Introduction

What we have in this small but important volume are nine articles that represent the "best of the best" from the spring 2012 meeting of the ABA's Section of State and Local Government Law. These articles were originally published in the section's journal, *The Urban Lawyer*, and are compiled in this book, the fifth volume in the annual series *At the Cutting Edge*.

The series is the brainchild of the editor, Dwight Merriam, and other section leaders who came to recognize how useful it would be to have an annual volume containing some of the best current thinking on a wide variety of land use subjects. So good was the concept that the National Association of Real Estate Editors gave the first book an award for its high quality and contribution to scholarship.

At the Cutting Edge 2012 follows in that bloodline and does everything its predecessors did. This edition offers articles on a broad range of subjects, held together by the common spiraling thread of the DNA of land use law. Indeed, the articles cover such diverse subjects that the editor has chosen to organize them in the only apparently logical way: alphabetical order by lead author.

Talk about hot topics—in the first article, "When All *Heller* Breaks Loose: Gun Regulation Considerations for Zoning and Planning Officials Under the New Second Amendment," authors Daniel J. Bolin and Brent O. Denzin of Ancel Glink in Chicago provide some fascinating insights for local land use planners and regulators, based on the U.S. Supreme Court's decision in *District of Columbia v. Heller*. The two authors first address recent developments in Second Amendment jurisprudence, then turn to methods that courts use in evaluating gun regulations, and conclude with valuable suggestions for local planning and zoning officials who may find themselves in the business of regulating gun-related land uses. The authors warn that "officials should be mindful that this is an evolving constitutional field" and that just as any of us "would keep the safety on a firearm, zoning and planning officials should take care to observe these still-developing constitutional standards to avoid an alleged violation of the Second Amendment."

Are you ready for another article on fracking? "The Need for Federal Regulation of Hydraulic Fracturing," by Ellen Burford, an Assistant State's Attorney in Edwardsville, Illinois, delivers exactly what the title says and is worth snagging from the sea of fracking articles, given its advocacy for a top-down planning and regulatory approach. Burford is

not reluctant to put her views right out there front and center: "While the United States needs to use the method of hydraulic fracturing, it also needs access to safe drinking water. In order for both goals to be achieved, it is necessary for hydraulic fracturing to be regulated at the federal level." The question remains, of course, how much preemption there will be for federal law over state law and local regulation, and how much preemption of local regulation by state law.

Some hot topics stay that way year after year, and one of those is the Religious Land Use and Institutionalized Persons Act (RLUIPA). Returning once again to this annual volume is Daniel P. Dalton, of Dalton & Tomich, plc in Bloomfield Hills, Michigan, a widely recognized practitioner and scholar in the field, with his article "The Religious Land Use and Institutionalized Persons Act: Recent Developments in RLUIPA's Land Use Jurisprudence." He represents religious organizations, and the first sentence of his piece suggests as much: "Historically, religious organizations have been subjected to uneven enforcement of land use regulations and sometimes blatant discrimination when compared to their non-religious counterparts." However, his treatment of the recent developments is comprehensive and evenhanded. Dalton notes the splits among the circuits with regard to their interpretations of key terms in RLUIPA and concludes: "This confusion has continued to make RLUIPA litigation an extremely active and specialized area of the law and one that attorneys can expect to grow in years to come."

One of the more interesting aspects of land use law is the equitable concept of municipal estoppel, which Kelly L. Frey, of Mintz Levin in Boston, so ably covers in his article "A 'Gateway Plan' to Unhindered Development: Recent Cases Addressing Municipal Estoppel." He explains the concept this way: "The term 'municipal estoppel' refers to instances where it is appropriate to preclude (or 'estop') a municipality from taking an action inconsistent with the municipality's previous representations." Frey's article is both a primer on the subject and a review of recent developments. He concludes that given the varied views of courts across the country and the lack of clear rules, it is risky for developers to depend on representations of local governments unless they get such representations in writing as part of the government's decision.

Attention, baby boomers: you may be zoned out, in more ways than one. A. Kimberly Hoffman and James A. Landon, of Morris James in Wilmington, Delaware, offer up a note of caution in "Zoning and the Aging Population: Are Residential Communities Zoning Elder Care Out?" They see a "perfect storm" of NIMBY-ism, suburban sprawl, inflexible zoning codes (or judicial interpretations of them), and Medicare

cutbacks that has resulted in exclusionary zoning practices limiting the access of seniors and their families to state-of-the-art nursing care and social support in many residential communities. The authors address the role of the Fair Housing Act and offer a curative prescription of six features that zoning codes should have to ensure that the needs of the elderly are met locally.

Jeffrey Kleeger, who teaches at Florida Gulf Coast University in Ft. Myers, Florida, has written an article with the attention-grabbing, Demosthenes-challenging title "*Kelo*'s Influence on Keystone Pipeline Asks 'Where's the Public Purpose?'" This article examines the Keystone Pipeline Expansion Project in the context of privatization coupled with increasingly broad applications of eminent domain law as an aspect of dispossession by expropriation that can threaten the viability of Keystone since the analysis turns on "public purpose." The question that he focuses on is whether Keystone's alleged public purpose can be found by the courts to be pretextual, thereby including the use of eminent domain.

With "Recent Developments in Comprehensive Planning," Edward J. Sullivan and Jennifer Bragar, the dynamic duo from Garvey Schubert Barer in Portland, Oregon, are back again, writing under the same old plain-vanilla title that belies the great content and, appropriate for this volume, "cutting edge" insights. There is no better annual summary of the law in the critical area of comprehensive planning, and you will benefit from reading it. They conclude, after some 5,300 words of careful analysis, that "the increasing number of cases on plan amendments and interpretation over the last year all lead to the conclusion that the plan continues to gain credence in the development process."

Robert H. Thomas, a director of Damon Key Leong Kupchak Hastert, in Honolulu, Hawaii, and Berkeley, California, and author of the popular blog www.inversecondemnation.com, is a know-it-all in the nicest way of all things eminent domain, and it is good to see him back again in this volume. His article, "Recent Developments in Eminent Domain: Public Use," is about what it says it is about. If you are a looking for the big new trend in a post-*Kelo* world, you will not find it here, because Thomas concludes that there have been no shifts in the tectonic plate of eminent domain law this last year. That in and of itself is worth reading about and knowing.

The last article is by Paul D. Wilson, whose entertaining articles have graced the pages of prior volumes. Now, it seems, Wilson has fled private practice for the warm, secure, no-need-to-market bench. Congratulations. We look forward to his opinions, which we expect will

ring like those of the Honorable Michael A. Musmanno (1897–1968), Justice of the Pennsylvania Supreme Court. In his last article before strapping on the muzzle of judicial temperament, Paul writes about the conflicts between landowners and local land use officials, citing as one example the landowner who "just wants to keep those ridiculous inflatable people waving in the breeze at his car dealership." This is Wilson's way of leading us through the vague void of the void-for-vagueness doctrine. Like everything Wilson has ever written, this piece will both entertain and educate the reader.

It's a wrap. One year, nine articles, several score of footnotes, and a diverse but comprehensive exposition of the hot topics in land use law. Dwight Merriam and the Section of State and Local Government Law are to be congratulated on this series and in particular this addition to it. It is this sort of contribution that is terribly important to the growth and strength of land use law. Enjoy.

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