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Controversial charities and public benefit

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A key requirement of charities is that they must benefit the public. Public benefit can, however, be elusive. How do we determine the public benefit of organisations whose purposes and activities are focused on promoting or advocating for contested viewpoints? These controversial organisations pose particular challenges for charity regulators who are required to be objective in their assessment of public benefit. Controversial organisations can be informed by a religious ethos — such as Family First or the Society for the Protection of the Unborn Child — or be non-religious such as Amnesty International, the Secular Society, or anti-vivisection groups.

Until recently, the courts and charity regulators have been largely able to avoid assessing the public benefit of controversial organisations by applying the political purpose doctrine. In New Zealand, however, this doctrine was rejected by the Supreme Court in *Re Greenpeace of New Zealand Inc* [2015] 1 NZLR 169. The decision in *Greenpeace* has been helpfully discussed in this journal ([2015] 93, 108, and 116). Previous commentators have suggested that this decision sheds welcome light on this area and shows the ability of charity law (and, in particular, the courts) to break free from the 'shackles' of past doctrine ([2015] NZLJ 108). This article expresses a more cautious view. It argues that by dispensing with the political purpose prohibition for charities, New Zealand courts have created a different challenge for charity regulation: how to assess the public benefit of controversial charities.

This article discusses the difficulty — both practically and constitutionally — of assessing public benefit in relation to controversial organisations. It argues that this difficulty has been exacerbated by the New Zealand Supreme Court's rejection of the political purpose doctrine in its *Greenpeace* decision. Unlike previous commentaries in this journal ([2015] NZLJ 305; [2017] NZLJ 307), it argues that the recent deregistration of Family First exposes the weaknesses in that judgment. Without recourse to the bright-line rule of the political purpose doctrine, decision-makers must assess the public benefit of controversial organisations engaged in law reform advocacy. This poses challenges for institutional competence and constitutional legitimacy.

THE POLITICAL PURPOSE DOCTRINE

Generally speaking, an organisation can be registered as a charity if its purposes are exclusively charitable and it is for the benefit of the public. A charitable purpose is one that falls under the four heads of charity: the relief of poverty; the advancement of education; the advancement of religion; and any other matter beneficial to the community (Charities Act 2005, s 5(1)). For an organisation to fall under the fourth head of charity — a purpose beneficial to the community — it must be sufficiently similar (but not necessarily identical) to a purpose previously accepted as charitable. An organisation's purposes may be identified from its statement of objects or inferred through its activities. A public benefit is one that is identifiable and defined and aimed at the general public or a sufficient section of it.

Until recently, if the organisation's main purpose was political then it would not be charitable. A political activity was permitted only if it were ancillary (that is, secondary or incidental) to the charity's main purpose and not an independent purpose (Charities Act 2005, s 5(3)).

The political purpose doctrine appears to have arisen most clearly from the English decision in *Bowman v Secular Society* [1917] AC 406. There are instances in the 19th century, however, of political purpose charities being recognised for organisations such as the Anti-Slavery Society and for the purpose of furthering "Conservative principles" (*Re Scowcroft* [1898] 2Ch 638). Judicial commentary has also suggested there is a "paucity of" or "scanty" judicial authority for the doctrine (Lords Simonds and Lord Porter in *National Anti-Vivisection Society v Inland Revenue Commissioners* [1948] AC 31, 63 and 54). Nonetheless, the political purpose doctrine was accepted law in New Zealand (*Molloy v Commissioner of Inland Revenue* [1981] 1 NZLR; *Re Collier (deceased)* [1998] 1 NZLR 81; *Re Draco Foundation (New Zealand) Charitable Trust*, HC Wellington CIV-2010-485-1275, 15 February 2011) and still applies in England (*McGovern v Attorney-General* [1982] 1 Ch 321).

What constitutes a political purpose? Amongst other indicators, advocating for a change in law has been deemed political (*Bowman v Secular Society Ltd* [1917] AC 406, 442). The decision in *McGovern v Attorney-General* (at 340) framed law reform advocacy widely to include changes in law, governmental policy, or administrative decision-making in any country. This categorisation was not intended to be exhaustive. In this case, two purposes of a trust established by Amnesty International — securing the release of prisoners of conscience and procuring the abolition of torture and inhuman or degrading treatment or punishment — were held not to be charitable. This was because they were said to likely prejudice the United Kingdom's relations with other countries.

The difficulty with this doctrine is that many not-for-profit organisations have an interest in seeing certain laws, policies, or decisions changed in order to achieve their purpose. Because of this, they may engage in political campaigning or law reform advocacy to raise awareness of certain societal issues and what they see as ineffective or harmful

laws, policies, or decision-making. The broad description of political purpose in the case law — specifically *McGovern* — means that much of this activity is caught by the doctrine. Whether that political activity is ancillary or not then becomes crucial to the organisation's charitable status. If, by examining the objects or activity of the organisation, the regulator finds that its main or independent purpose is political, then it could not be registered as charity.

The political purpose doctrine made it difficult for many worthwhile organisations to be registered as charities and this led the courts in Australia and New Zealand to reconsider it. The Australian High Court rejected the doctrine in *Aid/Watch Inc v FCT* [2010] HCA 42. Here the Court found that a political activist group concerned with promoting the effectiveness of foreign aid delivery had a purpose beneficial to the community (at [47]). The organisation was found to be charitable despite its main purpose being political, and its main activity being campaigning for changes to the ways in which aid is delivered, which necessarily involved criticising and attempting to bring about change in government activity and policy. New Zealand followed suit and rejected the political purpose doctrine in *Greenpeace*. In this case, a majority of the Supreme Court (Elias CJ, McGrath and Glazebrook JJ) overturned decades of jurisprudence to find that the doctrine was no longer necessary or beneficial as a matter of law (at [59]). A blanket exclusion, it reasoned, distracted from the underlying inquiry which was whether a purpose is of public benefit in the sense that the law recognises as charitable (at [69]). Following this decision, political purposes and charitable purposes are no longer mutually exclusive. Activities such as the promotion of specific causes or viewpoints and law reform advocacy — which had previously prevented controversial organisations from obtaining charitable status — could now be charitable.

The result of the *Greenpeace* decision is that organisations set up with the aim of persuading people about their views on issues, or advocating for specific causes or law reform, could now theoretically be charitable. Without the bright-line rule that the political purpose doctrine provides, however, the decision-maker now has to determine whether the purpose or activity of the organisation is for the public benefit. This can be particularly difficult where the cause is controversial or the particular viewpoint is contested.

The difficulty in determining the public benefit of controversial organisations is not helped by the sparse Supreme Court guidance. Elias CJ simply stated that public benefit will depend 'on consideration of the *end* that is advocated, the *means* promoted to achieve that end and the *manner* in which the cause is promoted' (at [76] emphasis added). The Supreme Court acknowledged, however, that advocacy for specific causes would often not be charitable because it would not be possible to say whether the views (in their promotion or their achievement) are for the public benefit (at [73] and [102]).

Subsequent deregistration decisions of the Charities Registration Board (the Board) have confirmed the Supreme Court's prediction. The Sensible Sentencing Trust was deregistered in 2015 because its advocacy in relation to criminal sentencing was found not to be a charitable purpose. In August 2017, the Board confirmed its earlier deregistration decision regarding Family First on the basis that promoting and advocating for particular views about marriage and the traditional family could not be determined to be for the public benefit in a way that has previously been accepted as charitable (at [34]). It would seem that controversial organisations will have a difficult time achieving charitable status despite the new law.

THE RATIONALE FOR THE POLITICAL PURPOSE DOCTRINE

The Supreme Court in *Greenpeace* found it "difficult to construct any adequate or principled theory to support blanket exclusion" of political purposes from charitable status. ([69)]. However, two main rationales — institutional competence and constitutional legitimacy — were dismissed too quickly by the Court (for a summary of other rationales see *Re Collier (deceased)* [1998] 1 NZLR 81, 89–90 (HC) and *Greenpeace* [2011] 2 NZLR 815 at [50]–[59]). The recent Family First deregistration decision demonstrates that these two rationales are still relevant, at least with regards to controversial organisations, and that the political purpose doctrine would avoid the difficulty of determining the public benefit these organisations.

Institutional competence

The first main rationale is institutional competence. An argument in support of the political purpose doctrine is that the courts are not equipped to determine the public benefit of any proposed change in the law. Lord Parker in *Bowman* thought that "the Court has no means of judging whether a proposed change in the law will or will not be for the public benefit" (at 442). Affirming *Bowman*, Slade J in *McGovern* observed that, with regards to changes to foreign laws, domestic courts cannot assess what the impact of the chance would be on inhabitants of foreign countries. Slade J then extended this rationale to include government policy and executive decision-making. He thought that the court would not have sufficient means of determining whether reversing the policy or decision would be beneficial to the public (at 339).

The institutional competence rationale has obvious flaws when it comes to organisations that seek reform of legislation. Most obviously, it contradicts other aspects of charity law and the decision-making activities of those bodies (which in New Zealand includes the Charities Registration Board and the high courts) tasked with determining charitable status. These bodies are able to assess public benefit except, according to the institutional competence rationale, when it comes to law reform. When it comes to law reform, apparently they no longer have any means to assess public benefit even where there is substantial evidence of public benefit (or lack thereof) at their disposal. This distinction seems artificial and implausible.

Where an organisation seeks to change policy or other executive action, however, the institutional competence rationale is stronger. After all, courts have long been reluctant to pass judgment on the merits (as opposed to the lawfulness) of policy or executive decision-making on the basis that they lack the expertise to know whether a particular policy or decision is a good one. This is particularly the case where the decision or dispute is polycentric or involves matters of high policy such as national security, environmental regulation, or distribution of health care resources.

Controversial organisations, in particular, demonstrate how the institutional competence rationale is not obsolete. William Young and Arnold JJ (dissenting) in *Greenpeace* note that "judges are usually not well-placed" to determine whether adopting contentious positions would benefit the public. The worth of purposes in complex areas such as

New Zealand's foreign policies on nuclear weapons and weapons of mass destruction, or environmental protection, are "not easily determined by the courts". A dispute over charitable status is not the 'ideal forum' for determining appropriate governmental policies in these areas (at [125]).

The Board's deregistration decision regarding Family First illustrates the difficulty entailed in assessing the public benefit of a controversial organisation. Here the Board had to consider the public benefit of the organisation's stated purposes which, the group argued, were analogous to the purpose previously accepted as charitable under the fourth head of charity, namely "the promotion of moral and mental improvement". A significant number of Family First's purposes — inferred from its activities — involved *advocating* for causes directed at moral improvement. Moreover, its advocacy presented a particular (contested) point of view. Family First advocates on issues concerning family life and its advocacy is based on a 'traditional' conception of the family and community well-being. Amongst other things, it promotes the heterosexual nuclear family. How can the decision-maker assess the public benefit of such activity?

No longer able to resort to the political purpose doctrine, the decision-maker in cases like Family First must now assess the public benefit of the controversial organisation's advocacy. This task is made more challenging given that, despite doing away with the doctrine, the Supreme Court provided little guidance as to how to assess public benefit. It emphasised that to be registered as a charity the views of the organisation did not have to be generally accepted or non-contentious — charitable status should not depend on 'majoritarian assessment' (at [75] — but provided no guidance beyond that.

The High Court decision in Family First provided some guidance in the form of what the Board was *not* permitted to do. Collins J warned against the Board assessing whether Family First's purposes are charitable — namely, its activities are aimed at promoting the moral improvement of society — by undertaking "a subjective assessment of the merits of Family First's views" ([2015] NZHC 1493 [89]) by which he means their own personal views of Family First. He noted that the Board has an obligation under the Charities Act to act with honesty, integrity, and good faith (sch 2, cls 17 & 18). It should be noted that a directive that the Board must not make subjective decisions is no guarantee of ensuring that the organisation *in fact* benefits the public. Taking an 'objective' or agnostic stance on the merits of a particular organisation can, while appearing to be progressive and open-minded, actually result in harmful activity being given the moral imprimatur of state support. In *Centrepoint Community Growth Trust v Commission for Inland Revenue* [1985] 1 NZLR 673, for example, Justice Tompkins rejected the Commissioner for Inland Revenue's suggestion that the group's views on sexual activity and children were harmful and the group was given charitable status. The group's leaders were later convicted of sexually assaulting children.

Given that the Supreme Court warned against a "majoritarian assessment" and the High Court against a "subjective assessment" of public benefit, how then, should the Board determine public benefit in the instance of a controversial organisation such as Family First? One option is to rely on expert evidence as to how the particular purpose or activity benefits the public. Such assessment is difficult, however, where the charitable purpose is the *moral* improvement of society. Relying on expert evidence, if it is available, as to what is morally beneficial is undesirable in a liberal state. Another option is for the Board to make its own assessment about public benefit without recourse to evidence. But here the Board is once again in a bind: it cannot make a subjective assessment (according to the High Court) but nor can it rely on a commonly accepted or majoritarian assessment (according to the Supreme Court). Given that morality is a personal or societal code of conduct regarding the correct way to live one's life, it is difficult to see how moral improvement could be assessed objectively let alone in a manner that does not depend on the decision-maker or the community's own assessment of (or assumptions about) the worth of the particular purpose. Hammond J expressed sympathy for judicial reluctance to enter into a debate on the merits of organisations engaged in advocacy of a particular (contentious) point of view on this basis citing Rickett "Charity and Politics" (1982) 10 NZULR 169.

The Charities Services guidance seems to anticipate this difficulty with assessing the public benefit of controversial organisations from the start. It states that the public benefit of a view must be capable of being shown clearly and that the courts cannot usually say that promoting one view over another view is for the public benefit. This almost complete rules out all moral improvement purposes based on controversial viewpoints and sounds a lot like a retreat back to the political purpose doctrine in all but name (see the dissent in *Greenpeace* on this point at [126]).

Part of the difficulty with the new approach to political purposes is the failure of the Supreme Court to identify a specific benefit that groups engaged in law reform advocacy can achieve. Public benefit, it says (at [103]) "may sometimes be found in advocacy … But such finding depends on the wider context …" The Australian *Aid/Watch* decision, by contrast, identifies a specific benefit that such advocacy can achieve, namely contributing to a culture of free political express on which a representative and responsible system of government — as required by the Australian constitution — depends.

The Supreme Court has made the decision-maker's task even more difficult by requiring an assessment of the benefit of *achieving* the stated purpose (rather than just the benefit of *pursuing* it). This means, as Harding has explained ("An Antipodean View of Political Purposes and Charity Law" (2015) 131 LQR 181, 185), that the decision-maker cannot end the public benefit inquiry simply by looking at the benefit of advocacy in and of itself — for example, by identifying the benefit of political engagement and expression as the Australian approach does — but must go on to assess the benefit of the purpose if it is achieved. This puts the decision-maker in the ill-suited (and arguably ridiculous) position of having to assess the public benefit (which may involve having regard to the consequences for NZ's international relations) of actually achieving purposes such as peace (as opposed to war), nuclear disarmament, and the elimination of weapons of mass destruction. The Supreme Court majority did acknowledge that if the political purpose is controversial, it will be more difficult to demonstrate that its achievement will benefit the public. However, the decision-maker must still make "some effort to ascertain the public benefit or otherwise not only of that purpose being pursued but also of it being achieved, nevermind how controversial that purpose might be" (Harding at 183).

While previously a decision-maker could avoid assessing the benefit of law reform in controversial areas such as abortion or voluntary euthanasia by applying the political purpose doctrine, it can no longer do so. What is likely going

forward is that, in order to avoid making a value judgment regarding the worth of a particular cause or viewpoint, the decision-maker will increasingly rely on the absence of clear evidence of public benefit to deny charitable status. This will be the political purpose doctrine being applied through the backdoor. Maintaining some form of the political purpose doctrine, on the basis of institutional competence, would allow for greater transparency.

Constitutional legitimacy

A second rationale for the political purpose doctrine is to ensure constitutional legitimacy. A court or charity regulator is venturing into constitutionally treacherous territory when it suggests that a change in the law is beneficial. This is the case even where the change in the law might be obviously beneficial. Two aspects to constitutional legitimacy are at play with the political purpose doctrine. The first is the constitutional principle of separation of powers. The second is the importance of consistency in the law and between institutions.

As to the first aspect — separation of powers — the reasoning is that by determining that a change in legislation would be beneficial to the public, the courts are sending a message to Parliament that its laws may be incorrect. This could compromise a court's institutional integrity as the applier, not the maker, of laws and arguably "usurp[s] the functions of the legislature" (Slade LJ in *McGovern* at 337). It is hardly unusual, however, for judges to comment on the inadequacy of the law or to suggest changes. Countless instances exist of courts making recommendations that law reform might be desirable. As Hammond J noted in *Re Collier (Deceased)* [1998] 1 NZLR 81, 89 "it is commonplace … whether in judgments or extra-curially" for judges to suggest changes in the law and some of these suggestions have led directly to law reform. There is something unsettling, however, about the courts or a charity regulator being called on *primarily* to assess whether legislative reform would be beneficial rather than merely making a passing or obiter dicta recommendation in the course of its usual business. The institutional integrity of the courts or the regulator would be compromised even more if it is required, as part of determining charitable status, to assess whether it would be in the public benefit for intra vires, and otherwise lawful, actions of the *executive* branch not to occur (Slade LJ in *McGovern* at 339).

Of course, separation of powers and institutional integrity would arguably be preserved if the decision-maker simply avoided any assessment of whether the law change was beneficial and simply admitted all political purpose organisations as charities. It is obvious, however, that not all political purpose organisations will have a public benefit. The difficulty, as discussed above, is distinguishing those changes in the law that are beneficial from those that are not. The Australian High Court, unlike the New Zealand Supreme Court, avoided this problem by focusing on the *means* that the organisation was pursuing and avoiding assessing the benefit of the ends if they were achieved. Note also that the Australian High Court found that the Aid/Watch charity was not favouring *particular* changes in the law but rather encouraging *general* public debate on the activities of government in relation to the relief of poverty. In this way, the Australian organisation differs from Family First.

A more convincing, but often overlooked, rationale is the second aspect of constitutional legitimacy. This is the importance of consistency (also termed coherence) in the law and as between governmental bodies. The idea is that consistency is important to the legitimacy of any legal system and therefore one government department should not undermine legislative initiatives or the lawful policies and decisions of other governmental departments. In support of the political purpose doctrine, an early case from Australia identified the difficulty for law in finding that it was beneficial to have legislative or political change: "[a] coherent system of law can scarcely admit that objects which are inconsistent with its own provisions are for the public welfare" (*Royal North Shore Hospital of Sydney v Attorney-General* (1938) 60 CLR 396, 426).

This article has already pointed out that calls for law reform by the judiciary are not uncommon and not necessarily constitutionally illegitimate. Moreover, law reform can lead to greater, not less, consistency in the law. It is not unusual for some areas of law to be inadvertently inconsistent. In some instances this inconsistency is harmless and can be resolved through judicial interpretation if needed, in others it requires immediate legislative amendment. Controversial organisations are not typically concerned with this type of low-level law reform. Rather, they seek deep legislative and policy changes on contested (and often value-laden) viewpoints. The difficulty for any charity regulator is in assessing the public benefit of those organisational purposes that contradict or seek to undermine the *values* on which certain laws or policies are based. It is almost impossible for a decision-maker to find that these purposes would be in the public benefit without also commenting on the merit of certain legislative agenda or government initiatives and the values that underpin them. If the purpose is found to be in the public benefit, the decision-maker is effectively expressing a view that is inconsistent with existing legislation and government policy.

I have argued elsewhere (*Freedom of Religious Organisations* (OUP, USA, 2016 at 188–189) that where an organisation is associated with "the arm of the state" certain public law standards or values, such as equality, should be adhered to. It has also been argued that bodies which are public — which registered charities are in some senses — should "set an example" or avoid "send[ing] the wrong message about the government's overall commitment to [its] legislation". (Craig *Administrative Law* (Sweet & Maxwell, UK, 2008) at 571). Moreover, receipt of government funds in the form of tax advantages means there ought to be some consistency between the activities of charities and government policies. After all, it would not be in the government's interest to undermine its policies by giving fiscal advantages to organisations that seek to change them. In the case of Family First, this would be the governmental agenda of ensuring equal rights as between same-sex and heterosexual couples.

In addition to the fiscal benefits of being a registered charity, charitable status also gives moral credibility to an organisation. Charitable status indicates that the purpose the organisation is pursuing is worthy enough to receive the support of the state. As Ridge has noted, charitable status 'signals society's endorsement' and, if nothing else, this can help with obtaining financial support ((2011) 35 Melb U L Rev 1071, 1073). The flip side of this is that the charity sector itself will lose credibility and the trust of the public if it is dominated by polarising organisations whose purposes are inconsistent with the certain public law values. The political purpose doctrine was one way to prevent this happening.

The political purpose doctrine is not necessarily required, however, to avoid inconsistency in the law and as between governmental bodies. A controversial organisation could be denied charitable status on the basis that its purposes are inconsistent with government policy and legislative agenda — and are therefore detrimental to the public — without resort to the doctrine. And it is possible, of course, for a political purpose to in fact be *consistent* with public law values such as equality and other governmental policies.

Moreover, advocacy for law reform may not, in and of itself, be problematic for consistency if the focus is on the *means* and not the *ends* sought. The difference between the purpose and activities of Family First and Aid/Watch are illustrative here. According to the Australian High Court, Aid/Watch sought to encourage general public debate about how poverty is best relieved — an activity consistent with the constitutional principles on which representative and responsible government is based. The difficulty for Family First, however, was that it seeks the end goal of changing specific substantive laws and policies on matters related to the family. Requiring the decision-maker to determine the merit of achieving a particular course of legislative change or executive action — which the decision in *Greenpeace* requires since abandoning the political purpose doctrine — poses more difficulty for consistency (see *Aid/Watch* at [45]). If we accept that consistency is an important constitutional principle, it is hard to see how recognising the charitable status of a group that seeks to undermine government policy is constitutionally legitimate. The political purpose doctrine, while not always necessary to ensure consistency, avoided the decision-maker having to make such an assessment.

CONCLUSION

Despite the recent attempt by the Supreme Court in *Greenpeace* to do away with the problems created by the political purpose doctrine, the court has created new difficulties particularly with regards to those organisations who purposes and activities are based on contested viewpoints. The new approach asks the decision-maker to assess the public benefit of both the means and ends pursued by these controversial organisations while providing little guidance on how to do so. Such assessment is not without difficulty both practically and constitutionally. This article has re-examined two rationales for the political purpose doctrine — institutional competence and constitutional legitimacy — and shown that, at least for controversial organisations, these rationales may still hold true and some form of the political purpose doctrine has merit. Going forward, however, we may very well see the courts backpedalling from the decision in *Greenpeace* in order to avoid the difficult task of assessing the public benefit of controversial organisations. As a result, there may eventually be little difference between the old political purpose doctrine and the new approach. ❐

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become important players in the property market, redeveloping and reconfiguring land for resale. Inevitably, poor incentives would arise: government agencies would carry out fewer takings and public works, while those who did mandate complete takings might receive windfall profits. Agglomeration of land would be incentivised, leading to the wealthy benefiting from public works. Problems of landbanking, which have impeded housing supply in many jurisdictions, would be exacerbated. Arbitrariness, which may be overstated anyway, can be managed through the compensation process. Bell and Parchomovsky's approach therefore creates as many problems — perhaps more — than it solves.

We propose here another innovative solution: a significant change, but one less dramatic than allowing a landowner to require a complete taking. We propose that rather than enabling landowners to mandate complete takings, landowners be enabled to apply to a quasi-judicial agency for a zoning dispensation in relation to the leftover parcel. This would help ameliorate any residual problems with leftover parcels, while avoiding the expense and other adverse incentives of complete takings.

To provide an example, suppose a landowner has a block of 10,000m2. Zoning provisions require 1,000m2 minimum per lot. An area is taken for roading, leaving only 5,500m2. Whereas the original parcel could be subdivided into 10 lots, the remainder, after compensation, can only be subdivided into 5 because of its dimensions, leaving an 'extra' 500m2 that does not meet the 1,000m2 minimum. A useful dispensation might depart from normal zoning rules to allow 6 lots within the 5,500m2, not just 5. This would ameliorate the impact of the taking and the 'extra' 500m2.

Details would need to be worked through in different jurisdictions. Which agency or authority would make the dispensation decision, and in what manner, would require specific attention. In some jurisdictions, expropriation is inherently constitutional; in other jurisdictions, it is less so. Zoning frameworks, decisions, and rules vary between jurisdictions, and the structure of decisions on dispensations would therefore vary from place to place. But enabling a dispensation regime for landowners as a consequence of a partial taking makes much more sense than enabling a landowner to require a complete taking. It provides an innovative and novel solution to partial takings without many of the consequences of a complete takings regime. Incomplete takings are not inherently a problem. Complete takings would be. Put another way, a zoning dispensation regime would cure any issues, without the adverse side effects.

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