ***76** invidious nature.[195] Similarly,[196] municipalities should not be accorded deference from the courts when condemning land to achieve the same objective.[197]

To illustrate, should a landowner bring a claim against a municipality alleging that her property was condemned based on parochial motives, the court should not accord deference to the municipality's findings. Rather, the court should review the facts surrounding the condemnation and come to its own conclusion as to whether the condemnation served a public use. Without the presumption and corollary deference to the municipality's findings, a court could very well find an insidious or parochial taking, like the ones discussed above,[198] to be unconstitutional due to bad-faith invocation of public use and lack of a legitimate state interest.[199]

2. Burden Shifting

A similar solution would be for a court to shift the burden from the plaintiff-landowner to the defendant-municipality to show that the condemnation was made in good faith. Currently, many courts view the decision to condemn land for public use as a legislative finding with which it will not interfere.[200] Although courts will intervene if there is evidence of "fraud or palpable bad faith,"[201] there is rarely a "smoking gun" indicating sinister or bad-faith motives.[202]

***77** In fact, further pushing the odds in the municipality's favor, courts place the "burden ... *upon the landowner* to show that the public use is a sham and a fraud."[203] Since open space preservation is a valid use and is certainly not a sham or a fraud,[204] all a municipality needs to do is assert that its condemnation is predicated on the need for open space preservation,[205] making it incredibly difficult for a landowner to prevail.

As a solution, where there is prima facie evidence of a pretextual taking, courts should shift the burden *to the municipality* to

show good faith or the absence of fraud, and then weigh certain factors to determine the motives behind the condemnation. Such factors should include: (1) prior environmental studies; (2) public opinion; and (3) availability of alternative land to further the preservation efforts. Evidence that the municipality initiated environmental studies after the announcement of the development plans should be viewed suspiciously.[206] Moreover, courts should examine the constituents' motives in determining the possible presence of an ulterior motive.[207] Lastly, if alternative land exists within the municipality which could have been used or condemned to further the preservation efforts, then the court should construe this factor against the municipality as an ulterior motive for condemnation. In the case where the bona fide motive is truly the preservation of open space, a steadfast refusal to utilize alternative land may be indicative of bad faith.

Similarly, if a landowner establishes prima facie evidence of discriminatory intent, courts should also shift the burden to the municipality to prove otherwise, applying the same factors discussed above for determining whether the condemnation was in good faith. If the municipality could show that it conducted environmental studies prior to the announcement of the condemnation, lack of opposition from the constituents, or evidence confirming the lack of alternative land, then the court would likely find lack of a bad-faith motive behind the condemnation.

78** ***B. Legislative Solutions

1. Planning Boards or Commissions on a State Level

Although both the eradication of the presumption of rationality and the shifting of the burden may appear to help mitigate suspect takings, one critical component of the judicial process severely limits the potential success of these methods: a court cannot conduct its own fact-finding inquiries and must adjudicate based on the facts presented.[208] On the other hand, a state-sponsored agency tasked with evaluating condemnation decisions would be able to conduct its own fact-finding investigation and review the condemnation based on a truly objective viewpoint--not solely on subjectively presented facts.[209]

The beginnings of a solution to the problem of pretextual takings can be seen in Oregon's Land Use Board of Appeals (LUBA), a state-level appeals board established by the state legislature in 1979 to review important public-policy decisions.[210] Such policy decisions include expertise in land use matters, accuracy and consistency of rules and decisions, efficiency, and lower administrative costs.[211] Although a twenty-year review and continued funding indicate LUBA's success, LUBA only has jurisdiction to adjudicate cases that are formally presented to it.[212] This limited jurisdiction prohibits LUBA from reviewing unjust land use decisions merely because the landowner failed to appeal to it.

To ensure objectivity, fairness, and the elimination of pretextual takings, all states should adopt a state-level land use review board (LURB) patterned off Oregon's LUBA.[213] If a LURB were charged with reviewing all local-government condemnation requests for open space preservation, the review would be objective, unbiased, and result in a fair and just ***79** decision.[214] Because a LURB would operate at the state level, the influence from local homeowners and other local influences[215] would not factor in its decision.[216] If the town's condemnation request is made in good faith and is not pretextual, then a LURB would rule in the town's favor. However, in cases similar to *Deerfield*, the LURB would see past the subterfuge of the condemnation and rule that the condemnation is unjust and predicated on bad faith and discriminatory motives.[217]

Furthermore, a LURB would be superior to the other proposed judicial solutions,[218] for the simple reason that judicial doctrine is resistant to change due to *stare decisis*. Beyond that, a singular entity to review local land use decisions would help eliminate the possibility of inconsistent rulings. In addition to consistent rulings, considerable cost savings and increased efficiency would be realized by both the local and state governments and the appellant landowner.[219] The trial court system is costly and a LURB would provide savings due to its streamlined process and quicker resolution.[220]

CONCLUSION

When a municipality seeks to prevent an unwanted development, the means utilized to prevent the development should not be viewed differently by the courts.[221] If a state has enacted legislation[222] that effectively prohibits the practice of exclusionary zoning, or a state court has declared such practices unlawful,[223] the town should not be permitted to achieve the same ends through alternative means.

The act of towns using local land use controls to allay their NIMBYism fears is not a new phenomenon.[224] Until the late 1970s, exclusionary zoning was a land use control ***80** exploited by towns to prevent undesirable developments.[225] As courts and state legislatures began to curtail the use of exclusionary zoning,[226] towns searched for alternative ways to achieve the same invidious objectives, and have apparently settled on abusing their eminent domain powers.[227] Instead of enacting an ordinance prohibiting affordable housing, the towns simply condemn the land slated for the undesirable project,[228] while claiming that the land will be used for the altruistic purpose of open space preservation.[229]

Fortunately for the towns, courts and state legislatures have held that open space preservation is a valid public purpose for condemnation.[230] So long as legislative findings exist to support the findings of need for open space, courts will defer to those findings and uphold the condemnation.[231] Even where the municipality has openly stated that the condemnation was to stop the construction of an unwanted project, courts have upheld the condemnation as constitutional.[232] Although state legislatures have attempted to curtail such sinister takings, most states' legislation regarding condemnation allows for such takings.[233]

Naturally the question must be asked: Why should a town be allowed to utilize alternative ways to effectuate means that have been held to be wrongful? There are two avenues for addressing this inconsistency. First, courts could review the land use decision objectively without according it a presumption of constitutionality and rationality. Alternatively, courts could shift the burden to the municipality to prove its land use decision was rational and constitutional. But, courts are constrained by precedent, and effecting a wholesale change in doctrine is unlikely. Instead, states should establish LURBs, patterned on Oregon's LUBA. LURBs would provide an objective and fair review of contested land use decisions without the requirement of adhering to judicial precedent. Furthermore, LURBs would be able to base their decisions on evidence that may not be admissible in a court proceeding.

Although NIMBY sentiments may never be eliminated, land use controls should not be used as a mechanism to perpetuate parochial views.[234] LURBs would provide an objective and fair process to review suspect condemnations and ensure municipalities do not abuse land use controls.

Footnotes

a1 J.D. Candidate, Hofstra University School of Law, 2012; Chief Information Officer, MASS Communications. The Author is grateful for the comments and guidance from Ashira Pelman Ostrow, Gary Kalbaugh, Alessandra Glorioso, Lauren Rieders, Nicholas Pershing Schwartz, and Michael Schwed. The Author would also like to thank the editors and staff of the *Arizona Journal of Environmental Law & Policy* for their efforts during the editing process. The Author would also like to give a very special thank you to his wife, Lauren, whose support and dedication allowed him to write this Article.

1 *See* Mount Laurel Twp. v. Mipro Homes, L.L.C. (*Mipro Homes*), 878 A.2d 38, 43 (N.J. Super. Ct. App. Div. 2005), *aff'd per curiam*, 910 A.2d 617 (N.J. 2006).

2 *See* S. Burlington Cnty. NAACP v. Twp. of Mount Laurel (*Mount Laurel II*), 456 A.2d 390 411-12 (N.J. 1983); S. Burlington Cnty. NAACP v. Twp. of Mount Laurel (*Mount Laurel I*), 336 A.2d 713, 717 (N.J. 1975).

3 *See Mount Laurel I*, 336 A.2d at 716.

4 Fair Housing Act, N.J. STAT. ANN. § 52:27D-302 to 329 (West 2011). The Fair Housing Act was adopted in response to the South Burlington County NAACP cases. Brian R. Lerman, Note, *Mandatory Inclusionary Zoning - The Answer to the Affordable Housing Problem*, 33 B.C. ENVTL. AFF. L. REV. 383, 400 (2006). The Act established a Council on Affordable Housing (COAH), which requires each community within New Jersey to house their "fair share" of the affordable housing needs of the state. *Id.* at 401-02. The success of the COAH has been questionable at best. *Id.* at 401. In fact, there are plans to outright abolish the COAH and return the control of planning for affordable housing to the local governments. Matthew Kadosh, *In Case You Missed It: Local Government Favors Christie's Proposed COAH Plans*, PASSAIC VALLEY TODAY, June 10, 2010, *available at* http:// www.state.nj.us/governor/news/news/552010/approved/20100610a.html.

5 Lerman, *supra* note 4, at 400.

[6] *Mipro Homes*, 878 A.2d at 42-43. The original development plan for the sixteen acres was to build an assisted-living facility. *Id.* at 43. *See also* Kathleen Bird, *Eminent Domain; Test for Yet Another New Twist*, N.J. LAW, Apr. 17, 2006, at 1.

[7] *Mipro Homes*, 878 A.2d at 41-42.

[8] *See Mount Laurel I*, 336 A.2d at713; *see also*, N.J. STAT. ANN. § 52:27D-302 to 329.

[9] *See Mipro Homes*, 878 A.2d at 43.

[10] *See generally*, William B. Stoebuck, *A General Theory of Eminent Domain*, 47 WASH. L. REV. 553 (1972) (discussing the history of eminent domain).

[11] *Id.* at 555.

[12] Kohl v. United States, 91 U.S. 367, 371 (1876).

[13] U.S. CONST. amend. V; *see also* Kelo v. City of New London, 545 U.S. 469, 472 (2005) (holding that the Constitution requires just compensation when property is seized for a public purpose).

[14] *See Kelo*, 545 U.S. at 469; Ilya Somin, *The Limits of Backlash: Assessing the Political Response to Kelo*, 93 MINN. L. REV. 2100, 2101 (2009); CASTLE COAL., http://www.castlecoalition.org/index.php?option=com_ content&task=view&id=510 (last visited Oct. 12, 2010).

[15] *See* New Gourmet Concepts, Inc. v. Siedo Invs. Co., 988 So. 2d 961, 962 (Ala. 2007) (exercising eminent domain to erect a teaching hospital); Burma Hills Dev. Co. v. Marr, 229 So. 2d 776, 777 (Ala. 1969) (exercising eminent domain to build a public road).

[16] *See Kelo*, 545 U.S. at 469 (defining public use).

[17] *See* Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1018-19 (1992) (holding that preservation of open space is a constitutionally valid purpose for condemnation); *see also* FOREST SERV., U.S. DEP'T OF AGRIC., FS-889, OPEN SPACE CONSERVATION STRATEGY (2007) (defining open space as "forests, grasslands, farms, ranches, wetlands, riparian areas, and urban greenspaces") [hereinafter OPEN SPACE CONSERVATION STRATEGY].

[18] *Lucas*, 505 U.S. at 1018-19 (1992).

[19] *See, e.g.*, OPEN SPACE CONSERVATION STRATEGY, *supra* note 17.

[20] *See infra* Part IV.B.

[21] *See* Mount Laurel Twp. v. Mipro Homes, L.L.C. (*Mipro Homes*), 878 A.2d 38, 49 (N.J. Super. Ct. App. Div. 2005), *aff'd per curiam*, 910 A.2d 617 (N.J. 2006) (holding that the township exercised eminent domain to halt development).

[22] *See, e.g.*, *id.*; *infra* Part III.C. One of the more recent notable cases involving a town's opposition to an unwanted project was *Kelo*

v. City of New London, 545 U.S. 469 (2005). The unwanted project, which the town was unsuccessful in blocking, included acres of land for an office complex, hotels, and condominiums. Five years after the holding in the *Kelo*, Pfizer announced that it was leaving the city and moving 1400 jobs to another campus located in another city. Patrick McGeehan, *Pfizer to Leave City That Won Land-Use Suit*, N.Y. TIMES, Nov. 13, 2009, at A1. The city's biggest office complex would now be empty adjacent to the land that was cleared of homes to make room for a hotel and condominiums that were never built. *Id.*

[23] McGeehan, *supra* note 22.

[24] William A. Fischel, *Voting, Risk Aversion, and the NIMBY Syndrome: A Comment on Robert Nelson's "Privatizing the Neighborhood"*, 7 GEO. MASON L. REV. 881, 881 (1999); see also Christopher Serkin, *Big Differences for Small Governments: Local Governments and the Takings Clause*, 81 N.Y.U. L. REV. 1624, 1656 (2006) (arguing that NIMBYs are motivated both by a desire to protect property values and by a desire to preserve community character); Ashira Pelman Ostrow, *Minority Interests, Majority Politics: A Comment on Richard Collins' "Telluride's Tale of Eminent Domain, Home Rule, and Retroactivity"*, 86 DENV. U. L. REV. 1459, 1467-68 (2009).

[25] Fischel, *supra* note 24, at 881. See *infra* Part III.A. for a more detailed overview of NIMBYism.

[26] *See infra* Conclusion.

[27] *See* S. Burlington Cnty. NAACP v. Twp. of Mount Laurel (*Mount Laurel I*), 336 A.2d 713, 724-25 (N.J. 1975) (holding that zoning decisions could not be used to prevent low- and moderate-income housing); *see also* Part II.

[28] *See infra* Part II.

[29] *See infra* Part III.

[30] *See id.* Although this Article will not discuss the other potential effects of pretextual takings, it is important to mention one possibly devastating effect. If municipalities continue to take land in bad faith, it may call into question the legitimacy of governmental decision-making. *See* Carol M. Rose, *Planning and Dealing: Piecemeal Land Controls as Problem of Local Legitimacy*, 71 CAL. L. REV. 837, 837 (1983) ("But during the last two decades, judges and legal scholars have shown increasing doubt that local governments make land development decisions fairly and rationally--that is, with a reasonable distribution of burdens among individuals, and with the care and deliberation commensurate with the long-term implications of land development.").

[31] *See infra* Part IV.

[32] *See infra* Conclusion.

[33] *See infra* Conclusion.

[34] Jonathan Witten, *Adult Supervision Required: The Commonwealth of Massachusetts's Reckless Adventures with the Affordable Housing and Anti-Snob Zoning Act*, 35 B.C. ENVTL. AFF. L. REV. 217, 217-18 (2008). In 1916, New York passed a zoning ordinance that prompted the federal government to study the effects of zoning. MICHAEL ALLAN WOLF, THE ZONING OF AMERICA: EUCLID V. AMBLER 26-31 (2008) (describing the role of New York's ordinance in the rise of zoning).

[35] Note, *State-Sponsored Growth Management as a Remedy for Exclusionary Zoning*, 108 HARV. L. REV. 1127, 1127 (1995) [hereinafter *State-Sponsored Growth*].

[36] *Id.* at 1127.

[37] *Id.* at 1127-28.

[38] *See* Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926). The Court held that zoning ordinances are a valid exercise of a state's police power, and an ordinance will not be declared unconstitutional unless it is "clearly arbitrary and unreasonable."

[39] *State-Sponsored Growth*, *supra* note 35, at 1129 (noting that New Jersey, California, Illinois, Michigan, New Hampshire, New York, Pennsylvania, and Virginia have all invalidated zoning ordinances).

[40] *See* S. Burlington Cnty. NAACP v. Twp. of Mount Laurel (*Mount Laurel I*), 336 A.2d 713, 724-25 (N.J. 1975).

[41] *State-Sponsored Growth*, supra note 35, at 1130.

[42] *See, e.g.*, Britton v. Chester, 595 A.2d 492, 498 (N.H. 1991) (holding that an ordinance restricting multi-family homes was invalid since it did not provide for a sufficient range of housing); Berenson v. New Castle, 415 N.Y.S.2d 669, 679 (N.Y. App. Div. 1979) (holding that a local zoning ordinance was unconstitutional for failing to provide adequate multi-family housing); Arnel Dev. Co. v. City of Costa Mesa, 178 Cal. Rptr. 723, 729 (Cal. Ct. App. 1981) (holding that a zoning ordinance was invalid due to its exclusion of multi-family residences).

[43] Michael Amon, *New Limits on Cell Towers*, NEWSDAY (New York), Sept. 22, 2010, at A2. The Town of Hempstead enacted ordinances restricting new cell phone towers. *Id.* Town residents cited fears of a diminution in property values and aesthetics as the basis for their objection to the towers. *Id.* The restrictions forbid the construction of the towers within 1500 feet from homes, day care centers, schools, and houses of worship. *Id.* The cell phone companies may construct towers within those areas if they can prove there is an "urgent coverage gap." *Id.* However, in order to prove the need, they will need to conduct expensive studies and pay for the town to hire consultants to review those studies. *Id.*; *see* WASHINGTON TOWNSHIP, PA., ZONING ORDINANCE § 901.

[44] Ashira Pelman Ostrow, *Process Preemption in Federal Siting Regimes*, 48 HARV. J. ON LEGIS. 289, 291-92 (2011). The NWPA regulated the siting of high-level nuclear waste facilities. *Id.* (citing 42 U.S.C. §§ 10101-10270). The Low Level Radioactive Waste Policy Act of 1980 and its 1985 Amendments (collectively, the "LLW Act") dealt with the siting of low-level nuclear waste facilities. *Id.* While the NWPA expressly designated a site for a facility, the LLW Act merely provided incentives to influence state and local governments' siting decisions. *Id.*

[45] 47 U.S.C. § 332 (2006). For example, the statute prohibits "environmental effects of radio frequency emissions" as a factor when deciding the placement of a tower. § 332(c)(7)(B)(iv). It also requires state or local governments to provide substantial written evidence supporting the denial of a tower placement request. § 332(c)(7)(B)(iii).

[46] 47 U.S.C. § 10172. An amendment to the NWPA selected the Yucca Mountain site as the primary high-level radioactive waste repository site. *Id.* Nevada challenged the constitutionality of the statute on the grounds that the federal designation of Yucca Mountain required state consent. *See* Nevada v. Watkins, 914 F.2d 1545 (9th Cir. 1990) (holding that the decision to site a radioactive waste repository in Yucca Mountain was neither unconstitutional nor contrary to federal or state law).

[47] *See, e.g.*, Robert J. Hopperton, *A State Legislative Strategy for Ending Exclusionary Zoning of Community Homes*, 19 URB. L. ANN. 47, 47-49 (1980) (citing examples of state legislation from Arizona, California, Colorado, Idaho, Maryland, Michigan, Minnesota, Montana, New Jersey, New Mexico, Ohio, Rhode Island, South Carolina, Tennessee, Vermont, Virginia, and Wisconsin that address the issue of community homes for developmentally disabled persons); Lerman, *supra* note 4, at 387-89.

[48] Peter J. Kulick, Comment, *Rolling the Dice: Determining Public Use in Order to Effectuate a "Public-Private Taking" - A Proposal to Redefine "Public Use"*, 2000 L. REV. MICH. ST. U. DET. C. L. 639, 643 (2000).

[49] William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782, 785 (1995).

[50] U.S. CONST. amend. IV. In 1897, the Supreme Court held that the Takings Clause applied to states by means of the Fourteenth Amendment. *See* Chicago, B. & Q.R. Co. v. City of Chicago, 166 U.S. 226 (1897).

[51] *See* Babcock v. Cmty. Redevelopment Agency, 306 P.2d 513, 521 (Cal. Dist. Ct. App. 1957).

[52] Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 241 (1984) (quoting United States v. Gettysburg Elec. Ry. Co., 160 U.S. 668, 680 (1896)).

[53] *Id.*

[54] *See, e.g.*, Deerfield Park Dist. v. Progress Dev. Corp., 174 N.E.2d 850, 853 (Ill. 1961); *Midkiff*, 467 U.S. at 240-41.

[55] Kulick, *supra* note 48, at 646.

[56] *Id.*

[57] *See infra* Part III.B.3.

[58] *See* New Gourmet Concepts, Inc. v. Siedo Invs. Co., 988 So. 2d 961, 962 (Ala. 2007) (exercising eminent domain to erect a teaching hospital); Burma Hills Dev. Co. v. Marr, 229 So. 2d 776, 777 (Ala. 1969) (exercising eminent domain to build a public road); Neptune Assocs., Inc. v. Consol. Edison Co., 509 N.Y.S.2d 574, 575 (N.Y. App. Div. 1986) (condemning land to erect a new public utilities station).

[59] *See e.g.*, Kelo v. City of New London, 545 U.S. 469, 484-86; Berman v. Parker, 348 U.S. 26, 33-34 (1954).

[60] *Berman*, 348 U.S. at 31. Although the Act does not specifically define what constitutes a "blighted area," it does state:
"Substandard housing conditions" means the conditions obtaining in connection with the existence of any dwelling, or dwellings, or housing accommodations for human beings, which because of lack of sanitary facilities, ventilation, or light, or because of dilapidation, overcrowding, faulty interior arrangement, or any combination of these factors, is in the opinion of the Commissioners detrimental to the safety, health, morals, or welfare of the inhabitants of the District of Columbia.
Id. at 28 n.1.

[61] *Id.* at 31-34.

[62] *See id.* at 35.

[63] *Id.* at 34-36.

[64] 545 U.S. at 472-474.

[65] *Id.* at 475.

[66] *Id.*

[67] *Id.*

[68] *Id.* at 473.

[69] *Id.*

[70] *Id.* at 484.

[71] *Id.* at 469.

[72] *See, e.g.*, Twp. of W. Orange v. 769 Assoc., 800 A.2d 86, 89-91 (N.J. 2002); Babcock v. Cmty. Redevelopment Agency, 306 P.2d 513, 521 (Cal. Dist. Ct. App. 1957); Timmons v. S.C. Tricentennial Comm'n, 175 S.E.2d 805, 814 (S.C. 1970); Mount Laurel Twp. v. Mipro Homes, L.L.C. (*Mipro Homes*), 878 A.2d 38, 49 (N.J. Super. Ct. App. Div. 2005), *aff'd per curiam*, 910 A.2d 617 (N.J. 2006); *see also* 26 AM. JUR. 2d *Eminent Domain* § 32 (2011) ("A reviewing court will not upset a municipality's decision to use its eminent domain power in the absence of an affirmative showing of fraud, bad faith, or manifest abuse.").

[73] *See* Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1006-07 (1992).

[74] *See* 848 N.Y.S.2d 214, 215 (N.Y. App. Div. 2007).

[75] *See Lucas*, 505 U.S. at 1018-19 (1992).

[76] *Id.* at 1006-07.

[77] *See id.* at 1007.

[78] *See id.* at 1024 n.11.

[79] *See id.* at 1018-19.

[80] 848 N.Y.S.2d 214, 215 (N.Y. App. Div. 2007).

[81] *Id.* at 215.

[82] *Id.* at 216-17.

[83] *Id.* at 216.

[84] *Id.*

[85] *Id.* at 214 (emphasis added).

[86] *Id.* at 222.

[87] *See* Lucas v. S.C. Coastal Council, 505 U.S. 1003 (1992).

[88] *See* CONN. GEN. STAT. §§ 23-8 to 23-9 (2010); N.J. STAT. ANN. § 40:61-1 (West 2010).

[89] *See* 2011 Conn. Acts 11-80 (codified as CONN. GEN. STAT. § 23-8).

[90] 2004 N.J. Laws 152 (codified at N.J. STAT. ANN. § 40:61-1).

[91] *See, e.g.*, OPEN SPACE CONSERVATION STRATEGY, *supra* note 17; UNIFORM CONSERVATION EASEMENT ACT (1981); OPEN SPACE INSTITUTE, *A Plan for the Land: The Open Space Institute's Strategic Plan 2007-2009*, http:// www.osiny.org/site/PageServer?pagename=Feature_Strategic_Plan (last visited Nov. 7, 2010). Open space preservation ensures continued water supplies, natural resources, and wildlife. OPEN SPACE CONSERVATION STRATEGY, *supra* note 17, at 3.

[92] *See* OPEN SPACE CONSERVATION STRATEGY, *supra* note 17; *see also* OPEN SPACE INSTITUTE, *supra* note 91.

[93] NATURAL RESOURCES CONSERVATION SERVICE, U.S. DEP'T OF AGRIC., *Community Assistance and Farmland Preservation*, http:// www.nrcs.usda.gov/programs/fppa/(last visited July 17, 2011); OPEN SPACE INSTITUTE, *supra* note 91.

[94] LINDA E. HOLLIS & WILLIAM FULTON, Open Space Protection: Conservation Meets Growth Management 5 (Brookings Inst. Ctr. on Urban and Metro. Policy Apr. 2002).

[95] *Id.* at 3.

[96] *Id.*

[97] *Id.*

[98] *Id.*

[99] *Id.*

[100] *Id.* at 5. The non-urban-type amenities that were provided typically included parks, playgrounds, and natural preserves. *Id.*

[101] *Id.* at 6.

[102] *Id.* at 25.

[103] *See* OPEN SPACE INSTITUTE, *supra* note 91; OPEN SPACE CONSERVATION STRATEGY, *supra* note 17; NATURAL RESOURCES CONSERVATION SERVICE, *supra* note 93.

[104] *See* OPEN SPACE INSTITUTE, *supra* note 91; *but see* William A. Fischel, The Evolution of Zoning since the 1980s: The Persistence of Localism 15 (Sept. 2010) (unpublished manuscript) (on file with Dartmouth College), *available at* http://ssrn.com/abstract=1686009.

[105] *See* OPEN SPACE CONSERVATION STRATEGY, *supra* note 17.

[106] *Id.* at 3.

[107] *Id.* at 4.

[108] *See* N.Y. ENTVL. CONSERV. LAW § 1.0101 (Consol. 2010).

[109] *Id.*

[110] *See, e.g.*, WIS. STAT. § 700.40 (2010); R.I. GEN. LAWS §§ 42-17.9-1 to 17.9-8 (2010); MO. REV. STAT. §§ 67-860 to 67-910 (2010).

[111] *See* Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1018-19 (1992).

[112] See John R. Nolon, *Historical Overview of the American Land Use System: A Diagnostic Approach to Evaluating Governmental Land Use Control*, 23 PACE ENVTL. L. REV. 821, 831 (2006).

[113] *See id.*

[114] *See id.* at 832. Congress began to adopt federal laws to address such broad inter-jurisdictional environmental issues as land, air, and water pollution. *Id.*

[115] *See id.* at 833.

[116] *Id.*

[117] *Id.*

[118] Such techniques included "planned unit development districts, floating zones, special use permits" along with "more flexibility in locating development in appropriate places" and "the purchase of development rights, the transfer of development rights, and the recreation of traditional neighborhood districts to give even greater authority to local governments to marshal the forces of development and arrange buildings appropriately on the land." *Id.*

[119] *See infra* Part III.C.

[120] Fischel, *supra* note 24, at 881.

[121] *See id.*

[122] *Id.* There have been studies dispelling the fear that affordable housing in a community lowers the overall market value of the surrounding homes. *See* MAXFIELD RESEARCH INC., A STUDY OF THE RELATIONSHIP BETWEEN AFFORDABLE FAMILY RENTAL HOUSING AND HOME VALUES IN THE TWIN CITIES (Sept. 2000); Ingrid Gould Ellen et al., *Does Federally Subsidized Rental Housing Depress Neighborhood Property Values?* (Public Law & Legal Theory Working Paper Series Working Paper No. 05-02, 2005), *available at* http:// ssrn.com/abstract=721632.

[123] Serkin, *supra* note 24, at 1656. Subjective enjoyment can be described as a desire to preserve a community's "character, independent of any effect on property values." *Id.*

[124] Fischel, *supra* note 24, at 881. *See also* Jessica Peck Corry, Independence Inst. Prop. Rights Project, *At the Crossroad of Condemnation: The Debate Over the Use of Eminent Domain for Private Development and Open Space*, at 11 (Jan. 2006), http://i2i.org/articles/IP_1_2006_b.pdf; Richard Briffault, *Our Localism: Part II - Localism and Legal Theory*, 90 COLUM. L. REV. 346, 443 (1990).

[125] Fischel, *supra* note 24, at 881. *See also* Corry, *supra* note 124, at 11; Briffault, *supra* note 125, at 443.

[126] Serkin, *supra* note 24, at 1656. Although hard to measure, invidious motives, such as racial discrimination, can result in NIMBYism. *Id.*

[127] Fischel, *supra* note 24, at 881-82 ("NIMBYs are mostly nearby homeowners who object to further development within their community.").

[128] *Id.*

[129] *See* Mount Laurel Twp. v. Mipro Homes, L.L.C. (*Mipro Homes*), 878 A.2d 38 (N.J. Super. App. Div. 2005), *aff'd per curiam*, 910 A.2d 617 (N.J. 2006); Fischel, *supra* note 24, at 882-83.

[130] *See* Serkin, *supra* note 24, at 1644-54.

[131] *See id.* at 1647-48.

[132] *See id.* at 1648.

[133] *See id.*

[134] *See id.*

[135] *See id.* at 1648.

[136] *See id.*

[137] Bituminous Materials, Inc. v. Rice County, Minn., 126 F.3d 1068, 1071 (8th Cir. 1997). The court noted that some in a decision-making position may abuse their power if the decision benefits them personally. *Id.*

[138] Rose, *supra* note 30, at 855. Rose writes:
A legislative body drawn from too small or too homogeneous a constituency may be dominated by a single interest or faction.

Factional domination may take varying forms. One is sheer corruption, made possible in smaller representative bodies because a limited number of persons have influence which must be bought. Another possibility is domination by a few who are perceived by others as the powerful. The decisions of these few can affect many within the community; others must curry their favor, and even larger interests find difficulty in organizing against their "cabals." Finally, and perhaps most feared by Madison, is the factional domination created by a popular "passion"--sometimes a sudden whim, sometimes a longstanding prejudice--that carries a majority before it.
Id.

139 *See id.* at 855-56.

140 *See id.* at 855.

141 *See id.* at 856.

142 *See id.*

143 *See infra* Part IV.B.

144 *See* S. Burlington Cnty. NAACP v. Twp. of Mount Laurel (*Mount Laurel II*), 456 A.2d 390, 390 (N.J. 1983); S. Burlington Cnty. NAACP v. Twp. of Mount Laurel (*Mount Laurel I*), 336 A.2d 713, 713 (N.J. 1975); *see also infra* Part IV.B. In *Peter Rock Associates v. Town of North Haven*, Peter Rock proposed a 122-lot subdivision for a 182-acre property. 756 A.2d 335, 338-39 (Conn. Super. Ct. 1998). The town conducted an environmental review which determined that "[t]he impact of the development on the wetlands will be, it said, 'significant' and will 'eventually change the overall character and quality of the wetlands.'" *Id.* at 339 (quoting an environmental review report). The town eventually commenced condemnation proceedings and acquired the land. *Id.* at 338. As with the other cited examples, the timing of the actions by the government implies a pretextual taking. The decision to preserve the land as open space was made after the developer submitted its plans to develop the residential properties. *Id.* at 338.
Another instance occurred in Osterville, Massachusetts, where there was a dispute regarding the Village of Osterville's plan to condemn between thirty and thirty-five acres of land for use by the local fire department. *Town Strikes Back at COMM on Darby Land*, THE BARNSTABLE PATRIOT (Apr. 25, 2003), http://www.barnstablepatriot.com/text/Archive0006_00000000004747.htm. The Town of Barnstable "believes that it is an effort to block an 87-unit affordable housing project in the works for part of the ... land." *Id.* The Village of Osterville eventually voted and approved the acquisition of an easement to protect a water-supply well. *What's Next for Darby? That's Up to the Council*, THE BARNSTABLE PATRIOT (May 19, 2005), http:// www.barnstablepatriot.com/home2/index.php?option=com_content&task=view&id=% 206727&Itemid=30h; *Darby Water Easement OK'd*, THE BARNSTABLE PATRIOT (Apr. 13, 2006), http://www.barnstablepatriot.com/home2/index.php?option=com_ content&task=view&id=9045&Itemid=30. The Village of Osterville is one of seven villages located within the Town of Barnstable. TOWN OF BARNSTABLE, COMPREHENSIVE PLANS (Mar. 2005), http:// www.town.barnstable.ma.us/growthmanagement/comprehensiveplanning/lcp/AppendiciesVillagePlans/ Osterville%20Village.pdf.

145 *See infra* Part III.C.; Michael B. Gerrard, *The Victims of NIMBY*, 21 FORDHAM URB. L.J. 496, 496 (1994).

146 *See infra* Part III.C.

147 *See id.*

148 *See* Mount Laurel Twp. v. Mipro Homes, L.L.C. (*Mipro Homes*), 878 A.2d 38 (N.J. Super. Ct. App. Div. 2005), *aff'd per curiam*, 910 A.2d 617 (N.J. 2006).

149 *See Mount Laurel I*, 336 A.2d at 715.

[150] *See Mipro Homes*, 878 A.2d at 38.

[151] *Id.* at 40.

[152] *Id.* at 43.

[153] *See id.*

[154] *See id.*

[155] *Id.*

[156] *Id.* at 49.

[157] *See id.* at 43-44.

[158] *See id.*

[159] Robert G. Seidenstein & Dana E. Sullivan, *Court: Open Space Trumps Development*, N.J. LAWYER, Dec. 11, 2006, at 1.

[160] *Id.*

[161] Mount Laurel Twp. v. Mipro Homes, L.L.C., 910 A.2d 617, 619 (N.J. 2006) (alterations omitted).

[162] Richard S. Van Osten, *Property-Taking for Open Space Unfair to Families*, ASHBURY PARK PRESS, Dec. 15, 2006, at 23A.

[163] *Id.*

[164] Bob Ivry, *Land-Seize Ruling Roils N.J. Builders*, THE RECORD (Bergen County, NJ), Dec. 13, 2006, at B01. Patrick O'Keefe, CEO of the New Jersey Builders Association, contended that, even if an applicant is in full compliance with zoning ordinances and rules, the municipality can still condemn the land. *Id.*

[165] *See* 174 N.E.2d 850, 854 (Ill. 1961).

[166] *Id.* at 852.

[167] *Id.*

[168] *Id.* at 853.

[169] *Id.* at 855.

[170] *Id.* at 853.

[171] *Id.*

[172] *Id.* at 862. The original case was remanded to the trial court for a hearing to determine whether the taking served a public purpose. *Id.* at 856. The trial court held for the town and the Supreme Court of Illinois affirmed on appeal. *Id.* at 862.

[173] Mount Laurel Twp. v. Mipro Homes, L.L.C. (*Mipro Homes*), 878 A.2d 38, 49 (N.J. Super. Ct. App. Div. 2005) *aff'd per curiam*, 910 A.2d 617 (N.J. 2006).

[174] *See* Donald Janson, *All-White Town Wins Illinois Suit*, N.Y. TIMES, Dec. 1, 1962, at A14. John W. Hunt, an attorney for the defendant development corporation, noted that "'the technique of condemnation' had been used by local officials from coast to coast to prevent housing integration." *Id.* There were also reports of vandalism during the development of the homes. *Vandals Mar Homes*, N.Y. TIMES, Dec. 18, 1959, at A26. It is important to note that an equal protection claim would likely fail since evidence must be proffered to show that the condemnation served a discriminatory purpose. Washington v. Davis, 426 U.S. 229, 240-41 (1976). It would not be enough to show that the effect of the condemnation kept out a suspect class. *Id.*

[175] 26 Cal. Rptr. 2d 140, 141-42 (Cal. Ct. App. 1993).

[176] *Id.* at 141.

[177] *Id.* at 142.

[178] *Id.*

[179] *Id.* at 141; Elizabeth Lu, *Girls' School Urged to Sue Alhambra for Thwarted Land Sale*, L.A. Times, JAN. 14, 1990, at J3.

[180] *Ramona Convent of the Holy Names*, 26 Cal. Rptr. 2d at 147.

[181] *Id.* at 147. The school was in debt after rebuilding an administration building that was destroyed by an earthquake. *See* Lu, *supra* note 179. Without the proceeds from the division and sale of the baseball field, the school would be forced to reduce programs offered to the school's students. *See id.*

[182] 775 A.2d 284, 290 (2001).

[183] *Id.* at 302. The bad-faith motive of the town is further supported by the "fierce resistance" of the town's constituents toward the plans to build the affordable housing. Lisa Prevost, *Housing Plan Gives Town a Jolt*, N.Y. TIMES, May 9, 2010, at RE11.

[184] *AvalonBay Cmtys.*, 775 A.2d at 292.

[185] *Id.*

[186] *See supra* Parts IV.A.-B. One solution, albeit extreme, is the outright prohibition of condemnation for open space preservation. The New York Assembly has recently proposed legislation that would drastically reduce municipalities' power to condemn land for preservation of open space. S. 341, 2011 Leg. Sess. (N.Y. 2011). The proposed legislation would only grant funding for Open Space Conservation Projects if undertaken with "a willing seller." *Id.* The legislation further states that "[t]he use of eminent domain in connection with any open space conservation project shall be limited to lands with respect to which the owner has

consented to the use of eminent domain or where the use of eminent domain is required to quiet title." *Id.* Nebraska had also introduced legislation that would prohibit the condemnation of land for certain preservation projects, but it was subsequently quashed. *Continue Work to Close Trial Gap*, LINCOLN J. STAR (Neb.), Apr. 29, 2009, at B7. An amendment to the proposed bill would allow condemnation only if approved by the legislature. *Id.* The state senator who introduced the bill reasoned that the condemnation of land for such purposes should be questioned because it would be condemned for a "non-essential" purpose. Senator Pankonin, *A Local Issue Prompts a New State Policy* (May 5, 2010), http://www.senatorpankonin.com/column2.asp?ID=75. While this bill does not directly address the issue of local governmental abuse of condemnation powers, it does evince support for further restrictions on local governments. *See* S. 341; *Continue Work to Close Trial Gap*, *supra* note 187; Sara C. Bronin, *The Quiet Revolution Revived: Sustainable Design, Land Use Regulation, and the States*, 93 MINN. L. REV. 231, 267-68 (2008). However, because open space preservation is important to society, an outright ban on condemnation for such purposes would likely cause more harm than good. In cases where land is not owned by the municipality and the current landowner refuses to sell, condemnation may be the only option to transfer ownership and preserve the land.

187 *See infra* Part V.

188 *See, e.g.*, Twp. of W. Orange v. 769 Assoc., 800 A.2d 86, 571-72 (N.J. 2002); Babcock v. Cmty. Redevelopment Agency, 306 P.2d 513, 521 (Cal. Dist. Ct. App. 1957) ("It has been held in many cases that where the right of eminent domain is vested in a municipality, an administrative body ... the question as to whether the circumstances justify the exercise of the power in a given instance is not a judicial one."); Timmons v. S.C. Tricentennial Comm'n, 175 S.E.2d 805, 814 (1970) ("Whether there is a necessity, a permanent taking or a public use are primarily legislative questions, and there is a presumption that the use contemplated is a necessary, permanent and public one."); 26 AM. JUR. 2d *Eminent Domain* § 32 (2011) ("A reviewing court will not upset a municipality's decision to use its eminent-domain power in the absence of an affirmative showing of fraud, bad faith or manifest abuse.").

189 *Timmons*, 175 S.E.2d at 814.

190 *Id.*

191 *See* Daniel R. Mandelker & A. Dan Tarlock, *Shifting the Presumption of Constitutionality in Land-Use Law*, 24 URB. LAW 1 (1992).

192 *Id.* at 5.

193 *Id.* at 12-15.

194 *See, e.g.*, Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 270-71 n.21 (1977); Nollan v. California Coastal Comm'n, 483 U.S. 825, 834 n.3 (1987); *see also* Mandelker & Tarlock, *supra* note 191, at 12-15.

195 Mandelker & Tarlock, *supra* note 191, at 12-15. Federal courts only shift presumptions when constitutional rights are violated or for a suspect classification. *Id.* However, state courts are more likely to shift the presumption. *Id.* This typically occurs when a zoning is limited to a small area, which gives rise to perceived defects in the decision-making process. *Id.* The presumption has also been shifted when zoning restrictions are placed on nontraditional families. *Id.*

196 *See* S. Burlington Cnty. NAACP v. Twp. of Mount Laurel (*Mount Laurel I*), 336 A.2d 713, 716 (N.J. 1975).

197 *See* Mount Laurel Twp. v. Mipro Homes, L.L.C. (*Mipro Homes*), 878 A.2d 38, 49 (N.J. Super. Ct. App. Div. 2005), *aff'd per curiam*, 910 A.2d 617 (N.J. 2006).

198 *See infra* Part III.C.

[199] *See, e.g.*, Pequonnock Yacht Club, Inc. v. City of Bridgeport, 790 A.2d. 1178, 1187-88 (2002) (holding that the City's plans for redevelopment of the property were unconstitutional because they were unreasonable and not an essential component of the city's plan). The city was ordered to reconvey the property back to the original owner as a result of the holding. *Id.*

[200] *See, e.g.*, Babcock v. Cmty. Redevelopment Agency, 306 P.2d 513, 521 (Cal. Dist. Ct. App. 1957); Timmons v. S.C. Tricentennial Comm'n, 175 S.E.2d 805, 814 (S.C. 1970); *Mipro Homes*, 878 A.2d at 49; *see also* 26 AM. JUR. 2d *Eminent Domain* § 32 (2011) ("A reviewing court will not upset a municipality's decision to use its eminent-domain power in the absence of an affirmative showing of fraud, bad faith or manifest abuse.").

[201] *See Babcock*, 306 P.2d at 521.

[202] *See supra* Part IV.B. Some courts have gone as far as to hold that a decision to condemn land for the preservation of open space predicated on a desire to halt development will not constitute bad faith. *See Mipro Homes*, 878 A.2d at 37. Instead, courts will rely on open-texture tests such as a purpose to "cloak some sinister scheme" before they will intervene. *Timmons*, 175 S.E.2d at 814.

[203] *Timmons*, 175 S.E.2d at 815 (emphasis added). In some instances, the land may be condemned for the stated purpose of open space and subsequently used for another purpose. *See* City and County of San Francisco v. Coyne, 86 Cal. Rptr. 3d 255 (Cal. Dist. Ct. App. 2008) (condemning land for the stated purpose of open space); KAREN MAUNEY-BRODEK, CITY AND CTY. OF S.F. RECREATION AND PARK DEP'T PLANNING DIVISION, PRESENTATION AND DISCUSSION OF THE NORTH BEACH LIBRARY (Sept. 18, 2008) (discussing using the condemned land for the site of a new library), *available at* http://sf-recpark.org/ftp/uploadedfiles/meetings/Recreation_and_Park_Commission/supporting/2008/item9FinalJoeDiMaggioNorthBeachMasterPla.

[204] *See* Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1018-19 (1992).

[205] *See infra* Part IV.B.

[206] *See* Twp. of Hamilton v. Fieldstone Assoc. LLP, No. L-2622-04, 2008 WL 1820682 (N.J. Super. Ct. App. Div. April 24, 2008). In *Township of Hamilton*, the Town only first added the contested land to its Open Space and Recreation Plan after the developer announced plans to build residential units. *See id.*

[207] Evidence found of "fierce resistance" of the town's constituents toward the plans to build the affordable housing. Lisa Prevost, *Housing Plan Gives Town a Jolt*, N.Y. TIMES, May 9, 2010, at RE11.

[208] David M. Metres, The National Impact Test: Applying Principled Commerce Clause Analysis to Federal Environmental Regulation, 61 HASTINGS L.J. 1035, 1061 (2010).

[209] *See id.*

[210] *See* Edward J. Sullivan, *Reviewing the Reviewer: The Impact of the Land Use Board of Appeals on the Oregon Land Use Program, 1979-1999*, 36 WILLAMETTE L. REV. 441, 446 (2000). In 1979, Oregon statutorily established a state-level appeals board with jurisdiction to review local land use decisions that had been successful. *See* OR. REV. STAT. § 197.825 (2010) (declaring the LUBA to have exclusive jurisdiction to review any local, special district, or state agency land use decision). Other states have created appeals boards but limited their jurisdiction to specific land use decisions. *See, e.g.*, MASS. GEN. LAWS ch. 40B, § 22 (2010) (granting authority to the Housing Appeals Committee to review denials of affordable housing application).

[211] *See* Sullivan, *supra* note 210 at 446-47. A twenty-year review of LUBA has highlighted its success, which is further evinced by the continued funding and support from the state legislature. *Id.* at 448-49. Only 26% of the LUBA cases appealed to the Court of Appeals were remanded. *Id.* at 498 n.449.

[212] *See id.* at 498.

[213] *See id.*

[214] Jerry L. Anderson & Daniel Luebbering, *Zoning Bias II: A Study of Oregon's Zoning Commission Composition Restrictions*, 38 URB. LAW. 63, 78 (2006) (noting that "the availability of LUBA review may ameliorate the bias problem").

[215] *See supra* Part IV.A.

[216] *See* Anderson & Luebbering, *supra* note 214.

[217] *See supra* Part IV.B.2.

[218] *See supra* Parts V.A.1-2.

[219] Sullivan, *supra* note 210, at 447, 500.

[220] *Id.*

[221] *See* Mandelker & Tarlock, *supra* note 191, at 12-15 (discussing instances of presumption eradication and shifting for exclusionary zoning cases); Babcock v. Cmty. Redevelopment Agency, 306 P.2d 513 (Cal. Dist. Ct. App. 1957) (finding deference to legislatures for condemnation proceedings).

[222] The New Jersey Fair Housing Act established an agency to oversee municipalities' compliance with state-mandated affordable housing requirements. N.J. STAT. ANN. § 52:27D-301 to 334.

[223] *See* S. Burlington Cnty. NAACP v. Twp. of Mount Laurel (*Mount Laurel I*), 336 A.2d 713, 724 (N.J. 1975).

[224] Towns have used exclusionary zoning to keep out unwanted individuals or to prevent undesirable projects. *See* Lerman, *supra* note 4, at 387-89.

[225] *Id.*

[226] *Id.*

[227] *See supra* Part IV.B.

[228] *See id.*

[229] *See id.*

[230] *See, e.g.*, Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1016 (1992); CONN. GEN. STAT. §§ 23-8 to 23-9 (2010); N.J. STAT. ANN. § 40:61-1 (2010).

[231] *See* Babcock v. Cmty. Redevelopment Agency, 306 P.2d 513 (Cal. Dist. Ct. App. 1957); Timmons v. S.C. Tricentennial Comm'n, 175 S.E.2d 805, 814 (S.C. 1970).

[232] Mount Laurel Twp. v. Mipro Homes, L.L.C. (*Mipro Homes*), 878 A.2d 38, 38 (N.J. Super. App. Div. 2005), *aff'd per curiam*, 910 A.2d 617 (N.J. 2006).

[233] Somin, *supra* note 14, at 2120.

[234] *See supra* Part IV.B.