

# Development Rights Transfer: An Exploratory Essay

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Chicago's Old Stock Exchange Building, a 13-story architectural landmark of international stature, was demolished in 1972 to make way for a pedestrian 45-story office tower on one of the Chicago Loop's prime business locations. In Manhattan, the Tudor Parks, described by *The New York Times* as "two quiet green islands, suspended above the compacted chaos of East 42nd Street in the privately-owned Tudor City development,"<sup>1</sup> are targeted as the site of luxury high-rise buildings. Puerto Rico's Phosphorescent Bay, a unique ecological resource whose waters explode at dusk with the luminescence of billions of tiny dinoflagellates, is threatened with imminent degradation by industrial development on the still virgin lands that encircle the Bay.

These and countless other imperiled resources seem to have little in common at first glance. Some are man-made, others nature's own. Their locations run from bustling downtown sites to once remote rain forests and nature preserves. They are cherished for purposes as diverse as landmark preservation, open space maintenance, and protection of the natural environment.

Each is vulnerable, however, because it is a low density resource situated where the marketplace demands a high density use. This clash between resource protection and the development juggernaut defines the contours of a national land use dilemma. The recurring failure of conventional land use practice<sup>2</sup> to accommodate these warring forces has resulted in demands for reform that, all too often, are nurtured more by apocalyptic rhetoric than by deliberate reflection.

For most of this century constitutional jurisprudence exacerbated

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1. *N.Y. Times*, Oct. 4, 1972, at 46, col. 4.

2. Recognition of the inadequacy of existing techniques is apparent in reports of influential land use study commissions; see, e.g., *THE USE OF LAND, A CITIZEN'S POLICY GUIDE TO URBAN GROWTH* (W. Reilly ed. 1973) [hereinafter cited as *USE OF LAND*]; *THE PRESIDENT'S COMMITTEE ON URBAN HOUSING: A DECENT HOME*, H.R. Doc. No. 34, 91st Cong., 2d Sess. (1968); and proposed legislative reforms illustrated by the American Law Institute's Model Land Development Code, see *ALI MODEL LAND DEVELOPMENT CODE* (Tent. Draft Nos. 2-5, 1970-73), and by national land use bills sponsored by the Nixon administration, see S. 924, 93d Cong., 1st Sess. (1973), and by Senator Henry Jackson, see S. 268, 93d Cong., 1st Sess. (1973).

the conflict. While few modern courts denied that resource protection was a legitimate governmental end, most scrutinized the economic consequences of public programs adopted for this purpose. Measures that cut sharply into the profitability of private property risked invalidation as uncompensated takings improperly implemented under the state's police power. Among the many rationales advanced to distinguish the valid exercise of the police power from uncompensated takings,<sup>3</sup> perhaps the most widely accepted is the harm/benefit test, suggested by Professor Freund in 1904<sup>4</sup> and updated by Professor Dunham in 1958,<sup>5</sup> which requires compensation if the regulation creates a community benefit, but allows no recovery if it prevents a harmful land use.<sup>6</sup>

Programs that, without compensation, aim at resource protection by forbidding landowners to convert their land from low- to high-density development are prime candidates for invalidation under the harm/benefit test.<sup>7</sup> Worthy though the preservation of a landmark or nature preserve may be, this rationale insists that the community resort to its eminent domain power unless it can show that the proposed higher density development will create harms that the community may proscribe under the police power. To do otherwise would compel the owner of the threatened resource to improve the com-

3. For a collection of legal writings exploring the distinction between the police power and the power of eminent domain, see Kusler, *Open Space Zoning: Valid Regulation or Invalid Taking*, 57 MINN. L. REV. 1, 9 n.26 (1972).

4. See E. FREUND, *THE POLICE POWER* 546-47 (1904).

5. See Dunham, *A Legal and Economic Basis for City Planning*, 58 COLUM. L. REV. 651, 663-69 (1958).

6. [I]t may be said that the state takes property by eminent domain because it is useful to the public, and under the police power because it is harmful . . . . From this results the difference between the power of eminent domain and the police power, that the former recognizes a right to compensation, while the latter on principle does not.

E. FREUND, *supra* note 4, at 546-47.

7. See, e.g., *State ex rel. Marbro Corp. v. Ramsey*, 28 Ill. App. 2d 252, 171 N.E.2d 246 (1960) (mandating issuance of a demolition permit for the Garrick Theater, a Chicago School of Architecture landmark); *State v. Johnson*, 265 A.2d 711 (Me. 1970) (setting aside a permit denial and an injunction prohibiting the filling of appellants' land preparatory to sale); *Aronson v. Town of Sharon*, 346 Mass. 598, 195 N.E.2d 341 (1964) (invalidating an amendment which zoned an area of the town as a rural single-residence district); *Morris County Land Improvement Co. v. Parsippany-Troy Hills Twp.*, 40 N.J. 539, 193 A.2d 232 (1963) (invalidating zoning intended to prevent construction within an ecologically sensitive marshland); *Keystone Associates v. Moerdler*, 19 N.Y.2d 78, 224 N.E.2d 700, 278 N.Y.S.2d 185 (1966) (declaring invalid a statute which created a private corporation and vested it with power to condemn the Metropolitan Opera House property and appropriate it for use as a public auditorium, despite a provision in the statute for compensating the property owners who had intended to construct an office building on the site). *But see McCarthy v. City of Manhattan Beach*, 41 Cal. 2d 879, 264 P.2d 932 (1963) (refusing to invalidate a zoning ordinance permitting plaintiffs' ocean-front property to be used only for recreational purposes). The *Marbro* court bluntly summed up the conflict:

It is laudable to attempt to preserve a landmark; however, it becomes unconscionable when an unwilling private party is required to bear the expense. *State ex rel. Marbro Corp. v. Ramsey*, *supra* at 256, 171 N.E.2d at 247.

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munity's lot and would freeze his property in its current low density status while not similarly restraining the range of development options open to his neighbors. Moreover the "harm" prevented is a far cry from the nuisance-like analogue contemplated by Freund and Dunham. Rather, it is the termination of a community benefit—fortuitously provided by the owner—to make possible subsequent development which, if undertaken by his neighbors, would not be objectionable on nuisance-related grounds.

A community's options under the harm/benefit test have not been enviable. Because scarce public dollars are typically earmarked for social needs more compelling than resource protection, eminent domain has usually not been feasible. Two alternatives remained: the police power and moral suasion. Wholesale attrition of America's natural and man-made amenities is poignant evidence of the inadequacy of these traditional options.

Portraying the current land use climate or its likely evolution invites confusion akin to that which befuddled Lewis Carroll's Alice in her maddening game of croquet. Some commentators speak of a "new mood in America";<sup>8</sup> others of a "quiet revolution."<sup>9</sup> However styled, ferment in the land use field is now so pervasive that, like Alice's flamingo, hedgehog, and card soldiers, nothing seems to stay put for very long, least of all the point at which judges will draw the line between the police power and the power of eminent domain. Indeed, some recent opinions appear to have all but defused the compensation requirement as an effective constitutional limitation on government's exercise of its land use powers.<sup>10</sup>

8. See USE OF LAND, *supra* note 2, at 17.

9. See F. BOSSELMAN & D. CALLIES, *THE QUIET REVOLUTION IN LAND USE CONTROL* (Council on Environmental Quality 1971).

10. See, e.g., *Steel Hill Development, Inc. v. Town of Sanbornton*, 469 F.2d 956 (1st Cir. 1972) (sustaining a six-acre minimum lot zoning restriction on a tract purchased for recreational home development); *Candlestick Properties, Inc. v. San Francisco Bay Conserv. & Dev. Comm'n*, 11 Cal. App. 3d 557, 89 Cal. Rptr. 897 (1970) (sustaining denial of a fill permit for development along San Francisco Bay); *Golden v. Planning Board*, 30 N.Y.2d 359, 285 N.E.2d 291, 334 N.Y.S.2d 138 (1972) (sustaining development regulations authorizing a municipality, *inter alia*, to prohibit subdivision development for up to 18 years); *Just v. Marinette County*, 56 Wis. 2d 7, 201 N.W.2d 761 (1972) (sustaining prohibition of residential development in state wetlands zone); cf. *In re Spring Valley Development*, 300 A.2d 736 (Me. 1973) (sustaining application of Maine Site Location of Development Law to subdivided 92-acre private site); *Potomac Sand & Gravel Co. v. Governor of Maryland*, 266 Md. 358, 293 A.2d 241, *cert. denied*, 409 U.S. 1040 (1972) (sustaining prohibition of dredging on private lands within state wetlands zone); *Turnpike Realty Co. v. Town of Dedham*, 284 N.E.2d 891 (Mass. 1972) (sustaining a virtual prohibition of residential development, citing combined flood plain zoning and ecological resource protection grounds). The wave of judicial decisions in the 1970's sustaining environmentally-based land use regulation against the taking charge plays a prominent role in the remarkable proposition, recently advanced by three land use commentators, that the "regulation of the use of land, if reasonably related to a valid public purpose, can never constitute a taking." F. BOSSELMAN, D. CALLIES & J. BANTA, *THE TAKING ISSUE* 238 (1973) (emphasis added) [hereinafter cited as *TAKING*].

This turnabout is the result of five converging trends in the land use field. The most important trend is environmentalism, which provides the impetus for an expansion of government's land use powers paralleled only by the United States Supreme Court's 1926 decision in *Euclid v. Ambler Realty Company*<sup>11</sup> upholding the constitutionality of zoning under the police power. Environmentalists believe that *all* types of development threaten environmental quality. Thus, bifurcating development into harmful and nonharmful categories is, for them, untenable.<sup>12</sup> Instead, the individual development decision, like Tennyson's flower in the crannied wall, should not be perceived piecemeal, but must be viewed in terms of its relationship to the larger context of which it is a part. This premise has become a staple among environmental economists<sup>13</sup> and has made headway in the courts as well.<sup>14</sup> Once development itself becomes suspect, little can be excluded from the category of harmful land uses.

The benefit concept also experiences a troublesome metamorphosis. When resource protection was regarded as essentially a frill, a goal which the government could pursue only on a compensated basis, resort to eminent domain made sense. Recently upgraded in the literature and, increasingly, by the courts to a concern of utmost social priority, resource protection might now be attained under the harm/benefit test by means of the police power irrespective of economic hardships suffered or windfalls reaped by individual landowners.<sup>15</sup>

11. 272 U.S. 365 (1926).

12. See p. 100 *infra*.

13. See P. BARKLEY & D. SECKLER, *ECONOMIC GROWTH AND ENVIRONMENTAL DECAY: THE SOLUTION BECOMES THE PROBLEM* 32 (1972):

The accumulation of people and their appurtenances in limited, technologically non-expandable space is perhaps the ultimate resource constraint and the ultimate problem of pollution.

See generally T. CROCKER & A. ROGERS, *ENVIRONMENTAL ECONOMICS* (1971); J. DALES, *POLLUTION, PROPERTY, AND PRICES* (1968); E. MISHAN, *THE COSTS OF ECONOMIC GROWTH* (1967).

14. For example, a federal court of appeals looked squarely to the environmentalist premise for its rationale in sustaining a six-acre minimum lot size requirement of a rustic New Hampshire community against the charge, *inter alia*, that it effected an uncompensated taking:

We recognize as within the general welfare, concerns relating to the construction and integration of hundreds of new homes which would have an irrevocable effect on the area's ecological balance, destroy scenic values, decrease open space, significantly change the rural character of the small town, pose substantial financial burdens on the town for police, fire, sewer and road services, and open the way for the tides of weekend "visitors" who would own second homes. If the federal government itself has thought these concerns to be within the general welfare (citing the National Environmental Policy Act), we cannot say that [this community] cannot similarly consider such values and reflect them in its zoning ordinance.

*Steel Hill Development, Inc. v. Town of Sanbornton*, 469 F.2d 956, 961 (1st Cir. 1972).

15. Compare *Morris County Land Improvement Co. v. Parsippany-Troy Hills Twp.*, 40 N.J. 539, 193 A.2d 232 (1963), with *Just v. Marinette County*, 56 Wis. 2d 7, 201 N.W.2d 761 (1972). In *Morris*, Judge Hall, perhaps the most informed sitting jurist in land use

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Heightened citizen expectations concerning the preservation of environmental amenities have come at a time of growing municipal impoverishment. Traditional methods of public finance have proven inadequate to generate the funds required to fulfill these expectations and to meet the expanded welfare responsibilities of government in the twentieth century. Sympathetic to the fiscal difficulties of local governments, the courts have increasingly chosen to acquiesce in a broadening of the police power rather than force the scuttling of worthy public programs.<sup>16</sup>

Third, courts have belatedly recognized that land development is a business. Seemingly obvious, this point has been obscured by the almost religious mystique that has set land development apart from other forms of business activity since the apotheosis of property ownership by Blackstone and other early English commentators.<sup>17</sup> Extolling the sacredness of private property, these apologists were not thinking of Boise Cascade, Zeckendorf, and Levitt but of the private citizen whose property was the principal barrier between himself and the whims of an arbitrary state. In land-rich, laissez-faire America, however, the courts ignored this distinction, thereby

affairs, was unwilling to classify development within an ecologically sensitive area as a "harm," despite his recognition of the social benefits that would flow from the area's maintenance in its natural state. He therefore invalidated the challenged noncompensatory measure. The *Just* court, on the other hand, expressly disagreed with Judge Hall, finding instead that development within ecologically sensitive areas is indeed a "harm." Sustaining a near-blanket prohibition on development in privately owned lands within wetlands zones, it reasoned that "an owner of land has no absolute and unlimited 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," and concluded that the police power may be used "to prevent harm to public rights by limiting the use of private property to its natural uses." *Just v. Marinette County*, *supra* at 17, 201 N.W.2d at 771.

For some commentators the economic result sanctioned in *Just* is viewed as meritorious. As much appears, for example, in the argument of Bosselman, Callies, and Banta that "regulation of land, if reasonably related to a valid public purpose [such as environmental protection], can never constitute a taking." *TAKING*, *supra* note 10, at 238. See *USE OF LAND*, *supra* note 2, at 175; Sax, *Takings, Private Property and Public Rights*, 81 *YALE L.J.* 149, 156 (1971). Yet these authors caution that "we must not let concern for the environment blind us to the fact that regulations have real economic impact on real people, and we must search for solutions that will take their interests into account," *TAKING*, *supra* note 10, at 2, and that a proper construction of the taking clause "must be politically feasible . . . , make sense economically, . . . and hold up in court." *Id.* at 318. How a construction of that clause which limits the requirement of compensation to the sole instance of "actual appropriation of land by the government," *id.* at 254, is compatible with any of these objectives, with the possible, if problematic, exception of the last, is regrettably left unaddressed in the authors' otherwise thoughtful and far-reaching examination of the taking issue.

16. See p. 107 *infra*.

17. Among Blackstone's better known, if somewhat cosmological, encomia to private property is his statement that,

There is nothing which so generally strikes the imagination, and engages the affections of mankind, as the right to property; or that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe.

2 W. BLACKSTONE, *COMMENTARIES* \*2.

imbuing the American property system with a distinctive bias in favor of those deriving their wealth from land.<sup>18</sup> But the pendulum has started back. Courts<sup>19</sup> and commentators<sup>20</sup> are beginning to stress the identity in principle of the expectations of land developers and other types of entrepreneurs regarding economic return on their respective investments.<sup>21</sup>

The fourth trend is the gravitation of land use powers from local governments to regional, state, and federal agencies. National land use bills,<sup>22</sup> the proposed American Law Institute Model Land Development Code,<sup>23</sup> the "sensitive area" legislation of many of the states,<sup>24</sup> and the review of local land use decisions by regional agencies<sup>25</sup> are illustrative.

Three consequences of this trend are pertinent. First, restrictive police power measures that might not be sustained if evaluated within a purely local context are more easily defended if scrutinized in terms of broader regional, state or national interests.<sup>26</sup> Second, courts

18. See notes 90-94 *infra*.

19. See, e.g., *Steel Hill Development, Inc. v. Town of Sanbornton*, 469 F.2d 956, 961 (1st Cir. 1972); *Just v. Marinette County*, 56 Wis. 2d 7, 12, 201 N.W.2d 761, 768 (1972).

20. See, e.g., Johnston, *Constitutionality of Subdivision Exactions: The Quest for a Rationale*, 52 CORNELL L.Q. 871, 923 (1967); Cunningham, *Public Control of Land Subdivision in Michigan: Description and Critique*, 66 MICH. L. REV. 1, 25-33 (1967).

21. The land subdivider, Professor Johnston properly observes, is a: manufacturer, processor, and marketer of a product; land is but one of his raw materials. In subdivision control disputes, the developer is not defending hearth and home against the king's intrusion, but simply attempting to maximize his profits from the sale of a finished product. As applied to him, subdivision control exactions are actually business regulations.

Johnston, *supra* note 20, at 923.

22. See, e.g., S. 924, 93d Cong., 1st Sess. (1973) (Nixon bill); S. 268, 93d Cong., 1st Sess. (1973) (Jackson bill).

23. ALI MODEL LAND DEVELOPMENT CODE (Tent. Drafts Nos. 2-5, 1970-73).

24. See, e.g., Maryland Wetlands Act, MD. ANN. CODE art. 66C, §§ 718-30 (Supp. 1972); Florida Environmental Land and Water Management Act of 1972, FLA. STAT. ANN. § 380 (1972); Virginia Wetlands Act, VA. CODE ANN. §§ 62.1-13.2 to -13.9 (Supp. 1973); cf. ALI MODEL LAND DEVELOPMENT CODE art. 7, pt. 2 (Tent. Draft No. 3, 1971).

25. See, e.g., Massachusetts Regional Planning Law, MASS. ANN. LAWS ch. 40B, §§ 20-23 (1971) (review by state agency of local zoning decisions hindering the construction of low-income housing).

26. Examples include measures imposing extraordinarily stringent controls upon the development of lands in the San Francisco Bay area, the Hackensack Meadowlands of northern New Jersey, and the Lake Tahoe bi-state region. See CAL. GOV'T CODE §§ 66600-61 (West Supp. 1972). Denial of a permit to fill and build on a privately-owned tract along the Bay was unsuccessfully challenged in *Candlestick Properties, Inc. v. San Francisco Bay Conserv. & Dev. Comm'n*, 11 Cal. App. 3d 557, 89 Cal. Rptr. 897 (1971). The administration of the legislation since its passage is reviewed in F. BOSSELMAN & D. CALLIES, *THE QUIET REVOLUTION IN LAND USE CONTROL* 108-35 (Council on Environmental Quality 1971). See Hackensack Meadowlands Reclamation and Development Act, N.J. STAT. ANN. §§ 13.17-1 to 13.17-86 (1968). The statute was upheld in *Meadowlands Regional Development Agency v. State*, 112 N.J. Super. 89, 270 A.2d 418 (1970), *aff'd*, 63 N.J. 35, 304 A.2d 545 (1973). A two-year moratorium on selected development within the Meadowlands District imposed under the statute and implementing regulations was upheld in *Meadowland Reg. Dev. Ag. v. Hackensack Meadowlands Dev. Comm'n*, 119 N.J. Super. 572, 293 A.2d 192 (App. Div. 1972). See Tahoe Reg. Planning Compact, CAL.

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are more likely to defer to agencies at higher levels of government than to local governments, confident that the former have a better grasp of the entire picture, are endowed with more qualified planning staffs, and address land use concerns of overwhelming social and economic import for the area concerned.<sup>27</sup> Finally, determining what is a reasonable return on undeveloped land such as a tract in Florida's Great Cypress Swamp<sup>28</sup> or in the Hackensack Meadowlands<sup>29</sup> will be shaped in large measure by the regional agency's overall development plan as well as by its capital improvements program. In a community where development patterns are already largely fixed, however, discrepancies between a return dictated by these expectations and one severely reduced as a result of bold public intervention will be far more visible and hence more vulnerable to attack as an uncompensated taking.

Finally local governments are experiencing growing sophistication in planning matters. Today's planning arsenal includes such elaborate techniques as timed development,<sup>30</sup> flexible bulk and use regulation,<sup>31</sup> design review,<sup>32</sup> zoning bonuses,<sup>33</sup> and a host of other innovations.<sup>34</sup> Goaded by federal<sup>35</sup> and state planning assistance programs,<sup>36</sup> moreover, many local governments are now predicating their

Gov'T CODE § 66801 (West Supp. 1972), which has been approved by Congress (Pub. L. No. 91-148, 83 Stat. 360 (1969)). The statute was sustained in *People ex rel. Younger v. County of El Dorado*, 5 Cal. 3d 480, 487 P.2d 1193, 96 Cal. Rptr. 553 (1971).

27. See cases cited note 26 *supra*. See generally Heyman, *Innovative Land Regulation and Comprehensive Planning*, in *THE NEW ZONING: LEGAL, ADMINISTRATIVE AND ECONOMIC CONCEPTS AND TECHNIQUES* 23 (N. Marcus & M. Groves eds. 1970) [hereinafter cited as *NEW ZONING*].

28. The development pressures threatening the Great Cypress Swamp are detailed in Comment, *Jetport: Planning and Politics in the Big Cypress Swamp*, 25 U. MIAMI L. REV. 713 (1971).

29. See note 26 *supra*.

30. See, e.g., *Golden v. Planning Board*, 30 N.Y.2d 359, 285 N.E.2d 291, 334 N.Y.S.2d 138 (1972); *Josephs v. Town Board*, 24 Misc. 2d 366, 198 N.Y.S.2d 695 (Sup. Ct. 1960).

31. See, e.g., *Chrinko v. South Brunswick Twp. Planning Bd.*, 77 N.J. Super. 594, 187 A.2d 221 (L. Div. 1963) (flexible bulk regulation through cluster zoning); *Cheney v. Village 2 at New Hope, Inc.*, 429 Pa. 626, 241 A.2d 81 (1968) (flexible bulk and use regulation through planned unit development zoning).

32. See *NEW YORK, N.Y. ZONING RESOLUTION* art. VII, ch. 4, § 74-792(5) (1971) (authorizing design review of the compatibility of proposed construction with designated New York City landmark buildings).

33. A zoning bonus is an additional increment of density that the municipality awards to the developer as a quid pro quo for the inclusion in his project of a prescribed amenity, such as a plaza or an arcade. In theory, the amount of the density increment should equal or slightly exceed in value the cost of the amenity. See J. COSTONIS, *SPACE ADRIFT: LANDMARK PRESERVATION AND THE MARKETPLACE* 30-32 (forthcoming 1974) [hereinafter cited as *SPACE ADRIFT*].

34. See generally *NEW ZONING*, *supra* note 27, *passim*; Elliott & Marcus, *From Euclid to Ramapo: New Directions in Land Development Control*, 1 HOFSTRA L. REV. 56 (1973).

35. Federal planning assistance programs are summarized in D. HAGMAN, *PUBLIC PLANNING AND CONTROL OF URBAN AND LAND DEVELOPMENT* 57-58, 62-71, 73-75 (1973).

36. See, e.g., *CONN. GEN. STAT. ANN.* § 8-201 *et seq.* (1970); *ILL. REV. STAT.* ch. 127, § 63b14-14.18 (1971).

land use decisions upon thorough planning studies whose conclusions are express components of duly enacted comprehensive plans.

Given these developments, stringent land use measures are less easily attacked on taking grounds for two reasons. First, instead of imposing restrictions outright, local governments proceed by less visible but equally onerous routes. Astute communities no longer flatly proscribe unwanted development. Rather, they make it the subject of involved special exception procedures, reviewing it on a case by case basis and approving it, if at all, pursuant to discretionary criteria and detailed conditions.<sup>37</sup> Second, once the courts are persuaded that a challenged measure is the product of thoughtful planning inquiries, they are less likely to quibble with its economic consequences.<sup>38</sup>

The apparent weakening of the compensation requirement does not mean, however, that the land use dilemma is nearing satisfactory resolution. Many land use conflicts will remain troublesome because of their distinctly local character, as in the case of the Tudor Parks controversy, or because of the visibly disproportionate burdens that their resolution under the police power threatens to foist off on a tiny class of landowners, as illustrated by the Stock Exchange conflict.<sup>39</sup> Furthermore the current or continuing influence of the five trends sketched above cannot be confidently predicted for any given state. Each is controversial and a certain target of continuing litigation by developers and landowners, who can be expected to invoke ample precedents that clash with the ambitious concept of the police power that these trends signal.

In any event the question would remain even if the whittling away of the compensation requirement gained widespread legal support. Although deemed constitutional, this solution might not be fair or politic, for the issue is not whether resource protection is meritorious but who should pay for it. Denying greater density to the landowner in the foregoing examples makes him the unwilling fi-

37. See *Golden v. Planning Board*, 30 N.Y.2d 359, 334 N.Y.S.2d 138, 285 N.E.2d 291 (1972). These procedural and regulatory refinements abound in the cases cited note 10 *supra*.

38. Professor Heyman persuasively argues that the taking objection often serves as a convenient cover invoked by courts to invalidate a measure because it is the product of ill-conceived planning. *Innovative Land Regulation and Comprehensive Planning*, in *New Zoning*, *supra* note 27, at 26-32, 64-65.

39. An analysis of the decrease in value that would be sustained if four Chicago School of Architecture buildings were permanently designated as landmarks revealed an average drop in the fair market value of these properties of 52.1 percent or, stated in dollar terms, an aggregate loss of \$8,732,000. See *SPACE ADRIFT*, *supra* note 33, at 76, table 6. Greater relative losses can be anticipated when no income-producing improvements are permitted on the restricted resource site.



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nancier of a resource that the community desires. In addition, the land of other property owners, unaffected by the stringent controls, may become more valuable,<sup>40</sup> a result aptly described by Professor Hagman as the "windfall/wipe-out" phenomenon.<sup>41</sup> Public measures that create windfalls for some by gouging others surely ought to be avoided if possible, whatever their constitutional status.<sup>42</sup>

Political realities must also be taken into account since the implementation of action programs, not the vindication of an abstract constitutional principle, is ultimately at stake. The views of commentators for whom the compensation requirement is outmoded notwithstanding,<sup>43</sup> implementing action programs will be difficult, if not impossible, without strong governmental commitment and the cooperation or acquiescence of affected private groups. Noncompensatory measures that severely reduce economic return on private property are unlikely candidates on both counts. Few public officials and administrators are eager to back controversial programs that threaten to antagonize potent interest groups. It is certain that real estate and other potentially burdened interests will attempt to block such measures. One need look no further than the increasing signs of an environmental backlash, abetted by the nation's ravenous energy demands,<sup>44</sup> for the stormclouds that lie ahead.

40. This result is known among land economists as the problem of "shifting value." As described by Turvey:

Where land is withdrawn from the area available for building, the value of the prospect of building increment on the remaining land is increased by the actual value of the prospect thus extinguished on the withdrawn land.

Turvey, *Development Charges and the Compensation-Betterment Problem*, 63 *ECON. J.* 299, 300 (1953).

41. See F. BOSSELMAN & D. CALLIES, *supra* note 26, at 24-27; D. HAGMAN, *supra* note 35, at 550 n.k. A glaring example exists in Hawaii where harsh restrictions upon development in that state's "conservation zones" have caused substantial increases in the value of private lands located in "urban zones," districts in which higher densities are permitted as a matter of right. In July 1973, Professor Hagman received a comprehensive planning and research demonstration grant (Project No. California PD-13) from the U.S. Dep't of Housing and Urban Development for a study entitled "Windfalls and Wipeouts: The Quiet Undoing of Land-Use Controls." The study will identify and appraise the extent to which a variety of land use and public finance techniques, including development rights transfer, are likely to distribute the burdens and benefits of public land use regulation more equitably than occurs under existing practice.

42. For a thoughtful analysis of the link between the Fifth Amendment and the "windfall/wipeout" phenomenon, see Wexler, *Betterment Recovery: A Financial Proposal for Sounder Land Use Planning*, 3 *YALE REV. OF L. & SOC. ACTION* 192, 200-04 (1973).

43. See authorities cited note 15 *supra*.

44. The "energy crisis" has already made serious inroads in the environmental gains of recent years. President Nixon has urged the states and cities to relax their air pollution regulations to allow the burning of high-sulfur fuel to avert "a very serious" shortage of heating fuel in 1973-74. *N.Y. Times*, Sept. 9, 1973, § 1, at 1, col. 8. In August 1973, the House and Senate in different forms approved the Trans-Alaskan Pipeline Authorization Act which will expedite construction of the pipeline by, *inter alia*, declaring that the Secretary of the U.S. Dep't of Interior has complied with pertinent requirements of federal environmental legislation and by substantially immunizing the building of the pipeline from further judicial challenge. See 119 *Cong. Rec.* 7216-7309 (daily ed. Aug. 2, 1973).

It cannot be doubted that the American property system has erred in treating land as a commodity for trade, virtually ignoring its status as a community resource. But it is far from clear that a precipitous jump to the emasculation of the compensation requirement is the proper way to remedy the environmental degradation traceable in part to the system's bias favoring private property rights.

That requirement, as interpreted in this century, buttresses two social functions of property that are perilous to ignore. The first is property's role as guarantor of individual liberties, a role affirmed in the *Magna Carta*, by Coke and Blackstone,<sup>45</sup> and by contemporary commentators, such as Charles Reich.<sup>46</sup> Concededly, courts have construed this function overbroadly in sheltering land entrepreneurs from public regulation. But that concession hardly establishes that the latter should be totally deprived of the safeguards afforded by the compensation requirement in instances other than actual physical appropriation. And it is simply wrong to assume that environmental measures will burden fat cat developers while leaving untouched private citizens generally, the class most in need of these safeguards.

The concern for individual liberties should not be dismissed as a star-spangled cloak for anti-environmental behavior. A recent report of the Task Force on Land Use and Urban Growth adverts repeatedly to instances of the "visceral . . . 'damned-if-we-want-urbanization' response"<sup>47</sup> parading under the environmental banner<sup>48</sup> and cautions that the new mood "encompasses a range of negative attitudes that are sometimes confused and even hostile to the needs of our society for new development."<sup>49</sup>

The institution of private property also provides the framework of incentives in response to which land development occurs in the American economy. A blunderbuss assault on the compensation requirement will inevitably weaken that framework, hindering rational decisions respecting commerce in land. Land is neither wholly a social resource nor a commodity for trade. Its hybrid character warrants continued, if somewhat modified, recognition of the entitlement of land entrepreneurs to the security of transactions that the American economic system affords to merchants generally. Despite the advo-

45. For an account of the evolution of this notion from its origins in the *Magna Carta* to the writings of Coke and Blackstone, see TAKING, *supra* note 10, at 53-60, 75-81, 88-92, 100-02.

46. See Reich, *The New Property*, 73 YALE L.J. 733, 771 (1964).

47. USE OF LAND, *supra* note 2, at 60 (quoting an observer's reaction to a population limitation referendum in Boulder City, Colorado).

48. See *id.* at 33, 42, 52-61, 89-94, 100-01.

49. *Id.* at 17.

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cacy of “no-growth” policies from various quarters,<sup>50</sup> moreover, it is certain, as the Task Force on Land Use and Urban Growth documents, that “grow we will.”<sup>51</sup> In light of land’s hybrid character and of the certainty of further growth, it would be tragic to dissipate the opportunities created by America’s “new mood” toward its environment by seeking to clamp restraints on the property system that are inequitable and probably unworkable. Instead, these opportunities should be seized to refashion the property system to accommodate the nation’s environmental needs with a redefined conception of the legitimate economic expectations of those deriving their wealth from land.

One technique for achieving this accommodation is development rights transfer. It stands squarely upon a principle which has been implicit in American land use practice since the *Euclid* decision: The development potential of privately-held land is in part a community asset that government may allocate to enhance the general welfare.

This article is divided into three sections. The first sets forth two applications of the development rights transfer technique and discusses its advantages over conventional resource protection approaches. The second section explores the legal difficulties inherent in viewing private property as partially a community asset. The final section identifies subsidiary issues in the economics and planning realms that are likely to arise when resource protection programs employing the transfer technique are implemented.

### I. Development Rights Transfer: The Concept and Its Operation

The basic cause of the land use conflicts described above is the destruction of the development potential and hence market value of affected sites or areas. The same site cannot support a landmark and a modern office tower, or a nature preserve and a polluting industrial plant. By assuming that the development potential of a site may be used *only on that site*, the property system makes an either/or choice inevitable: the landmark or the tower, the nature preserve or the plant. Depending upon the choice, constitutional challenge or amenity loss is the predictable outcome.

Development rights transfer breaks the linkage between particular land and its development potential by permitting the transfer of that potential, or “development rights,” to land where greater density

50. *Id.* at 50-53.

51. *Id.* at 75.

will not be objectionable.<sup>52</sup> In freeing the bottled-up development rights for use elsewhere, the technique avoids the either/or dilemma because it both protects the threatened resource and enables the owner of the restricted site to recoup the economic value represented by the site's frozen potential. The mechanics of this flexible approach are set forth in two contexts below.

#### A. *Landmark Preservation: The Chicago Plan*

One proposal, the Chicago Plan,<sup>53</sup> illustrates how the transfer technique may be employed to preserve urban landmarks. The city would begin by designating a "development rights transfer district," an area within which the unused development rights of landmark sites could be transferred.<sup>54</sup> The boundaries of this district would be drawn to include the area of the city in which most of its downtown landmarks are concentrated. The purposes of this boundary requirement are threefold: first, the area would probably offer the most lucrative market for these rights because land values are likely to be high; second, the low density landmarks would offset to some extent the increased density permitted on transferee sites by serving as light and air parks sprinkled throughout the area; and third, the area would ordinarily contain a high concentration of the city's public services and facilities, enabling it to handle the redistributed density and concomitant population with greater efficiency than other sections of the city.

Upon the designation of a building as a landmark its owner would be entitled to sell its unused development rights to owners of non-landmark sites within the transfer district. In addition, the landmark owner would enjoy a healthy reduction in his real estate tax bill because his site, shorn of its former rights, would drop sharply in value. He would be allowed to transfer the rights to one or more sites, but increased bulk on individual transferee sites would be held to rigorous ceilings to prevent esthetic blight by buildings that dwarf their neighbors. The landmark owner would then be obligated

52. The literature on development rights transfer is sparse, the principal studies including SPACE ADRIFF, *supra* note 33; Costonis, *The Chicago Plan: Incentive Zoning and the Preservation of Urban Landmarks*, 85 HARV. L. REV. 574 (1972) [hereinafter cited as *Chicago Plan*]; Marcus, *Air Rights Transfers in New York City*, 36 LAW & CONTEMP. PROB. 372 (1971); Note, *Development Rights Transfer in New York City*, 82 YALE L.J. 338 (1972). The transfer technique, as applied in New York City, is further described in Elliott & Marcus, *supra* note 34, at 72-78.

53. See *Chicago Plan*, *supra* note 52. The simplified description that follows in text of the Chicago Plan, as originally devised by the author, is drawn from this article.

54. The amount of transferable rights for any given landmark site is measured by the difference between the interior square footage allowed for a building on that site under present zoning and the square footage that the landmark actually contains.

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to maintain the building in accordance with sound building management practices.

A dual bulk system would regulate densities on nonlandmark sites within the transfer district. Landowners who declined to purchase development rights would be governed by the lower ceilings of the bulk district, the "residual zone," within which their land was located when the transfer district was established. Purchasers of development rights, on the other hand, would enjoy additional density in amounts proportional to their purchases; increases in the value of their land attributable to the extra density would determine the price that they would pay for these rights.

If a landmark owner rejected the transfer option and insisted instead upon a cash award or the right to redevelop his site, the city would be empowered to obtain a preservation restriction by purchasing or condemning the as-yet unused rights. Acquisition costs and other expenses of this program would be funded through a "development rights bank." The bank would serve as a pool for the development rights acquired from recalcitrant owners as well as those donated by owners of other landmarks or transferred from publicly owned landmarks. The city would finance program costs out of a revolving fund created by selling these pooled rights, subject to the same urban design controls that apply to private owners. The bank's start-up funds would derive, in most cases, from sale of the development rights of one or more publicly owned landmarks.

With the transfer of its development rights elsewhere, the landmark property loses its speculative appeal. Because it remains in private hands, the city avoids outlays for fee acquisition, restoration, and maintenance and can continue to tax it but at a lesser rate. The reduced tax yield of the landmark property, however, will be largely offset by the increased taxes paid by owners of the more profitable buildings that go up on transferee sites.

### B. *Environmental Protection: A Proposal for the Phosphorescent Bay*

#### 1. *From Landmarks to Nature Preserves*

Subsequent empirical investigation of the Chicago Plan's feasibility<sup>55</sup> has suggested two refinements which merit review because

55. In June 1972, the U.S. Dep't of Housing and Urban Development awarded an urban demonstration grant to the National Trust for Historic Preservation to examine the legal, economic, and planning feasibility of the Chicago Plan, using the threatened Chicago School of Architecture landmarks in Chicago's Loop as the principal, though

they form a bridge between the application of development rights transfer in the specialized context of urban landmark preservation and its more ambitious use for environmental goals. They also call attention to the need for a fundamental shift in the rationale supporting the technique and require a consideration of the thesis that the development potential of private land ought to be regarded in part as a public resource.

The recommendation that transfer districts be coextensive with areas of landmark concentration is the subject of the first refinement. In some cities districting on this basis could prove unduly restrictive. These areas may already be congested due to poor planning or successful lobbying by real estate interests for excessive bulk allowances.<sup>56</sup> The recommendation could compound faulty urban design in these cases even though the Plan calls only for the *redistribution* of presently authorized bulk, not for the *creation* of further density.<sup>57</sup> The recommendation also may not be workable in cities whose landmarks are widely scattered. Either the entire city must become a transfer district, a suggestion fraught with distressing planning complications, or only a portion of it, in which case landmarks outside the district will not be protected. Furthermore, the recommendation could prevent a city from utilizing other opportunities

not exclusive, focus of the inquiry. The author served as project director of this study, the economic inquiry being conducted by Real Estate Research Corporation of Chicago, Illinois, and the urban design investigation by the Okamoto Associates of San Francisco, California. The results of this study, which are recounted in *Space Adrift*, were not available when the Chicago Plan was initially worked out. Instead, an earlier rudimentary empirical study coauthored by the author with Jared Shlaes, a Chicago realtor, was used. See *Development Rights Transfer: A Solution to Chicago's Landmarks Dilemma* (Chicago Chapter Foundation of the American Institute of Architects & National Trust for Historic Preservation, May 13, 1971).

56. The use of development rights transfer to preserve landmarks in New York City, see NEW YORK, N.Y. ZONING RESOLUTION art. VIII, ch. 4, §§ 74-79, 74-791 to -793 (1971), has been sharply criticized on this ground. See Note, *supra* note 52, at 351-53; Dissent from Resolution CP-21166 of the New York City Planning Comm'n to the Board of Estimate, May 13, 1970 (comments of Planning Board member Spatt on amendment expanding use of the technique). These criticisms are manifestations of a more fundamental problem—the predominant influence of the real estate community in rigging municipal spatial allocation policies to serve its special interests. For a case study demonstrating that bulk zoning in Chicago's central business district is little more than a developer's bonanza, see SPACE ADRIFT, *supra* note 33, at 80-86, 95-104. See generally E. HIGBEE, *THE SQUEEZE: CITIES WITHOUT SPACE* (1960); S. TOLL, *ZONED AMERICAN* (1969).

57. This distinction can be illustrated by comparing zoning bonuses with development rights transfers. In affording the developer a "bonus" of additional density in return for an amenity such as a plaza furnished at the developer's expense, the community increases the amount of density in the residual zone by the amount of the bonus space. But no such increase occurs when a development rights purchaser constructs a larger building because the augmented bulk of his building is offset by a corresponding decrease in the bulk permitted on the landmark site from which the rights are transferred. See notes 33 *supra*, 203 *infra*. See generally *Chicago Plan*, *supra* note 52, at 575-78, 594-96.

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that the transfer technique offers for improved urban design including, for example, dispersal or concentration of selected land uses, establishment of high rise elements at defined locations, and optimization of transit system use.<sup>58</sup> If the areas within which additional density is desirable were some distance from the city's landmarks, the Plan's subsidiary urban design advantages could not be realized. Cities may therefore consider the alternative of mapping transfer districts independently of areas of landmark concentration.<sup>59</sup>

The second refinement relates to the consequences of the Plan's adoption for existing density levels within areas that are selected as transfer districts. Under the dual bulk system described earlier, the density prescribed for nonlandmark sites either remains unchanged or, if their owners purchase development rights, actually increases. Density would not be deliberately skewed downward, whether to create a market for the rights or to overcome urban design complications that may result from density transfers. The dual bulk system is thus essentially an instance of density zoning, which prescribes a maximum amount of bulk for an area as a whole and permits developers to concentrate or disperse that density on individual lots within the area in accordance with flexible site planning criteria.<sup>60</sup> Under this conception the total density for the entire transfer district is fixed by the bulk regulations of the residual zones included within the district's boundaries. Analogous to clustered subdivisions<sup>61</sup> or planned unit developments (PUD's)<sup>62</sup>—also examples of density zoning—the Plan treats the overall district as a single tract, permitting the potential density of transferee sites to increase as that of landmark sites decreases.

Pragmatic considerations dictated the decision to base the Chicago Plan on the density zoning rationale. Politically, the Plan's chances for adoption would plummet if it called for reduction of existing densities in the city's prime development area. America's cities are

58. See *SPACE ADRIFT*, *supra* note 33, at 50, 136.

59. *Id.* at 50, 51.

60. See *Chicago Plan* 620-28. Traditional bulk zoning, on the other hand, allocates density on a lot by lot basis and does not permit the maximum density on any lot within a bulk district to exceed that of any other lot there.

61. Cluster zoning ordinances offer the developer a trade: if he agrees to devote a prescribed percentage of his subdivision tract to a community use, such as a park or schoolground, he is authorized in return to build the same number of residential units on the remaining portion of this tract that he formerly could have built on the tract as a whole. See URBAN LAND INSTITUTE, *NEW APPROACHES TO RESIDENTIAL LAND DEVELOPMENT* (Tech. Bull. No. 40, 1961); W. WHYTE, *CLUSTER DEVELOPMENT* (1964).

62. In addition to offering the same flexibility regarding density allocation as cluster ordinances, PUD zoning ordinances relax building type and use restrictions. See Goldston & Scheuer, *Zoning of Planned Residential Developments*, 73 HARV. L. REV. 241 (1959); *Symposium, Planned Unit Development*, 114 U. PA. L. REV. 1 (1965).

addicted to chronic growth fantasies<sup>63</sup> and municipal politicians are loath to take on the banks, chambers of commerce, and other boosters of bigness in their cities.<sup>64</sup> Given the relatively small number of landmarks and hence limited amount of density to be transferred in any city, moreover, neither the Plan's marketing nor its urban design requirements are likely to demand recourse to this controversial approach.

From a legal perspective there seemed even less reason to embrace deliberate downzoning. Density zoning has been firmly endorsed by the courts since its inception two decades ago,<sup>65</sup> but they have not spoken to the legitimacy of deliberately downzoning or its equivalent, refusing to upzone an area,<sup>66</sup> in order to buttress the market for development rights or to avoid the urban design complications. Judicial approval of these practices would be tantamount to endorsement of the principle that the development potential of private property is in part a community resource. While the principle merits judicial approval, the density zoning rationale offered a less risky, though fully adequate, foundation for the original version of the Plan.

It is impossible to sidestep this problem, however, if transfer districts are mapped independently of areas of landmark concentration. Consider, for example, a proposal that the residents of the Historic Georgetown District in Washington, D.C., advanced to facilitate restoration of the waterfront bordering the District.<sup>67</sup> They were distressed with the deterioration of the waterfront into an industrial slum and with a zoning ordinance which permitted large buildings that would destroy the District's dimensional scale. Furthermore, the construction of Washington's new Metro subway system had created pressures for removal of the ten-story height limit that Congress imposed on the city in 1910 to insure that the Capitol dominates

63. Chicago's recently proposed comprehensive plan has been described as a "super plan." *Chicago Sun Times*, June 15, 1973, at 4, col. 1.

64. See note 56 *supra*.

65. See *Chicago Plan*, *supra* note 52, at 623-25; notes 189-90 *infra*.

66. Because changing the status quo is usually more productive of troublesome legal consequences than leaving it unchanged, the suggested equivalence of a deliberate downzoning of existing densities and a deliberate refusal to upzone them may appear anomalous. The subject of legal challenge, however, would not be these actions per se, but the legitimacy of the objectives that they are intended to serve. As the discussions of the Chicago Plan, p. 86 *supra*, and of the Georgetown proposal, text accompanying note 67 *infra*, make clear, the respective actions fulfill identical objectives, namely, creation of a market for development rights and avoidance of urban design complications resulting from density transfers. Hence, a determination that these objectives fall outside the scope of the zoning or, more largely, the police power would seem as fatal when a community refuses to upzone as when it deliberately downzones for this purpose.

67. See Von Eckardt, *Getting Charm and Height*, *Wash. Post*, Feb. 27, 1971, § C, at 1, col. 5; *Chicago Plan*, *supra* note 52, at 596 n.74.



the skyline. Accordingly, the Georgetowners urged that presently unused development rights along the waterfront be transferred for use downtown in high density development adjoining the Metro route. This strategy would provide funds for waterfront restoration, prevent high density development there, avoid urban design problems that could arise if this density were transferred to other sections of predominantly low density Georgetown, and encourage efficient transit system use by channeling additional density along the Metro route.

But this plan also anticipates that densities permitted as of right along the Metro would be set at levels lower than those that would have been fixed if no rights were to be transferred there. Otherwise, developers might have no incentive to purchase the transferred rights. Nor would the low density amenity—the restored waterfront—be located within the area of redistributed density. The balance of high density for low that occurs when transfer districts overlap areas of landmark concentration would therefore be sacrificed.

Adapting the transfer technique to the larger task of environmental protection will require that transfer districts be located outside of environmentally sensitive areas and that densities permitted as of right in the districts be deliberately skewed downward. Both features appear in the following transfer proposal which takes as its focal point Puerto Rico's embattled Phosphorescent Bay.

## 2. *Salvation for the Dinoflagellates*

In common with other ecologically fragile areas, the Phosphorescent Bay faces the spectre of grave harm through high density development. Highway construction and other capital improvements have rendered its formerly remote location accessible and the prospect of additional jobs for the island's underemployed work force makes commercial development attractive to its political leaders. Soaring land values, moreover, have made the cost of public acquisition of the Bay lands prohibitive and rock bottom real estate taxes encourage owners of these lands to hold their property off the market in anticipation of windfall profits. The Bay, in short, epitomizes the threatened environmental resource whose plight cannot be remedied by recourse to conventional land use controls or public financing techniques.

Development rights transfer may substantially alleviate the threat which economic forces pose to the Bay. The proposal set forth here has been conceived without the benefit of planning and economic studies such as those used in formulating and refining the Chicago

Plan<sup>68</sup> and is therefore tentative.<sup>69</sup> At a minimum, however, it serves as a useful point of departure for subsequent discussion of the legal, planning, and economic issues that must be confronted in employing the transfer technique for environmental protection.

The proposal proceeds from two givens: the general pattern of development in Puerto Rico and the existing regulatory powers of the Puerto Rico Planning Board. Crudely defined, Puerto Rico's land mass comprehends three types of areas: urban, nonurban, and transitional. The principal urban areas are the coastal cities containing most of the population and industry. Nonurban sections include the rugged interior and the coastal sections lying between the built-up areas where most of the island's environmentally sensitive locations are found. Transitional areas surround the cities and are imminent targets for residential and commercial development.

Although largely the brainchild of Rexford Tugwell some thirty years ago, the Puerto Rico Planning Board<sup>70</sup> was given powers which anticipate remarkably well the trend toward a more influential planning role for regional and state agencies. The board, for example, exercises its powers throughout the island, not simply within unincorporated areas.<sup>71</sup> Moreover, it zones only the land within urban areas;<sup>72</sup> development in other areas is subject to case by case approval.<sup>73</sup> In addition, the board must prepare an island-wide comprehensive plan,<sup>74</sup> which may address the subject of natural resource protection<sup>75</sup> as well as other land use and social welfare concerns of the island.

68. See note 55 *supra*.

69. In early 1973, the author and Real Estate Research Corporation received an invitation from Francisco J. Blanco, executive director of the Conservation Trust of Puerto Rico to investigate the possibility of employing development rights transfer to protect Puerto Rico's dwindling environmental resources. The background information concerning Puerto Rico is largely derived from preliminary interviews conducted by the author and Robert S. DeVoy, senior vice-president, Real Estate Research Corporation, with Puerto Rican governmental officials, lenders, developers, and realtors, and from the publication, Puerto Rico Planning Board, *Land Use Policies: A Draft for Discussion* (1970). The author gratefully acknowledges Messrs. DeVoy and Blanco's many useful comments on the Puerto Rico proposal.

70. See Puerto Rico Planning and Budget Act, P.R. LAWS ANN. tit. 23, §§ 1-225 (Supp. 1972). For regulations implementing the Act, see RULES AND REGULATIONS OF PUERTO RICO tit. 23, §§ 1-225 (1973).

71. See P.R. LAWS ANN. tit. 23, § 6a (Supp. 1972).

72. See *id.* § 9(1). Zoning regulations may also be applied to lands outside of urban areas "when such application serves to control urban development by preserving [these lands] for agricultural purposes." *Id.*

73. See *id.* §§ 9(3), 25; RULES AND REGULATIONS OF PUERTO RICO tit. 23, §§ 10-1 to -451 (1973).

74. See P.R. LAWS ANN. tit. 23, §§ 6a(2), 9 (Supp. 1972).

75. See *id.* § 6a(2). The Board is also authorized to employ its zoning power to preserve agricultural land and provide greenbelts around urban areas and along highways. See *id.* § 9(1). Whether these sections would permit the Board to create the Planned Environmental Zones referred to subsequently in text is not clear. Cf. *Land Use Policies: A Draft for Discussion*, *supra* note 69, at 69 (questioning authority of the Board under existing legislation to create "conservation districts").

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The Phosphorescent Bay and the island's other environmentally sensitive resources could be safeguarded in the following manner. First, the planning board would prepare an inventory of the island's known environmentally sensitive areas, much as the municipal landmarks commission inventories landmarks under the Chicago Plan. Second, the board would designate these areas as Protective Environmental Zones (PEZ's) and prescribe criteria and related procedures for designating other areas in the future. Development within a PEZ that threatens the protected resource would be flatly prohibited. Other forms of development, however, would be permitted if they comport with applicable planning criteria of a nonenvironmental nature. Regulating the PEZ in this manner would assure protection of the resource and would minimize governmental interference with private ownership. Permitting a broad range of alternative uses short of those threatening environmental harm, moreover, would avoid effective challenge to the PEZ designation as a taking in many cases, and it would reduce the amount of the condemnation award that might be constitutionally or statutorily required in others.<sup>76</sup>

Third, property owners within a PEZ would be permitted to challenge the PEZ designation and regulations before the board.<sup>77</sup> The designation and regulations would remain unchanged if the board concluded that they were not constitutionally objectionable or, in the alternative, that they permitted a return in excess of the minimum prescribed by statute. If it found the designation or regulations defective, the board could opt to compensate the owners, measuring the award either by the difference between the highest return that is possible under the uses permitted in the PEZ and the minimum return that is required to satisfy constitutional requirements, or by the difference between actual return and that fixed by statute. The board could also cure the constitutional objection by appropriately

76. See pp. 122-23 *infra*.

77. For examples of comparable procedures under existing law, see New York City Landmarks Ordinance, NEW YORK, N.Y. ADMIN. CODE ANN. ch. 8-A, §§ 207-1.0q, 207-8.0 (1971); Massachusetts Wetlands Law, MASS. GEN. LAWS ANN. ch. 130, § 105 (Supp. 1971). The New York ordinance enables an owner of a designated landmark building to compel either the lifting of formal landmark status—and its attendant restrictions on the building's alteration or demolition—or public acquisition of the building if he demonstrates through administrative proceedings that the landmark property is unable to earn a reasonable return. The Massachusetts statute similarly empowers the owner of land within a designated wetlands area to secure either compensation or removal of the wetlands designation and related use restrictions if the latter are deemed confiscatory. The owner, however, must seek relief before a court, not an administrative agency. For an account of the statute and its administration, see F. BOSSELMAN & D. CALLIES, *supra* note 26, at 205-16.

liberalizing the restrictions.<sup>78</sup> Decisions of the board would, of course, be subject to judicial review.

Finally, the board would fund compensation awards through sale of the claimant's otherwise frozen development potential for use in transfer districts located elsewhere on the island. Although these districts would serve the same marketing function as those called for under the Chicago Plan, they would differ in four key respects. First, they would not be located in a single city or in one of its sections; rather, they would be found throughout the island, principally in transitional areas but possibly in selected urban areas as well.<sup>79</sup> Second, because of this locational difference, the medium of transfer would not be floor area as under the Chicago Plan, but some other form of liberalized development control proportioned in dollar value to the frozen potential of the restricted parcel. Using floor area as the medium of exchange would not be feasible in Puerto Rico because transfers are more likely to occur between dissimilar districts, such as rain forests and residential zones.

Third, the two refinements to the original version of the Chicago Plan—mapping transfer districts independently of the protected resource and skewing downwards the residual densities within transfer districts—would probably be employed routinely in Puerto Rico. The risk that high density poses for ecologically fragile resources will often require that it be removed from PEZ's altogether. Density zoning, under which bulk is redistributed on a physically contiguous land area, may not be feasible when transfer districts are located far from the protected resource. These differences can be illustrated by comparing the transfer of density from Bay lands to a residential subdivision forty miles away with the transfer of 60,000 square feet of floor area (approximately two stories) from a landmark in a central business district to a site two blocks away. If residual densities within the subdivision already equal the maximum that the prevailing market for new construction would absorb and that substantive planning criteria justify, the transferred density would not only be unsalable but, if used within the subdivision, could cause congestion and poor design results as well. Neither problem would

78. A similar approach is advocated in Bosselman, *The Third Alternative in Zoning Litigation*, 17 ZONING DIGEST 113, 116-17 (1965); ALI MODEL LAND DEVELOPMENT CODE art. 9-111(3) (Tent. Draft No. 3 (1971)).

79. Sections of Puerto Rico's cities are underdeveloped, causing inefficient usage of the island's small land mass. See Land Use Policies: A Draft for Discussion, *supra* note 69, at 48-51. Targeting these areas as transfer districts and encouraging their redevelopment to more appropriate density levels would produce more efficient urban development patterns.

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arise under the Chicago Plan because the additional two stories of the landmark site would merely be added to a nearby site zoned, perhaps, for forty stories and surrounded by predominantly high-rise construction.<sup>80</sup>

Finally, authority to transfer density would be vested solely in the planning board rather than shared with property owners in PEZ's. By allowing transfers to major development areas throughout the island, the Puerto Rico program enhances the probability that development rights transfer can produce beneficial planning results in addition to providing resource protection. It has been observed, for example, that key areas of certain Puerto Rican cities are underbuilt, contrary to the island's preference for compact rather than sprawling development.<sup>81</sup> Enabling the planning board, in its discretion, to transfer density to these areas would resolve this problem with greater certainty than if private owners also enjoyed the transfer option. Bookkeeping under the Puerto Rican program, moreover, would be complicated by the wider geographical scope of the transfers and by the nonhomogeneity of the types of development occurring on transferor and transferee sites. Exclusive planning board administration of density transfers would seem the more advisable course for dealing with these complications as well.

### C. *Development Rights Transfer: A Positive Prospectus*

The role development rights transfer will play as a land use and public financing technique in coming years is not easily assayed. Conceptually, the device is in its infancy. It has not as yet received the imprimatur of the courts.<sup>82</sup> Despite the favorable conclusions of a feasibility study addressing its use for landmark preservation<sup>83</sup> and

80. For a projection of the urban design consequences of density transfers within high-density commercial and residential zones, see SPACE ADRIFT, *supra* note 33, at ch. 5.

81. See note 79 *supra*.

82. Court challenges involving two New York City development rights transfer programs may soon shed some light on judicial attitudes toward the technique. In the first action the Penn Central Company, as owner of Grand Central Station, a designated landmark, has attacked the constitutionality of the New York City Landmarks program, which includes provisions expressly tailored to relieve economic pressures threatening the landmark by permitting the transfer of its unused development rights to nearby lots. See NEW YORK, N.Y. ZONING RESOLUTION art. VII, ch. 4, §§ 74-79, 74-791 to -793 (1971). An account of the litigation may be found in USE OF LAND, *supra* note 2, at 150-52. An action has also been commenced challenging the constitutionality of a second measure, NEW YORK, N.Y. ZONING RESOLUTION art. IX, ch. 3, §§ 93-00, 93-01 to -075 (1972), which offsets the prohibition of development of Manhattan's Tudor Parks by permitting the transfer of their development rights to other lots within a "Special Park District." The measure is further described in Elliott & Marcus, *supra* note 34, at 76-78.

83. See note 55 *supra*.

some conspicuous successes in a variety of limited contexts,<sup>84</sup> it cannot lay claim to extensive testing in the marketplace. A variety of stubborn planning and economic questions remain unresolved. Despite these uncertainties it may not be premature to catalogue the major advantages of development rights transfer.

### 1. *Constitutional and Political Advantages*

Development rights transfer promises resource protection without calling either for drastic inroads upon settled constitutional principles or for public programs that are politically unfeasible. For constitutional purposes landowners with actionable interests include owners of the protected resource and property owners within transfer districts. Resource owners will be duly compensated for the curtailment of their development prerogatives under the program. The economic return of landowners within transfer districts may be reduced, of course, but the magnitude of the reduction will not be greater than, and typically will fall far short of, that which courts have routinely sustained under the police power since the *Euclid* decision.<sup>85</sup>

84. Applications or pending uses of the technique include the following: preservation of the Old Locust Grove Farmhouse in suburban Montgomery County, Md., see *SPACE ADRIFT*, *supra* note 33, at 43; preservation of the Heurich Mansion, a Washington, D.C., landmark, *id.* at 41; preservation of Amster Yard, Manhattan, see Huxtable, *City Landmark Gets a Chance for Survival*, N.Y. Times, Aug. 2, 1970, § 8, at 1, col. 1; preservation and refurbishing of historic buildings in Manhattan's Special South Street Seaport District, see Horsley, *Air Rights Deal Saves South St. Seaport*, N.Y. Times, July 30, 1973, at 31, col. 3; protection of agricultural land in Suffolk County, New York, see SOUTHAMPTON, N.Y. ZONING ORD. NO. 26, § 2-4-30 (1972), discussed in Chavooshian & Norman, *Transfer of Development Rights: A New Concept in Land Management 7* (Rutgers University n.d.). State legislatures have also begun to show an interest in the technique. In 1971, for example, the Illinois legislature approved an extensive revision of that state's preservation enabling act prepared by the author to permit the use of development rights transfer in aid of historic preservation. See Ill. Pub. A. No. 77-1372 (Ill. Leg. Serv., Aug. 31, 1971), in part codified at ILL. REV. STAT. ch. 24, § 11-48.2-1A, in part amending ILL. REV. STAT. ch. 24, § 11-48.2-2-6 (1969). In January 1972, Senator William J. Goodman introduced a bill (Senate Bill No. 252, 1972) in the Maryland Senate authorizing local governments to create transfer districts in which development rights could be sold. See Rose, *From the Legislatures*, 1 REAL ESTATE L.J. 276 (1973). A transfer bill has also been prepared for introduction in the New Jersey legislature in 1973 that would employ the technique to preserve New Jersey's prime agricultural land. Letter from B. Chavooshian, Land Use Specialist and Program Advisor for Resource Management, Rutgers University, to the author, July 16, 1973.

Federal interest in the transfer concept has been underscored by Secretary of the Interior Rogers C.B. Morton who has proposed a demonstration program under which 12 Chicago School of Architecture landmarks would be brought under the protective umbrella of a "National Cultural Park" to be jointly administered by the National Park Service and the city. In return for enactment of the Chicago Plan, p. 86 *supra*, Chicago would receive the federal financial assistance necessary to seed the development rights bank and to cover related costs in the administration of the Park. See *SPACE ADRIFT*, *supra* note 33, at 62; Huxtable, *A Plan for Chicago*, N.Y. Times, April 15, 1973, § 2, at 23, col. 3.

85. See p. 108 *infra*.

Adding compensation as a sweetener to the transfer package does not guarantee that the proposed resource protection programs will escape political opposition. Until quite recently, in fact, it may have intensified resistance because it immunizes from constitutional attack measures that severely dilute private control over the use of land. Increasingly, however, the public outcry against environmental despoliation as a result of land development is being forcefully brought to the attention of courts and legislatures, which in turn react by decreeing or enacting alternatives<sup>86</sup> that the real estate community will consider more onerous than transfer programs.

The portents for the economic feasibility of thoughtfully conceived transfer programs are favorable. Simulated application of the Chicago Plan under the economic conditions prevailing in the Chicago real estate market in 1971, for example, produced auspicious results.<sup>87</sup> Favorable response to other forms of incentive zoning, such as zoning bonuses and cluster and PUD zoning, is also encouraging.<sup>88</sup> At a minimum that response demonstrates the capacity of investors in land development to adapt to a variety of developmental ground rules through the pricing mechanism and other means, provided that the rules are clearly spelled out in advance and are evenhandedly administered. Nevertheless, existing voids in land economics research and in market experience caution against facile conclusions respecting the transfer technique's economic impact on resource owners and landowners within transfer districts.

## 2. *Recoupment of Governmentally Created Values in Private*

Development rights transfer promises to redress the most grievous consequence of the American property system's bias in favor of private property rights: government's failure to recoup for public use an appropriate measure of the values that it creates in privately held

86. These include the public trust doctrine, resurrected principles of venerable origin affirming public rights in riparian lands, population and building height limitation referenda, 60-acre lot size minima, environmental impact statement requirements, building permit moratoria, and governmental refusals to extend public services. See *TAKING*, *supra* note 10, at 3-50; *USE OF LAND*, *supra* note 2, at 33-73. Developers increasingly must also contend with citizen-sponsored comprehensive plans, sophisticated conservation organizations armed with batteries of attorneys spoiling for a fight, and recurring media portrayals of developers as flinty-eyed bad guys thirsting for the almighty buck. By permitting the transfer of development from ecologically-sensitive areas to locations that are environmentally unobjectionable, the transfer technique offers developers a strategy which assures them a fair return on their investment while minimizing environmentally-based opposition to their development programs.

87. See *SPACE ADRIFT*, *supra* note 33, at chs. 3, 4.

88. See *NEW ZONING*, *supra* note 27; W. WHYTE, *supra* note 61; *Chicago Plan*, *supra* note 52, at 575-77.

land.<sup>89</sup> This failure runs through virtually all of the system's traditional recoupment mechanisms, including real estate taxation,<sup>90</sup> special assessment,<sup>91</sup> diminution of eminent domain awards through the doctrine of special benefits,<sup>92</sup> and recapture of the cost of public programs through resale of interests acquired by the government.<sup>93</sup> It has also undoubtedly contributed to the lack of experimentation in the United States with public land banking programs.<sup>94</sup> Commentators of a variety of persuasions with respect to economic in-

89. For an original discussion of possible methods of recoupment other than development rights transfer, see Wexler, *supra* note 42, at 206-13.

90. Assaults upon the real estate tax as inefficient and inequitable are endemic in public finance literature. See, e.g., H. GROVES, FINANCING GOVERNMENT 69 (6th ed. 1964); Rawson, Property Taxation and Urban Development: Effects of the Property Tax on City Growth and Change 10 (Urban Land Institute Research Monograph No. 4, 1961); Browning, *Land Value Taxation: Promises and Problems*, 29 J. AM. INST. PLANNERS 301, 302 (1963).

91. In principle, a special assessment finances public improvements by returning to government amounts equal to increases in value accruing to private property benefited by the improvements. See authorities cited note 139 *infra*. In practice, government is usually shortchanged. Restrictive administration or judicial interpretation of the hazy distinction between "general" and "special" benefits (increases in value resulting from the former not being assessable against the benefited parcel, see notes 139-42 *infra*) excludes from consideration land values originating with the improvement. The same result obtains when, as frequently occurs, specially benefited land is excluded from an improvement district. Even when a parcel is conceded to be subject to assessment, moreover, appraisal procedures often do not fully credit government's contribution to its value or do so on a regressive basis. Windfalls may be enjoyed by private owners if the increase in value exceeds the cost of the improvement. Finally, special assessment legislation typically mandates that only a fraction of the cost of an improvement may be recovered through assessments, leaving the remainder to be returned through general tax revenues. See Spengler, *The Increment Tax versus Special Assessments* (pts. 1-3), 20 BULL. NAT'L TAX ASS'N 258 (1935), 21 BULL. NAT'L TAX ASS'N 14, 240 (1936); Wexler, *supra* note 42, at 196-98.

92. This doctrine is founded on the view that the amount government must pay when it condemns less than a landowner's entire parcel should be diminished by any appreciation in the value of the remainder attributable to the public improvement. See 3 P. NICHOLS, THE LAW OF EMINENT DOMAIN § 8.6206 (3d rev. ed. 1965). See generally Haar & Hering, *Determination of Benefits in Land Acquisition*, 51 CALIF. L. REV. 833 (1963). But its effectiveness has been blunted in two regards. First, judicial confusion attending the distinction between "general" and "special" benefits has eroded the efficiency of the device as a recoupment mechanism. See *id.* at 868-69. Second, many jurisdictions do not permit conceded special benefits to be offset against the award for the parcel taken, set-off only being allowed against damages to the parcel not taken. See *id.* at 879. Should these benefits exceed the latter, of course, they provide a windfall for the property owners.

93. Responding to the nation's deep-seated laissez faire traditions, the courts have dealt uneasily with public programs in which government intervenes, as entrepreneur, in a formerly private economic sphere. Such intervention is patent when, to finance the programs, government resells or leases the interest that it has condemned, as in the case of urban renewal, trade center, navigation, and other capital projects during this century. For an account of the grudging judicial stance toward the recoupment feature in some of these programs as well as the legal pitfalls that confront others, see *Chicago Plan*, *supra* note 52, at 605-11. See generally R. CUSHMAN, EXCESS CONDEMNATION (1917); Hodgman, *Air Rights and Public Finance: Public Use in a New Guise*, 42 S. CAL. L. REV. 625 (1969).

94. For the impressive support that has existed among American land use commentators on behalf of land banking, see authorities collected in ALI MODEL LAND DEVELOPMENT CODE, SPECIAL NOTE ON LAND BANKING 50 (Tent. Draft No. 5, 1973). But see S. Kamm, *Land Banking: Public Policy Alternatives and Dilemmas* (Urban Institute Paper No. 112-28, 1970).



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stitutions have despaired of government's laxity in its recouplement practices.<sup>95</sup>

By regarding the development potential of private property as in part a community resource, on the other hand, development rights transfer enables government to share in the gains occasioned by rising land values. Eminent domain awards paid to owners of protected resources will be discounted to eliminate windfalls attributable to governmental rather than private initiative. Marginal downward revisions in the development potential of lands within transfer districts will afford the funds required by these awards; these revisions will be proportioned to what land economists have long regarded as the "unearned increment" in the value of private property.<sup>96</sup>

Development rights transfer, in short, looks squarely to the land development process itself for revenues to protect the community from the unfortunate consequences that may fairly be attributed to that process. Rather than advocating an indiscriminate assault on the compensation principle, it apportions the burdens and benefits of land development on the basis of a coherent, socially defensible policy.

### 3. *Resolution of the Windfall/Wipe-out Dilemma*

The random impact of land use regulations within the private sector is another source of grave imbalance in the nation's property system. As the trend toward the adoption of stringent resource protection programs increases, windfalls and wipe-outs<sup>97</sup> threaten to become endemic. To avoid this unfortunate result a balancing mechanism should be built into these programs that cancels out the unjustified gains and losses in the private sector. Under development rights transfer programs owners of restricted resources are not wiped out, but are duly compensated, and the windfall of increased land values that property owners within transfer districts might other-

95. See, e.g., J. COMMONS, INSTITUTIONAL ECONOMICS 811-18 (1934); H. GROVES, FINANCING GOVERNMENT 96, 357 (6th ed. 1964); E. SELIGMAN, ESSAYS IN TAXATION 83, 491-539 (10th ed. 1925); Haar, *The Social Control of Urban Space*, in CITIES AND SPACE 218 (L. Wingo ed. 1963); Wicksell, *A New Principle of Just Taxation*, in CLASSICS IN THE THEORY OF PUBLIC FINANCE 112-15 (R. Musgrave & A. Peacock eds. 1968); Eliot, *A Progressive Tax on Bare Land Values*, 4 CITY PLANNING 83 (1928); Spengler, *The Taxation of Land Value Increments*, 17 J. LAND & PUB. UTILITY ECONOMICS 54-58 (1941); Wenler, *supra* note 42, at 200-06; cf. P. BARKLEY & D. SECKLER, *supra* note 13, at 179.

This lacuna in the nation's property philosophy accounts for the paradox that, after creating land values, the government is often stymied by them when it seeks to regulate private land use decisions in the public interest. See pp. 90-92 *supra*. Thus, "[s]peculators are subsidized by our system of public improvements for private profit." 18 HOUSE AND HOME, Aug. 1960, at 144.

96. See authorities cited note 95 *supra*.

97. See p. 83 & note 41 *supra*.

wise enjoy in consequence of these restrictions is offset by the payments they must make for additional development rights.

#### 4. *Closing the Externalities Loop*

A negative externality is defined by economists as a cost of a particular enterprise that is not borne by the entrepreneur but is shifted to the community.<sup>98</sup> With the imperfect public understanding of environmental problems that preceded publication of Rachel Carson's *Silent Spring* and other influential works of ecological scientists, the externalities of land development were poorly grasped both popularly and in the law. The variety and geographic extent of environmental damage caused by land development was not recognized. Piecemeal perception of both factors explains in part the misconceived bifurcation of development posited by the harm/benefit rationale.

An important consequence of this recently acquired knowledge is a greater awareness of the negative externalities that attend all forms of land development.<sup>99</sup> Indeed, some commentators have identified as the "underlying cause" of the environmental dilemma "an absence of rules which make it worthwhile for perpetrators . . . to count as their own costs the costs they impose on others."<sup>100</sup>

One function of law is to return the cost of an externality to its creator when the harm is deemed sufficiently grave in its societal impact. In part, recent decisions,<sup>101</sup> which in their quest for environmental quality have put in issue the continued vigor of the compensation requirement, are motivated by this objective. The same goal animates development rights transfer, which "closes the externalities loop" by charging the land development process with costs that formerly, and improperly, fell upon the community in the form of environmental depredation—or of expensive remedial programs to overcome it.

98. See P. BARKLEY & D. SECKLER, *supra* note 13, at 98-122. See generally K. KAPP, *THE SOCIAL COSTS OF PRIVATE ENTERPRISE* (1950); Coase, *The Problem of Social Cost*, 3 J. LAW & ECON. 1 (1960).

99. An appreciation of the impact of discrete development decisions upon the environment is apparent in the environmental impact statement requirements of federal and state legislation. See, e.g., National Environmental Policy Act, 92 U.S.C. § 4332 (1970); CAL. PUB. RES. CODE § 21100 (West Supp. 1973). By insisting that the consequences of proposed development be scrutinized from a broad space-time perspective and in relation to less harmful alternatives, this requirement conflicts directly with the crude, atomistic perception of the environment that has shaped so much of the Anglo-American system of property law. See generally *USE OF LAND*, *supra* note 2, at 195-208 (describing the requirement as the "[b]est [m]echanism [s]o [f]ar" for protecting environmental quality, *id.* at 195).

100. P. BARKLEY & D. SECKLER, *supra* note 13, at 100.

101. See note 10 *supra*.

### 5. *Universality of Application*

Development rights transfer is an extraordinarily flexible tool for resource protection which can be adapted to protect virtually any low density resource endangered by market forces that press for higher densities. Whether it will be economically feasible in any given context depends principally upon two factors: market demand for new construction within the transfer district and zoning controls that limit the residual density to levels that fall short of these demands.<sup>102</sup> The first can be anticipated whenever low density resources are imperiled by market forces because it is these forces that have placed the resources in peril; moreover, healthy construction markets which can serve as sales areas for the transferred density can presumably be found elsewhere within the jurisdiction where the resource is located. The second factor depends solely upon action by the pertinent legislative authority, assuming that the allocation of private development potential in the interest of resource protection is a proper exercise of governmental power.

### 6. *Improved Physical Planning*

Development rights transfer can also serve as a catalyst to improved land use planning. The Georgetown proposal, for example, demonstrates how cities can employ transfers to encourage more efficient transit system use.<sup>103</sup> In a regional context transfers can function to channel population to predetermined locations, such as those at the metropolitan fringe where extensive capital improvement programs are proposed or underway. But the most attractive of these subsidiary advantages is the impetus that transfers provide for more thoughtful, comprehensive land use planning by the city, region or state. Transfers should not occur within a planning vacuum if frustration of other planning goals of equal or greater priority than resource protection is to be avoided. Thus, built into the Chicago Plan and the Puerto Rico proposal are extensive planning inquiries: inventories of the number, location, and character of the pertinent low density resource, selection as transfer districts of areas in which additional or redistributed density can be efficiently absorbed, and identification of zoning trade-offs, such as reduced lot size, extra floor area, or tower coverage, that will be allotted to development rights purchasers.

102. For a detailed evaluation of the economic variables affecting the marketability of development rights, see *SPACE ADRIFT*, *supra* note 33, at ch. 4.

103. See p. 90 *supra*. Other subsidiary planning advantages of the transfer technique are recounted in *SPACE ADRIFT* 50, 136.

### 7. *Improved Economic Planning*

Development rights transfer would also respond to the economic questions often left unanswered by restrictive land use programs. In state sensitive area acts, for example, Cassandra-like prefaces warning of impending environmental doom and operative clauses calling for the designation of loosely defined sensitive areas are found cheek by jowl with blunt injunctions against uncompensated takings.<sup>104</sup> They fail to offer concrete guidance as to the cost of these resource programs, the source of payments, and the reach of the ban against uncompensated takings.<sup>105</sup>

Legislative silence perpetuates the imbalances in the American property system and virtually guarantees that stringent resource protection programs will be fought by influential private interests whose support or acquiescence is vital to the success of many of these programs. Further, the buck is improperly passed to the courts, which are ill-suited to deal knowledgeably with the complex economic issues that review of these programs necessarily entails. Hence, an even greater disarray among judicial approaches to the taking issue can be anticipated than that which pervades the pre-1970 decisions.<sup>106</sup>

While transfer programs of the type suggested in this article certainly do not provide all the answers, they at least ask the right questions. Reasonable estimates of the cost, for example, of preserving Puerto Rico's ecologically fragile areas or Chicago's landmarks<sup>107</sup> can be derived from an inventory of their number and type and from projections of the costs attending the acquisition of their development rights. The extent to which these costs can be offset by density transfers can be gauged by market studies fixing the probable value of development rights within proposed transfer districts.<sup>108</sup> With this data the jurisdiction can make realistic judgments of what it can afford and of the relative costs and benefits of alternative priorities

104. See, e.g., Maryland Wetlands Act, MD. ANN. CODE art. 66C, § 725 (Supp. 1972); Virginia Wetlands Act, VA. CODE ANN. §§ 62.1-13.6-13.13(2)(a) (Supp. 1973).

105. A notable exception to the observation in text has occurred in Florida where citizens in 1972 approved a bond issue for \$240 million for the purchase of environmentally endangered lands. See *USE OF LAND*, *supra* note 2, at 65-66.

106. See, e.g., Dunham, *Griggs v. Allegheny County in Perspective: Thirty Years of Expropriation Law*, 1962 SUP. CT. REV. 63, 103; Kusler, *supra* note 3, at 3 n.4; Van Alstyne, *Taking or Damaging by the Police Power: The Search for Inverse Condemnation Criteria*, 44 S. CAL. L. REV. 1, 14 (1971).

107. For a detailed simulation of these procedures as applied to the preservation of four Chicago School of Architecture landmarks, see *SPACE ADRIFT*, *supra* note 33, at ch. 3.

108. For an exposition of the relevant appraisal techniques and an illustration of their use to determine market demand for development rights within Chicago's Loop area, see *id.* at ch. 4.

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among its land use goals. These judgments should assist it in formulating resource programs that both allay the justified concerns of affected property owners and enable the courts to fashion norms that furnish security of transactions for those engaged in commerce in land.

### II. Development Rights Transfer: A Legal Rationale

To the traditionalist zoning is a design, not a fiscal, tool. Used in conjunction with development rights transfer, on the other hand, it is both. Around this hybrid use of zoning cluster the legally controversial features of the technique. Disgruntled owners in transfer districts can be expected to insist that government may fix density levels *only* on the basis of substantive planning criteria—those relating to adequate light, air, pedestrian access, and similar factors. But transfer programs regulate density for the additional purpose of creating a market for development rights. Hence, these owners will conclude, the programs must fall as improper encroachments upon private property rights.

This objection may take various forms. It may be contended that raising funds for environmental betterment lies within the province of the taxing rather than the police power. Transfer programs' cost-shifting and residual density features may be challenged on taking grounds. Contentions that transfer programs are exclusionary and improperly discriminate against landowners within transfer districts may give rise to equal protection attacks.

Two statutory challenges arising under pertinent state zoning enabling acts can be anticipated as well. First, it may be insisted that these acts do not authorize communities to employ zoning in aid of the broader environmental and amenity goals that transfer programs address. Second, the programs' dual bulk system may be said to violate the dictate in most of these acts that "[a]ll [zoning] regulations shall be uniform for each class or kind of buildings throughout each district."<sup>109</sup>

Though formidable, these objections can be overcome by securing judicial approval of the principle that the development potential of private property is in part a community asset and by modifying applicable land use legislation to permit the implementation of this principle in the context of specific transfer programs. This section

109. ADVISORY COMMITTEE ON ZONING, DEP'T OF COMMERCE, A STANDARD STATE ZONING ENABLING ACT UNDER WHICH MUNICIPALITIES MAY ADOPT ZONING REGULATIONS § 2 (rev. ed. 1926).

addresses the first of these concerns by offering a legal rationale for development rights transfer, but leaves the specific content of required amendments to lawmakers in each jurisdiction. The discussion does, however, identify areas where statutory change is likely to be advisable.

### A. *Development Rights Transfer as a Regulatory/Fiscal Hybrid*

Zoning is grounded in the state's police power. Is it then necessarily impermissible to build into a zoning measure provisions intended to raise funds for resource protection? Putting the question of statutory authority to one side for the moment, the answer ought surely to be no. The difference between the police and taxing powers is hardly clearcut and may be so slim in specific instances as to be unrecognizable.<sup>110</sup> Courts have long considered it neither surprising nor ob-

110. From a functional perspective the premise that the two powers must be rigidly compartmentalized is dubious. For years public finance scholars have rejected it out of hand. See, e.g., J. COMMONS, *supra* note 95, at 820; E. SELIGMAN, *supra* note 95, at 402-06. Professor Commons, for example, has written that

the police power is none other than the sovereign power to restrain or suppress what is deemed, by the dominant interests, to be disadvantageous, and to promote and foster what they deem advantageous for the commonwealth. Taxation, then, is the most pervasive and privileged exercise of the police power . . . . Even when not consciously intended to be regulative, taxes nevertheless regulate, for they, like the protective tariffs, determine the directions in which people may become wealthy by determining directions in which they may not become wealthy . . . . It is impossible to avoid these effects of taxes, therefore impossible to escape the police power of taxation, therefore impossible to look upon taxes of any kind whatever as merely a means of obtaining revenue . . . . Taxation is, in fact, a process of obtaining public revenue by proportioning inducement to obtain profits.

J. COMMONS, *supra* at 820.

Professor Seligman makes the same point in his query: "Shall we call the Indian duty on opium a tax and refuse the same name to the American internal revenue charge, because India looks primarily to revenue, and the United States to regulation?" E. SELIGMAN, *supra* at 403.

Legal scholars too have recognized the ephemerality of the distinction, functionally considered. Despite his authorship of the revenue/regulatory test, for example, Cooley concedes that in many instances custom alone determines whether a measure will be characterized as a tax or as a police power enactment. 4 T. COOLEY, *THE LAW OF TAXATION* § 1784, at 3514 (4th ed. 1924) [hereinafter cited as COOLEY]. Further, modern land use commentators have argued that the taxing and police powers may be used interchangeably as the foundation for planning techniques such as the subdivision exaction. See note 205 *infra*. Especially noteworthy in this regard is the conclusion of Heyman and Gilhool that "[r]egardless of label, properly constituted exactions for a wide variety of purposes are constitutionally permissible." Heyman and Gilhool, *The Constitutionality of Imposing Increased Community Costs on New Suburban Residents through Subdivision Exactions*, 73 *YALE L.J.* 1119, 1155 (1964) [hereinafter cited as *Subdivision Exactions*].

For support of this conclusion, compare *Associated Home Builders of the Greater East Bay, Inc. v. City of Walnut Creek*, 4 Cal. 3d 633, 484 P.2d 606, 94 Cal. Rptr. 630, *appeal dismissed*, 404 U.S. 878 (1971) (sustaining forced dedication or substitute fee exaction as a police power measure), with *Associated Homebuilders of the Greater East Bay, Inc. v. City of Newark*, 18 Cal. App. 3d 107, 95 Cal. Rptr. 648 (1971) (sustaining a levy keyed to the number of bedrooms in dwellings as a license tax on the occupation of constructing buildings).

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jectionable that police power measures are often accompanied by distinct fiscal effects—including direct imposition of fees<sup>111</sup>—just as taxing measures are frequently attended by unmistakable regulatory results.<sup>112</sup>

But the inquiry does not end with the conclusion that transfer programs are unobjectionable simply because they combine regulatory and fiscal elements. That conclusion establishes only that state legislatures *may* authorize local governments to enact these programs under the police power. To avoid ensnarement in the ultra vires trap local governments must be prepared to demonstrate that legislatures *have* done so. A sound enabling act<sup>113</sup> will assist them in showing, first, that there is a statutory predicate for the local ordinance; second, that the ordinance is a police power rather than a taxing measure; and third, that the ordinance comports with the requirements of police power doctrine.

The significance of the first of these showings lies, of course, in the status of local governments as creatures of the state possessing only those powers accorded them by the state.<sup>114</sup> More complicated is the need for the second—convincing the court that a transfer program is a police power, not a taxing measure. Taxing enactments must pass muster under a gamut of state constitutional and statutory constraints which, depending upon the type of tax involved, may include uniformity,<sup>115</sup> *ad valorem* imposition,<sup>116</sup> and tax rate limitations.<sup>117</sup> If deemed taxing measures, transfer programs will almost

111. See, e.g., *Associated Home Builders of the Greater East Bay, Inc. v. City of Walnut Creek*, 4 Cal. 3d 633, 484 P.2d 606, 94 Cal. Rptr. 630 (1971) (subdivision exaction legislation requiring payment of a fee in lieu of land dedication under prescribed conditions); *Portland Pipe Line Corp. v. Environmental Improvement Comm'n*, 307 A.2d 1 (Me. 1973) (license for clean-up of oil spills in state waters) (*semble*); *Garden State Racing Ass'n v. Cherry Hill Twp.*, 42 N.J. 454, 201 A.2d 554 (1964) (license fee, receipts from which were used to regulate increased traffic and parking caused by racetrack activities); *Sproul v. Oregon*, 234 Ore. 579, 383 P.2d 754 (1963) (levy on forest lands for fire suppression purposes).

112. See illustrations cited in H. GROVES, *supra* note 95, at 42-44; E. SELIGMAN, *supra* note 95, at 402-06.

113. In order to probe the legal issues posed by defective enabling legislation, discussion in the remainder of the text assumes that local governments rather than state or regional agencies will administer development rights transfer programs. As the Puerto Rico proposal illustrates, however, these programs may be implemented at any level of government depending upon the goals which the particular program is designed to achieve. See SPACE ADRIFT, *supra* note 33, at 176.

114. See cases and authorities cited in S. SATO & A. VAN ALSTYNE, STATE AND LOCAL GOVERNMENT LAW 85-95 (1970).

115. See 1 COOLEY, *supra* note 110, at § 260; 16 MCQUILLIN, MUNICIPAL CORPORATIONS, *Taxation* § 44.19 (1972 rev. vol.).

116. See 1 COOLEY, *supra* note 110, at §§ 127, 153; 16 MCQUILLIN, MUNICIPAL CORPORATIONS, *Taxation* § 44.17a (1972 rev. vol.).

117. See 16 MCQUILLIN, MUNICIPAL CORPORATIONS, *Taxation* § 44.25 (1972 rev. vol.).

certainly run afoul of one or more of these constraints,<sup>118</sup> unless their structure is substantially modified.<sup>119</sup>

An express statutory declaration that development rights transfer is a police power technique will be helpful, though not conclusive. The court can be expected to make an independent appraisal,<sup>120</sup> utilizing Judge Cooley's classic litmus for distinguishing police power from taxing measures—namely, whether development rights transfer's primary goal is "regulatory" or "fiscal" in nature.<sup>121</sup> Despite the test's vagueness, there seems little reason to doubt that the technique will be labeled regulatory if the court otherwise finds it proper. The purpose of transfer programs, after all, is identical with that of conventional land use endeavors: channeling private development decisions toward results that comport with the jurisdiction's physical planning objectives.

A contrary conclusion would require that the court wrench the income-generating component of the transfer program from its overall regulatory setting. Courts have refused to isolate the fiscal element in their evaluation of other hybrid forms of development control. Thus, communities may zone to encourage industry and other lucrative sources of tax revenue to settle within their boundaries.<sup>122</sup> They may also impose dual bulk systems in conjunction with cluster and PUD zoning ordinances that offer the developer a trade of increased density for dedication of a prescribed percentage of his land to community use.<sup>123</sup> Without any trade they may secure the same result through subdivision ordinances that mandate dedication or monetary payments as a condition to subdivision plat approval.<sup>124</sup> The courts have approved these measures despite their conceded fiscal elements and, as to the latter two, despite the fact that acquisition of private land for public use has traditionally been financed through the taxing power.

118. If restrictions on densities within transfer districts were held equivalent to a real estate tax on lands located there, for example, the program would be invalidated because the "tax" would meet neither the uniformity nor *ad valorem* imposition requirements.

119. See pp. 125-26 *infra*.

120. See note 111 *supra*.

121. See 4 COOLEY, *supra* note 110, at § 1784. On the distinction between measures founded on the police power and those based on the power of taxation, see generally 9 McQUILLIN, MUNICIPAL CORPORATIONS, *Municipal Licenses and Permits* § 26.16 (1964 rev. vol.); Note, *A Re-Evaluation of the Judicial Criteria for Determining the Reasonableness of Municipal License Fees*, 11 RUTGERS L. REV. 702 (1957); Note, *Police Power Taxation*, 4 WILLAMETTE L.J. 532 (1967).

122. See *Gruber v. Raritan Twp.*, 39 N.J. 1, 186 A.2d 489 (1962). See generally D. HAGMAN, *URBAN PLANNING AND LAND DEVELOPMENT CONTROL LAW* § 51 (1971) [hereinafter cited as *URBAN PLANNING*].

123. See cases cited notes 189-90 *infra*.

124. See note 137 *infra*.



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These decisions reflect the judiciary's unwillingness to block innovative land use programs by invoking precious conceptual distinctions between the police and taxing powers. They are pragmatic in tone, disappointingly so to those who would prefer more thoughtful treatment of the differences between the two powers. Yet they anticipate remarkably well the growing recognition among influential scholars<sup>125</sup> and study commissions<sup>126</sup> that solution of the nation's grave land use problems must start with the premise that physical planning and economic planning are, at base, two sides of the same coin.

The third showing—compliance of the enabling act and the implementing ordinance with police power doctrine—should prove the least troublesome. Under police power doctrine, the burdened class must be shown to be the class whose actions have created the evil that the legislation is intended to remedy<sup>127</sup> and revenues raised from the police power imposition must be devoted exclusively to the public objectives that motivated their adoption.<sup>128</sup> The nexus between development and environmental harm should fulfill the first requirement, especially if its existence appears as an express legislative finding in the enabling act's preface. And restricting the use of development rights sales funds solely for the environmental objectives of the particular transfer program can be achieved simply by writing the pertinent limitations into both the enabling act and the ordinance.

### B. *Development Rights Transfer and Due Process*

#### 1. *The Confiscation Objection*

Whether the residual densities prescribed for transfer districts will trigger a successful taking challenge to transfer programs depends upon the magnitude of the reduction in economic return that courts

125. See, e.g., Rawson, *Property Taxation and Urban Development: Effects of the Property Tax on City Growth and Change* 7-8 (Urban Land Institute, Research Monograph No. 4, 1961); Browning, *Land Value Taxation: Promises and Problems*, 29 J. AM. INST. PLANNERS 301, 307 (1963); Hagman, *The Single Tax and Land Use Planning: Henry George Updated*, 12 UCLA L. REV. 762, 782-88 (1965).

126. See *USE OF LAND*, *supra* note 2, at 19-22, 27-29, 103-43, 219-61. See generally THE PRESIDENT'S COMMITTEE ON URBAN HOUSING: A DECENT HOME (1968); NATIONAL COMMISSION ON URBAN PROBLEMS: BUILDING THE AMERICAN CITY, H.R. Doc. No. 34, 91st Cong., 2d Sess. (1968).

127. See, e.g., 1 COOLEY, *supra* note 110, at § 268; E. FREUND, *supra* note 4, at 635.

128. Under settled police power doctrine, a logical connection must exist between the object sought to be accomplished by a regulatory ordinance and the means prescribed for this end. Clearly, applying revenue raised in conjunction with a regulatory scheme to some purpose unrelated to that scheme would violate this requirement. *Cf. Kelber v. City of Upland*, 155 Cal. App. 2d 631, 318 P.2d 561 (1957).

will deem nonconfiscatory and the severity of the particular program's restrictions. Neither variable should prove the undoing of a carefully formulated transfer program.

Recent cases,<sup>129</sup> some assert, support the view that, short of an actual appropriation by government, regulation of private land use for a public purpose can never constitute a taking.<sup>130</sup> This interpretation is perilous for draftsmen of transfer legislation. Aside from its blatant unfairness as an across-the-board prescription, it may in retrospect be viewed as an overbroad reading of these cases, which represent the position of little more than a handful of state courts.

Reliance upon it is unnecessary in any event because established zoning doctrine provides more than enough leeway to legitimate the density limitations that are likely to be required to guarantee a transfer program's economic feasibility. The *Euclid* decision buried the claim that zoning measures are constitutionally infirm simply because they preclude landowners from devoting their property to its most profitable use. Instead, these measures are routinely sustained so long as they advance the community's general welfare and the property is susceptible to some reasonable, albeit less profitable, type or intensity of development.<sup>131</sup>

That resource protection—the goal of transfer programs—advances community welfare cannot be seriously contested. But the reasonableness of the extent of development permitted under the residual densities prescribed for transfer districts cannot be assessed without reference to the second variable—the stringency of these densities under the particular transfer program. This issue cannot be resolved in the abstract. Studies indicate, however, that restraints upon residual densities should fall well within the range sanctioned by established zoning doctrine.<sup>132</sup> Nor should it be assumed that transfer

129. See note 10 *supra*.

130. See TAKING, *supra* note 10, at 238; USE OF LAND, *supra* note 2, at 175.

131. A representative formulation of this principle appears in an opinion written by a distinguished zoning jurist:

[P]roperty need not be zoned to permit every use to which it is adapted nor must all property similarly situated be accorded identical treatment. To so require would frustrate the zoning objective of a well-balanced community according to a comprehensive plan. It is sufficient if the regulations permit some reasonable use of the property in light of the statutory purpose.

*Morris County Land Improvement Co. v. Parsippany-Troy Hills Twp.*, 40 N.J. 539, 557, 193 A.2d 232, 242 (1963) (Hall, J.).

132. See Department of City Planning, San Francisco Downtown Zoning Study, Final Report (1966); Ruth, *Economic Aspects of the San Francisco Zoning Ordinance Bonus System*, in NEW ZONING, *supra* note 27, at 159. The economic investigation supporting zoning bonuses offered to developers within the Manhattan Broadway Theater District who agree to include theaters in their projects is recounted in Weinstein, *How New York's Zoning Was Changed to Induce the Construction of Legitimate Theaters*, in NEW ZONING, *supra* note 27, at 131. See note 55 *supra*.

programs will be open-ended ventures, whether in terms of costs that communities will incur or restrictions that landowners within transfer districts will experience under them. The community is free to expand or contract the scope of its resource protection goals, to supplement funds obtained from development rights sales with general revenues, and to make other appropriate adjustments. In addition, the constraints of practical politics, a concern for social equity, and the desire to avoid vulnerability to constitutional challenge should deter imprudent governmental use of the transfer device.

## 2. *The Cost-Shifting Objection*

The contention that the cost of resource protection programs may not be internalized to the land development process cannot be dismissed by citing contrary precedents because none addresses the issue precisely as it arises in the transfer context. In analogous contexts courts have approved police power programs in which costs were shifted to those whose activities created the need for the programs.<sup>133</sup> Within the specific area of land use the subdivision exaction precedents<sup>134</sup> are the most pertinent. Despite significant differences between the subdivision exaction and transfer techniques,<sup>135</sup> these precedents offer a useful point of departure for predicting judicial response to transfer programs. For our purposes they can be divided roughly into two groups: decisions that evaluate subdivision exactions (or substitute fees) under special assessment doctrine<sup>136</sup> and

133. See, e.g., *Portland Pipe Line Corp. v. Environmental Improvement Comm'n*, 307 A.2d 1 (Me. 1973) (*semble*); *Garden State Racing Association v. Cherry Hill Twp.*, 42 N.J. 454, 201 A.2d 554 (1964); *Sproul v. Oregon*, 234 Ore. 579, 383 P.2d 754 (1963); *Drinneen v. City of Knoxville*, 212 Tenn. 270, 369 S.W.2d 562 (1963). With respect to the amount of the police power imposition, which is typically cast as a "license fee," Cooley observes:

[I]t is proper and reasonable to take into account not only the expenses merely of direct regulation, but all the incidental consequences that may be likely to subject the public to cost in consequence of the business licensed. In some cases the incidental consequences are much the most important, and, indeed, are what are principally had in view when the fee is decided upon . . . . What is a reasonable fee depends largely upon sound legislative discretion, and it will be presumed that the fee is reasonable in amount, unless the contrary appears on the face of the law itself, or is established by proper evidence.

4 COOLEY, *supra* note 110, § 1809, at 3555-56 (emphasis added). See generally authorities cited *supra* note 121.

134. See, e.g., notes 136-37 *infra*. The relevant legal literature is collected in Landau, *Urban Concentration and Land Exactions for Recreational Use: Some Constitutional Problems in Mandatory Dedication Ordinances in Iowa*, 22 DRAKE L. REV. 71, 78 n.45 (1972).

135. See p. 115 & note 168 *infra*.

136. See, e.g., *Kelber v. City of Upland*, 155 Cal. App. 2d 631, 318 P.2d 561 (1957); *Pioneer Trust & Savings Bank v. Village of Mount Prospect*, 22 Ill. 2d 375, 176 N.E.2d 799 (1961); *Gulest Associates, Inc. v. Town of Newburg*, 25 Misc. 2d 1004, 209 N.Y.S.2d 729 (1960), *aff'd*, 15 App. Div. 2d 815, 225 N.Y.S.2d 538 (1962), *overruled*, *Jenad, Inc. v. Village of Scarsdale*, 18 N.Y.2d 78, 218 N.E.2d 673, 271 N.Y.S.2d 955 (1966); *Haugen*

the more recent decisions that emphasize their character as police power measures.<sup>137</sup> In the following section it is conceded that development rights transfers, like subdivision exactions, probably do not comport with special assessment criteria,<sup>138</sup> but it is argued that they do satisfy the less demanding requirements of the police power.

*a. Development Rights Transfers and the Special Assessment*

Special assessment doctrine justifies governmental impositions on the basis of the "special benefit" that assessed property receives from the public improvement financed by the special assessment.<sup>139</sup> Because land values within the general area of the improvement often increase, the concept of special benefit is ostensibly confined by three criteria: spatial proximity of the improvement to the assessed property;<sup>140</sup> inclusion of the specific improvement in the restricted category of public facilities that may be so financed;<sup>141</sup> and proportionality between the amount of the assessment and the provable benefits accruing to the assessed property.<sup>142</sup>

v. Gleason, 226 Ore. 99, 359 P.2d 108 (1961). See also *Jenad, Inc. v. Village of Scarsdale*, supra, 18 N.Y.2d at 86, 218 N.E.2d at 677, 271 N.Y.S.2d at 959 (Van Voorhis, J., dissenting); *Jordan v. Village of Menomonee Falls*, 28 Wis. 2d 608, 623, 137 N.W.2d 442, 450 (1965) (Hallows, J., dissenting). Under these opinions the challenged subdivision exaction measures were deemed unauthorized by pertinent enabling legislation and, in *Pioneer Trust and Savings Bank v. Village of Mount Prospect*, supra, possibly unconstitutional as well. Concluding that the measures do not comport with criteria derived from special assessment doctrine and unwilling to sustain them on broader police power grounds, the opinions analogize the exactions to taxes, i.e., impositions for general governmental purposes, which fail to satisfy one or more of the taxation requirements. See p. 105 supra.

137. See, e.g., *Associated Home Builders of the Greater East Bay, Inc. v. City of Walnut Creek*, 4 Cal. 3d 633, 484 P.2d 606, 94 Cal. Rptr. 630 (1971); *Aunt Hack Ridge Estates, Inc. v. Planning Comm'n*, 160 Conn. 109, 273 A.2d 880 (1970); *Jenad, Inc. v. Village of Scarsdale*, 18 N.Y.2d 78, 218 N.E.2d 673, 271 N.Y.S.2d 955 (1966); *Jordan v. Village of Menomonee Falls*, 28 Wis. 2d 608, 137 N.W.2d 442 (1965).

138. This question has been vigorously debated in the literature. For the view that subdivision exactions should be evaluated only under special assessment theory and that forced dedication of school or park lands cannot be sustained under that theory, see Reps & Smith, *Control of Urban Land Subdivisions*, 14 SYRACUSE L. REV. 405 (1963). Heyman and Gilhool take a more expansive view of the matter, claiming, first, that subdivision exactions can be sustained alternatively on special assessment, police power, or taxing rationales, and, second, that special assessment theory is sufficiently broad to countenance the forced dedication of school and park lands. See *Subdivision Exactions*, supra note 110.

139. See, e.g., 14 McQUILLIN, MUNICIPAL CORPORATIONS, *Special Taxation and Local Assessments* § 38.02 (1970 rev. vol.); 1 W. PAGE & P. JONES, TAXATION BY LOCAL AND SPECIAL ASSESSMENT § 11, at 16-22, § 118, at 197-203 (1909).

140. See, e.g., W. WINTER, THE SPECIAL ASSESSMENT TODAY 18 (1952); Spengler, *The Increment Tax versus Special Assessments*, 20 BULL. NAT'L TAX ASS'N 258, 259 (1935). But see *Subdivision Exactions*, supra note 110, at 1148-49.

141. See Reps & Smith, supra note 138, at 410; 14 McQUILLIN, MUNICIPAL CORPORATIONS, *Special Taxation and Local Assessments* §§ 38.11-29 (1970 rev. vol.). But see *Subdivision Exactions*, supra note 110, at 1149.

142. See 14 McQUILLIN, MUNICIPAL CORPORATIONS, *Special Taxation and Local Assessments* § 38.31 (1970 rev. vol.); 1 W. PAGE & P. JONES, supra note 139, § 11, at 16-22.

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The forced dedication of land within a subdivision or the payment of fees for school or recreational facilities elsewhere within the community does not easily meet these stringent requirements. Although lands dedicated within the subdivision meet the spatial proximity test, lands acquired elsewhere in the community may not.<sup>143</sup> Also dubious on the basis of traditional special assessment doctrine is the inclusion of educational and recreational facilities within the class of improvements that may be financed through assessments.<sup>144</sup> Demonstrating that land within the subdivision increases in value in correlation with the value of the dedicated parcel or the amount of the substitute fee raises difficult questions of cost accounting that are not easily resolved.<sup>145</sup> A further complication, moreover, is the deep-seated American sentiment, implicit throughout the earlier subdivision exaction cases,<sup>146</sup> that recreational and educational expenses ought to be borne by the community as a whole, not by developers or newcomers to the community.

These cases warn that development rights transfer will encounter hostility if courts analogize the technique to special assessment. The resource whose protection is financed under the transfer program will typically be distant from the burdened parcels; its benefits, moreover, will radiate throughout the jurisdiction instead of being localized to these parcels. Amenities and environmental resources do not fall within the traditional listing of improvements that may be financed under special assessments. Finally, the price of development rights will not be tied to an increase in value accruing to transfer districts by virtue of resource protection. Rather, it will be made by the market on the basis of value increases attributable to the extra density.

Courts, however, are not likely to analogize development rights transfer to special assessment. To begin with, the rationales supporting the techniques differ. Unlike special assessment, development rights transfer posits, first, that the externalities of land development warrant shifting to it the cost of resource protection, and, second, that increases in private land values attributable to governmental initiatives and general community growth can be recouped. The former premise is irrelevant to special assessment doctrine, which

143. See note 136 *supra*.

144. See note 141 *supra*.

145. A proposed model for cost-accounting analysis is discussed in *Subdivision Exactions*, *supra* note 110, at 1141-46.

146. See note 136 *supra*.

does not key the imposition to the assessed parcel's prospective uses.<sup>147</sup> The latter imports a more comprehensive concept of "benefit" than special assessment.<sup>148</sup> Furthermore, recent decisions have relied more heavily upon the roomier standards of the police power to evaluate the propriety of subdivision exactions.<sup>149</sup> Judicial recourse to these standards to scrutinize development rights transfer can be anticipated because the transfer technique is considerably more congruent with the exaction device than with special assessment.

*b. Development Rights Transfer and the Police Power*

In shifting to the police power recent subdivision exaction decisions<sup>150</sup> place greater emphasis on the community-wide benefits resulting from the exactions than on those accruing to the particular subdivision. This shift reflects the courts' appreciation of the practical difficulties that large-scale development poses for local governments<sup>151</sup> and their willingness to favor the latter in the trade-off between developer profits and sound community growth.<sup>152</sup> Thus, the improvement need not be located within or contiguous to the subdivision as long as its benefits are available to subdivision residents.<sup>153</sup> It may benefit the remainder of the community, as well as

147. For this reason Page and Jones insist that special assessment is not a police power technique. Under special assessment the benefits received by the assessed property must equal or exceed the amount of the assessment, while under the police power no attention is paid to the fact that "[the performance of a duty] will confer any exceptive. [*sic*] benefit on [the] property, as in cases of local assessments. On the contrary, this power justifies the exaction from [the property owner] of that which will lessen the value of his estate by depriving him of what would, under other circumstances, be a lawful use and enjoyment of his property . . . ."  
I W. PAGE & P. JONES, TAXATION BY LOCAL AND SPECIAL ASSESSMENT § 92, at 150 (1909) (emphasis added). See also E. FREUND, *supra* note 4, at 635. Its foundation upon the principle of special benefits also precludes special assessment from classification as a conventional tax. See p. 125 *infra*.

148. See p. 110 *supra*. It is this larger concept of benefit that underlies the proposal advanced by land economists and public finance specialists for a land value increment tax. See, e.g., Eliot, *supra* note 95, at 85; Spengler, *supra* note 95, at 56.

149. See note 137 *supra*.

150. *Id.*

151. See, e.g., Associated Home Builders of the Greater East Bay, Inc. v. City of Walnut Creek, 4 Cal. 3d 633, 638, 484 P.2d 606, 610-11, 94 Cal. Rptr. 630, 634-35 (1971); Aunt Hack Ridge Estates, Inc. v. Planning Comm'n, 160 Conn. 109, 113-15, 273 A.2d 880, 883-84 (1970); Jenad, Inc. v. Village of Scarsdale, 18 N.Y.2d 78, 84-85, 218 N.E.2d 673, 676, 271 N.Y.S.2d 955, 958-59 (1966).

152. In one subdivision exaction case the court characterized the underlying conflict as pitting the developer's "interest in filling the entire area with housing" against the "public interest in maintaining a more healthful open space environment." Aunt Hack Ridge Estates, Inc. v. Planning Comm'n, 160 Conn. 109, 119, 273 A.2d 880, 885-86 (1970).

153. See, e.g., Associated Home Builders of the Greater East Bay, Inc. v. City of Walnut Creek, 4 Cal. 3d 633, 484 P.2d 606, 94 Cal. Rptr. 630 (1971) (sustaining fee to be used for acquisition or improvement of parkland within three-quarter mile radius of subdivision); Jenad, Inc. v. Village of Scarsdale, 18 N.Y.2d 78, 218 N.E.2d 673, 271 N.Y.S.2d 955 (1966) (sustaining fee to be used for "park, playground and recreational purposes" anywhere within village).

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these residents, provided that the subdivision is a contributing factor to the need for the facility.<sup>154</sup> The improvement may be other than those traditionally financed by special assessment though it apparently must tie into the community's physical planning program.<sup>155</sup> Finally, no requirement is expressed in these opinions that the cost of the subdivision improvement must correlate with the enhanced value accruing to subdivision land as a consequence of the improvement.<sup>156</sup>

*Associated Home Builders v. City of Walnut Creek*,<sup>157</sup> a 1972 California Supreme Court decision, exemplifies this liberalizing trend. A group of developers challenged a California statute and implementing ordinance requiring either dedication of recreational lands or payment of a fee to be used for acquiring recreational facilities within a three-quarter mile radius of the subdivision. Predictably, the plaintiffs took refuge in special assessment doctrine. Their principal claim was that the developer or future residents of the subdivision could be compelled under the legislation "to pay for recreational facilities the need for which stems not from the development of any one subdivision but from the needs of the community as a whole."<sup>158</sup> They insisted that the exaction must "necessarily and primarily benefit the particular subdivision"<sup>159</sup> and questioned whether recreational facilities may be secured through such exactions.<sup>160</sup>

The court rejected these claims by testing the legislation against the less confining standards of the police power,<sup>161</sup> noting the un-

154. See, e.g., *Associated Home Builders of the Greater East Bay, Inc. v. City of Walnut Creek*, 4 Cal. 3d 633, 637-41, 484 P.2d 606, 610-12, 94 Cal. Rptr. 630, 634-36 (1971); *Jordan v. Village of Menomonee Falls*, 28 Wis. 2d 608, 617-18, 137 N.W.2d 442, 447-48 (1965). Cases approving the propriety of fees in lieu of dedication deviate somewhat from this requirement because the fees may typically be used to acquire land some distance from the subdivision. See cases cited note 153 *supra*. In these cases, however, the pertinent legislation allows the municipality to have recourse to fees only if dedication of lands within the subdivision is inappropriate given the subdivision's small size or the presence of an existing school or park within or nearby the subdivision. Hence, they too require nearby school or parkland accessible to and serving the needs of the residents of that subdivision.

155. Local governments have utilized the exaction technique principally to acquire school and recreational lands in addition to obtaining more traditional improvements such as sewers, streets, and drainage facilities. Existing practice suggests that the technique will likely be limited to achievement of the community's physical planning objectives. That this limitation may be judicially required is suggested in a recent influential case which distinguished between the legitimate employment of the technique for a community's recreational land needs and its use to serve the "more general and diffuse need [that new residents create] for such areawide services as fire and police protection." *Associated Home Builders of the Greater East Bay, Inc. v. City of Walnut Creek*, 4 Cal. 3d 633, 642, 484 P.2d 606, 613, 94 Cal. Rptr. 630, 637 (1971) (dictum).

156. See note 137 *supra*.

157. 4 Cal. 3d 633, 484 P.2d 606, 94 Cal. Rptr. 630 (1971).

158. *Id.* at 637, 484 P.2d at 610, 94 Cal. Rptr. at 634.

159. *Id.* at 640, 484 P.2d at 611-12, 94 Cal. Rptr. at 635-36.

160. *Id.* at 641, 484 P.2d at 613, 94 Cal. Rptr. at 637.

161. *Id.* at 644, 484 P.2d at 615, 94 Cal. Rptr. at 639. Also pertinent in the court's view was the addition to the California Constitution in 1966 of Article XXVIII, § 1,

fortunate consequences that shrinking open space and rising population have wreaked upon development patterns in California and the nation.<sup>162</sup> In the court's view communities may properly consider general community needs for recreational land as well as those of a particular subdivision in the formulation of subdivision programs.<sup>163</sup> The court refrained from passing on the contention that the land must primarily serve the recreational needs of the subdivision because the challenged legislation expressly addressed this requirement,<sup>164</sup> but it did mark in dictum its sympathy for the position advanced by the Sierra Club, as *amicus curiae*, that exactions can be justified under the police power even if employed for recreational facilities used by the general public rather than devoted to the special needs of future subdivision residents.<sup>165</sup>

The court did not agree that sustaining the legislation would be tantamount to approving the use of exactions for the indiscriminate financing of governmental operations. Instead, it distinguished the benefits that subdivision residents would enjoy under the challenged legislation as "less diffuse" than those associated with general governmental services such as fire and police protection.<sup>166</sup> In addition, the court hinted strongly at the negative externalities theme and the fundamental indivisibility of the land development process. The plaintiffs' argument, the court reasoned,

overlooks the unique problem involved in utilization of raw land. Undeveloped land in a community is a limited resource which is difficult to conserve in a period of increased population pressure. The development of a new subdivision in and of itself has the counter-productive effect of consuming a substantial supply of this precious commodity, while at the same time increasing the need for park and recreational land. In terms of economics, subdivisions diminish supply and increase demand.<sup>167</sup>

which declares that open space and scenic beauty advance the "economic and social well-being of the state and its citizens." CAL. CONST. art. XXVIII, § 1. The court recognized that the challenged subdivision exaction legislation furthered these "salutary purposes" and hence should be sustained if at all possible. *Associated Home Builders of the Greater East Bay, Inc. v. City of Walnut Creek*, 4 Cal. 3d 633, 638-39, 484 P.2d 606, 611, 94 Cal. Rptr. 630, 635 (1971). But the court's assessment of the legislation's validity turned on the police power analysis recounted in text, not upon the cited constitutional provision.

162. *Id.* at 639, 484 P.2d at 611, 94 Cal. Rptr. at 635.

163. *Id.* at 637-41, 484 P.2d at 610-11, 94 Cal. Rptr. at 634-35.

164. *Id.* at 640, 484 P.2d at 612, 94 Cal. Rptr. at 636.

165. *Id.* at 648 n.6, 484 P.2d at 612 n.6, 94 Cal. Rptr. at 636 n.6.

166. *Id.* at 641-42, 484 P.2d at 613, 94 Cal. Rptr. at 637. See note 155 *supra*.

167. *Id.* at 641-42, 484 P.2d at 613, 94 Cal. Rptr. at 637.



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While *Associated* and its brethren are harbingers of judicial approval of development rights transfer, they fall short of being conclusive because differences in the scope and structure<sup>168</sup> of transfer and exaction programs have made it unnecessary for the courts to clearly enunciate an adequate legal rationale for the transfer technique. Exactions, for example, have been employed for only a limited number of objectives, including the acquisition of land for educational and recreational purposes, whereas development rights transfer programs may embrace a variety of concerns. Despite their greater reliance upon the police power, the recent opinions remain profoundly influenced by special assessment theory. The fact of more pronounced benefits for the subdivision than for the overall community remains the touchstone of even the most liberal decisions. In contrast, benefits afforded by transfer programs are community-wide in nature, rather than localized to the transfer district.

The case for development rights transfer ultimately rests on two propositions which, though independently based, are mutually reinforcing: First, government may properly shift to developers and landowners the cost of resource protection programs initiated to counteract the environmentally harmful effects of their land use decisions; and, second, government may finance these programs by recapturing the increment of the increase in land values attributable to governmental actions and general community growth.

168. The postures of the subdivider and the landowner within a transfer district vis-à-vis the subdivision exaction and the purchase of development rights, respectively, are not parallel. The subdivider must submit to the exaction, but the landowner may decline to contribute to the resource protection effort by choosing not to purchase development rights. Cast in option form, development rights transfer is more akin to cluster zoning, see note 61 *supra*, and zoning bonuses, see note 33 *supra*, than to subdivision exaction. Because of the nonmandatory character of the former two techniques, commentators have argued that they are considerably less vulnerable as uncompensated takings, assuming that the densities permitted as of right under the programs employing them are not so restrictive as to be confiscatory. See Hanna, *Subdivisions: Conditions Imposed by Local Government*, 6 SANTA CLARA LAWYER 172, 183-84 (1966); Mandelker, *The Basic Philosophy of Zoning: Incentive or Restraint?*, in NEW ZONING, *supra* note 27, at 16. Because these techniques envisage a trade of increased density for the prescribed amenity, the developer receives what one commentator has labeled a "de facto quid pro quo." Mandelker, *supra*. Despite its plausibility, this reasoning is subject in many states to the criticisms that compensation must be paid in money, not special benefits; that where special benefits are an appropriate medium of tender, the value of development rights may be deemed too speculative to permit an award of development rights to so qualify; and that the condemnee is entitled to a condemnation jury in any event. See *Chicago Plan*, *supra* note 52, at 598 n.75. Further, it can be persuasively argued that development rights transfer does entail a mandatory exaction insofar as residual density levels within transfer districts are deliberately skewed below those justified by market and substantive planning criteria. The contention would be that government is simply offering to sell back to the victim what it had previously purloined from him. Cf. Landau, *supra* note 134, at 81-82. In view of these uncertainties, the discussion assumes that the burdens suffered by landowners within transfer districts do not differ in principle from those incurred by developers under the subdivision exaction technique.

Both propositions are implicit, though unrealized, in the recent subdivision exaction opinions. Reliance on the first proposition is apparent in the *Associated* court's sympathy for the Sierra Club's assertion that subdivision exactions are valid even if their benefits are enjoyed on a community-wide basis rather than localized principally within the subdivision.<sup>169</sup>

The second proposition is also reflected in *Associated*, but the court's appreciation of the recoupment justification for subdivision exactions is tepid at best. According to the court,

The rationale of the [subdivision exaction] cases affirming constitutionality indicate that the dedication statutes are valid under the state's police power. They reason that the subdivider realizes a profit from governmental approval of a subdivision since his land is rendered more valuable by the fact of subdivision, and in return for this benefit the city may require him to dedicate a portion of his land for park purposes whenever the influx of new residents will increase the need for park and recreational facilities.<sup>170</sup>

By concentrating solely on the "fact of subdivision" as the cause of the increase in the value of private land, *Associated* and the precedents it cites ignore capital improvement programs, public regulation of other lands within the jurisdiction, governmental measures stimulating general community growth, and myriads of other initiatives that create in large part the economic framework for private transactions in land.<sup>171</sup> The court's reasoning, moreover, gratuitously suggests the older "privilege" rationale for subdivision exactions, a rationale which even supporters of broad subdivision powers for local governments find distasteful.<sup>172</sup> A firmer grasp of the theoretical underpinnings of the recoupment justification would have enabled the court to avert both difficulties.

Prescribing a narrower ambit for exactions than for transfers may perhaps be warranted. Subdivision exaction programs are often piecemeal in conception and reflect an undeniable tendency to treat the latest developer as a target for financing facilities whose benefits

169. See p. 114 *supra*.

170. *Associated Home Builders of the Greater East Bay, Inc. v. City of Walnut Creek*, 4 Cal. 3d 633, 644, 484 P.2d 606, 615, 94 Cal. Rptr. 630, 639 (1971).

171. See pp. 98-99 & note 95 *supra*.

172. See, e.g., Johnston, *supra* note 20, at 881; *Subdivision Exactions*, *supra* note 110, at 1130. The classic judicial opinion utilizing the privilege theory to sustain subdivision exactions is *Ridgefield Land Co. v. City of Detroit*, 241 Mich. 468, 217 N.W. 58 (1928).

are mainly of community-wide import.<sup>173</sup> But the rationale for development rights transfer is not so confined. Schemes such as the Chicago Plan and the Puerto Rico proposal look to the overall land development process as the generator of funds for resource protection and address more comprehensively the impact of individual development decisions upon the jurisdiction's total environmental fabric.

By establishing an explicit framework for equitably allocating resource protection costs, transfer programs should allay justifiable constitutional and policy concerns that attend any cost-shifting device. The cause of judicial apprehensiveness with subdivision exaction programs, in fact, is the absence of clear standards that the courts can confidently invoke to prevent communities from overreaching the individual developer. Development rights transfer should meet this concern by calling for an inventory of the probable cost of the jurisdiction's resource protection needs and providing for their satisfaction through impositions tied to the value of development that can reasonably be anticipated in transfer districts. As express components of the transfer program, findings under both headings may be challenged by affected landowners in litigation.

### 3. *Development Rights Transfer and Equal Protection*

The *Associated* case also raised two equal protection issues that draftsmen of development rights transfer programs must anticipate. The plaintiffs argued that the challenged legislation violated equal protection by compelling contributions only from developers subject to the subdivision ordinance while leaving unaffected those not similarly constrained<sup>174</sup> and that the legislation would operate in an exclusionary manner by raising the cost of housing for newcomers to the community.<sup>175</sup> By analogy, developers and landowners within transfer districts may claim, first, that they are denied equal protection because densities permitted as of right outside of the district will be more liberal than those within the district, and, second, that the price builders pay for the development rights which would otherwise be available by right will ultimately be passed on to the purchasers

173. Rejecting the special assessment analogy as too restrictive a foundation for subdivision exactions, Professor Johnston has properly observed:

The entire municipality is a healthier, safer environment when subdivisions are provided with adequate streets, water, sanitation, and open space. It is this benefit to the *total* community which sustains the exercise of the police power, rather than the more direct benefit to the subdivision itself.

Johnston, *supra* note 20, at 871 n.21 (emphasis added). See also *id.* at 901-03, 923.

174. 4 Cal. 3d 633, 643-44, 484 P.2d 606, 614, 94 Cal. Rptr. 630, 638 (1971).

175. *Id.* at 648, 484 P.2d at 618, 94 Cal. Rptr. at 642.

of their projects. The merits of these claims depend entirely upon the details of the challenged transfer program, but *Associated* and related precedents are persuasive that properly implemented transfer programs will not fall on either count.

The *Associated* court rejected the first contention by implicitly relying on the principle that a legislative classification comports with equal protection requirements if it is based upon a rational distinction.<sup>176</sup> The same principle should immunize development rights transfer from effective assault if the jurisdiction can point to documented economic and planning studies demonstrating that the areas selected as transfer districts can reasonably be expected to be focal points of future development.

Nor did the court find the exclusionary argument compelling. In common with other courts<sup>177</sup> and commentators,<sup>178</sup> it expressed genuine concern about the trade-off between resource protection and achievement of other community objectives such as the production of low cost housing.<sup>179</sup> It properly recognized, moreover, that subdivision exaction programs can be manipulated to achieve exclusionary results and that even when not so abused may tend to raise the cost of the developer's finished product.<sup>180</sup> The court pragmatically responded to this dilemma by evaluating the program in light of the gravity of the community's land use problems and the extent to which the program in fact produced exclusionary consequences.

A similar inquiry can be anticipated if a transfer program is impugned as exclusionary. And a similar outcome can be predicted for thoughtfully formulated programs. If the program is instituted before developers acquire land within transfer districts, it is far from certain that the cost of development rights will be passed on to housing consumers. From the developer's perspective it is immaterial whether he pays the seller, or the seller and the government, as long as the total price for the land remains unchanged. Using a technique known by real estate appraisers as "residual land value analysis,"<sup>181</sup> the developer will in all likelihood discount the price that

176. *Id.* at 643, 484 P.2d at 614, 94 Cal. Rptr. at 638. See *Dandridge v. Williams*, 397 U.S. 471 (1970); *McGowan v. Maryland*, 366 U.S. 420 (1961).

177. See *Steel Hill Development, Inc. v. Town of Sanbornton*, 469 F.2d 956, 961 (1st Cir. 1972); cf. *Golden v. Planning Board*, 30 N.Y.2d 359, 378, 285 N.E.2d 291, 302, 334 N.Y.S.2d 138, 152 (1972).

178. See, e.g., Harvith, *Subdivision Dedication Requirements—Some Observations and an Alternative: A Special Tax on Gains from Realty*, 33 ALBANY L. REV. 474, 477-80 (1969); *Subdivision Exactions*, *supra* note 110.

179. *Associated Home Builders of the Greater East Bay, Inc. v. City of Walnut Creek*, 4 Cal. 3d 633, 648, 484 P.2d 606, 618, 94 Cal. Rptr. 630, 642 (1971).

180. *Id.*

181. See SPACE ADRIFT, *supra* note 33, at ch. 3 for an explanation and application of this technique in determining the value of development rights within Chicago's Loop.

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he pays to the seller by the amount he must pay to the government to secure the additional rights. Thus, the costs of the transfer program will be borne principally by landowners and speculators, not by consumers.<sup>182</sup>

Even if resource protection costs are shifted to consumers, it hardly follows that courts will find transfer programs exclusionary. Development in many transfer districts will be primarily industrial or commercial in nature,<sup>183</sup> thus obviating the objection altogether. Independently of transfer programs, moreover, the cost of housing in districts likely to become residential will often fall within the middle income and luxury range, a circumstance that is not constitutionally troublesome if the jurisdiction has made adequate provision for low cost housing elsewhere within its boundaries.<sup>184</sup> Nor can it be concluded without refined economic projections that development rights transfer will unduly raise costs in transfer districts where low cost housing is anticipated.

Two final points bear emphasis in assessing the cost implications of development rights transfer, whether in conjunction with exclusionary zoning or other social concerns. First, a transfer program will be only one component of the jurisdiction's land use plan. As such, it should be accommodated with other goals. If, for example, a jurisdiction is committed to increasing its supply of low income housing, it could exclude from consideration as transfer districts areas containing probable sites for this housing.

Second, painful social and economic trade-offs are inevitable in the nation's quest for environmental quality. It is fanciful to assume that resource protection will come without a price tag either now or in the future. Such assumptions, in fact, have plunged the nation into the environmental quagmire from which it is belatedly straining to extricate itself.

182. For a detailed analysis of the relationship between zoning and the price that informed developers will pay for land, see *id.* at ch. 4. Significantly, *House and Home*, the trade organ of the home building industry, has enthusiastically endorsed land increment value taxation on the ground that it would *lower* the price that developers pay for land, thereby lowering the price of housing for the ultimate consumer. See 18 *HOUSE AND HOME*, Aug. 1960, *passim*.

183. Under the Chicago Plan, for example, it is contemplated that transfer districts will often coincide with the city's central commercial and office districts. See *Chicago Plan*, *supra* note 52, at 594-96; *SPACE ADRIFT*, *supra* note 33, at 49-50.

184. See, e.g., *SASSO v. City of Union City*, 424 F.2d 291, 294-95 (9th Cir. 1970); *Oakwood at Madison, Inc. v. Township of Madison*, 117 N.J. Super. 11, 15-16, 283 A.2d 353, 355-56 (Super. Ct. 1972); cf. *In re Appeal of Girsch*, 437 Pa. 237, 263 A.2d 395 (1970). See generally Bigham & Bostick, *Exclusionary Zoning Practices: An Examination of the Current Controversy*, 25 *VAND. L. REV.* 1111 (1972); Cunningham, *The Interrelationship Between Exclusionary Zoning and Exclusionary Subdivision Control—A Second Look*, 6 *U. MICH. J.L. REFORM* 290 (1973); Comment, *Modern Social Problems and Land Use Regulation—The New Jersey Experience*, 14 *WM. & MARY L. REV.* 732 (1973); Annot., 48 *A.L.R.* 3d 1210 (1973).

#### 4. *Development Rights Transfer and Zoning Enabling Legislation*

Two additional issues may arise if local governments implement transfer programs under legislation akin to the Standard State Zoning Enabling Act.<sup>185</sup> It may be argued that development rights transfer violates the Act's uniformity requirement<sup>186</sup> because some lots within a transfer district may be developed to greater maximum densities than others. The second issue is whether the purposes section<sup>187</sup> of the Act comprehends the broader environmental and amenity goals that transfer programs envisage. Although the judicial gloss placed on the Act in the half-century since its formulation appears ample on both counts, amendment of the pertinent enabling legislation may nevertheless be advisable.

##### a. *The "Uniformity" Objection*

It is unclear in many jurisdictions whether the uniformity requirement even applies to bulk regulations.<sup>188</sup> If it does, however, cluster<sup>189</sup> and PUD<sup>190</sup> precedents, which have consistently sustained the dual bulk system against the charge of nonuniformity, should be adequate to obtain judicial approval of a transfer program. The uniformity requirement, those precedents reason, mandates only that landowners within the district be afforded reasonable access to the increased density offered by the density zoning measure. It is irrelevant whether the development end product is in fact identical in terms of comparative project bulk, height, or area.

So construed, the uniformity requirement would be satisfied by the development rights transfer proposal set forth in this article. The relevant inquiry would be whether all landowners within the transfer district enjoy equivalent access to the development rights that are offered for sale there and not whether some landowners in the district will ultimately build to greater densities than others by virtue of the program. Care must be taken, therefore, to insure that provisions relating to the public offer and sale of the rights provide the requisite access.

185. ADVISORY COMMITTEE ON ZONING, DEP'T OF COMMERCE, A STANDARD STATE ZONING ENABLING ACT UNDER WHICH MUNICIPALITIES MAY ADOPT ZONING REGULATIONS (rev. ed. 1926).

186. *Id.* § 2.

187. *Id.* § 3.

188. See cases cited in *Chicago Plan*, *supra* note 52, at 625 n.194.

189. See *Prince George's County v. M & B Construction Corp.*, 267 Md. 338, 297 A.2d 683 (1972); *Chrinko v. South Brunswick Twp. Planning Bd.*, 77 N.J. Super. 594, 187 A.2d 221 (L. Div. 1963).

190. See *Orinda Homeowners Comm. v. Board of Supervisors*, 11 Cal. App. 3d 768, 90 Cal. Rptr. 88 (1970); *Cheney v. Village 2 at New Hope, Inc.*, 429 Pa. 626, 241 A.2d 81 (1968).

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### *b. The "Purposes" Objection*

For most courts today the purposes section of the Standard State Zoning Enabling Act is virtually coextensive with the scope of the police power.<sup>191</sup> Particularly favored in recent decisions is the enhancement of environmental quality through zoning measures.<sup>192</sup> Hence, it would be surprising indeed if a transfer program were struck down as *ultra vires*. Whatever uncertainty may exist on this point in a specific jurisdiction, however, can be erased altogether by proper modification of zoning enabling legislation.

### III. Development Rights Transfer: Areas for Further Inquiry

The economic and planning ramifications of development rights transfer are largely uncharted terrain, not only for the lawyer, but for the land economist and planner as well. Given the complexity of potential problems, the gaps in existing research, and the evident dangers of implementing poorly conceived transfer programs, it is obvious that extensive investigation and controlled experimentation is necessary. The purpose of this section is to facilitate subsequent inquiry by cataloguing the salient problems and by suggesting a modified version of the transfer device—enacted as a taxing measure—that may alleviate the thornier of these problems.

#### A. *Economic Questions*

One set of questions is that which arises in determining the losses that the owner or owners of the resource site incur under the transfer program. A second is concerned with skewing the cost of development rights (or, correlatively, the residual densities within transfer districts) at levels that generate the revenues needed for resource protection without discouraging new construction in transfer districts.

191. For a summary of the variety of purposes that may legitimately be pursued through zoning regulation, see URBAN PLANNING, *supra* note 122, at §§ 41-52. The rare case in which a zoning measure serving a concededly valid police power objective is invalidated as not in pursuance of a proper zoning purpose can typically be explained on other grounds. In *Westwood Forest Estates, Inc. v. Village of South Nyack*, 23 N.Y.2d 424, 244 N.E.2d 700, 297 N.Y.S.2d 129 (1969), for example, the court invalidated a zoning measure barring further apartment construction which was passed by the municipality to prevent pollution of the Hudson River by inadequately treated municipal sewage. One ground of the decision was that pollution control is not a proper zoning purpose. Alternatively, the court ruled that the ordinance was not enacted in accordance with a comprehensive plan and hinted at its possible invalidity on equal protection grounds as imposing upon the plaintiff a burden that should have been borne by the community generally. Two years later, however, the former proposition was overruled *sub silentio* by *Salamar Builders Corp. v. Tuttle*, 29 N.Y.2d 221, 275 N.E.2d 585, 325 N.Y.S.2d 933 (1971), which sustained a zoning ordinance increasing minimum lot sizes expressly to alleviate the pollution of local wells and of the drainage reservoir serving the entire area.

192. See note 10 *supra*.

### 1. *The Protected Resource*

The losses suffered at the resource site pose two issues: their amount and the extent to which they are compensable under the standards of the applicable transfer program. Resolving the first issue requires a determination of the difference between the value of the resource site before and after the restrictions are imposed.<sup>193</sup> Although this task may be somewhat complicated by the character of the threatened resource,<sup>194</sup> it is one that appraisers routinely undertake when government acquires a less than fee interest in private property.

Establishing how much, if any, of this loss is legally compensable is less easily resolved. Despite endless litigation on this issue since *Euclid*, the development of standards that are both rational and predictable seems no closer to realization today.<sup>195</sup> Accounting for the issue's apparent intractability are the lack of an explicit, generally accepted policy framework defining with reasonable precision the legitimate economic expectations of those engaged in land development and the assumption that the courts can adequately fashion such a policy, unaided by legislative and administrative bodies.

Under transfer programs, however, an administrative agency rather than a court would address the compensation issue initially.<sup>196</sup> The agency's more sophisticated grasp of the complexities of land economics, sharpened by its day-to-day experience in administering the transfer program, should prepare it to evaluate the impact of the program's restrictions on specific resource sites. Compensable damages will be measured pursuant to statutory standards framed either as a simple legislative incorporation of the constitutional ban against uncompensated takings<sup>197</sup> or as a more detailed formula that might, for example, mandate a minimum rate of return for restricted sites.<sup>198</sup>

193. For a description and application of these techniques to determine the economic damages suffered by owners of urban landmark properties, see *SPACE ADRIFT*, *supra* note 33, at ch. 3. Other illustrations may be found in the cases and authorities cited in *Chicago Plan*, *supra* note 52, at 617 n.169.

194. Appraising the damages suffered as a result of the imposition of permanent landmark status on a downtown office building, for example, is considerably more complex than making a similar determination regarding restrictions on unimproved land. See *SPACE ADRIFT*, *supra* note 33, at 176.

195. See authorities cited note 106 *supra*.

196. See p. 93 *supra*.

197. ALI MODEL LAND DEVELOPMENT CODE § 4-402(5) (Tent. Draft No. 5, 1973) illustrates this approach by directing a court in a condemnation action growing out of restrictions upon a "development permission" to include among the "assumptions [that] shall produce the highest market value" a condemnation award keyed to "the minimum development necessary to eliminate the unconstitutional taking."

198. An example of this approach is found in the New York City landmarks ordinance, which defines reasonable return as a net annual return of six percent on the landmark property's assessed valuation. See *NEW YORK, N.Y. ADMIN. CODE* ch. 8-A, § 207-1.0q (1971).



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If the former standard is used the agency will employ the same general premises in fixing compensation for the sites of threatened resources that it uses in selecting residual densities within transfer districts. That is, the value of the most profitable use of those sites will be discounted to reflect the extent to which it is a product of community rather than private efforts and the degree to which the harm posed by the sites' conversion to higher density use may properly be proscribed under the police power. The latter standard will entail greater involvement of the legislative branch, probably the key to achieving a consensus concerning the legitimate economic gain to be permitted from private land use and hence likely to be given greater deference by the courts.

If the agency or a reviewing court determines that compensation is due for a restriction, the jurisdiction may pay the award and acquire a protective interest in the site or it may decline to do so and instead rezone the site to the most restrictive density compatible with the applicable standards.<sup>199</sup> Its choice will depend in part, of course, upon the availability of funds generated by the transfer program and by other conventional revenue sources. Presumably it will opt for the second course if these funds are insufficient to pay the award or if, in its judgment, they ought instead be allocated to protect other resources of greater relative merit.

### 2. *The Transfer District*

In order to determine whether the demand for new construction in an area proposed as a transfer district will be sufficient to create an adequate market for development rights, market studies addressing, for example, past and projected land absorption rates, existing or proposed public improvements within the area, and demographic patterns should be made.<sup>200</sup> Once a given area is established as a likely target for intensive future development, a transfer program must be designed to permit developers to build profitably under its controls. Overly harsh residual densities or development controls that offer little financial advantage to the developer may spell trouble in one of two forms. Developers may cannibalize the program by bringing political pressure to dilute its stringent density regime or they may be frightened away from the transfer district altogether, choosing instead to build in outlying areas. In neither case would the community obtain the funds to finance its resource protection

199. See p. 94 *supra*.

200. See *SPACE ADRIFT*, *supra* note 33, at ch. 4.

effort in the latter it would unwittingly encourage metropolitan sprawl. If these outcomes are to be avoided, the details of the transfer program must be closely meshed with market conditions and requirements.

### B. *Planning Questions*

The major planning tasks associated with transfer programs are identifying sites containing sensitive resources and devising regulations to safeguard them, insuring that density transfers do not create design abuse, and coordinating transfers with other features of the jurisdiction's comprehensive plan. The first task will require the hiring of qualified specialists knowledgeable about the characteristics of the resources located in the transfer program area.

Preventing design abuse within transfer districts, while not without its technical challenges, should by no means be insuperable. A dual bulk system does present design complications that are not encountered under traditional bulk zoning.<sup>201</sup> Thus, suitable areas must be selected as transfer districts; zoning trade-offs (including increased floor area, tower coverage, or reduced lot size) which will be financially attractive to developers without causing congestion or other undue planning results must be identified. Generally successful results under zoning bonus, cluster, and PUD programs—each of which allocates density with as much flexibility as a transfer program—demonstrate that the technical difficulties inherent in these functions should prove manageable.<sup>202</sup> Development rights transfer, in fact, may well be less difficult to administer than these other flexible zoning initiatives.<sup>203</sup>

201. For an enumeration of these risks in the context of urban landmark preservation and of appropriate safeguards to offset them, see *SPACE ADRIFT*, *supra* note 33, at ch. 5.

202. See generally *NEW ZONING*, *supra* note 27; *W. WHYTE*, *supra* note 61.

203. In allowing additional density on the same site as the amenity that the community "purchases" with this density, they create palpable risks of congestion on that site. To avoid congestion, planners must limit density to an amount that the amenity can "digest." See *Chicago Plan*, *supra* note 52, at 594 n.69. Calculating this amount is a two-step operation: a ratio must be fixed between a stated increment of density and its consequences in terms of design compatibility with surrounding development and of increased population and attendant loads on public facilities and services; and, second, the capacity of the amenity—be it a park, arcade, or subway concourse—to offset these consequences must be projected. That these calculations are less a job for the slide rule than for informed guesswork appears in Ada Louise Huxtable's comment that the "point at which increased density tips the scales against planned improvements is a matter for the Delphic Oracle." *Thinking Man's Zoning*, *N.Y. Times*, Mar. 7, 1971, § 2, at 22, col. 5.

Neither the digestion rationale nor its speculative calculations pertains in a transfer context because density is transferred to a geographically distant transfer district rather than added to the resource site. Total density for the latter is fixed just as it would

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Coordinating a transfer program with the jurisdiction's comprehensive plan will undoubtedly provide the most severe test for development rights transfer. Regrettably, the phrase "comprehensive plan" is often little more than a euphemism for a melange of land use policies—or nonpolicies—that happen to prevail in a jurisdiction at any given point in time. The neat formulations of planning theorists notwithstanding, this "plan" is typically more reflective of lobbying activities and other realities of the land development process than of conscious strategies adopted in pursuance of selected community goals to advance the public interest. Not only is a transfer program unlikely to work under such circumstances, but it could well compound existing distortions in the local planning picture.

Public officials can react to these unpleasant observations by dismissing development rights transfer as intriguing but impractical, or, hopefully, by upgrading the quality of their planning efforts.<sup>204</sup> They could also choose to minimize these technical problems by substituting for density transfers an outright tax upon all or selected kinds of development.<sup>205</sup> Since no density would be transferred under this approach, the community's physical planning regime would be no more subject to distortion than it is under traditional bulk zoning.

This approach is attractive on other grounds as well. Because the transfer program would be implemented as a taxing measure, neither a showing of benefits correlated with the levy nor of the injurious impact of land development on the general welfare would be necessary.<sup>206</sup> The jurisdiction must demonstrate only that the levy is for

be for a traditional bulk district except that it is not a unitary figure but a composite of residual density plus the additional density that landowners there may purchase in the form of development rights.

204. The call for improved planning is more than an academic remedy. Congress, the American Law Institute, state legislatures, and the foundations are moving dramatically to afford technical and financial support. The electorate too has become increasingly conscious of and distressed by the formerly hidden costs of inadequate public land use control, much of it traceable to inferior planning. America's "new mood," in short, could provide the impetus for a sophisticated, sustained planning commitment which, in remedying many of the nation's land use deficiencies, could alleviate as well the design risks that inhere in development rights transfer.

205. See Harvith, *supra* note 178, *passim*; *Subdivision Exactions*, *supra* note 110, at 1146-54; Doebele, *Improved State Enabling Legislation for the Nineteen-Sixties*, 2 NATURAL RES. J. 321, 341-42 (1962), for evaluations of the legality and merits of enacting subdivision legislation within a taxing rather than a police power rubric. A license tax upon the business of constructing dwellings keyed to the number of bedrooms per dwelling was sustained in *Associated Home Builders of the Greater East Bay, Inc. v. City of Newark*, 18 Cal. App. 3d 107, 95 Cal. Rptr. 648 (1971), commented upon in 23 ZONING DIGEST 231 (1971).

206. Cf. *Associated Home Builders of the Greater East Bay, Inc. v. City of Newark*, 18 Cal. App. 3d 107, 95 Cal. Rptr. 648 (1971) (sustaining as an occupation tax a levy on developers keyed to the number of bedrooms included in their projects). See pp. 112-17 *supra*.

a proper governmental purpose,<sup>207</sup> a characterization that is self-evident given the program's goal of resource protection. In the legislative arena where the question of the tax's social equity would be addressed, the rationale for development rights transfer set forth in this article would be as cogent for the taxing alternative as for the police power alternative.

A host of additional advantages would result if the tax were imposed broadly on all or most forms of new construction. The equal protection difficulties associated with the special burdens suffered by landowners within transfer districts<sup>208</sup> would be reduced because there would not be a sharp distinction between lands within and lands outside of the district. Eliminating this distinction would also reduce the dangers of program dilution and of development that leapfrogs transfer districts.<sup>209</sup> Further, enlarging the incidence of the imposition would dilute the exclusionary zoning objection<sup>210</sup> because resource protection costs would be borne by a larger class of landowners and developers than under the police power alternative. It would likely generate greater revenue as well.

Finally, in that all or most new construction would be required to contribute to the resource protection effort, a broad-based tax would also be more consistent with the fact that the land development process is essentially indivisible. So conceived, the taxing alternative would generate a community "Environmental Trust Fund" financed by "users" of the environment much as the national Highway Trust Fund<sup>211</sup> is supported by a variety of levies upon users of America's highways.

Despite the tax proposal's obvious merits and the current appeal of environmental issues, popular resistance to further taxation of any kind could prove insurmountable. Further, the planning advantages other than resource protection that density transfers afford<sup>212</sup> would largely be lost. Choice of the type of tax—property, income, or excise—and the proper taxing vehicle are pregnant with economic and administrative consequences which, although different, are potentially as troublesome as the design risks of the police power approach. Opt-

207. See 1 COOLEY, *supra* note 110, at § 174; 16 MCQUILLIN, MUNICIPAL CORPORATIONS, *Taxation* § 44.35 (1972 rev. vol.).

208. See pp. 117-18 *supra*.

209. See p. 123 *supra*.

210. See pp. 117-19 *supra*.

211. For a concise description of the Highway Trust Fund, see J. BUCHANAN, THE PUBLIC FINANCES 553-70 (rev. ed. 1965). Another commentator has also noted the appeal of a trust fund approach. See Wexler, *supra* note 42, at 203-04.

212. See p. 101 *supra*.

ing for a land increment value tax, for example, requires prescribing standards for distinguishing "earned" from "unearned increments," upgrading existing assessment procedures and personnel, and nurturing a political framework that insures evenhanded, consistent treatment of property owners.<sup>213</sup>

The tax and the density transfer approaches proceed from the same policy foundation, call for similar background studies, would be administered by cognate staffs using parallel procedures, and would have largely equivalent economic consequences for resource owners, developers, and landowners. From a research viewpoint, therefore, they need not be regarded as mutually exclusive because inquiry into their feasibility can be conducted on a joint basis. From the perspective of legislative strategy, the choice between the two will depend in large part upon whether planning risks or popular objection to the imposition of a new tax is perceived as more objectionable.

### Conclusion

The central argument advanced in this article is that the development potential of private property is in part a community asset allocable to serve the community's needs. As implemented under development rights transfer this principle vastly expands government's economic and planning leverage over private land use decisions. Concomitantly, it places the leadership and administrative burden for resource protection more squarely on government's shoulders.

Government must not permit the real estate community or overzealous environmentalists to make the transfer program a captive of their special interests, or, failing this, to dilute or scuttle it. It must frankly communicate to the public that, like any other resource protection initiative, development rights transfer comes freighted with a mix of costs and benefits, chief among the former being the zoning adjustments or development charges of the police power and taxing approaches. It should be alert to the larger social and economic trade-offs that density transfers cause, fashioning and managing its transfer program to achieve resource protection without running roughshod over other community goals. It must insulate the transfer program from planning and design amateurs by assembling an adequately funded and qualified planning staff and by supporting the staff's initiatives against unwarranted political interference. Finally,

213. See generally authorities cited note 95 *supra*.

government needs to be realistic about the inherent possibility of favoritism that development rights transfer shares with other public programs which distribute lucrative franchises and privileges on the basis of flexible criteria.

Expanded governmental land use initiatives are imperative to hold the line on further environmental deterioration. The risks of development rights transfer, therefore, must be assessed against those of available or proposed alternatives, not against some supposed trouble-free ideal. Two such alternatives—the traditional harm/benefit test and the proposal that compensation for governmental interference with private land use be limited to the sole case of actual appropriation of private land—have been considered in tandem with development rights transfer with this purpose in mind. Measured against them and, more fundamentally, against the current land use ferment, development rights transfer could well be an idea whose time has come.

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