

# Introduction

*At the Cutting Edge 2009* is the second in an annual series of writings selected from *The Urban Lawyer*, the premier scholarly journal of the ABA's Section of State and Local Government Law. Last year, *At the Cutting Edge 2008* was a runaway success in bringing the best-of-the-best articles on recent developments to Section members and a wider audience.

The Section's work is done largely through its committees. One of them is land use, but several others are inevitably drawn into issues related to land use. Each spring these committees prepare annual reports on recent developments that are published in *The Urban Lawyer*. While Section members all receive *The Urban Lawyer* and can therefore read the reports there, the Section leadership concluded that a single volume with articles focused on land use would be useful as a reader and give the Section an opportunity to make the reports available to those who are not section members. It would also provide a collection appropriate for law and planning students, most probably as a secondary text. The series *At the Cutting Edge* has already accomplished these objectives.

This year's edition consists of eight articles of nine to seventeen pages on remarkably diverse land use issues: interpretation of the Telecommunications Act, exactions and impact fees, green buildings laws including the critical preemption issue, ethics, comprehensive planning, public use and pretext in eminent domain, and the nettlesome issue of how far government can go in controlling unruly speakers at public hearings.

What sets these articles apart is that they are not only intellectually sophisticated and cutting edge but also filled with practical advice that land use lawyers and planners can put to work at once. While most of the authors are well known and widely regarded preeminent authorities, the Section is also pleased to present the impressive work of some up-and-comers whose names will soon be commonplace.

Bob Foster, first up last year and again this year (by reason of being the earliest in the alphabet, as the articles are so arranged), tells us, as his title says, "What the Meaning of 'May' May Be: Recent Developments in Judicial Review of Land Use Regulation of Cellular Telecommunications Facilities under the Telecommunications Act of 1996." It may sound more arcane than it is. The issue is the extent to which local governments can "apply traditional features of zoning oversight"

and use their discretion in considering impacts of telecommunications facilities. Wireless facilities are everywhere, and this article is of particular help in understanding how the law has evolved and where the line is drawn between federal override and local rule.

Andy Gowder and Bryan Wenter bring us up to speed with “Recent Developments in Exactions and Impact Fees.” This is a perennial hot topic for the Section, and the authors dig deep into the most important developments, including whether legislatively imposed fees are exactions and how the courts have treated some governmental actions that look like exactions but are called something else, such as off-site mitigation and in-lieu fees. Who ever thought that *Nollan* and *Dolan* could be this interesting?

Erin Burg Hupp’s discussion, “Recent Trend in Green Buildings Laws: Potential Preemption of Green Building and Whether Retrofitting Existing Buildings Will Reduce Greenhouse Gases and Save the Economy,” identifies and illuminates two looming issues in the green building movement. In the end, we learn that local government must be careful because federal law may indeed preempt local legislation as happened in Albuquerque. She also provides some useful insights into the tough problem of analyzing the potential benefits of green building.

Ask someone about legal ethics in land use and chances are you will identify Patricia Salkin as the person in the know. Her report this year, “2009 Ethical Considerations in Land Use,” is a string of vignettes with lessons learned. You have to marvel that officials get themselves into these jams. Patty has some good, practical advice for all of us. You may find surprising the story of how the court decided a case in which a board member’s daughter rented an apartment from the applicant developer and another member of the board apparently shared an address with the developer. Not a problem, said the court.

As Patty Salkin is to ethics, Ed Sullivan is to comprehensive planning. Just as the first warm spring rain on a full-moon night brings on the migration of the spotted salamanders every year, with the spring comes “Recent Developments in Comprehensive Planning Law,” his annual tour-de-force of every important decision and legislative enactment on comprehensive plans. He never stops there: each year he offers up an analytic framework to help explain the differences in the way the various states address planning.

Rob Thomas runs an informative blog on inverse condemnation, <http://www.inversecondemnation.com>, and follows these developments seemingly by the hour. Thus, he has written “Recent Developments in Public Use and Pretext in Eminent Domain” to describe the hodgepodge

of lower federal court rulings that have no apparent pattern or consistency when it comes to determining whether claimed public benefits are pretextual. Maybe this is an area for state legislation, as the U.S. Supreme Court suggested in *Kelo* (*Kelo v. New London*, 545 U.S. 469 (2005)): “We emphasize that nothing in our opinion precludes any State from placing further restrictions on its exercise of the takings power. Indeed, many States already impose ‘public use’ requirements that are stricter than the federal baseline.”

Next, in “Recent Developments in Regulatory Takings Jurisprudence,” Christopher Whitcomb and Mary Lynn Huett jump into that mare’s nest of takings jurisprudence—the ripeness rule—and somehow escape alive. They use the word “befuddle” to describe what the rule does to the courts, and how right they are. Their comprehensive and evenhanded treatment of the issue is remarkable.

The end cap and mildly madcap piece in this collection is the light-hearted but enlightening article by Paul Wilson and Jennifer Alcarez, “But It’s My Turn to Speak! When Can Unruly Speakers at Public Hearings Be Forced to Leave or Be Quiet?” According to Julie Cheslik, the editor of *The Urban Lawyer*, the volume was barely out when calls and e-mails started coming in asking for reprints. Public participants gone wild are an-all-too-common problem. Paul and Jennifer survey the relevant case law, analyze it, and come up with four clear points on what local governments must do if they are to succeed in maintaining law and order at zoning meetings.

Many people might think the “Big Eight” refers to the former NCAA-affiliated Division I-A college athletic association. The ABA’s Section of State and Local Government Law sees its Big Eight as the masterful collection of articles in *At the Cutting Edge 2009*. Congratulations to all the authors on a job well done.

David L. Callies, FAICP  
Benjamin A. Kudo Professor of Law  
William S. Richardson School of Law  
Honolulu  
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