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Gideon Kanner: There's No Such Thing as a Free Lunch!

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Great lawyers need to be great archaeologists. With the explosive expansion of the volumes of raw material now available in law libraries, it is no easy task to draw from the welter those particular items that will grab the attention of a court and, hopefully, turn the judges in your direction. When one of those excursions into the dusty catacombs hits pay dirt, it is nirvana. When the court that gets energized is the United States Supreme Court, it may (with apologies to both Allen King and salami and eggs) be better than sex.

In wishing Professor Kanner a farewell from academic life, I'd like to share two archeological war stories which deserve wider notice than they now have.

In the field of inverse condemnation (part of the little puddle of the law occupied by Professor Kanner), few appellate footnotes have attained the notoriety of footnote twenty-two in Justice Brennan's dissent in *San Diego Gas & Electric Co. v. City of San Diego*.[1] For those of you who have not made a career out of this arcane legal playing field, *San Diego Gas* was one of a series of cases taken by the Supreme Court to decide whether the fifth amendment requires just compensation for a taking of property affected by a regulation rather than by a physical invasion. In one fell swoop, that footnote exposed many municipal lawmakers and their defenders for game-players, bent on using the law to make citizens jump through hoops—even after an ordinance had been judicially struck down. This concept was crucial. To obtain real relief, property owners' advocates needed to convince the Court that invalidation was a remedy in name only, but of no utility to the supposedly victorious citizen.

The proof came in the form of the published version of a 1974 speech to a meeting of the National Institute of Municipal Law Officers. The speech had been given by a California city attorney, and demonstrated more clearly than volumes of legal argument the fate of a property owner "lucky" enough to convince a California court to invalidate a municipal ordinance:

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* The author is a partner at Berger & Norton in Los Angeles and confesses to the following: He and Gideon Kanner were partners before Gideon became a professor, and he toils in the same thankless vineyard of the law in an effort to civilize governmental treatment of property owners.

1. 450 U.S. 621, 655 n.22 (1981) (Brennan, J., dissenting).

IF ALL ELSE FAILS, MERELY AMEND THE REGULATION AND START OVER AGAIN.

If legal preventive maintenance does not work, and you still receive a claim attacking the land use regulation, or if you try the case and lose, don't worry about it. All is not lost. One of the extra 'goodies' contained in the recent [California] Supreme Court case of *Selby v. City of San Buenaventura*, appears to allow the City to change the regulation in question, even after trial and judgment, make it more reasonable, more restrictive, or whatever, and everybody starts over again.

* * *

See how easy it is to be a City Attorney. Sometimes you can lose the battle and still win the war. Good Luck.[2]

Perhaps more than anything else, that flip comment by a city attorney, illustrating in neon the disdain with which government viewed the "remedy" of invalidation, helped set the stage for the Court's eventual holding that invalidation was an inadequate remedy and compensation was required.[3]

What most people don't know is that the legal archeologist who dug up that particular damning piece of evidence was Gideon Kanner.[4] Of the eventual impact of his research, he is justly proud.

At a different level, Professor Kanner is probably the world's foremost published authority on the subject of pre-condemnation blight—the adverse impact of highly publicized impending condemnation on property owners who are unable to sell their properties and must await the eventual condemnation at the will of the condemning agency.[5] During this sometimes interminable interim, as Professor Kanner has amply demonstrated in his articles, many property owners lose their property by foreclosure or bankruptcy.

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2. *Id.*

3. First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304 (1987). Some of the travails in progressing from *San Diego Gas* to *First English* are chronicled in Berger & Kanner, *Thoughts on the* White River Junction Manifesto: *A Reply to the "Gang of Five's" Views on Just Compensation for Regulatory Taking of Property*, 19 LOY. L.A.L. REV. 685 (1986).

4. Fellow archaeologists will find the same material quoted at page 29 of his Jurisdictional Statement in Agins v. City of Tiburon, 447 U.S. 255 (1980), a precursor to *San Diego Gas*.

5. Kanner, *Condemnation Blight: Just How Just Is Just Compensation?*, 48 NOTRE DAME LAW. 765 (1973); Kanner, *Developments in Eminent Domain: A Candle in the Dark Corner of the Law*, 52 J. URB. L. 862 (1975); Molho & Kanner, *Urban Renewal: Laissez-Faire for the Poor, Welfare for the Rich*, 8 PAC. L.J. 627 (1977).

In that capacity, after convincing the California Supreme Court to establish a compensatory remedy for unreasonable delay,[6] he appears also to have been instrumental in civilizing the pre-condemnation blight law of Oregon. There, the court of appeal had relied on a particularly pernicious New York decision which drastically limited (actually, all but eliminated) the ability of a property owner to recover compensation for blight.[7] In reversing, the Oregon Supreme Court (and this is only slightly paraphrasing) noted that it had read about the New York case in one of Professor Kanner's articles and concluded that Kanner doesn't like the New York case and neither do we! The Oregon Supreme Court found the Kanner criticism more persuasive than the opinions of three other state appellate courts, which agreed with New York.[8]

During his archeological excavations, Professor Kanner came across an apocryphal story that became his trademark. I won't belabor it for you here. Ask him. Suffice it to say that the story was about an emperor and a group of learned academics and the punch line was "There's no such thing as a free lunch!" Gideon Kanner has spent much of his legal career preaching that message. I wish him well in his next incarnation.

6. Klopping v. City of Whittier, 8 Cal. 3d 39, 500 P.2d 1345, 104 Cal. Rptr. 1 (1972).

7. City of Buffalo v. J.W. Clement Co., 28 N.Y.2d 241, 269 N.E.2d 895, 321 N.Y.S.2d 345 (1971).

8. Lincoln Loan Co. v. State Highway Comm'n, 274 Or. 49, 545 P.2d 105 (1976).