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# AN INTRODUCTORY NOTE AND DEDICATION

*Bernard E. Jacob\**

I am very pleased to have been invited to say a few words of introduction in the very first issue of the HOFSTRA PROPERTY LAW JOURNAL. In one sense the first issue of this new journal, like that of all new journals, is the beginning, the first of the building blocks on which, at some time in the future, its reputation will be built. In another sense, the publication of the first issue is also the *end* of another, very hard and very trying process: that of soliciting submissions, organizing for and undertaking for the first time the intellectual, the compositional and the orthographic functions of being an editor. It is tending to the endless details of getting a viable organization going and, at the same time, seeing a substantial printing job through the press. This first issue of any journal is, in just these senses, both a beginning, full of hope, and an end, with just a hint of justified satisfaction and pride.

As Chair of the Faculty Advisory Committee for the JOURNAL, I have had a unique opportunity of sitting in on the work and the deliberations of its initial student Board and Staff. In that capacity I can testify that this old chestnut of being both beginning and end is very true in its case. As the Dean's introductory message stresses, the JOURNAL has a private, personal history; for the current Editorial Board members began their JOURNAL career as members of the predecessor journal: they participated in the move from one journal to the other and cheered the change in name and subject-matter to the HOFSTRA PROPERTY LAW JOURNAL. They then set to work under the new name and regime. Within the year they are sending the first issue to the press: this is the sense in which the appearance of this issue is a consummation; it represents the end-product of a great deal of work on their part.

This first issue also truly marks, I believe, a beginning. For I do

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believe that the JOURNAL has a future, an honorable and exciting one. The scope of the JOURNAL discloses that it will be devoted in the broadest sense to property law issues; but there is and will be an emphasis on the law in relation to land. In terms of traditional legal subject-matters, this means that the JOURNAL will concern itself with conveyancing and leasing, real estate financing, land development, land use regulation, housing policy, development policy, urban and other planning and, last but not least, all the forms of preservation (which is the flip side of development), such as historical preservation, preservation of recreational facilities and resources and environmental protection. This set of emphases implies a continuing editorial interest, also, in an array of subject specialties that profoundly impact on both the fact and the law of most or all of the foregoing, such as taxation, municipal government, business organization law, the law of financial institutions and securities laws, creditor and debtor law, energy law and resources law, anti-discrimination and affirmative action law and consumer protection law.

There is every evidence that the core of these subjects, real estate law, broadly conceived, is not an antique subject at all. It is a very young one, but one that is rapidly growing, both in importance and in complexity. One proof of that is simply the list of subject areas I have recited above. As far as I am concerned another proof of this lies in the flow of interesting articles that arrive, week in and week out, at the offices of JOURNAL and have done so since the JOURNAL first announced its existence. Each one adds further weight to the conclusion that there is a continuing need for at least one more journal devoted to these subjects.

A large number of these articles are being submitted by academics, a sure sign of the existence of an innovative field. Who was interested in this field a few years ago? But the articles are also coming from experienced and thoughtful practitioners. The stuff for shaping and modernizing the law through debate and analysis is present. The JOURNAL rightly believes it can justify its existence by offering a forum to academics and practitioners for this debate and analysis.

The recent actions of the *Real Property and Probate Section of the A.B.A.* points in the same direction. The respected Journal of that section (which certainly has grown in quality and sophistication over its two decades of existence) has recently arranged for full-time academics to become editors of each of its two divisions (Real Es-

tate, Probate). Professor Peter Salsich of St. Louis University Law School is now the editor for real estate. At the same time, the venerable *Real Property, Probate and Trust Journal* has calved the *Probate & Property*, a "magazine," but so far still containing a lot of useful and interesting matter, breezier in style, but still very useful to this practitioner and teacher.

There are a few other journals devoted to real estate law and more than a few that are devoted to planning or to urban law. The JOURNAL hopes to cover material overlapping with all these journals. Perhaps, it is particularly necessary to refer to the breadth of the JOURNAL's scope just because this first issue happens to be heavily weighted toward land use planning subject matters. In the common talk of interested lawyers, I believe, the fact is that "land use" or "land use planning" law implies not only a focus on public sector action, but a public sector point of view; "real estate" law, on the other hand, connotes a strictly private, developer and lender oriented point of view as well as a differently oriented subject-matter focus. The JOURNAL hopes to eschew an exclusive interest in either point of view by offering a forum to both.

That certainly seems a correct approach in the age when public/private enterprises have become a permanent part of the urban development scene, and when many important facilities seem to be making the transit from public to private ownership, and just as many are moving from private ownership to public ownership. Less flippantly, what the developer builds, what the regulator regulates *and* what the preservationist seeks to preserve is all the self-same thing, this tired old Mother Earth of ours. There is a very real sense in saying, at some level of abstraction and metaphor, the law we are talking about has as its ultimate goal the preservation in a sensible way of private property and private places in what, after all, is only one single dynamic ball fleeing through space, the universal joint resource of all mankind, this planet, which all of us perforce share with everybody and everything else, human, animal, vegetable, mineral.

I hope what I have just said above about being a forum for developer-oriented law as well as public-oriented law assures my colleagues in the real estate bar. The JOURNAL hopes to serve them as well as the public sector planning bar.

The first issue is lucky in having the opportunity to bring a number of important articles to print. The lead article is by William

Valletta. Mr. Valletta formerly served as Counsel to the New York City Board of Standards and Appeals and writes on the development by the Board of Standards for proving the financial impact of "hardship" as a ground for obtaining relief, a variance, from existing zoning regulations. It is particularly important to have access to Mr. Valletta's work available to all, in part because the Board of Standards and Appeals is, all too often, thought of as an administrative board which, although it has awesome practical powers, is a mystery except to a relatively small group of practitioners regularly appearing before it. This is letting the light in in the best sense.

The United States Supreme Court has laid down the law which is taken up by the remaining authors in this first issue. Professor Martinez adds to his earlier efforts to rationalize the notoriously difficult law determining compensability of undue government actions under the just compensation clause; he does so by presenting an analysis of a "trilogy" of cases: Not only *Nollan*<sup>1</sup> and *First English*,<sup>2</sup> where the private citizen "won" in its claims against government action, but *Keystone*.<sup>3</sup> There the private association of coal mine owners lost their claim to compensation for the impact of a regulation of their mining activities protective of the stability of the surface. Indeed, they lost their claim in the teeth of the grand-daddy of "regulatory takings" cases, *Pennsylvania Coal Co. v. Mahon*.<sup>4</sup> For this case involved, a half century before, the very same kind of regulation in a contest between Pennsylvania government and the coal-mine owners; back then, the coal-mine owners won; today they lost.

Professor Martinez' treatment of these cases, be it ever so persuasive, cannot hope to put an end to the discussion of the issues that they raise. Indeed, all three, and especially the difficult pair of California cases, *Nollan* and *First English*, have initiated a storm of controversy. As Professor Ginsberg indicates,<sup>5</sup> they have also initiated a storm of litigation that is probably to be deplored. In any case, the JOURNAL is and should be proud to be an early participant in that storm of debate, discussion and controversy. It completes this first issue with a nice counterpart to Professor Martinez' academic ef-

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1. *Nollan v. California Coastal Commission*, 107 S.Ct. 3141 (1987).

2. *First English Evangelical Lutheran Church v. County of Angeles*, 107 S.Ct. 2378 (1987).

3. *Keystone Bituminous Coal Ass'n v. DiBenedictis*, 107 S.Ct. 1232 (1987).

4. 260 U.S. 293 (1922).

5. *Infra*, p. 69.

forts, namely, *A Practitioner's Symposium* on these two landmark cases.

The JOURNAL is quite pleased at the number of articles, the quality and the variety that this Symposium offers. There is no point in relating the facts and holdings of the two subject-matter Supreme Court cases here, for Professor Ginsberg does a good job of that in introducing the Symposium. It will, however, be useful to look at the varied affiliations of the participants. Robert Best,<sup>6</sup> now Director of California's Department of Transportation, headed up the Pacific Legal Foundation's representation of the Nollans. The private side is well represented.

It is represented as well by four distinguished private practitioners. The very highly regarded Dwight Merriam<sup>7</sup> is a former, and Brian Blaesser<sup>8</sup> is the current, chair of the Planning and Law Division of the American Planning Association. San Franciscans Daniel Curtin and Michael Durkee<sup>9</sup> has jointly authored a fourth piece in the Symposium.

But the view point of the public sector is not dependent on the fair-mindedness of the private practitioner authors mentioned. The Symposium is completed by pieces by Cynthia Pols,<sup>10</sup> associated with the National League of Cities, and by David Doheny and Paul Edmondson,<sup>11</sup> both associated with the National Trust for Historic Preservation. Although none of these authors are officially speaking for her or his respective employer, one can conclude that the sextet of articles provides a lively view of the two cases and their implications, a view sharpened and deepened by conflict and contest.

I think that I am justified, in this space, to add to my remarks about the genesis and the scope of the JOURNAL and my brief teasers about the contents of this issue. What I want to add is some expressions of gratitude, on my part and on behalf of the student editors, and a personal dedication of this issue of the JOURNAL.

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6. Best, *New Constitutional Standards for Land Use Regulation: Portents of Nollan and First English*, *infra*, p. 145.

7. Merriam, *Commentary on First English and Nollan*, *infra*, p. 83.

8. Blaesser, *A Miranda Card for Planners*, *infra*, p. 139.

9. Curtin and Durkee, *Money For the Taking: When Land Use Regulation Goes Too Far*, *infra*, p. 109.

10. Pols, *The Taking Clause: The Evolving and Uncertain Standards Applicable to Cities and Towns*, *infra*, p. 73.

11. Doheny and Edmondson, *Supreme Court Land Use Rulings: Responsible controls are not Endangered*, *infra*, p. 95.

The thanks go out to the Dean and members of the Faculty of the Hofstra Law School who have been willing to assist this student effort. The thanks go out, in a more particular way, to all my colleagues on the Faculty Advisory Committee. Behold! here is a Faculty Advisory Committee that actually worked; that met with the student editors, that were one and all dedicated to making the JOURNAL a success, initially and as a continuing institution. Its members worked hard. Each brought his considerable special expertise to bear. Each was willing to be painfully blunt about shoddy work and the need for high standards. Their preaching was mostly, if not entirely, taken to heart by their congregation, this year's editors. They have earned their thanks. As for me, I want to thank them for all the foregoing and for helping me to articulate, in ways that previously I would not have been able, what it means to carry on the practice of producing a good legal journal.

So here is thanks to each of Professors Baruch Bush and James Hickey, to William Ginsberg, Distinguished Professor of Environmental Law, to Ronald Silverman, Distinguished Professor of Real Estate Law, and to Eugene Wypyski, Distinguished Professor of Law Librarianship and Director of the Hofstra Law School Library.

With that I have one last task, which is at the same time one last pleasure. I would like to make a personal dedication of the first issue of the HOFSTRA PROPERTY LAW JOURNAL to my colleague in law and friend, Emmanuel B. Halper. Manny will be known to members of the New York City Real Estate Bar as a highly qualified real estate practitioner, to many lawyers and businessmen as the author of a first rate text on shopping center leasing,<sup>12</sup> and to others as an author and lecturer. He was also the life of the International Institute of Real Estate Studies and a prophet of the continuing importance of transnational real estate investment ties. Our investment abroad in real estate, the investment of foreigners in American real estate development, is each now a permanent part of the scene. Manny saw early on that this must be so.

One consequence of that prophecy was that Manny persuaded me and, through me, Hofstra University, to become co-sponsor of a Journal dedicated to the business and legal aspects of transnational property law. The INTERNATIONAL PROPERTY INVESTMENT JOURNAL was the result. That Journal was the JOURNAL's predecessor. For

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12. HALPER, SHOPPING CENTER AND STORE LEASES (1983).

five years student editorial boards struggled with the exotica of foreign law, of international monetary regimes, of international financing of real estate, of Eurodollars and Asia-dollars, of the host of problems and opportunities that reach beyond our national borders.

It was and is an important, and a fantastically interesting, kind of legal development. But, after five years, it was our universal conclusion at Hofstra that it was not feasible for student editors to do an effective job in this demanding frontier of the law, either in terms of soliciting good articles (in English) or in terms of direct student research and writing. That conclusion led to a second conclusion. At the end of 1987, Hofstra University severed its connection with the INTERNATIONAL PROPERTY INVESTMENT JOURNAL. In its place, the University authorized an experiment with the HOFSTRA PROPERTY LAW JOURNAL.

So it is clear that the JOURNAL has grown out of the older international property law concerns which were first introduced by Manny Halper. It is, therefore, appropriate (to my mind) that I make a very personal dedication of this issue, to EMMANUEL B. HALPER, who certainly was the father of the INTERNATIONAL PROPERTY INVESTMENT JOURNAL and, just for that reason, is at least an honored forebear of the HOFSTRA PROPERTY LAW JOURNAL.

Well, that completes what I intended to cover in these introductory remarks. Except for this: Now, you know, there is the old story about the dog who understood how to play checkers, but, the sourpuss complained, lost three games out of every five. We indulgent parents, Faculty Advisory Board and Student Editorial Board both, can find plenty to be happy about in the *mere fact* that the first issue is coming out. You strangers, to whom this JOURNAL is addressed, our readers, must, like the sourpuss, demand a little more than the mere fact that the first issue exists. For you, at least, what is necessary is that the first issue *justify* itself by containing useful information and insightful analysis or argument on important subjects, and that this material is clearly and carefully presented with reliable citations to the basic authority. We can only hope that that is what we have presented. We have all striven to see that this issue contains articles presented in a manner that meets all these standards; we must leave it up to you to judge whether it does or not.