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New York City Planning Commission

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MANDATORY DEVELOPMENT RIGHTS TRANSFER AND THE TAKING CLAUSE: THE CASE OF MANHATTAN'S TUDOR CITY PARKS

Norman Marcus*

This article is dedicated to my late father-in-law, Arthur Lenhoff, who taught at the University of Buffalo Law School from 1939 to 1957 when he retired as Distinguished Professor of Law. His memory continues to ignite the legal imagination.

INTRODUCTION

In the last decade, nationwide concern over environmental protection has greatly increased. The courts have responded by taking a broader view of regional, state and municipal police power to protect threatened natural resources.1 Actions which would have been seen as unconstitutional "takings" several years ago have recently been held valid exercises of the police power.2 Unfortunately, courts have stopped short of applying these same rules to protect urban areas of critical concern to the general public. An open space in midtown Manhattan is an important—perhaps even more important to a larger number of people—as an unspoiled beach on the California coast. Yet the New York State Supreme Court has recently struck down New York City's plan to preserve two private urban parks by allowing the potential developer to transfer his building rights to other sites.3

This article will take the position that this plan, and similar land use controls which allow a potential for profitable use, do not constitute takings, but are legitimate and justifiable exercises of the

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The author is indebted to Bernard J. Kabak, a former attorney in the Counsel's office, for many of the ideas herein expressed, and to Janine Petit for her helpful research in connection with the preparation of this article.


2. For a discussion of the "taking" clause of the fifth amendment, see notes 72-121 infra & accompanying text.

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state's power to promote the general welfare. Medieval concepts of property need no longer frame municipal alternatives in densely built urban areas. Such areas arguably need greater control over land use than rural districts, as was recognized by the Supreme Court in Village of Euclid v. Ambler Realty Co.

New York City is attempting to preserve its irreplaceable urban resources through land use controls, including the transfer of development rights. If this effort is to be successful, certain fundamental principles concerning property, and the rights accruing to it, must be clarified in light of the changing needs of modern times. A review of the growing importance of the three-dimensionality of property interests, coupled with an historical analysis of the taking issue in English common law, the United States Constitution and subsequent state constitutions, provides the appropriate framework within which to evaluate land use controls similar to those enacted to preserve private open spaces in densely developed areas.

The case of the Tudor City Parks provides an object lesson on how the quality of the urban environment is in danger of being downgraded. Such downgrading should not be tolerated since it is supported only by an essentially medieval view of property geared to an agricultural society and by a retiring view of governmental police power based upon the social Darwinism fashionable in the early 20th century.

I. THE TUDOR CITY PARKS

The Tudor City complex is a unique part of mid-Manhattan. The two small, private parks surrounded by tall apartment buildings form a key spot of greenery, light and air in one of the most densely built, and worst polluted, parts of Manhattan. At the time of its construction, between 1925 and 1931, Tudor City was one of the first large-scale urban renewal developments in New York City. The site,

5. 272 U.S. 365 (1926).
6. See notes 30-71 infra & accompanying text.
located in the old slaughterhouse district, is today one of the "best"
neighborhoods in the city.

The development was built on a level above 42d Street, across
First Avenue from the present site of the United Nations. Elevating
the project prevented much of the traffic congestion which a develop-
ment of this size could have caused. The design is such that deliveries
and tenant traffic are removed from the main thoroughfares of 42d
Street, First and Second Avenues to Tudor City Place. Furthermore,
as Fred F. French, builder and manager of Tudor City, mentioned
when announcing his development plans: "The surest way to solve
the traffic problem is eliminate it. That is, establish living quarters
near one's place of business."[9]

The 12-building complex includes hotels, several restaurants,
many small shops, and apartment buildings in the Tudor style, con-
taining over 3,300 apartments. The buildings are grouped around
two 15,000 square-foot parks located on either end of a bridge span-
nig 42d Street. Most windows in the project face the parks, toward
which the large majority of apartments are oriented. The New York
Times noted with interest the park development, stating: "So far as
known it will be the first park developed in Manhattan by private
interests for nearly a hundred years."[10]

In 1972, the entire Tudor City complex, including the parks,
was sold to a New York real estate developer who owns much of the
property in midtown Manhattan, including the Empire State Build-
ing. When the developer announced plans to build in the park space
or, alternatively, over 42d Street, there was an immediate public
outrcy. The City Planning Commission proceeded to examine five
possible plans for the parks.[11] The first was to allow the developer
to erect, as-of-right, a 32-story residential tower on the site of the
northern park and a 28-story tower on the southern park. The pri-
vate parks, four brownstones on East 43d Street, and the Hermitage
—a 10-story, 50-unit apartment house—would have been demolished
under this plan. The design concept and architectural unity of Tudor
City would have been lost. The new towers would have cast shadows
for most of the day over two, small public parks on the lower 42d

Park in 1831.
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Street level and would have interfered with the light and air of the tenants of the remaining Tudor City buildings and nearby structures. Added to the neighborhood would be 530 luxury-class apartments, a net gain of 466 high-priced housing units and a net loss of 32,543 square feet of park space.

The second possibility, a single tower spanning 42d Street, was thought by many to be the plan preferred by the developer. "It's more prestigious," said Jacquelin T. Robertson, then Director of the Mayor's Office of Midtown Planning and Development. "He [the developer] is not a guy out scrambling. He's at the top of the ladder." This building would have retained the parks and opened them to the public. The city could have exercised some design control over the new structure which, compared to the "as-of-right" buildings, would have interfered less with the light and air of the surrounding Tudor City apartments. But it also would have overshadowed the park area for much of the day. New mapping and zoning legislation would have been required, since this would have been the first time a private structure had been erected over a major city street. The developer also sought compensation for the cost of building a platform 30 feet over 42d Street claiming the platform as part of his lot area for bulk computation purposes. The prospect of setting a precedent for tunnelling other major city streets was disturbing, both in terms of density and urban design. Questions of tunnel safety, ventilation and traffic control also arose. Finally, the monumental, 50-story tower would have placed several 42d Street frontages in shadow, blocked the 42d Street vista, and screened the United Nations Building. From the viewpoint of urban design, it was not a desirable alternative.

The next two plans explored the possibility of first, building on the north park while relocating it on a bridge over 42d Street (this would have involved demolishing the same buildings as in the "as-of-right" plan); and, second, building on the "as-of-right" design but, this time, replacing the parks with a new park above 42d Street.

The final, and most popular, alternative was the creation of a special zoning district for private parks in the densely developed mid-
town-Manhattan area. Only recreational facilities would be permitted in areas so designated, but the owner would be able to sell or transfer the allowable building rights from his private park space to eligible receiving parcels in the midtown core. This transfer, however, would represent a deviation from traditional zoning ordinances based on the zoning lot.

Zoning controls define the development potential of a lot. New York City's Zoning Resolution allows a certain height, bulk and density for structures on each lot, proportionate to the size of the lot and appropriate to its location. When landmarks or private parks do not utilize the permitted bulk of a lot in a high-density area, owners are encouraged to destroy the present use and rebuild to the allowable maximum. In order to preserve a threatened critical resource, however, it is necessary to divert the development pressure elsewhere. Traditional zoning ordinances regard transfer of unused development rights to noncontiguous lots in separate ownership as contrary to a sense of uniform controls in a given area. They view the relationship of density controls to street width, transit access, school seats and other infrastructure requirements as failing to survive indiscriminate transferability of unused development rights between widely spaced parcels. The unit of development control chosen in these ordinances is the zoning lot. Had a different unit of control been chosen as its basis, for example, a block or a square mile, there would have been no bias against wider area transferability of development potential. A block-by-block control could achieve density objectives as successfully as a lot-by-lot approach. The city's fifth and final alternative recognized both the need to preserve a threatened resource and the density objectives by allowing transfer of development rights within a wider unit of development control.

The plan for development rights transfer was accepted by the City Planning Commission as the best alternative. Designated areas in private ownership now used for recreational purposes within the boundaries of the granting district would be mapped with a special

14. The boundaries of the Special Park granting district are: 60th Street, East River, 33d Street, Hudson River.
15. The boundaries of the receiving district are: 60th Street, Third Avenue, 38th Street and Eighth Avenue.
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“P” overlay. Eligibility to receive development rights within the receiving district would be dependent on a minimum lot size of 30,000 square feet and zoning presently permitting development at the maximum allowable commercial density—15 FAR. The owner of a designated granting lot would be able to transfer part of his development rights to any eligible receiving lot, increasing that lot’s maximum floor area up to 10 percent. Additional bulk modification authorizing the increase in the floor area ratio of the receiving lot by more than 10 percent, but not exceeding 20 percent of the maximum limit, would be possible under a special permit procedure but would require a public hearing before the Planning Commission and the City’s Board of Estimate. The transfer would be subject only to certification by the Chairman of the City Planning Commission of the appropriateness of a program for the continued maintenance of the open recreational area and its conversion to public use; the park would remain private until the certification of the first development rights transfer therefrom.

Supporting the creation of the new Special Park District the Commission said:

It is the Commission’s judgment that the redistribution of bulk which may occur as a result of designating existing parks under this procedure is warranted by the nature and extent of the infrastructure network which exists in this area. There will be no net increase in the density as a result of this procedure in the total midtown area comprising the outer boundaries of the granting lot district . . . merely a redistribution of bulk to protect current amenities in the area.

In the case of Tudor City, the value of the development rights has, if anything, increased by moving from a residential district, characterized by land values of not more than $150 per square foot, to a

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18. FAR (Floor Area Ratio) is a concept which is used to control the amount of building on a lot. The FAR “number” represents the multiple of the lot area which produces the allowable maximum floor area in the development.


21. Tudor City is zoned predominantly R-10—a classification which permits a development containing floor area ratio of ten times the lot area (FAR 10) and approximately 400 dwelling units per acre.
commercial district where land values typically run to $300 per square foot.\(^{22}\)

The Special Park District was approved by the City's Board of Estimate and became a part of the Zoning Resolution.\(^{23}\) The decision was greeted enthusiastically by city residents, the architectural community, and the press. In an editorial dated December 18, 1972, *The New York Times* wrote:

*Those Tudor City Parks*

Small, pocket-sized parks are an endangered species in urban environments, usually coveted by developers and especially susceptible to obliteration by construction of new towers of concrete and steel . . . .

... [A] recent decision by the Board of Estimate deserves warm commendation. In the uneven struggle between small parks and large developers, the Board opted for a compromise settlement that seems to us to be eminently fair . . . .

Such transferability of air rights, which are extremely valuable in this city, represents a new concept now written into municipal law. It is an idea fervently espoused by the "Save Our Parks" committee which waged a mighty struggle in behalf of the Tudor City sanctuaries of green, beautifully landscaped in the English manner with pebbled walks, shrubs and trees. These delightful parks will remain as refuges from the hurly-burly and congestion of East 42nd Street.\(^{24}\)

The conflict over the Tudor City Parks did not end, however, with the creation of the Special Park District. The previous owner, who had retained a first mortgage on the property when it was sold to the developer and his three development companies, brought suit

\(^{22}\) B. Kabak, Value of Tudor City Development Rights, Nov. 24, 1972 (appendix to memorandum to Norman Marcus, prepared with the assistance of Alfred Schimmel, Director of Mortgage Research Analysis) (on file at New York City Planning Commission). See also Letter from John A. Munro, Vice President, Ely-Cruikshank Co., Inc., real estate appraisers to John F. McKean, Nov. 21, 1972 (on file at New York City Planning Commission). The Tudor City Parks development rights have, to the author's knowledge, been the subject of at least one substantial offer to purchase.

\(^{23}\) New York City, N.Y., Zoning Rs. § 91-00 et seq. (1973).


WORTHY OF KING SOLOMON—is the decision by the City Planning Commission vetoing realtor Harry Helmsley's scheme to replace two patches of Tudor City greenery with high-rise masonry. Instead the Commission is offering Helmsley bonus additions to other planned developments in central Manhattan. It is we think, an eminently fair ruling all around.
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against the city, the state and the four mortgagees after the developers defaulted on their mortgages. The plaintiff claimed that the city's action amounted to inverse condemnation—an unconstitutional "taking" of property for which the transferable air rights were not just compensation. The city answered by contending that its action fell within the permissible ambit of the zoning police power. Justice Waltemade of the Supreme Court of the State of New York ruled for the plaintiff, but stopped short of embracing the plaintiff's inverse condemnation theory. The court found that the uncertain value of the development rights barred them from consideration as compensation and held that property owners in the receiving area had not been given sufficient notice of the density that would be added to their district. The court's order invalidated the zoning amendment establishing the Special Park District and restored the zoning classification previously in effect. The city is in the process of appealing this decision.

II. EVOLUTION OF THE CONCEPT OF PROPERTY INTO THREE DIMENSIONS

What do these terms "property" and "taking" mean? Does property signify today what it did 200 years ago when the fifth amend-


27. The Planning Commission examined both adverse possession and prescriptive easement as alternatives to the planned development. Both alternatives were rejected. See M. Levine, Tudor City—Adverse Possession and/or Prescriptive Easements, March 24, 1972. (memorandum to Norman Marcus) (on file at New York City Planning Commission). The tenants of the development could not claim prescriptive easement rights, since their possession is not deemed adverse to that of the landlord. Olin v. Kingsbury, 181 App. Div. 348, 168 N.Y.S. 766 (1st Dep't 1918); REAL PROP. ACTIONS LAW § 531 (McKinney 1963). The unorganized public cannot acquire rights by prescription since there is no grantee capable of taking under the presumed grant. Morgan v. McLoughlin, 6 Misc. 2d 434, 163 N.Y.S.2d 51 (Sup. Ct. 1957).

28. "In those cases where the Courts have invoked the doctrine of inverse condemnation, the owners' property had been physically taken and used by the appropriating authorities so that a restoration of the property to the owners was not possible." Fred F. French Inv. Co. v. City of New York, 77 Misc. 2d at 205, 352 N.Y.S.2d at 768; see Hyert v. Orange & Rockland Util., Inc., 17 N.Y.2d 352, 218 N.E.2d 263, 271 N.Y.S.2d 201 (1966); Ferguson v. Village of Hamburg, 272 N.Y. 234, 5 N.E.2d 801 (1936); Buholtz v. Rochester Tel. Corp., 40 App. Div. 2d 283, 339 N.Y.S.2d 775 (4th Dep't 1973).

29. 77 Misc. 2d at 205, 352 N.Y.S.2d at 768.

85.
ment was written, or 400 years ago when agriculture was the dominant use of land? Even in those days, the police power of the state could regulate property in the public interest. Where is the line to be drawn between the legitimate use of this power and an unconstitutional taking? It is necessary to examine the history of these concepts to uncover the social forces and policies from which they were derived. We can then determine their present-day relevance and attempt to apply them in a manner which affords the maximum social utility for our own time.

A. The Early Importance of the Earth's Surface

The idea that dominion over real property means control over a portion of the earth's surface, uniquely and permanently positioned in space, goes back to early common law. That does not mean, of course, that the idea retains its vigor today. "It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past."30 The principle that location in space is the essence of real property was based on grounds that have, indeed, long since vanished.

The first of these grounds, the idea of seisin, was so fundamental that "we may almost say that the whole system of our [English] land law was law about seisin and its consequences."31 Seisin generated title to land; there was no title without its root in seisin. Seisin meant possession, the physical occupation of the land. For title to be conveyed there had to be a "livery of seisin," a transference of the physical possession of the land from the grantor to the grantee.32 Livery of seisin was accomplished by the donor and the donee coming upon the land and pronouncing the words of donation. If the parties were daring, it was sufficient for them to perform the livery of seisin with the land merely in view; but even then it was essential for the donee to have made an actual entry on the land while the donor was yet

32. Id. at 29, 83.
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alive. There was no nonsense about charters of feoffment or other documents, which the Romans had used to convey land until the barbarians invaded. Even when charters were first introduced, their reading would be followed by a ceremony on the land itself including, at times, a perambulation of its boundaries before witnesses. Not even a royal charter could confer title without livery of seisin. "If the king made two inconsistent gifts, a later charter with an earlier seisin would override an earlier charter with a later seisin."

In a system where title was held through seisin and conveyed through livery of seisin, it is no small wonder that such great emphasis was placed on physical control over the land. In law, nothing else mattered. We have, of course, long since abandoned the idea of seisin and its ceremonies as controlling in the law. The idea of physical control over a portion of the earth's surface as being the essence of real property, to the extent that it is derived from seisin, should likewise be abandoned.

The second ground for the principle that location in space and dominion over a defined surface of land is the essence of real property relates, not to England's legal system, but to its economic system. The common law emerged in England before the Industrial Revolution. Throughout that period, "the structure of the nation had been essentially medieval; so too, had been its law. If we are to seek the fundamental notes of this medieval policy we shall find that they were based upon the fundamental fact that the normal occupation of the bulk of the inhabitants was agriculture." Citing Lord Coke, Blackstone said that land "comprehendeth in its legal signification any ground, soil, or earth whatsoever; as arable, meadows, pastures, woods, moors, waters, marshes, furzes, and heath." Land, in other words, was valued for the qualities of its surface, the qualities that

33. Id. at 83.
34. Id. at 86-90.
35. Id. at 90 (footnote omitted).
38. 2 W. BLACKSTONE, COMMENTARIES *17.
This point has not been lost on the courts:

In the earlier days of the common law the attention of buyers and sellers and therefore the attention of the courts, was fixed upon the surface. He who owned the surface owned all that grew upon it and all that was buried beneath it. His title extended upward to the clouds and downward to the earth's center. The value of his estate lay, however, in the arable qualities of the surface, and, with rare exceptions, the income derived from it was the result of agriculture.

It is clear that the concept of property in the common law, where the land's location and surface are emphasized, does not contradict the position taken herein—that the essence of property is its potential for profitable use. The point of tangency between the old common law of real property and the modern law of real property is not that land's surface and location in space are the essence of real property, but that profits are. "Medieval land law is not to be understood apart from medieval agriculture," and modern land law is not to be limited by the requirements of medieval agriculture.

Finally, there were social and political reasons why dominion over a defined surface was an important early principle. These reasons, too, are no longer applicable. In England, prior to the Industrial Revolution, land was the basis of stability in society. "Land was the principal form of wealth, and therefore, the principal source of power, and the law had to take account of this situation." The exigencies of modern society are quite different. Stability is no longer achievable through the fixity offered by land. What is needed today is a dynamic stability, founded on the ability to adjust to ever-changing needs and demands, and a method "to accommodate conflict and

39. The legal importance attached to land in an agricultural economy is by no means unique to the common law system. In Roman Law, the Res Mancipi, the superior form of property, was land, slaves, and beasts of burden. F. MAITLAND, ANCIENT LAW 265, 269 (1963). "It is impossible to doubt that the objects which make up the class are the instruments of agricultural labour, the commodities of first consequence to a primitive people." Id. at 269.


41. The King v. Inhabitants of All Saints, 105 Eng. Rep. 984 (K.B. 1816). For collected cases on this point, see Horizontal Divisions of Land, 10 (n.s. 1) AM. L. REGISTER 577, 581-84 (U. of Pa. 1862).

42. F. MAITLAND, Tenures in Roussillon and Namur, in 2 COLLECTED PAPERS 252 (H. Fisher ed. 1862).

43. T. PLUCKNETT, supra note 37, at 64.
allocate the costs of that accommodation.” Dynamic stability can be achieved by “trying to determine what resolution of conflicting uses is likely to maximize total net benefits for us, and how we can best achieve that goal.”

Maximizing net benefits is, of course, the objective of most government action today. It is the specific objective of the Park District regulation. Ultimately, the Park District regulation is a legislative body's innovative application of its power to regulate the development of land for the public good, without sloughing off the constitutional obligation to protect private values by leaving the problem in the hands of the judiciary. The fundamental soundness of this approach is advocated by Professor Michelman: “[W]hat is counselled here is, more than anything else, deemphasis of reliance on judicial action as a method of dealing with the problem of compensation.”

In summary, the principle that location in space is the essence of real property was based on three grounds—a legal doctrine (seisin), an economic base (agriculture), and a political system (land as a source of power and social stability)—that have become infirm through time. A landowner's expectation of spatial dominion over his property, since it is based on grounds now infirm, has diminished purpose in our law today. The courts should refrain, therefore, from elevating this expectation to the point of being a constitutionally protected interest in real property.

B. The Growing Importance of Development Rights

For over 100 years, scholars, recognizing the infirmity of medieval property concepts, have contended that development rights have real value distinguishable from the land to which they attach. In Hori-
zontal Divisions of Land,"^{48} the author raises the question of whether the space or column of air above a man’s soil is an interest that can be severed from the soil and granted or conveyed as a freehold tenement. He notes the English and Scottish authorities favoring the proposition and observes that “we know of reason why they [the cited authorities] are not applicable in this country. It is true, land is more valuable, houses are more lofty, and cities cover smaller areas, in proportion to their respective populations, where these peculiar ownerships occur, than they do in this country; but as our population increases we may adopt the same habit.”^{49}

In their decisions, the courts have avoided ruling directly on the question of whether development rights can form a type of real property separate from the land or a structure on the land.^{50} One of the earliest cases appearing to support this doctrine was Pearson v. Matheson,^{51} decided by the South Carolina Supreme Court in 1915. It was held that a reservation in the grantor of all rights in the space more than fourteen feet above the ground was valid. A slightly later case, Taft v. Washington Mutual Savings Bank,^{52} cited Pearson as an example of the “well-recognized common law right”^{53} to subdivide horizontally.

As Horizontal Divisions of Land^{54} predicted, it is especially in dense urban areas, like New York City, that the space above the soil’s surface has become most valuable. Land owners and developers have been eager to exploit the inherent value of clustering development rights. For example, in Glen Oaks, Queens, New York, the owner of 106 acres used for a golf course had the option of building more than 2,500 single family houses on his property. The houses, together with the paved streets, would have covered most of the site, destroying the golf course and creating serious storm water run-off and sewer problems. The owner chose, instead, to create a large-scale residential

\footnotesize{48. Horizontal Divisions of Land, 1 (n.s. 1) Am. L. Register 577 (U. of Pa. 1862).
49. Id. at 580.
50. New York courts realized as early as 1863 that the value of an interest in property was not necessarily tied to the land. In Graves v. Berdan, 26 N.Y. 498 (1863), the court ruled that a tenant in an upper story was no longer liable for rent when the building burned down.
51. 102 S.C. 377, 86 S.E. 1063 (1915).
52. 127 Wash. 503, 508, 221 P. 604, 606 (1923).
53. Id.
54. See Horizontal Divisions of Land, supra note 48.}
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development\textsuperscript{55} by transferring all the development rights to a portion of the large-scale single zoning lot constituting only two percent of the site, thus preserving the golf course.\textsuperscript{56} Further examples of development rights transfers as a technique to preserve landmarks are explored infra.

The attitude of the courts is exemplified by Newport Associates, Inc. v. Solow,\textsuperscript{57} where development rights were seen as "valuable and transferable."\textsuperscript{58} In Newport, plaintiff was the owner of land in Manhattan, improved by a building that had less bulk than the Zoning Resolution allowed, leaving a surplus of development rights. Defendant was the lessee of the plaintiff's land and building and owner of two adjoining parcels. Under a provision of the Zoning Resolution that allowed the transfer of development rights between adjoining parcels,\textsuperscript{59} defendant sought to transfer the surplus development rights from plaintiff's parcel to his own, where he was constructing an office building. Plaintiff sued to prevent the transfer of the development rights, contending that the transfer would diminish the value of his property. The court held for the defendant. Although no constitutional issue was raised in the case, Newport is significant because it shows that the court of appeals was comfortable with the notion that development rights, as separate from the land that generates them, have a value of their own and can be transferred easily.\textsuperscript{60} These principles were not questioned even by the appellate division, whose holding for the plaintiff\textsuperscript{61} was reversed by the court of appeals. Indeed, the

\textsuperscript{55} NEW YORK CITY, N.Y., ZONING RES., art. VII, ch. 8 (1973).
\textsuperscript{56} Elliott & Marcus, From Euclid to Ramapo, 1 Hofstra L. Rev. 56, 85 n.117 (1973).
\textsuperscript{58} Id. at 268, 283 N.E.2d at 603, 332 N.Y.S.2d at 621 (Breitel, J., concurring).
\textsuperscript{59} NEW YORK CITY, N.Y., ZONING RES. § 12-10 (1973): "For the purposes of this definition, ownership of a zoning lot shall be deemed to include a lease of not less than 50 years duration with an option to renew such lease so as to provide a total lease of not less than 75 years duration." The definition of zoning lot allows transferability where such parcels enjoy a common ownership interest for at least 75 years. A showing of common ownership by the applicant for a building permit will allow incorporation of any unused development right on the combined zoning lot in a building plan.
\textsuperscript{60} See also Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 419 (1922) (Brandeis, J., dissenting).
appellate division held for the plaintiff precisely because it saw development rights as having value.

Development rights transfer has been used in New York primarily to protect and assist historic landmarks—valuable and endangered urban resources. The concept grew naturally out of the ability of an owner of two contiguous parcels (which are viewed as one zoning lot when owned by the same person) to concentrate the bulk of his building on one parcel.\(^6\) The overall density of the block remains the same, for the lower density on one parcel compensates for the greater density on the other. New York City's Landmarks' Preservation Law\(^6\) permitted the city to designate landmarks and slow down their destruction. Restriction on use that amounted to a taking, however, was seen as requiring compensation. Acquisition by the city of landmark properties is usually not practical, particularly in Manhattan where land values are extremely high. Therefore, city officials sought to find a way to preserve landmarks through zoning rather than through the expensive exercise of eminent domain.

Their solution was to broaden the concept of bulk concentration on one portion of a large single lot\(^6\) to permit the transfer of unused development rights from a low density landmark across adjacent lot lines and to lots across the street.\(^6\) In 1969, the concept was further expanded to permit transfer to lots within a chain of common ownership extending to the landmark lot.\(^6\) The city first approved this type of development rights transfer at the behest of the owner of Amster Yard, a 19th century collection of small residential structures, open spaces and stores in midtown Manhattan.\(^6\) The owner of this landmark was permitted to sell a portion of his development rights to a nearby parcel on which an office building was to be built.\(^6\) In return, the city required from the developer a promise to create a $100,000 trust fund, its income to be used for maintenance

\(^{62}\) New York City, N.Y., Zoning Res. § 12-10 (1973) ("Zoning Lot" defined).
\(^{64}\) See Elliott & Marcus, supra note 56.
\(^{65}\) New York City, N.Y., Zoning Res. § 74-79.
\(^{66}\) Id.
\(^{67}\) Amster Yard is located on a through-block property, east of Third Avenue, between 49th and 50th Streets.
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of the landmark. The simplest and most successful development rights transfers are those employed to preserve a single landmark building, transferring its unexhausted development rights to an adjacent development site. This was most recently accomplished on the east side of Manhattan where a small landmark house was preserved and enhanced through design controls imposed on the adjacent site and by the transfer of the unused bulk.

Another current effort at development rights transfer in New York is much more ambitious. The existence of many small buildings surrounding the Fulton Fish Market in lower Manhattan was an attractive, but uneconomic, use of land. These blocks of small, 200-year-old buildings were ripe for redevelopment. In order to preserve this historic area while allowing new development to occur, the city created the special South Street Seaport District which contains a preservation area and a redevelopment area. The low-scale Seaport area will be retained by ultimately transferring its unused development rights to specified neighboring locations for commercial development. The transfer mechanism permits the development rights to be bought by a middleman and banked. This phase has already occurred. Next, the banked development rights will be shifted onto designated receiving parcels within the district. This system will aid the marketability of the development rights. As soon as the development rights are physically incorporated in new development, the profits from the sale can begin to be used for renovation of the historic buildings. The result is that buildings will be maintained and new development fostered with no net increase in density to the neighborhood. Potential speculation in these development rights is curbed by the predesignation of specific receiving lots.

The new zoning district for private parks in New York City is the latest attempt to use development rights transfers to achieve health, safety and general welfare objectives. It is the most recent application of the horizontal division of land concept—an idea that is at least 100 years old in America. It clearly reflects the fact that property values in urban cores can no longer be solely attributable

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69. NEW YORK CITY, N.Y., ZONING RES. § 74-79 (1973) requires "a program for the continuing maintenance of the landmark." In this instance, the trust fund satisfied the requirement.

70. COMMISSION REPORT (Nos. CP-22150, -22151, Nov. 29, 1972).

71. NEW YORK CITY, N.Y., ZONING RES. § 89-00 et seq (1973).
to a two-dimensional surface area, but must be largely credited to the three-dimensional zoning envelope of development rights assigned pursuant to the police power. Furthermore, property transfers within New York City indicate that a measurable, even predictable, value can be assigned to that envelope of rights.

III. WAXING AND WANING OF THE “TAKING” CLAUSE AND ITS RELATION TO THE STATE POLICE POWER TO REGULATE PROPERTY

In *Fred F. French Investing Co. v. City of New York*,\(^72\) the plaintiff argued that the zoning restrictions imposed on the private open spaces in the Tudor City development constitute a taking of those properties. A “taking” is a violation of the fifth amendment to the Constitution: “nor shall any person . . . be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use, without just compensation.”\(^73\) In order to assess this claim of taking, it is necessary to review the origins of the taking clause and the police power in the English common law, the Constitution and the ensuing cases. It is the argument of this article that the taking clause, having waxed in the early decades of this century, is presently waning—contracting in the face of socially imperative police power objectives.

A. Origins of the Taking Clause: A Limitation on the Sovereign’s Personal Power as Distinguished from his Police Power

The English-colonial heritage forms the background for the fifth amendment requirements of “just compensation” and “due process.” Commentators have been able to find little specific information to support theories of the meaning of “taking” under the amendment. Indeed, a recent book, *The Taking Issue*,\(^74\) pointed out: “There is a conspicuous absence of historical data that might enable one to determine why Madison added the just compensation language to the

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73. The fourteenth amendment applied this provision to the states.
fifth amendment." Madison's language rests firmly on that of the Magna Carta:

No freeman shall be arrested, or detained in prison, or deprived of his freehold, or in any way molested; and we will not set forth against him, nor send against him, unless by the lawful judgement of his peers and by the law of the land.\textsuperscript{78}

There is no mention of compensation in the document. The property provisions of the Magna Carta were designed to remedy a specific evil—the arbitrary confiscation of property by the king for his own use. The document was forced on an unwilling king and was frequently ignored in the almost 600 years between the signing of the Magna Carta and the drafting of the Bill of Rights.\textsuperscript{77} The deprivation forbidden in the Magna Carta probably meant the actual confiscation of land. Land use regulation existed in medieval England; even regulation that deprived a man of all use of his land was valid.\textsuperscript{78} Holdsworth wrote on medieval regulation of property in England:

Property, said the Doctor and Student, was given by the law of man, not by the law of God or reason; and therefore "the same law may assigne such conditions upon the propertie as it listeth, so they be not against the law of God nor the law of reason." Therefore the state could determine the limitations under which property could be acquired. In other words it could regulate the conditions under which all branches of commerce and industry could be carried on.\textsuperscript{79}

By the time of the settlement of the United States, this basic concept had changed little. A man was assured of the security of his property against seizure by the king—a principle that became of supreme importance in colonial property law—but he was not free from regulation. Coke stated that a property owner could be deprived of all economic use of his property if the regulation "extends to the public benefit . . . for this is for the public and everyone hath benefit by

\textsuperscript{75} Id. at 99-100.
\textsuperscript{76} Id. at 56.
\textsuperscript{77} Id. at 57-60.
\textsuperscript{78} In this connection, note the severe London land use restrictions advanced in Elizabethan England, including acreage zoning and the prohibition of conversion of existing structures to multiple dwellings. Id. at 64-67.
\textsuperscript{79} 4 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 316 (3d ed. 1945).
It is also useful to remember that much of the Bill of Rights, like the Magna Carta, is devoted to defining the limitations on the power of the head of state. Property could not be taken for the *private* use of the sovereign, but it could be taken for public use—the use of the majority—with the appropriate democratic safeguards. Colonial land use regulations were common, ranging from restrictions against overplanting to requirements for planting shade trees. When improved private lands were “taken” for a public project such as the building of a road, compensation was usually required. Frequently, however, compensation was not necessary for the taking of undeveloped land. The United States Supreme Court had few chances to consider the taking issue in the first half of the 19th century. The courts of New York, however, were forced to examine the problem in depth in the case of *Brick Presbyterian Church v. City of New York*. There, the Presbyterian Church had been granted title to lands on the outskirts of the city for a church and cemetery. As the city grew, the cemetery became an inappropriate land use and a potential health hazard, according to the sanitation theories of the day, and an ordinance was passed forbidding use of the property for burials. The ruling left the church with almost no other use for its property and deprived the parish of a place to bury its dead. Yet the court found for the city, saying:

> It would be unreasonable in the extreme, to hold the plaintiffs should be at liberty to endanger not only the lives of such as belong to the corporation of the church, but also those of the citizens generally, because their lease contains a covenant of quiet enjoyment.

One year later, in a case upholding the right of the city’s harbor master to control the docking of ships at private wharfs in New York City’s rivers, the court said:

> The line between what would be a clear invasion of right on the one hand, and regulations not lessening the value of the right, and calculated for the benefit of all, must be distinctly marked. . . .

81. TAKING ISSUE 76.
83. TAKING ISSUE 85.
84. 5 Cow. 538 (N.Y. 1826).
85. Id. at 542.
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... Every public regulation in a city may, and does, in some sense, limit and restrict the absolute right that existed previously. But this is not considered as an injury.86

It is interesting to note that these cases, and others of the era,87 rely heavily on the concept of a regulation conferring a benefit to the public. This requirement goes back to the common law concept discussed above, that property may be strictly regulated for the public good but not confiscated by the sovereign. In an 1827 case challenging a statute which permitted the City of New York to regulate the interment of the dead within its boundaries, the court expressed this dichotomy:

[Private property shall not be taken even for public use, without just compensation. No property has, in this instance, been entered upon or taken. None are benefited by the destruction, or rather the suspension of the rights in question, in any other way than citizens always are, when one of their numbers is forbidden to continue a nuisance.]88

B. Waxing of the Taking Clause

The Supreme Court began its expansion of the taking clause in the latter part of the 19th century, enlarging sections of the Bill of Rights to cover actions by the states. The Court's first notable case on the taking issue was *Pumpelly v. Green Bay Co.*,89 in which the Court ruled that permanent flooding of the plaintiff's land by a state-authorized dam constituted a taking that required compensation. Later cases, however, interpreted *Pumpelly* as still requiring an actual invasion of the land to constitute a taking. As late as 1887 in *Mugler v. Kansas*,90 the Court supported the police power even when its prohibitions curtailed substantial investments in property. In the Court's decision which upheld the Kansas statute prohibiting the manufacture and sale of liquor and made the plaintiff's brewery worthless, Justice Harlan wrote:

A prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health,

87. Coates v. Mayor of the City of New York, 7 Cow. 585 (N.Y. 1827) (group of cases decided with *Vanderbuilt*).
88. Stuyvesant v. Mayor of the City of New York, 7 Cow. 588, 606 (N.Y. 1827).
89. 80 U.S. (13 Wall.) 166 (1871).
90. 123 U.S. 623 (1887).
morals or safety of the community, cannot, in any just sense, be deemed a taking or an appropriation of property for the public benefit. Such legislation does not disturb the owner in the control or use of his property for lawful purposes, nor restrict his right to dispose of it, but is only a declaration by the State that its use by any one, for certain forbidden purposes, is prejudicial to the public interests. . . . The exercise of the police power by the destruction of property which is itself a public nuisance, or the prohibition of its use in a particular way, whereby its value becomes depreciated, is very different from taking property for public use, or from depriving a person of his property without due process of law. In the one case, a nuisance only is abated; in the other, unoffending property is taken away from an innocent owner.91

The Court did not change its stand when the restrictions involved oleomargarine instead of liquor. In Powell v. Pennsylvania,92 the Pennsylvania statute banning the sale of oleomargarine was upheld, despite the fact that it rendered the plaintiffs' factory virtually useless.

At the same time these decisions upholding the local exercise of the police power despite the adverse impact on economic investment were coming down, a counter-theme was emerging from the Court. This theme—the immunity of the labor-management contract from legislative acts of conscience—which sounded in a series of cases dealing with wage and hour laws and other social legislation,93 was to threaten the Mugler scope of police power and significantly emasculate it. These cases struck down state laws, enacted under the Article X residual police power, protecting the health, safety and general welfare of the people.

It seems somewhat ironic that Justice Oliver Wendell Holmes, a dissenter on the decisions throwing out local wage and hour regulations, could rewrite the Constitution in his decision on the taking clause in Pennsylvania Coal v. Mahon,94 the case that forms the precedent for most pre-1970 decisions on taking. The test for differentiating a taking from an exercise of the police power became one of the degree of detriment to commercial value, a very uncertain line. It is

91. Id. at 668-69 (emphasis added).
92. 127 U.S. 678 (1888).
94. 260 U.S. 393 (1922).
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a decision appropriate to the laissez-faire politics of the 1920's and its preceding decades, but not a decision geared to the complexities of urban life today.

The Kohler Act, which was the Pennsylvania statute invalidated by the Pennsylvania Coal decision, appears to be reasonable "public safety" legislation. Its provisions forbade the mining of coal where it would cause the subsidence of developed areas; mine subsidence had become a critical problem in the early 20th century in northeastern Pennsylvania. Mahon's property had been purchased by his predecessor in title from the coal company. The deed stipulated that the coal company retained mineral rights, and the property owner waived any claims of damage against the company. Since the company owned most of the land in the area, purchasers had little bargaining power. Mahon brought suit against the Pennsylvania Coal Company for an injunction prohibiting mining under his home on the basis of the Kohler Act. The Supreme Court of Pennsylvania, finding for Mahon, held the Kohler Act constitutional and declared the acceptance of mining in the original deed contrary to public policy.

Justice Holmes, despite his ringing dissents in defense of wage-and-hour laws and other social legislation of the era, wrote the opinion of the Court overturning the Pennsylvania ruling and establishing a "degree of diminution of value" test to determine "takings" forbidden by the fifth or the fourteenth amendments. For unstated reasons, he found interference with property rights to be constitutionally inhibited, even in this mining case with compelling health, safety and general welfare objectives. Yet Holmes had previously found, and would subsequently find, no difficulty in upholding similar interference with private contractual rights. The philosophy of Pennsylvania Coal—a kind of social Darwinism which favors untrammeled use of private resources at the cost of leaving unrequited public health, safety and general welfare objectives—seems indistinguishable from the other judicial products of the period.

97. See Lochner v. New York, 198 U.S. 45, 74 (1905) (Holmes, J., dissenting); Adkins v. Children's Hosp., 261 U.S. 525, 567 (1923) (Holmes, J., dissenting). Perhaps the fact that Pennsylvania coal was an essential national resource in 1922 provides the key to Holmes' opaque opinion.
C. Waning of the Taking Clause

*Pennsylvania Coal,* perhaps because of its curious authorship, has had a long run through this century. Only in the 1970's have observers begun to note a lessening of reliance upon it, which appears to be related to a deepening concern for protection of the natural environment. Whether the nation's highest court expressly overrules this case, which appears to put concern for private property far out in front of concern for the environment, or simply ignores it *sub silentio,* in the opinion of some scholars, its chilling influence is waning. With *Pennsylvania Coal* out of the way, the police power, vis-à-vis the taking clause, resumes its *Mugler* shape and requires a physical invasion of property for a finding that a taking has occurred. The analysis of police power regulation shifts in emphasis from impact on private property to an evaluation of the public purpose served and the adequacy of the means used to achieve the result.

When seen in the perspective of history, the *Pennsylvania Coal* twist on the taking clause seems aberrant and at odds with an old common law tradition which sanctioned often harsh interferences with private property when intended for the public good. Certainly the spate of federal and state environmental legislation, enacted since the late 1960's, would appear to challenge the philosophy, if not the holding, of *Pennsylvania Coal.* This legislation, based on a


99. See note 122 infra.

100. *Taking Issue,* *supra* note 7, at ch. 10.

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desire to protect areas of critical concern to the environment and the public, falls within the tradition of pre-Pennsylvania Coal definitions of the police power. The majority of cases reviewing these statutes have generally upheld them in opinions which dwell on the legitimacy of the public policy objective.\footnote{102} Effect on private property owners is not measured against the just compensation requirements of a taking under Pennsylvania Coal, but rather against a more general standard of fairness.\footnote{103}

The authors of The Taking Issue\footnote{104} view these cases as forerunners of a resurgence of police power. Although the Special Park District, as applied to the Tudor City Parks, protects a man-made rather than God-made environmental treasure, this distinction should not impair the validity of the police power objective. The Tudor City Parks are as close to the beach as any midtown office worker is likely to get on his lunch hour.

Not all scholars agree, however, that the police power is being, or should be, broadened beyond Pennsylvania Coal at the expense of the taking clause. John J. Costonis writes:

> 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 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, 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. 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

\footnote{102} See cases cited at note 98 supra.
\footnote{103} Just v. Marinette County, 56 Wis. 2d 7, 201 N.W.2d 761 (1972) suggests: "The loss caused the individual must be weighed to determine if it is more than he should bear." In this measurement, the court suggests the application of "contemporary standards," Id. at 15, 16, 201 N.W.2d at 767.
\footnote{104} TAKING ISSUE, supra note 7.
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.¹⁰⁵

Even under this stricter test, the Special Park District cannot be seen to constitute a taking in the equitable sense. When transfer of development rights opportunities leave intact the property's potential for generating profit, a restriction to passive recreation on the surface of the property cannot amount to a taking. This proposition of law is based in ancient and venerable authority, Lord Coke's opinion in The King v. Inhabitants of All Saints: "[F]or what is the land but the profits thereof: for thereby vesture, herbage, trees, mines and all whatsoever parcel of that land doth passe."¹⁰⁶

When looked at in the context of development rights transfers, Pennsylvania Coal does not form a barrier to the legislation. The Holmes decision quotes the earlier case of Commonwealth v. Clearview Coal: "For practical purposes, the right to coal consists in the right to mine it."¹⁰⁷ Holmes adds in Pennsylvania Coal, "[w]hat makes the right to mine coal valuable is that it can be exercised with profit."¹⁰⁸ In urban areas, what makes land valuable is the right to build on it—a right already regulated by law. If we extend Holmes' reasoning, the concept of development rights transfer is unimpeachable, since the developer's right to build is simply shifted to other land, and he retains his profit. The development rights to be transferred from the Tudor City Parks are exactly the amount of development rights available for construction under the preexisting zoning regulation.¹⁰⁹ As stated above, the transfer from a residential to a commercial district may even increase the value of the development rights.¹¹⁰

To the layman, who "thinks of property as a man's belongings, or as the things that a man owns,"¹¹¹ it may seem strange to speak of a parcel of land not as a holistic thing, but as the generator of

¹⁰⁷. 256 Pa. 328, 331 (1917).
¹⁰⁸. 260 U.S. 393, 414 (1922).
¹⁰⁹. NEW YORK CITY, N.Y., ZONING RES. § 91-03 (1973).
¹¹⁰. See notes 21-22 supra & accompanying text.
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discrete and separate interests in property including, in this instance, a right to build in three dimensions elsewhere and a right to maintain no more than an open space in a particular location. It is a reflection of the legal conception of property not as “things,” but as the sum of the interests that the law recognizes and protects—a “bundle of rights.” The Park District regulation removes from the bundle of rights, constituting a landowner’s property interest, one single element: the right to build at a particular location. Whether the mandatory spatial transfer inherent in this regulation can withstand the test of the taking clause of the Constitution is the real question at issue in the Tudor City litigation. The argument that follows concludes that the requirement is constitutionally permissible.

Underlying the plaintiff’s position in this litigation is a conception of property as something more than the potential for economic benefit. That conception is rooted in Blackstone, whose famous definition of property rights makes no reference to profit or economic benefit:

There is nothing which so generally strikes the imagination, and engages the affections of mankind, as the right of property; or that sole 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.113

Especially with regard to real property, there is a deep-seated feeling that it is more than just a thing that can generate profit. Rather, there exists the feeling that its location, its position in space, is of its very essence. But, there is a concurrent idea that leads to greater understanding: “The concept of property never has been, is not, and never can be of definite content.”114 The one word “property” has different meanings for different legal purposes. Arriving at a definition may prove a fascinating exercise in jurisprudence.115 However, the narrower issue involved here, is: what is property for the purpose of answering the question of whether a police power regulation effects a taking; and, if it does, what is the nature of the compensation required?

112. RESTATEMENT OF PROPERTY § 5 (1936).
113. 2 W. BLACKSTONE, COMMENTARIES *2.
114. Philbrick, supra note 111, at 696.
It is clear that "property," when considered in connection with the "taking" question, is not congruent with property in its most expansive jurisprudential definition. If it were congruent, every governmental interference with property rights would constitute a taking under the fifth amendment. No constitutional principle is more certain, however, than the principle that not every governmental interference with private property is a compensable taking. As Justice Holmes said, "[g]overnment 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. As long recognized, some values are enjoyed under an implied limitation and must yield to the police power."116 Holmes reinforces the notion that property value can be damaged without requiring compensation. What then, is the standard of compensation when property value is diminished beyond the Pennsylvania Coal line? Must compensation be made up to the full value of the property, or only to that level which the value of the property could legitimately have been reduced under police power? The Constitution uses the phrase "just compensation"; Costonis states that the property owner should be "duly compensated";117 and a third test of "fair compensation" can be inferred from the environmental cases of the 1970's.118 Given the legitimacy of a zoning objective to retain open spaces in densely developed urban areas, a standard which achieves such objectives without sacrificing the property's economic value must be upheld. Surely, transferable development rights, susceptible of market valuation, are a fair compensation for a developer whose rights could be substantially diminished under more traditional zoning regulation with no compensation whatsoever.119

The requirement of just compensation would continue to apply to condemnation and physical invasion takings. A less exacting requirement of "fairness" would seem appropriate where legitimate police power restrictions on private property are at issue. The oppor-

117. Costonis, supra note 105, at 96.
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tunity to use development rights elsewhere, instead of on the designated area of critical concern to the environment, should be accepted by the courts as a fair compromise between the public and private interest.

IV. MANDATORY DEVELOPMENT RIGHTS TRANSFER AWAY FROM AREAS OF CRITICAL CONCERN TO THE ENVIRONMENT IS NOT A TAKING OF PROPERTY

The transfer of development rights plan for the Tudor City Parks does not amount to an uncompensated taking. Under either the old Pennsylvania Coal test or the newer theory of the 1970's environmental cases,120 substantial economic value continues to repose in the property. Obviously, the simplest and most profitable course for the developer would be "as-of-right" development, but the city has found that this course does not promote the general welfare. By mandating that the developer transfer his building rights to other property, the city has not taken his interest in the property; it has regulated his right to build. The transferable development rights need not be measured against just compensation requirements for a "taking." They should be seen as a reasonable development alternative under the regulation of the city's police power, since the developer is left with many valuable development options within Manhattan's most important commercial center.

In a densely urbanized area like Manhattan, the surface of land, in and of itself, has little intrinsic value. The value of this land lies in the profit-making structure that can be built on it. This interest

120. See generally Taking Issue.

Although less dramatic than a return to strict construction, a strategy of gradual evolution is consistent with current trends. In the evolution of a constitution, it is far more common to find a case gliding gracefully into oblivion than to find it dramatically overruled. Such could be the fate of Pennsylvania Coal as an evolving appreciation of public purpose and public necessity takes form in the 1970's. Courts may increasingly find particular regulations for the protection of certain environmental and ecological values such an important exercise of the police power that they outweigh any loss of land values under the Pennsylvania Coal balancing test.

Id. at 256.
is severable from the land, and a fair redistribution of this interest does not constitute a taking.

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

Under the Park District regulation, the developer retains the development rights in which the full value of his land is reposed and, therefore, suffers no actual loss in his property's capacity for beneficial use. Professor Sax makes the most direct and succinct statement of this principle: "[W]hatever theory [of what constitutes a compensable taking] one follows, it is hard to find a taking if the victim suffered no loss...."*124*

In view of these authorities, any argument which claims that the Park District regulation is unconstitutional because the city seeks to enhance its resource position through an exercise of the police power is clearly in error. There is nothing wrong *per se* in the government seeking to enhance its resource position. On the contrary, a finding of such result would tend to uphold the regulation as a proper exercise of the police power, advancing the general welfare. Without elaborating any subtle theories or sophisticated tests, Justice Holmes stated: "It [the Constitution] deals with persons, not tracts of land. And the question is what has the owner lost, not what

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122. *Takings Issue* 240 (emphasis added). *See also* Just v. Marinette County, 56 Wis. 2d 7, 201 N.W.2d 761 (1972):
   The Justs argued their property has been severely depreciated in value. But this depreciation of value is not based on the use of the land in its natural state but on what the land would be worth if it could be filled and used for the location of a dwelling. While loss of value is to be considered in determining whether a restriction is a constructive taking, value based upon changing the character of the land at the expense of harm to public rights is not an essential factor or controlling.
   *Id.* at 23, 201 N.W.2d at 771 (emphasis added).
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has the taker gained."126 Sax unequivocally applies the concept as the test of a taking:

The precise rule to be applied is this: when an individual or limited group in society sustains a detriment to legally acquired existing economic values as a consequence of government activity which enhances the economic value of some governmental enterprise, then the act is a taking, and compensation is constitutionally required . . . .127

The private interest of the developer in maximum profit ought to yield to the public good. The developer of the Tudor City Parks would lose nothing by the transfer of his development rights and the city would painlessly absorb his building bulk in other nearby structures. There would be no net gain in density of the area. A few buildings would rise a few stories higher; but the public would retain some necessities of urban life: a few trees, benches, sunlight and air.

CONCLUSION: WHERE DO WE GO FROM TUDOR CITY?

In Village of Euclid v. Ambler Realty Co.,128 Justice Sutherland recognized an evolving use of zoning as a legitimate mode for protecting the ever-changing general welfare:

Until recent years, urban life was comparatively simple; but with the great increase and concentration of population, problems have developed, and constantly are developing, which require, and will continue to require, additional restrictions in respect of the use and occupation of private lands in urban communities. Regulations, the wisdom, necessity and validity of which, as applied to existing conditions, are so apparent that they are now uniformly sustained, a century ago, or even half a century ago, probably would have been rejected as arbitrary and oppressive. . . . [W]hile the meaning of constitutional guarantees never varies, the scope of their application must expand or contract to meet the new and different conditions which are constantly coming within the field of their operation.129

Broadly speaking, zoning regulations involve use, bulk and density restrictions on private property. Bulk restrictions have increasingly

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127. Sax, supra note 124, at 67.
129. Id. at 386-87.
taken the form of floor-area restrictions which limit building size to that which can be supported by the municipality.

Zoning ordinances have traditionally regulated development by employing the zoning lot as the unit of control, but any unit with commonly accepted boundaries could be used easily. Some of the more flexible approaches to development control have included "large scale developments,"130 and "planned unit [or cluster] developments."131 These alternatives maintain the same overall density of single lot subdivisions but permit more design flexibility, often to preserve the character of the land—unique topography, ponds and trees. If a larger area unit of control is acceptable for developments in single ownership, it should be equally acceptable where ownership in the larger area is fragmented. It could serve the same planning goal—better development with greater zoning flexibility without increasing density. Perhaps most important, the resulting zoning flexibility could provide the framework necessary to sustain stringent public regulation of areas of critical concern to the environment, such as major public resource areas.

State police power is more and more frequently being employed to protect areas of the environment. The term environment, in this context, must include such things as landmark structures, topography, coastal areas and improved open space in densely developed communities. We may, in such areas, be witnessing a significant erosion in the traditional protection accorded private property rights in favor of public rights.

The individual zoning lot unit of development control has operated at cross purposes with these public objectives by maximizing development pressure in high value land areas on all underdeveloped lots. The classic zoning ordinance set up uniform controls for all lots at a time when environmental areas of critical concern were but dimly perceived. Growth, at that time, was the social imperative; and the major constraint in zoning was to promote equal opportunity by treating large areas according to uniform regulations. The potentially large zoning development envelope for underdeveloped lots became an irresistible attraction. Alternatives to this attraction had to be found if precious landmarks and other socially prized urban spaces

130. New York City, N.Y., Zoning Res. § 78-00 et seq (1973).
131. Id.
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were to survive. After the loss of many amenities, the planning rationale and zoning technology for large-scale developments focused on the problem. The notion of development rights transfer to serve defined planning purposes is the result.

It would be simplistic to assume that such transfers could always occur without adverse planning consequences. Although the preservation benefit is always immediately ascertainable, the burdens, in the form of excess bulk and density on the receiving lot, may be insupportable to the immediate neighbors of the receiving lot. Generally, the further the development rights are transferred, the less perceptible are the benefits in the eyes of the neighbors of the receiving lot. Such “cross-town transfers” may be regarded as spot zoning deviations from a plan.\(^{132}\) Given the potential for abuse of the long distance transfer technique, its exercise should only be allowed by special permit of the municipality after making strict planning-oriented findings.\(^{133}\)

The notion of a development rights transfer as a means by which the public protects an area of critical concern to it, while at the same time treating a property owner fairly, may see considerable use over the next decade.\(^{134}\) With the passage of environmental legislation at the federal and state level,\(^{135}\) recognizing the necessity for protecting public access to, and enjoyment of, unique private areas threatened by development, courts have already begun to reflect on the importance of this emerging set of social values. The value of areas of

\(^{132}\) Comment, Development Rights Transfer in New York City, 82 YALE L.J. 338 (1972).

\(^{133}\) For the special permit provisions for Special Park District, see notes 14-19 supra & accompanying text.

\(^{134}\) See Costonis, supra note 105.

critical concern to the public such as coastal shorelines, landmark buildings and rare open spaces in densely developed areas can be expected to gain judicial protection against legal challenges, premised on the taking of private property absent the "just compensation" form of compensation. The courts have already begun by refusing to give private owners the option of electing condemnation compensation when municipalities are incapable of offering it.186 Mandatory development rights transfer offers a middle ground, assuring the public objective while not bankrupting the municipal treasury and still affording the private property owner a fair measure of value for his property.

136. Fred F. French Inv. Co. v. City of New York, 77 Misc. 2d 199, 352 N.Y.S.2d 762 (Sup. Ct. 1973). While invalidating the Special Parks District zoning provision, the court refused to find a "taking."