

## ***Coniston Corp v Village of Hoffman Hills:* How to Make Procedural Due Process Disappear**

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### I. INTRODUCTION: A HOLMES DISCIPLE

It is an honor to join so many distinguished colleagues in the grand celebration of Richard A. Posner's twenty-five years as a judge on the Seventh Circuit. His broad intellect, economical style, and tremendous productivity from the bench—not to mention his Herculean achievements as a scholar—make him the most influential appellate court judge of our generation. As befits this occasion, however, I see no reason to examine one of his many opinions with which I agree. Rather, as befits our relationship of now thirty-five years, I choose to write about a highly influential Posner opinion with which I and, I expect, many others disagree: *Coniston Corp v Village of Hoffman Estates*.<sup>1</sup> That case offers more latitude to local government officials on land use decisions than is commonly found in most courts, and it is in my view all too sympathetic to the claims of expertise and discretion advanced on behalf of land planners.

To set the stage, here are the simple facts of the underlying dispute. Coniston had acquired several hundred acres of undeveloped land near the Village of Hoffman Estates, which were then annexed to the Village by mutual agreement. The parties took the unusual step of incorporating the Village's land use ordinance into that annexation agreement. The agreement did not set out specific procedures for reviewing any application to develop that parcel, but it did require Coniston to develop a general plan for the entire tract, which it did, and to prepare more specific site plans for each section of the entire plot prior to its development. The master agreement first sent each particular plan to a Village Plan Commission whose recommendations were passed on to the Village Board of Trustees for its approval or disapproval.<sup>2</sup>

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<sup>1</sup> 844 F2d 461 (7th Cir 1988).

<sup>2</sup> *Id* at 462.

Coniston used this method to secure approval for several tract developments. This litigation arose when Coniston presented to the Plan Commission a proposal to put five one-story commercial buildings on seventeen acres of land, with a total square footage of 181,000 square feet. This time, however, the Village Board of Trustees balked after receiving a detailed favorable recommendation from the Plan Commission. Initially, it denied the proposal without giving any reasons for departing from the recommendation, although one trustee did express the view (her view, at least) that the Village already had too much unrented office space. Pressed by Coniston to review its first decision, the Board went into executive session after which it stuck to its earlier decision, again without explanation.<sup>3</sup> Obviously miffed, Coniston brought a § 1983 action challenging the decision under the Due Process Clause, while waiving, at least initially, any takings claim with respect to the permit denial.<sup>4</sup> Judge Norgle dismissed the suit in an unreported opinion, and Judge Posner affirmed that decision—Judges Coffey and Easterbrook, concurring—in a provocative, wide-ranging, elegant, and ultimately unsatisfying opinion.

Before analyzing *Coniston's* particulars, it is important to recall that Posner's larger constitutional vision generally takes its cue from Oliver Wendell Holmes,<sup>5</sup> but more from the deferential Holmes of *Lochner v New York*,<sup>6</sup> and less from the conflicted Holmes of *Pennsylvania Coal Co v Mahon*.<sup>7</sup> Posner never lacks for self-confidence in making up his mind about legal matters, both great and small. He has that rare knack of cutting right to the heart of any issue, and uses his economic sophistication to expose the foolishness of those who don't get the efficiency of the common law or the importance of free and open competition in the marketplace. Yet when the topic shifts to constitutional law, the judicial champion of the Hand formula, which requires an open-ended judicial balancing of costs and benefits, uses all his intellectual firepower to explain why courts can't make the multi-

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<sup>3</sup> Id at 462–63.

<sup>4</sup> Id.

<sup>5</sup> For the affinity, see generally Richard A. Posner, ed, *The Essential Holmes: Selections from the Letters, Speeches, Judicial Opinions, and Other Writings of Oliver Wendell Holmes, Jr.* (Chicago 1996).

<sup>6</sup> 198 US 45 (1905) (finding that the state did not have the constitutional authority to regulate the number of hours a baker can work).

<sup>7</sup> 260 US 393 (1922) (finding that prohibiting a party from exercising its contractual right to mine coal if doing so causes subsidence to dwelling houses constitutes an unconstitutional taking).

ple considerations of “distributive and corrective justice” needed to pass on the constitutionality of various government actions.<sup>8</sup>

In taking this constitutional posture, Posner is, of course, bound as a lower court judge to follow the Supreme Court’s lead. But in this instance, he shows more deference to local government officials than any Supreme Court precedent requires. Like Holmes, he does not take this stance like some progressive justices—think of Louis Brandeis or William Brennan—who actually favor the legislative initiatives that they shield from constitutional attack. Quite the opposite, Posner loves to expose the folly of statutes whose constitutionality he passionately defends, as, for example, in his powerful economic critique of an ill-considered Chicago rent control ordinance.<sup>9</sup> Nor does Posner suffer from an unaccountable blind spot to risks that protectionism and anticompetitive activities pose to economic well-being.<sup>10</sup> And he never stoops to making silly empirical claims to justify perverse economic regulation. His stock in trade is the outlandish demurrer, not the meek denial. His deep conviction is that our Constitution allows a myriad of foolish and misguided legislative schemes that only knaves would support. He is “brutal”—one of Posner’s famous words—about the underlying realities, just like his hero, Holmes.

These strong tendencies in Posner’s constitutional thought predate *Coniston*. The futility of *Coniston*’s procedural and substantive due process claims offers only further testimony to Posner’s relentless intellectual consistency. One wag has suggested that Posner’s constitution really reads, “Any person may be deprived of life, liberty, or property, without due process of law.” This is how *Coniston* reads.

The short description of *Coniston* supplied above should make it evident that the procedural due process argument relating to the Board’s arbitrary and capricious judgment is the pivotal point in the case. But for powerful rhetorical reasons, Posner chooses to set the stage with an extended digression meant to place his stamp on the entire field of property-related constitutional claims. In sequence, he starts with takings, moves on to substantive due process, both dicta, only to decide the case by rejecting *Coniston*’s procedural due process

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<sup>8</sup> *Coniston*, 844 F2d at 468 (arguing that legislatures are better suited than courts to make zoning decisions because the various criteria for such decisions are too “open-ended” for courts to evaluate effectively).

<sup>9</sup> See *Chicago Board of Realtors, Inc v City of Chicago*, 819 F2d 732, 745 (7th Cir 1987) (Posner concurring) (“Thus it is clear that the Chicago ordinance does not deny ‘substantive due process,’ though not because it is a reasonable ordinance, which it is not.”).

<sup>10</sup> See *Coniston*, 844 F2d at 467 (noting critically that the rejection of *Coniston*’s permit was likely a protectionist act designed to insulate existing building owners from new competition).

claim.<sup>11</sup> His implicit gloss asks, why should anyone take the last objection seriously when it is cut from the same cloth as the first two? To sense how Posner's mind works requires a close reading of each portion of his opinion with an eye on two themes. The first is the underlying case for constitutional deference to political branches in property-related cases. The second looks at his treatment of the relevant precedents. That journey is instructive, for readers always learn more from Posner's mistakes than from the sound insights of lesser thinkers.

## II. A QUICK TOUR OF TAKINGS

On the takings issue, Coniston filed its initial complaint before the Supreme Court gave its cautious blessing to suits demanding compensation for total temporary takings in *First English Evangelical Lutheran Church v Los Angeles County*.<sup>12</sup> But even if we get past pleading points on waiver and amendment, there is in principle the ticklish question of whether the denial of a permit counts as a total loss of use, because it is never clear what lesser uses might have been allowed. In any event, *First English* contains an elastic exception to the basic rule that removes the duty of compensation during any "normal" planning period. In addition, Posner notes without any comment that landowners cannot sue in federal court until they have exhausted their administrative remedies,<sup>13</sup> which was not done here.<sup>14</sup> This procedural obstacle course is designed to ensure that zoning challenges based on the federal Constitution never darken the doorsteps of the federal courts. In any event, the modest takings bubble in *First English* has been effectively punctured because of the feeble damages allowable for temporary takings.<sup>15</sup> Posner breaks no new ground here.

Undeterred, Posner continues with his digression by noting, with clinical indifference, that the market value formula of compensation necessarily confiscates the subjective value of the inframarginal landowner, because, as he rightly says, not everyone has a for sale sign in

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<sup>11</sup> See *id.* at 469 (distinguishing between the due process requirements for legislative versus adjudicative decisionmaking, and finding that the requirements were sufficiently satisfied in this case).

<sup>12</sup> 482 US 304, 321 (1987) (holding that "where the government's activities have already worked a taking of all use of property, no subsequent action by the government can relieve of the duty to provide compensation for the period during which the taking was effective").

<sup>13</sup> See *Williamson County Regional Planning Commission v Hamilton Bank*, 473 US 172, 194-95 (1985) (finding that a property owner can have no takings claim against the government unless they have availed themselves of state and federal compensatory remedies and been denied just compensation).

<sup>14</sup> See *Coniston*, 844 F2d at 463.

<sup>15</sup> For some of the complications, see *Wheeler v City of Pleasant Grove (Wheeler IV)*, 896 F2d 1347, 1351 (11th Cir 1990) (awarding \$59,841 in damages based on applying the market rate of return to the "value lost as a result of the regulatory restrictions," which was \$525,000).

front of his property.<sup>16</sup> But his oddest diversion goes to the “public use” requirement, which he says may carry with it the negative implication that the state owes no compensation under the Takings Clause when it takes private property solely for private use, leaving the opening for a remedy under the Due Process Clause. A strange form of textualism lies behind this suggestion, for it supposes that the greater government abuse is one that receives no constitutional protection at all. Posner seeks to close this gap by invoking the Due Process Clause, but to no avail, because ironically that clause in connection with substantive due process claims has been read to contain the same public use limitation.<sup>17</sup> He then tries to give plausibility to this view with the backhanded observation that the Supreme Court “may”—against the constitutional text, of course—actually believe that the state cannot take property, even with compensation, for private use.<sup>18</sup> Yet ironically the one point on which the Supreme Court is clear is that the public use language bars local governments from forcing outright transfers from one private party to a second.<sup>19</sup> The problem with the Court’s formulation is that the endless array of conceivable benefits and purposes makes it easy to clothe any transaction in the requisite garments.<sup>20</sup> The effect of Posner’s musings is to make the takings law look like a game without constitutional meaning and purpose. And since it is just a game, it is easy to see why only the most minimal judicial scrutiny is needed.

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<sup>16</sup> See *Coniston*, 844 F2d at 464.

<sup>17</sup> See *Chicago, Burlington & Quincy Railroad Co v City of Chicago*, 166 US 226, 236 (1897):

But if, as this court has adjudged, a legislative enactment, assuming arbitrarily to take the property of one individual and give it to another individual, would not be due process of law as enjoined by the Fourteenth Amendment, it must be that the requirement of due process of law in that amendment is applicable to the direct appropriation by the State to public use and without compensation of the private property of the citizen.

<sup>18</sup> See *Coniston*, 844 F2d at 464 (positing that the Takings Clause may be broad enough to encompass takings for private use and discussing Supreme Court opinions that support this broad view of the Clause).

<sup>19</sup> See *Kelo v City of New London*, 545 US 469, 477 (2005) (“[I]t has long been accepted that the sovereign may not take the property of *A* for the sole purpose of transferring it to another private party *B*, even though *A* is paid just compensation.”).

<sup>20</sup> See, for example, *id* at 480–83 (citing previous Supreme Court cases finding that transfers of property from one set of private owners to another for purely economic purposes met the “public use” requirement of the Takings Clause); *Hawaii Housing Authority v Midkiff*, 467 US 229, 241 (1984) (“But where the exercise of the eminent domain power is rationally related to a conceivable public purpose, the Court has never held a compensated taking to be proscribed by the Public Use Clause.”).

## III. SUBSTANTIVE DUE PROCESS

After polishing off the Takings Clause, Posner turns to due process, where he delights in shredding that well-known oxymoron. He then takes after that “tenacious but embattled” principle by noting its historical kinship with the traditional notion of “the law of the land,” which may capture shades of substantive law but surely does not clinch the case.<sup>21</sup> It is worth noting that the first Justice Harlan never used the Due Process Clause of the Fourteenth Amendment to apply the Takings Clause to the states. Rather, his view depended on the meaning of the phrase: “Due process of law as applied to judicial proceedings instituted for the taking of private property for public use means, therefore, such process as recognizes the right of the owner to be compensated if his property be wrested from him and transferred to the public.”<sup>22</sup>

There is, I think, good reason to ask whether the just compensation and public use requirements work themselves into the Constitution against state action through the Due Process Clause. My own preference is to find these in the Privileges or Immunities Clause of the Fourteenth Amendment, at least before its meaning was eviscerated in the *Slaughter-House Cases*.<sup>23</sup> But no matter where this twin guarantee is located, it bears heavily on Posner’s treatment of the underlying problem. In his view, the historical issues take a back seat to the institutional concern that the open-ended tests of substantive due process give the courts an “uncanalized discretion” to invalidate all legislation, including all zoning legislation.<sup>24</sup> But, in reality, the tests announced are far more stringent than this; even most zoning ordinances sadly flunk them.

Posner cites with approval *Euclid v Ambler Realty Co.*,<sup>25</sup> which of course decisively endorsed the low standard of review in zoning cases.<sup>26</sup> But the Realty Company’s challenge to that zoning ordinance did not ask the Supreme Court to become a roving commission dispensing its own brand of social justice. The landowner questioned the Village’s decision to break an integrated sixty-eight acre plot border-

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<sup>21</sup> See *Coniston*, 844 F2d at 465.

<sup>22</sup> *Chicago, Burlington & Quincy Railroad Co v City of Chicago*, 166 US 226, 236 (1897).

<sup>23</sup> 83 US 36, 76 (1872) (upholding a state statute barring the slaughtering of animals within designated areas; restricting the privileges and immunities of citizens to those in their capacity as citizens of the United States). For my views, see generally Richard A. Epstein, *Of Citizens and Persons: Reconstructing the Privileges or Immunities Clause of the Fourteenth Amendment*, 1 NYU J L & Liberty 334 (2005).

<sup>24</sup> See *Coniston*, 844 F2d at 465.

<sup>25</sup> 272 US 365 (1926).

<sup>26</sup> See *id.* at 391 (finding that a local ordinance zoning land for residential purposes “bears a rational relation to the health and safety of the community”).

ing on the Nickel Plate Railway into three divisions, thereby knocking off around 75 percent of the value of the land. So now run the case through Harlan's mill. Initially, it seems hard to deny that the right to develop land is one of the sticks in the common law bundle of ownership rights. Its loss in this case has a clear and measurable effect on market value, for which no compensation is supplied. Perhaps one could justify this loss in value by pointing to some external gains generated by the zoning decision. But clearly there were no health and safety issues that tipped the balance in favor of the Village. The social justification has to lie in some claim that other neighbors are better off as a consequence of the restriction, but the zoning law also depresses nearby land by cutting out the opportunity to open complementary businesses. From a social point of view *Euclid's* zoning law looks like a dead loser, regardless of its ostensible purpose. Justice Sutherland in *Euclid* did mention how some zoning ordinances could deal with fire and contagion, but never paused to explain why that particular zoning ordinance served any of these legitimate police power ends.<sup>27</sup> But wholly out of context, he did make an ominous reference about how apartment houses could become "parasites" in respectable neighborhoods.<sup>28</sup>

So the law starts off on the wrong foot because it denies the most powerful due process/takings claim imaginable in cases of land use regulation. *If* the private property includes the loss of private property rights short of actual dispossession, *Euclid* presents the ideal case to lower the boom on a local government. The zoning ordinance produces great losses for the owner and no systematic gains for any one else.

Posner is keenly aware that after *Euclid* the takings law gives oodles of protection to someone who is thrown off a sliver of his land, but does little (not quite nothing) for owners stripped of a substantial chunk of their use and development rights.<sup>29</sup> Of course, rational owners would gladly surrender the former in order to keep the latter, but Posner does not raise a peep in protest of a distinction that makes no economic sense. All the codification efforts in the Restatement of Ser-

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<sup>27</sup> See *id* (stating that zoning regulations "excluding from residential areas the confusion and danger of fire, contagion, and disorder, which in greater or less degree attach to the location of stores, shops, and factories" are constitutionally valid).

<sup>28</sup> See *id* at 394 ("[I]n such sections very often the apartment house is a mere parasite, constructed in order to take advantage of the open spaces and attractive surroundings created by the residential character of the district.").

<sup>29</sup> See *Coniston*, 844 F2d at 466 ("[I]n cases under the takings clause the courts distinguish between taking away all of the owner's rights to a small part of his land and taking away (through regulation) a few of his rights to all of his land, and grant much broader protection in the first case.").

vitudes<sup>30</sup> were intended to remove the divide between easements (which allow others to enter property) and covenants (which restrict land use) that forms the arthritic backbone of the regulatory state.

Posner justifies his version of the status quo by surmising that “[n]o one thinks” that substantive due process should be read so broadly as to cover all cases of “erroneous zoning decisions.”<sup>31</sup> But the defenders of strong property rights never make that claim. They (all right, we) only insist that reasonable means be used to achieve reasonable health and safety objectives (of which there were none in *Coniston*). Given the uncertainty of future events, all the law can expect of regulators is that they make good faith and reasonable efforts to avoid overbroad restrictions. The due process/takings challenge won’t bite where the zoning board uses the wrong ratio to determine the number of parking spaces needed per apartment in a new high rise. But it counts as a huge leap of faith to say that difficult borderline cases make the health and safety standard unworkable so that a local zoning board should be allowed to zone for whatever reasons it chooses.

More concretely, if Posner is correct that anticompetitive and protectionist acts remove virtually all protection given by the Due Process Clause and Takings Clause, then the entire enterprise of property protection is at an end. After all, it is not hard to conjure up at least some pro- or anticompetitive justification for any system of land use regulation. But by the same token, Posner offers no explanation as to why requiring a health or safety justification would lead to the invalidation of government initiatives that were worth preserving. It is an odd case for him to play the institutional trump card, without any consideration of how any alternative standard might play out in *easy* cases, perhaps to improve the operation of local governments which, as Posner so well knows, are rife with factionalism and local preferences, which a landowner, unlike a developer, cannot counteract by exercising the exit option. Nor is there any glimmer of recognition that his supposed multifaceted institutional justifications could in principle play out equally well with the outright confiscation of land. Why bother to monitor these if courts have no institutional capabilities to second-guess planning commissions? Take the Posner institutional objection seriously and every constitutional takings challenge to land use regulation is DOA—which is what he wants.

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<sup>30</sup> Restatement (First) of Property (Servitudes) (1944).

<sup>31</sup> *Coniston*, 844 F2d at 466.



#### IV. PROCEDURAL DUE PROCESS

The discussions on takings and substantive due process are, of course, preliminary maneuvers. The sorry state of takings law cannot be laid at Posner's feet, for it is the brainchild of the majority of Supreme Court justices who have long shared this same world view. The same cannot be said, however, of the procedural due process challenges in *Coniston*, which go several steps beyond what the law otherwise requires. Coniston's argument raises two key questions. The first is whether the proceeding in question is an adjudicative one to which some due process rights attach, and the second asks, what rights, if any, should attach in adjudicative hearings. On both these questions, Posner takes the common deferential stance in land use to new heights.

##### A. Legislative versus Adjudicative Hearings

Administrative law contains a solid distinction between legislative and adjudicative action. That distinction was easier to apply before the rise of the administrative state with all its hybrid bodies. But in a world populated with boards and commissions, it is harder to classify particular functions. Is the body in question formulating policy, or is it deciding existing cases in accordance with preexisting policies? Within the administrative context, the requirements of procedural due process attach to adjudicative procedures where the property of one, or a very small group of persons, stands alone against the full might of the law. The same individualized protections are not needed to validate legislative action where political coalitions can take up the slack. For example, in *Bi-Metallic Investment Co v Colorado State Board*,<sup>32</sup> Justice Holmes held that the requirements of procedural due process did not apply to a proportionate tax increase for *all* property owners within the taxing district: "Where a rule of conduct applies to more than a few people it is impracticable that every one should have a direct voice in its adoption."<sup>33</sup> That same distinction has been carried over into the zoning context.<sup>34</sup> The basic approach treats initial zoning *plans* as legislative. Rezoning is generally treated the same way, but the rule can shift in cases of "spot zoning" that target one or just a few individual parcels. *Individual* permit applications are invariably

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<sup>32</sup> 239 US 441 (1915).

<sup>33</sup> *Id.* at 445.

<sup>34</sup> See, for example, *Fasano v Board of County Commissioners*, 164 Ore 574, 507 P2d 23, 26-28 (1973) (accepting the Board as the governing body and finding that its rezoning decision was a judicial exercise of authority, and was therefore held to a stricter standard of review in determining whether the change conformed to the comprehensive plan), disapproved on other grounds by *Neuberger v City of Portland*, 288 Ore 585, 607 P2d 722, 725 (1980).

treated as adjudicative actions requiring procedural protections—except in *Coniston*, which treated the decision of the Village Board of Trustees as a legislative act.

In reaching this astonishing conclusion, Posner cites *Bi-Metallic* approvingly, but does not pause to mention the radically different factual contexts in the two cases. He then argues that “[i]t is not labels that determine whether action is legislative or adjudicative.”<sup>35</sup> He then ignores totally the spot zoning cases and wrongly states that it is “usually true” that zoning law treats approvals or disapprovals of site plans as legislative acts. To support this determination he notes that the Village Board of Trustees is the “governing body” of Hoffman Estates and, further, that its own zoning ordinances contain no explicit criteria on which to base its judgments.<sup>36</sup>

Wholly unconvincing: the Village Board of Trustees occupied two roles, and only a love of labels could suggest that it acts in a legislative capacity in reviewing a specific recommendation from the Plan Commission just because the Board takes on that role when it formulates general zoning policy. If the denial of a particular application over the recommendation of the Plan Commission is legislative, then nothing the Village Board does is ever adjudicative, and all procedural protections are gone so long as one body serves dual functions in small municipalities.

Nor is the lack of stated standards decisive. Recall that the ordinance was incorporated into the annexation agreement, which *Coniston* wanted in order to protect its interests down the road. It makes no sense to think that its inclusion was intended to give the Village Board *carte blanche* on zoning applications. The combination of the setting, ordinance, and annexation agreement makes the Board’s decision the quintessential adjudicative act.

## B. Uses of the Permit Power

The next question asks what happens once permit denials are treated as adjudicative actions.<sup>37</sup> To answer that question, start with this simple proposition: the state *never* becomes a co-owner of property simply through the exercise of its permit power. Let that be done, and then the state could wipe out the value of private property in two steps instead of one. First, it passes a permitting statute—or two or three—and then, pursuant to its self-proclaimed powers as a co-owner, it denies the original owner the right to build or use his property. No

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<sup>35</sup> *Coniston*, 844 F2d at 468.

<sup>36</sup> *Id.*

<sup>37</sup> For my general view on this question, see Richard A. Epstein, *The Permit Power Meets the Constitution*, 81 Iowa L Rev 407 (1995).

system of private property could survive if states could use permits to bootstrap themselves into that dominant position. It is for this reason that permits, no matter what the context, can never be denied at will, but must only be denied for cause. The situation is the polar opposite of cases when private property owners exercise their right to exclude, which can (at least at common law) be done for a good reason, a bad reason, or no reason at all.

This distinction between state permits and private owners has powerful functional roots. The landowner may be able to exclude anyone from his land without cause, but there are normally lots of other owners, who, either for love or money, are willing to let some people in. The power over this or that land is not a power over the market, given these numerous close substitutes. When, as with traditional common carriers, a property owner traditionally did exert that level of control, then the legal rule quickly shifted so that all customers of the railroad had the right to service on reasonable and nondiscriminatory terms.<sup>38</sup> The rejections had to be for cause—an inability to pay the proper fare, the risk of disruptive passengers, overcrowding, and the like. Today, common carriers usually operate in competition with each other, so that it is a fair question whether the older duty limitation on service should continue to apply. But a parallel erosion of power by new entry never happens to state agencies armed with the permit power. Nor does the presence of two permitting agencies increase the options for the property owner. Multiple permits only compound the problem by forcing an owner to comply with both restrictions at the same time. The “for cause” for rejection test is a weak but necessary reed to stand against the legal monopoly of the permitting body.

Any for-cause test with teeth has to contain two components. The first addresses the ends in view. Allow an infinite set of reasons to justify the denial of a permit and we are back in the at-will universe for permitting authorities. What subclass of reasons then count as legitimate? It is hard to give a comprehensive answer that works for all permits, but with respect to land use permits, health, safety, pollution, and environmental risks rise to the top of pile. Questions of infrastructure support and density matters often come into play as well. Finally,

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<sup>38</sup> For the origins of the doctrine, see *Allnut v Inglis*, 104 Eng Rep 206, 210–11 (KB 1810) (Lord Ellenborough) (finding that “if, for a particular purpose, the public have a right to resort to his premises and make use of them, and he have a monopoly in them for that purpose, if he will take the benefit of that monopoly, he must as an equivalent perform the duty attached to it on reasonable terms”); for its extension to common carriers, see H.W. Chaplin, *Limitations upon the Right of Withdrawal from Public Employment*, 16 Harv L Rev 555, 556–57 (1903) (describing the fundamental law of common carriers as requiring carriers to carry any member of the public at all times, to serve each person on the same terms, and to charge reasonable rates).

considerations of community “character” and neighborhood “aesthetics” sometimes make the list, but only with obvious misgivings about their elastic nature. The basic insight is that the inevitable physical adjacencies between neighbors tend to enlarge the class of relevant externalities, which is likely to be more extensive than, say, in service markets. But on the back end, the one class of justifications that cannot meet the standard are the economic protectionism and anticompetitive behavior that Posner’s brutal realism embraces in *Coniston*.

The next question is what set of rules and procedures help ensure that a governing board uses its power to advance this (largish) class of legitimate ends. Transparency is an important value, which in turn requires meeting the familiar due process requirement that an administrative body give its reasons when it turns down a permit application. In this connection, we sometimes face the reverse vice of wearing down applicants with a war of attrition by happily giving frustrated applicants too many reasons for administrative refusals or delays on too many occasions.<sup>39</sup>

It should be evident on this case that the minimal performance of the Hoffman Estates Board is deficient both with respect to the ends it invokes and the (want of) reasons that it offers to support those goals. As Posner rightly observes, there is no reason to think that the Village of Hoffman Estates has better information about the economic prospects for real estate development.<sup>40</sup> Yet some casual prediction on that score is the only scrap of evidence offered to explain the permit refusal. Posner infers from this feeble record some form of naked protectionism of existing firms in the marketplace—which need not be true. In reaching this striking conclusion, he relies on a decision of the First Circuit in *Creative Environments, Inc v Estabrook*,<sup>41</sup> which challenged the decision of the Town of Bolton to block the plaintiff’s large new housing development.<sup>42</sup> But the invocation of this case is troubling. First read the full paragraph of Judge Campbell’s thorough opinion in *Creative Environments*, from which Posner quotes only the italicized portion in the manner set out immediately below:

Plaintiffs also cite to *Cordeco Development Corp. v. Santiago Vasquez*, 539 F.2d 256 (1st Cir.) . . . . In *Cordeco*, another equal

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<sup>39</sup> Twenty-year periods are not uncommon for the process to run its course before the United States Supreme Court. One of many recent cases that required the stamina of a marathon runner is *Monterey v Del Monte Dunes at Monterey, Ltd*, 526 US 687 (1999) (resolving a case in which the central dispute between the parties was nearly twenty years old).

<sup>40</sup> See *Coniston*, 844 F.2d at 466 (noting that the plaintiffs’ information on how to maximize the value of the property is “almost certainly a better guess than governmental officials would make”).

<sup>41</sup> 680 F.2d 822, 833 (1st Cir 1982).

<sup>42</sup> See *id* at 833.

protection case, this court affirmed a section 1983 judgment against Puerto Rican officials who, the jury found, had improperly denied the plaintiff a permit to extract sand while granting such permits to a more influential, politically connected rival. The federal basis for liability in *Cordeco*, however, was never expressly litigated . . . and the facts of that case—involving officials favoring a politically powerful, wealthy businessman with a public license over a less influential but equally deserving competitor—are significantly different from the present case. . . . Here it is merely indicated *that town officials are motivated by parochial views of local interests which work against plaintiffs' plan and which may contravene state subdivision laws*. Apparently no rival developer advocating CEI's ambitious plan would have had more success than Barber. Plaintiffs would thus have us rule that the due process clause to the United States Constitution was violated when Bolton's Planning Board, for the purpose of protecting what it viewed as the town's basic character, openly interpreted state subdivision laws and a state court decision in ways which frustrated plaintiffs' large-scale housing development of a particular design.<sup>43</sup>

The italicized portion is then embedded in a new sentence that reads:

Thus we agree with the First Circuit's decision in *Creative Environments* . . . that the fact "that town officials are motivated by parochial views of local interests which work against plaintiffs' plan and which may contravene state subdivision laws" (or, we add, local ordinances) does not state a claim of denial of substantive due process.<sup>44</sup>

The devilish switch in meaning should be evident when the two passages are compared. By way of background, note that Judge Campbell in *Creative Environments* stressed that the Bolton planning board gave seven separate and specific reasons for rejecting the developer's proposal,<sup>45</sup> which cured any defect of indefiniteness that might have lodged in the governing statute. The reference to "parochial" motives in *Creative Environments* offered not the slightest support for permit denials based on rank protectionism or anticompetitive behavior. Indeed, *Creative Environments* condemns those corrupt practices in *Cordeco*, which explains why that permit was properly denied while this one was properly allowed. Taken in context, the

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<sup>43</sup> Id at 832–33 (emphasis added).

<sup>44</sup> *Coniston*, 844 F2d at 467.

<sup>45</sup> *Creative Environments*, 680 F2d at 826.

word “parochial” refers to the desire of the local commission to retain the town’s “basic character,” which is one of those elusive aesthetic objectives that sometimes operates as a shield for anticompetitive behavior, but which in and of itself falls today within the legitimate ends for the planning power. Campbell highlights the subdued nature of his uneasiness about what Bolton characterizes as the reason for the denial of the permit by putting the words “it is merely indicated” before the words Posner quotes. When Posner carefully excises these words he turns *Creative Environments* completely on its head. A case that is foursquare against economic protectionism is read as supportive of the very proposition it rejects.

#### V. REMEDY

Posner’s evisceration of procedural due process in *Coniston* made it unnecessary for him to decide what remedy *Coniston* should have against the Village Board. The range of possibilities tracks those available in principle when zoning restrictions are found to constitute a regulatory taking. At one time, the supposed remedy for these violations was a decree that invalidated the planning commission’s order, which allowed it to start again a second time.<sup>46</sup> And a third time until, who knows. . . . The futility of this remedy should be obvious. It allows the local government to delay land development indefinitely by making a series of denials, each which offers a tiny variation from the previous decree. The decision to reject all damage awards was justified by the need to avoid “chilling” local planning authorities. By looking only at private abuse, it creates ideal test-tube conditions for endless government abuse. As noted earlier, *First English* contemplated interim damages, and that too has proved an inglorious failure because the few dollars it offers after protracted litigation are too small to matter. No rational private party wants to incur additional expense and risk further delay by bringing a second lawsuit.

The feebleness of invalidation and interim damages are every bit as great in this area. The Village Board in *Coniston* behaved in wholly arbitrary and capricious fashion. Its bad faith seems palpable, even when measured against the modest procedural due process protections in the land use context. To have remanded the case for further consideration is to play into the Village’s hands by wrapping the project in more red tape. The factual record, moreover, pushes none of

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<sup>46</sup> See, for example, *Agins v City of Tiburon*, 24 Cal 3d 266, 598 P2d 25, 30–32 (1980) (concluding that the balance between protecting property interests and affording public officials authority to act is best struck by “preserving for the landowner, in appropriate cases, declaratory relief or mandamus remedies”).

2007]

*How to Make Procedural Due Process Disappear*

1703

the hot buttons for state intervention in the land use context. It is consistent with a prior unblemished track record. The Plan Commission was already on board. The site raises no sensitive environmental concerns. Nor were the land uses incompatible for the neighborhood, given that Coniston owned all (or at least most) of the land surrounding the seventeen-acre plot. Coniston asked not for compensation, but for issuance of the permit. On these facts the proper disposition seems clear: Posner should have awarded the permit, if only as a reminder that blatant unlawful behavior does not pay even for government officials. But sad to say, his strong constitutional priors led him woefully astray. And we are left to ponder why a judge who knows so much about the dangers of government power and the virtues of the market is content to use his great literary and intellectual powers to make a jumble of what should have been an easy case.