A COMPARATIVE LOOK AT TDR, SUBDIVISION EXACTIONS, AND ZONING AS ENVIRONMENTAL PRESERVATION PANACEAS: THE SEARCH FOR DR. JEKYLL WITHOUT MR. HYDE

*NORMAN MARCUS**

I. INTRODUCTION

While NEPA and its progeny may have spawned a logical national process for flagging environmental impacts before major land use decisions affecting the environment are made, no comparable coordinated program for environmental preservation of privately-owned natural areas (of quality) emerged in the 1970's. Discrete pieces of federal and state legislation concerning coastal zone management,[1] open space,[2] flood insurance,[3] clean air,[4] and water quality control[5]

* Counsel, New York City Planning Commission, Adjunct Professor, New York University Law School, and Pratt Institute; B.A., Columbia College, 1953; LL.B., Yale University Law School, 1957.

The author is deeply indebted to Elizabeth Friedgut, J.D., Washington University School of Law, 1980, for her creative legal participation in the preparation of this article.

1. Coastal Zone Management Act of 1972, 16 U.S.C. §§ 1451-1464 (1976 & Supp. III 1979).

2. Provision is made for federal grants for open space acquisition at 16 U.S.C. § 460l-8(e) (1976).

3. National Flood Insurance Act of 1968, 42 U.S.C. §§ 4001-4128 (1976 & Supp. III 1979).

4. Clear Air Act, 42 U.S.C. §§ 7401-7642 (Supp. III 1979).

5. Clean Water Act, 33 U.S.C. §§ 1251-1376 (1976 & Supp. III 1979).

emerged during this period. This legislation was accompanied on the local level by a mixed bag of regulatory techniques including special district zoning,[6] transferable development rights (TDR),[7] and subdivision exactions,[8] which, along with renascent legal propositions such as the public trust doctrine[9] and the law of custom,[10] provided tools of varying quality to achieve the environmental preservation goal. This article will examine these tools with regard to their effectiveness in promoting environmental preservation as well as their adverse impacts on other local community goals.

In the search for the best way to secure environmental preservation short of paying for it through the exercise of eminent domain, each of the techniques, when examined critically, displays a dismaying Janus-like tendency to cause or exacerbate other problems within the affected community. This article will explore the propensity of TDR to create or magnify density problems in terms of both building bulk and population. The article will also note the tendency of subdivision exactions to exclude potential community newcomers and will question whether even sensitive zoning controls within the natural zone can prevent unacceptable development pressures on an all-too-yielding environment.

By recognizing and grappling with the Hyde-like propensities latent in some of our principal regulatory tools, we can minimize the unanticipated consequences of enthusiastic but uncritical pursuit of an environmental chimera. We can also choose the regulation which makes the most sense for our particular area of concern.

Traditionally, Americans have believed that ownership of a fee simple interest in real property confers upon its owner the right to do whatever he wants with his land, subject only to minimal government

---

6. *See generally* THE NEW ZONING: LEGAL, ADMINISTRATIVE, AND ECONOMIC CONCEPTS AND TECHNIQUES (N. Marcus & M. Groves eds. 1970).

7. *See generally* Costonis, *Development Rights Transfer: An Exploratory Essay*, 83 YALE L.J. 75 (1975) [hereinafter cited as Costonis, *Development Rights Transfer*].

8. *See generally* Heyman & Gilhool, *The Constitutionality of Imposing Increased Community Costs on New Subdivision Residents through Subdivision Exactions*, 73 YALE L.J. 1119 (1963) [hereinafter cited as Heyman & Gilhool].

9. *See generally* Berland, *Toward the True Meaning of the Public Trust*, 1 SEA GRANT J. 83 (1976). *See also* notes 142-73 and accompanying text *infra*.

10. W. BURBY, REAL PROPERTY § 115 (3rd ed. 1965) [hereinafter cited as BURBY]. *See also* State *ex rel.* Thornton v. Hay, 254 Or. 584, 462 P.2d 671 (1969).

regulations.[11] Although land previously seemed to be "an unlimited commodity,"[12] sprawl has forced local governments to re-examine their land use policies and take strong measures to curb what has been described as "the appallingly rapid disappearance of open space" in this country.[13]

Government regulation in this area has increased the involvement of municipalities in the private real estate market and reflects the growing realization that zoning alone may be insufficient to deal with the complex needs of today's expanding suburban communities.

> The basic argument is that zoning policies function as a head tax on new entrants, but that the tax may be too high in that it goes beyond reducing the congestion costs of new development and reduces the amount of developable land below that amount demanded by the market. The result is . . . an inefficient resource allocation because too much land is left undisturbed.[14]

Conventional zoning is particularly ineffective when applied to the problem of how best to protect an area's open space and environmental resources. It can do little more than "provide for the harmonious and efficient development of *all* the land."[15] According to traditional Euclidean[16] zoning theory, a municipality is divided into several uniform use districts within which certain kinds of incompatible development are prohibited. This system achieves no positive benefits extending beyond the development site.

When faced with the problem of how best to protect environmentally sensitive lands, local governments have traditionally had two options. They could "downzone" entire zoning districts containing valuable open space, or they could acquire the property in question for public park use through an exercise of their eminent domain powers.[17] Downzoning is an attempt by a municipality to mitigate the

---

11. Chavooshian, Norman & Nieswand, *Transfer of Development Rights: New Concept in Land Use Management*, in THE TRANSFER OF DEVELOPMENT RIGHTS 165, 166 (J. Rose ed. 1975) [hereinafter cited as Chavooshian].

12. *Id.*

13. Associated Home Builders v. City of Walnut Creek, 4 Cal. 3d 633, 638, 484 P.2d 606, 610, 94 Cal. Rptr. 630, 634 (1971), *appeal dismissed*, 404 U.S. 878 (1971).

14. Tarlock, TDR and Natural Resources Law: Comparison and Contrast 10 (May 3, 1979) (paper prepared for presentation at the Lincoln Institute of Land Policy Seminar on TDR).

15. Chavooshian, *supra* note 11, at 167.

16. *See* Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).

17. U.S. CONST. amend. V, applied to the states by U.S. CONST. amend. XIV, § 1.

impact of development activity on the surrounding area by the enactment of an ordinance which either increases the minimum lot size for new unit construction[18] or otherwise decreases the dwelling unit yield on an acreage basis. Courts have closely scrutinized the validity of downzoning schemes utilizing theories ranging from Fourteenth Amendment confiscation to minority group exclusion on state or federal constitutional grounds.[19] As for the direct taking alternative, it is clear that the fiscal crisis which most municipalities face today as well as citizen movements to adopt resolutions like Proposition 13 are likely to discourage effective utilization of eminent domain on any wide-scale basis to protect environmentally sensitive lands.[20]

Consequently, there is a pressing need for sound legal devices to

---

18. *See generally* D. MANDELKER & R. CUNNINGHAM, PLANNING AND CONTROL OF LAND DEVELOPMENT 445-48 (1979) [hereinafter cited as MANDELKER & CUNNINGHAM]. The United States Supreme Court recently upheld the downzoning of an area with outstanding views of the San Francisco Bay in Agins v. City of Tiburon, 100 S. Ct. 2138 (1980). This case will be examined in some detail in connection with the natural area zoning alternative. *See* notes 107-09, 338-49 and accompanying text *infra*.

19. Chavooshian, *supra* note 11, at 167. *See, e.g.*, Kavanewsky v. Zoning Bd. of Appeals, 160 Conn. 397, 279 A.2d 567 (1971) (exclusionary motives are invalid zoning purposes); Oakwood at Madison, Inc. v. Township of Madison, 72 N.J. 481, 371 A.2d 1192 (1977) (large-lot zoning scheme invalid as exclusionary since municipality was not providing its fair share of region's low-income housing needs); Southern Burlington County NAACP v. Township of Mount Laurel, 67 N.J. 151, 336 A.2d 713, *appeal dismissed and cert. denied*, 423 U.S. 808 (1975) (large-lot zoning scheme invalid); National Land and Inv. Co. v. Kohn, 419 Pa. 504, 215 A.2d 597 (1965) (locality's desire to preserve existing character of community not a valid legislative purpose). *But see* Chucta v. Planning and Zoning Comm'n, 154 Conn. 393, 225 A.2d 822 (1967) (downzoning necessary to provide open space for schools and adequate land for proper water supply and sewage disposal); Norbeck Village Joint Venture v. Montgomery County Council, 254 Md. 59, 254 A.2d 700 (1969) (downzoning to establish greenbelt as part of countywide comprehensive plan is legitimate exercise of municipal police power).

20. The problems involved in using the power of eminent domain today have been identified as follows:

> 1) lack of funds for this purpose. Voter reluctance to approve programs or bond issues that will result in increased taxation is a serious obstacle . . . ; 2) when title is transferred from private to public ownership, the property is removed from the tax rolls and the remaining property owners in the jurisdiction must bear a proportionately larger share of the burden; 3) many . . . landowners are unwilling to relinquish possession of their land even for a fair consideration; 4) . . . the high costs of land acquisition . . . divert substantial public resources from other objectives of higher priority, such as education and housing.

Rose, *A Proposal for the Separation and Marketability of Development Rights as a Technique to Preserve Open Space*, 51 J. URB. L. 461, 465 (1974).

protect natural resources. It has become increasingly apparent that traditional land use techniques may not provide municipalities with legally sufficient controls over development to ensure the protection necessary for their precious environmental resources. In recent years, local governments have experimented with the use of transfer of development rights, subdivision exactions, and special zoning districts as means of coping with this environmental imperative. These devices—their promise and their problems—will be the subject of this inquiry.

II. Some Regulatory Alternatives to Public Funding

Let us imagine the following hypothetical. A large lakefront area, twenty miles from the nearest incorporated hamlet but within its territorial jurisdiction, exists in relatively pristine treed condition, free from development except for a few scattered secluded summer cottages set back a minimum of 200 feet from the shoreline. The town may acquire a major research and development plant with its expected complement of workers. Land all the way to the lakefront is being optioned; developers are making inquiries regarding possible subdivisions; and local officials are weighing various regulatory options to insure that change, when it comes, respects the town's basic goals. These goals include prohibition of building within 200 feet of the lakefront shoreline; retention of the existing small-town character which is presently retained by permitting densities not exceeding one dwelling unit per acre; and preservation of natural features such as unique topography, boulders, flora and fauna to the maximum extent consistent with its low-population density and small town character.

The municipality, already familiar with traditional Euclidean zoning, wishes to consider application of newer regulatory techniques to achieve its ends, such as transferable development rights (TDR), environmental subdivision exactions, and natural area zoning, as well as to protect its land through the latest extensions of the public trust doctrine and the law of custom.

A. *Transferable Development Rights (TDR)*

The suggested TDR solution to preserving the 200-foot lakefront strip requires that a municipality first recognize development rights therein on the pre-existing minimum one acre lot basis. The municipality could then sever and transfer these development rights to the balance of the vacant upland extending to the present urbanized area,

mandating preservation[21] of the area from whence the development rights originated. Such TDR could be made conditional on clustering or planned unit development, including multiple dwellings, or could be granted as of right in the form of additional units on smaller lots.

The idea for TDR in suburban or rural settings arose from the same theory as lay behind planned unit developments[22] (PUDs) and cluster zoning.[23] PUDs and clusters require that the open space area and the development be on the same or adjoining parcels[24] and that the entire parcel be in common ownership. TDR plans, on the other hand, may provide for a municipality to designate large areas of open space a considerable distance from the area where TDRs may actually be received and put to use. The severance and sale of these development rights is intended to mitigate adverse effects on property owners from the loss or reduction of their right to develop their land located within the preservation zone. The areas thus preserved need

21. Such preservation could be achieved either through restricted open use zoning classification (recreation, agriculture), where such classification constitutes a reasonable beneficial use, or through application of the public trust doctrine or law of custom. *See* notes 125-73 and accompanying text *infra*.

22. "A Planned Unit Development (PUD) is a residential development in which prevailing density regulations apply to the project as a whole rather than to its individual lots. Densities are calculated on a project-wide basis, permitting, among other things, the clustering of houses and provision of common open space." P. ROHAN, ZONING AND LAND USE CONTROLS § 1.02(2)(c) n.19 (1978) [hereinafter cited as ROHAN].

23. "Cluster zoning is a device or technique for the grouping of residences to increase dwelling densities on specific locations of development area in order to provide open space elsewhere." *Id.* § 1.03(2)(b)(ii). To assure this result, "[p]rovision is made in the zoning ordinance, or in the subdivision regulations, for the development of tracts of land in compliance with overall density limitations but without regard to specific yard, lot coverage, area or frontage requirements." R. ANDERSON, AMERICAN LAW OF ZONING § 8.17 (1968).

24. Carlo & Wright, *Transfer of Development Rights: A Remedy for Prior Excessive Subdivision*, 10 U.C.D. L. REV. 1, 3 (1977) [hereinafter cited as Carlo & Wright]. The use of PUDs and cluster zoning techniques, however, will not sufficiently restrict development to preserve natural resources. This is because:

> these devices are generally applied to small areas and are usually an option to the existing lot-by-lot subdivision process . . . [T]he best [that can] be achieved is some minimal break in an otherwise monotonous development. Haphazard, noncontiguous, scattered open space generally is the result. This . . . does not protect the large areas of open space, such as farmlands, steep and wooded slopes, and aquifer recharge areas, that are necessary if the water and air supply is to be free from serious pollution as the population increases.

Chavooshian, *supra* note 11, at 168.

not adjoin the development area[25] to which the rights ultimately attach. The author will question the assumption underlying this "mitigation" proposition, particularly where rosy real estate development expectations are belied by the heretofore exclusively natural qualities of the area, such as shorefront, steep slope, and thick forest undisturbed since Indian times.

The principle underlying TDR is that the development potential of privately owned land represents "a community asset that government may allocate to enhance the general welfare."[26] TDR is meant to protect public resources through the redistribution of zoning densities to areas in the community where development will pose no environmental threat and the infrastructure will support the additional densities. The assumption is that TDR can increase predictability in planning, since the environmental designation of lands within the preservation zones will give more definition to the municipality's comprehensive plan. This may enable local governments to exercise greater control over population influx and its relation to the provision of capital improvements, and to otherwise provide for the well-ordered growth of their areas.[27]

The chance for success of any TDR scheme is at its inception questionable. Its effectiveness depends on the creation and maintenance of a market for development which may or may not occur given the vicissitudes of today's real estate market.[28] To the extent that the implementation of such a program requires the establishment of generic uniform districts, including a preservation zone generating transferable development rights and a district to receive the generated development rights, an argument can be made that the limits of TDR are the limits of traditional zoning.[29] Thus, concepts familiar

25. Carlo & Wright, *supra* note 24, at 3.

26. Schnidman, *Transferable Development Rights (TDR)*, in WINDFALLS FOR WIPEOUTS 532 (D. Hagman & D. Misczynski eds. 1978).

27. Chavooshian, *supra* note 11, at 175. Overt control of population influx has been challenged as a violation of the constitutional freedom to travel protected under the First Amendment. Federal courts have skirted this challenge largely due to lack of standing, giving effect to population-curbing regulation based on a quality of life rationale. *See* Warth v. Seldin, 422 U.S. 490 (1975); Construction Indus. Ass'n v. City of Petaluma, 522 F.2d 897 (9th Cir. 1975), *cert. denied*, 424 U.S. 934 (1976). *See also* cases cited in note 19 *supra*.

28. Shlaes, *Who Pays for Transfer of Development Rights*? 40 PLANNING 7, 8 (July, 1974), *reprinted in* THE TRANSFER OF DEVELOPMENT RIGHTS 330, 331 (J. Rose ed. 1975) [hereinafter cited as Shlaes].

29. Elliott & Marcus, *From Euclid to Ramapo: New Directions in Land Develop-*

to Euclidean enthusiasts, such as zoning in accordance with "a well-considered plan"[30] and "spot zoning,"[31] are apt to see increasing use as springboards to challenge far-flying TDR shifts lacking any rational planning nexus.[32]

Whether the use of TDR will in fact protect environmentally sensitive lands will depend on the type of area in which the system is applied. For example, the use of TDR in the commercial center of a major urban area like New York City can provide property owners with some assurance that their development rights will be purchased at a price approximating their market value.[33]

Such is not the case, however, in many suburban and rural areas where there may be no demand to build at increased densities, a demand which must be at the heart of any TDR program which is to be

---

ment Controls, 1 HOFSTRA L. REV. 56, 72 (1973) [hereinafter cited as Elliott & Marcus].

30. N.Y. GEN. CITY LAW § 20.25(a) (McKinney 1977). *See also* Haar, *In Accordance with a Comprehensive Plan*, 68 HARV. L. REV. 1154 (1955) [hereinafter cited as Haar].

31. Spot zoning has been described as the alteration of the existing character of an area in favor of a particular class of property owners, to the detriment of the general community. Udell v. Haas, 21 N.Y.2d 463, 235 N.E.2d 897, 288 N.Y.S.2d 993 (1968).

32. *See generally* Elliott & Marcus, *supra* note 29, at 56; Marcus, *Villard Preserv'd: Or, Zoning for Landmarks in the Central Business District*, 44 BROOKLYN L. REV. 1 (1977); 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, *Mandatory TDR*].

33. This is because the demand to build at increased densities is so great in large urban areas that development rights owners, in effect, occupy a "monopolistic position" in the market that gives them more assurance that their rights will be purchased at a fair price. *See also* Marcus, New York City: The Development Rights Transfer Story 23 (May 3, 1979) (paper prepared for presentation at the Lincoln Institute of Land Policy Seminar on TDR) [hereinafter cited as Marcus, New York City]. The United States Supreme Court recognized the value of transferable development rights in midtown Manhattan in Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104 (1978), *rehearing denied*, 439 U.S. 883 (1978). *But see* Fred F. French Inv. Co. v. City of New York, 39 N.Y.2d 587, 350 N.E.2d 381, 385 N.Y.S.2d 5 (1976), *appeal dismissed*, 429 U.S. 990 (1976), wherein the New York Court of Appeals invalidated a 1972 amendment to the New York City Zoning Resolution which created a "Special Park District" and provided for the transfer of development rights from two private parks rezoned for preservation as passive recreation areas. In so doing, the Court reasoned that in the absence of a reasonable beneficial use, the development rights were too speculative to be considered as a measurable property right since their sale was made dependent on "an unpredictable real estate market" and "the contingent future approvals of administrative agencies, events which may never happen because of the exigencies of the market and the contingencies and exigencies of administrative action." *Id.* at 598, 350 N.E.2d at 388, 385 N.Y.S.2d at 11-12.

taken seriously. Where such demand does exist, the increased densities generated by TDR may pose a threat to suburban or rural character far surpassing any threatened loss of an ecological treasure. This threat takes the form of squeezing additional units of development onto the receiving lot in the transfer zone. For example, in our hypothetical development district, the minimum one-acre zoning lot control would, with the purchase of TDR, support two units of housing instead of one. From a community planning perspective, such doubling of density may pose undesirable aesthetic and infrastructure burdens. Municipalities may prefer to institute an expanded version of subdivision land dedication and fee exaction requirements or a variation of New York City's Special Natural Area Zoning District in order to protect their communities' environmental resources.

1. The Marketplace Predicate for TDR

No TDR scheme will work without assurance that sale of development rights will be profitable.[34] The availability of buyers for the rights "will vary among different communities as well as over time and will depend upon the size and character of the transfer zone, the rigidity of its zoning, and the demand for new development within its boundaries."[35] Consequently, before any municipality decides to implement a TDR program within its jurisdiction, it should carefully analyze the local economic climate.

In doing so, a municipality's first concern should be whether an appropriate area exists to which it may safely transfer development rights. These transfer districts must be "areas suitable for more intense development based on planning theory, (and must have) available public facilities and utilities, and overall compatibility with both the built and natural environment."[36] The municipality generates demand for the right to build in the transfer district by permitting development at a higher density than is otherwise allowable under the existing zoning resolution,[37] provided that the prospective

34. *See* Shlaes, *supra* note 28, at 8, THE TRANSFER OF DEVELOPMENT RIGHTS, at 333.

35. *Id.*

36. Schnidman, *Transferable Development Rights (TDR)*, in WINDFALLS FOR WIPEOUTS 532 (D. Hagman & D. Misczynski eds. 1978).

37. The total permitted increased [sic] in density in the district will depend on the number of outstanding development rights issued as a result of the designation of the preserved district.

developer first purchases development rights from an owner of property located within the preservation zone.[38]

The municipality must not draw the transfer districts too narrowly, or there will be an insufficient number of sites to which the development rights may be transferred.[39] Transfer districts must be large enough not only to assure preservation landowners that there will be a market for their development rights, but also to provide for the well-ordered distribution of the additional densities throughout the area.

The delicacy of the situation requires the implementation of a *very* flexible municipal zoning scheme that will allow transfer of development rights to lots which are not necessarily located adjacent to the preservation zone.[40] The experience of the New York City Planning Commission in this regard may prove instructive. In considering

---

. . . .

Moreover, whatever new density requirements are established in whatever location, the overall result must be a new zoning district where it is more desirable to build with development rights. . . . In short, the new densities permitted must [themselves] create the incentive.

Chavooshian, *supra* note 11, at 173.

A TDR transfer district may appear to resemble a Special Development Zoning District which has traditionally provided for the manipulation of zoning lot densities through the provision of a floor area ratio (FAR) bonus. This technique enables a developer to exceed the maximum floor area allowable in relation to overall lot size permitted under the zoning ordinance in return for the provision of certain improvements. Through the FAR bonus, a city exercises its police power to artificially restrict development "and then prescribes conditions under which these restrictions may be relaxed." The TDR system, on the other hand, singles out the right to develop from the other rights of ownership and manipulates it to control land use, thereby creating possible equal protection problems. Rose, *supra* note 20, at 475.

38. The impetus to apply for permission to build at an increased density may also be created by the downzoning of the entire transfer district. The political opposition that such an approach is likely to engender in the community would probably preclude its adoption. *See* Gans, *Saving Valued Spaces and Places Through Development Rights Transfer*, in THE TRANSFER OF DEVELOPMENT RIGHTS 275, 278 (J. Rose ed. 1975) [hereinafter cited as Gans].

39. Marcus, New York City, *supra* note 33, at 22.

40. The designation of non-adjacent transfer districts must be grounded in the new approach to zoning exemplified by PUDs and Special Purpose District regulations. Otherwise, TDR to noncontiguous lots could be regarded as "contrary to the prevailing notions about the need for uniformity of controls in a given area" on the grounds that "the essential interrelationship of zoning density controls to street width, transit access, school seats and other objects of planning concern could not survive the indiscriminate transferability of unused development rights between widely spaced parcels." Elliott & Marcus, *supra* note 29, at 72.

whether TDR could be used to protect the unique natural areas of Staten Island and the Riverdale section of the Bronx, this author noted that "locations near these large natural areas were zoned for single-family residences on relatively large lots. There was no market for TDRs in these sylvan retreats, whose character would have been utterly destroyed by higher densities."[41] Hence any successful utilization of TDR from these areas would have necessitated the designation of more distant transfer districts.[42]

In order to protect the interests of property owners in existing neighborhoods, a municipality may have to establish a transfer district sufficiently removed from the preservation zone. In this way, the increased densities to which the receiving lots will be subject will not unduly affect *either* the environmental preserve *or* the surrounding suburban character. In addition to the administrative difficulties and tax consequences involved,[43] however, any local government seeking to implement TDR in this manner would probably have to defend its scheme against the claim that establishing non-contiguous transfer districts will have arbitrary and therefore impermissible planning consequences. Opponents would argue that these transfer districts bear no reasonable relationship to the benefits accruing from the preservation of the natural areas, and that any such crosstown transfers are spot zoning deviations[44] from the municipality's comprehensive plan.

Another problem with using TDR to protect environmental resources in suburban areas is the way in which development rights are measured for each property owner in the preservation zone. The usual measurement is in terms of number of residential units per acre.[45] Purported advantages of this system are administrative simplicity and equalization of development costs and benefits arising from regulation rather than from inherent land characteristics.[46] The

41. Marcus, New York City, *supra* note 33, at 22.

42. This approach proved infeasible and the plan was ultimately rejected. *Id.*

43. *See* notes 59-67 and accompanying text *infra*.

44. Marcus, *Mandatory TDR*, *supra* note 32, at 109.

45. DeVoy, Transfer of Development Rights—A Critique of Present Experience and Proposals for Marketable Transfer Rights 5 (May 3, 1979) (paper prepared for presentation at the Lincoln Institute of Land Policy Seminar on TDR) [hereinafter cited as DeVoy].

46. Lynch, *Controlling the Location and Timing of Development by the Distribution of Marketable Development Rights*, in THE TRANSFER OF DEVELOPMENT RIGHTS 259, 261 (J. Rose ed. 1975). The author also notes that "[t]he proposition might be consid-

value of development rights, however, "can vary greatly depending on the environment (both natural and manmade), access, and availability of public facilities and services."[47] These factors are ultimately accounted for in that the rights are bought and sold at the then current market value for new units in the transfer district.

TDR is intended to mitigate what has been christened the "windfalls and wipeouts" phenomenon in land use planning.[48] According to this theory, whenever government regulation restricts the right to develop certain properties, thereby "wiping out" an important element of value of the lands in question, other properties in the community increase in value in proportion to the loss of "building increment"[49] from the regulated areas and receive a "windfall" in the process. In our TDR example, landowners are "wiped out" by the designation of their property for special preservation treatment, while transfer district property owners receive a "windfall" from their enhanced location, where proximate to the preserved natural resources. The sale of development rights by the preservation property owners is intended to mitigate the windfalls and wipeouts engendered under such a TDR scheme by forcing developers to pay for the rights to build at additional densities.[50] That payment, depending on the mu-

---

ered an unfair redistribution of land values, since owners of inaccessible or unusable land get as many rights as the owners of ripe land. But the owner of unusual land is still unable to market it and this may be reinforced by the enactment of 'non-development' zones." *Id.* at 263. In this way, TDR is intended to protect preservation property owners from arbitrary planning results on the rationale that they are receiving an "average reciprocity of advantage." *See* Marcus, *The Grand Slam Grand Central Terminal Decision: A Euclid for Landmarks, Favorable Notice for TDR and a Resolution of the Regulatory/Taking Impasse*, 7 ECOLOGY L.Q. 731, 744 (1979). The doctrine of "average reciprocity of advantage" was elucidated by Justice Holmes in Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922). Query whether any "uniformity" achieved through such indiscriminate blanketing of TDR privileges is not essentially spurious.

47. DeVoy, *supra* note 45, at 5.

48. *See generally* WINDFALLS FOR WIPEOUTS (D. Hagman & D. Misczynski eds. 1978).

49. Turvey, *Development Charges and the Compensation-Betterment Problem*, 63 ECON. J. 299, 300 (1953), cited in Costonis, *Development Rights Transfer, supra* note 7, at 83.

50. Costonis, *Development Rights Transfer, supra* note 7, at 99. In this way, TDR "closes the externality loop by charging the land development process with costs that formerly, and improperly, fell upon the community in the form of environmental degradation—or of expensive remedial programs to overcome it." *Id.* at 100.

nicipal process, is made directly or indirectly to the owner of environmentally sensitive land.

Some windfalls and wipeouts persist, however, even under this TDR arrangement. There is no assurance that the sale price of the development rights will adequately reflect their ultimate value to transfer district property owners who will use them presumably to build more profitable structures than are available to non-participating landowners in the area.[51] Furthermore, if, as will not be uncommon, the transfer district is designated in an area at some distance from the preservation zone, the property owners in the distant district, although not benefitted by proximity to the preserved natural area, will still have to purchase development rights if they wish to build at the greater densities.[52] At the same time, landowners adjacent to the preservation zone receive all of the benefits, indeed a windfall, from proximity to the natural resources, while paying none of the costs involved.

The preservation property owners' receipt of a fair price for development rights depends on "their perception of the density restrictions within the transfer area and the value to developers from the relaxation of these restrictions."[53] Proposals for giving greater certainty and definition to preservation owners' development rights include: "[T]ranslate the physical units of [development] into their dollar value so as to better assimilate the financial yield that the rights will . . . generate from their attachment to transfer sites;"[54] require local

51. Gale, *The Transfer of Development Rights: Some Equity Considerations*, 14 URBAN L. ANN. 81, 84 (1977) [hereinafter cited as Gale].

52. *Id.* at 86.

53. Field & Conrad, *Economic Issues in Programs of Transferable Development Rights*, 51 LAND ECON. 331, 332 (1975) [hereinafter cited as Field & Conrad].

54. DeVoy, *supra* note 45, at 5. One variant of this approach has been proposed for Vermont. Wilson, A Land Use Control System Based on Transferable Development Rights 1-7 (1974) (unpublished paper for Vermont Natural Resources Council). Under this approach,

> a local government would conduct an appraisal of each property in the jurisdiction, establishing both its current use and market values. Development rights would be apportioned to each property owner as a function of the differences in these values. The sum of the differences for all eligible properties in the jurisdiction would constitute the dollar value of the maximum permissible volume of development. . . . In order to develop his land to the maximum allowable extent, the owner would have to purchase development rights equivalent to the anticipated value of the new use, established by an up-to-date appraisal. If a developer wanted to build on a newly-acquired property, it would be necessary for him to obtain rights equivalent to the difference between the appraised pres-

governments to issue development rights at a uniform price and allow sale prices in the transfer area to bear any "difference due to amenity and location," thereby minimizing the loss in tax revenue that the municipality would otherwise have to tolerate upon the reassessment of the preservation property;[55] and provide for the establishment of a development rights bank run by the municipality that would compensate the landowner in cash for the taking of his development potential and would place the burden on the city for regaining the preservation program's cost through direct sale of development rights to developers.[56]

The purpose behind these proposals is to minimize the speculative activity otherwise generated by TDR through the implementation of a system that cushions impacts on the preservation properties and hopefully better reflects the market realities and planning considerations involved in the use of TDR. This proposed cure is perhaps worse than the disease. Municipal investment in a development rights bank would provide a fascinating case study of Jekyll and Hyde schizophrenia: conflicting pressures to sell the rights and recoup municipal investment versus community pressures to limit the extent and location of the additional transferable densities. Another problem with this approach is that landowners may lack confidence in a local government's ability to regulate the price of development

---

ent use value and the sale price (less any development rights already attached to the property at purchase). After a specified period of time, development rights prices would be established on the open market, rather than through appraisal. Gale, *supra* note 51, at 84-85 (footnotes omitted).

55. Gans, *supra* note 38, at 277.

56. Note, *The Unconstitutionality of Transferable Development Rights*, 84 YALE L.J. 1101, 1113 (1975) [hereinafter cited as *Unconstitutionality*]. The problems with the approach are the same as those facing municipalities in the exercise of their eminent domain powers, *i.e.*, the lack of adequate funds to purchase the development rights. For an ingenious way out of this problem, see Costonis, *The Chicago Plan: Incentive Zoning and the Preservation of Urban Landmarks*, 85 HARV. L. REV. 574 (1972), *reprinted in* THE TRANSFER OF DEVELOPMENT RIGHTS 300 (J. Rose ed. 1975) [hereinafter cited as Costonis, *The Chicago Plan*]. Nor does it appear likely that a local government will be able to recoup some of its losses by the taxation of development rights before they are purchased by property owners in the transfer district. The rights cannot be taxed as real property without attachment to a particular plot of land. *See* 56 A.L.R. 3d 1300 (1974). Whether they can be taxed as personalty will depend on the law of the jurisdiction in which the TDR scheme is being implemented. Should any municipality be bold enough to try this scheme it would soon face the dilemma of trying to regulate in accordance with a well-considered plan while trying to peddle the purchased development rights in the most marketable location.

rights.[57] If recourse to public investment for environmental preservation is in the cards, use of straightforward eminent domain programs for these purposes would seem preferable to municipal TDR bank Ponzi schemes.[58]

For the reasons given above, most municipalities have chosen to permit the free market, within limits set by the existing zoning resolution and current economic theory, to determine the price and specific placement of development rights within their jurisdiction. This essentially *laissez faire* TDR approach, within broad guidelines set out in the definition of preservation and transfer areas, has resulted in *ad hoc* decision-making and a great deal of market uncertainty in the sale of development rights. Preservation property owners have often refused to sell at the price offered, on the grounds that the offer does not adequately reflect the loss of their development potential, or have quoted figures unreasonably high for area developers.[59] Undoubtedly, some of thse problems are due simply to ignorance of the purposes and intended effects of TDR. Nonetheless, failure to trade in development rights, for whatever reason, also diminishes the demand for them in the transfer district, thereby causing preservation property owners financial uncertainty in the marketing of their development rights.[60] No wonder, then, that the courts have been reluctant to find that TDR provisions can assure preservation landowners a "reasonable return" on their property.[61]

---

57. Gans, *supra* note 38, at 277. According to one real estate economist, the private real estate industry believes that local governments adopt TDR price-fixing plans on:

> the assumption that developers' profits are excessive and that these profits can be reduced without lowering the developers' incentive or increasing the cost of the product. Patent nonsense. Most major real estate developers have a goal of a 15% rate of return on invested capital—and frequently this is not achieved. In fact, the average is much less, despite the high risk.

DeVoy, *supra* note 45, at 3.

58. The reference here is to Charles Ponzi, an international real estate financier of the earlier twentieth century. Ponzi is particularly noted for his get rich quick schemes which brought him to the very pinnacle of financial success, but led shortly thereafter to his ruin and deportation from the United States in 1934. For further insights into the life of this elegant promoter-swindler, see Maloney, *The Rise of Mr. Ponzi*, NEW YORKER, May 5, 1937, at 20.

59. Gans, *supra* note 38, at 277.

60. Chavooshian, *supra* note 11, at 172. It can also result in a long-term loss in general tax revenues which most municipalities can ill-afford. *See* notes 62-67 and accompanying text *infra*.

61. *See, e.g.*, Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104 (1978);

The marketplace predicate for TDR from environmental preserves is thus rendered uncertain by the community's comprehensive plan as exemplified in its zoning restrictions. To the extent this framework can be bent to render TDR a more marketable commodity, the more likely it is to gain credibility as an environmental preservation device. The foregoing discussion, however, makes clear the negative consequences which follow any such bending of the planning framework.

2. Local Tax Consequences of TDR

Municipal planning boards around the country are currently attempting to find solutions to problems created by the harsh fiscal realities of the day. Among such problems is the need to keep taxes at the minimum necessary to ensure orderly community development and adequate maintenance of both public facilities and the existing infrastructure system. Above all, the situation calls for the preservation and, if possible, the enhancement of municipal revenues so as to better enable a local government to plan for the future of its citizenry.

In light of these fiscal imperatives, as well as the unanswered questions raised by TDR,[62] it cannot be said that TDR provides a fiscally responsible means by which a municipality can protect its open space and important natural resources. The use of TDR can result in the loss of valuable tax revenue to a city upon the designation of undeveloped lands, previously assessed for purposes of *ad valorem* taxation at a very high speculative rate, within the environmental preservation zone.

Fred F. French Inv. Co. v. City of New York, 39 N.Y.2d 587, 598, 350 N.E.2d 381, 388, 385 N.Y.S.2d 5, 12 (1976). The situation has been described by one commentator as follows:

> The most obvious problem is that [such] market-denying allocation zoning generally lowers the return on investment, for the permitted use is likely to be less intensive than that demanded by the market. . . . Market-buying allocations often raise classic substantive due process problems and the erratic nature of the allocation causes those who lose in the zoning game . . . to cast their objections to the windfall and wipeout allocation produced as a denial of equal protection of the laws. The confusion over the proper purpose of zoning aggravates the constitutional problems, for many contemporary exercises of the zoning power are difficult to justify within the framework of traditional excuses for state infringement of private initiative.

Tarlock, TDR and Natural Resources Law: Comparison and Contrast 1 (May 3, 1979) (paper prepared for presentation at the Lincoln Institute of Land Policy Seminar on TDR).

62. *See* notes 28-61 and accompanying text *supra*.

The experience of Collier County, Florida, is a case in point. Collier County's reassessment of Special Treatment (preservation zone) lands reduced their taxable value by about $45,000,000 and cost the county $641,000 in taxes annually.[63] Collier County's Planning Commission was able to justify this loss of tax revenue and subsequent curtailment of public services on the grounds that the county would not only recoup this initial loss of revenue at a later date, but might well improve its tax base through the development of the transfer district at increased permissible densities.[64] Whether future development could restore the loss of tax revenue to a city or county, however, seems pure speculation. Crediting long-range tax recovery to the introduction of a TDR scheme seems equally arbitrary, since the success of such a program depends so much on what has always been regarded as the basically unpredictable real estate market.

It is clear that no area—even Collier County—can stand to lose substantial tax revenue, even for a relatively short period of time. Additional densities in the transfer district would increase demand for public services, requiring added municipal revenues. Tax base erosion at such a time could well undermine provision of adequate improvements and services by the municipality. Without the assurance of sufficient revenues to provide these improvements, there will be no community demand to maintain a market for development rights since no development will be permitted in an area lacking adequate infrastructure.[65]

One possible solution to this dilemma, at least in suburbia, may be found through the making of inter-jurisdictional agreements between tax districts. Such an agreement would "balance the revenue loss in the preservation area jurisdiction against the tax benefits received by the jurisdiction containing the development parcels."[66] A municipality might also prevent revenue loss by designating development and preservation areas within the same tax district.[67] The political and

63. Spagna, Transferable Development Rights: Implementing the Idea 23-24 (May 3, 1979) (paper prepared for presentation at the Lincoln Institute on Land Policy Seminar on TDR) [hereinafter cited as Spagna].

64. *Id.*

65. Harwell, *Growth Management Results—The Effects of Growth Management Actions on Six Communities*, ENVT'L COM. 9, 11 (June 1979). *See also* Golden v. Planning Bd., 30 N.Y.2d 359, 285 N.E.2d 291, 334 N.Y.S.2d 138 (1972), *appeal dismissed*, 409 U.S. 1003 (1974).

66. Carlo & Wright, *supra* note 24, at 26.

67. *Id.*

administrative difficulties involved in restructuring the tax system in a given area, however, may well preclude the adoption of such measures.

B. *Subdivision Exactions*

The suggested subdivision exaction solution to preserving the 200-foot lakefront strip in our hypothetical would be, first, to prohibit erection of major structures thereon through limited use zoning, the public trust doctrine, or the law of custom; second, to require the dedication of designated environmental reserve land (achievable by private acquistion and subsequent dedication) or payment of an exaction for environmental preservation on future subdivisions; and third, possibly to levy special assessments on all taxpayers for acquiring and maintaining, as appropriate, the precious lakefront resource which benefits the entire municipality.

1. The Planning and Market Implications of Subdivision Exactions

Unlike TDR, which is an optional developer response to market demand for housing in a particular community, subdivision exactions are mandatory requirements imposed on new development. They are required from all developers as a condition of plat approval to ensure that any new subdivision will minimize adverse impact on the character of the existing community.[68] The market for residential development had traditionally adjusted to the increased costs of housing generated by such local requirements by raising purchase prices. Consequently, at every point along the ascending economic curve, purchasers are priced out of the market, with corresponding exclusionary impacts.

Subdivision ordinances have withstood legal challenge on the theory that their exactions are a valid expression of a municipality's power to plan for the comprehensive development of the area.[69] The

68. 5 WILLIAMS, AMERICAN LAND PLANNING LAW § 156.09 (1975).

69. *See generally* Associated Home Builders v. City of Walnut Creek, 4 Cal. 3d 633, 642-47, 484 P.2d 606, 614-17, 94 Cal. Rptr. 630, 638-40 (1971) (municipalities have affirmative duty to provide open space); Jenad, Inc. v. Village of Scarsdale, 18 N.Y.2d 78, 82-83, 218 N.E.2d 673, 674-75, 271 N.Y.S.2d 955, 956-57 (1966) (open space requirements are akin to other necessary public facilities, such as sewers, sidewalks, and lights); Brous v. Smith, 304 N.Y. 164, 170-71, 106 N.E.2d 503, 507 (1952) (approval of subdivision applications is within scope of municipal police power); Jordan v. Village of Menomonee Falls, 28 Wis. 2d 608, 622, 137 N.W.2d 442, 448 (1965)

rationale usually applied to uphold the validity of these exactions is that the costs of providing adequate municipal services to meet additional demand on existing community facilities should be borne by future residents of the proposed subdivision.[70]

Subdivision exactions are designed to help control the growth and development of a community, a responsibility which has traditionally been entrusted to a local planning board.[71] In general, a municipal planning board must approve any subdivision before it is built. This power of review gives planning boards the authority to impose a general design pattern on land within their jurisdiction. Unlike the situation created by TDR, a municipality can thus carefully direct and control the impact of new development from the moment that a plat application is filed until the subdivision itself is complete.[72] In this way, local governments are in a better position to effectively balance the public interest in the preservation of natural resources with a landowner's interest in making a "reasonable return" on his investment.

Subdivision exactions were originally utilized to finance certain improvements, such as streets and sidewalks, within a subdivision. In recent years, these requirements have been expanded to include the dedication of land and/or the payment of fees to provide parks and schools to meet the needs of a particular neighborhood[73] and to alleviate over-crowding of existing facilities.[74] The prevalence of subdivision exactions as a planning tool today reflects the realization that adequate open space is essential to the general public welfare.[75] In this regard, any attempt to implement a subdivision dedication or exaction requirement to protect an area's environmental resources should be based on the experience of municipalities in conditioning

---

(exactions are necessary given correlation between need to maintain municipal service levels and influx of new residents into community).

70. *See, e.g.*, Blevens v. City of Manchester, 103 N.H. 284, 288-89, 170 A.2d 121, 123-24 (1961); Jenad, Inc. v. Village of Scarsdale, 18 N.Y.2d 78, 82-83, 218 N.E.2d 673, 674-75, 271 N.Y.S.2d 955, 956-57 (1966); Jordan v. Village of Menomonee Falls, 28 Wis. 2d 608, 622, 137 N.W.2d 442, 448 (1965).

71. UNITED STATES DEP'T OF COMMERCE, A STANDARD CITY PLANNING ENABLING ACT (1928).

72. *See* 5 N. WILLIAMS, AMERICAN LAND PLANNING LAW § 156.09 (1975).

73. *See* R. ANDERSON, AMERICAN LAW OF ZONING 2D 23.39 to .41 (1975) [hereinafter cited as ANDERSON 2D].

74. Heyman & Gilhool, *supra* note 8, at 1134.

75. *See* Chavooshian, *supra* note 11, at 175.

plat approval on the provision of a certain amount of vacant land for improvements designed to accommodate the needs of the new subdivision and incidentally to benefit the community at large.

Local ordinances generally require that three to twelve percent of the land proposed for development be dedicated to the municipality.[76] The dedication amount may be based on either a fixed percentage of the total amount of subdivision land or a density formula requiring a certain amount of land per dwelling unit or lot.[77] The fee exacted in lieu of land dedicated is often a per lot amount "equal to the value of the land which could have been required, or a percentage of the assessed value of all the land in the plat."[78]

Originally, land dedications were by far the more popular planning device, no doubt because of their derivation from earlier regulations conditioning plat approval on the dedication of land for streets and sidewalks. Fees were used where a particular parcel was too small for a municipality to reasonably require the dedication of even a small percentage for public open space or where there were already adequate recreational or educational facilities in the area of the proposed new development.[79] Municipalities are rapidly coming to appreciate, however, the flexibility that per lot fees can add to the control of vacant land development.[80]

Although the determination of what a developer must provide in return for plat approval permits some negotiation and bargaining, the final decision as to whether the landowner must dedicate a portion of

76. *See* ANDERSON 2D, *supra* note 73, at § 23.39.

77. Jacobsen & McHenry, *Exactions on Development Permission*, in WINDFALLS FOR WIPEOUTS 342, 344 (D. Hagman & D. Misczynski eds. 1978).

78. *See* ANDERSON 2D, *supra* note 73, at § 23.40.

79. For cases upholding the use of per lot fees as an alternative to land dedications to preserve open space, see East Neck Estates, Ltd. v. Luchsinger, 61 Misc. 2d 619, 621, 305 N.Y.S.2d 922, 924 (1969); Jenad, Inc. v. Village of Scarsdale, 18 N.Y.2d 78, 85, 218 N.E.2d 673, 676, 271 N.Y.S.2d 955, 958 (1966) (per lot fees no more of a "tax" or "illegal taking" than land dedication); Jordan v. Village of Menomonee Falls, 28 Wis. 2d 608, 611, 137 N.W.2d 442, 449 (1965) (equalization fees a concommitant of land dedication provision).

80. *See* Associated Home Builders v. City of Walnut Creek, 4 Cal. 3d 633, 639 n.6, 484 P.2d 606, 612 n.6, 94 Cal. Rptr. 630, 636 n.6 (1971). A statement made by the California Supreme Court is representative of this trend:

> It is difficult to see why, in light of the need for recreational facilities . . . and the increased mobility of our population, a subdivider's fee in lieu of dedication may not be used to purchase or develop land some distance from the subdivisions which also would be available for use by subdivision residents.

Id.

his property or pay a per lot fee instead is left to the discretion of the municipal planning board.[81] Planners have traditionally regarded in lieu fees as merely a substitute for land dedications.[82] The record on the subject seems to suggest that a planning board could require only one type of exaction for a single project.[83] Nevertheless, since both land dedications and fee exaction requirements are considered "reasonable form[s] of village planning"[84] the use of a combination of these exaction techniques seems sound.[85]

Lately, increased attention has focused on the concept of using subdivision exactions to protect areas of critical environmental concern in an entire region.[86] In recognition of the particularly sensitive nature of lands containing such features as wetlands, important water sources, and the habitation of a fragile ecosystem, planners have recommended that an optimum twenty-five percent of a particular subdivision or its dollar equivalent be dedicated to open space.[87] The actual amount exacted from a developer will generally depend, however, on the location and characteristics of the land in question.[88]

Land dedications and/or fee exactions are especially useful to promote the public interest in environmental protection because they enable the municipality to shift environmentally sensitive lands into public ownership and away from the development pressures which

---

81. *See* East Neck Estates, Ltd. v. Luchsinger, 61 Misc. 2d 619, 621, 305 N.Y.S.2d 922, 924 (1969); ANDERSON, *supra* note 23, at § 19.19.

82. *See* Jenad, Inc. v. Village of Scarsdale, 18 N.Y.2d 78, 85, 218 N.E.2d 673, 676, 271 N.Y.S.2d 955, 958 (1966); Jordan v. Village of Menomonee Falls, 28 Wis. 2d 608, 611, 137 N.W.2d 442, 449 (1965).

83. In one challenge to the constitutionality of a subdivision exaction ordinance for parks, the relevant statute was construed to authorize land dedications or fee exactions, but not both. *See* Cimarron Corp. v. Board of County Comm'rs, 563 P.2d 946, 947-48 (Colo. 1977).

84. Jenad, Inc. v. Village of Scarsdale, 18 N.Y.2d 78, 84, 218 N.E.2d 673, 676, 271 N.Y.S.2d 955, 958 (1966).

85. *See* N.Y. Op. State Comp. 77-447, discussed at notes 310-11 and accompanying text *infra*; Associated Home Builders v. City of Walnut Creek, 4 Cal. 3d 633, 639, 484 P.2d 606, 611-12, 94 Cal. Rptr. 630, 635 (1971).

86. *See* ARIZ. REV. STAT. ANN. § 9-463.01.C.4 (West 1977); CAL. GOV'T CODE § 66411 (Deering 1979 & Supp. 1980). *See also* Adirondack Park Agency Act, N.Y. EXEC. LAW §§ 800-819 (McKinney Supp. 1980); California Coastal Act of 1976, CAL. PUB. RES. CODE §§ 30000-30900 (Deering Supp. 1980); TAHOE REGIONAL PLAN. AGENCY, LAND USE ORDINANCES 13 (1980). *See generally* P. SIMKO, PROMISED LANDS: SUBDIVISIONS AND THE LAW 484 (1978) [hereinafter cited as SIMKO].

87. *See* SIMKO, *supra* note 86, at 484.

88. *Id.*

may otherwise entice even the most environmentally conscious landowner to build. Such lands will either be acquired by the subdivision applicant and subsequently dedicated to the municipality, or acquired by the municipality with the aid of subdivision fees in lieu of dedications. Property owners who develop their land should not suffer undue hardship from the exaction requirements since increased environmental quality in the surrounding community is a saleable amenity. Individual developer investments are secure since the system demands similar exactions from all new developers, thereby preventing one owner from being singled out to bear a disproportionate burden of the cost of protecting valuable open space.[89]

The price of environmental protection may not be cheap. Subdivision exactions can result in a substantial increase in the cost of future development which consumers may ultimately absorb.[90]

Given the inflated costs of participating in today's housing market, it is likely that additional increases in home prices will effectively preclude even greater numbers of lower- and middle-income families from benefiting from the preservation of environmentally sensitive lands. On the other hand, the TDR alternative discussed above imposes additional residential densities at the expense of rural character as the price of environmental protection. It is arguable, however, whether TDR's additional residential densities, marketed in the prevailing suburban pattern, will substantially mitigate inherent exclusionary tendencies in suburbia.

Units of municipal or county government charged with regulation of development in environmental preservation areas should carefully weigh the potentially exclusionary tendencies of subdivision exactions against the TDR and zoning consequences of unleashing or insufficiently restraining development pressures on the environment.

Any new development is likely to have an effect on the existing environment or community. In view of the American dream that motivates its citizenry to search for ever-greener pastures in which to settle, it is unreasonable to expect a wide-scale prohibiton of all new construction in the interest of environmental protection. Nevertheless, subdivision exactions may enable local governments to balance these competing interests.

89. *See* Heyman & Gilhool, *supra* note 8, at 1129.

90. *See generally* Mandelker, *The Catch 13 of Proposition 13: Higher Development Charges New Questions for Courts*, ENVT'L COM. 4-5 (July 1979) [hereinafter cited as Mandelker, *Catch 13*].

2. Local Tax Implications of Subdivision Exactions

The use of subdivision exactions could enable a municipality to avoid the widespread loss of tax revenues that would plague the implementation of a TDR scheme. Although land dedicated to the local government in return for plat approval will be lost to the municipal tax base, arguably this loss will be offset by the subsequent increase in assessed valuation of the subdivision lots, as well as by the per lot fees exacted from developers in lieu of land dedications.

The increase in value should reflect the benefits accruing to subdivision lots by virtue of the preservation of natural resources in the area, an uncertain result under the TDR alternative, where market factors are not in tune with each other.[91] In this way, proximity to environmentally sensitive lands can be viewed as an "amenity"[92] provided by the local government which tends to increase the value of existing property.[93] A municipality can thus generate additional revenue from taxes levied against new subdivision lots in two ways: first, through an increased assessed property value for purposes of the general *ad valorem* property tax;[94] and second, the developers' costs of dedication and/or fee exactions are likely to be passed on to consumers[95] through an increased real property transfer tax which is based on the sale price of the property.

The municipality might additionally add to its tax base from the reassessment of property held by citizens already residing in the community. For example, the establishment of a nature preserve would presumably benefit the entire community. If so, a municipality should not single out new subdivisions to bear the full tax burden of an open space exaction program.[96] Any scheme proposing this type

91. *See* notes 28-61 and accompanying text *supra*.

92. This result would require that an analogy be drawn between the preservation of natural resources and the provision of parks and school sites. The latter are generally regarded, for appraisal purposes, as "amenities" which increase the value of a subdivision lot. Note, *Subdivision Land Dedications: Objectives and Objections*, 27 STAN. L. REV. 419, 429 n.24 (1975) [hereinafter cited as *Dedications*]. *See also* Ellickson, *Suburban Growth Controls: An Economic and Legal Analysis*, 86 YALE L.J. 385, 401 n.38 (1977) [hereinafter cited as Ellickson].

93. *See generally* Ellickson, *supra* note 92.

94. *Id.*

95. *See* note 271 and accompanying text *infra*.

96. Otherwise, they will be found to violate most states' constitutional requirement of uniform property taxation. Vendetti-Siravo, Inc. v. City of Hollywood, 39 Fla. Supp. 121, 122-23 (1973).

of differential assessment system could violate the basic premise of ad valorem or general property taxation, namely that the increments of value of the appraisal scale used to assess general property taxes be uniformly applied to all land within a particular tax jurisdiction.[97] Hence, the local government could acquire greater revenue through an across-the-board increase in property taxes as well as via special business taxes.

In any current discussion of local property taxation, however, it is essential to consider the potential impact of a Proposition 13[98] on municipal tax powers. Provisions such as Proposition 13 attempt to reduce local property taxes by amending the state constitution to limit the amount of real property taxes that a municipality can levy.[99] If the California ordinance proves successful, it is doubtful that property taxes can adequately recapture and maintain the "windfall" provided property owners from the preservation of environmental resources. Furthermore, it is unlikely that subdivision exactions can be used exclusively for this purpose.[100]

One way to ensure the availability of funds to protect publicly owned environmentally sensitive lands might be a broadly based variation of a special assessment tax.[101] If this proves fiscally impracticable, or if the municipality's need for revenues otherwise becomes acute, a local government may need to enact a preferential tax assessment system. Such a system would provide that environmentally valuable open space remain in the hands of private owners, but that it be taxed at a rate which reflects its actual use rather than its development potential.[102] This scheme gives an incentive to the landowner to retain his property in its natural state, thereby serving the municipality's purpose in the protection of natural resources and the citizens' interest in reduced taxes.[103]

The success of any planning device designed to protect valuable open space depends largely on the local government's ability to de-

97. *See* D. MANDELKER, STATE AND LOCAL GOVERNMENT IN A FEDERAL SYSTEM 301 (1977).

98. *See generally* Mandelker, *Catch 13, supra* note 90, at 5.

99. CAL. CONST. art. XIIIA, § 2.

100. *See* Mandelker, *Catch 13, supra* note 90, at 5.

101. *See* notes 329-33 and accompanying text *infra*.

102. *See* Keene, *Differential Assessment and the Preservation of Open Space*, 14 URBAN L. ANN. 11, 14 (1977).

103. *Id.* at 17.

velop a flexible system of control over the use of vacant land within its jurisdiction. This requires the establishment of guidelines that give municipal planning boards the discretion to exact land and/or fees from the developers as a condition for subdivision plat approval. It also necessitates broad taxing powers to ensure that the costs of preserving environmentally sensitive lands are distributed fairly among all property owners, and that the municipality will have sufficient resources to plan effectively for the benefit of the community as a whole.

C. *Natural Area Zoning*

A more traditional approach to the municipality's environmental goals lies in the special natural area zone approach. A consequence of the TDR solution is a higher population density in the transfer zone with concommitant impacts on its natural features and possible loss of small town flavor. The subdivision exaction scheme contemplates a reduced population density given the unbuildable nature of the preserved natural area, and a more costly house in the subdivision reflecting a pass-along of the exaction. A special natural area zone approach avoids both of these consequences, but at a certain price.

The special natural area district approach respects an area's underlying zoning population density assumptions and lot size requirements, but permits variation in all other zoning aspects, such as yard, height, and setback regulations consistent with maximum natural feature preservation. Subject to these standards, it permits development within a natural area.

New York City has accorded such zoning special district status to its large Staten Island Greenbelt area,[104] comprising the highest elevations along the Atlantic seaboard from Florida to Maine, and to the topographically varied Riverdale area in the Bronx across the Hudson from the New Jersey Palisades.

In a natural area district, the locality permits no subdivision or alteration of the land before filing of a land survey. The survey enumerates and locates all natural features found on the site, including topographic elevations, botanic and marine environment, trees above six inch caliper, boulders, streams and ponds.[105] Subdivisions which

104. NEW YORK CITY ZONING RESOLUTION ch. 5, art. X, § 105 (1974).

105. *Id.* § 105.90.

arbitrarily create lots dense with major natural features are discouraged in favor of a scheme assigning to each buildable lot its fair share of natural features. The intent is to anticipate requests to build and to insure as far as possible that each lot contains sufficient building area consistent with minimal disturbance of natural features.

Building permit approval on the resulting lots is not ministerially available; rather, the municipality balances by examining discretionary criteria which insure maximum feasible environmental preservation.[106] Materials, extent of paving, and planting are typical considerations. The city insures compliance with conditions and retention of the balance of the property in a natural state by requiring restrictive covenants running with the land, benefiting neighbors within the natural area districts as well as the City of New York.

Similarly, the City of Tiburon, California, placed an environmentally sensitive area with magnificent views of the San Francisco Bay in a special Residential Planned Development Zone (RPD-1).[107] This zoning reduced the as-of-right building entitlement from one unit per acre to one unit per five acres. The Tiburon ordinance also provided for an additional four units at the discretion of local planning officials upon a showing that the owner would incorporate the special natural features of the area in question, such as scenic views, topography and other open space considerations, into the building plan.[108] The United States Supreme Court recently upheld this zoning regulation in *Agins v. City of Tiburon*.[109]

The natural area district suggestion, applied to our hypothetical lakefront area, could permit the retention of a maximum number of existing trees along the shoreline or a tree retention program buffering each house and any access road thereto. It could, through related subdivision controls, require public shoreline access. It could minimize paving and consequent runoff disturbing to botanic and nearby marine environments. Building materials could be controlled to disturb the natural environment as little as possible.

Assuming the market for homes in a natural area with special environmental features primarily encompasses families looking for a stable, permanent community, the adoption of special natural area

106. *Id.* § 105.021.

107. TIBURON, CAL., ORDINANCES 123 N.S. and 124 N.S. (June 28, 1973), *cited in* Agins v. City of Tiburon, 100 S. Ct. 2138, 2140 (1980).

108. *See* Agins v. City of Tiburon, 100 S.Ct. at 2142.

109. *Id.* 2140-41 (1980). See notes 338-47 and accompanying text *infra*.

district zoning controls would benefit the market. These controls do not exclude newcomers but instead insure assimilation in a manner deferential to the natural environment. Some construction costs are incurred in guarding against the indiscriminate leveling of land, bulldozing of trees, shielding of watercourses and the like, but these costs only add to the resale values in the neighborhood. Another cost of the process involves delay in reviewing plans to assure the abovementioned desirable results.

New York City's experience in the two areas where these regulations are in force indicates no resistance by builders and extraordinary citizen enthusiasm for the special review concept and the results derived therefrom. In light of the Supreme Court's ruling in *Agins v. City of Tiburon*, one may anticipate national acceptance of this concept.

Tax consequences of the natural area concept have reflected continuing upward assessments in such areas. This result attests to the fact that designing communities consistent with nature adds to the tax base.[110]

III. A Legal Framework for Analysis

A. *An Environmental Reserve: Reasonable Regulation or Invalid "Taking?"*

Does highly restrictive regulation of environmentally sensitive land spell "taking?"

According to the test laid down by the United States Supreme Court in *Village of Euclid v. Ambler Realty Co.*,[111] a court will invalidate a land use regulation upon a showing that the ordinance is "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals or general welfare."[112] To defeat such a claim, a city must prove, among other things, that the affected property owner is not deprived of "all profitable remaining use" of his land and that the ordinance is "rationally related to the municipality's comprehensive plan."[113]

Since *Euclid*, courts have sometimes equated invalidity with "taking," a confusion which has begun to dissipate in the wake of recent

110. *See generally* I. McHarg, Designing with Nature 153-95 (1969).

111. 272 U.S. 365 (1926).

112. *Id.* at 395.

113. *See* Elliott & Marcus, *supra* note 29, at 58-59.

New York Court of Appeals decisions.[114]

The authority of a local government to regulate the use of private property derives from its police power.[115] The basic premise of any land use scheme is that "all property is acquired and held under the tacit condition that it shall not be so used to injure the equal rights of others, or to destroy or generally impair the public rights and interests of the community."[116] Local zoning ordinances were originally enacted to protect community residents from the harmful effects of what were regarded at common law as nuisances.[117] Recently, the Supreme Court has recognized that "the police power is not confined to the elimination of filth, stench and unhealthy places. It is ample to lay out zones where . . . the blessings of quiet seclusion and clean air make the area a sanctuary for people."[118] The Court's rationale for the exercise of this power is that "land-use restrictions or controls [serve] to enhance the quality of life by preserving the character and desirable aesthetic features of a city. . . ."[119]

The Supreme Court recently identified three factors, any one of which could convert an apparently valid "public program adjusting

---

114. *See, e.g.*, Penn Cent. Transp. Co. v. City of New York, 42 N.Y.2d 324, 366 N.E.2d 1271, 397 N.Y.S.2d 914 (1977), *aff'd*, 438 U.S. 104 (1978), *rehearing denied*, 439 U.S. 883 (1978); Fred F. French Inv. Co. v. City of New York, 39 N.Y.2d 587, 350 N.E.2d 381, 385 N.Y.S.2d 5 (1976), *appeal dismissed*, 429 U.S. 990 (1976).

115. U.S. CONST. amend. X.

116. Commonwealth v. Tewksbury, 11 Met. 55 (Mass. 1846), *cited in* Potomac Sand and Gravel Co. v. Governor of Md., 266 Md. 358, 367-69, 293 A.2d 241, 247 (1972), *cert. denied*, 409 U.S. 1040 (1972).

117. *See* Goldblatt v. Town of Hempstead, 369 U.S. 590, 595 (1962) (public interest requires such protection); Hadacheck v. Sebastian, 239 U.S. 394, 411 (1915) (brick manufacture a nuisance in certain localities under certain circumstances, therefore subject to state police power regulation). *See also* Boomer v. Atlantic Cement Co., 26 N.Y.2d 219, 228, 257 N.E.2d 870, 873-75, 309 N.Y.S.2d 312, 317 (1970) (cement plant's dust a nuisance eligible for damages remedy but not injunctive relief).

118. Village of Belle Terre v. Boraas, 416 U.S. 1, 9 (1974).

119. Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 129 (1978). *See also* City of New Orleans v. Dukes, 427 U.S. 297, 304 (1976) (New Orleans street vendors subject to state police power regulation as important part of appearance and custom of the city); Young v. American Mini-Theatres, Inc., 427 U.S. 50, 71 (1976) (city may prohibit "adult" motion picture theatres from certain urban neighborhoods to preserve quality of urban life); Village of Belle Terre v. Boraas, 416 U.S. 1, 9-10 (1974) (municipality may prohibit occupancy of a dwelling by two or more persons who are unrelated); Berman v. Parker, 348 U.S. 26, 33 (1954) (legislature empowered to determine that community should be beautiful, spacious and well-balanced as well as healthy, clean and protected); Welch v. Swasey, 214 U.S. 91, 108 (1909) (aesthetic considerations proper justification for exercise of state police power).

the benefits and burdens of economic life to promote the common good"[120] into an unconstitutional taking.

First, a government restriction may have such "an unduly harsh impact upon the owner's use of the property"[121] or "may so frustrate distinct investment-backed expectations as to amount to a 'taking.' "[122] (Harshness, or absence of a reasonable beneficial use.)

Second, a government acquisition of built or natural resources "to permit or facilitate uniquely public functions" may constitute a "taking."[123] (Appropriation, not present where a public trust or custom prevail.)

Third, a government restriction on real property "not reasonably necessary to the effectuation of a substantial public purpose"[124] may constitute a "taking." (Arbitrariness, or discord with a comprehensive plan.)

Following is a review of the components of this tripartite test—existence of a reasonable beneficial use, applicability of the law of custom or the public trust doctrine, and accord with a comprehensive plan—as applied to environmental preservation measures.

1. *A "reasonable beneficial use."* Public intervention in the form of land use regulation often reduces the property's value to its owner.[125] As long as the affected property owner is able to make some "reasonable beneficial use" of his land, however, a court will probably find that the ordinance in question does not violate the constitutional prohibition against the deprivation of private property without due process of law. In so doing, most courts are likely to rule that the public interest protected outweighs the private interest in the development potential of a particular parcel of land.[126] In its most recent

120. *See* Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978).

121. *Id.* at 127.

122. *Id.*

123. *Id.* at 128.

124. *Id.* at 127.

125. Penn Cent. Transp. Co. v. City of New York, 42 N.Y.2d 324, 335, 336 N.E.2d 1271, 1278, 397 N.Y.S.2d 914, 921 (1977).

126. *See* Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 110 (1978) (Grand Central Station too important a landmark to risk as part of redevelopment scheme); Sibson v. State, 115 N.H. 124, 129, 336 A.2d 239, 242 (1975) (state action sustained unless public interest so clearly of minor importance as to make the restriction of individual rights unreasonable); State *ex rel.* Thornton v. Hay, 254 Or. 584, 590, 462 P.2d 671, 674 (1969) (public use easements for shoreline and beaches pre-

discussion of the taking issue, *Penn Central Transportation Co. v. City of New York*,[127] the Supreme Court made clear that a property owner is entitled to a "reasonable return" from his land commensurate with his "distinct investment-backed expectations."[128] But what is reasonable "in turn depends upon a total view of the relevant facts and circumstances."[129] What, for example, is the distinct investment-backed expectation of an owner who has inherited or bought "at a song" a centuries-old swamp full of flora and fauna which is of integral value to the community?

A return's reasonableness depends not only "upon the value of the property, but also upon the owner's desire to expand the property."[130] Any expansion must, however, be a reasonable property adaptation[131] as determined by its general location, the degree of development the area has so far sustained, and the extent to which the expansion may encroach upon the remaining vacant land in the community. In other words, the existing character of an area will influence the owner's distinct investment-backed expectations. Since land use controls purport to regulate a property owner's right to build "where necessary for the public welfare,"[132] a regulation is not invalid simply because it deprives a landowner of "the most profitable or most beneficial use of his property."[133]

In no area of the law is the relative nature of a landowner's right to a reasonable return more clearly highlighted than in the field of environmental protection. The current awareness of the importance[134] of

---

served by statute); Just v. Marinette County, 56 Wis. 2d 7, 22-26, 201 N.W.2d 761, 770-72 (1972) (preservation of natural wetlands outweighs value of development potential).

127. 438 U.S. 104 (1978).

128. *Id.* at 127.

129. Fred F. French Inv. Co. v. City of New York, 77 Misc. 2d 199, 202, 352 N.Y.S.2d 762, 766 (Sup. Ct. 1973).

130. Nate, *The Freshwater Wetlands Act: Permissible Regulation v. Constructive Taking*, 43 ALBANY L. REV. 295, 305 (1979).

131. *Id.*

132. Candlestick Properties, Inc. v. San Francisco Bay Conserv. and Dev. Comm'n, 11 Cal. App. 3d 557, 571, 89 Cal. Rptr. 897, 905 (1970).

133. Nate, *supra* note 130, at 304.

134. Simko, *supra* note 86, at 721, stated:

> Open space, besides its obvious aesthetic and recreational appeal, serves many valuable ecological functions. It provides a habitat for wildlife. Its vegetation buffers noise and serves as a natural air-pollution filter, absorbing carbon dioxide and other pollutants and giving out oxygen. Its soils absorb rain and run-off,

protecting precious natural resources is new.[135] It reflects a shift away from traditional notions of property rights based on a "hierarchy in which the right to profit stands first, with a grudging exception for exigent public need."[136] In the past, whether a particular ordinance resulted in an impermissible taking of private property depended largely on "the economic effects that occur[red] solely *within* the physical boundaries of [an individual owner's] property."[137] The realization at the heart of the present environmental protection movement that "property does not exist in isolation"[138] has prompted the legal profession to alter its perception of private property rights and to consider the idea that the land system in this country is "an interdependent network of competing uses."[139] Thus a property owner's claim that he has been deprived of the right to a "reasonable return" from his property should be evaluated in the context of the general public welfare of the entire community or area in which the particular parcel of land is located.[140]

One mitigating factor in this potentially harsh regulatory climate could be a preferential tax assessment system[141] which rewards the owner who keeps his land in its natural state. An existing open use

---

lessening flooding potential. Preservation of open space is often necessary to preserve natural drainage courses such as arroyos, creeks, and swampy areas, which function as natural water-purification and dispersion systems.

135. According to one authority, "[u]ntil the last two decades, all land was [regarded as] 'developable.'" *Id.* at 485.

136. Sax, *Takings, Private Property and Public Rights*, 81 YALE L.J. 149, 151 (1971).

137. *Id.* at 152.

138. *Id.*

139. *Id.* at 150.

140. Steel Hill Dev., Inc. v. Town of Sanbornton, 469 F.2d 956 (1st Cir. 1972). *See also* Golden v. Planning Bd., 30 N.Y.2d 359, 285 N.E.2d 291, 334 N.Y.S.2d 138 (1972), *appeal dismissed*, 409 U.S. 1003 (1974) (zoning ordinance delaying subdivision development until municipal services could accomodate subdivision *held* not a taking); State *ex rel.* Thornton v. Hay, 254 Or. 584, 462 P.2d 671 (1969) (public interest and benefit of shorelands and beaches outweigh potential development value to private individuals).

141. Golden v. Planning Bd., 30 N.Y.2d 359, 380-81, 285 N.E.2d 291, 303-04, 334 N.Y.S.2d 138, 154-55 (1972). *See* notes 101-03 and accompanying text *supra*. This approach has also been used with varying degrees of success in the growth management systems of Ramapo, New York, Petaluma, California, and the Twin Cities, Minnesota. For more detailed discussion of preferential tax assessment systems in the context of growth management, see generally Keene, *supra* note 102.

might well be "reasonably beneficial" with the assurance of a preferential tax assessment.

2. *Custom and public trust: doctrines which excuse government resource acquisition*. Where natural usage of sensitive environmental land has been customary, restrictions which assure continuance of such natural usage are apt to find sanction under either the law of custom or the public trust doctrine.

An example of this approach to environmental regulation can be found in *Sibson v. State*.[142] In *Sibson*, the New Hampshire Supreme Court upheld the denial of a permit application to fill a four-acre tract of salt marshland.[143] In so doing, the court rejected a claim that the denial deprived the owners of all reasonable beneficial use of their property.[144] The court declared that its decision would have no effect on the existing value of the owners' property.[145] It would deny the owners "none of the normal traditional uses of the marshland including wildlife observation, hunting, haying of marshgrass, clam and shellfish harvesting, and aesthetic purposes."[146] The court found that the owners had been deprived of only a speculative profit, an insufficient basis for holding that a particular government action had effected an invalid taking of private property.[147] In arriving at this conclusion, the court balanced the private interest in such speculative profit against what it found to be the paramount public interest in "proscribing future activities that would be harmful to the public" if the salt marshlands were destroyed.[148] Significantly, it noted that the land "remained as it had been for milleniums."[149] Moreover, the court cited *Just v. Marinette County*,[150] a leading case expounding the applicability of the public trust doctrine to environmentally sensitive lands.

The shift in attitude toward greater appreciation of the public in-

142. Sibson v. State, 115 N.H. 124, 336 A.2d 239 (1975).

143. *Id.* at 127, 336 A.2d at 241.

144. *Id.* at 129, 336 A.2d at 243.

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.*

150. 56 Wis. 2d 7, 201 N.W.2d 761 (1972), discussed at note 169 and accompanying text *infra*.

terest inherent in conservation regulation has also coincided with a resurgence of interest in the idea that a legally recognizable public right to the preservation of certain natural resources can arise through custom.[151] The rule that an interest in property can accrue by custom derives from a principle of early English property law that permitted the general public to acquire rights in land held in private ownership.[152] Customary rights arise by "common consent and uniform practice."[153] To make such a determination, a court must find that, first, the usage of the land in question is ancient; second, the right has been exercised without interruption by any other party with a paramount claim; third, "the customary use [has been] peaceable and free from dispute;" fourth, the determination is reasonable; fifth, the practice is firmly established in the community; sixth, the custom is "obligatory" in that the private landowner has no opportunity to choose whether he will recognize the custom; and, finally, the custom does not conflict with other laws or customs.[154]

Although courts in the United States have not widely recognized the doctrine of custom,[155] the Oregon Supreme Court noted in *State* ex rel. *Thornton v. Hay*[156] that the doctrine is particularly applicable to large areas of land possessing unique natural features.[157] *Thornton* was an action brought by the State of Oregon to enjoin the construction of a fence on dry sand property owned by the proprietors of a tourist facility.[158] The construction of the fence would have prevented the general public from enjoying an area which had been in public use "as long as the land had been inhabited."[159] It also would have conflicted with a long-standing state policy in favor of uniform treatment of the Oregon coastline.[160] The court found that the "ancient" public recreational use of the dry sand area gave sufficient no-

151. *See* State *ex rel.* Thornton v. Hay, 254 Or. 584, 462 P.2d 671 (1969). *See also* notes 156-61 and accompanying text *infra*.

152. BURBY, *supra* note 10, at 702.

153. BOUVIER'S LAW DICT., Rawles's Third Revision 742, *cited in* State *ex rel.* Thornton v. Hay, 254 Or. at 595, 462 P.2d at 677.

154. 1 BLACKSTONE, COMMENTARIES 75-78, *cited in* State *ex rel.* Thornton v. Hay, 254 Or. at 595-97, 462 P.2d at 677.

155. BURBY, *supra* note 10, at 702.

156. 254 Or. 584, 462 P.2d 671 (1969).

157. *Id.* at 595, 462 P.2d at 676.

158. *Id.* at 585, 462 P.2d at 672.

159. *Id.* at 595, 462 P.2d at 676-77.

160. *Id.* at 594, 462 P.2d at 676.

tice of custom to the owners of the tourist facility so as to preclude the appropriation of the property for private use.[161]

The notion that the public welfare is paramount in situations where private landowners threaten environmental resources is also at the heart of the public trust doctrine.[162] Under this theory, certain rights in property, for example, the right to develop a particular parcel of land, are "held by one party (in this case, the private property owner) for the benefit of the public at large or some considerable portion thereof."[163] Historically, the public trust doctrine has been applied to restrict the rights of landowners to develop property located adjacent to, and including, public waterways.[164] The interests sought to be protected by the trust are navigation, ports, free passage, commerce, fishing, conservation, and aesthetics.[165]

Recently, courts around the country have expanded the concept of the public trust to advance the aims of the environmental protection movement.[166] The doctrine essentially "makes the public guardian

161. *Id.* at 598, 462 P.2d at 678.

162. *See* J. SAX, DEFENDING THE ENVIRONMENT ch. 7 (1971); V. YANNACONE & B. COHEN, 1 ENVIRONMENTAL RIGHTS AND REMEDIES ch. 2 (1971); Cohen, *The Constitution, the Public Trust Doctrine, and the Environment*, 1970 UTAH L. REV. 388; Esposito, *Air and Water Pollution: What To Do While Waiting For Washington*, 5 HARV. C.R.—C.L. L. REV. 32 (1970); Fraser, *Title to the Soil Under Public Waters*, 5 LAND & WATER L. REV. 391 (1970); Sax, *The Public Trust Doctrine In Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471 (1970); Waite, *Public Rights To Use And Have Access To Navigable Waters*, 1958 WIS. L. REV. 335; Note, *Public Access To Beaches*, 22 STAN. L. REV. 564 (1970); Comment, *Private Fills In Navigable Waters: A Common Law Approach*, 60 CAL. L. REV. 225 (1972); Comment, *Role of Local Government in Water Law*, 1959 WIS. L. REV. 117. *See generally* Berland, *Toward the True Meaning of the Public Trust*, 1 SEA GRANT L.J. 83 (1976); Montgomery, *The Public Trust Doctrine in Public Land Law: Its Application in the Judicial Review of Land Classification Decisions*, 8 WILLAMETTE L.J. 135 (1972); Note, *The Public Trust in Public Waterways*, 7 URBAN L. ANN. 219 (1974) [hereinafter cited as *Public Waterways*]; Comment, *Governmental Restriction of Water Use*, 1959 WIS. L. REV. 341.

163. *Public Waterways, supra* note 162, at 220.

164. *Id.*

165. Note, *The Public Trust in Tidal Areas: A Sometime Submerged Traditional Doctrine*, 79 YALE L.J. 762, 777-78 (1970).

166. *See, e.g.*, Just v. Marinette County, 56 Wis. 2d 7, 17, 201 N.W.2d 761, 768 (1972) (shoreland zoning ordinance preventing changes in nature of land without special permit upheld). *See also* Brecciaroli v. Connecticut Comm'r of Envt'l Protection, 168 Conn. 349, 362 A.2d 948 (1975) (not an unconstitutional taking where plaintiff, though precluded from making certain use of tidal wetland, could still apply to fill lesser amount of land and could apply to make reasonable unregulated use of land); Sibson v. State, 115 N.H. 124, 336 A.2d 239 (1975) (denial of permit to fill salt marsh-

of those valuable natural resources which are not capable of self-regeneration and for which substitutes cannot be made by man."[167] To protect these lands, care must be taken to limit the activities permitted to such traditional uses as farming, fishing, or recreation, or to "the natural uses peculiar to that resource."[168] Consequently, the notion of a reasonable beneficial use for environmentally sensitive lands held in public trust will be restricted to those activities which will not impair the public interest in the preservation of the targeted areas.

A leading case expounding this doctrine is *Just v. Marinette County*.[169] Therein, the Supreme Court of Wisconsin upheld the constitutionality of a zoning ordinance under which the Justs were denied a special permit to develop their land located near a navigable lake and a navigable river.[170] In so doing, the court declared that

> [t]he state of Wisconsin under the trust doctrine has a duty to eradicate the present pollution and to prevent further pollution in its navigable waters. . . . [This duty] requires the state not only to promote navigation but also to protect and preserve those waters for fishing, recreation and scenic beauty.[171]

In considering the Justs' claim that the ordinance was confiscatory, the court found that their conception of value was "based upon changing the character of the land at the expense of harm to public rights."[172] The court did not regard this loss in value as sufficiently "essential or controlling" to preclude it from holding that:

> An owner of land has no absolute right to change the essential natural character of his land so as to use it for a purpose for which it was unsuited in its natural state and which injures the rights of others. The exercise of the police power in zoning must be reasonable and we think it is not an unreasonable exercise of that power to prevent harm to public rights by limiting the use of

---

land upheld); Tom's River Affiliates v. Department of Envt'l Protection, 140 N.J. Super. 135, 355 A.2d 679 (1976) (court upheld denial of permit for condominium construction in coastal review area).

167. Cohen, *The Constitution, The Public Trust Doctrine, and the Environment*, 1970 UTAH L. REV. 488.

168. Sax, *The Public Trust Doctrine in Natural Resources Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471, 477 (1970).

169. 56 Wis. 2d 7, 201 N.W.2d 761 (1972).

170. *Id.*

171. *Id.* at 16, 201 N.W.2d at 768.

172. *Id.* at 23, 201 N.W.2d at 771.

private property to its natural uses.[173]

3. *In accordance with a comprehensive plan (lack of arbitrariness).* In general, courts are willing to find a rational ground for singling out a class of landowners to bear "the cost of a land use beneficial to the public"[174] if the regulation accords with the municipality's comprehensive plan.[175] A comprehensive plan controls and directs the community's development through zoning based on the land's present and potential uses.[176] The power of a local government and its planning board to enact such a plan derives from the Standard Zoning Enabling Act,[177] a model state statute authorizing municipalities to enact comprehensive zoning ordinances in the interest of protecting the general public welfare.[178]

The standard of "in accordance with a comprehensive plan" is meant to provide courts with an analytical framework within which to adjudicate the effect of various land use controls on individual property owners. In so doing, a court must determine whether the ordinance in question logically relates to a general community interest.[179] A comprehensive plan enables the court to differentiate between zoning motivated by favoritism and zoning enacted for the public good.[180]

The purpose behind the "comprehensive plan" test is to prevent arbitrary and piecemeal zoning.[181] Consequently, before a court will find any land use ordinance valid, the municipality must demonstrate that the means it selected to achieve what it deems to be a "substantial public purpose"[182] are reasonably related to the governmental objective at hand. Evidence tending to show that an ordinance will

173. *Id.* at 17, 201 N.W.2d at 768.

174. Elliott & Marcus, *supra* note 29, at 60. *But see* Vernon Park Realty, Inc. v. City of Mount Vernon, 307 N.Y. 493, 121 N.E.2d 517 (1954).

175. *See generally* Haar, *supra* note 30.

176. ROHAN, *supra* note 22, at § 37.01.

177. UNITED STATES DEP'T OF COMMERCE, THE STANDARD STATE ZONING ENABLING ACT (1926).

178. *Id.* § 1.

179. Heyman, *Innovative Land Regulation and Comprehensive Planning*, in THE NEW ZONING: LEGAL, ADMINISTRATIVE, AND ECONOMIC CONCEPTS AND TECHNIQUES 23, 27 (N. Marcus & M. Groves eds. 1970).

180. *Id.*

181. ROHAN, *supra* note 22, at § 37.01.

182. Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 127 (1978).

result in an alteration of the existing character of an area in favor of a particular class of property owners to the detriment of the general community will result in the invalidation of the regulation as illegal "spot zoning."[183]

It is thus clear that a zoning ordinance or land use control places a restriction on an owner's right to make use of his property. To the extent of the limitation, the affected landowner is treated differently from other property owners in the community not subject to the particular restraints of the regulation in question. If, however, the municipality applies the regulation uniformly to all similarly situated properties, and if there is a discernible rational basis for the particular land use classification in the comprehensive plan, a court will uphold the regulation as a valid exercise of a municipality's police power.[184]

Any environmental protection measure which is to survive judicial scrutiny must be in accordance with a comprehensive plan. Although the public purpose of preserving important natural resources is unimpeachable once documented, that documentation must satisfy a three-part test.[185] The municipality must show first, that the planning mechanism employed will in fact assure protection of the resources; second, that the regulation will not cause an arbitrary class of landowners to bear a disproportionate burden of the costs of preserving the natural resources;[186] and third, that the program excludes measures "not reasonably necessary to the effectuation of a substan-

183. *See* Udell v. Haas, 21 N.Y.2d 463, 235 N.E.2d 897, 288 N.Y.S.2d 888 (1968). For the suggestion that inadequate planning in the implementation of a TDR scheme can also lead to spot zoning, see Fred F. French Inv. Co. v. City of New York, 77 Misc. 2d 199, 352 N.Y.S.2d 762 (Sup. Ct. 1973).

184. Elliott & Marcus, *supra* note 29, at 60.

185. *See* cases cited in note 166 *supra*. *Accord*, Steel Hill Dev., Inc. v. Town of Sanbornton, 469 F.2d 956, 961-62 (1st Cir. 1972) (legislation to protect existing land uses respected by the court); Candlestick Properties, Inc. v. San Francisco Bay Conserv. and Dev. Comm'n, 11 Cal. App. 3d 557, 571, 89 Cal. Rptr. 897, 905 (1970) (legislation declaring the importance of preserving the natural resource of San Francisco Bay respected by the court); Potomac Sand and Gravel Co. v. Governor of Md., 266 Md. 358, 373, 293 A.2d 241, 249 (1972), *cert. denied*, 409 U.S. 1040 (1972) (legislation protecting wetlands respected by the court); Turnpike Realty Co. v. Town of Dedham, 362 Mass. 221, 236, 284 N.E.2d 891, 901 (1972) (court resolved all rational presumptions in favor of zoning to preserve floodplain); State *ex rel.* Thornton v. Hay, 254 Or. 584, 587-99, 462 P.2d 671, 673-78 (1969) (legislation recognizing common law right to use beaches respected by the court).

186. Elliott & Marcus, *supra* note 29, at 59-60. In Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 135 (1978), the Supreme Court held that owners of desig-

tial public purpose."[187] In this regard, *Penn Central* decided that selective designation of landmark areas violates neither principles of uniformity of regulation nor fair assignment of preservation burdens—provided the designations proceed under a program of comprehensive character.[188]

Thus, courts may uphold a planning device designed to restrict the right to develop land containing important natural resources, provided that it preserves the owner's right to a beneficial use of property; it derives from a long-standing custom in the community, or from a public trust governmentally created to protect the public interest in the preservation of environmentally sensitive lands; or it meshes with the community's comprehensive plan.

Under each of these doctrines, the owner's right to make some use of his property originates from distinct investment-backed expectations based upon existing custom in the sensitive natural area. Some municipalities may decide to use TDR,[189] dedications or subdivision exaction proceeds, preferential tax assessments,[190] or a special natural area zoning district to mitigate the possibly harsh impact of the above-discussed doctrines on owners. If so, that decision should rest on a knowledgeable analysis of burdens and benefits in the particular area of regulatory application. Adequate legal justification for the imposition of such development restrictions exists—provided they are administered in a uniform, reasonable fashion and in accordance with the community's comprehensive plan.

B. *TDR: The Legal Questions*

1. Is TDR a substitute for "reasonable beneficial use?"

The basic premise behind TDR is that the value of land in a dense urban area "lies in the profit-making structure that can be built on

---

nated landmarks benefited from the comprehensive regulatory scheme and so could not be said to bear any disproportionate burden.

187. 438 U.S. at 127.

188. *Id.* at 132.

189. By printing development rights (*e.g.*, for a shoreline) and allowing their transfer to an ecologically "safe" area, a community may be creating for the first time those "distinct investment-backed expectations" which will form a more difficult basis for evaluating the reasonableness of any restriction placed on such property, to say nothing of political reaction in the ecologically safe area which receives the development rights.

190. *See* notes 101-03 and accompanying text *supra*.

it."[191] Since a development right is the owner's right to build or develop his land,[192] it is generally regarded as a property owner's most valuable commodity. Courts have recognized that the development potential of a particular parcel of land is a legally recognizable interest severable from the land.[193] According to traditional TDR theory, the severed development rights can be sold for a price that will substantially diminish the burden imposed on a preservation landowner from the loss of his right to develop an individual site.[194] This process would insure the landowner's ability to make a reasonable return on his investment.

Without some assurance that the rights will actually be bought and attached to a site within the transfer district, however, TDR will not protect a landowner's "distinct investment-backed expectations."[195] TDR compels an owner "to enter an unpredictable real estate market to find a suitable receiving lot for the rights."[196] This uncertainty devalues development rights even before they are severed and destroys the property's economic value.[197] Similar consequences could ensue in either heavily developed urban areas without available transfer sites or insufficiently developed areas lacking effective market demand for development rights.[198]

If an affected landowner cannot rely on the sale of development rights to match his financial loss, the only alternative to an invalid

191. Marcus, *Mandatory TDR, supra* note 32, at 105.

192. Chavooshian, *supra* note 11, at 171.

193. *See* Newport Assoc. v. Solow, 30 N.Y.2d 263, 283 N.E.2d 600, 332 N.Y.S.2d 617 (1972), *cert. denied*, 410 U.S. 931 (1973).

194. *See* Shlaes, *supra* note 28, at 8, THE TRANSFER OF DEVELOPMENT RIGHTS, at 332. The holding of the New York Court of Appeals in Fred F. French Inv. Co. v. City of New York, 39 N.Y.2d 587, 595, 350 N.E.2d 381, 386, 385 N.Y.S.2d 5, 9-10 (1976), indicates that TDR is not intended to provide preservation property owners with the same "just compensation" owed to landowners whose property was made subject to an exercise of the eminent domain power. Instead, TDRs should be regarded more as "fair compensation for a developer whose rights could be substantially diminished under more traditional zoning regulation with no compensation whatsoever." Marcus, *Mandatory TDR, supra* note 32, at 104.

195. *See* Penn Cent. Transp. Co. v. City of New York, 438 U.S. at 127. *See also* Fred F. French Inv. Co. v. City of New York, 39 N.Y.2d at 596-97, 350 N.E.2d at 387, 385 N.Y.S.2d at 11.

196. Fred F. French Inv. Co. v. City of New York, 39 N.Y.2d at 595, 350 N.E.2d at 388, 385 N.Y.S.2d at 12.

197. *Id.*

198. *Unconstitutionality, supra* note 56, at 1111. *See also* Address by David Heater, Bettman Symposium, Am. Soc'y of Plan. Officials (May 13, 1974).

taking under a regulatory preservation mandate is to determine whether the owner's current uses of the preservation property enable him to make a "reasonable return" on his investment. The outcome of this inquiry depends on the existing and permitted uses of the property, the owner's reasonably based expectations as to development in the area, and in certain cases, the general community's customary view of the property.

Property ownership in highly dense urban areas is characteristically subject to intense development pressures. In this context, market realities may lead property owners to expect that they can make some use of their land that reflects its competitive value. As evidenced by the decision of the New York Court of Appeals in *Fred F. French Investing Co. v. City of New York*,[199] the designation of private property for passive recreation use in the urban core is invalid absent adequate protection of the affected landowner's economic interests; in this case, adequate protection required not only severance of the development rights but also their attachment to a site within the transfer district.[200] The court reasoned that it would be improper to use the police power to impose the disproportionate burden of the costs of preserving open space on the owners of single properties.[201] The effect of the zoning ordinance in *French* was to deprive the park property owner of his property rights by destroying the property's economic value.[202]

Nevertheless, the right of a landowner to make a reasonable return on his investment, even in an urban real estate market, does not mandate the right to develop for the highest possible return,[203] particularly where an existing structure on the land meets the owner's "distinct investment-backed expectations."[204] This was the Supreme Court's rationale in affirming New York City's designation of Grand

199. 39 N.Y.2d 587, 350 N.E.2d 381, 385 N.Y.S.2d 5 (1976), *appeal dismissed*, 429 U.S. 990 (1976).

200. *Id.* at 597, 350 N.E.2d at 387, 385 N.Y.S.2d at 11.

201. *Id.* at 599, 350 N.E.2d at 389, 385 N.Y.S.2d at 12.

202. *Id.* at 597, 350 N.E.2d at 387, 385 N.Y.S.2d at 11.

203. Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 136 (1978) (landmark preservation law limiting future use while protecting past use *held* not a taking). *See also* Society for Ethical Culture v. New York City Landmarks Preserv. Comm'n, 68 A.D.2d 112, 416 N.Y.S.2d 246 (1979), *aff'd*, N.Y. Ct. App., slip. op., Dec. 18, 1980; Shepard v. Skaneateles, 300 N.Y. 115, 89 N.E.2d 619, 91 N.Y.S.2d 187 (1949) (zoning change from mercantile to residential not a taking).

204. Penn Cent. Transp. Co. v. City of New York, 438 U.S. at 127.

Central Terminal as a landmark in the *Penn Central* case.[205] According to the Court, the overriding public interest in the preservation of the Beaux-Arts Terminal, and the prevention of harm that would result from its destruction, outweighed the Railroad's right to a financial return greater than what it was currently receiving from the existing terminal.[206] The Court found that the landmark designation did "not interfere in any way with the present uses of the terminal," and that there was nothing in the record to warrant the finding "of an intention to prohibit *any* construction above the Terminal."[207] These factors, in addition to the TDR option made available to the railroad, led the Court to uphold this application of New York City's landmark law to the Terminal as a reasonable regulation "substantially related to the promotion of the general welfare."[208]

The availability of existing structures which can be used for profit-making purposes (or in other words, which can be put to a reasonable beneficial use) can lighten the burden of preservation designations in urban areas. TDR options add to the reasonableness of these designations. On the other hand, undeveloped suburban and rural communities contemplating TDR options to provide needed mitigation to the owners of environmentally designated vacant land lack such a pre-existing reasonable beneficial use. The inevitable fluctuations in any development rights market will only add another unreliable "benefit" under the *French* analysis. In "taking" cases, any ordinance which restricts the uses of undeveloped property to those associated with the land in its natural state could well be invalid since it effectively precludes the owner from realizing the development potential of his land.[209]

There has, however, been increasing judicial recognition of the idea that a landowner has "no absolute right to change the essential

205. *Id.*

206. *Id.* at 137.

207. *Id.* at 136.

208. *Id.* at 138.

209. *See, e.g.*, State v. Johnson, 265 A.2d 711 (Me. 1970) (wetlands act restrictions precluding filling of otherwise valueless land constitute an unreasonable exercise of police power and therefore a taking); Morris County Land Improvement Co. v. Township of Parsippany-Troy Hills, 40 N.J. 539, 193 A.2d 232 (1963) (zoning ordinance which prevents land use for any reasonable purpose is confiscatory and beyond police power); Spears v. Berle, 63 A.D.2d 372, 407 N.Y.S.2d 590 (1978) (where wetlands act prohibits the only economic use of property, use must be permitted or land must be taken in condemnation proceeding).

natural character of his land."[210] Consequently, if property owners were to bring a taking claim against the designation of their land within a preservation zone, it is likely that a court would uphold the TDR ordinance in question as a legitimate police power measure designed to mitigate burdens on owners to prevent the destruction of the area's natural resources.[211] Nor could the regulation be said to impose unreasonable financial loss on the landowners since the restrictions would not affect any of the existing limited uses of the property.[212] Essential to this argument is the absence of distinct investment-backed expectations of the owner *at the time of his acquisition*.

Courts have found uses such as general recreation, agriculture, and horticulture sufficient to provide a "reasonable beneficial use" to an owner of undeveloped, environmentally sensitive land.[213] It is thus questionable whether the concept of development rights transfer is even necessary to preservation in rural and suburban areas with limited growth expectations. The line of cases following *Just v. Marinette County* indicates that where the purpose of a particular ordinance is the protection of natural resources, the development potential of

---

210. Just v. Marinette County, 56 Wis. 2d 7, 17, 201 N.W.2d 761, 768 (1972). *See also* cases cited in note 166 *supra*.

> The idea that a regulation of the use of land prevents the owner from making money, assumes that a landowner has a constitutional right to use and develop his land for some purpose which will result in personal profit, regardless of the effect that such development will have on the public. Such a holding gives land as a commodity a constitutional status higher than other commodities—a status it no longer deserves.

Bosselman, Callies, & Banta, The Taking Issue 240 (written for the Council on Environmental Quality, 1973).

211. Spagna, *supra* note 63, at 20-21. *See also* notes 69 and 185 *supra*.

212. Steel Hill Dev., Inc. v. Town of Sanbornton, 469 F.2d 956, 963 (1st Cir. 1972) (zoning ordinance increasing minimum lot size not a taking as property not rendered "useless"); Brecciaroli v. Connecticut Comm'r of Envt'l Protection, 168 Conn. 349, 358, 362 A.2d 948, 953 (1975) (no taking where permit denied for wetland development but allowed for unprotected portion of property); Sibson v. State, 115 N.H. 124, 129 n.104, 336 A.2d 239, 243 n.104 (1975) (wetlands development permit denial does not foreclose existing uses of hunting, wildlife observation, shellfish harvesting and so does not constitute a taking); Just v. Marinette County, 56 Wis. 2d 7, 17, 201 N.W.2d 761, 768 (1972) (reasonable exercise of police power to prevent public injury by limiting use of private property to its natural uses not a taking). *Accord*, Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 137 (1978) (preservation of designated landmark by limiting use to existing uses not a taking).

213. *See* Turnpike Realty Co. v. Town of Dedham, 362 Mass. 221, 235, 284 N.E.2d 891, 899 (1972).

these lands is limited at best.[214] Hence the very premise of TDR—that a property owner shall not be deprived of his right to build—becomes immediately suspect. *There may be no right to build.*

Courts have recognized that local governments have the authority to impose growth control measures where necessary to protect environmentally sensitive lands and to preserve the small town character of their communities.[215] Consequently, in such jurisdictions, it cannot be said that a preservation landowner has been deprived of a legally protected interest sufficient to warrant the issuance of transferable development rights which would threaten the community's other goals. Only where a TDR scheme fits within those goals and the community is anxious to concede further equity to regulated landowners should it be considered.

Uncontrolled distribution of TDRs in the transfer district normally impedes the above mentioned goals of environmental quality of life and small town character. For example, there is nothing to prevent the accumulation of development rights by a single property owner and the erection of a structure that is completely out of character with the surrounding area.[216] No court has accorded a harshly regulated landowner's TDR options—in and of themselves—the status of a reasonable beneficial use of land. *French* held to the contrary, and *Penn Central* did not disturb this conclusion. While preservation accompanied by TDR in either urban or suburban and rural communities may avoid taking consequences, the TDR device may itself have such arbitrary planning consequences for a municipality that great caution should be exercised prior to its use as a means of protecting natural resources.

2. The Uniformity Issue

Optional TDR creates uncertainty as to whether all development within the transfer district will bear its fair share of a legitimate envi-

214. *See* note 166 *supra*.

215. *See* Construction Indus. Ass'n v. City of Petaluma, 522 F.2d 897 (9th Cir. 1975), *cert. denied*, 424 U.S. 934 (1976) (zoning changes to retard rapid growth of small town are legitimate); Steel Hill Dev., Inc. v. Town of Sanbornton, 469 F.2d 956 (1st Cir. 1972) (increase in minimum lot size for new developments not arbitrary as a protection against rapid population growth); Golden v. Planning Bd., 30 N.Y.2d 359, 285 N.E.2d 291, 334 N.Y.S.2d 138 (1972), *appeal dismissed*, 409 U.S. 1003 (1974) (subdivision zoning limitations to effect statutorily defined legitimate zoning purposes such as avoiding population concentration are valid).

216. Costonis, *Development Rights Transfer, supra* note 7, at 99.

ronmental preservation infrastructure burden. Mandatory TDR coupled with harsh restrictions within the preservation zone, on the other hand, may violate Fourteenth Amendment rights of property owners.[217]

At the heart of TDR is the transfer of permissible densities from the preservation district to a pre-designated receiving lot area.[218] Past legal challenges to this kind of density zoning have arisen largely in the context of PUDs and cluster zoning cases.[219] In hearing such cases, most courts have held that the regulations pass the uniformity test if they allow *all* property owners within the zoning district "to develop their parcels in accordance with the flexible density, building type, or use requirements of these ordinances."[220] To the extent that TDR compares with PUDs and cluster zoning techniques, it is justifiable under an expanded version of the Euclidean police power rationale, *i.e.*, that land use classifications and restrictions within a specific district are valid where necessary to further a "substantial public purpose"[221] such as preserving open space. Conventional zoning and TDR differ, however, in two important aspects.

> First, TDR permits increased development only for those who purchase development rights; and second, there is a limited supply of development rights. If some owners decide not to sell their rights, there will be even fewer rights available. This may preclude interested landowners from participating in the program.[222]

TDR restrictions may appear uniform on their face, but in application the results can often be uneven. For example, although all preservation property owners are restricted in the use of their land, under the TDR model employed here it is far from certain that each land-

---

217. *See, e.g.*, Fred F. French Inv. Co. v. City of New York, 39 N.Y.2d 587, 350 N.E.2d 381, 385 N.Y.S.2d 5 (1976), *appeal dismissed*, 429 U.S. 990 (1976).

218. *See* Rose, *supra* note 20, at 485.

219. *See* notes 22-24 and accompanying text *supra*. *See also* Orinda Homeowners Comm. v. Board of Supervisors, 11 Cal. App. 3d 768, 90 Cal. Rptr. 88 (1970) (cluster development); Chrinko v. South Brunswick Township Planning Bd., 77 N.J. Super. 594, 187 A.2d 221 (Super. Ct. Law Div. 1963) (cluster zoning valid on public policy grounds, only incidentally benefited subdivision developer); Cheney v. Village 2 at New Hope, Inc., 429 Pa. 626, 241 A.2d 81 (1968) (PUD district replacing earlier zoning plan valid).

220. Costonis, *The Chicago Plan, supra* note 56, at 623-24, THE TRANSFER OF DEVELOPMENT RIGHTS, at 313-14.

221. Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 127 (1978).

222. Carlo & Wright, *supra* note 24, at 14.

owner will be able to sell his development rights, let alone command a price approximating "fair market value." Since the sale of development rights depends on the demand to build at increased densities in the transfer district, if this demand is lacking or diminishes after a time, landowners who have yet to sell their development rights may miss the opportunity to mitigate their financial loss.[223] The demand for development rights is part of an "unpredictable real estate market"[224] beyond the control of most landowners. Although a basic premise of TDR is that a sense of fairness dictates that preservation property owners receive some compensation for the public benefit they are providing,[225] the transfer mechanism apparently results in fortuitous non-uniform treatment of similarly situated preservation properties.

Regulations within a transfer district also lack uniformity since "purchasers of development rights can build to greater densities than other property owners in the district."[226] Nevertheless, with the exception of certain spot zoning problems,[227] the opportunity of properties located within the receiving lot area to acquire development rights gives affected landowners in the district equal protection under the law. Although the costs to transfer district property owners of purchasing development rights to build at increased densities are not insubstantial, presumably under incentive zoning theory the benefit to the transfer district landowner outweighs the financial burdens incurred by participation in the program.[228] After all, no one forces

223. Field & Conrad, *supra* note 53, at 338.

224. Fred F. French Inv. Co. v. City of New York, 39 N.Y.2d 587, 598, 350 N.E.2d 381, 388, 385 N.Y.S.2d 5, 12 (1976).

225. Costonis, *"Fair" Compensation and the Accommodation Power: Antidotes for the Taking Impasse in Land Use Controversies*, 75 COL. L. REV. 1021, 1062 (1975).

226. Costonis, *The Chicago Plan, supra* note 56, at 621, THE TRANSFER OF DEVELOPMENT RIGHTS, at 312. In this way, "developers would be disproportionately burdened when compared to developers in other parts of the city able to secure rezonings, variances, or other public largesse to achieve the same densities." Gale, *supra* note 51, at 87. "Though the expenses associated with this procedure in legal fees and lost construction time are not usually inconsequential, it is likely that they will not often equal the cost of purchasing development rights in an open market." *Id.* at 87 n.35. Consequently, "the relevant inquiry [should] be whether all landowners within the transfer district enjoy equal access to the development rights that are for sale there and not whether some landowners in the district will ultimately build to greater densities than others by virtue of the program." Costonis, *Development Rights Transfer, supra* note 7, at 120.

227. *See* notes 251-53 and accompanying text *infra*.

228. Elliott & Marcus, *supra* note 29, at 61.

him to buy these rights; he can still develop the transfer site to its existing zoning limits "without any costs other than those associated with the purchase and development of comparable property lying inside and outside the district."[229] The ability to develop at the densities originally permitted in the district should provide a developer with sufficient financial return to offset any claim that he has been unfairly discriminated against in the event that there are no more development rights for sale.[230]

It cannot be said, however, that the same reasoning applies to the owner of property located within the preservation district who wishes to use his own development rights to erect a structure in the transfer district. Unless he is in the fortuitous position of already owning land in the receiving lot area, the prospective developer must first go to the considerable trouble and expense of purchasing a transfer lot upon which to attach his development rights.[231]

Unless a municipality can prove that the restrictions and benefits it imposes on affected landowners under a preservation plan with TDR options are reasonably related to the preservation of the municipality's natural resources, lack of uniform treatment of properties located within the preservation and transfer districts makes questionable the basic fairness of using TDR for this purpose.

3. TDR and its Relation to "A Comprehensive Plan"

In recent years, local governments have adopted increasingly stringent environmental protection measures pursuant to their police power. Courts have upheld these regulations[232] on the theory that

229. Shlaes, *supra* note 28, at 8, THE TRANSFER OF DEVELOPMENT RIGHT, at 332.

230. For a discussion of the taking issues involved in TDR, see notes 111-24 and accompanying text *supra*.

231. *Unconstitutionality, supra* note 56, at 1111.

232. *See, e.g.*, Steel Hill Dev., Inc. v. Town of Sanbornton, 469 F.2d 956 (1st Cir. 1972); Potomac Sand and Gravel Co. v. Governor of Md., 266 Md. 358, 293 A.2d 241, (1972) *cert. denied*, 409 U.S. 1040 (1972). These cases upheld environmental regulations against equal protection claims on the theory that a rational basis existed for the singling out of developers' property. The decision of the *Steel Hill* court is indicative of the lengths to which courts are willing to go in the interests of environmental protection.

> [W]e find little merit to appellant's contentions that the zoning ordinance [minimum 6 acre lot forest conservation zone] has resulted in a taking of appellant's property without just compensation or that it is discriminatory. . . . [A]ppellant still has the land and buildings. . . . Though the value of the tract has been decreased considerably, it is not worthless or useless so as to constitute a tak-

"no property is an economic island, free from contributing to the welfare of the whole of which it is but a dependent part. The limits are that unfair or disproportionate burdens may not . . . be placed on single properties or their owners."[233] Concepts such as the public trust doctrine and a rediscovered law of custom have stripped certain natural areas of any development mirage their owners might have perceived. According transferable development rights to such areas arguably ignores these recent harbingers of the law and reverts to an earlier view that all private property, regardless of uniqueness, is to be treated alike insofar as *laissez faire* development options are concerned.

Any measure which bestows development rights on an environmentally sensitive area presumptively lacks planning credence, unless this classification can be defended as part of a complex but effective means of securing environmental preservation—one of the goals of the plan.

Under traditional zoning theory, any classification of land use is valid as long as there is a rational basis for imposing the restriction.[234] This standard requires a showing that there is a "reasonable relation between the end sought to be achieved by the regulation and the means used to achieve that end . . ."[235] TDR schemes seek to protect community resources through a system wherein transfer district property owners pay for the public benefit preserved in their vicinity in exchange for the right to build at additional, and presumably more profitable, densities.[236] In this regard, the use of TDR to help protect environmental resources can be said to reflect a belief that the well-ordered development of a municipality requires the preservation and enhancement of the area's open space to be balanced by shifted and heightened development densities in other areas.[237] TDR should be in accordance with the municipality's

---

ing. . . . As to appellant's claim of discrimination, we note that its land, like all other land zoned six acres, is essentially virgin forest.

469 F.2d at 963.

233. Fred F. French Inv. Co. v. City of New York, 39 N.Y.2d 587, 599, 350 N.E.2d 381, 389, 385 N.Y.S.2d 5, 12 (1976).

234. Elliott & Marcus, *supra* note 29, at 60.

235. Fred F. French Inv. Co. v. City of New York, 39 N.Y.2d at 596, 350 N.E.2d at 386, 385 N.Y.S.2d at 10.

236. DeVoy, *supra* note 45, at 3. *See* notes 26-27 and accompanying text *supra*.

237. *See, e.g.*, Steel Hill Dev., Inc. v. Town of Sanbornton, 469 F.2d 956, 961-62 (1st Cir. 1972). This is also the basic premise behind the use of subdivision exactions

comprehensive plan. In the process, the overall expected density of the community should not change; rather, a proportion of the density originally allowed in the preservation zone will move to the receiving transfer zone.[238]

It is by no means certain, however, that the use of TDR will adequately protect environmentally sensitive lands.[239] For example, if the purpose behind the implementation of such a scheme is to protect a coastal estuary, but the transfer district is designated adjacent to the preservation zone, as is often the case, quite possibly the additional densities in the transfer district may disturb and even preclude the successful maintenance of a suitable habitat for the area's native flora and fauna. Similarly, if the intent of a particular TDR plan is to protect open space while promoting public access to the lands in question, and if the transfer district is too far from the preservation area for the additional population to benefit from the open space, the municipality may not realize its objective.

If the transfer district lies in an area adjacent to the preservation zone, it seems equitable to have the landowners in the area pay for at least the aesthetic, if not the economic, windfall they receive by virtue of their location. As previously discussed, however, the constraints of the real estate market in the community often necessitate the establishment of a transfer district at some distance from the preservation area. If so, it may well be unreasonable to require property owners in the district to purchase development rights in order to build at increased densities. They receive no aesthetic benefit from the environmental resources they are paying to preserve; the benefits go instead to the area adjacent to the open space, on which no costs have been

---

and Special Natural Area Districts. The authority of a municipality is well-grounded in its power to plan for the general public welfare. *See generally* Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).

238. Spagna, *supra* note 63, at 18-19.

239. In one case, TDR produced the following results:

> The lands which have been preserved are small parcels. At the present time, they are isolated from each other and do not meet the goal of preserving essential resources such as farmlands, wetlands, and recharge areas, which require large contiguous areas for an effective preservation program. Whether these small tracts will be integrated into a broader expanse will depend on the continued attractiveness to builders of the bonus densities in the transfer district. . . .

Pizor, Non-Metropolitan Transfer of Development Rights Program: Program Experience in the Middle Atlantic States 27 (May 3, 1979) (paper prepared for presentation at the Lincoln Institute of Land Policy Seminar on TDR).

imposed.[240]

Consequently, too much distance between preservation and transfer areas risks losing the "planning connection" between underuse of one area and overbuilding of the other.[241] The result can be "planning chaos."[242] Without the buffer of light and air created by the preservation zone, the relaxation of bulk and density restrictions in the transfer district may "overload public services and distort the urban landscape."[243]

This situation arises partly because many TDR schemes fail to effectively regulate the sale of development rights and their subsequent distribution in the transfer district. The right to build at additional densities in an as-of-right TDR scheme (unlike the permit system of the Special Natural Area District[244]) is not controlled by any governmental standards except the district's maximum density regulation.[245] Thus, nothing may preclude a developer from buying up all the available development rights and constructing a building with a maximum floor area ratio (FAR),[246] regardless of its effect on surrounding properties.[247] Hence, a property owner in the transfer district "may find that his neighbor has built a larger structure than would otherwise be possible on a nearby site, thereby reducing access to light, air, and view"[248] and perhaps, as a result, the value of his land.

A landowner in this position may have some means of legal redress. A case in point is *Fred F. French Investing Co. v. City of New*

240. *Unconstitutionality, supra* note 56, at 1118.

241. Marcus, New York City, *supra* note 33, at 21.

242. Costonis, *The Chicago Plan, supra* note 56, at 628, THE TRANSFER OF DEVELOPMENT RIGHTS, at 317. The foundation for such a charge lies on the assumption "that government may fix density levels *only* on the basis of substantive criteria—those relating to adequate light, air, pedestrian access, and similar factors." Costonis, *Development Rights Transfer, supra* note 7, at 103.

243. Costonis, *The Chicago Plan, supra* note 56, at 628, THE TRANSFER OF DEVELOPMENT RIGHTS, at 317.

244. For discussion of principles underlying special natural area zoning districts, see notes 104-10 and accompanying text *supra*.

245. Costonis, *Development Rights Transfer, supra* note 7, at 89.

246. Floor area ratio is a concept used to control the amount of building on a lot. The FAR "number" represents the multiple of the lot area which produces the allowable maximum floor area development, under the existing zoning ordinance.

247. Field and Conrad, *supra* note 53, at 338.

248. Shlaes, *supra* note 28, at 9, THE TRANSFER OF DEVELOPMENT RIGHTS, at 334-35.

York.[249] Therein the New York Supreme Court noted the failure to give adequate notice to the designated receiving area landowners of the expected increases in bulk and density as one of its grounds for declaring the ordinance unconstitutional.[250]

These facts may also provide the basis for a claim that TDR effects an invalid "spot zoning" of sites within the transfer district. Spot zoning has been defined as the "reclassification of a small area of land in such a manner as to disturb the tenor of the surrounding neighborhood."[251] The result is that the owner of the site in question benefits from the reclassification to the detriment of other property owners in the area.[252] Spot zoning challenges can be overcome only upon a showing that the special treatment accorded the landowner involved is reasonably necessary to further the efforts of the municipality in implementing its comprehensive plan.[253]

In considering the viability of such a claim in the present context, it is important to remember the purpose of TDR: to distribute the benefits and burdens involved in the protection of environmentally sensitive lands throughout the entire community, and to avoid singling out preservation property owners to bear the full cost of protecting the area's natural resources.[254] In the process, the transfer district as a whole should benefit from the additional densities available to property owners who wish to build with development rights.[255] With no control mechanism, save the "unpredictable real estate market,"[256] by which to regulate the distribution of development rights throughout the transfer district, there can be no assurance that area property owners will benefit from new development.[257] Nor is it certain that any new development in the transfer district will actually pay for the

249. 77 Misc. 2d 199, 352 N.Y.S.2d 762 (Sup. Ct. 1973).

250. *Id.* at 205, 352 N.Y.S.2d at 768.

251. Pierrepont v. Zoning Comm'n, 154 Conn. 463, 469, 226 A.2d 659, 662 (1967).

252. Carlo & Wright, *supra* note 24, at 16.

253. *See generally* Haar, *supra* note 30.

254. Costonis, *Development Rights Transfer, supra* note 7, at 99. *See generally* notes 48-50 and accompanying text *supra*.

255. *See* Schlaes, *supra* note 28, at 8, THE TRANSFER OF DEVELOPMENT RIGHTS, at 334.

256. Fred F. French Inv. Co. v. City of New York, 39 N.Y.2d 587, 598, 350 N.E.2d 381, 388, 385 N.Y.S.2d 5, 12 (1976).

257. *See* Shlaes, *supra* note 28, at 9, THE TRANSFER OF DEVELOPMENT RIGHTS, at 334.

preservation of the community's natural resources.[258]

Without greater assurance that TDR will effectively protect natural resources as well as the interests of affected property owners, the assertion that TDR restrictions are "expected to produce a widespread public benefit"[259] may be insufficient to overcome an attack on the ordinance as an arbitrary and therefore impermissible exercise of municipal power. At present, no practical proposals to guide the "unpredictable real estate market"[260] have emerged to ensure the uniform treatment of all similarly situated properties. Nor have controls been implemented that effectively regulate the sale and distribution of development rights within the transfer district so that the dispersal of the additional densities from the preservation zone will minimize adverse impact on the immediate surrounding area. Without such controls, a TDR scheme may be found not to accord with a comprehensive plan.

Indeed, recognition of development rights in natural area properties for transfer elsewhere risks challenge of such rights as discordant with the comprehensive plan. Where marshes or coastlines are eligible for preservation under custom or public trust doctrines and distinct investment-backed expectations are limited to shellfishing and rice culture, TDR seems more like overkill than a reasonable means of achieving environmental preservation in accordance with a comprehensive plan. Consequently, unless it can be shown that no more reasonable or less restrictive planning tool exists with which to protect our natural resources, a court may declare the use of TDR in this context arbitrary and invalid.[261]

C. *The Legality of Subdivision Exactions for Environmental Preservation*

1. The Taking Issue

The author's suggestion advanced herein contemplates, as a condition precedent to the privilege of subdivision, either the acquisition and subsequent dedication of an appropriate[262] portion of the envi-

258. *See* notes 34-42 and accompanying text *supra*.

259. Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 133 n.30 (1978).

260. Fred F. French Inv. Co. v. City of New York, 39 N.Y.2d 587, 598, 350 N.E.2d 381, 388, 385 N.Y.S.2d 5, 12 (1976).

261. Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 127 (1978).

262. The subdivision legislation would contain an appropriate ratio based on land

ronmental reserve or payment of a fee in lieu thereof to the municipality. Such subdivision fees would reimburse the municipality for its acquisition of the environmental reserve.[263] Following reimbursement such fees could help meet environmental reserve maintenance needs.

The basis of any claim brought by a developer that a given subdivision exaction regulation results in an invalid taking for public use will generally rest on either or both of two arguments. First, the property which he is being requested to dedicate "subtracts from the land available for development" to such an unreasonable extent that it will substantially interfere with his right to make a "reasonable return" on investment.[264] Second, subdivision fees which are not passed on to homebuyers in the subdivision are an inequitable charge against his profits.[265]

In the past, the validity of subdivision exactions has been upheld against taking claims on the theory that the authority to subdivide vacant land is in fact a privilege,[266] granted to the developer at the discretion of a municipality. Since nothing compels a property owner to subdivide his land, it is not unreasonable to expect him to fulfill certain requirements which the local government views as necessary to protect the public welfare.[267] Although the privilege rationale has apparently lost its vitality in federal courts,[268] it still forms the basis

---

values in the environmental reserve and the number of units contemplated in the subdivision.

263. A similar approach was proposed in New York City as a means of reimbursing the city's costs in acquiring land for a low-income housing project. The proposal would have relocated those deprived of housing by raising zoning densities in an area ripe for market-rate high-rise housing. The beneficiaries of the rezoning would have paid pro rata fees to the city for this purpose. *See* Elliott & Marcus, *supra* note 29, at 69-72.

264. MANDELKER & CUNNINGHAM, *supra* note 18, at 810.

265. *Id.*

266. Jacobsen & McHenry, *Exactions on Development Permission*, in WINDFALLS FOR WIPEOUTS 342, 345 (D. Hagman & D. Misczynski eds. 1978).

> Local governments first imposed conditions on developers in exchange for recording a subdivision plat map. Local governments justified this control with the rationale that recording a subdivision plat map was a privilege so that conveyances could be made by reference to the plat instead of by cumbersome metes and bounds descriptions. Since it was not a right, the privilege could be conditioned.

Id.

267. MANDELKER & CUNNINGHAM, *supra* note 18, at 810.

268. *Id.*

for many state court decisions upholding the validity of various subdivision land use controls.[269]

Additional justification for the exaction of land and money from developers comes from the growing recognition of the importance of protecting the community's environmentally sensitive lands.[270] Furthermore, exaction requirements should not be regarded as unduly burdening the ability of a landowner to make use of his property.

> The municipality by approval of a proposed subdivision plat enables the subdivider to profit financially by selling the subdivision lots as home building sites and thus realize a greater price than could have been obtained if he had sold his property as unplatted lands. In return for this benefit, the municipality may require him to dedicate part of his platted land to meet a demand to which the municipality would not have been put but for the influx of people into the community to occupy the subdivision lots.[271]

Consequently, land dedication and fee exaction requirements are regarded as a reasonable regulation of the right to build. These requirements protect the overriding general public interest in securing appropriate growth absorption safeguards, including the preservation of open space and other natural resources in the community.[272]

Courts have not hesitated, however, to invalidate the use of exaction requirements upon a finding that the dedication or per lot fee resulted in a substantial depreciation in the value of the developer's property, either in actual acreage or marketability. For example, in *East Neck Estates, Ltd. v. Luchsinger*,[273] the New York Supreme Court held confiscatory a requirement that a property owner dedicate a strip of shore front for use as a public beach when the loss of the land, which the owner conceded was not suitable for home construction, would decrease the value of the tract by more than a third.[274] In

---

269. *See generally* Mid-Continent Builders, Inc. v. Mid-West City, 539 P.2d 1377, 1379 (Okla. 1975) (requirement that developers install water lines not a taking); Jordan v. Village of Menomonee Falls, 28 Wis. 2d 608, 618-19, 137 N.W.2d 442, 448 (1965) (required dedication of land for park, school or recreational sites as condition for subdivision approval a valid exercise of police power).

270. *See* notes 134-50 and accompanying text *supra*.

271. Jordan v. Village of Menomonee Falls, 28 Wis. 2d 608, 618-19, 137 N.W.2d 442, 448 (1965).

272. *See* note 132 and accompanying text *supra*.

273. 61 Misc. 2d 619, 305 N.Y.S.2d 922 (Sup. Ct. 1969).

274. *Id.* at 623, 305 N.Y.S.2d at 926. The court went so far as to sanction municipal dictation of park designation on an official map, which would preclude any devel-

so doing, the court recognized that the value of a parcel of land derives as much from its location as from the amount of property available for development.[275] Thus, while it might be reasonable to require one developer to dedicate a certain percentage of land for public use, the same requirement applied to another parcel of similar size could prove inequitable given the intangible elements of value inherent in property ownership.[276]

This author's suggested device avoids the *East Neck Estates* problem of on-site dedication since land dedication requirements could be satisfied off the subdivision site in accordance with stated environmental reserve acquisition priorities. Because the subdivider cannot force the city to condemn its property, in lieu fees will always be a necessary backup device.

As the court implied in *East Neck Estates*, the concept of exacting per lot fees developed to avoid inequities peculiar to the subdivision property.[277] By paying a per lot fee instead of dedicating land, a developer might be able to use all the land available to him for subdivision purposes while still paying his proportionate share of the cost of protecting the remaining vacant land in the community.[278] Absent a deprivation of reasonable use of property, a court would not find an invalid taking.

Cases such as *East Neck Estates*, as well as other decisions upholding the use of subdivision exactions to provide community open space, also attest to the growing consensus that proximity to open space actually enhances the value of subdivided land.[279] Given that

---

opment within the area. It drew the line at dedication. From the standpoint of environmental preservation the result is satisfactory; from the standpoint of public uses, the result is unsatisfactory.

275. *Id.*

276. *See generally* note 280 *infra*.

277. East Neck Estates, Ltd. v. Luchsinger, 61 Misc. 2d at 621-22, 305 N.Y.S.2d at 924-25.

278. *Id.*

279. *See generally* Associated Home Builders v. City of Walnut Creek, 4 Cal. 3d 633, 484 P.2d 606, 94 Cal. Rptr. 630 (1971), *appeal dismissed*, 404 U.S. 878 (1971) (park land dedication or fee payment in lieu thereof as condition precedent to subdivision approval valid on public need grounds, not a taking); Jenad, Inc. v. Village of Scarsdale, 18 N.Y.2d 78, 218 N.E.2d 673, 271 N.Y.S.2d 955 (1966) (fee payment in lieu of land dedication by developer upheld where statute allowed village to require appropriate conditions as prerequisite to subdivision approval); East Neck Estates, Ltd. v. Luchsinger, 61 Misc. 2d 619, 305 N.Y.S.2d 922 (Sup. Ct. 1969) (required dedication of shoreland as public park valid exercise of police power as prerequisite to

this increase in value will more than likely be reflected in the price eventually set for the subdivided lots,[280] the fees, or for that matter, the land dedications, should not be regarded as "an unreasonable" charge against developers' profits.[281] If the additional costs developers incur in meeting the exaction requirements are ultimately passed on to consumers, and the builders' margin of profit thereby remains the same[282] as it would have been had the exaction not been imposed, there should no longer be grounds on which to base a due process/taking objection.[283]

---

subdivision approval); Jordan v. Village of Menomonee Falls, 28 Wis. 2d 608, 137 N.W.2d 442 (1965) (fee payment prerequisite to valid exercise of police power). In *East Neck Estates*, however, the court noted:

> It was testified that the value of a shorefront lot on the tract was well over $20,000. A person who is willing and who can pay this sum for a building plot and erect upon it a suitable home is rarely enamored of the prospect of viewing the public between his living room and the panorama of Long Island Sound. Whatever the sociological import of such an attitude be, it is a fact that it reduces the value of shorefront property, and in this case by over a third. The question is not whether this is fair, sensible, or patriotic, the question is whether such [public] ownership would cause this result.

61 Misc. 2d at 623, 305 N.Y.S.2d at 926.

280. *Dedications, supra* note 92, at 421-30. The method of analysis used by the authors of this note was derived from the "before and after" rule of eminent domain used in California, among other jurisdictions. *Id.* at 421 n.10.

> In California, eminent domain law guarantees that the developer will always be paid, as a minimum the 'fair market value' of the condemned property. In addition, the developer receives any indirect economic benefits deriving from the condemnation and subsequent development of the surrounding property. . . .

Id. at 420.

> In 'before and after' rule jurisdictions, the first step in compensating a property owner is to determine the precondemnation value of the entire piece of property. The value remaining after condemnation is then determined. The condemnee is paid the difference between the fair market value of the entire parcel prior to condemnation and the value of the remnant after condemnation.

Id. at 421 n.10.

> In a jurisdiction that adheres to the 'before and after' rule of eminent domain compensation, the municipality will not be required to pay the developer the value of condemned land if he is indirectly compensated by the residents of the subdivision.

Id. at 429 n.25.

281. *Id.* at 421-30.

282. *Id.*

283. *Id.* at 423-24. *See also* Associated Home Builders v. City of Walnut Creek, 4 Cal. 3d 633, 640 n.6, 484 P.2d 606, 612 n.6, 94 Cal. Rptr. 630, 636 n.6 (1971) *appeal dismissed*, 404 U.S. 878 (1971); Aunt Hack Ridge Estates v. Planning Comm'n, 160 Conn. 109, 118-19, 273 A.2d 880, 885 (1970).

Even without resorting to an analysis of the supply and demand curve reflected in the sale of subdivided lots in areas containing environmentally sensitive lands, courts are unlikely to find that subdivision exactions effect an invalid taking of private property. The protection of natural resources has judicial recognition as a valid police power objective, paramount to the interests of private property owners in realizing a profit from their investment.[284] At the same time, subdivision exactions do not deprive a landowner of all reasonable use of his property. He is merely required to assume his proportionate share of the cost of preserving the remaining environmental resources in the area.[285] It is to his benefit to do so. Consequently, as long as the amount of land or money exacted from a developer is not excessive and he is given adequate notice of the cost so that it may be included in his initial price projections,[286] it cannot be said that subdivision exactions result in a taking of private property for public use, contrary to due process.

2. The Reasonableness of Exactions

a. *The Reasonable Relationship Test*

Can the exactions be premised on benefit to the community at large or must the benefit be uniquely attributable to the "contributing" subdivision?

The use of subdivision exactions to protect valuable vacant land has usually been regarded as a legitimate exercise of the municipality's authority to plan for the general welfare of the community.[287]

---

284. *See* notes 132-40 and accompanying text *supra*. Reliance on the police power to uphold subdivision exactions reflects the decision of the courts in this country to:

> place greater emphasis on the community-wide benefits resulting from the exactions than on those accruing to the particular subdivision. This shift [also] reflects the courts' appreciation of the practical difficulties that large-scale development poses for local governments and their willingness to favor the latter in the trade-off between developer profits and sound community growth. Thus, the improvement need not be located within or contiguous to the subdivision as long as its benefits are available to subdivision residents. It may benefit the remainder of the community, as well as these residents, provided that the subdivision is a contributing factor to the need for the facility.

Costonis, *Development Rights Transfer, supra* note 7, at 112-13.

285. *See* notes 69-75 and accompanying text *supra*.

286. *See* Johnston, *Constitutionality of Subdivision Exactions: The Quest for a Rationale*, 52 CORNELL L.Q. 871, 922 (1967).

287. *See* note 69 *supra*.

The power of a local government to enact such measures derives from a state's version of the Standard City Planning Act.[288] That Act "obligates commissions to adopt a master plan for the physical development of the municipality,"[289] and authorizes local planning boards to promulgate subdivision regulations which condition plat approval on the provision of adequate facilities for open space, light, and air to benefit community residents.[290] All subdivision exactions can be thought of as "grounded upon a judgment that subdivisions which do not provide adequate space . . . for parks and other public uses are defective."[291] According to one commentator, exactions are necessary to protect consumers who "may be able to discern the existence of such defects, [but whose] bargaining power is probably too weak to force subdividers to provide necessary improvements."[292] This view gains support through recent judicial decisions upholding environmental protection measures on the theory that the public's interest in the preservation of natural resources outweighs a developer's right to build on his property.[293] The courts have also indicated that a municipality may have an affirmative duty to establish nature preserves in the interest of the public health and welfare given "the inexorable decrease in open space available to fulfill such a need."[294]

Any attempt to exercise the police power, however, is subject to a test of reasonableness.[295] In evaluating a particular subdivision ordinance against this standard, a court must consider whether the means selected by the municipality will indeed serve to implement the policy objective of preserving environmentally sensitive lands, and whether the exaction requirements are being applied to developers in a uniform manner.

The most common justification for subdivision exactions is that developers should pay to replace or preserve the proportion of open

288. UNITED STATES DEP'T OF COMMERCE, A STANDARD CITY PLANNING ENABLING ACT (1928).

289. *Id.* § 6.

290. *Id.* § 14.

291. Johnston, *supra* note 286, at 923.

292. *Id.*

293. *See* notes 69 and 185 *supra*.

294. Associated Home Builders v. City of Walnut Creek, 4 Cal. 3d 633, 638, 484 P.2d 606, 610, 94 Cal. Rptr. 630, 634 (1971).

295. Jordan v. Village of Menomonee Falls, 28 Wis. 2d 608, 619, 137 N.W.2d 442, 448 (1965).

space to be lost to the community from the construction of their proposed subdivision developments.[296]

The local planning board often determines the amount of land or fees required from a developer on a case by case basis.[297] Except when a municipality enacts a regulation fixing the land or fee exaction at an arbitrary figure,[298] or when a showing has otherwise been made that the board clearly abused its discretionary power,[299] courts will not upset a municipality's determination as to the amount it should exact from a developer. On the other hand, questions have arisen in regard to the municipality's ultimate use of the land and fees exacted.

Contentions concerning the validity of subdivision conditions usually center on whether a municipality can exact fees or land dedications from developers to benefit the community as a whole, or only to meet the need for open space "specifically and uniquely attributable"[300] to a particular subdivision. In most cases invalidating plat approval conditions, the courts have adopted the latter approach.

Given today's growing concern for comprehensive environmental planning in the face of diminishing open space, the "specifically and uniquely attributable" approach seems ill-equipped to deal with the need for well-coordinated community development.

> When applied, the ["specifically and uniquely attributable"] doctrine usually prevents suburbs from collecting cash contributions for city-wide programs. . . . In other critical situations,

296. *See* notes 69-70 and accompanying text *supra*.

297. ANDERSON, *supra* note 23, at § 23.19.

298. Admiral Dev. Corp. v. Maitland, 267 So. 2d 860 (Fla. Dist. Ct. App. 1977) (ordinance requiring five percent of subdivided area to be dedicated as park or, if area dedicated is too small for park, a fee of five percent of gross area value as prerequisite to subdivision approval held overbroad and invalid); Frank Ansuini, Inc. v. City of Cranston, 107 R.I. 63, 264 A.2d 910 (1970) (required dedication of seven percent of subdivision land for parks arbitrary).

299. Admiral Dev. Corp. v. Maitland, 267 So. 2d 860 (Fla. Dist. Ct. App. 1977) (arbitrary five percent of gross area value fee in lieu of park land dedication an abuse of discretion); Gordon v. Village of Wayne, 370 Mich. 329, 121 N.W.2d 823 (1963) (town has no authority to compel park dedication or fees in lieu thereof prior to plat approval); Haugen v. Gleason, 226 Or. 99, 359 P.2d 108 (1961) (planning regulation authorizing exaction of land acquisition fee from developers as prequisite to subdivision approval invalid absent limitations assuring fees would go to directly benefit a regulated subdivision).

300. Pioneer Trust and Sav. Bank v. Village of Mount Prospect, 22 Ill. 2d 375, 381, 176 N.E.2d 799, 802 (1961). *See also* Aunt Hack Ridge Estates, Inc. v. Planning Comm'n, 160 Conn. 109, 273 A.2d 880 (1970).

> [it] provides no protection at all. For example, the doctrine literally would authorize the exaction of fire engines, library books, and teachers' salaries whenever a development is large enough to have created the entire "need" for those expenditures.[301]

This approach is particularly ineffective when applied to the problem of how best to protect a community's natural resources. The need for early municipal action to preserve environmentally sensitive lands precludes continuing an approach that uses subdivision exactions merely to enhance the beauty and economic value of an individual development. Furthermore, there simply may not be enough vacant land available in a small subdivision to allow it to have its own park or nature preserve.[302] Nor is it certain that preserving such slivers of open space will adequately protect the ecological balance of these areas.[303] Clearly a local government needs the authority to apply land dedications and fee exactions toward the establishment of community-wide facilities. This power is essential in maintaining an area's natural resources.

Recent trends in judicial interpretation of subdivision regulations indicate that the courts may be willing to validate the use of these requirements to meet the needs of the municipality as a whole.[304] Courts have traditionally considered off-site conditions in determining the need for subdivision exactions when "the impact of the proposed development on adjacent territory and [other] property within its jurisdiction"[305] is found to be a material factor in the promotion of the general public welfare.[306] As courts realize that problems in-

---

301. Ellickson, *supra* note 92, at 482.

302. *See, e.g.*, N.Y. Op. State Comp. 78-310.

303. *See* note 239 *supra*.

304. *See generally* Associated Home Builders v. City of Walnut Creek, 4 Cal. 3d 633, 484 P.2d 606, 94 Cal. Rptr. 630 (1971), *appeal dismissed*, 404 U.S. 878 (1971) (subdivider seeking to acquire advantages of a subdivision has duty to conform subdivision to the welfare of lot owners and general public); Jenad, Inc. v. Village of Scarsdale, 18 N.Y.2d 78, 218 N.E.2d 673, 271 N.Y.S.2d 955 (1966) (where park not needed, fee in lieu of park land may be exacted, and such fees may be pooled for later park development to benefit general public).

305. Pearson Kent Corp. v. Bear, 28 N.Y.2d 396, 398, 271 N.E.2d 218, 219 (1971).

306. *Id. See also* Ayers v. Council of Los Angeles, 34 Cal. 2d 31, 207 P.2d 1 (1949) (off-site conditions reasonable to consider in context of subdivision's effect on local and neighborhood planning and traffic conditions); Land/Vest Properties, Inc. v. Town of Plainfield, 117 N.H. 817, 379 A.2d 200 (1977) (developer must upgrade off-site roads leading into subdivision in relation to needs created by and benefits conferred on subdivision); Garipay v. Town of Hanover, 116 N.H. 34, 351 A.2d 64

volved in maintaining adequate open space in a particular community require a broad reading of a municipality's police power; an increasing number of jurisdictions are adopting the "reasonable relationship test" articulated in *Jordan v. Village of Menomonee Falls*.[307] In that case, the Wisconsin court ruled that a municipality need only show that the demand for additional park and recreation facilities to be financed by subdivision exactions was "reasonably related" to new development in the area.[308] The court found that this approach was necessary to avoid imposing "an unreasonable burden of proof upon the municipality."[309]

The analysis of the *Jordan* court applies to the use of the subdivision process urged in this article. If validation of subdivision requirements under the reasonable relationship test demands only a showing that the need for open space is attributable to development activity in general, then a municipality may use exactions to establish and maintain a preserve of environmentally sensitive land to benefit the community as a whole.

Local planning boards must be given sufficient flexibility and scope of authority if this objective is to be achieved. In New York, for instance, "a town planning board may require a subdivision to set aside a *combination* of park lands and moneys, to be paid to the town, in trust, to be used exclusively for recreation purposes, if it determines that such a combination would most effectively carry out the [town's plan]."[310] Other possible planning devices include developer dedication or purchase of a separate parcel of land for community use, or a land swap program. Under such a program in the South Richmond Special Zoning District in New York City, a developer receives a

(1976) (town planning board may deny subdivision approval solely on basis of inadequacy of off-site, town-oriented road).

307. 28 Wis. 2d 608, 137 N.W.2d 442 (1965).

308. *Id.* at 618, 137 N.W.2d at 448.

309. *Id.* at 617-18, 137 N.W.2d at 447.

> In most instances it would be impossible for the municipality to prove that the land required to be dedicated for a park . . . was to meet a need solely attributable to the anticipated influx of people into the community to occupy this particular subdivision. On the other hand, the municipality might well be able to establish that a group of subdivisions approved over a period of several years had been responsible for bringing into the community a considerable number of people making it necessary that the land dedications required of the subdividers be utilized for . . . park and recreational purposes for the benefit of such influx.

Id.

310. N.Y. Op. State Comp. 77-447.

buildable parcel of city-owned property in return for the dedication of a portion, or even all, of land containing important natural features.[311]

Care must be taken that the means municipalities use to determine the amount of the land dedication or fee exaction reflect the proportionate burden placed on the remaining vacant land by the new subdivision. The regulations should specify maximum and minimum limits on the percentage of required land or moneys to provide the planning boards with adequate guidelines for making their determinations, and to give developers sufficient notice of the costs of plat approval.[312] If a municipality enacts these procedural safeguards in a subdivision ordinance, the reasonableness of the exaction requirements should not be in doubt, provided the city applies them in a consistent manner to all new developments.

b. *Uniformity*

The issue here is whether new developers and community residents are being forced to assume a disproportionate burden of the costs of preserving open space.[313] As long as a municipality uses a standard formula[314] to determine the amount all new developers owe to offset the decrease in available community land caused by the new subdivision,[315] the courts will not invalidate exaction requirements as being arbitrarily applied to an individual landowner.[316] Unless it finds a

311. NEW YORK CITY ZONING RESOLUTION ch. 5, art. X, § 105 (1974). This zoning enactment contains a designated open space network based on the area's largely intact bountiful topography, forests, and fenways. Affected private land as well as city-owned parcels are restricted against development.

312. Haugen v. Gleason, 226 Or. 99, 359 P.2d 108 (1961).

313. Fonoroff, *Special Districts: A Departure from the Concept of Uniform Controls*, in THE NEW ZONING: LEGAL, ADMINISTRATIVE, AND ECONOMIC CONCEPTS AND TECHNIQUES 82, 90 (N. Marcus & M. Groves eds. 1970).

314. *See generally* Heyman & Gilhool, *supra* note 8, at 1144-47, wherein the authors suggest that the techniques of cost-accounting analysis might prove useful in this regard.

315. *Id.* at 1134.

316. *But see* Brown v. City of Joliet, 108 Ill. App. 2d 230, 247 N.E.2d 47 (1969) (no other subdividers had been required to install storm drain trunklines); Divan Builders, Inc. v. Planning Bd., 66 N.J. 582, 334 A.2d 30 (1975) (only two of many benefited landowners would be charged for drainage facility); McKain v. Toledo City Planning Comm'n, 26 Ohio App. 2d 171, 270 N.E.2d 370 (1971) (plaintiff had been required to dedicate land for street widening and adjacent subdivider had not); Frank Ansuini, Inc. v. City of Cranston, 107 R.I. 63, 264 A.2d 910 (1970) (exaction ordinance arbitrary on its face).

rational basis for imposing the requirements on new developers alone, a court might find that a subdivision ordinance discriminates against new residents generally in favor of older developments and industrial and commercial property owners whose land was not subject to similar requirements.[317]

An analogous situation arises when user fees are required from new developments in return for connection to the municipal capital improvements system. In *Contractors and Builders Association v. City of Dunedin*,[318] the Supreme Court of Florida invalidated an ordinance allowing the city to exact user fees from new developers to cover the entire cost of expansion of municipal sewer services that was to be utilized by both old and new residents.[319]

The court based its decision on the grounds that

> it is not just and equitable for a municipally-owned utility to impose the entire burden of capital expenditures, including replacement of an existing plant, on persons connecting to a water and sewer system after an arbitrarily chosen time certain. The cost of new facilities should be borne by new users to the extent new use requires new facilities, but only to that extent.[320]

If it were otherwise, there would be no rational basis for distinguishing between old and new residents.

In the context of our parks and schools example, the courts have generally found population to be an acceptable variable on which to uphold the validity of subdivision exaction requirements.[321] In so doing, the courts have held that a rational basis exists for imposing the exactions since the influx of new residents into the community will generate the need for additional facilities.[322] New industrial and commercial property owners need not share the cost because it is un-

---

317. *See generally* Ellickson, *supra* note 92, at 481-86.

318. 329 So. 2d 314 (Fla. 1976).

319. *Id.*

320. *Id.* at 320-21.

321. Krughoff v. City of Naperville, 41 Ill. App. 3d 334, 336, 354 N.E.2d 489, 501 (1976). *See also* Associated Home Builders v. City of Walnut Creek, 4 Cal. 3d 633, 484 P.2d 606, 94 Cal. Rptr. 630 (1971), *appeal dismissed*, 404 U.S. 878 (1971).

322. Heyman & Gilhool, *supra* note 8, at 1141. The authority of a local government to make these classifications derives from its police power.

> Under police power doctrine, the burdened class must be shown to be the class whose actions have created the evil that the legislature is intending to remedy (COOLEY, THE LAW OF TAXATION § 268 (4th ed. 1924)) and revenues raised from the police power impositions must be devoted exclusively to the public objectives that motivated their adoption. The nexus between development and environ-

likely they will make use of the new facilities.[323] Nor should exactions be required from other residents since they will probably have already paid for their schools and parks out of their general property taxes.[324] On the other hand, an argument can be made that new residents are being required to help finance the maintenance costs of old parks and schools out of their property taxes. It has been remarked, however, that "[d]iscrimination can be avoided [even here] . . . by reducing the amount of the exaction by the discounted amount of the old school costs to be paid by the property tax on the houses in the new subdivision."[325]

Nonetheless, the aforementioned arguments used to uphold the validity of subdivision exactions and user fees against the charge of non-uniform administration may not entirely apply to the problem of environmental protection. The use of subdivision exactions to protect a municipality's natural resources could well result in new developers and community residents being burdened with a disproportionate share of the costs of preserving environmentally sensitive lands.[326] While there may be a rational basis for imposing special costs on new subdivisions to pay for neighborhood facilities which older residents have already paid for in some way,[327] it is clearly inequitable for new residents to pay for any more than their proportionate share of improvements that will benefit the community

---

mental harm should fulfill the . . . requirement, especially if its existence appears as an express legislative finding in the enabling act's preface. . . .
Costonis, *Development Rights Transfer, supra* note 7, at 107.

323. Krughoff v. City of Naperville, 41 Ill. App. 3d 334, 336-37, 354 N.E.2d 489, 501 (1976).

324. Heyman & Gilhool, *supra* note 8, at 1144.

325. *Id.*

326. Mandelker, *Catch 13, supra* note 90. This is especially true if the experience of post-Proposition 13 California, where "the cost of fees and permits for an average house . . . rocketed to $1,283 from just $43" in San Diego is indicative of future trends. Sansweet, *Catch 13—Californians Discover Tax Cut Mania Has a Corollary—Fee Fever*, WALL STREET J., June 1, 1979, at 1 (Midwest Edition).

327. Krughoff v. City of Naperville, 41 Ill. App. 3d 334, 354 N.E.2d 489 (1976). *Accord*, Associated Home Builders v. City of Walnut Creek, 4 Cal. 3d 633, 484 P.2d 606, 94 Cal. Rptr. 630 (1971), *appeal dismissed*, 404 U.S. 878 (1971); Collis v. City of Bloomington, 310 Minn. 5, 246 N.W.2d 19 (1976). *But see* Ellickson, *supra* note 92, at 485, in which the author argues that subdivision exactions from new developers would be fair only "if new . . . subdivisions were to receive above average park benefits or if the city had previously relied principally on special assessments, special park districts, or subdivision exactions to raise revenues for park acquisitions."

as a whole.[328]

Consequently, a municipality may need to enact a combination of exaction, dedication, and tax measures which will reach not only developers but all taxpayers in the town. This approach would generate capital in both real property and moneys to protect the area's environmentally sensitive lands, and would also address Fourteenth Amendment equal protection concerns. It would necessitate the adoption by a local government of a broad-reaching scheme designed to recapture from owners of all the different kinds of property located within its jurisdiction their share of the cost of protecting natural resources. A municipality might thus require new developers to comply with existing land dedication and fee exaction requirements. At the same time, the municipality could levy a special assessment tax[329] against the prior residents[330] and industrial and commercial property owners[331] in proportion to the benefit they will receive from the pres-

328. Heyman & Gilhool, *supra* note 8, at 1134.

329. *Id.* at 1146-48. Special assessments could thus recapture the windfalls accruing to property owners in the area who would presumably benefit from the establishment of a municipal nature preserve in addition to their existing neighborhood facilities. Special assessments would be especially useful for this purpose because they are based on the idea that a landowner may be assessed a tax to pay for special benefits at a rate proportionate to the increase in value attributable to the property from the improvement in question. Since the concept "embodies no categorical spatial requirement . . . [t]he distance of property from the improvement does not itself preclude the legislature from subjecting it to special assessment." *Id.* at 1148. Neither is the special assessment "bound by state constitutional requirements of uniformity and *ad valorem* taxation or by limitations on the amount of taxation." *Id.* at 1147. *See* 2 C. ANTIEAU, MUNICIPAL CORPORATION LAW § 14.00 (1963); 14 E. MCQUILLIN, MUNICIPAL CORPORATIONS § 38.05 (3d ed. 1950); 1 W. PAGE & P. JONES, TAXATION BY ASSESSMENT § 34 (1909). If this is the case, special assessments might also provide a solution to the problems municipalities face, subject to state constitutional limitations on the amount of property taxes that a local government may exact. *See generally* Mandelker, *Catch 13, supra* note 90.

330. This assumes that adequate statutory authority is found, based on cases upholding the special assessment of private land to finance park acquisitions. *See, e.g.*, Wilson v. Lambert, 168 U.S. 611 (1898); Winnetka Park Dist. v. Hopkins, 371 Ill. 46, 20 N.E.2d 58 (1939). *Cf.* State v. City of Topeka, 201 Kan. 729, 443 P.2d 240 (1968) (state lands subject to assessment for local park). *See also* Ellickson, *supra* note 92, at 484 n.305; Volpert, *Creation and Maintenance of Open Spaces in Subdivisions: Another Approach*, 12 U.C.L.A. L. REV. 830 (1965).

331. The basic premise behind special assessments is that the cost of community facilities should be distributed among landowners in the area in proportion to the actual benefits or burdens received by them. This premise has also been applied to industrial property owners in the context of the Clean Air Act, 42 U.S.C. §§ 7401-7642 (Supp. III 1979).

In areas unable to meet the national air quality standards, the Clean Air Act autho-

ervation of environmentally sensitive lands.[332] The distinction between different types of property ownership could be justified on the basis of the overriding public interest in the protection of natural resources.[333]

Assessments and exactions can effectively reflect proportionate costs of environmental protection only if the municipality can reasonably determine proportionate benefits to residents from a community nature preserve. One approach to this problem proposed in the context of parks and schools, determines the base cost of new facilities or community improvements, and then uses a cost-accounting model[334] to apportion the costs among individual units.

Whether this type of system could ensure that all property owners within a municipality bear their share of the costs of environmental protection remains to be seen. Nevertheless, some means of allocating responsibility for the preservation of natural resources among all community residents must be found if new development is not to be singled out to bear the full burden of environmental protection. The alternative may well be a politically acceptable but legally vulnerable exclusionary device unfairly adding to the cost of housing in the community.

D. *Natural Area Zoning: Legal Questions*

The critical legal necessities in any zoning scheme for a unique natural area will be the environmental acceptability of development (as evidenced by a planning study) and the existence of a reasonable beneficial use of land in the context of the property owner's distinct

---

rizes a new industrial or point pollution source to purchase "pollution rights" from existing sources in the area. 42 U.S.C. § 7503 (Supp. III 1979). Thus new polluters can pay existing sources to reduce their pollutant emissions to qualify for permit approval to build a new facility without imposing additional burdens on the region's air quality. Before the appropriate state planning authority approves an emission offset plan, the authority must first calculate the net pollution allocation for the area in question and determine the proportionate distribution of the costs involved in maintaining such a system. EPA Effluent Limitations Guidelines, 40 C.F.R. § 51 App. S (1980).

332. *See generally* Misczynski, *Special Assessments*, in WINDFALLS FOR WIPEOUTS 311 (D. Hagman & D. Misczynski eds. 1978).

333. *See* notes 69 and 185 *supra*; SIMKO, *supra* note 86, at 14. The recognition of the importance of acting now to preserve our natural resources also underlies the use of differential tax assessments to protect valuable agricultural land and open space. *See generally* Keene, *supra* note 102.

334. Heyman & Gilhool, *supra* note 8, at 1143 n.102.

investment-backed expectations. The United States Supreme Court suggested these criteria in *Agins v. City of Tiburon*.[335] Such an approach envisions no TDR or subdivision aids, but essentially mandates environmental protection on a "pay as you go" basis.

A careful study of unique characteristics must precede any special zoning for a natural area.[336] The study can assess fragility or resilience in the face of development, and establish resulting thresholds of environmental impact for different types of development.

If the study reveals a thoroughly fragile environment, the municipality should entertain no illusions about the efficacy of a special natural area zoning district which permits even a limited degree of residential development. In this situation, where environmental preservation assumes paramount political importance, planners should consider the TDR and subdivision exaction alternatives along with the law of custom and the public trust doctrine described earlier in this article.

Zoning which allows development permits in such a fragile area would seem to fly in the face of the requirement of consistency with a well-considered plan. It would appear even more questionable in the light of NEPA-type process mandates requiring consideration of alternatives which are less damaging to the environment. A municipality should anticipate litigation from environmentalists if it allows such a situation to develop.

Should the municipality adopt a restrictive alternative—such as harshly limited use of the natural area coupled with TDR privileges,

335. 100 S. Ct. 2138, 2142 (1980).

336. The City of Tiburon undertook such a study pursuant to California zoning legislation which mandates a municipal land use plan providing for open space preservation. CAL. GOV'T CODE §§ 65560-65570 (Deering Supp. 1980). This legislation acknoweldges the necessity of preserving open space:

> "for the assurance of the continued availability of land for the production of food and fiber, for the enjoyment of scenic beauty, for recreation and for the use of natural resources." CAL. GOVT. CODE § 65561(a) (West Supp. 1980); see Tiburon, Cal. Ordinance No. 124 N.S. § 1(f) and (h) (June 28, 1973).

Agins v. City of Tiburon, 100 S. Ct. 2138, 2142, n.7 (1980). The Court noted that the Tiburon City Council had found

> "[i]t is in the public interest to avoid unnecessary conversion of open space land to strictly urban uses, thereby protecting against the resultant adverse impacts, such as air, noise and water pollution, traffic congestion, destruction of scenic beauty, disturbance of the ecology and the environment, hazards related to geology, fire and flood, and other demonstrated consequences of urban sprawl." Ordinance No. 124 N.S. § 1(c).

Agins v. City of Tiburon, 100 S. Ct. 2138, 2142 n.8.

subdivision exaction beneficiary status, or tax abatement or exemption—the affected property owner may litigate the taking issue discussed in the preceding sections of this article. At this point, interplay among the following factors would seem critical to a determination of reasonable beneficial use: Prior use of the property; land price vis-a-vis other properties zoned for the residential density sought to be developed; and reasonableness of the restrictions, given the value of compensatory privileges such as TDR, subdivision exaction beneficiary status, and tax abatement or exemption.

Clearly, a history of unspoiled character coupled with public use of the property suggests application of the public trust doctrine and/or the law of custom. Any TDR or other privileges which the municipality in its good conscience confers on the owners of such property should not buttress taking claims.[337] The price for such property will reflect its limited value for private purposes. A land price comparable to that prevailing on residentially zoned property would, on the other hand, tend to show "distinct investment-backed expectations" at odds with customary public or restricted usage.

Care is required in transplanting the Supreme Court's reasonable beneficial use lessons in *Penn Central*, a case sustaining New York City's stringent landmark regulations, to rural and suburban natural area preservation. The basic difference between the two situations is that reasonable beneficial use is more likely to be associated with preserved urban structures than with preserved naked land in the boondocks. While the Court favorably regarded TDR privileges of the landmark owner as a factor mitigating "taking," the existence of a reasonable beneficial use in the preserved structure (two-story Grand Terminal in Manhattan's skyscrapered midtown district) formed the cornerstone of the court's decision.

The easy case for special natural area district zoning is found where environmental study of the area discloses its compatibility with development, provided certain construction precautions and design and density standards are observed. Just such a sophisticated regulation emerged from Tiburon's open space plan which the Supreme Court found constitutional in the *Agins* case.[338] Of interest here was the city's relatively broad range of discretion to limit devel-

337. *I.e.*, because these privileges evince compensatory intentions, they should not be deemed evidence of a "taking" in bad conscience, so as to trigger just compensation requirements under the 14th Amendment.

338. 100 S. Ct. 2138 (1980).

opment to five-acre minimum lots or to permit up to five times that density on a building site.[339] The exercise of such discretion presumably would depend on the individual site plan, its sensitivity toward corridors, topography, and general open space objectives. Special district zoning is valid when, in light of the affected area's unique aspects, application of the community's otherwise uniform development controls would offend its planning goals. Under these circumstances, extreme partisans of the environment will have difficulty blocking development under NEPA-like statutes, and property owners raising tired Fourteenth Amendment "taking" objections (*i.e.*, their reasonable beneficial use might have been more beneficial) will also fail. In more than one hundred instances in Staten Island and Riverdale, no lawsuits by either group have been generated under the New York City zoning provision.

This view finds further support in *Agins*,[340] which involved a challenge to the constitutionality of a Tiburon municipal zoning ordinance enacted in accordance with the California Open Space Lands Act.[341] The Agins claimed that the enactment of this comprehensive land use plan, which placed their five-acre plot of undeveloped land in a low-density (minimum five-acre lot size), open space zone, resulted in a taking of their property for which they were entitled to compensatory damages under the Fifth and Fourteenth Amendments.[342]

In a unanimous opinion which made numerous references to the *Penn Central* decision, the Court found that the Tiburon ordinance on its face did not effect a taking of the Agins' property. Instead, the low-density zoning classification promoted a legitimate governmental objective, the protection of open space, without denying the claimants a reasonable beneficial use of their land.[343] The Court held that the use of natural area districts to protect a community from the ill effects of urbanization was a valid exercise of the city's police power.[344] Furthermore, the zoning regulation would not impose a disproportionate burden of the costs of environmental preservation

339. *See* 100 S. Ct. at 2140.
340. 100 S. Ct. at 2138.
341. CAL. GOV'T CODE §§ 65560-65570 (Deering Supp. 1980).
342. 100 S. Ct. at 2140.
343. *Id.* at 2141-42.
344. *Id.* at 2142.

on the affected landowners.[345] The City had determined that although the Agins' property had a holding capacity limit for five-acre development, an increase in capacity up to one acre development could be granted under the ordinance at the discretion of local planning officials. Finding the degree of latitude provided by the Tiburon plan sufficient to protect the claimants' "reasonable investment expectations,"[346] the Court noted that "[a]lthough the ordinances limit development, they neither prevent the best use of appellants' land . . . nor extinguish a fundamental attribute of ownership. . . ."[347]

Despite the strong language in the *Agins* opinion, it is not certain whether natural area zoning will remain constitutional as applied to all cases.[348] The Agins challenged the open space zoning scheme even before they applied for permission to develop their property at a higher density.[349] This fact leaves open the possibility that another landowner in a similar situation might be denied permission to develop his property with such detrimental effects that the Supreme Court would invalidate the ordinance in question as an impermissible confiscation of private property without just compensation.

Consequently, if the municipality uses its zoning powers to protect special natural areas, it must maneuver the ship of state so as to skirt the twin shoals of Scylla and Charybdis: the principled rock of environmental purity and the property owner's hardy right to a reasonable beneficial use of his land.

CONCLUSION: CHOOSING THE RIGHT ENVIRONMENTAL STRATEGY

The search among environmental land use techniques for an ever-beneficent Dr. Jekyll without another inseparable Mr. Hyde has not led to a panacea. Nagging side effects accompany every "cure." In another and more important sense, however, the differing negative

345. *Id.*

346. *Id.*

347. *Id.*

348. An interesting case on the horizon is San Diego Gas and Elec. Co. v. City of San Diego, 80 Cal. App. 3d 1026, 146 Cal. Rptr. 103 (1978), which raises questions concerning the validity of natural area zoning as it affects public utilities. The case has been scheduled for oral argument during the 1980-81 Supreme Court term, 100 S. Ct. 3008 (1980). At issue will be a decision of the California Court of Appeals which found that there was a taking of the claimant's property where inclusion of the land in an open space zone precluded the laying of power lines, as well as other industrial uses for which the site was exclusively suited. *Id.*

349. 100 S. Ct. at 2141.

side effects of the three devices examined herein suggest appropriateness (or inappropriateness) in differing geographical and political contexts.

Dr. Jekyll discovered too late that integrated individuality, warts and all, is preferable to a schizoid duality of pure components. Moving from metaphor to land use, I have tried to show that TDR, subdivision exactions, and zoning all have "warts" when applied to the problem of environmental preservation in suburban and rural areas.

The community that invokes TDR as its preservation solution unleashes a higher density genie elsewhere. It may be difficult to rebottle the genie in transfer zones distant from the preserved natural resource, with irretrievable loss of small town character possibly ensuing. The community imposing subdivision exactions risks a costly head tax on newcomers which may exclude diverse population groups. Even sensitive natural area zoning gives away the environmental game at the outset by allowing development within the sacred precincts.

All communities differ from each other in one or more aspects, as do natural areas. A planning process should enable a community to rationally choose the most appropriate environmental technique. Thus, the choice between TDR and subdivision exactions would depend on their relative impacts upon other community goals: encouragement of diversity through higher density housing versus reinforcement of small town character. An environmental analysis should permit assessment of development potential within any natural area. If the area can tolerate a measure of development without losing those precious natural attributes which make the area unique, natural area zoning may be preferable to either the higher density implications of TDR or the exclusionary tendencies of subdivision exactions.

The Janus-like quality of regulatory environmental preservation techniques reflects the inevitable pressures of a complex society on single "tunnel-vision" goals.[350] Thus, in a world teeming with pollution, poverty, and materialistic values, the environmental virtues of Dr. Jekyll appear unquestionable. But to deny the connection with Mr. Hyde suggests that one can have one's cake and eat it too; that environmental preservation has no economic consequences, no social consequences, no anti-environment consequences *elsewhere*.

350. *See generally* Marcus, *Clean Air in Search of a Comprehensive National Plan: An Urban View*, 8 URB. LAW. 307 (1976).

Only by recognizing these consequences through a rational consideration of alternatives can we avoid hasty and ill-considered legislation arising from our passionate uncritical embrace of the environment. Other competing precious principles and goals must force us to pick and choose the right environmental strategy from among an increasing array of tempting caskets.[351]

351. In Shakespeare's *The Merchant of Venice*, the aspiring jurist Portia sets a test for her marriage suitors. They must choose correctly from among three caskets—gold, silver, and lead—to win her heart. For the correct key to Portia's heart, see Act III, scene 2.