

Chicago-Kent College of Law

From the Selected Works of Dan Tarlock

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Professor Hagman's Legacy to Legal Scholarship (with D. Mandelker)

A. Dan Tarlock, *Chicago-Kent College of Law*

PROFESSOR HAGMAN'S LEGACY TO LEGAL SCHOLARSHIP

Daniel R. Mandelker*
& A. Dan Tarlock†

Professor Donald G. Hagman taught Land Use Controls, Local Government Law, Environmental Law, and State and Local Taxation at UCLA from 1963 until his far too early accidental death in June of 1982. He was a prodigious researcher and writer, and by the early 1970's his work had established him as one of the most promising land use and local government scholars of his generation. This promise was quickly and completely fulfilled. In the mid-1970's he published his casebook, *Public Planning and Control of Urban and Land Development*, with a second edition in 1980;¹ his prize winning monograph on racially discriminatory boundary manipulation practices, *The White Curtain, Racially Disadvantaging Boundary Change Practices*;² and his masterpiece on the "taking issue," *Windfalls for Wipeouts*.³ This last book has shaped much of the current debate about landowners' rights to compensation as the result of losses caused by public regulation. Professor Hagman was justifiably proud that Justice Brennan cited *Windfalls for Wipeouts* in his path-breaking dissent in *San Diego Gas and Electric Co. v. City of San Diego*,⁴ and that "Justice Brennan got it right."⁵

As a graduate of the University of Wisconsin School of Law, Professor Hagman was rooted in the "law of action" tradition pioneered in the land use and natural resources area by the late giant

* Howard A. Stamper Professor of Law, Washington University.

† Professor of Law, Illinois Institute of Technology Chicago-Kent College of Law.

1. D. HAGMAN, *PUBLIC PLANNING AND CONTROL OF URBAN AND LAND DEVELOPMENT* (1973 & Supp. 1976; 2d ed. 1980).

2. 54 U. DET. J. URB. L. 681 (1977).

3. *WINDFALLS FOR WIPEOUTS* (D. Hagman & D. Micsynski eds. 1978).

4. 450 U.S. 621, 659 (1981) (Brennan, J., dissenting).

5. Mandelker, *In Memoriam Donald G. Hagman*, 1982-7 LAND USE L. & ZONING DIG. 3.

among law teachers, Jacob H. Beuscher.⁶ Don Hagman was "Mr. Land Use Law" in California through his much-used state treatise⁷ and his exhaustive and innovative computer study of the California Supreme Court's treatment of land development and environmental law cases from 1962 to 1980 that appeared in this law review in 1980.⁸ However, Professor Hagman was never content to remain a "local" scholar, no matter how inapt that description is of California law and administrative regulation. His work was national and increasingly comparative in scope, and his reputation matured accordingly. In this brief essay, we, who have been his long-time friends, colleagues, and at times friendly critics, pay tribute to his intellectual legacy by summarizing his most important contributions in the areas of law to which he so creatively devoted himself.

During his professional career, Professor Hagman published important work continuously. He authored scholarly articles, monographs, treatises, and hornbooks, and produced a casebook widely-used by law students and others. He also wrote many shorter papers and commentaries in publications such as the *Land Use Law & Zoning Digest* which he often used, sometimes tongue in cheek, as forums to try out new ideas. What distinguishes his writing is his constant, Sisyphean effort to integrate the arbitrarily separate curricular areas of land use controls, local government, and environmental law in an effort to design efficient, fair, and humane institutions to govern urban areas.

As a scholar, Don Hagman stands squarely in the middle of two intellectual currents. The founding generation of land use scholars often accepted quite uncritically the need for government intervention in the urban environment. It followed that the principal function of the law was to eliminate old and archaic constraints on the exercise of the police power. He was too young to accept uncritically the New Deal approach to public law. Profes-

6. Professor Beuscher taught and wrote about land use and water at the University of Wisconsin from 1935 through 1967, at a time, in the words of his colleague Willard Hurst, "when there was yet very limited interest either in the law school world or in government in a comprehensive and penetrating examination of the uses of law to foster better adjustments between man and his physical and biological environment." Hurst, *Introductory Note* to F. THOMAS, *LAW IN ACTION: LEGAL FRONTIERS FOR NATURAL RESOURCES PLANNING* at xi (1972). Professor Beuscher's interest was in "not what law 'is,' but what it does and what it can be made to do, and by what means." *Id.* at 3. Like Professor Hagman, Jacob Beuscher died early, at the height of his powers and hard at work.

7. D. HAGMAN, J. LARSON & C. MARTIN, *CALIFORNIA ZONING PRACTICE* (1969).

8. DiMento, Dozier, Emmons, Hagman, Kim, Greenfield-Saunders, Waldau & Wollacott, *Land Development and Environmental Control in the California Supreme Court: The Deferential, the Preservationist, and the Preservationist-Erratic Eras*, 27 UCLA L. REV. 859 (1980).

sor Hagman was equally too old and perhaps too experienced to accept uncritically the neo-conservative criticisms of land use and environmental regulation. He was, however, a keen student of this revisionist movement and was considerably influenced by its stress on the teaching of welfare economics.

Because his mind was too lively, his work cannot be neatly reduced to one or two transcendent concepts; his scholarly legacy is there to be enjoyed and mined rather than reduced to a theory. Professor Hagman always articulated his views forcefully and one of his best statements is contained in a commentary he wrote for a conference on the taking issue:

[L]et me advise that I am middle-of-the-road in my opinion, 100 percent of what the free marketeers say about the problem of the taking issue is half true, which is about the mark I give to the environmentalists who argue that no regulation, however harsh, should be invalidated as a taking. A 50 is a pretty high mark. My faith in my own views hovers about there, the taking issue being a complex business, at least as complex as any other that is the subject of my scholarly efforts.

It would be nice if one could be 'religious' about regulation and truly believe it right that regulation be eliminated. It would be easier if one could assert a simple rule at the other extreme — all regulation is valid. Mugwumpian views are harder. But on our way to a solution of the problem, it does seem important to recall that harsh regulations might be made more acceptable not only from the regulatees' but from society's point of view if some compensation is paid. That reform, plus the reorganization of the regulators (so that some of the incentive-killing aspects of regulation due to overbreadth, conflict, and erracticism are eliminated) might be a step in the right direction.⁹

II. LAND USE

A. *Professor Hagman as a Teacher of Teachers*

In 1973, Professor Hagman published the first edition of his widely used and admired casebook, *Public Planning and Control of Urban and Land Development*.¹⁰ Two years earlier he had published his hornbook, *Urban Planning*,¹¹ that has become the standard short reference work. The casebook originated, as do most

9. Hagman, *Land Use Regulation Without Compensation: A Mugwumpian View*, in *PLANNING WITHOUT PRICES* 121, 136 (B. Siegan ed. 1977).

10. D. HAGMAN, *supra* note 1. The reviews of the first edition were very favorable. *See, e.g.*, Brown, Book Review, 6 *URB. LAW.* 742, 749 (1974) ("thought provoking, idea generating and direction giving publication . . ."); Bross, Book Review, 5 *ENVTL. L.* 193, 197 (1974) ("breaks new ground."); and Callies, Book Review, 7 *U. MICH. J.L. REF.* 516, 519 (1974) ("very good" casebook).

11. D. HAGMAN, *URBAN PLANNING AND LAND DEVELOPMENT CONTROL LAW* (1971).

better mousetraps, from supplementary materials that he had first prepared for his course in 1966; a Tentative Edition was published by the UCLA Institute of Government and Public Affairs in 1969. A second edition of the casebook was published in 1980.¹²

Public Planning and Control of Urban and Land Development was one of the first in a second generation of land use casebooks, and represented a significant, even idiosyncratic, break with the then conventional understanding of the content of the course. Land use law emerged as a separate course after World War II; in the early 1950's both Property and Local Government law teachers claimed the subject matter.¹³ By the mid-1950's, the course was established on its own, and, despite some strong dissenting opinions,¹⁴ savored more of property than local government law. Professor Charles Haar of Harvard University published the leading casebook, *Land Use Planning: A Casebook on the Use, Misuse and Re-Use of Urban Land*, in 1959,¹⁵ although Professor Jacob Beuscher's locally published casebook, *Land Use Controls: Cases and Materials*, had been circulating since 1954-55.¹⁶ Taking the subject matter as it lay, the early books emphasized the parcel by parcel regulation of land development and use. The bulk of the case and statutory materials centered on three broad subject matter areas: (1) the common law of nuisance and private land use restrictions, (2) the constitutionality and interpretation of zoning and subdivision control ordinances, and (3) the efforts of the then widely praised federal urban renewal program to create a new and superior urban environment. As reflected in the titles, Professor Beuscher's materials were perhaps the more traditional. However, both he and Professor Haar gave considerable attention to what

12. D. HAGMAN, *supra* note 1.

13. Professor Hagman himself has written the definitive history of the development of the land use curriculum. Hagman, *The Teaching of Land Use Controls and Planning Law in American Law Schools*, 1972 LAND USE CONTROLS ANN. 61. See also Tarlock, *Current Trends in the Development of an Environmental Curriculum*, in LAW AND THE ENVIRONMENT 297, 309-13 (M. Baldwin & J. Page, Jr. eds. 1970).

14. D. MANDELKER, *MANAGING OUR URBAN ENVIRONMENT* (1966) is a notable effort to restructure the local government law course to focus on the problems of land use and development.

15. C. HAAR, *LAND USE PLANNING* (1959). Haar's book was preceeded by Professors Myers Dougal and David Haber's innovative *PROPERTY, WEALTH, LAND: ALLOCATION, PLANNING AND DEVELOPMENT* (1948), which dramatically interjected public regulation and planning issues in the first year curriculum and greatly influenced succeeding generations of law teachers, and by F. HORACK & V. NOLAN, *LAND USE CONTROLS: SUPPLEMENTARY MATERIAL FOR REAL PROPERTY* (1955), which is the first published set of exclusive land use materials.

16. J. BEUSCHER, *LAND USE CONTROLS: CASES AND MATERIALS, PREFACE* (1964). The casebook ultimately became J. BEUSCHER, R. WRIGHT & M. GITELMAN, *LAND USE: CASES AND MATERIALS* (1976), and is now R. WRIGHT & M. GITELMAN, *LAND USE: CASES AND MATERIALS* (3d ed. 1982).

planners said about what they did, but of necessity presented land use planning as an ideal not yet realized but worth pursuing.

By the time Professor Hagman began to organize his materials, there was a growing dissatisfaction with the first generation of casebooks because they had too limited a vision of the subject matter of land use and presented a static rather than dynamic perspective of the regulatory process. Professor Hagman had the good fortune to reach maturity in one of the most exciting, if not chaotic, periods in our recent history, and his casebook well reflects his time. As a result of efforts to eliminate poverty, rebuild the inner cities, and subsequently to clean up and to preserve the natural environment, land use regulation was transformed from an upper middle class, largely suburban and local concern to a major national political issue. For the first time since the New Deal, the idea that comprehensive resource planning should precede major regulatory decisions was taken seriously by courts and legislatures, and all levels of government—local, state, and federal—undertook new land use regulatory experiments.

Public Planning and Control was the first national casebook to try to make sense out of the radically changed regulatory picture. Its title reflects its purpose—to marry as equals the twin aspects of land use, planning, and regulation. Professor Hagman claimed to be a partisan of the local government approach to land use planning. While parts of his book reflect this tradition, the book departs from the tradition in its emphasis on planning and new federal and state programs. Although Professor Haar's casebook began with a long examination of the history of land use planning, Professor Hagman first elevated planning to center stage. The first eight chapters of his book contain the most searching and critical examination yet published in a casebook of what planners try to accomplish. In the first edition the foundation case on zoning, *Village of Euclid v. Ambler Realty Co.*,¹⁷ was not introduced until Chapter X, entitled *The Zoning Classics*. Only 223 pages were devoted to traditional zoning and subdivision control issues in order to make room for the new topics such as property taxation and environmental regulation. The mix remained the same in the second edition, except that in a bow toward tradition, the zoning materials were prefaced by a short chapter on nuisance law.

Professor Hagman's casebook is, of course, not without its faults, such as spotty coverage of certain issues, as many have noted. As authors of separate land use casebooks, we are es-topped to comment further and pedagogical criticism is now un-

17. 272 U.S. 365 (1926).

happily irrelevant. What is relevant is that in light of Professor Hagman's death, his faults have become virtues. More so than many casebook authors, Professor Hagman used his casebook to argue his own positions, such as his preference for middle- and short-range planning over long-range comprehensive planning. He also tended toward contemporaneous statement of issues, rather than cases and other conventional legal materials. As a result, Professor Hagman has left us with a *Zeitbild* (era portrait) of the 1970's that exists in no other set of legal materials and a wonderful collection of his views, many of which were published in rather inaccessible sources. Professor Hagman had an unerring eye for the simple, direct statement that went to the heart of a matter often obscured by excessive technical "jargon" and a wonderful wit, so that the casebook has the additional virtue of being a delight to read. As he stated in the preface to the second edition of his casebook, "my mission in life includes striking a blow for plain, fun talk having its place in the legal literature sun"

B. *Professor Hagman's Principal Contributions to Land Use Scholarship*

A legal scholar is expected to make two types of contributions to knowledge. The first and traditional function of a law professor has been to organize and explain complex areas of case and statutory law. In recent years, law professors have been exhorted to abandon this function and to become fully integrated into the more detached and theoretical world of the university. They are urged to use the great mass of legal and non-legal secondary literature to reconceptualize problems in an effort to provide fresh insight into the role of the legal system, if any, in improving existing methods of conflict resolution.¹⁸

In the legal profession generally, Professor Hagman was much respected and beloved for his discharge of the organizational and explanatory function. As a prominent young land use lawyer wrote on Professor Hagman's death: "Many land use lawyers keep a well-thumbed desk copy of his hornbook handy, and many non-California lawyers wish that Don Hagman had done a practice manual for their state like the one on which he collaborated for California."¹⁹ This used to be the ultimate tribute for a legal scholar. However, in today's university environment such a

18. The present dichotomy between doctrinal and theoretical legal scholarship and resulting angst among serious scholars is well-explored in a recent symposium in the *Yale Law Journal*. See Kronmen, *Forward: Legal Scholarship and Moral Education*, 90 YALE L.J. 955 (1981); Posner, *The Present Situation in Legal Scholarship*, 90 YALE L.J. 1113 (1981).

19. Bangs, *In Memoriam Donald G. Hagman*, 1982-7 LAND USE L. & ZONING DIG. 3.

statement carries with it the derisory implication that the person is deficient in the second scholarly function. Professor Hagman paid some price within the academic community for his outside popularity and was never wholly at home in that community, which was short-sighted on all sides. Professor Hagman's general reputation rested on a sound groundwork of legal scholarship. He understood all aspects of his subject and made important theoretical contributions to many problems. In our judgment his three most important, although by no means exclusive, contributions were to (1) the role of property taxation in land use planning, (2) the need for some form of compensation to landowners who suffered a loss in value as a result of regulation, especially the newer environmentally-based controls, and (3) the proper role of land use plans in subsequent regulatory decisions.

If Professor Hagman's scholarly contributions are to be fully appreciated, they must be placed in their immediate historical context. Professor Hagman began his career at a time when the Progressive vision of governance through largely value-free bureaucracies had triumphed,²⁰ but a profound questioning of the fruits of progressivism had begun. Like many of his generation, Professor Hagman still had faith in the ability of government to better the human condition, but he became increasingly concerned about the ability of excessively centralized bureaucracies to act effectively and fairly.

1. Tax Policy as an Alternative to Regulation.

In the 1950's the law of zoning was largely freed from its nuisance origins, but, as many began to observe, zoning and subdivision ordinances alone seemed incapable of shaping urban growth along desired lines. The twin pillars of land use controls exerted too indirect an influence over market and non-market determinants to achieve the orderly growth patterns planners envisioned.²¹ Scholars began to turn their attention to understanding and to harnessing the primary forces that influenced growth and ultimately to consider alternative public responses to the prevailing pattern of local zoning and subdivision control.

Professor Hagman's first journal articles examined one of the primary growth determinants, the property tax system. In his first article, published in the 1964 *Wisconsin Law Review*,²² he examined the role of the property tax in preserving agricultural

20. This history is traced in H. BOSCHKEN, *LAND USE CONFLICTS: ORGANIZATIONAL DESIGN AND RESOURCE MANAGEMENT* 21-44 (1982).

21. See generally D. MANDELKER, *THE ZONING DILEMMA* (1971).

22. Hagman, *Open Space Planning and Property Taxation—Some Suggestions*, 1964 WIS. L. REV. 628.

lands and "open space." In his second, a year later, he reviewed the renewed interest in Henry George's single tax system to promote concentrated urban development.²³ The 1964 article was the first major law review article to examine the growing popularity of differential taxation schemes to preserve an agricultural land base around urbanizing areas. Professor Hagman concluded his survey of statutes and cases with the sound observation that differential taxation schemes were unlikely to achieve any substantial general public benefits unless they were tied more closely to land use planning and control programs. He was right, as the conclusion of the *National Agricultural Lands Study* in 1981 illustrates:

[U]nless differential assessment programs are combined with agricultural zoning, with agreements that restrict the land to agricultural use, or with purchase of development rights, there is no assurance that the beneficiaries of tax reduction or abatement will keep their land in agricultural use. Owners may simply enjoy reduced taxes until the time comes when they want to sell.²⁴

In his second article, published in an important early symposium on land use planning in this journal,²⁵ he explored the prospects for using land value taxation to control urban development in an ingenious fictitious history of the City of New Chicago on Mars—a possibility made somewhat plausible by the dawn of the space age. Again he sounded the appropriate note of caution:

[L]and value taxation as a grand scheme is far from grand. It is not a substitute for government, nor will it cure all societal ills As a grand scheme the movement is as dead (or alive) as the right wing propagandists who currently support it Planners, however, should know about land value taxation. They should know the power of the concept and its worth as a tool They should make the practice of using property taxation for land use planning purposes a tool of their own.²⁶

2. Windfalls for Wipeouts: "From England to the U.S."

Professor Hagman made one of his most lasting contributions to the land use policy debate in a mammoth, 660-page book, *Windfalls for Wipeouts*, which he co-edited with a California economist.²⁷ The book proposed a comprehensive scheme for the compensation of wipeouts caused by planning and land use regulation, the funds for compensation to be raised by taxing the wind-

23. Hagman, *The Single Tax and Land-Use Planning: Henry George Updated*, 12 UCLA L. REV. 762 (1965).

24. NATIONAL AGRICULTURAL LANDS STUDY, FINAL REPORT 69 (1981).

25. *Land Planning and the Law: Emerging Policies and Techniques*, 12 UCLA L. REV. 707 (1965).

26. Hagman, *supra* note 23, at 781, 788.

27. WINDFALLS FOR WIPEOUTS, *supra* note 3.

falls which regulation also creates. The intellectual origins of the book, and the experience that stimulated Professor Hagman's thinking on the windfalls for wipeouts problem, take us back to a sabbatical leave he took in London, England in the 1970-71 academic year.

The British system has long been the best example of a successful and highly integrated land use control system in the English-speaking world. Adopted immediately after the Second World War, at a time when American land use regulation was still struggling for recognition, the British system has attracted a stream of American legal scholars who have studied its legal structure and administration.²⁸ Professor Hagman joined that stream of scholars in his sabbatical year, and took the unusual step of working for the British planning department as a legal consultant. Professor Mandelker visited with Professor Hagman during the winter of that year and found him full of new ideas and insights, and relishing his tour of duty with the British planning agency. He wrote a number of internal memoranda for the department which explored a variety of legal problems in the British planning system and which unfortunately were not published.

When Professor Hagman returned to the United States he became a major interpreter of British and British Commonwealth land use law. He wrote extensively on the British land use control system to the end of his career,²⁹ traveled to Australia and other Commonwealth countries, and returned frequently to Great Britain for lectures and conferences. His writing on the administration of the British system is descriptive. What most attracted his attention in Britain was the system of compensation for land use regulation and the levy of a "betterment" tax on land values created by land use regulation. Professor Hagman generalized from the British compensation and betterment levy system in *Windfalls for Wipeouts* to propose a similar program for the American setting.³⁰

The view that land use controls create and destroy land use values in land markets, and that this redistribution of land values is unfair and should be corrected by taxing windfalls to compensate wipeouts, has had a strong appeal for land use theorists. In

28. *E.g.*, D. MANDELKER, *GREEN BELTS AND URBAN GROWTH: ENGLISH TOWN AND COUNTRY PLANNING IN ACTION* (1962).

29. *E.g.*, *English Planning and Environmental Law and Administration: The 1970's*, 46 J. AM. PLAN. A. 172 (1980); *English Planning Law: A Summary of Recent Developments*, 11 HARV. J. ON LEGIS. 557 (1974) (with Pepe); *Report: The Greater London Development Plan Inquiry*, 37 J. AMER. INST. PLANNERS 290 (1971); Articles 1 and 2 of A MODEL LAND USE DEVELOPMENT CODE: THE ENGLISH ARE COMING, 1971 LAND USE CONTROLS ANN. 3.

30. *WINDFALLS FOR WIPEOUTS*, *supra* note 3, at 12-18.

Great Britain, a Royal Commission which met during World War II provided the intellectual support for a comprehensive program of compensation and betterment taxation which was adopted by the Labor Government that came to power in 1945. A value was placed on the development potential of all undeveloped land in the country, and a fund was created to compensate landowners for losses in development value imposed by the land use control system. A betterment tax was levied on land value increases resulting from development receiving governmental "planning permission." This program was part of a comprehensive revision of British land use legislation which established the post-war land use control system. The British compensation and betterment tax system has not survived in the form in which it was originally adopted. Full compensation for loss in development value has been abolished, although rudimentary provisions for compensation remain. A scaled-down betterment tax, however, has survived several changes in government.

Windfalls for Wipeouts is a wide-ranging compendium which includes contributions on the economics of compensation and betterment systems by his co-editor as well as articles by other authors on a variety of land use compensation and taxation systems. Professor Hagman's contribution reformulated the windfalls for wipeouts theory and proposed a variety of compensation and betterment collection systems which would tax windfalls to compensate wipeouts.

The theoretical base for the system is limited, however. Professor Hagman believed that wipeout compensation would make land use regulators more aware of social costs,³¹ and that betterment taxation would provide a return to society of "wealth it creates."³² A chapter on economic theory by his co-editor grappled with the economic issues.³³ It did not seriously consider the argument that some wipeouts can be imposed in land use controls as justifiable social risks, and that windfalls may not occur when increases in land value created by the land use control system are internalized in market prices.

The strength of the book lies in its proposals for compensation and betterment which have since shaped the windfalls for wipeouts debate in this country. Not unexpectedly, the debate has centered on the compensation problem. Windfall recapture has largely been ignored in a society dedicated to retention of market gains. Whether Professor Hagman entirely approved this shift in emphasis is not certain. His interest in the windfalls for wipeouts

31. *Id.*

32. *Id.* at 18.

33. *See id.* ch. 5.

idea clearly reflects the fairness concerns that influenced so much of his scholarly work. Perhaps he believed that providing for wipeout compensation at least was a beginning, and that windfall recapture would come later.

Windfalls for Wipeouts contains a number of compensation and betterment proposals and an analysis of windfall for wipeout programs throughout the English-speaking world. In view of the growing attention paid to the compensation problem, the proposal for an "incremental" compensation program is of special interest. As proposed in the book, the incremental program calls for compensation if "a land use planning or regulatory authority . . . changes . . . its plans or regulations [to] cause a reduction in the real value of property."³⁴ The proposal would compensate for what are known as "downzonings" in the land uses allowable on a property. It assumes that risk-taking by landowners should not extend to community land use actions that destroy development expectations based on adopted plans and regulations.

Neither the incremental windfalls for wipeouts proposal, nor a more comprehensive "omnibus" proposal also contained in the book,³⁵ linked compensation to property takings through land use regulation. Yet the compensation idea took root in a dissenting opinion by Justice Brennan in a U.S. Supreme Court decision in a land use taking case, *San Diego Gas & Electric Co. v. City of San Diego*.³⁶ Brennan cited the *Windfalls for Wipeouts* book to support his proposition that compensation should be paid for land use regulations held to be a temporary taking of land.³⁷ Professor Hagman embraced the Brennan dissent. A chapter in *Windfalls for Wipeouts* contained a compensation proposal for land use regulation.³⁸ Some of his last work was an effort to apply the principles expressed in this chapter to the formulation of a temporary damages remedy that would be consistent with the Brennan opinion.³⁹

A speech by Professor Hagman at a wetlands conference in San Francisco just before his death stated his final views on the compensation issue. He did not discuss the merits of the compensation remedy. Justice Brennan had spoken, and Professor Hagman believed that a majority of the court accepted his views. For Professor Hagman the issue was how the compensation remedy for land use regulation should be structured. He did not live

34. *Id.* at 61.

35. *Id.* at 31-60.

36. 450 U.S. 621 (1981).

37. 450 U.S. at 659 n.25 (Brennan, J., dissenting).

38. See WINDFALLS FOR WIPEOUTS, *supra* note 3, ch. 11.

39. Hagman, *Temporary or Interim Damages Awards in Land Use Control Cases*, 4 ZONING & PLAN. L. REP. 129, 137 (1981).

to complete his work on this critically important topic, but what he wrote will provide insight and ideas on the compensation problem for years to come.

3. The Relationship Among Planning, Regulation, and Fairness

Professor Hagman published two major land use law treatises in addition to his land use law casebook. One of these is a widely used and cited co-authored treatise on California land use law.⁴⁰ The California text was under revision at Professor Hagman's death.

In 1971 Professor Hagman published a national treatise in the West Hornbook series, *Urban Planning and Land Development Control Law*.⁴¹ This treatise reflected his wide-ranging interests, and covered more than conventional land use law topics. The first part of the book covers the traditional planning and zoning issues, and the second part broke new ground with chapters on topics such as urban renewal, taxation as a land use control device, and race and poverty issues. A 1975 supplement added chapters on federal land use law and the British land use law system. Like all of Professor Hagman's work, *Urban Planning* provides concise and clear statements on land use law principles. The book achieved a national reputation in the 1970's as the only single volume treatise on land use law, and has been widely cited by the courts. The U.S. Supreme Court recently turned to Professor Hagman's book for a definitive definition of inverse condemnation.⁴²

Professor Hagman also published a number of articles on land use law. Many of these articles were brief editorials in the *Land Use Law and Zoning Digest*, a monthly publication of the American Planning Association. He served as a reporter for the *Digest* for many years. These short articles concentrated on the California decisions and California land use problems. Through these pieces he became the leading interpreter of California land use law to the land use law profession, an important role made all the more important by the leading status of the California decisions in the land use field.

A sampling of the *Digest* articles indicates the range of im-

40. D. HAGMAN, J. LARSON & C. MARTIN, CALIFORNIA ZONING PRACTICE (1969).

41. *Supra* note 11.

42. *United States v. Clarke*, 445 U.S. 253, 257 (1980) ("As defined by one land use planning expert . . ."). For a state case relying on Professor Hagman's treatise, see *Little v. Board of County Comm'rs*, — Mont. —, 631 P.2d 1282, 1289 (1981) (quoting and relying on his definition of spot zoning).

portant topics Professor Hagman considered. In *No Good Fortune for Selby in San Buenaventura*,⁴³ he discussed a California "planning blight" case, one of his favorite topics. The court had ruled that a land use plan reserving land for public facilities was not a taking. In other articles he discussed the views of California Supreme Court justices on zoning issues.⁴⁴ In an article he published in the *Digest* just before his death, Professor Hagman criticized the requirement in California law that land use controls be consistent with the local comprehensive plan.⁴⁵ The article reflected a long-held belief that mandatory planning does not improve land use control. An earlier article had proposed an alternative to comprehensive plans:

I think that general plans should be scrapped. In their place we need a highly computerized information system that produces utilizable information in a highly readable way that is made available to decision-makers so that they can make ad hoc decisions based on the best information available at the time.⁴⁶

The vesting issue, another land use issue to which Professor Hagman turned his attention in recent years, reflected his continuing and increasing concern with fairness problems. Land development often takes considerable time, especially in the large-scale development projects typical of California. When a municipality revises its land use regulations before a development is completed and fully "permitted," a developer may have to comply with more restrictive land use requirements before he can proceed. The courts protect land developers in this situation through a doctrine known variously as "estoppel" or "vested rights." In most states this doctrine requires developers to begin construction in good faith reliance on a building permit. Professor Hagman believed that the protection afforded to developers under this doctrine was not sufficient, especially in multi-stage projects in which construction was completed one stage at a time.

The vested rights issue became controversial in California after the Supreme Court refused to grant vested rights to a developer of a major project in the state's coastal zone.⁴⁷ Professor Hagman responded with a major article in which he outlined

43. 25 ZONING DIG. 208 (1973).

44. Hagman, *Cancel the Metamorphosis*, 1979-7 LAND USE L. & ZONING DIG. 3; Hagman, *The Metamorphosis of Justices Mosk and Tobriner and the California Supreme Court*, 1979-3 LAND USE L. & ZONING DIG. 10.

45. Hagman, *Inconsistency on Mandatory Planning and Consistency*, 1982-5 LAND USE L. & ZONING DIG. 5.

46. Hagman, *NEPA's Progeny Inhabit the States—Were the Genes Defective?*, 7 URB. L. ANN. 3, 50 (1974) [hereinafter cited as Hagman, *NEPA's Progeny*].

47. *Avco Community Developers, Inc. v. South Coast Regional Comm'n*, 17 Cal.3d 785, 553 P.2d 546, 132 Cal. Rptr. 386 (1976).

vested rights principles which would be fair to developers.⁴⁸ The article included a model vested rights statute. The statute was not adopted, but California adopted an alternative proposal under which developers and municipalities may negotiate agreements to protect developers in the land use control process. A subsequent article outlined the legal problems the developer agreement statute presented.⁴⁹

Professor Hagman identified an important land use problem in his vested rights work, which was related to his concern with windfalls and wipeouts. Given the arbitrary state of the vesting doctrine, developers protected by the doctrine receive windfalls while developers who are not protected are wiped out. Several courts have responded to this criticism by relaxing the vested rights doctrine, and Professor Hagman wrote on this trend.⁵⁰ Vesting is another area in land use law where Professor Hagman's original and provocative work is likely to be influential for the foreseeable future.

III. LOCAL GOVERNMENT

1. New Forms of Regional Government

Professor Hagman taught local government law at UCLA and was concerned throughout his career with local government law issues. Unlike many other land use scholars, he recognized the importance of local government structure and authority to land use controls and included local government materials in his casebook. While a visiting professor at the University of Minnesota Law School in 1966-67, he became interested in the Minnesota Municipal Commission, a state agency responsible for municipal incorporations and boundary changes. The Minnesota Commission is one of several commissions in the country and is an innovative experiment in the administrative control of local government incorporation and boundary change.

Professor Hagman wrote a report sponsored by the university which reviewed the law of incorporation and boundary change in the United States, and which contained an innovative statutory proposal.⁵¹ Unfortunately, the report was not widely distributed and he did not publish it in article form. This study clearly gave

48. Hagman, *The Vesting Issue: The Rights of Fetal Development Vis a Vis The Abortions of Public Whimsy*, 7 ENVTL. L. 519 (1977).

49. Hagman, *Development Agreements*, 3 ZONING & PLAN. L. REP. 65, 73 (1980).

50. Hagman, *Estoppel and Vesting in the Age of Multi-Land Use Permits*, 11 SW. U.L. REV. 545 (1979).

51. Standards for Incorporation and Municipal Boundary Change Recommendations Based on a Study of Statutory and Case Law in the United States (General Extension Division, University of Minnesota 1969).

him the background he needed for his later work on local government organization problems.

Professor Hagman also became interested in the voting rights problem as it affected local government incorporation and annexation after decisions by the U.S. Supreme Court invalidated state laws conditioning the right to vote in municipal bond and similar elections on property ownership. Many state incorporation and annexation laws contain similar restrictions, and he argued in a co-authored article that they were unconstitutional under the Supreme Court cases.⁵² In *Curtis v. Board of Supervisors*,⁵³ the California Supreme Court quoted from and relied on Professor Hagman's article, and a monograph he prepared for the UCLA Institute of Government and Public Affairs, to strike down a statute allowing a majority of property owners to block an incorporation election. He was paternally proud of *Curtis*; he always referred to it as "his" case.

Professor Hagman's most innovative and far-reaching proposals for local government reform are contained in an article he published as part of a 1970 symposium in the *Georgetown Law Journal*.⁵⁴ The article was concerned with the problem of governmental fragmentation and fiscal inequality in the Los Angeles-Orange County metropolitan area. Way ahead of his time, Professor Hagman saw the need to separate problems of regional governance from problems of fiscal inter-governmental equity. He also anticipated the movement for greater local participation in governmental affairs through governmental decentralization. The article proposed a reorganization of local government in the region through the creation of a metropolitan government with taxing power and the authority to distribute revenues to local government sub-units. The sub-units would exercise local government powers, subject to the authority of the metropolitan government to set performance standards.

Revenue distribution would be based on a performance "output" standard rather than on an "input" standard such as fiscal equality. Professor Hagman based this recommendation on his review of the school finance inequality problem, and concluded that equality in financial resources was not a proper standard. "It is obvious that even equal expenditure per child does not insure quality education."⁵⁵ Later studies, and the complexities inherent in the school finance decisions, support his conclusion.

52. Hagman & Disco, *One-Man One Vote as a Constitutional Imperative for Needed Reform of Incorporation and Boundary Change Laws*, 2 URB. LAW. 459 (1970).

53. 7 Cal. 3d 942, 501 P.2d 537, 104 Cal. Rptr. 297 (1972).

54. Hagman, *Regionalized Decentralism: A Model For Rapprochement in Los Angeles*, 58 GEO. L.J. 901 (1970).

55. *Id.* at 941.

The Georgetown article has unjustifiably suffered from lack of interest in metropolitan government reform and has not had the attention it deserves. Professor Hagman's prophetic and innovative ideas may yet receive attention if our society decides that metropolitan governance problems demand public attention.

2. Race, Representation, and Boundary Change

Perhaps the central task of the judiciary since the end of World War II has been to adapt the Constitution to the reality, never envisioned by the founders of the Republic, of a multi-racial society. In outlawing *de jure* racial discrimination and franchise denials, the Supreme Court articulated for a somewhat reluctant nation the vision of a society based on individual dignity. In the late 1960's, the vision of a multi-racial society, bound together by constitutional doctrines premised on an unambiguous principle of equality, began to blur as the economic and social costs of such a society became clearer. It became harder and harder to apply a simple definition of equality to the second generation of more complex discrimination problems, which combined both racial discrimination and economic elements. One of the many difficult areas was local government and land use practices. Local boundary change and service practices and zoning ordinances that mandated large lots and minimum house sizes were challenged as unconstitutional under a variety of creative theories. Many, including Professor Hagman, thought that the courts could do for local government and land use law what they had done for *de jure* racial discrimination.

Professor Hagman was an early and eloquent critic of the use of local prerogatives to achieve or perpetrate racial discrimination. Writing in the 1971 *Utah Law Review*, he stated his convictions and clearly and consistently adhered to them for the rest of his life:

Although urban planning and controls have generally operated to aid the public health, safety, and welfare, they may not have had that effect upon either the poor or minority groups. Rather, planning and controls and related public powers have often been used to exclude, separate, and remove minorities and the poor from places occupied by middle and upper class whites. Some of the prejudice has been implemented by direct government action,—i.e., the direct purpose of some legislation or other act was to vent prejudice—sometimes only the effect and not the motive has been to produce exclusion, separation, and removal, and in other instances the government has participated only by enforcing devices privately created to effectuate the prejudice. That state and local government processes have been and are being used to further racial discrimination is especially disheartening. More should

be expected from government.⁵⁶

In the early 1970's, Professor Hagman directed a Russell Sage Foundation study of the effect of local governmental unit boundary changes on minorities. The study grew out of his early interest in voting rights in boundary elections. *The White Curtain: Racially Disadvantaging Local Government Boundary Practices*,⁵⁷ was published in 1977 in the *University of Detroit Journal of Urban Law*, and its thesis was straight-forward: "local governments . . . use their powers to change or to refuse to change their exterior boundary lines in order to disadvantage racial minorities."⁵⁸

This multi-author study is an important but limited piece of scholarship. It is the most comprehensive collection of empirical case studies of local government boundary practices, from a Texas water district to northern city school boundary suits. However, candor requires us to acknowledge that the study is one of Professor Hagman's least successful works for two principal reasons. First, as he acknowledged in his introduction, federal constitutional law no longer supported the implicit premise of the study, so it was overtaken by events. During the study period, the Supreme Court refused (1) to make wealth, even when intertwined with race, a suspect classification, (2) to allow racial discrimination, in constitutional rather than statutory suits, to be established other than by proof of intent, (3) to create a federal law of local zoning, and (4) to extend the use of the one person, one vote rule to diminish traditional state control over local boundary change procedures. Second, Professor Hagman failed to analyze in sufficient depth either the constitutional arguments that were being advanced in the early 1970's to open local communities to many who wanted to enter or the Supreme Court's rejection of them. This failure gives the study a melancholy, elegiac tone that limits its long term impact to a rich but not fully analyzed set of data. In his own substantive chapter,⁵⁹ Professor Hagman articulated a theory of intergovernmental public service equity based on a mix of the two foundation equal services cases, *Hawkins v. Town of Shaw*⁶⁰ and *Serrano v. Priest*,⁶¹ and the suggestion in *Milliken v. Bradley*⁶² that regional equality can be required

56. Hagman, *Urban Planning and Development—Race and Poverty—Past, Present and Future*, 1971 UTAH L. REV. 46.

57. *Supra* note 2.

58. *Id.* at 681.

59. Hagman, *The Use of Boundary Lines to Discriminate in the Provision of Services by Race*, 54 U. DET. J. URBAN L. 849, 865-879 (1977) [Hereinafter Hagman, *The Use of Boundary Lines*].

60. 461 F.2d 1171 (5th Cir. 1972).

61. 3 Cal. 3d 384, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971).

62. 418 U.S. 717 (1974).

when intentional racial discrimination is proved.

The most interesting aspect of the chapter is his effort to counter the public choice case against judicially or legislatively mandated fiscal equality. Public choice theory attempts to apply the economic theory of rational choice to the political market, and an early article provided a rationale of sorts for fragmented units of local government and thus interregional fiscal inequality. The famous "Tiebout"⁶³ model posits that existing jurisdiction boundary patterns and resulting fiscal disparities among units may simply reflect an efficient allocation of resources. In short, Los Angeles is the triumph of consumer sovereignty, just as is a supermarket shelf of different breakfast cereals. Any efforts to promote regional fiscal equality would lead to an inefficient allocation of resources because people might be forced to buy too many services.

Professor Hagman attempted to refute those who used the "Tiebout" model as a justification for interregional fiscal inequality by arguing that the presence of racial discrimination rendered the model irrelevant:

Presumably, the reason for intraregional inequality now is that it pays, or is efficient for, rich whites to be in separate communities. Separate and unequal, just as it was before, when a separate government was not needed to provide separate and unequal schools. Separate and unequal, just as it was in the town of Shaw—the situation that upset plaintiff Hawkins. Separate and unequal, just as it can now be in Detroit under *Milliken* unless the last round of litigation requiring better equalization is an approach ultimately vindicated.

It is precisely because it pays rich whites to be separate and unequal that exclusionary land use controls pay. Destroy inequality by requiring the equalization of services and we may no longer be separate; first because the whites will have equal services as an incentive for moving back into the cities, and second because the suburbs will have less incentive for keeping "high service cost" people out. Alternatively, people are free to stay where they are and receive equal protection.

The foregoing arguments do not set out to prove that the equalization of services is efficient. The case for equalization is built on fairness. But any proposal built on fairness is likely to be opposed by those who use pseudo-scientific economic analyses to "prove" that progress in removing the badges of slavery and poverty in this country by equalization would be bad policy because it would be inefficient. This Chapter may not have been successful in fully disarming Tieboutism, but its purpose was to have at least called Tiebout's impact on the equalization of services issue into considerable question.⁶⁴

63. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416 (1956).

64. Hagman, *The Use of Boundary Lines*, *supra* note 59, at 896.

IV. ENVIRONMENTAL LAW

Prior to the late 1960's, what we now call environmental quality issues were the province of two small, although sometimes powerful, wings of the Nineteenth Century progressive conservation movement. Before the turn of the century, the movement to conserve America's natural resources split into two wings. The dominant wing was scientific conservation which stressed the wise use of our resource base, and the minor wing was the preservation movement. This latter movement provided much of the legacy of the modern environmental movement, but its focus was almost exclusively on political action to persuade Congress to leave public lands untouched. For reasons that are still not entirely clear, in the late 1960's environmental quality suddenly secured a high place on the national political agenda.⁶⁵ Public demand for action exceeded prior, fragmented Congressional legislation and administrative concern, and, as a result, the courts were asked to become front-line protectors of environmental issues. Some courts responded enthusiastically to this role, and Congress began furiously to legislate. From this unstable mix of crash judicial activism and catch-up legislation, environmental law was born.

Professor Hagman was not among the "official" founders of environmental law who met at Arlie House, Virginia in September of 1969 to define the scope of the area,⁶⁶ but he soon became a keen student of the subject. He was one of the first land use teachers to grasp the potential impact on local control practices of environmental regulation. Professor Hagman did not publish many environmental law articles, although air and water pollution issues were fully incorporated into his casebook. Rather, his special contribution was to refuse to see environmental quality as a transcendental principle that avoided the need to worry about issues such as social justice and fairness. His basic view stated a hard truth that has been increasingly documented: "Most environmental problems are a matter of aesthetics, and only the affluent can afford aesthetics."⁶⁷

His major article was *NEPA's Progeny Inhabit the States: Were the Genes Defective*, and in it he asked some hard questions about environmental impact analysis. In 1969 Congress, with little understanding of its legal significance, passed the National Environmental Policy Act,⁶⁸ a short act requiring the preparation of environmental impact statements for all major federal actions significantly affecting the equality of the human environment.

65. See J. PETULLA, *AMERICAN ENVIRONMENTAL HISTORY* (1977).

66. *LAW AND THE ENVIRONMENT* (M. Baldwin & J. Page Jr. eds. 1970).

67. Hagman, *NEPA's Progeny*, *supra* note 46, at 50.

68. 42 U.S.C. §§ 4321-4374 (1976).

Shortly thereafter, California passed CEQA—its own little NEPA.⁶⁹ The first major California Supreme Court opinion to construe CEQA, *Friends of Mammoth v. Board of Supervisors*,⁷⁰ held that private activities subject to local regulation were subject to the environmental impact report requirement. The legislature soon softened the immediate impact of the decision,⁷¹ but Professor Hagman lodged two major arguments against the very notion of environmental impact analysis. First, he argued that environmental impact analysis had the potential to ignore social justice issues and to serve as a screen for racial discrimination. Second, he neatly punctured the chief argument of some of NEPA's more enthusiastic defenders who were trying to construct a positive argument for NEPA beyond the idea that anything that delayed environmentally bad projects was good. NEPA, they argued, had the potential to evolve into a comprehensive environmental planning process.⁷²

Professor Hagman found NEPA to be the antithesis of planning, and even where it was integrated into general planning procedures, a process unlikely to produce much of value. His criticism of NEPA procedures at the state and local level remain as trenchant now as they were in 1974:

The NEPA and NEPA-like state act theory and approach to land use control is the antithesis of comprehensive land use control. Local planning and zoning is an outgrowth of nuisance law; NEPA and NEPA-like acts reintroduce the concept with greater sensitivity. Under nuisance law, a use or a project is judged either in one's imagination (preliminary injunction) or after it is built and its impact on the surroundings is considered. If the adverse externalities are too great, the use or project is declared a nuisance and enjoined, forced to mitigate externalities, or forced to pay damages. The planning and zoning system, by contrast, is theoretically different. The plan (master plan or as represented by the zoning) is developed first. Development is then placed in accordance with this comprehensive plan. If it does not fit the plan, it does not theoretically get built.

NEPA and NEPA-like state acts are like nuisance law in that the project is first imagined in a particular place and then its relation to the surroundings is judged. Of course, the judging is much more sensitive and, at least to date, the project cannot be stopped if the externalities are adverse. The only hope is that the project will not be built if the men proposing it are

69. California Environmental Quality Act, CAL. PUB. RES. CODE §§ 21000-21151 (West 1977 & Supp. 1982).

70. 8 Cal. 3d 247, 502 P.2d 1049, 104 Cal. Rptr. 761 (1972).

71. In late 1972, CEQA was limited to discretionary as opposed to ministerial land use approvals. CAL. PUB. RES. CODE § 21080 (West. Supp. 1972).

72. F. ANDERSON, NEPA IN THE COURTS 290 (1974).

rational and, as government officials, will act only in the overall public interest.⁷³

V. CONCLUSION

In this Article, we have followed the convention of the printed page by referring to Professor Hagman. But, to us, and many other colleagues, professionals, and students he was always Don. As we reviewed his works, most of which we had studied carefully when they appeared, a host of personal memories came flooding forth of Don enlivening a conference or seminar, holding forth over a drink or of chance encounters of him at an airport. These we will keep and share among his friends from time to time to try and push away the sadness and pain of his death. Those who did not know him have been deprived of something special, but they are not deprived of the essence of Don. His major thoughts and much of his style and personality are preserved in his scholarly legacy. Don was fond of acronyms, and his various concoctions that explained land use techniques and ideas will stay with us. An acronym comes to mind that sums him up—LOLULTSW: Loved and Outstanding Land Use Law Teacher, Speaker, and Writer.

73. Hagman, *NEPA's Progeny*, *supra* note 46, at 47.