

TAKING, TDR, AND THE TUDOR CITY PARKS: FRED F. FRENCH INVESTING CO. V. CITY OF NEW YORK

Incentive zoning schemes, such as zoning bonuses¹ and development rights transfers (TDR),² have evolved in response to a growing awareness of the conflict between sound environmental design and the profit motive.³ Enforcement of these schemes raises the question of

1. Zoning bonuses are increments of additional floor space granted to developers who include one or more specified amenities in their building to compensate for the density of the project. Theoretically, the value of the bonus will equal or exceed the cost of providing the amenity. See J. COSTONIS, *SPACE ADRIFT* 30 (1974) [hereinafter cited as *SPACE ADRIFT*] (discussion of incentive zoning as a tool for historic preservation); Barnett, *Case Studies in Creative Urban Zoning*, in *THE NEW ZONING: LEGAL, ADMINISTRATIVE, AND ECONOMIC CONCEPTS AND TECHNIQUES* 125, 128 (N. Marcus and M. Groves eds. 1970) (describes recent zoning incentive measures in New York City).

2. Where a property has not been developed to its as-of-right maximum, schemes of development rights transfers permit shifting of the property's unused development potential to another site. As a method of control, transfers of development rights (TDR) can preserve a landmark or an open space while shifting the economically valuable right to build to land where greater density is not objectionable. See Costonis, *Development Rights Transfer: An Exploratory Essay*, 83 *YALE L.J.* 75, 85-86 (1973) (analysis of the policy considerations and legal rationale of development rights transfers). See also *SPACE ADRIFT*, *supra* note 1, at 32-34; *TRANSFER OF DEVELOPMENT RIGHTS* (J. Rose ed. 1975) (examines legal precedents, analyzes proposals, and evaluates the concept of TDR); Costonis, *The Chicago Plan: Incentive Zoning and the Preservation of Urban Landmarks*, 85 *HARV. L. REV.* 574, 589-602 (1972) (presents TDR proposal involving the condemnation of development rights as a means of landmark preservation); Marcus, *Air Rights Transfers in New York City*, 36 *LAW & CONTEMP. PROB.* 372 (1971) [hereinafter cited as *Air Rights*] (history of the development of TDR in New York City); Marcus, *Mandatory Development Rights Transfer and the Taking Clause: The Case of Manhattan's Tudor City Parks*, 24 *BUFFALO L. REV.* 77 (1974) [hereinafter cited as *Marcus*] (analyzes *French* facts, and TDR generally, using a three-dimensional concept of property); Note, *Development Rights Transfer and Landmarks Preservation—Providing a Sense of Orientation*, 9 *URBAN L. ANN.* 131 (1975); Note, *The Unconstitutionality of Transferable Development Rights*, 84 *YALE L.J.* 1101 (1975) [hereinafter cited as *Unconstitutionality*] (discusses the eminent domain, police power and special assessment aspects of TDR in a constitutional context); Note, *Development Rights Transfer in New York City*, 82 *YALE L.J.* 338 (1972) (considers impact and history of TDR in New York and analyzes landmark cases).

3. See *SPACE ADRIFT*, *supra* note 1, at 28.

when, if ever, the government must compensate individuals for losses resulting from regulation of the use of property.

In *Fred F. French Investing Co. v. City of New York*,⁴ the owners of two private parks⁵ sought the New York City Planning Commission's approval of a shifting of development rights from the parks to an adjoining site and a corresponding zoning change.⁶ Alternatively, the owners proposed to erect a building of the maximum size permitted by existing zoning on each of the park sites.⁷ In response, the city enacted a zoning amendment⁸ permitting only passive recreational use of the parks and requiring that they be open daily to the public.⁹ The amend-

4. 39 N.Y.2d 587, 350 N.E.2d 381, 385 N.Y.S.2d 5, *appeal dismissed*, 429 U.S. 990 (1976).

5. *Id.* The parks are located in the Tudor City Complex, a planned residential community near the United Nations in mid-town Manhattan. The two 15,000 square foot parks cover about 18-1/2% of the area of the complex. Approximately 8000 residents are housed in the fifteen buildings comprising the remainder of the complex. At the time of acquisition by the present mortgagor, defendant Ramsgate Properties, the parks were zoned R-10, a classification permitting residential development. *Id.* at 590-91, 350 N.E.2d at 383, 385 N.Y.S.2d at 7; Marcus, *supra* note 2.

6. 39 N.Y.2d 587, 592, 350 N.E.2d 381, 383, 385 N.Y.S.2d 5, 7, *appeal dismissed*, 429 U.S. 990 (1976). The owners of Tudor City planned to erect a 50-story mixed commercial and residential tower on a platform over East 42nd Street between First and Second Avenues. The plan required a change in the C5-3 zoning of the area astride 42nd Street and the transfer of the development rights of both of the Tudor City parks. *Fred F. French Inv. Co. v. City of N.Y.*, 77 Misc. 2d 199, 201, 352 N.Y.S.2d 762, 764 (Sup. Ct. 1973). Besides raising questions of tunnel safety, ventilation, and traffic control, the prospect of setting a precedent for tunnelling other city streets was disturbing in terms of density and urban design. Additionally, the finished tower would have screened the United Nations Building and shadowed or blocked much of 42nd Street. Marcus, *supra* note 2, at 81.

7. 39 N.Y.2d at 572, 350 N.E.2d at 383, 385 N.Y.S.2d at 7. New York City used the floor area ratio (FAR) concept to control the amount of building on a given lot. *See Air Rights, supra* note 2, at 373. In contrast to envelope zoning, which precisely regulates both the bulk of a building and its location on the lot, FAR zoning authorizes a maximum bulk defined by a multiplier of the area of the zoning lot. It thus increases design flexibility by permitting varied design configurations. *See SPACE ADRIFT, supra* note 1, at 80-82. The R-10 zoning of the Tudor City parks resulted in a FAR of 10. Under existing zoning, then, the owners were permitted to erect a maximum of 300,000 square feet (10 X 30,000 square feet) of rentable space. They therefore proposed to erect a 32-story residential tower on the north park and a 28-story tower on the south park. The proposed towers would have blocked the air and light of other Tudor City tenants and would have cast shadows over two public parks on 42nd Street. *See Marcus, supra* note 2, at 80-81.

8. New York, N.Y., ZONING RESOLUTION art. IX, ch. 1, § 91.00 (1973).

9. 39 N.Y.2d at 592, 350 N.E.2d at 384, 385 N.Y.S.2d at 8. The zoning amendment established Special Park District "P" which was "designed to promote the public interest, general welfare and environmental amenities, by requiring the owner to continue the parks as a passive recreational area with lighting, planting, landscaping and sitting areas for the public from 6 A.M. to 10 P.M. daily." *Fred F. French Inv. Co. v.*

ment also authorized the transfer of development rights from the parks to sites in a designated noncontiguous receiving area.¹⁰

The Fred F. French Investing Co.¹¹ brought suit seeking a declaration of the unconstitutionality of the zoning amendment and compensation for an inverse taking by eminent domain.¹² The trial court held the amendment unconstitutional and restored the former zoning classification but denied compensation,¹³ and the intermediate appellate

City of N.Y., 77 Misc. 2d 199, 201, 352 N.Y.S.2d 762, 764 (Sup. Ct. 1973) (emphasis in original). Improvements were "limited to 'structures incidental to passive recreational use.'" Fred F. French Inv. Co. v. City of N.Y., 39 N.Y.2d at 592, 350 N.E.2d at 384, 385 N.Y.S.2d at 7-8.

10. 39 N.Y.2d at 592, 350 N.E.2d at 384, 385 N.Y.S.2d at 8. Lots of a minimum of 30,000 square feet zoned to permit development at the maximum commercial density located in an area bounded by 60th Street, Third Avenue, 58th Street and Eighth Avenue were automatically eligible to receive transferred development rights increasing maximum floor area up to 10%. Increases of up to 20% were available with the city's approval. Prior to any transfer, however, the city had to certify a plan for the continuing maintenance of the now public parks at the owner's expense. *Id.* New York City zoning laws have traditionally permitted the transfer of air rights between contiguous building sites held in common ownership. Ownership in fee is not required; a leasehold of at least 50 years duration with options permitting renewal up to a total lease of at least 75 years will suffice. *Air Rights, supra* note 2, at 373.

11. Tudor City was built and managed by Fred F. French. *See* Marcus, *supra* note 2, at 79-80. When the property was sold in 1970, plaintiff received eight purchase money mortgages in addition to cash. Two of the mortgages, totalling \$8.8 million, were secured in part by the parks. Fred F. French Inv. Co. v. City of N.Y., 77 Misc. 2d 199, 200, 352 N.Y.S.2d 762, 764 (Sup. Ct. 1973).

12. 39 N.Y.2d at 590, 350 N.E.2d at 382, 385 N.Y.S.2d at 6. Inverse taking by eminent domain (more commonly called "inverse" or "reverse" condemnation) is a procedural device for recovering damages to property that could have been compensated in an original condemnation action plus damage merely speculative at the time of such an action that is used when the sovereign fails to initiate eminent domain proceedings. *See* Mandelker, *Inverse Condemnation: The Constitutional Limits of Public Responsibility*, 1966 Wis. L. REV. 3 (survey of inverse condemnation law). *See generally* United States v. Dickinson, 331 U.S. 745 (1946); *Trippe v. Port of New York Auth.*, 17 App. Div. 2d 472, 236 N.Y.S.2d 312 (1962), *rev'd on other grounds*, 14 N.Y.2d 119, 198 N.E.2d 585, 249 N.Y.S.2d 409 (1964) (owner asserting claim for property may be compensated by inverse condemnation); *Rice v. City of New York*, 32 Misc. 2d 942, 225 N.Y.S.2d 65 (Sup. Ct. 1962) (owners received compensation by inverse condemnation for continuing trespass by the city). *See also* Beuscher, *Some Tentative Notes on the Integration of Police Power and Eminent Domain by the Courts: So-Called Inverse or Reverse Condemnation*, 1968 URBAN L. ANN. 1; Cabaniss, *Inverse Condemnation in Texas—Exploring the Serbonian Bog*, 44 TEX. L. REV. 1584 (1966); Magavern, *The Evolution and Extension of the New York Law of Inverse Condemnation*, 24 BUFFALO L. REV. 273 (1975).

13. 77 Misc. 2d 199, 203-04, 352 N.Y.S.2d 762, 766-68 (Sup. Ct. 1973). The court found the zoning amendment violative of due process reasonableness standards on two grounds. First, the amendment barred any economic use of the property, and, second, the automatic transferability of development rights pre-empted the rights of tenants and owners at the future transfer site. Finding no precedent for a right to compensation after an unreasonable zoning regulation when the restoration of the property to the owners

court unanimously affirmed.¹⁴ The city appealed, seeking review of the declaration of unconstitutionality and by cross-appeal, French sought review of the denial of its summary judgment motions based on inverse taking. The New York Court of Appeals affirmed the lower courts and held that, despite the permitted transfer of development rights, the rezoning of buildable private parks exclusively as parks open to the public was an unconstitutional deprivation of property rights without due process of law. The court held, however, that such rezoning did not constitute a compensable taking.

Private property cannot be taken for public use without just compensation.¹⁵ Although this limitation on governmental authority was originally applied in eminent domain cases,¹⁶ takings which require compensation are not limited to actual physical appropriations of private property.¹⁷ The essential element of a taking is governmental action which substantially interferes with the use and enjoyment of private

was possible, the court denied the claim for fair and just compensation. *Id.* at 204-05, 352 N.Y.S.2d at 768. For a general discussion of the trial court's opinion, see 1 A. RATHKOPF, *THE LAW OF ZONING AND PLANNING* § 6.12[a] (4th ed. 1975); Marcus, *supra* note 2, at 85; *Unconstitutionality*, *supra* note 2.

14. 47 App. Div. 2d 715, 366 N.Y.S.2d 346 (1975).

15. "No person shall be . . . deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use, without just compensation." U.S. CONST. amend. V.

"[N]or shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV.

The provisions of the fifth amendment have been made applicable against the states through incorporation into the fourteenth amendment. See *Malloy v. Hogan*, 378 U.S. 1 (1964) (fifth amendment privilege against self incrimination incorporated into the fourteenth amendment); *Chicago, B. & Q. R.R. v. Chicago*, 166 U.S. 226 (1897) (fourteenth amendment due process requires compensation to be paid to the owner of private property taken for public use under the authority of a state). Most state constitutions contain similar provisions. See, e.g., N.Y. CONST. art. 1 § 6 ("No person shall be deprived of life, liberty or property without due process of law."); § 7(a) states that "[P]rivate property shall not be taken for public use without just compensation." For a discussion of the constitutional provisions of other states see, 1 P. NICHOLS, *THE LAW OF EMINENT DOMAIN* § 4.0 (3d ed. 1976).

16. F. BOSSELMAN, D. CALLIES, AND J. BANTA, *THE TAKING ISSUE* 105-23 (1973) [hereinafter cited as *THE TAKING ISSUE*].

17. *E.g.*, *United States v. General Motors Corp.*, 323 U.S. 373, 378 (1945) (taking of unexpired term of a lease); *Cayon v. City of Chicopee*, 360 Mass. 606, 609, 277 N.E.2d 116, 118 (1971) (value of property diminished after city announced that land would be taken for urban renewal but failed to execute the taking); *Old Colony & Fall River R.R. v. County of Plymouth*, 77 Mass. (Gray) 512 (1858) (compensation awarded when public highway laid across a railroad); see 2 P. NICHOLS, *THE LAW OF EMINENT DOMAIN* § 6.1 (3d ed. 1976).

property.¹⁸ Absent action by the sovereign in eminent domain, a taking occurs when an actual invasion effectively destroys or impairs the usefulness of property.¹⁹ Similarly, the total destruction of the value of private property for governmental advantage constitutes a taking.²⁰ However, a reasonable exercise of the police power may regulate the use of property without providing compensation.²¹

The traditional distinction between eminent domain and the police power is that eminent domain takes property because it is useful to the public, while the police power regulates property to prevent use that is detrimental to the public interest.²² In the landmark case of *Pennsylvania*

18. *Cayon v. City of Chicopee*, 360 Mass. 606, 609, 277 N.E.2d 116, 118 (1971). In addition to physical entry by the condemnor or the physical ouster of the owner, a direct legal restraint on the use of property will constitute a taking. Laws which by their own force and effect interfere with the physical use, possession, enjoyment or power of disposition of property will provide the required direct legal restraint. See *City of Buffalo v. Clement Co.*, 28 N.Y.2d 241, 255-56, 269 N.E.2d 895, 903-04, 321 N.Y.S.2d 345, 356-57 (1971) (announced intent to condemn with resulting diminution of value does not constitute taking in the absence of the assertion of dominion and control over the property). See also 1973 URBAN L. ANN. 343.

19. See *Pumpelly v. Green Bay Co.*, 80 U.S. (13 Wall.) 166, 177-80 (1871) (flooding of plaintiff's land caused by defendant's dam constitutes a "taking"); *accord*, *United States v. Lynah*, 188 U.S. 445, 470-71 (1903).

20. See *Armstrong v. United States*, 364 U.S. 40 (1960) ("taking" occurs where government's appropriation destroys liens which owner holds).

21. See *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926) (established constitutionality of comprehensive zoning laws); *McMahon v. City of Dubuque*, 255 F.2d 154 (8th Cir. 1958), *cert. denied*, 358 U.S. 833 (1958) (refusal to rezone for commercial use within scope of police power); *Dennis v. Village of Tonka Bay*, 156 F.2d 672 (8th Cir. 1946) (despite owner's desire to use lake front property for commercial purposes, residential zoning was constitutionally permissible); *St. Louis County v. City of Manchester*, 360 S.W.2d 638 (Mo. 1962) (county zoning ordinances lawful restriction on location of sewage disposal plant); *J.D. Constr. Corp. v. Bd. of Adjustment*, 119 N.J. Super. 140, 290 A.2d 452 (L. Div. 1972) (invalidated zoning ordinance limiting number of apartment units to 15% of single family residences); *Connell v. Town of Ganby*, 12 App. Div. 2d 177, 209 N.Y.S.2d 379 (1961) (zoning ordinance not arising from a comprehensive plan unreasonable exercise of the police power). Zoning regulations are limited by standards of due process. See, e.g., *Consolidated Edison Co. v. Village of Briarcliff Manor*, 208 Misc. 295, 144 N.Y.S.2d 379 (Sup. Ct. 1955) (zoning ordinance prohibiting needed high-tension electric line invalid). Zoning regulations are also limited by equal protection standards. See *Stevens v. City of Salisbury*, 240 Md. 556, 214 A.2d 775 (1965) (requirement that owners of corner lots remove or reduce to specified height barriers at their own expense is confiscatory); *Town of Hempstead v. Romano*, 33 Misc. 2d 315, 226 N.Y.S.2d 291 (Sup. Ct. 1962) (attempt to terminate non-conforming use as junk yard, after failing to act for 18 years, not enforced).

22. See 1 P. NICHOLS, *THE LAW OF EMINENT DOMAIN* § 1.42 (3d ed. 1976). Commentators have suggested a variety of tests for determining when a taking has occurred. See, e.g., Calabresi & Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972) ("entitlements"); Costonis, "Fair"

nia Coal Co. v. Mahon,²³ this difference was held to be one of degree²⁴ and, as Judge Breitel in the *French* decision observed, subsequent cases challenging police power regulations and cases concerning eminent domain have used the same ambiguous terminology. In both instances, certain governmental conduct was found to be a "taking,"²⁵ yet distinct remedies have emerged. The resulting confusion has plagued courts, counsel, and commentators alike.²⁶

The *French* court's analysis of the taking issue attempts to clarify the muddled distinction between police power and eminent domain. Judge Breitel suggests that the term "taking" should be reserved for eminent domain cases, and that cases invalidating governmental actions on constitutional grounds under due process should use the language "deprivation of property without due process of law."²⁷ This method of analysis requires courts to separate the question of whether a taking has occurred from the question of whether a challenged regulation violates constitutional notions of due process.²⁸ An exami-

Compensation & the Accommodation Power: Antidotes for the Taking Impasse in Land Use Controversies, 75 COLUM. L. REV. 1021 (1975) ("accommodation power"); Dunham, *A Legal & Economic Basis for City Planning*, 58 COLUM. L. REV. 650 (1958) (private fault/public benefit); Michelman, *Property, Utility and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165 (1967) ("fairness"); Netherton, *Implementation of Land Use Policy: Police Power vs. Eminent Domain*, 3 LAND & WATER L. REV. 33 (1968) ("appropriateness"); Olson, *The Role of "Fairness" in Establishing a Constitutional Theory of Taking*, 3 URBAN LAW. 440 (1971) ("fairness" and "justice"); Sax, *Takings, Private Property and Public Rights*, 81 YALE L.J. 149 (1971) [hereinafter cited as *Public Rights*] ("public rights"); Sax, *Takings and the Police Power*, 74 YALE L.J. 36 (1964) [hereinafter cited as *Takings*] (enterprise/arbitral capacity).

23. 260 U.S. 393 (1922). In *Pennsylvania Coal*, the Supreme Court applied constitutional limitations previously reserved for eminent domain cases and found a challenged exercise of the police power to be a "taking." See THE TAKING ISSUE, *supra* note 16, at 238-55.

24. 260 U.S. at 413. See THE TAKING ISSUE, *supra* note 16, at 134.

25. 39 N.Y.2d 587, 593-95, 350 N.E.2d 381, 384-86, 385 N.Y.S.2d 5, 8-9 (1976).

26. See note 22 *supra*. See also THE TAKING ISSUE, *supra* note 16.

27. 39 N.Y.2d at 594, 350 N.E.2d at 385, 385 N.Y.S.2d at 9.

28. A literal interpretation of the traditional notion that regulation which goes too far becomes a taking implies that there is a continuum running from police power through the eminent domain power. The function of the court in evaluating a challenged governmental action thus becomes the determination of where on this continuum the challenged action falls.

Regulation	Taking
Police Power	Eminent Domain

nation of the resolution of the taking issue in the *French* case, however, points out that these questions may not be easily disentangled.

In deciding that the zoning amendment in *French* did not constitute a compensable taking, the court of appeals first looked to the character of the city's action. Relying on *Lutheran Church v. City of New York*,²⁹ the court distinguished actions based on the government's enterprise capacity from those based on its arbitral capacity.³⁰ In adopting the early view of Professor Sax,³¹ the *Lutheran Church* court stated that when government takes private resources for the common good, it acts in its enterprise capacity and must pay just compensation. When government intervenes in conflicts over the use of land however, or seeks to eliminate uses injurious to others in the community, it acts in its arbitral capacity³² and does not need to provide compensation.³³ While the *French* opinion fails to discuss this issue at length, implicit in the court's characterization of the zoning amendment as a

Judge Breitel's analysis assumes two independent grounds of decision, due process and eminent domain. This, in turn, implies two independent continua.



Under this approach, a regulation which goes too far becomes unreasonable and therefore unconstitutional. The question of whether a compensable taking has occurred is a totally separate matter. The function of the court here should be to place a challenged governmental action on *each* of the continua. Further, it seems clear that this process requires the application of independent standards for each continuum.

29. 35 N.Y.2d 121, 316 N.E.2d 305, 359 N.Y.S.2d 7 (1975).

30. This distinction had its origin in Sax, *Takings and the Police Power*, 74 YALE L.J. 36 (1964).

31. Professor Sax repudiated this approach in Sax, *Takings, Private Property and Public Rights*, 81 YALE L.J. 149 (1971). Sax contends that the problem is considerably more complex than the enterprise/arbitral test indicates.

32. Sax argues that property is the end result of competition among inconsistent economic values. See *Takings*, *supra* note 22, at 61. When government enters this competition to enhance its own resource position, it acts in its enterprise capacity. *Id.* at 63. Maintaining an army, building roads and bridges, and operating schools and offices are examples of government acting as enterpriser. *Id.* at 62. When government mediates, rather than participates, in the competition among economic values, it acts in its arbitral capacity. Here, the essence of the government's action is to set standards to reconcile the differing private interests within the community. *Id.* at 62-63. For a discussion of the competing interests in property from an environmental viewpoint, see Ausness, *Land Use Controls in Coastal Areas*, 9 CALIF. WESTERN L. REV. 391, 418 (1973).

33. *Lutheran Church v. City of New York*, 35 N.Y.2d 121, 128-29, 316 N.E.2d 305, 310, 359 N.Y.S.2d 7, 14.

regulation and its failure to award compensation is the notion that the city was acting in its arbitral capacity.

Even if one assumes an intent to apply the enterprise/arbitral test, the court's efforts here are sadly lacking.³⁴ Although a meaningful application of the test would require going beyond the face of the zoning amendment,³⁵ the *French* court finds the form of the city's action decisive, apparently equating zoning ordinances with the arbitral capacity.³⁶ Before accepting this view, however, the facts of *Morris County Land Improvement Co. v. Township of Parsippany-Troy Hills*³⁷ should be considered. In *Parsippany*, the township enacted a series of zoning ordinances³⁸ which restricted the use of plaintiff's land to unproductive private uses³⁹ or to public or quasi-public use⁴⁰ in an attempt to retain the land in its natural state.⁴¹ Professor Sax analyzed the case in his article proposing the enterprise/arbitral test and found

34. It can be questioned whether the court ever intended a serious application of the enterprise/arbitral test. Even in *Lutheran Church* there are indications that the test would not be regarded as determinative of the taking question. In *French*, the court cites the test in one breath and begins discussion of when a regulation—never compensable under the Sax approach—becomes a compensable taking. Looking at the evidence of the treatment of the test, it would seem wise to never choose to rely solely on an enterprise/arbitral capacity argument.

35. Only the consequences of a governmental action are significant in the application of the enterprise/arbitral test. The fact that a challenged act is in a form traditionally treated as a non-compensable exercise of the police power is not controlling. See *Takings*, *supra* note 22, at 73.

36. *But see* *Forster v. Scott*, 136 N.Y. 577, 32 N.E. 976 (1893), where the court held that the purpose, effect and operation of a law or regulation, not its appearance, would determine whether it constituted a taking or an exercise of the police power. *Id.* at 584, 32 N.E. at 977.

37. 40 N.J. 539, 193 A.2d 232 (1963) (series of ordinances restricting the use of wetlands constituted a taking).

38. *Id.* at 545, 193 A.2d at 236. The township's original zoning ordinance which was adopted in 1945 put the property in the most restrictive residential classification. In 1954, an amendment placed it in the "Indeterminate Zone Classification." The property was finally reclassified in 1960 as a "Meadows Development Zone." *Id.*

39. *Id.* at 543-45, 193 A.2d at 234-36. Among these uses were: raising woody or herbaceous plants; commercial greenhouses; raising aquatic plants, fish, and fish food. *Id.*

40. *Id.* at 545, 193 A.2d at 236. As-of-right public or quasi-public uses included: outdoor recreational uses operated by a government agency; conservation uses, including drainage control, forestry and wildlife sanctuaries; public utility transmission lines and substations; and township sewage treatment plants and water supply facilities. *Id.*

41. *Id.* at 548, 193 A.2d at 237-38. Since plaintiff sought a declaration of the unconstitutionality of the zoning regulations, the question of whether a right to just compensation existed did not arise. *Id.*

the township acting in several of its enterprise capacities.⁴² Despite the facade of "mere" regulation, compensation was required.⁴³

French, while possessing the essential characteristics of *Parsippany*, contains even stronger support for a taking claim. In both cases, land was restricted to unproductive use in an attempt to retain it in its existing state. The zoning amendment in *French*, however, opened the property to the public and, further, imposed an affirmative duty to maintain it for their benefit.⁴⁴ The effect of the amendment was to establish two public parks in Tudor City. Clearly, such an action is an exercise of the enterprise capacity.

It might be argued that the transfer of development rights provision of the *French* zoning amendment pushes the case into Sax's reciprocal benefit exception to the enterprise/arbitral test.⁴⁵ The reciprocal benefit exception embraces situations in which the benefits accruing to the property owner equal or exceed the detriment resulting from the government's action. In such cases, Sax would not require compensation.⁴⁶ A finding that the transfer of development rights permitted in *French* would confer a benefit outweighing the detriment imposed by the zoning amendment is inconsistent with the court's holding that the economic value of the severed development rights had not been preserved.⁴⁷

42. See *Takings*, *supra* note 22, at 72-73.

43. *Id.* The result of the so-called zoning law was to make the property almost as much a part of the government's utility, park, and recreation system as if an interest in fee had been purchased. Under the enterprise/arbitral test, compensability is clear. *Id.*

44. 39 N.Y.2d 587, 592, 350 N.E.2d 381, 384, 385 N.Y.S.2d 5, 8 (1976). See note 9 *supra*.

45. See *Takings*, *supra* note 22, at 73-74.

46. *Id.*

47. The court disposed of the taking question by finding that, while there was a significant diminution in the value of the property, none of the additional factors necessary for a right to compensation were present. In doing so, Judge Breitel failed to discuss why the entry of the public into previously private parks does not provide the physical invasion which results in a compensable taking. Instead, he merely stated that there was no physical invasion of the property.

In *Pumpelly v. Green Bay Co.*, 80 U.S. (13 Wall.) 166 (1871) the first notable Supreme Court "taking" case, the Court held that absent an actual appropriation for public use, when an actual invasion (flooding) effectively destroys the usefulness of property, there is a compensable taking. The zoning amendment in *French* destroyed the usefulness of the parks. 39 N.Y.2d 587 at 597, 350 N.E.2d at 381, 385 N.Y.S.2d at 11. Certainly the distinction between land covered by water and land covered by people which equates the former, but not the latter, with a physical invasion is not inherently obvious. The strength of this argument alone seems to raise a duty for the court to elaborate its reasoning on this point.

The court's myopic analysis of this issue is clear evidence of its extreme reluctance to find a taking.⁴⁸ Although Judge Breitel's analysis purports to separate the questions for independent decision, in the future, consideration of the taking issue will be dependent on the resolution of the due process question.⁴⁹ In *French*, the court had an excellent opportunity to find a taking by applying Sax's own criteria. Its failure to do so indicates that in virtually all police power cases, the reasonableness of the challenged regulation will be the decisive issue.

The taking issue resolved, the court employed a two step analysis in its examination of the constitutionality of the *French* zoning amendment. Reserving consideration of the effect of the permitted transfer of development rights, the court first looked at the reasonableness of

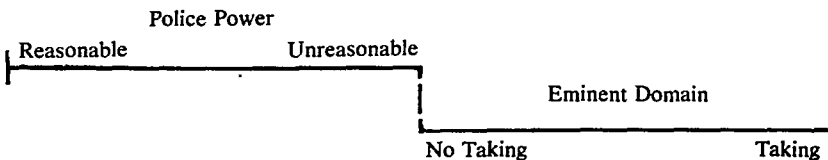
Illustrative of other types of arguments the court might have considered are the following:

(a) Since the zoning amendment forced a private party to provide an essentially public service, was not the destruction of the value of the parks for the government's advantage? *See* *Armstrong v. United States*, 364 U.S. 40 (1960).

(b) Are not the required plan and the restricted use a substantial interference with the use and enjoyment of private property? *See* *Cayon v. City of Chicopee*, 360 Mass. 606, 277 N.E.2d 116 (1971); *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).

48. When combined with the language of Judge Breitel's dissent in *Keystone Assoc. v. State of New York*, 33 N.Y.2d 848, 307 N.E.2d 254, 352 N.Y.S.2d 194 (1973) (Breitel, J., dissenting), this treatment of the taking issue points to the fact that the New York Court of Appeals will rarely find an unreasonable zoning regulation resulting in a compensable taking. (Except for *de facto* takings by public bodies with the power of eminent domain, which do not involve unconstitutional legislation, there are no precedents or statutory mandates requiring the compensation of losses resulting from the impact of unconstitutional legislation.)

49. While the form of the *French* opinion follows the independent consideration of due process and eminent domain approach, the perfunctory dismissal of the eminent domain question indicates that the due process issue will be treated as a threshold question. If the regulation is unreasonable, and therefore invalid under due process, the eminent domain/taking question will not be given serious consideration. Thus, the court is actually working with a single bifurcated continuum.



The essence of the court's opinion is that no regulation can go far enough to be a taking. *But see* *Horizon Adirondack Corp. v. State*, 318 Misc. 2d 619, 388 N.Y.S.2d 235 (1976), in which Judge Lengyel virtually invites property owners to sue to recover damages for the temporary economic losses resulting from unconstitutional regulatory statutes. Citing *French*, the *Horizon* court indicates that the possibilities for the recovery of money damages for unreasonable zoning have not been exhausted.

the rezoning of the buildable private parks as parks open to the public.⁵⁰ In the view of the court, such rezoning deprived the owner of all his property rights, and negated the security of plaintiff's mortgages by rendering the parks unsuitable for any reasonable income producing or other private use, thereby destroying their economic value.⁵¹

The second step of the court's due process analysis acknowledged that the development rights of the parks represent a component of the property's economic value. Since these rights were not nullified by the zoning amendment, it became incumbent on the court to consider whether the permitted transfer of the severed development rights preserved the economic value of the property. In this case, the variables involved in the realization of a return from the transfer of the development rights rendered their value too uncertain to meet constitutional requirements. The court found that the city's action had destroyed the economic value of both the underlying property and the severed development rights. Thus, the zoning amendment was held unreasonable and unconstitutional.⁵²

Commentators have suggested that since transferable development rights are granted as a form of compensation for private losses resulting from governmental action, the constitutionality of TDR schemes should be measured by the law of eminent domain and standards of just compensation.⁵³ Underlying the *French* decision however, is the

50. 39 N.Y.2d at 595-98, 350 N.E.2d at 386-88, 385 N.Y.S.2d at 9-11. A zoning ordinance is unreasonable if it encroaches on private property rights without a substantial relation to the furtherance of the public health, safety, morals, or welfare. *E.g.*, *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 387 (1926). Moreover, a zoning ordinance is also unreasonable if it lacks a reasonable relationship between the desired end and the means chosen to reach that end. *Id.* at 389. *See also* *Salamar Builders Corp. v. Tuttle*, 29 N.Y.2d 221, 275 N.E.2d 585, 325 N.Y.S.2d 933 (1971) (requirement of larger parcels in order to space septic tanks reasonably related to minimizing water pollution); *Bd. of Educ. v. City Council of Glen Cove*, 29 N.Y.2d 681, 274 N.E.2d 749, 325 N.Y.S.2d 415 (1971) (one acre zoning of school site as part of general policy affecting all publicly held land is arbitrary). Finally, a zoning regulation is unreasonable if it renders property unsuitable for any reasonable income productive or other private use, thus destroying its economic value. *E.g.*, *Lutheran Church v. City of New York*, 35 N.Y.2d 121, 316 N.E.2d 305, 359 N.Y.S.2d 7 (1975) (landmark designation of building wholly inadequate for business purposes of religious corporation unconstitutional); *Shepard v. Village of Skaneateles*, 300 N.Y. 115, 89 N.E.2d 619 (1949) (rezoning to prevent construction of gasoline station in primarily residential area not confiscatory); *Eaton v. Sweeney*, 257 N.Y. 176, 177 N.E. 412 (1931) (when zoning approaches the point where owner is deprived of beneficial use of his property, the court should step in and afford relief).

51. 39 N.Y.2d at 597, 350 N.E.2d at 387, 385 N.Y.S.2d, at 11.

52. *Id.* at 598, 350 N.E.2d at 388, 385 N.Y.S.2d at 12.

53. *See* *Marcus*, *supra* note 2, at 104; *Unconstitutionality*, *supra* note 2, at 1110.

concept that development rights transfers are not compensation at all. Instead, they are existing property rights which have been modified by governmental intervention. The constitutional question of reasonableness, therefore, turns on whether existing value has been preserved, rather than whether adequate new and different value has been created.⁵⁴ Thus the court avoids the questionable practice of using eminent domain standards to resolve due process questions regarding the constitutional exercise of the police power.⁵⁵

The *French* case provides a method of analysis which divides cases using "taking" terminology into two groups: due process "deprivation" cases and "actual" taking cases. *French* indicates that the New York Court of Appeals is likely to find the form of the government's action controlling. Where the government is attempting to regulate zoning, constitutional notions of due process will apply and the regulation will be invalidated if unreasonable. Barring precedent squarely on point, the court will turn a deaf ear to claims that invalid regulations are actual takings requiring compensation.

The *French* court held that the uncertainties of purchasing a receiving lot or marketing the TDR failed to adequately assure the preservation of the value of the rights as they existed when attached to the parks. Nevertheless, the decision openly encourages legislators and administrators to continue experimentation in this area and broadly hints that other transferable development rights schemes will pass constitutional muster. In this case, however, when viewed in relation to both the value of the private parks after the amendment and the value of the detached development rights, the attempted zoning regulation constituted a deprivation of property without due process of law.⁵⁶

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54. There has been some discussion as to whether the economic value of the development rights had actually been destroyed. See 90 HARV. L. REV. 637 (1977).

55. See *Art Neon Co. v. City and County of Denver*, 488 F.2d 118 (10th Cir. 1973), cert. denied, 417 U.S. 932 (1974). Plaintiff challenged a zoning ordinance requiring the termination of non-conforming signs according to an amortization schedule. The trial court had found the ordinance unconstitutional since it did not provide for just compensation. 357 F.Supp. 466, 478 (D.Colo. 1973). However, the court of appeals expressly rejected the just compensation standard and held that the zoning ordinance need only meet a test of reasonableness. 488 F.2d at 121. See 9 URBAN L. ANN. 303 (1975).

56. See *Costonis, Fred F. French Investing Co. v. City of New York: Losing a Battle but Winning a War*, 28 LAND USE L. & ZONING DIGEST 6 (No. 7, 1976).