Transfer of Development Rights: A Remedy for Prior Excessive Subdivision

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Transfer of development rights is a potential solution to the ever increasing problem of preserving open space lands. In this article, the authors analyze the constitutionality and the practicality of applying transfer of development rights programs to previously subdivided lands which a planning agency has determined should no longer be developed. The authors analyze also the constitutionality of local government controlling the value of severed development rights through police power mechanisms to insure a stable market for investors. The authors argue that the application of the program to subdivision lands comes within the ambit of traditional police power and that development rights constitute a beneficial use of land following downzoning.

Recently, governmental planning agencies have recognized the problems created by excessive or inappropriate subdivision of community lands.[1] Open space is being reduced at an alarming rate and high quality land use planning has become more difficult to achieve.[2]

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[1] *See.* PEPPER, BICE AND ASSOCIATES, DENSITY TRANSFER SYSTEMS; OPTIONS FOR THE LAKE TAHOE BASIN, A FEASIBILITY STUDY PREPARED FOR THE CALIFORNIA TAHOE REGIONAL PLANNING AGENCY, 15-16 (August 1976) [hereinafter cited as PEPPER STUDY]; CALIFORNIA COASTAL ZONE CONSERVATION COMMISSION, CALIFORNIA COASTAL PLAN, 175 (December 1975) [hereinafter cited as COASTAL PLAN]; CALIFORNIA TAHOE REGIONAL PLANNING AGENCY REGIONAL PLAN 44-47 (August 1975) [hereinafter cited as TAHOE PLAN]. For a judicial discussion of the efforts of suburban communities to deal with disorderly development, *see* Associated Home Builders of the Greater Eastbay, Inc. v. City of Livermore, 18 Cal. 3d 582, 557 P.2d 473, 135 Cal. Rptr. 41 (1976).

[2] Consequently, planning agencies have recently turned to controls on the timing of development as well as the location and type of development. These controls have been upheld by the courts. *See* Construction Industry Ass'n of Sonoma County v. City of Petaluma, 522 F.2d 897 (9th Cir. 1975), *cert. denied*, 424 U.S. 934 (1976); Golden v. Planning Board of Ramapo, 30 N.Y.2d 359, 285 N.E.2d 291, 334 N.Y.S.2d 138 (1972), *appeal dismissed*, 409 U.S. 1003 (1972).

Traditionally a planning agency could utilize its police power to rezone subdivided areas to more restricted uses.[3] However, it is untenable to rely solely on restrictive zoning today. Down-zoning[4] presupposes that the property owner has no vested interest in a particular type of development.[5] Unfortunately, many owners of small subdivision lots have existing financial interests in their property in the form of dwellings or public infrastructure (e.g., roads and sewers).[6] Even those owners who do not have such financial interests are demanding a more equitable alternative to down-zoning.[7] Transfer of development rights (TDR) provides an excellent means for alleviating these difficulties.

TDR is an expansion of the planned unit development concept. In a planned unit development, construction is clustered in a specified area while other large land areas are designated for open space.[8] A

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[3] In Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926), the Court upheld, as a valid exercise of the police power, a comprehensive zoning ordinance excluding industrial establishments and apartment houses from areas which the ordinance delineated residential, with a consequent loss of value to the owners of the undeveloped lands. The Court said that all zoning ordinances "must find their justification in some aspect of the police power, asserted for the public welfare." *Id.* at 387. The Court said that the extent of the police power "is not capable of precise delimitation" but rather varies according to circumstances. *Id.* The Court stated by way of example, "A nuisance may be merely a right thing in the wrong place,—like a pig in the parlor instead of the barnyard. If the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control." *Id.* at 388. The Court held that zoning ordinances, as are other police power measures, are entitled to a "reasonable margin to insure effective enforcement," *id.* at 388-89, even if harmless uses are regulated with harmful ones, and that a zoning ordinance is a valid exercise of the police power (at least on its face), unless "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals or general welfare." *Id.* at 395.

[4] "Down-zoning" as used herein is the restricting of land to less intensive uses than previously authorized. Generally, landowners have no vested right to previously existing zoning relations which have been superseded by new regulations. HFH, Ltd. v. Superior Court, 15 Cal. 3d 508, 521, 542 P.2d 237, 246, 125 Cal. Rptr. 365, 374 (1975) ("The long settled state of zoning law renders the possibility of change in zoning clearly foreseeable to land speculators and other purchasers of property, who discount their estimate of its value by the probability of such change"); Marblehead Land Co. v. City of Los Angeles, 47 F.2d 528, 534 (9th Cir. 1931), *cert. denied*, 284 U.S. 634 (1931).

[5] *See* text accompanying notes 25-45 *infra* for discussion.

[6] The investment in public infrastructure comes about by way of payment of bonds or other special assessments for streets or sewers. In most situations, the public infrastructure is a condition precedent for further development.

[7] The practical difficulties of prohibiting development of already subdivided lots are so great that the California Tahoe Regional Planning Agency, presumably as a regional agency including state appointees being less subject to local development pressures, has so far rejected "rollback of prior approvals for individual single family lots" as a land use control option because it is "a difficult choice politically." TAHOE PLAN, *supra* note 1, at 46.

[8] *See* Associated Home Builders, Etc. Inc. v. City of Walnut Creek, 4 Cal. 3d 633, 484 P.2d 606, 94 Cal. Rptr. 630 (1971); Orinda Homeowners Committee v. Board of Supervisors, 11 Cal. App. 3d 768, 90 Cal. Rptr. 88 (1st Dist. 1970).

planned unit developer is limited by the requirement that the open space area must be on the same or a contiguous parcel as the development.[9] The result of this clustered development is a reduction in the number of roads, sewers, and other public facilities needed to service residents; the minimization of land area covered by paved surfaces; and preservation of fragile and valuable resource lands. While TDR achieves these same goals, it transcends the inherent limitation of planned unit development by not requiring that the open space area be on the same parcel or even near the developed area.

The basic premise of TDR is that each property owner has a conditional right[10] to develop his land that can be severed and transferred permanently to another parcel. The objective is to shift the development potential from land threatened with undesirable use to land where development would be more suitable.[11] To initiate TDR, the planning authority must designate a development zone and a preservation zone. In the preservation area, the agency must prohibit further development and permit landowners to transfer severed development rights. Lands in the development zone can absorb the rights transferred from the preservation zone. The planning agency's action modifies the existing zoning classification in both instances. In the preservation area, the zoning limits growth; in the development area, the zoning allows increased development. Up to this point, the system resembles a traditional exercise of police power.[12] Unlike traditional zoning, however, TDR provides a residual use[13] to the preservation area landowner that can be used only on another parcel.

The residual use which the landowner receives consists of a transferable development right. The planning agency puts a value on this

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[9] Krasnowiecki, *Planned Unit Development: A Challenge to Established Theory and Practice of Land Use Control*, 114 U. OF PA. L. REV. 47 (1965).

[10] In fact, there is no "right" to develop, but rather the prospect of using land for purposes in accordance with valid, governing regulations, and dependent on other circumstances including financing, market forces, and geography. The so-called "right" to develop does not become a right that is vested, until the developer has completed substantial construction under a lawful building or possibly other corresponding final permit. Avco Community Developers, Inc. v. South Coast Regional Com., 17 Cal. 3d 785, 553 P.2d 546, 132 Cal. Rptr. 386 (1976). The rationale for the vested rights rule is that government becomes estopped from applying new zoning rules to particular property to the detriment of the owner, if the owner has performed substantial work in reliance on lawful, final governmental approval. When the public need to prohibit becomes so great, as in the case of nuisances, even existing uses may be terminated under the police power. Goldblatt v. Town of Hempstead, 369 U.S. 590 (1962) (use of land as a gravel pit in a residential area validly terminated).

[11] Costonis, *"Fair" Compensation and the Accommodation Power*, 75 COLUM. L. REV. 1021, 1061-62 (1975).

[12] *See* text accompanying notes 52-56, *infra* for discussion.

[13] With traditional zoning, the highest and best use may be prohibited but lesser residual uses are allowed on the restricted parcel, which serve to avoid any "taking" issue. *See* Goldblatt v. Town of Hempstead, 369 U.S. 590, 592 (1962).

right according to the measure of the development potential that has been permanently restricted.[14] The landowner may then sell the severed rights to an owner of a parcel located in the development area. The zoning change in the development area increases the development potential of lands where the severed rights are incorporated. The potential increase in density, however, occurs only for those parcel owners who purchase development rights. Those landowners who do not participate in the scheme remain subject to the existing zoning requirements.

In the past, planning authorities have used TDR mainly to preserve national monuments and historic landmarks.[15] Recent proposals, however, have addressed the possibility of applying a TDR scheme to vacant land areas which the community has determined should not be developed.[16] Local communities throughout California and the United States have been enthusiastic about these proposals, since TDR presents a potential solution to the previously insoluble problems of excessive subdivision and undesirable growth.[17]

The problems inherent in applying TDR to subdivision areas include the questions of the constitutionality of TDR as a valid exercise of police power and the constitutionality of local government entering the economic market and stabilizing the value of the severed development rights. An examination of these issues supports the conclusion that TDR, as applied to situations involving undesirable prior subdivision, is legally feasible and provides an excellent solution for planning problems.

I. UNDESIRABLE PRIOR SUBDIVISION AND THE INADEQUACY OF TRADITIONAL ZONING MECHANISMS

Through subdivision regulation, local planning agencies can control growth effectively and provide for the orderly conversion of raw land into building lots.[18] Unfortunately, many governmental entities

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[14] The market value of the right is difficult to determine. Costonis, *supra* note 11, at 1066-68. The market value will be affected by five factors: (1) expected sale price of completed development zone units, (2) development zone land costs, (3) construction costs, (4) the previous three factors on lands outside the system, and (5) expectations concerning the stability and permanence of the system. PEPPER STUDY, *supra* note 1, at 140. The fifth factor will always be an unknown prior to implementation of TDR.

[15] Note, *The Unconstitutionality of Transferable Development Rights*, 84 YALE L.J. 1101 (1975).

[16] Chavooshian, Nieswand and Norman, *Growth Management Program: A New Planning Approach*, 34 URB. LAND 22-7 (January 1975).

[17] For a comprehensive compilation of the many TDR statutes and ordinances adopted or introduced in a number of states and municipalities, *see* COOPERATIVE EXTENSION SERVICE, COOK COLLEGE - RUTGERS UNIVERSITY, DEVELOPMENT RIGHTS BIBLIOGRAPHY, 21-29, 53-57 (May 1976).

[18] R. YEARWOOD, LAND SUBDIVISION REGULATION: POLICY AND LEGAL CONSIDERATIONS FOR URBAN PLANNING 20 (New York 1971). In California,

have approved subdivisions without adequately considering the potential long-range impact of their decisions.[19] As a result, the planning agencies are in the position of regulating subdivided lots which have already been approved for development, but which are located in areas where it is no longer prudent to build.

The Lake Tahoe basin provides an example of this dilemma. Over 17,000 undeveloped, subdivided lots exist in the California portion of the Lake Tahoe basin.[20] Present sewer system capacity exists for only a small percentage of these parcels.[21] The existing system servicing the north shore reached capacity in 1975. Consequently, the Regional Water Quality Control Board issued a cease and desist order which prohibited all subsequent sewer hook-ups in that area.[22] Sewage capacity for the south shore also has recently reached its limits.[23] Water shortages serve as a further constraint on development.[24] These limitations preclude development on a substantial number of lots.

When confronted with the problems caused by unregulated growth and excess subdivision, a planning agency can resort to the traditional growth control devices of down-zoning or service moratoria. Unfortunately, these traditional methods cannot fully remedy situations like that at Tahoe where subdivision lots are small and may already include public infrastructure.

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state law regulates local government actions on subdivision proposals, as set forth in the Subdivision Map Act. CAL. GOV'T CODE §§ 66410-66499.37 (West Supp. 1977).

[19] PEPPER STUDY, *supra* note 1, at 15-16; COASTAL PLAN, *supra* note 1, at 175; TAHOE PLAN, *supra* note 1, at 44-47.

[20] TAHOE PLAN, *supra* note 1, at 44.

[21] The estimates continually change. Present estimates are that sewage capacity exists for approximately 4,500 of the 17,000 vacant lots. *California Tahoe Regional Planning Agency hearing on Tahoe Truckee Sanitation Agency Project* at Tahoe City, California (April 25, 1975) and hearings on *South Tahoe Public Utility District Capacity* at Tahoe City, California (March 4, 1977) and at South Lake Tahoe, California (April 8, 1977). (Tape recordings on file at California Tahoe Regional Planning Agency, South Lake Tahoe, California.)

[22] California Regional Water Quality Control Board connection ban, adopted June 4-5, 1975, lifted in May 1976. The replacement of the north shore facility scheduled for completion in 1976 will supposedly create capacity for 4,000 of the lots referred to in note 21 *supra*.

[23] California Regional Water Quality Control Board, Lahontan Region, issued a cease and desist order including a "connection ban" on April 26, 1977 for the South Lake Tahoe area. Though water quality standards are currently being violated by the South Tahoe Public Utility District treatment plant, the order does allow 500 more connections. The apparent reason for the allowance of additional connections in the absence of capacity is political pressure by the construction industry.

[24] TAHOE PLAN, *supra* note 1, at 82-86. Included as constraints are recognized obligations to keep sufficient water flowing in the Truckee River between Lake Tahoe and Pyramid Lake, Nevada, to meet the needs of the Paiute Indians.

A. Down-zoning

Government has the right to regulate the use of private property in the public interest.[25] The police power, however, is not without limits. To be valid, the exercise of police power must promote the health, safety, welfare or morals of the community.[26] Thus, a change in a zoning classification, such as a restriction which limits building heights, is a valid exercise of the police power. It promotes the general welfare by preventing overcrowding or unsightly structures, without totally preventing the landowner from using his property.[27]

There are two constitutional limitations on the exercise of the police power. If down-zoning goes beyond these limits, it is invalid and the landowner may seek a judicial remedy to redress the governmental action. A zoning ordinance is an invalid exercise of the police power when it constitutes either a deprivation of property without due process of law[28] or a "taking" without just compensation.[29] The remedy for the former is to invalidate the ordinance while the remedy for the latter is to award monetary compensation.

In *Nectow v. City of Cambridge*,[30] the Supreme Court invalidated an ordinance which reclassified the plaintiff's property from industrial to residential use. The Court did not award monetary damages. The basis of the decision was that the rezoning violated the due process clause of the fourteenth amendment. It was an invalid exercise of the police power since the property was bounded on two sides by railroad and industrial uses. There was no rational relationship between the ordinance limiting the property to residential use and the public health, safety, welfare, and morals. The restriction on the landowner's property did not promote a public interest; rather, it was an arbitrary line-drawing which unreasonably affected land value and use.[31]

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[25] *See, e.g.*, Village of Belle Terre v. Boraas, 416 U.S. 1 (1974); E. FREUND, THE POLICE POWER 158-59 (1904).

[26] In Mugler v. Kansas, 123 U.S. 623, 668-69 (1887), the Court upheld regulations prohibiting the manufacture of liquor, which had the effect of making a brewery worthless. The Court declared the prohibited uses . . . to be injurious to the health, morals, or safety of the community." The exercise of the police power was described by the Court as "[t]he power which the States have of prohibiting such use by individuals of their property as will be prejudicial to the health, welfare, the morals, or the safety of the public . . . ." *Id.* at 669. *See also* Village of Belle Terre v. Boraas, 416 U.S. 1, 9 (1974).

[27] Thus, in Goldblatt v. Town of Hempstead, 369 U.S. 590, 592 (1962) and South Terminal Corp. v. Environmental Protection Agency, 504 F.2d 646, 678-79 (1st Cir. 1974), the courts upheld restrictions which deprived property of its most valuable uses, but allowed the owner less intensive uses.

[28] U.S. CONST. amends. V and XIV.

[29] U.S. CONST. amend. V. For a discussion of the problems of using the "taking" terminology, see text accompanying notes 81-87 *infra*.

[30] 277 U.S. 183 (1928).

[31] The effect of the decision was to move the zoning boundary line 100 feet

The judicial standard of *Nectow* demands that an ordinance not be arbitrary or irrational. However, the courts have expanded this standard to require that zoning actions also not be too harsh under the particular circumstances; otherwise, an ordinance may be invalid regardless of its rationality. Under the latter view, a landowner may challenge a down-zoning action as a "taking" if it restricts property use even though there is no public use or acquisition of the land.

Under the taking clause of the fifth amendment, a court may hold an ordinance to be a "taking," even though it is rational and not arbitrary, if it is so severe that it deprives the landowner of substantially all beneficial use of his property.[33] For example, a federal court awarded damages to a landowner where a government order restricted all reasonable access to his property even though the rationale for the ordinance was the valid preservation of wilderness lands.[34] The order banned aircraft flights at lower than four thousand feet which precluded flying guests into the landowner's recreational resort. This deprived the owner of substantially all beneficial use of his

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to include the affected land in the higher use district.

With respect to the police power generally, the Court in the 1930's and early 1940's overruled many of the "economic due process" decisions decided with Nectow v. Cambridge in the 1920's. These cases included West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937) (upheld minimum wage law for women) *overruling* Adkins v. Children's Hospital, 261 U.S. 525 (1923) (invalidated setting of minimum wages for women), and Olsen v. Nebraska, 313 U.S. 236 (1941) (unanimous court upheld statute regulating employment fees) *overruling* Ribnik v. McBride, 277 U.S. 350 (1928) (invalidated limiting of employment agency fees). The landmark case ending the flirtation with "economic due process," at least by the U.S. Supreme Court, is generally considered to be Nebbia v. New York, 291 U.S. 502 (1934). In a 5-4 decision, the Court upheld a New York law regulating milk prices. The Court said that, absent other constitutional restrictions, ". . . a state is free to adopt whatever economic policy may reasonably be deemed to promote public welfare, and to enforce that policy by legislation adapted to its purpose. The courts are without authority either to declare such policy or, when it is declared by the legislature, to override it." *Id.* at 537.

With the demise of "economic due process," it is doubtful that the Court today would have reached the result the *Nectow* Court did in 1927. The *Nectow* statement of the law, taken from Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926) that a zoning ordinance must not be arbitrary, still holds. However, the Court would be much less inclined to "second guess" a planning agency's findings of reasonableness. Thus, the fact that the land in *Nectow* was also adjacent to residential development would probably serve to save that ordinance today as a reasonable decision on a demarcation between residential and industrial uses.

[32] *See* text accompanying notes 33-45 *infra* for discussion.

[33] HFH, Ltd. v. Superior Court, 15 Cal. 3d 508, 542 P.2d 237, 125 Cal. Rptr. 365 (1975), *cert. denied*, 425 U.S. 904 (1976).

The portion of the opinion stating the distinction was quoted and relied upon in Goldblatt v. Town of Hempstead, 369 U.S. 590, 593 (1962). The same distinction has been recently stated in a decision upholding a prohibition against filling San Francisco Bay in the absence of compensation. Candlestick Properties, Inc. v. San Francisco Bay Conservation Etc. Com., 11 Cal. App. 3d 557, 571-72, 89 Cal. Rptr. 897, 905-06 (1st Dist. 1970).

[34] Bydlon v. United States, 175 F. Supp. 891 (Ct. Cl. 1959).

land. The court stated that the government action was clearly contrary to legislative policy.

In *HFH, Ltd. v. Superior Court*,[35] the California Supreme Court addressed the issue of when an exercise of the police power becomes a "taking." The case involved a city's down-zoning an area which reduced the value of the plaintiff's land from $400,000 to $75,000. The complaint alleged that such drastic diminution in market value constituted a "taking" of private property. The California Supreme Court disagreed, holding that plaintiffs had failed to state a cause of action. The court enunciated the rule that landowners may not rely on the taking clause to exempt them from a down-zoning action which substantially reduces, but does not destroy, the market value of their property. It held that zoning which merely reduces the value of land is a valid exercise of the police power and not compensable.

The plaintiffs in *HFH* did not raise the question of whether they were entitled to compensation if the ordinance forbade substantially all economically feasible use of their property. The court, therefore, advanced no opinion on that issue, although it reserved the question for later consideration.[36]

In *Eldridge v. City of Palo Alto*,[37] a California court of appeal ruled on the question of a landowner's right to compensation when a restrictive ordinance deprives him of all beneficial use of his land. The City of Palo Alto had rezoned the plaintiff's land from single-family residential use on minimum one-acre sites to "open space." Under the new zoning classification, the minimum lot size for construction of a dwelling was ten acres. The plaintiffs brought an action against the city alleging that the restriction denied all reasonable and beneficial use of the property.[38] The court held that the plaintiffs had stated facts sufficient to overcome the city's demurrer. As a basis for its decision, the court cited the reasoning of the *HFH* court that a diminution in market value of property does not violate the taking clause. The court determined, however, that a "taking" does occur when the restriction goes beyond diminishing the value of the property to depriving the owner of all reasonable or beneficial use.[39]

These California decisions on "taking" are consistent with the position taken by the United States Supreme Court. Although the

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[35] 15 Cal. 3d 508, 542 P.2d 237, 125 Cal. Rptr. 365 (1975), *cert. denied*, 425 U.S. 904 (1976).

[36] *Id.* at 518 n.16, 542 P.2d at 244 n.16, 125 Cal. Rptr. at 372 n.16 (1975) *cert. denied*, 425 U.S. 904 (1976). For a discussion of the case, *see* Comment, *Sizing up Just Compensation Relief for Down-Zoning After HFH and Eldridge*, this volume.

[37] 57 Cal. App. 3d 613, 129 Cal. Rptr. 575 (1st Dist. 1976).

[38] One plaintiff owned 750 acres while the other owned 22.27 acres. 57 Cal. App. 3d 613, 617, 129 Cal. Rptr. 575, 577 (1st Dist. 1976).

[39] The Court based its decision on Pennsylvania Coal v. Mahon, 260 U.S. 393 (1922).

Supreme Court has advanced a test of balancing the degree of restriction against the necessity for the restriction rather than stating a precise line-drawing formula, the cases indicate that depriving a landowner of all use of his property may constitute a "taking."[40] Justice Holmes summed up the approach of the United States Supreme Court in *Pennsylvania Coal Co. v. Mahon:* [41]

> Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law . . . .
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> The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.[42]

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[40] Sax, *Takings, Private Property and Public Rights*, 81 YALE L.J. 149 (1971).

[41] 260 U.S. 393 (1922).

[42] *Id.* at 413, 415 (1922). In *Pennsylvania Coal*, the Court struck down a regulation of subsurface mining as unconstitutional. The California Supreme Court has twice expressly distinguished the *Pennsulvania Coal* opinion from comprehensive zoning cases on the following grounds: *Pennsylvania Coal* was an action between two private parties who were disputing regulations benefiting an individual (one home owner) rather than the community. In addition, the regulation destroyed previously existing contract and property rights as reserved between the parties. Consolidated Rock Products Co. v. City of Los Angeles, 57 Cal. 2d 515, 528-29, 370 P.2d 342, 350, 20 Cal. Rptr. 638, 646 (1962), *appeal dismissed*, 371 U.S. 36 (1962); McCarthy v. City of Manhattan Beach, 41 Cal. 2d 879, 890-91, 264 P.2d 932, 938-39 (1953). There are several other extremely important features about the case as well. First, while *Pennsylvania Coal* is still cited, some of the citations occur in decisions upholding prohibitions against any economic use. *See* Candlestick Properties, Inc. v. San Francisco Bay Conservation Etc. Com., 11 Cal. App. 3d 557, 571-72, 89 Cal. Rptr. 897, 905-06 (1st Dist. 1970) (prohibition against bay fill). Second, the case is suspect as a relic from the short-lived "economic due process" era. *See* note 31 *supra* for discussion. Third, the case involved termination of a previously existing use.

Goldblatt v. Town of Hempstead, 369 U.S. 590 (1962), provides an example of the application of *Pennsylvania Coal.* The 7-0 decision cited *Pennsylvania Coal* for the proposition that ". . . governmental action in the form of regulation cannot be so onerous as to constitute a taking which constitutionally requires compensation," and that "a comparison of values before and after is relevant." *Id* at 594. However, the Court said that the comparison is not conclusive. *Id.* The Court also relied on the distinction between the police power and eminent domain set forth in Mugler v. Kansas, 123 U.S. 623, 668-69 (1887). *See* discussion note 86, *infra.* The *Goldblatt* Court upheld an ordinance enacted in 1958 which prohibited further excavating at a 38-acre tract which had been used for mining sand and gravel since 1927. The town had since grown around the excavation. In the 1950s, the town had failed to stop the mining because a state court held the owner had been conducting a prior non-conforming use on the premises. The town had not appealed from that adverse trial court judgment. The *Goldblatt* Court upheld the ordinance on the basis that it could not be declared unreasonable. The purpose of the regulation was the same as that in *Pennsylvania Coal*—safety. The Court said it was unnecessary to determine whether the regulation was too onerous, because the record lacked any evidence as to reduction in value. In fact, the excavation had left a water filled 20-acre crater 25 feet deep, so that it is difficult to conceive of an alternative use of the property having any appreciable economic value. If sufficient public necessity exists to support a regulation prohibiting uses which have the effect of rendering property valueless, there appears to be no basis for either invalidating the regulation or requiring compensation.

Thus, the approach of the California Courts corresponds to federal constitutional parameters.

A planning agency faced with problems of excessive subdivision must consider the "taking" issue before down-zoning land. The agency can determine whether the down-zoning is likely to constitute a "taking" by applying the standard of the courts. If the landowner is left with little or no beneficial use of his property after down-zoning, a finding of a "taking" is possible. The subdivided area may then be subject to the intended regulation only through the exercise of eminent domain.

Several factors point to the conclusion that excluding residential use on subdivision lots may constitute a "taking." Generally, there is no reasonable or beneficial use left to a subdivision lot owner if down-zoning deprives him of the opportunity to develop his property. He probably cannot use the property for camping or aesthetic purposes, since there are often other buildings, streets, and public lighting in the area.[43] Also, the landowner remains liable for any bonded indebtedness owing on public improvements, such as sewers, even if down-zoning precludes their use. An additional factor that may contribute to a court's finding of a "taking" is the landowner's continuing obligation to pay taxes that may be cumulatively greater than the property value after down-zoning. If this occurs, the landowner will lose money by owning the property. The owner would be in a better position if the government simply confiscated the property through eminent domain. The landowner would derive profit from the sale and he would be released from tax and bond obligations. Down-zoning theoretically is a less harsh measure than outright confiscation. When it severely harms the landowner instead, the courts would probably favor paying compensation to one who is placed in a worse position by owning land than he would be if the land were condemned.[44]

If a planning agency decides to down-zone such subdivided lands and the courts find that this down-zoning constitutes a "taking,"

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[43] If the lots are not in diverse ownership, the improvements have not been installed, and the subdivision is not partially built, the situation would be significantly different. The area could be effectively rezoned. Thus in Gisler v. County of Madera, 38 Cal. App. 3d 303, 112 Cal. Rptr. 919 (5th Dist. 1974), the Court upheld the zoning of property for agricultural uses and 18-acre minimun lot size, even though the property in question had many years earlier been divided into two and one-half acre residential lots. Once the public infrastructure has been installed, those landowners whose property is benefited by the system must pay off a bonded indebtedness, proportionate to the benefit received. CAL. GOV'T CODE § 59100 *et seq.* (West 1966). There is discretion in some circumstances where, for example, a subdivision road or sewer has been installed which is used by the community generally. The city might reassess values to relieve landowners. CAL. STS. & HY. CODE § 5551 (West 1969).

[44] Arverne Bay Const. Co. v. Thatcher, 278 N.Y. 222, 232, 15 N.E.2d 587, 592 (1938).

the municipal treasury may suffer irreparable harm. A "taking" operates as an exercise of the eminent domain power and requires that government pay full market value for any land confiscated.[45] The high cost of this confiscatory action precludes its frequent exercise. The planning agency should, therefore, consider less expensive alternatives to down-zoning if a court is likely to find a taking because the zoning leaves little or no beneficial use to the landowner.

B. Service Moratoria

The second alternative traditionally available to planning agencies to control growth and its undesirable consequences is the imposition of service moratoria.[46] This alternative exists when a community ceases to provide necessary water and sewage services for proposed residential development until growth is desirable in the area. A New York court of appeals endorsed this method of preventing premature subdivision and undesirable growth patterns in *Golden v. Planning Board of Town of Ramapo*.[47]

In *Golden*, the town denied the plaintiff's application for subdivision approval. Pursuant to a master plan, a comprehensive zoning ordinance, and a capital expenditure budget, the town developed an eighteen year plan for the location and sequence of municipal facilities. Based upon the plan, the town amended its zoning ordinance to prohibit subdivision until municipal services became available in the area. The ordinance stipulated that delays on the provision of public facilities were to be temporary. On the basis of the temporary nature of the restriction, the court held that the town's phased growth program was a valid exercise of the police power. It reasoned that there was a rational basis for phased growth through the imposition of service moratoria when a community has inadequate physical and financial resources to furnish all essential services immediately.[48]

Thus, a planning agency faced with uncontrolled growth might employ service moratoria as a temporary measure. Any permanent restriction on development, however, may violate the taking clause.[49]

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[45] Costonis, *supra* note 11 at 1022.

[46] Government has the power to withhold utility extensions for rational purposes, such as the avoidance of adverse fiscal or environmental consequences. Note, *Control of the Timing and Location of Government Utility Extensions*, 26 STAN. L. REV. 945, 961 (1974).

[47] 30 N.Y.2d 359, 285 N.E.2d 291, 334 N.Y.S.2d 138 (1972), *appeal dismissed*, 409 U.S. 1003 (1972).

[48] The Court supported its conclusion with the observation that traditional zoning has been ineffective in resolving subdivision growth problems.

[49] In *Golden*, one feature stressed by the Court in upholding the phased growth regulation was the temporary nature of the restrictions. The Court said: "An ordinance which seeks to permanently restrict the use of property, so that it may not be used for any reasonable purpose must be recognized as a taking . . . ." An appreciably different situation obtains where the restriction constitutes a temporary restriction promising that the property may be put to a profit-

Service moratoria also cannot be applied to any subdivided area where municipal services already exist. The rationale advanced in *Golden* that a city must be allowed time to obtain financing for capital expenditures does not apply where the city has already spent the money.

The problems of unregulated urban and suburban growth, excessive subdivision, and overburdened utilities require a more innovative and effective remedy than down-zoning or service moratoria. TDR provides a potential solution to this multifaceted problem.

II. The Constitutionality of Transfer of Development Rights

TDR is a possible solution to the problems caused by undesirable, excessive subdivision. TDR advances the public purpose of preserving valuable resource lands, and allows the city to implement a program of controlled growth in the development area. TDR also avoids a potential "taking" problem by providing residual use to a down-zoned landowner in the form of a development right.[50]

Prior to adopting TDR, a planning agency should insure that the plan could withstand constitutional challenge. If TDR were held to be a "taking," the agency would encounter the same financial dilemma that exists for invalid down-zoning.[51] If TDR is not a "taking," but instead a valid exercise of the police power, the planning agency would have a valuable mechanism for resolving problems which have previously defied solution.

A. Transfer of Development Rights as an Exercise of the Police Power

TDR requires a planning agency to select areas from which and to which a landowner may transfer development rights. To effectuate this aspect of the scheme, the agency must change the existing zoning patterns in each area.

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able use within a reasonable time. *Id.* at 380, 285 N.E.2d at 303, 334 N.Y.S.2d at 154. However, cases striking down permanent comprehensive land use planning measures, absent exclusionary features (South Burlington County N.A.A.C.P. v. Township of Mount Laurel, 67 N.J. 151, 336 A.2d 713 (1975)) are absent. Accordingly, it would appear that while the temporary nature of a restriction is urged and noted as a favorable factor in upholding the restriction, it is not essential to validity where a permanent restriction appears justified.

[50] A TDR program which included opening the restricted land to public use was struck down in Fred F. French Inv. Co. v. City of New York, 39 N.Y.2d 487, 350 N.E.2d 381, 385 N.Y.S.2d 5 (1976), *appeal dismissed*, 97 S. Ct. 515 (1976). For discussion, *see* text accompanying notes 91-94 *infra*. For comment that TDR is constitutional, *see* Costonis, *Development Rights Transfer: An Exploratory Essay*, 83 YALE L.J. 75 (1973). *Contra*, *see* Note, *The Unconstitutionality of Transferable Development Rights*, 84 YALE L.J. 1101 (1975).

[51] *See* text accompanying notes 43-45 *supra* for discussion.

1. Preservation Area

The preservation area is that part of the community that contains lands which should be protected from development. To preserve these lands, a planning agency must down-zone the property to prohibit further growth. This down-zoning action is an exercise of the traditional police power.[52] The United States Supreme Court delineated the judicial standard for the validity of such use restriction of property in *Village of Euclid v. Ambler Realty Co.*[53] In that case, the plaintiff-landowner sought to enjoin a zoning ordinance which reclassified his property from industrial to commercial use. The court refused the injunction and held that a community may control the development potential of lands within its boundaries as long as there is a rational relationship between the restriction and the public interest.[54]

The Supreme Court defined the meaning of "public interest" more specifically in the case of *Village of Belle Terre v. Boraas.*[55] Speaking for the Court, Justice Douglas stated:

> The police power is not confined to elimination of filth, stench and unhealthy places. It is ample to lay out zones where . . . the blessings of quiet seclusion, and clean air make the area a sanctuary for people.[56]

The down-zoning action which accompanies TDR satisfies the *Euclid and Belle Terre* criteria for a valid exercise of the police power. The goal of the agency is the orderly development of a community which residents can enjoy. To achieve this goal, the planning agency limits its exercise of the police power to those areas most in need of restriction. Thus, the agency allows increased development only in specified, desirable areas through the use of transferred development rights. Directing growth to more favorable areas and preserving fragile lands that would be destroyed by development rationally relates to the agency's goal of orderly growth. The rational relationship of the ordinance to the community goals satisfies the constitutional standards.

2. Development Area

A TDR system also requires modification of the existing zoning ordinance in the area that will receive transferred development rights. In the development area, TDR permits landowners to increase unit density above the prescribed limit by purchasing development rights and applying them to properties in the designated region. This

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[52] *See* text accompanying notes 81-90 *supra* for discussion.
[53] 272 U.S. 365, 389 (1926).
[54] *Id.* at 389-90 (1926).
[55] 416 U.S. 1 (1974).
[56] *Id.* at 9 (1974).

concept is unique in land use planning and is not included within an existing legal framework.

It is possible that the increased density allowed by TDR constitutes a simple rezoning which fits neatly into a planning agency's traditional police power. If this is the case, the *Euclid* rationale[57] validates the action. However, TDR's density allowance differs from traditional zoning in two significant ways. First, TDR permits increased development only for those who purchase development rights. Second, there is a limited supply of development rights. If some owners decide not to sell their rights, there will be even fewer rights available. This may preclude interested landowners from participating in the program. These differences may provide the basis for a judicial challenge to TDR as an invalid exercise of police power. An analysis of zoning techniques similar to TDR that also authorize selected increased density may provide needed legal guidelines for a reviewing court.

3. Legal Rationale

Variances, spot zoning, and zoning exceptions are the traditional methods a planning agency uses to increase density on individual parcels or small areas of land. Since there is no established legal framework for analyzing the validity of TDR, a court could analogize TDR to these functionally similar situations. Even though aspects of the traditional methods differ from those of TDR, they provide a common legal framework for examining the validity of TDR as an exercise of the police power.

A landowner who wishes to use his land in a manner not allowed under the existing zoning ordinance may petition an administrative zoning board for a variance. For example, a property owner may seek a variance to construct a gas station in a residential area.[58] Another owner might request a variance to increase the statutorily limited floor area of a new building.[59] In deciding whether to grant a variance, a zoning board must consider the effect of a variance on the stability of the zoning district.[60] It achieves this by weighing several factors. The first is whether the landowner suffers any hard-

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[57] The basic concept applied and upheld in Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926), is that it is appropriate and rational to separate incompatible land uses.

[58] *See* Arverne Bay Const. Co. v. Thatcher, 278 N.Y. 222, 15 N.E.2d 587 (1938).

[59] *See* Application of Village of Bronxville, 1 A.D.2d 236, 150 N.Y.S.2d 906 (1956), *aff'd*, 1 N.Y.2d 839, 153 N.Y.S.2d 220, 135 N.E.2d 724 (1956).

[60] Rubin v. Board of Directors, 16 Cal. 2d 119, 124, 104 P.2d 1041, 1043 (1940) (judgment granting mandamus reversed, on the ground that the Board had discretion to deny a variance); CAL. GOV'T CODE § 65901 (West 1966).

ship under the existing ordinance.[61] The second factor is whether the present zoning deprives the landowner of privileges enjoyed by other landowners in his district.[62] A third consideration is whether the variance complies with the public interest, the present zoning, and the general plan of the community.[63] Finally, the zoning board determines whether the variance will create harmful effects to neighboring properties and the character of the district.[64] If the petitioning landowner shows that his property is unjustly burdened and the variance will not disturb the character of the district, the board may grant the variance.

The zoning board, however, can grant variances only within specified limits. In California, the supreme court has declared that a city may allow only a small percentage of variances within a particular district.[65] The court's rationale is that mutual restriction of neighboring properties through zoning enhances the community welfare. The granting of widespread variances would subvert this critical reciprocity.[66] Further, any major change in the nature of a zoning district is a legislative determination.[67] An administrative zoning board cannot circumvent the legislative policy-making role of the planning agency by authorizing a change in the use pattern of a zone through granting a high percentage of variances.[68]

TDR, while having some of the same results as zoning variances, differs from them in its application. These differences lend further support to TDR's validity. While variances relate only to small portions of a zone, TDR potentially affects every landowner in the

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[61] *See* Tustin Heights Assn. v. Board of Supervisors, 170 Cal. App. 2d 619, 627-628, 339 P.2d 914, 920 (4th Dist. 1959). (Judgment after sustaining demurrer to petition of residents seeking to challenge the granting of a conditional use permit, reversed.)

[62] CAL. GOV'T CODE § 65906 (West 1966).

[63] Rubin v. Board of Directors, 16 Cal. 2d 119, 124, 104 P.2d 1041, 1043 (1940).

[64] Comment, *The General Welfare, Welfare Economics, and Forming Variances*, 38 SO. CAL. L. REV. 548, 589-90 (1965).

[65] Topanga Ass'n for a Scenic Community v. County of Los Angeles, 11 Cal. 3d 506, 522 P.2d 12, 113 Cal. Rptr. 836 (1974).

[66] *Id.* at 517, 522 P.2d at 18-19, 113 Cal. Rptr. at 842-43.

[67] *Id.* at 522, 522 P.2d at 22, 113 Cal. Rptr. at 846.

[68] A New York court of appeals outlined a standard of review for testing the validity of variances in Hoffman v. Harris, 17 N.Y.2d 138, 269 N.Y.S.2d 119, 216 N.E.2d 326 (1966). If the variance involves only a change in density levels, there is no modification in the use pattern of the zoned district. Therefore, the court requires the landowner to show only that the zoning classification creates practical difficulties for him in the use of his property. He does not have to show that the ordinance severely burdens the property or that it has precluded all use of the land. For example, an owner of commercial buildings who wishes to increase floor space beyond the statutory limit can obtain a variance if he demonstrates that a smaller unit would be difficult to lease. Since a showing of inconvenience may satisfy the court, it appears that the standard of review

zoning district. TDR, through legislative enactment, mandates an opportunity for every landowner in the district to participate in the purchase of a limited number of development rights. There is no requirement of administrative approval to gain increased density for any single parcel in the development area. Because TDR is created by legislative action, it should be accorded a strong presumption of validity by the courts. Additionally, the public policy considerations that support TDR contribute to broad and important community interests such as preventing undesirable growth and overburdened public facilities. Further, TDR's functional similarity to zoning variances allows the courts to use the legal rationale of variances to validate TDR.

Spot zoning is another alternative for allowing increased density to landowners, although the courts discourage its use.[69] Spot zoning singles out a small parcel of land for a use classification radically different from that of the surrounding area. The owner of the spot zoned property usually benefits from this action to the detriment of the surrounding owners.[70] Although this zoning technique gives zoning relief to the particular property owner, the courts generally condemn its use because it violates *Euclid* zoning concepts. These concepts demand homogeneity throughout the district to promote the overall quality of the community. The *Euclid* court's standards do, however, permit ordinances which single out a particular plot or create small areas devoted to a different use if the restrictions are in accordance with the comprehensive zoning plan.[71]

TDR appears to meet the *Euclid* court's standards for a permissible zoning scheme while avoiding the pitfalls of spot zoning. TDR, while benefiting individual property owners who purchase the rights, is also a comprehensive regulation of the entire zoning district.[72] A California court of appeal addressed the issue of spot zoning in relation to planned unit development, a land use scheme that is closely related to TDR.[73] In *Orinda Homeowners Committee v. Board of Supervisors*,[74] a city rezoned residential land to permit the construction of a planned unit development. The ordinance allowed

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is flexible and that it can be easily satisfied.

[69] Spot zoning traditionally is strongly suspect. An ordinance may not arbitrarily impose greater restrictions upon some landowners than upon others similarly situated. City of Orange v. Valenti, 37 Cal. App. 3d 240, 243-44, 112 Cal. Rptr. 379, 382 (4th Dist. 1974).

[70] Rogers v. Village of Tarrytown, 302 N.Y. 115, 96 N.E.2d 731 (1951) (held that ordinance allowing owners of 10 or more acres in one and two family residential districts to develop apartments was intended to benefit the community rather than the individual owners, so as not to institute invalid "spot zoning").

[71] *Id.* at 124, 96 N.E.2d at 735.

[72] Berger, *The Accommodation Power in Land Use Controversies: A Reply to Professor Costonis*, 76 COLUM. L. REV. 799, 810 (1976).

[73] *See* text accompanying notes 8-9 *supra* for discussion.

[74] 11 Cal. App. 3d 768, 90 Cal. Rptr. 88 (1st Dist. 1970).

the landowner to increase dwelling density on a portion of his land if he would reserve the remaining areas for open sapce. The court held that the zoning did not offend uniformity requirements as long as the regulation was uniform for the entire zone. Individual units did not have to be alike. The court stated that planned unit development devised a better use of undeveloped property than the traditional approach of proceeding on a lot to lot basis.[75] This reasoning strongly supports the characterization of TDR as a uniform regulation of property rather than spot zoning. TDR applies to all landowners equally, even though everyone in the district may not participate in the plan. TDR, therefore, probably is not spot zoning and, accordingly, a court should not invalidate it.

A final related zoning technique that contributes to a police power framework for TDR is the zoning exception. The Illinois Supreme Court explained the zoning exception as a special use of land within a district which is necessary or desirable for the welfare of the community.[76] For example, construction of a school in a residential area constitutes a zoning exception.[77] Although such zoning changes provide beneficial services to the community, the courts require once again that the overall land use pattern remain uniform to preserve the character of the area and to conform with the general plan.

TDR and zoning exceptions both rely upon the express provisions of the zoning ordinance to determine who, within the district, may be granted increased use. In both instances, the ordinance establishes a limitation on the allowed increased use. In the case of zoning exceptions, the courts have accepted the legality of a system where the zoning ordinance establishes a dual standard—one for landowners generally and another for those property owners who meet the requirements set forth in the ordinance to merit special treatment. A court could analogize from the rationale of zoning exceptions to support TDR since the ordinance framework is similar. The distinction between the two systems is the scope of their application. Zoning variances are granted infrequently, whereas TDR may have widespread application.

The legal doctrine of variances, spot zoning, and zoning exceptions

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[75] *Id.* at 90 Cal. Rptr. at 90.

[76] Kotrich v. County of Du Page, 19 Ill. 2d 181, 166 N.E.2d 601 (1960), *appeal dismissed*, 364 U.S. 475 (1970) (in upholding a request to construct a country club in a residential zone, the court held that zoning exceptions not included in the customary class of uses are valid when compatible with nearby land use).

[77] In Tullo v. Township of Millburn, 54 N.J. Super. 483, 149 A.2d 620 (1951), the court distinguished zoning exceptions from variances. The court explained that exceptions are designed to allow uses meeting a public need such as a fire house, in a district where the use would otherwise not be allowed. Variances, on the other hand, are designed to alleviate undue hardship on private landowners.

which provide increased land use density indicates that the courts probably will uphold TDR. Each zoning technique contributes support to TDR's validity. The law of variance demonstrates that increased density for a specific group of landowners is permissible. The principles of spot zoning illustrate the legal parameters of uniformity which TDR satsifies, and zoning exceptions provide a legal basis for allowing increased density to a particular group by the language of an ordinance.

An additional factor that contributes to TDR's validity is the favorable judicial attitude toward innovative, legislatively mandated land use schemes.[78] The United States Supreme Court endorsed creative land use planning in *Young v. American Mini Theaters, Inc.*[79] The City of Detroit had passed an ordinance controlling the location of adult movie theaters. The ordinance required that each theater be separated from another of its kind by at least one thousand feet. It also prohibited adult theaters from being located within 500 feet of a residential area. In upholding the validity of the ordinance, the court remarked that:

> The city's interest in attempting to preserve the quality of urban life is one that must be accorded high respect . . . the city must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems.[80]

In the intractible situation of subdivision lands that should not be developed, courts are likely to welcome TDR as an innovative planning solution despite the absence of a definitive legal foundation.

B. Transfer of Development Rights and the Taking Issue

The down-zoning employed in TDR must be a valid exercise of the police power; it cannot be a "taking." In analyzing the taking issue,

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[78] In Construction Indus. Ass'n v. City of Petaluma, 522 F.2d 897 (9th Cir. 1975), *cert. denied*, 424 U.S. 934 (1976), the court upheld a plan limiting construction to 500 building permits per year as a reasonable exercise of the police power. The court stated: "The federal court is not the proper forum for resolving these problems. The controversy stirred up by the present litigation is indicated by the number and the variety of amici on each side . . . . The complex economic, political and social factors involved in this case are compelling evidence that resolution of the important housing and environmental issues raised here is exclusively the domain of the legislature." *Id.* at 909 n.17.

[79] 427 U.S. 50 (1976).

[80] *Id.* at 71. Similarly, even where disproportionate racial impact is alleged, a zoning ordinance will not be subject to the stricter "compelling interest" test, rather than the "arbitrariness" test, unless there is proof of a discriminatory purpose. Village of Arlington Heights v. Metropolitan Hous. Dev. Corp. 97 S. Ct. 555, 563-64 (1977). The deference extended by the Supreme Court to zoning enactments even where "fundamental" rights such as free speech or freedom from racial discrimination are impacted, implies a very broad mandate for legislative solutions to complex land use planning problems where only "property" rights are affected.

the courts have designated two related yet separate limitations on the police power. The first is that a regulatory ordinance which is related to a legitimate public purpose should leave some reasonable economic value in the down-zoned property.[81] If the restriction destroys virtually all value of the land, the courts may strike down the ordinance as a "taking." It is an invalid exercise of the police power because it regulates property without due process of law in contravention of the Fourteenth Amendment. A "taking" as a violation of due process is not remedied by compensation; instead, the courts grant declaratory relief to the landowner by invalidating the ordinance.[82]

The second limitation on the police power involves the remedy of compensation. A compensable "taking" occurs when the restrictive ordinance violates the standards of the fifth amendment. The amendment requires that compensation be paid to any landowner whose property is taken for a public purpose. The additional ele-

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[81] Fred F. French Inv. Co. v. City of New York, 39 N.Y.2d 587, 593-94, 350 N.E.2d 381, 385-86, 385 N.Y.S.2d 5, 10 (1976), *appeal dismissed*, 97 S. Ct. 515 (1976). *See* text accompanying notes 91-94 *infra* for discussion of the case.

[82] Costonis, *supra* note 11 at 1035. In Pinheiro v. County of Marin, 60 Cal. App. 3d 323, 327 60 Cal. Rptr. 633 (1st Dist. 1976), the Court did not reach the issue of whether inverse condemnation is unavailable so that a landowner is limited to seeking to have the zoning ordinance rendered invalid, because the owner had failed to allege deprivation of all use. A demurrer was properly sustained on that ground. Declaratory relief as well as inverse condemnation is unavailable to a landowner seeking to challenge a zoning ordinance on the "taking" ground, if the landowner alleges only a diminution of value as opposed to deprivation of all value. Dale v. City of Mountain View, 55 Cal. App. 3d 101, 127 Cal. Rptr. 520 (1st Dist. 1976).

Contra, Eldridge v. City of Palo Alto, 57 Cal. App. 3d 613, 129 Cal. Rptr. 575 (1st Dist. 1976); Brown v. Tahoe Regional Planning Agency, 385 F. Supp. 1128, 1132 (D. Nev. 1973). The *Eldridge* decision was reached over a strong dissent and the ordinance opened the restricted lands to public use (hiking trails). The problems posed by concluding that a zoning ordinance may be a valid exercise of the police power for which compensation is nevertheless required, is well illustrated by the aftermath of the *Brown* decision. In a later case, Western Int'l Hotels v. Tahoe Regional Planning Agency, 387 F. Supp. 429, 438 (D. Nev. 1975), the same federal judge who decided *Brown*, held that inverse condemnation could not be alleged against the Tahoe Regional Planning Agency because the agency had not been granted the authority to condemn property. It is difficult to manufacture a new category of police power requiring compensation and necessitating distinguishing between the actions of agencies with general grants of power such as counties, and the new planning agencies with limited powers. The courts would be well advised to adhere to the time honored distinction between the police power and eminent domain. *See* discussion note 30 *supra*. In this way, the choices open to the agency in proceeding with or without compensation together with the financial implications of the decision are clear from the beginning. If an ordinance should be invalidated, the landowners are free to proceed. Any delay in development should not be onerous, in view of constantly appreciating land prices. *See generally* Selby Realty Co. v. City of San Buenaventura, 10 Cal. 3d 110, 514 P.2d 111, 109 Cal. Rptr. 799 (1973) (cause of action for inverse condemnation does not arise on mere enactment of general plan showing land as programmed for eventual acquisition).

ment of public purpose is the essential difference between a non-compensable and a compensable "taking." For example, an ordinance which appropriates property for public use such as a park is a "taking."[83] This action requires compensation since there is public use rather than mere regulation. The rationale for awarding compensation is that the owner of the damaged property is contributing more than his proper share to the public undertaking.[84] He must be reimbursed for this intrusion.

Generally, "taking" for a public purpose involves restraints on property such as public possession, acquisition or severe down-zoning implemented for the purpose of decreasing the value of the property for later government acquisition at a reduced price.[85] In all of these compensable "taking" situations, the police power infringes on the condemnation power of government. Under the condemnation power, which is referred to as eminent domain,[86] the government purchases private property that it uses for a public purpose. When a restrictive ordinance achieves the same purpose without payment, the landowner has a right to challenge the governmental action and demand payment for his land. This is called an action for inverse condemnation. The courts must find a compensable "taking" before they can award damages for inverse condemnation.[87]

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[83] Sneed v. County of Riverside, 218 Cal. App. 2d 205, 32 Cal. Rptr. 318 (4th Dist. 1963) (land adjacent to airport).

[84] By using public funds to compensate landowners whose land is acquired by the public, the costs of public improvements are distributed throughout the community. *See* Clement v. State Reclamation Board, 35 Cal. 2d 628, 642, 220 P.2d 897, 905 (1950).

[85] Other actions giving rise to a requirement for compensation include unreasonable delay after public announcement of intent to acquire, Klopping v. City of Whittier, 8 Cal. 3d 39, 500 P.2d 1345, 104 Cal. Rptr. 1 (1972), "practical" taking such as prohibiting all use including growing of vegetation at end of an airport runway, Peacock v. County of Sacramento, 271 Cal. App. 2d 845, 77 Cal. Rptr. 391 (1969), or using a zoning classification as a subterfuge for acquisition of land. Sneed v. County of Riverside, 218 Cal. App. 2d 205, 32 Cal. Rptr. 318 (4th Dist. 1963).

[86] In Mugler v. Kansas, 123 U.S. 623, 668-69 (1887), the Court distinguished the police power as an action prohibiting a property use which may have an adverse impact on value, from eminent domain which is acquiring property for public use. The Court held that compensation is required only for an action of eminent domain.

[87] Professor John Costonis has proposed a third means of evaluating regulatory zoning ordinances that may result in a taking. *See* Costonis, *supra* note 11. He suggests that the government should award some compensation to severely down-zoned landowners who are denied all reasonable beneficial use of their property. The measure of compensation would not equal full market value of the land. Rather, it would constitute payment of the difference in value between reasonable beneficial use and the price of the land following the down-zoning. *Id.* at 1051-52. Costonis labels this action the Accommodation Power. The difficulty with the proposal is that Costonis fails to provide a guide as to what constitutes reasonable beneficial use. The landowner must rely on the same complex, judicial determinations as are presently applied. Unfortunately, Costonis

By its operation, the down-zoning used in TDR is not a compensable "taking." TDR does not appropriate or acquire property. It leaves title and possession of the land with the property owner. It also provides a residual use in the form of development rights. The property is limited by a single restriction; it cannot be developed. Restriction alone has never been sufficient for the courts to find a compensable "taking."[88]

The major issue is whether TDR violates due process by failing to provide a *valuable* residual use, thereby constituting a noncompensable "taking." The applicable court decisions indicate that it does not. The appropriate standard of review to test the validity of TDR is whether there is some reasonable beneficial use of property following a down-zoning.[89] TDR satisfies this requirement since it leaves beneficial use of the land in its natural state and provides development rights which may be sold or applied to another parcel. Use and enjoyment of property in its natural state alone, according to one court, would constitute a valid exercise of the police power.[90] TDR transcends this standard by providing additional value through the development rights.

A New York court of appeals discussed the issue of the value of TDR in *Fred F. French Investment Co. v. City of New York.*[91] In

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has not solved the nemesis of the courts which is defining the limits of a "taking." Berger, *supra* note 72 at 818, 823. Analysis of TDR, therefore, must for the present remain within the legal framework of the police power.

[88] However, zoning classifications used as a subterfuge to acquire land for public use are invalid. Sneed v. County of Riverside, 218 Cal. App. 2d 205, 32 Cal. Rptr. 318 (4th Dist. 1963) (held that zoning of airport approaches is distinguishable from traditional height restrictions, so that cause of action for inverse condemnation can be stated).

[89] *See* text accompanying notes 33-42 *supra.*

[90] In Just v. Marinette County, 56 Wis. 2d 7, 201 N.W.2d 761 (1972), the Wisconsin Supreme Court upheld shoreland zoning regulations prohibiting the alteration from natural conditions (filling) of land within 1,000 feet of a navigable lake and 300 feet of a navigable river. The purpose for the regulations was to protect the fragile shoreland environment. The court held that "[a]n owner of land has no absolute and unlimited right to change the essential purpose for which it was suited in its natural state and which injures the rights of others. The exercise of the police power in zoning must be reasonable and we think it is not an unreasonable exercise of that power to prevent harm to public rights by limiting the use of private property to its natural use." *Id.* at 17, 201 N.W.2d at 768. The decision was followed by the New Hampshire Supreme Court in Sibson v. State, 115 N.H. 124, 336 A.2d 239 (1975). *See also,* Turnpike Realty Co. v. Town of Dedham, 362 Mass. 221, 284 N.E.2d 891 (1972) (prohibited construction of structures requiring landfill in the flood plain); Turner v. County of Del Norte, 24 Cal. App. 3d 311, 101 Cal. Rptr. 93 (1st Dist. 1972) (ordinance limiting flood plain property to park, recreation or agriculture upheld). *Contra,* Morris County Land I. Co. v. Parsippeny-Troy Hills Tp., 40 N.J. 531, 193 A.2d 232 (1963) (ordinance requiring flood basin land to be kept in its natural condition invalidated).

[91] 39 N.Y.2d 587, 595, 350 N.E.2d 381, 386-87, 385 N.Y.S. 2d 5, 11 (1976, *appeal dismissed,* 97 S.Ct. 515 (1976). The landowner obtained relief declaring

that case, the city passed an ordinance which established a public park on plaintiff's land. As compensation, the city granted transferable development rights to the owner which he could use in another area. In response to the city's action, the landowner brought an action for declaratory relief and inverse condemnation. The court ruled in favor of the landowner but held that the city's action was a noncompensable "taking." The rationale for this finding was that the ordinance destroyed the economic value of the land, and rendered it unsuitable for any reasonable use.[92] The court did not award monetary compensation however, since there was no physical invasion of the property.

In determining this holding, the court reviewed the adequacy of the development rights given to the landowner as compensation for the restriction. The court endorsed novel land use techniques and acknowledged that development rights are a potentially valuable and transferable commodity.[93] There was a difficulty in this case, however, since the development rights system, as applied, failed to provide a reasonable value. The ordinance granted the rights to the landowner without designating a receiving parcel or a reliable purchaser. The court held, therefore, that absent some assurance of future use, the ordinance failed to preserve the value of the development rights until the landowner secured a purchaser or additional property where he could apply them.[94]

If TDR can achieve market stability, the courts will probably validate the scheme since it provides a reasonable beneficial use of property following down-zoning.[95] The courts demand that some reasonable beneficial use be left following down-zoning of property of a "taking" will occur. The severed development rights must constitute this beneficial use, since down-zoning undesirable subdivision lots may eliminate any meaningful use of property. The substituted development rights must have an actual and stable value to meet the courts' test. According to the *French* court, actual and stable value results from an immediate market for the rights to insure the required stability.[96]

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the ordinance unconstitutional but was not awarded damages. The landowner sought review in the U.S. Supreme Court on the damages issue.

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

[93] *Id.*

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

[95] In HFH, Ltd. v. Superior Court, 15 Cal. 3d 508, 512 n.2, 542 P.2d 237, 240 n.2, 125 Cal. Rptr. 365, 368 n.2 (1975), *cert. denied*, 425 U.S. 904 (1976), the court held that value relative to the worth of the land prior to the down-zoning is irrelevant. The only consideration is the present value of all property in contrast to the destruction of all value.

[96] Fred F. French Inv. Co. v. City of New York, 39 N.Y.2d 587, 598-99, 350 N.E.2d 381, 387, 385 N.Y.S.2d 5, 11 (1976), *appeal dismissed*, 97 S.Ct. 515 (1976).

C. Transfer of Development Rights as Reasonable Beneficial Use of Property

An analysis of the compensatory features of TDR is crucial to a determination of its validity. A planning agency could achieve market stability for TDR in two ways. First, the agency could down-zone the development area so that landowners would have to purchase development rights if they wished to develop beyond very low density. Second, the agency could participate in the market and insure a stable value by purchasing the rights.

The first alternative requires a planning agency to utilize its police power and down-zone all property in the development area. The purpose of the down-zoning is to create a market for development rights so that landowners in the preservation area can transfer development potential from valuable resource lands. The down-zoning establishes a market by forcing a landowner, who wishes to build beyond a minimal density level, to purchase development rights to obtain the desired density.

Although some landowners may object to the down-zoning of their development area lands to benefit the preservation area, the entire community profits from this arrangement. The California Supreme Court endorsed the use of zoning restrictions that primarily benefit residents of surrounding areas. The court determined that the constitutionality of a zoning restriction must be measured by its impact not only upon the welfare of the immediately affected area, but upon the welfare of the surrounding region.[97] Thus, restricting the development area lands to preserve valuable preservation area property is within the legal boundaries of restrictive zoning.

TDR also allows a down-zoned landowner in the development zone to retain title, possession, and enjoyment of his land, as well as the right to develop the property at low density. He is merely denied the right to develop the property to its highest and best use. Since a landowner does not have a vested right to maximum development of his property,[98] the limited use allowed under the TDR down-zoning is sufficient to validate the ordinance.

Following the valid down-zoning of the land, natural competitive

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[97] Associated Home Builders of the Greater Eastbay, Inc. v. City of Livermore, 18 Cal. 3d 582, 557 P.2d 473, 135 Cal. Rptr. 41 (1976).

[98] *See, e.g.*, South Terminal Corp. v. Environmental Protection Agency, 504 F.2d 646, 678 (1st Cir. 1974) (held that air quality regulation did not constitute a "taking" when a parking freeze required the extermination of 1000 existing parking spaces: "The taking clause is ordinarily not offended by regulation of uses, even though the regulation may severely or even drastically affect the value of the land or real property."); Hadacheck v. Sebastian, 239 U.S. 394 (1915) (upheld ordinance prohibiting manufacture of bricks in a district, even though property diminished in value from $800,000 to $60,000).

forces should eventually create a demand for development rights.[99] The price of rights, however, initially may fail to provide a reasonable return to preservation area owners for a number of reasons: initial suspicion of a novel commodity or erratic market structure, the dependency on the market structure, the number of rights in the market, the size and location of the transfer districts, the specific zoning classification, and the demand for new construction.[100] Local government planning agencies could solve these problems of instability through the second alternative which involves police power regulation of the price of development rights.

Government entities have broad powers to regulate sales prices of commodities and wages.[101] The California Supreme Court, in *Birkenfeld v. City of Berkeley*,[102] applied this power to the restriction of real property prices in the form of residential rent controls. In its decision invalidating an ordinance,[103] the court emphasized that real property has no special protection from government regulation. The court endorsed "applying the same constitutional standards to the regulation of rents that the courts apply to regulation of other consumer prices."[104] It rejected the plaintiff's contention that historic preference for real property demanded a greater showing of necessity for rent regulation. The court cited zoning cases that upheld police power restrictions on property use as support for its decision.[105] *Birkenfeld* supports a planning agency's legal right to regulate the price of development rights.

A planning agency, however, may decide that the free market system would not insure the stability that the courts require for the value of the development rights, even with down-zoning and price regulation. The *French* court emphasized that a landowner must have the opportunity to sell development rights immediately upon their severance or their value will become so abstract as to be temporarily destroyed.[106] The agency could create a development rights

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[99] H. MANNE, THE ECONOMICS OF LEGAL RELATIONSHIPS, 100-01 (1975).

[100] Berger, *supra* note 72 at 805.

[101] *E.g.*, Nebbia v. New York, 291 U.S. 502, 537 (1934).

[102] 17 Cal. 3d 129, 550 P.2d 1001, 130 Cal. Rptr. 465 (1976).

[103] The ordinance was invalidated because its application would result in unreasonable delay in adjusting maximum rents, and because of conflict with statutes providing a summary proceeding for the repossession of real property.

[104] *Id.* at 159, 550 P.2d at 1022-23, 130 Cal. Rptr. at 486-87.

[105] The California land use cases cited were Consolidated Rock Products Co. v. City of Los Angeles, 57 Cal. 2d 515, 370 P.2d 342, 20 Cal. Rptr. 638 (1962) (upheld regulation prohibiting use of property for sand and gravel excavation, even though property had no other appreciable economic value), *appeal dismissed*, 371 U.S. 36 (1962), the Miller v. Board of Public Works, 195 Cal. 477, 234 P. 381 (1925) (upheld ordinance prohibiting multi-family dwellings, other than duplexes, in designated residential use districts).

[106] Fred F. French Inv. Co. v. City of New York, 39 N.Y.2d 587, 350 N.E.2d 381, 385 N.Y.S.2d 5 (1976), *appeal dismissed*, 97 S.Ct. 515 (1976).

bank[107] by purchasing the rights with public funds as soon as they are available. This would assure a stable market for the sale of rights. The agency could later resell the rights to interested purchasers in the development area. This system would require government funding initially, but it would support itself by the sale of rights once it was established. Under the system, a planning agency would absorb any financial loss resulting from price differences. It would also retain any rights which would not be sold, and bear the attendant fiscal losses. The success of the system would be measured by how many rights were resold. Successfully selling all the rights would return all or part of the initial public expenditures.[108]

The problem with development rights banks, however, is the fiscal restraints they impose on public treasuries. A development rights bank necessitates a large initial expenditure. Funding may be difficult to obtain since governments have limited financial resources which must be allocated according to established priorities. Public funds are expended first for lands which will be open for public use. Outright acquisition of land for parks open to the public is likely to have higher funding priority than a transfer system which, while restricting development, necessarily leaves title and the right to exclusive possession in private hands.

Whether a planning agency down-zones the development area to create market demand, restricts the market value of the rights, or purchases the rights upon severance, TDR constitutes a stable and

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[107] *See* Costonis, *The Chicago Plan: Incentive Zoning and the Preservation of Urban Landmarks*, 85 HARV. L. REV. 574 (1972).

[108] Any approach to stabilizing the value of TDR that involves public funds, must relate to a valid public purpose. Article XVI, section 6 of the California Constitution prohibits the Legislature from making gifts of public funds to private parties. An agency can expend funds for public benefit, however, despite incidental benefits to private parties. American Company v. City of Lakeport, 220 Cal. 548, 32 P.2d 622 (1934) (incidental benefits to individuals does not render street improvements unconstitutional under gift provision); Patrick v. Riley, 209 Cal. 350, 287 P. 455 (1930) (held even though Legislature could require destruction of tubercular cattle without compensation under the police power, payment of compensation did not violate gift provisions since regulation was to accomplish a public rather than a private purpose). For example, a proposed amendment to the California Coastal Act of 1976 (not adopted) raised the issue of possible violation of the prohibition against gifts, by requiring compensation for valid down-zoning actions implementing the Coastal Plan. Since the compensation was not constitutionally required, and there was no attempt to "even out" the impacts of zoning by requiring payment from property owners who were "up-zoned" or otherwise beneficiaries of increases in value, the possibility of invalidity under the gift prohibition was raised. Letter from Charles A. Barrett, Chief Deputy Attorney General, to Melvin Lane, Chairman, Coastal Zone Conservation Commission, at p. 3, August 22, 1976, on file in the Office of the California Attorney General. TDR satisfies the standard of validity in this regard in the excess subdivision lot situation by providing the public benefits of resource preservation and growth reduction for previously irremedial problems.

substantially valuable commodity under each alternative. This stability of value is necessary to satisfy the courts' requirements of reasonable beneficial use, and fairness of value.[109]

III. General Considerations in Applying Transfer of Development Rights

Legal comment has hailed TDR as the answer to land use planning problems.[110] The claims expound on the potential success of the system in many situations such as preserving valuable landmarks and monuments[111] and alleviating problems of excess subdivision. Local planning agencies, however, should consider the tax revenue, planning, and administrative aspects of TDR prior to adopting the system.

Budget and taxation problems may occur by locating development and preservation area transfer districts in different tax jurisdictions. Such location creates potential loss of tax income since assessed land values[112] will fall in the preservation area because of the decrease in development potential, while values in the development area will rise because there is an increased opportunity to develop. Very complex interjurisdictional agreements would be necessary to avoid impairing the tax base of the jurisdiction containing lands which no longer have development potential. The goal of such agreements would be to balance the revenue loss in the preservation area jurisdiction against the tax benefits received by the jurisdiction containing the development area parcels. Thus, neither jurisdiction's tax base would be severely altered. A city can avoid loss of income by designating the development area in the same tax district as the preservation area. The community can thereby maintain its normal property tax structure regardless of the change in land value that results from TDR's zoning modifications.

An additional consideration in applying TDR is its inflexibility regarding a change in use patterns in the transfer districts. Once development potential transfers to a more suitable parcel, the origi-

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[109] Fred F. French Inv. Co. v. City of New York, 39 N.Y.2d 587, 597-98, 350 N.E.2d 381, 387, 385 N.Y.S.2d 5, 11 (1976), *appeal dismissed*, 97 S.Ct. 515 (1976).

[110] Baker, *Development Rights Transfer and Landmark Preservation—Providing a Sense of Orientation*, 9 URB. LAND ANN. 131 (1975); J. COSTONIS, SPACE ADRIFT 41-43 (1974); Costonis, *Development Rights Transfer: An Exploratory Essay*, 83 YALE L.J. 75 (1973); Schnidman, *Transferable Development Rights: An Idea in Search of Implementation*, 11 LAND AND WATER L. REV. 339, 348-49 (1976).

[111] J. COSTONIS, *supra* note 110 at 41-43.

[112] Property is assessed, for property tax purposes, based on its value, California Revenue and Tax Code, section 401, including the effects of zoning changes. CAL. REV. & TAX. CODE § 402.2 (West Cum. Supp. 1977).

nal land remains restricted even if changed circumstances no longer warrant that result. Unlike zoning, TDR does not allow easy reclassification of permissible land use. The function of TDR is to restrict permanently all growth on preservation area lands. To reverse the process, a planning agency would have to reassess the land use patterns in the area. If it decided that development were feasible and desirable, an agency would have to reclassify the area for development and implement a system whereby development potential could be transferred back to the area. This is a long and difficult process. Additionally, it defeats the original purpose of TDR which is permanent preservation of valuable resource lands. Therefore, it is imperative that the planning agency carefully consider its selection of transfer areas. Further, an agency cannot casually alter the size of the districts, since it may disturb the development rights market. A greater number of rights on the market will result in less demand and severe marketability problems are fatal for TDR.[113]

Another consideration in assessing TDR is the increased density created in the development area. A planning agency must allow for greater demand on municipal services since there will probably be more construction than the city anticipated when it installed the infrastructure. The agency can lessen the burden on municipal services by limiting the number of rights that each landowner may apply to an individual parcel. For example, a builder may wish to purchase ten development rights to increase the density of his five unit apartment complex to fifteen units. The planning agency could limit him to two additional units through the purchase of development rights. Under this type of limited application, the TDR scheme will remain within the confines of the community's general plan and it will not destroy the rationale of the general zoning classification by permitting uncontrolled growth.

Beyond TDR's effects on the community's revenue and planning, a planning agency must evaluate the complex administrative procedures necessary to implement TDR. The agency must assess present land use patterns, designate appropriate transfer areas, implement zoning changes, and participate in some form of market regulation. This will require additional resources and personnel. A planning agency must also weigh the financial burdens of TDR against its value in the particular community. The agency should note, however, that the ultimate cost of overcrowding, unsightly development, and lost resources from uncontrolled subdivision probably outweighs financial constraints caused by additional and varied administrative procedures.

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[113] Fred F. French Inv. Co. v. City of New York, 39 N.Y.2d 587, 350 N.E.2d 381, 385 N.Y.S.2d 5 (1976), *appeal dismissed*, 97 S.Ct. 515 (1976).

A most favorable result of TDR is that it provides fairness in zoning through eliminating the unfairness usually present in traditional down-zoning.[114] Equitable concepts and desire for sound planning compel an effort to even out the future limited development opportunities rather than allocating the remaining opportunities immediately. When sound planning or environmental constraints will not allow construction on preservation area lots, TDR mitigates the impact of the prohibition by leaving reasonable value to the property in the form of the development right. TDR also fairly distributes reasonable development opportunities. Rather than allocating building permits on a first come, first served basis in any area, an agency allows development only in areas where it is deemed beneficial based on growth patterns, municipal services, and ecological resource data. The community benefits and the landowner avoids the all or nothing effect of traditional zoning.

It is important for a planning agency interested in implementing TDR to examine these considerations carefully. There are drawbacks to the program such as its rigidity, the potential increase in urban population, and the complexity of administration. Current land use problems, however, demand solutions such as TDR that allow widespread and effective application. Also, careful planning can minimize the negative aspects of TDR if they are recognized and considered prior to adoption of the program. In the excessive subdivision situation, the vast, potential benefits promised by TDR far outweigh its detrimental aspects. An agency could improve the quality of its community land use patterns by adopting the program in appropriate situations.

CONCLUSION

Undesirable excess subdivision is a difficult problem for local planning agencies. This problem area has existed for a long time and will continue to exist unless an agency can devise a more satisfactory solution than traditional down-zoning or service moratoria. The legal disputes generated by utilizing the traditional solutions to exclude development have resulted in time consuming and expensive judicial challenges to the regulation. TDR presents a solution to ameliorate excess subdivision without the unfairness inherent in the traditional means.

TDR appears to be a valid exercise of the police power. This is necessary for its feasible application to subdivision areas. It provides a valuable residual use to down-zoned landowners in the form of development rights, thus satisfying judicial requirements of reason-

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[114] *See* Hagman, *A New Deal: Trading Windfalls for Wipeouts*, 40 PLANNING 9 (1974).

able beneficial use to avoid the "taking" issue. TDR also relates to the public purpose of preserving valuable resource lands while allowing the community to increase its growth in carefully controlled areas. The ultimate result of the program is that the community receives the benefit of fair and effective land use planning and the individual landowner retains value in his land. TDR is no panacea for all of the complex problems that characterize attempts to preserve open space. It is however a valuable and effective addition that a planning agency can use in conjunction with its traditional techniques.