“Yes, I can make you take that down”
Regulation of Non-Conforming Uses

8:30—9:40 a.m.
Friday, April 22, 2005
Sturm College of Law

Moderator: Ed Ziegler
Professor of Law
University of Denver Sturm College of Law
Denver, Colorado

Panelists: Dwight H. Merriam, Esq.
Robinson & Cole LLP
Hartford, Connecticut
“Yes, I can make you take that down…”

Regulation of Non-Conforming Uses

Friday, April 22, 2005
RMI UI 14th Annual Land Use Conference
Dwight Merriam, FAICP, CRE

Uses it or lose it…

• Abandonment
• Destruction
• Forced termination
• Amortization

…most of this right out of Ed Ziegler’s treatise!

Abandonment

When a nonconforming use is abandoned, the test is subjective.


...started out as a permitted use…

• Leased 1993; conformed with zoning.
• Then zoning changed, making it a nonconforming use.
• 1995: 15-year lease-purchase.

…but then, times changed…

• Summer 2001 ceased operations.
• Removed two metal ramps for display and blocked driveways with concrete blocks.
• Phone disconnected; yellow pages not renewed.
• No other changes.
...they tried…but time passed…

- Told municipality it wasn’t abandoning its right to use the property for a used car dealership.
- July 2002 - one year later – annual business license renewal not received.
- Applied to zoning board for determination.
- DECISION: passage of time only one factor.
- NOT ABANDONED.

Constitutional dimensions


Sign legal before annexation in 1987…

- Then nonconforming.
- Foreclosed 1996.
- City of Daphne notified buyer, Budget Inn of Daphne, that foreclosure ended “grandfathering” of the sign.

Substantive due process claim in state court.

- “Change in ownership regardless of name change” and “change in name regardless of ownership.”
- DECISION: arbitrary and capricious.
- Also allowed to do routine upkeep.

Intent not considered.


An adult entertainment case.

- Aldabbagh owned club.
- Public nuisance action for prostitution.
- Temporary restraining order; over one year.
- Nothing more sought (only relief possible).
- Parties agreed to dismiss with prejudice.
Nonconforming use lost after one year.

- DECISION: Remanded.
- If one year cessation was the fault of the owner because of its own misconduct, that may be enough.

Terminated by application for variance to change use.


Building official told buyer it was a vested nonconformity…but
- Nonconformity had been abandoned in 1979 when the former owner applied for a variance to change that use to light industry.
- Plaintiff buyer survives motion to dismiss.
- Will building official be liable?

Lesson Learned:
Don’t give due diligence advice over the counter…

And now a contest…
- Why women live longer than men...

6th place
5th place

4th place

3rd place
2nd place

And
the winner is:

...and now a
close runner up
Destruction

• Fire
• Flood
• Force majeure, like a hurricane

...the example of Coral Gables...

Division 3 Nonconforming Structures.

Section 6-301. Continuation of Nonconforming Structures. Except as may be provided for elsewhere in these LWRs, a non-conforming structure may be continued subject to the standards and conditions of this Division.

Section 6-302. Destruction of Nonconforming Structures. A nonconforming structure or nonconforming portion of a structure that is destroyed to an extent exceeding fifty (50%) percent of its replacement cost at the time of its destruction shall not be reconstructed except in conformity with these LWRs.

Article 6: Nonconformities
October 8, 2014

...so many problems of interpretation...

• Value measurement
• Property included
• Restoration means what

Forced termination
- Nuisance actions
  - Not usually
  - People v. Miller, 106 N.E.2d 34 (1952)
- Eminent domain

**Santa Monica California Municipal Code**

Amortization of nonconforming uses.

Within one year after the effective date of Sections …, all non-conforming adult entertainment uses as defined in Section 9.44.030 shall be brought into full compliance with this Chapter except that such activities may continue for up to an additional two years upon the granting of a Conditional Use Permit, pursuant to the Conditional Use Procedure set forth at prior code Section 9148 of the Municipal Code, and upon a determination that the adult use is obligated by written lease of the premises exceeding one year from the effective date of Sections … or that the adult use involves investment of money in leasehold or improvements such that the longer period is necessary to prevent undue financial hardship. For purposes of this section, in the case of two adult uses located within 1,000 feet of one another, that use which was first lawfully established and is otherwise in conformity with this Chapter, shall be entitled to continue in its present location.

...reasonableness of period...

  - Structure
  - Nature of use
  - Location
  - Cost
  - Public benefit
  - Period of use
  - Amortization period

**If you can’t beat them, join them...**

**The action is also in greyfields...**
How do you get there?

- Rezonings.
- Variances.
- Floating zones.
- Special permits/conditional uses.
- Site plan.
- As-of-right.
Reengineering Regulation to Avoid Takings

Dwight H. Merriam, AICP
Robinson & Cole, Hartford, Connecticut;
J.D., Yale University, 1978;
Master of Regional Planning, University of North Carolina, 1973;
B.A., University of Massachusetts, 1958.

Most, perhaps virtually all, of the inverse condemnation takings, both regulatory and physical takings, are avoidable. When we look at many of the leading takings cases from the perspective of a final court decision, we are often left shaking our heads. How could the California Coastal Commission have ever imagined that its enabling statute gave it the power to require the easement along the beach? Why would anybody defend the South Carolina Coastal Council in the Lucas case when the property was rendered valueless? If the government really wanted an easement in the first instance and really wanted to stop development in the second, perhaps it should have just written a check.

These after-the-fact types of questions point to an obvious key in avoiding takings—the government often has the choice of not regulating and always has the option of condemning a property for a proper public use or purpose.

But in most instances the government must regulate to carry out its functions and, perhaps more importantly, to avoid even greater liability. What would have happened in the First English case, for example, if the Los Angeles County commissioners had allowed that church camp for handicapped children to be rebuilt immediately after the disastrous flood—before anybody determined whether the camp might be flooded again—and then there was another flood and children were killed?

An alternative to regulation, acquiring every interest in property, is both unrealistic and unnecessary. As the United States Supreme Court said in Lucas: “It seems to us that the property owner necessarily expects the uses of his property to be restricted, from time to time, by various measures newly enacted by the State in legitimate exercise of

its police powers . . . .” The need for some regulation is universally recognized; the argument is over how much. To eliminate takings, we need to merely reduce or eliminate regulation and pay for rights lost, some argue. More effective means to avoid takings exist, however. Just as American companies have become more competitive through increased efficiencies and productivity, improvements in how government regulates can greatly diminish the damage to private property and the potential for takings.

And even when our regulatory programs “fail” and a property owner sues for just compensation, why do these cases seem to take a direct path from a regulatory decision to the trial court? Better regulations, as well as better procedures, such as variances or special permits, are needed to divert takings cases from long, expensive, and always-uncertain litigation.

A threshold element in a takings case involves defining what has been taken. The Fifth Amendment and comparable provisions in state constitutions protect “property.” Regulatory programs should be analyzed in the first instance to determine whether they can be reengineered to avoid affecting property interests. For example, landowners generally have no protected property interest in discretionary permits. Local land-use regulatory programs that increase governmental discretion by moving from the typical as-of-right site plan, conditional use, or special permit to a floating zone rezoning process may not implicate, at least in some jurisdictions, a protected property interest.

Assuming that what is at stake is a potentially protected property interest, we then need to know at what point it becomes protected; at that point the right vests. Because amendments to land-use regulations affect planned and ongoing development, property owners consequently seek protection from changes adversely affecting their projects by claiming a protected interest in existing land-use regulations. Governments often defend against such takings claims by arguing that rights have not vested. Since vesting is central to the formation of a protected property interest, we address the subject at length.

4. Lucas, 505 U.S. at 1027.
The general rule is that a vested right is property and cannot be taken without payment of just compensation.7 “[T]wenty-two states expressly equate a vested right with property or a property interest, while eight states implicitly suggest that a vested right is equivalent to a property right.” A government action that attempts to cut off a vested right “will almost certainly precipitate a substantive due process claim and arguably a takings claim as well.”9

But how does a right vest? A leading case, Avco Community Developers, Inc. v. South Coast Regional Commission, describes the majority rule:

It has long been the rule in this state and in other jurisdictions that if a property owner has performed substantial work and incurred substantial liabilities in good faith reliance upon a permit issued by the government, he acquires a vested right to complete construction in accordance with the terms of the permit. Once the landowner has secured a vested right the government may not, by virtue of a change in the zoning laws, prohibit construction authorized by the permit upon which he relied.10

The court in Avco also found that preliminary work prior to construction and before approval of a building permit will not exempt a developer from subsequent changes in a zoning ordinance; zoning the property or issuing approvals for work preliminary to construction is not enough to vest rights.

This majority position has been interpreted in many ways. Some courts relax the requirement for a building permit and focus on substantial expenditures and substantial reliance. The Florida Supreme Court found that when a property owner proceeds in good faith before issuance of a building permit, reasonably relying on an act or omission of government, and substantially changes position or incurs extensive obligations or expenses, it would be unjust to destroy the right obtained by the landowner.11 Colorado has modified the rule in a statute under which a landowner may obtain a three-year “vested” right to develop property without interference from new regulations aimed specifically at that project.12 There are exceptions to the right, and a landowner must satisfy all reasonable conditions imposed by local government when it approves the site-specific development plan.13

In a minority of states, courts have extended vested rights protection to landowners denied building permits because the municipality amended the zoning after the application was submitted. These states vest rights under “the then existing regulations as of the time when proper application is filed.”14

Just as a regulation that goes too far may cause a taking, regulatory provisions that require too many “hurdles for . . . [a property owner] to clear before it could vest its rights by filing for a building permit” may be unconstitutional, unenforceable, and even cause a taking in their own right.15 The City of Bellevue, Washington, required eight different approvals before the developer could apply for a building permit. This, the Supreme Court of Washington said, was an attempt to preempt common-law vesting doctrine. The attempt failed, however, because the ordinance’s preapplication procedures were vague and discretionary; they reserved for the city “almost unfettered ability to change its ordinances in response to a developer’s proposals.”16

Since facts and circumstances differ substantially, each court analyzes vested rights and takings problems case by case.17 It is simply not possible to describe a general rule of vesting because statutes and case law vary so much from state to state.

Estoppel and vested rights are different. The terms are often used interchangeably, regretfully, and incorrectly. When a rezoning occurs, a landowner who wants to maintain the prior zoning can argue either

7. Monongahela Navigation Co. v. United States, 148 U.S. 312, 341 (1893) (franchise to receive tolls at lock and dam on river is vested right); Greene v. Town of Blooming Grove, 879 F.2d 1061 (2d Cir. 1989) (vested nonconforming use is property under Fourteenth Amendment); John J. Delaney & Emily J. Vaias, Recognizing Vested Development Rights as Protected Property in Fifth Amendment Due Process and Takings Claims, 196 LAND USE INST. PLANN. REG., LITIG., EMINENT DOMAIN, AND COMPENSATION 769, 773 (citing Brian W. Blaesser et al., LAND USE AND THE CONSTITUTION: PRINCIPLES FOR PLANNING PRACTICE 8-9 (Brian W. Blaesser & Alan C. Weinstein eds., 1989)).
8. Delaney & Vaias, supra note 7, at 776-77; individual states listed, nn.32-33.
9. Id. at 777 n.1.
10. 533 P.2d 546, 550 (Cal. 1976) (no vested right because Avco did not have building permit); Lake Bluff Hous. Partners v. City of S. Milwaukee, 540 N.W.2d 189, 195-96 (Wis. 1995) (no vested right because developer never applied for building permit conforming to requirements in effect at time of application).
13. Id. at 82, 84.
15. West Main Assocs. v. Bellevue, 720 P.2d 782 (Wash. 1986) (invalidation of ordinance and damages for a taking sought, but court appears to have granted summary judgment only on invalidation).
16. Id. at 785.
17. See Delaney & Vaias, supra note 7, at 767. The article includes two appendices on how vesting occurs in each state plus a state-by-state synopsis of vested rights cases.
that a vested right exists or that government should be estopped to bar the use that had been allowed by the prior zoning.18

Estoppel, based in equity, requires substantial or good-faith reliance on some act or inaction by government or the developer.19 One of the best, plain-language descriptions of equitable estoppel in the takings context comes from the Florida appellate case of Florida Companies v. Orange County:

Stripped of the legal jargon which lawyers and judges have obfuscated it with, the theory of estoppel amounts to nothing more than an application of the rules of fair play. . . . A citizen is entitled to rely on the assurances and commitments of a zoning authority and if he does, the zoning authority is bound by its representations, whether they be in the form of words or deeds. . . . 20

The developer in that case received preliminary approval for a 327-lot subdivision and completed substantial work, including 70 percent completion of a sewage treatment plant and installation of sewer lines to about half the lots. Work was suspended for three years because of a down market, and the county then canceled the engineering approval of the project because of the failure to complete "substantial work" within one year after approval of the preliminary plans. The property owner sought reapproval, but by then the county had adopted a growth-management policy, and the application was denied. In stopping the county from denying the reapplication, the appellate court formulated an equitable estoppel doctrine:

[A] property owner (1) in good faith (2) upon some act or omission of the government (3) has made such a substantial change in position or has incurred such extensive obligations and expenses that it would be highly inequitable and unjust to destroy the right he acquired.21

The Florida Companies court did not reach the takings issue, however, because though it was raised in the appeal, it was not properly presented to the trial court. In addition to the elements described in Florida Companies, some courts will balance the equities of the estoppel defense against a possible threat to public welfare.22

Equitable estoppel against the government is truly exceptional and courts will not grant it if there is evidence that a property owner did not act in good faith or did not use due diligence in determining what regulations required. In a New York City case, which resulted in twelve stories being lopped off the top of a skyscraper, New York's highest court held that the city's erroneous issuance of a permit did not estop the municipality from correcting its errors because the developer through its own due diligence could have determined the applicable height limitation.23

Although the correct zoning restriction was on file, the developer had relied on an erroneous map showing a lesser setback for a nineteen-story height restriction. The permit was mistakenly issued on the basis of the map and while the building was under construction the problem was discovered, and a stop-work order issued for those portions of the building over nineteen stories.

The developer sued, claiming that the city was equitably estopped from imposing the nineteen-story restriction. The court rejected the equitable-estoppel claim because "reasonable diligence would have readily uncovered for a good-faith inquirer" the height limitation applicable to the site.

Property owners in estoppel claims generally are required to have acted appropriately. One court held that a property owner properly relied on an outdated copy of a zoning ordinance that had been provided by the city.24 In evaluating conduct, courts have focused on reasonableness. Some courts consider it reasonable for a landowner to measure a house to determine whether it conforms to city zoning setback restrictions.25 Willful violation of zoning ordinances can evidence bad-faith conduct and cause an estoppel claim to fail.26 Bad faith also can be found in misrepresentations to obtain permits or approvals.27 But, substantial expenditures by a property owner can strengthen an estoppel claim.28

18. 6 PATRICK J. ROHAN, ZONING AND LAND USE CONTROLS § 39.01(3) (1994).
19. DANIEL R. MANDELEK, LAND USE LAW 235, 237 (1993) (estoppel found by several courts when zoning changed "solely to frustrate a landowner who was entitled to a permit under existing regulations when he applied for one") (citations omitted).
20. 411 So. 2d at 1011 (citing Town of Largo v. Imperial Homes Corp., 308 So. 2d 571, 573 (Fla. Dist. Ct. App. 1975)). The question of authority can be a key to some estoppel claims. See Town of West Hartford v. Gelinas, 559 A.2d 1176 (Conn. App. 1989) (estoppel defense fails because no evidence that any agent of town authorized to enforce zoning induced property owner's action).
21. Florida Cox, 411 So. 2d at 1010 (citing Hollywood Beach Hotel Co. v. City of Hollywood, 329 So. 2d 10, 15-16 (Fla. 1976)).
22. See, e.g., County of Sonoma v. Rex, 231 Cal. App. 3d 1289 (1st Dist. 1991)
27. City of San Marcos v. R.W. McDonald Dev. Corp., 700 S.W.2d 674 (Tex. App. 1985) (misrepresentations to planning commission cause subdivision plat to be vacated).
28. See, e.g., City of Chicago v. Unit One Corp., 578 N.E.2d 194 (Ill. 1st Dist. 1991) (property owner has not shown substantial change in position; estoppel claim fails);
Estoppel claims also can fail due to the nature of the acts of a government official. *Ultra vires* acts, such as permits issued by mistake, can cause a claim to fail. For example, in South Carolina, government agents acting within the scope of their authority can create an estoppel claim; not so with unauthorized acts or omissions.²⁹ Claims can fail if a property owner relies detrimentally on casual private advice from an official.³⁰ Finally, affirmative acts or omissions by officials can beget liability, but knowledge is part of the burden of proving such affirmative conduct.³¹ States differ on their requirements. Pennsylvania, for example, requires "active acquiescence" by an official.³²

In general, do estoppel claims succeed? Sometimes they do, but not often because of the heavy burden on those trying to avoid enforcement by claiming the defense of estoppel.³³ In the end, courts balance private rights against adverse effect to the public. If a specific public harm is threatened, the balance may tip in favor of the public interest.³⁴

On the other hand, vested-rights claims, which involve asserting a right to a particular use of land because of detrimental reliance on a formal government promise, such as a permit, rest more on constitutional requirements and less on the broader considerations of equity.³⁵ In essence, vested rights extend constitutional protection to a property owner.³⁶ The primary difference is that the vested rights doctrine affords a landowner due process protection for an acquired property right, whereas in the case of estoppel, the landowner has no legally cognizable property interest to protect—he merely hopes to present facts and circumstances warranting equitable dispensation to continue an illegal activity.³⁷

The well-established rule is that an existing zoning classification in and of itself bestows no vested right in the continuation of the same classification because all property is subject to local government police power.³⁸ However, state law may provide otherwise. In Iowa, two sections of the state constitution and a decision by the state's highest court support a landowner's claim to a vested right to zoning.³⁹

In *Conrow v. City of Torrance*, a California property owner challenged a zoning ordinance as a taking, alleging that the ordinance caused the loss of a vested right to a nonconforming use of property.⁴⁰ The owner had negotiated with Los Angeles County to provide courtroom space. However, the city then amended the zoning to require a conditional-use permit for such uses with a site-specific determination on whether parking was adequate.

The Ninth Circuit found that regulating parking advanced the city's legitimate interest in protecting public welfare. The owner had no vested right to a nonconforming, court-related use. The owner did not detrimentally rely on any promise.⁴¹ Funds were not expended for any modifications nor were lease arrangements made for parking. Thus, the owner had no vested right other than in the original beneficial uses of the property.

Another type of existing zoning is the interim development ordinance (IDO). Municipalities may use IDOs to temporarily regulate land use, especially in areas of rapid growth and change, while permanent regulations are developed. Discretionary approvals and dwelling-unit allocations for a development project are sometimes granted under IDOs.⁴²

Approvals and allocations under IDOs do not create vested rights, however. The California Court of Appeals noted that "the rights which

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³⁶. MANDELKER, supra note 19, at 235. See Aviso, 553 P.2d at 546; Parkview Assoc., 519 N.E.2d at 1372; *Florida Cos.*, 411 So. 2d at 1008.

³⁷. Dennison, supra note 33, at 74.


³⁹. See Aviso, 553 P.2d at 550.

⁴⁰. 1995 U.S. APP. LEXIS 8721, at *5-*7 (9th Cir. 1995).

⁴¹. See Aviso, 553 P.2d at 550.

⁴². Consaul v. City of San Diego, 8 Cal. Rptr. 2d 762 (Cal. App. 1992)(IDO without building permit does not create vested right; takings issue not decided).
may vest through reliance on a government permit are no greater than those specifically granted by the permit itself. Under the IDO, no permit was issued—all the IDO represented was an opportunity to exercise an entitlement to the units in a unit allocation and to apply for a building permit. The lesson here is that an IDO may be used to regulate under volatile development conditions without creating property rights that might be taken if more restrictive regulations are added. An IDO provides a basis for ultimate issuance of a permit, but by its very nature as interim regulation, no vested expectancy.

However, a vested rights ordinance can address the issues raised by an IDO. The ordinance might include documentation requirements for any claim of vested right, procedures for addressing incomplete applications, hearing, and review procedures. Such a vested rights ordinance is one way to preclude successful court challenges of IDOs. Challenges can also be avoided by building in variances and exceptions, and an administrative appeals procedure.

Not only can changes occur before an application is filed, but sometimes the government changes position on a particular project during the application process and even after all approvals have been issued. One city adopted two ordinances, eliminating a permitted use and rezoning land that the landowner had developed over a period of years as permitted by previous ordinances and a proposed development plan. The state appeals court affirmed the trial court’s judgment that the city was equitably estopped to enforce a change in zoning regulations against a landowner who had acquired a vested right in zoning. But, the property owner decided not to pursue his development. Instead he prosecuted a separate action in the federal trial court, which rejected his just compensation claim.

On appeal, the Eleventh Circuit Court of Appeals affirmed. As for the particular project proposed by the property owner, the Eleventh Circuit stated that regardless of any vested rights recognized under state law, denial of permission to build a project does not, without more, state a claim for just compensation. “[T]he government does not effect a taking when its actions substantially advance legitimate state interests and leave economically viable uses of the land itself.”

Although takings claims can be based on the Fifth Amendment to the United States Constitution, state constitutions can also be used as authority. In fact, state constitutions may provide more protection for private property rights than the United States Constitution does. For example, in 1960, a brick manufacturing company purchased property in Harris County, Georgia, containing a vein of a special mineral for brick manufacturing. The property’s zoning, which permitted agriculture and forestry uses but not mining, was intended to “preserve land areas suitable for eventual rezoning.” The zoning remained unchanged through a number of reviews and through implementation of a comprehensive plan.

In 1993, the company decided to mine the property. It obtained a mining permit from the state but was unsuccessful in its efforts to change the zoning to permit mining. The County Board of Commissioners then voted to rezone the property to single-family residential. The company sued, alleging the rezoning affected a taking because it rendered the property virtually useless and, further, claiming a vested right to mine the land.

Although the Eleventh Circuit found that the federal Fifth Amendment taking claim was not ripe for adjudication, the court did affirm that under the Georgia Constitution the rezoning caused a taking. Under the Georgia Constitution, private property shall not be taken or damaged without payment of just and adequate compensation. Another state-law claim—that the property owner had acquired a vested right to mine the property—failed. Preliminary test drilling was held insufficient for vesting. Neither reliance on a zoning ordinance nor assurances of a zoning change existed.

In New Hampshire, a property owner expanded his campground without getting state and local approvals. A state agency cited the campground for numerous violations, which the owner corrected with bor-

43. Id. at 1796–97 (quotations, citations omitted). See also Santa Monica Pines Ltd. v. Rent Control Bd., 679 F.2d 27 (Cal. 1984) (vested right requires good-faith reliance on permit).
44. The purposes of IDOs and how to draft them are discussed in Elizabeth A. Garvin & Martin L. Leitner, Drafting Interim Development Ordinances: Creating Time to Plan, LAND USE L. 3 (June 1996).
45. Id. at 8.
46. See Pardee Constr. Co. v. City of Camarillo, 690 F.2d 701 (Cal. 1984) (stipulated judgment on vested-rights ordinance subject to requirements of subsequent ordinance on growth control).
48. Id. at 243.
49. Corn v. City of Lauderdale Lakes, 95 F.3d 1066 (11th Cir. 1996).
50. Id. at 1073. The Eleventh Circuit did remand to the trial court, though, for findings regarding the effect of a moratorium on the economically viable uses of the property.
51. Id. at 1076.
53. Id. at 1484.
54. See Gradous v. Bd. of Comm’rs, 349 S.E.2d 707 (Ga. 1986) (no taking because no showing of decrease in property value).
55. Bickerstaff, 89 F.3d at 1488–90.
rowed money, still without any local approvals.\textsuperscript{56} About two months
after he submitted his application for subdivision approval, the town
enacted a "buffer zone" for recreational campgrounds (200 feet around
the perimeter) prohibiting recreational facilities in the buffer area. The
town also rejected the owner’s application for a variance to construct
a new recreation hall. The inevitable takings claim followed. The New
Hampshire Supreme Court found that the expenditures without state or
local approval were speculative and did not create any vested rights.

What these cases suggest is that local governments have broad discretion
in legislatively amending their land-use regulatory programs, such as by changing a zone. Key again are the defining moments of
issuance of a development or building permit and some investment in
furtherance of the project. Even where there is a vested right, there may
not necessarily be a taking if these tests are not met.

Regulations can also be written to avoid takings claims by providing
for conditions that have already vested rights, such as highway access.
A landowner may be entitled to compensation for the impairment of
access when the changes require unreasonable rerouting or circuitous
travel.\textsuperscript{57} In \textit{Garrett v. City of Topeka}, an owner brought a takings action,
claiming that a city resolution limited her right of commercial access
to the street and thus effected a taking.\textsuperscript{58} Terming the city’s action an
economic regulatory taking, the court held that the applicable takings
test was whether the economic impact on the landowner outweighed
the public purpose of the regulation, and concluded that the access
had been made unreasonable, that there was a taking, and that just
compensation was $190,000.\textsuperscript{59}

In another case, however, the Idaho Supreme Court found no compen-
sable taking when a landowner intended to build a gas station
lost an eighteen-foot-wide curb cut and access to an alley because of
improvements to a freeway interchange.\textsuperscript{60} The court held that the re-
main ing vehicular access was "reasonable."\textsuperscript{61}

Good faith and reliance are important to vested rights. If a munici-
pality issues a building permit or approves construction of a project in
error, courts generally allow the government to revoke the permit.

\textsuperscript{56} Quirk v. Town of New Boston, 663 A.2d 1328 (N.H. 1995).
\textsuperscript{57} Small v. Kemp, 727 P.2d 904 (Kan. 1986) (no taking where change in access
was reasonable).
\textsuperscript{58} 916 P.2d 21 (Kan. 1996).
\textsuperscript{59} The \textit{Garrett} case’s usefulness is questionable, however, because it was limited
to its facts last year in Ebert v. Carlson, 971 P.2d 1182 (Kan. 1999), and its sister case,
City of Wichita v. McDonald’s Corp., 971 P.2d 1189 (Kan. 1999).
\textsuperscript{60} Merritt v. State, 742 P.2d 397 (Idaho 1986).
\textsuperscript{61} Id. at 400.

There is no taking, no vested right, and the government is not es-
topped.\textsuperscript{62} Some courts will protect a developer who acted in good faith,
who did not know a permit was issued in error, and who made expen-
ditures in reliance on approved permits. Good faith on the part of gov-
ernment is also a consideration.\textsuperscript{63}

In Illinois, a person contracted to buy a lot in a zone permitting
multifamily dwellings, contingent on obtaining a building permit for
fifty-one apartments.\textsuperscript{64} The buyer discussed the application with an
alderman, who expressed approval. The buyer relied in good faith on the
alderman’s statements and proceeded with the permit application, prep-
paration of architectural drawings, and payment for removal of all trees
on the property. No communication on the status of the permit was
received by the buyer. He then met with the building commissioner and
was told that an ordinance to rezone the property was pending, and the
city did not favor construction there.

Both the trial and the appellate courts ordered the city to issue a
building permit. The appellate court found that the buyer had acquired
a vested right both through the alderman’s statements and the architec-
tural and tree-removal expenditures. In addition, although not specifi-
cally articulated by the court, it appears that the building department
was waiting for the rezoning before issuing a denial of the building
permit. Under such circumstances, the argument for a taking is strong.

In reengineering regulations, governments should clearly specify
who has authority to bind the government and should warn that others
lack such authority. Periodic training for local officials on the dangers
of casual conversations with property owners and developers can
heighten awareness of potential liability.

A developer of townhouses and a hotel in California sought damages
for an alleged taking of land without just compensation.\textsuperscript{65} After discre-
tionary permit approvals (not relating to identifiable buildings) and
building permits were obtained, construction proceeded one unit at a
time. The developer then began constructing the hotel, but only 25
percent of the work was completed after several years. Another group

estopped from denying permanent certificate of occupancy when mobile does not con-
stitute protected nonconforming use); Parkview Ass’n v. City of New York, 519
\textsuperscript{63} DeStefano v. City of Charleston, 403 S.E.2d 648 (S.C. 1991) (withholding
of building permits until developer grants drainage easement is temporary taking).
\textsuperscript{64} O’Connell Home Builders, Inc. v. City of Chicago, 425 N.E.2d 1339 (Ill. App.
Cl. 1981).
\textsuperscript{65} Lakeview Dev. Corp. v. City of South Lake Tahoe, 915 F.2d 1290 (9th Cir.
1990).
purchased and finished the hotel. Twelve years after project approval, the developer unsuccessfully sought to finish the residential portion of the project. The court found that the developer had lost any vested rights and any taking claim because of its failure to proceed at a pace reasonably close to that anticipated when the project was approved.

One way to avoid such a situation is for regulators and developers to agree to a project-completion schedule. The schedule could include permit-expiration dates plus details of how permits may be extended.

Some courts have identified factors to consider in determining whether vested property rights have been taken. A federal trial court recently held that mere denial of a building permit is not a taking.66 In examining whether vested rights existed in the original building permit, the court considered the following factors:

- the owner’s due diligence in attempting to comply with the law;
- the owner’s good faith;
- expenditure of substantial, unrecoverable funds;
- the permit’s expiration without appeal of the period during which an appeal could have been taken from its issuance; and
- the sufficiency of evidence of individual property rights or of an adverse impact on public health, safety or welfare.67

Developers may be able to avoid litigation by using development agreements to protect their interests. In such an agreement, the developer enters into a contract with the local government to ensure that throughout development the project will be governed by the laws in effect when the agreement is executed. Statutes may define when and how development rights vest. For example, development rights could vest in a developer “in exchange for the construction and dedication of public improvements.”68

Several states have enacted legislation to more clearly define when property rights vest or to allow “development rights agreements.”69 In California, a survey of more than 450 cities and counties indicated that approximately 150 are using development agreements and another 150 are interested.70

Although Colorado has a vested-rights statute, even a statutory vested right does not guarantee comprehensive relief to an aggrieved property owner. In Villa at Greeley, Inc. v. Hopper, a developer of a pre-parole facility had received approval of a site specific development plan.71 The approval constituted a vested right under the statute, a trial court ruled.72 However, within a few months county voters voted by referendum that pre-parole facilities could not receive a certificate of occupancy unless the siting of such facilities had been approved by a majority vote of the county electorate. The developer sought another ruling as to whether the vote pertained to its project. A trial court ruled in favor the developer again, but an intervenor challenged that decision.

The Colorado appeals court ruled against the developer, holding that there was no taking.73 Although the statute does establish a vested right, the right entitles its holder only to compensation for expenditures made in reliance on the permit. In this case, the court remanded for a determination on what compensation the developer was due because of the referendum’s effect on its vested right.74

The Villa at Greeley case has prompted Professor Patrick A. Randolph, Jr., of the University of Missouri School of Law, to question why states could not, by statute or constitutional amendment, declare when development rights vest.75 Another law-school professor, Dale Whitman, of Brigham Young University, says states can define when rights in property vest, although such legislative acts raise federal constitutional questions.76 First, if the government’s action was arbitrary and capricious, or had an improper police power objective, or if it was not reasonably tailored to achieve its stated objective, it could constitute a substantive due process violation. Second, if the action left the property owner without substantial economic value in the property and the

69. Delaney & Vaia, supra note 7, at 775 (states include Colorado, Texas, and North Carolina); see also WASH. REV. CODE ANN. §§ 36.70B.170 through .210 (Michelle, LEXIS through 1999 legislation (1999 1st Spec. Sess.).
70. Callies & Grant, supra note 68, at 241.
72. Id. at 353.
73. Id. at 354.
74. Id. at 357.
75. Question posted to an internet discussion group sponsored by the American Bar Association Section of Real Property, Probate & Trust Law and the University of Missouri-Kansas City, School of Law (Jan. 26, 1997).
76. Reply to Randolph’s internet discussion group question (Jan. 28, 1997).
property owner’s reasonable investment-backed expectations have been lost, the action might constitute a taking.

Development rights agreements do not exempt development from the approval process nor totally eliminate the need for judicial interpretation. However, both development agreements and vesting statutes can reduce takings litigation by defining when vesting occurs and when it is lost.

What have we learned thus far? Preliminary land-use decisions may not be property rights, the greater the discretion the less the chance of vesting, legislative rezoning is the most discretionary control, and there are considerable advantages in comprehensive approvals with phasing and scheduling for completion of a project, such as through a development agreement. We now turn to specific zoning techniques, alternatives to Euclidean zoning, which might reduce the risk of takings, starting first with those based on a site-specific review.

By far, the most important of these is the variance. Variances go all the way back to Section 7 of the Standard State Zoning Enabling Act, which has been adopted in nearly all states in some form. Section 7 authorizes variances from the requirements of a zoning ordinance if they are not against the public interest and, owing to special conditions, a literal enforcement of the ordinance would cause unnecessary hardship.

Variances come in two varieties—use and area. Use variances allow a property owner to use property in a way that the zoning does not otherwise allow. An area variance, sometimes called a bulk or density variance, can allow development with less than the minimum or more than the maximum of some bulk density or dimensional requirement. An example would be placing a house part way into a side yard setback. Use variances are either prohibited or greatly disfavored in the law, but still granted in many places. Area variances are far more common and easier to defend.

Governments may vary a zoning ordinance where enforcement of it would result in an “unnecessary hardship” to a landowner. Determin-

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84. 24 N.E.2d 851 (N.Y. 1939).
86. MANDELKER, supra note 82, at 275.
87. 6 ROHAN, supra note 78, at § 43.01(6).
90. Cleary, supra note 89. See also Herrington v. County of Sonoma, 857 F.2d 567 (development plan rejected for failing to conform to county’s plan; further pursuit of application process futile) (9th Cir. 1988); Kikis v. New York, 1950 U.S. Dist. LEXIS 13715 (E.D.N.Y. 1990) (no futility exception; alleged hostility by agency); Kizzi v. City of Santa Cruz, 818 F.2d 1449 (9th Cir. 1987) (no futility exception unless application made), amended, 830 F.2d 968 (case distinguished from First English). But see San Mateo County Coastal Landowners’ Ass’n v. County of San Mateo, 45 Cal. Rptr. 2d 117 (1995) (due process claim as applied not ripe because variance not requested; takings claim not argued at trial and not pursued on appeal).
Donald Hagman in his important one-volume treatise pegged the level of illegality at more than 90 percent.91

Another problem is that variances can only be used if permitted by local zoning ordinances. Such ordinances can only exist through state enabling acts. Further, because a universal variance process does not exist at the federal level, each statute must include its own process.

Although variances are not available in subdivision approvals, many enabling statutes and, consequently, many local subdivision regulations provide for "waivers," but there are very few subdivision cases involving takings. The waiver's role in avoiding takings in subdivisions is probably far smaller than the role of the variance in zoning generally.92

The availability of variances and whether they must be sought before going to court are critical to using the technique to avoid takings. Variances were not available at the outset in Lucas. When the restrictions on development took effect in 1988, there were only twelve undeveloped lots in South Carolina affected by them. After hurricane Hugo devastated the coastline in 1989, the number of potentially affected lots rose to 300 or more. At that point, the state legislature sought to divert the large number of impending takings claims by amending the statute in 1990 to allow a property owner to seek a variance or waiver from the prohibitions. Of the twelve lots originally affected by the restrictions, ten went through the waiver process—only David Lucas' two lots were never subjected to it. Many of the other lots ultimately went through the process to allow them to be rebuilt following the hurricane.

What was right and what was wrong with this type of process? First, it was not available at the time restrictions were imposed, a significant fault. Second, no property owner was required to use it. David Lucas strategically avoided this way out and positioned himself perfectly to win his case.93 Wherever possible, property owners should be required to undergo a review process before being allowed to go to court. Such a process enables the government case by case to extricate a landowner from a potential taking by easing or altering restrictions to avoid rendering a property valueless.

The South Carolina variance/waiver process prevented wholesale attacks on the regulatory program by enabling the state to grant waivers and development approvals with conditions such as armorining the shoreline and elevating structures. In this way, public health and safety was protected, but individual characteristics of building lots were respected.

The takings issue has arisen in a number of variance cases, with mixed results. In one case, a property owner's application to expand her store was conditioned upon dedicating certain lands to public use, pursuant to the Community Development Code.94 She unsuccessfully appealed to the state Land Use Board of Appeals (LUBA) for a variance, arguing that the specified conditions violated the Fifth Amendment as an uncompensated taking. The U.S. Supreme Court held that the city's dedication requirements did, in fact, constitute an uncompensated taking of property, but a taking would not have occurred if the variance had been granted.

In another case, a Pennsylvania court rejected the landowner's takings argument precisely because a variance had been granted.95 The Board of Supervisors rejected the landowner's development plan because it did not show the ultimate right of way of the Department of Transportation.96 According to the landowner, measuring the setbacks from the ultimate right of way would make it impossible to build on the lot; therefore, he argued, "a de facto taking of his property without just compensation" had occurred.97 The court wrote:

Review of the stipulation reveals that the zoning board had approved the setbacks proposed by Landowner and had granted him a variance. In light of this fact, Landowner's argument that the Supervisors' imposition of this requirement constitutes a taking is without merit.98

One writer has criticized hardship variances for failing to adequately address the takings issue as well as for failing to control future takings litigation.99 In place of the standard variance, he proposes an administrative takings variance. With it, takings issues would be identified dur-

92. A LEXIS search in the MEGA file of the MEGA library on December 15, 1999, produced only three relevant cases: Carrier Enter., Inc. v. Cheshire Planning and Zoning Comm'n, 1996 Conn. Super. LEXIS 1085 (Conn. Super. Ct. April 29, 1996) (waiver request denied); McLaughlin v. Amherst, 646 N.E.2d 418 (Mass. App. Ct. 1995) (at new trial on compensation for taking, landowner must prove that waivers could have been obtained); Kompare v. Planning Comm'n of Danbury, 1999 Conn. Super. LEXIS 1841 (July 8, 1999) (court upholds Planning Commission denial of waivers—this case was an appeal of a waiver denial, but not a taking case).
96. Id. at 636.
97. Id. For more on variances, see Brian W. Blaesser, Discretionary Land Use Controls: Avoiding Invitations to Abuse of Discretion §§ 2.01–16 (1997).
98. Ball, 598 A.2d at 636.
ing the variance process itself rather than during litigation. That would give agencies "an authoritative voice" in factfinding through presentation of an administrative record. Therefore, "timely, reliable determination[s]" would be made, and agencies could "avoid "the unnecessary erosion of environmental policy typified by the Lucas legislation.""

A special permit is a type of discretionary zoning approval requiring a site-specific review. Sometimes called a special use permit, a special exception or a conditional use, it is not a big factor in takings litigation because the underlying use almost always holds sufficient value to avoid a takings claim. However, this flexible approach can expand the range of economic uses and may enhance property values beyond what is allowed as of right. Special permit uses, thus, may appreciably boost total value, perhaps offsetting a loss of value elsewhere. Importantly, the special permit use may be the only practical use in transition areas, such as residential zones abutting commercial zones where the land has no market value for residential development.

Hospitals, funeral homes, and churches are typical special-permit uses. They benefit the larger community and fit well in many types of districts, including some residential districts. But each potential site must be evaluated individually. In Massachusetts, the owner of sixteen acres in the floodplain zone applied for a special permit to develop the property. The special permit as granted limited construction to land at or above an elevation of 370 feet. Only about six of the sixteen acres was above that elevation. The property owner sued claiming a taking of the ten acres but lost in the trial court.

Massachusetts' highest court analyzed the case in terms of (1) "investment-backed expectations" of the property owner, (2) "economic impact" on the property, and (3) "character of the governmental action." Finding against the property owner on all of those factors, the court held that neither the zoning nor the special-permit restriction constituted a compensable taking under federal law because the special permit enabled development of six of the sixteen acres.

As with other discretionary regulatory techniques, care must be taken to provide adequate standards. For example, the South Carolina Beachfront Management Act allows the Coastal Council to grant a special permit "if, among other requirements, the proposed construction is not detrimental to the public health, safety, or welfare." This type of authorization offers the agency no explicit guidance and may allow for too much discretion; a reviewing court is less likely to defer to the agency's decision if it is made under such a loose standard.

A planned unit development (PUD) is a flexible zoning technique allowing a variety of uses in close proximity with physical and activity diversity that can enrich the community. With PUDs, developers not only have the opportunity to mix a broad range of land uses, but they may have broad discretion in deciding on the intensity of development and on dimensional standards.

Some courts have gone so far as to opine that PUDs are "an antidote to the ill effects of traditional Euclidean zoning" because they allow communities to grow more naturally, without the rigidity of the typical Euclidean scheme. Moreover, PUDs financially benefit developers and investors because they permit "more intensified utilization of vacant land which is scarce and skyrocketing in price."

The PUD, typically implemented through the colorfully termed "floating zone," combines the broad discretionary approval of legislative rezoning with the detailed, administrative review of a site plan. The floating zone is described in the narrative of the regulations, but not initially mapped—instead, it "floats" over the community, looking for a place to land.

PUDs are flexible. The restrictions in the community’s zoning regulations need not apply to PUDs. For example, a PUD may allow multi-unit housing in a single-family zone. Further, a PUD ordinance can allow a municipality to provide for changing needs by adjusting its zoning. PUDs may offer a solution to towns concerned about outgrowing their infrastructure. For example, a town could use a PUD to

105. Id.
106. Citations to PUD cases in a number of states can be found in 2 EDWARD H. ZIEGLER, JR., RATHCOFF’S THE LAW OF PLANNING & ZONING § 13.04[2][b] (1996). See also BLASSEER, supra note 97, at §§ 6.01–14.
107. Old Tuckaway Assoc. Ltd. P’ship & Affiliated Capital Corp. v. City of Greenfield, 509 N.W.2d 323 (Wis. Ct. App. 1993)(no taking in city’s refusal to approve project; no showing made of total or near-total deprivation of uses) (citing 4A POWELL ON PROPERTY § 630.10[1]).
111. See Tri-State Generation & Transmission Co. v. City of Thornton, 647 P.2d 670, 677–78 (Colo. 1982) (PUD ordinance constitutional); Millbrae Ass’n for Residential Survival v. City of Millbrae, 69 Cal. Rptr. 251, 266 (Cal. App. 1968)(PUDs are flexible, but substantial changes to them amount to rezoning; case remanded).
ensure that when it grows, residents receive proper utility service. Also, a town might want to coordinate municipal improvements with a PUD.

Although flexibility is important, standards are still needed to avoid excessive administrative discretion. At least one community requires that a PUD conform to a municipality’s comprehensive zoning plan. If there are no ordinance provisions for PUDs, a zoning board of appeals cannot create a PUD by granting a large number of variances from municipal zoning regulations. Further, a board acting without a PUD ordinance could face a charge of spot zoning.

In a community with a PUD ordinance, the developer of a PUD floating zone takes the narrative of the ordinance/regulations, which include siting criteria (parcel size, access to water, sewer and road infrastructure, etc.), and applies to rezone the land. With this legislative petition, the developer includes at least a conceptual site plan showing the general layout of development and infrastructure with specifications for density, number of units, floor area, setback, side yards, and open space.

A 1993 Wisconsin case illustrates both the advantages of flexibility for the developer and the discretion given to the government in using the PUD technique. Tuckaway Club Enterprises first began to develop a golf-course community in Greenfield, Wisconsin, in 1967 pursuant to the local PUD regulations and a Declaration of Restrictions entered into with the city following initial approval of the project. By 1987, the market had changed and the development allowed on the undeveloped, remaining thirty-two acres of the tract was incompatible with surrounding neighborhoods developed over the prior twenty years. Consequently, the developer sought and was granted an amendment to the PUD declaration, limiting residential density to seventeen units per acre. The owner then sought to sell five acres to another developer. That developer proposed to develop within the seventeen-unit limit, but he ran into opposition from neighbors. Ultimately the city council denied the development application based on the regulations regarding “aesthetic compatibility and economic feasibility.”

The Wisconsin appellate court upheld that denial, finding no taking because the property owner “still has the opportunity to present revised plans for a project that conforms with the aesthetics of the surrounding neighborhood and is shown to be economically feasible.” The court further held that there was no contract guaranteeing any development at seventeen dwelling units per acre.

A developer can “lock in” elements of a development by negotiating an overall master plan for development density, the approximate “footprint” locations of structures, and the necessary supporting infrastructure, including a schematic roadway system and illustrative water and sewer service. It is appropriate to negotiate language either in the regulation or in the PUD approval describing the extent to which the developer and the municipality are bound.

A developer can have a vested right to a PUD. For example, in Oregon, a PUD was approved for 440 acres. After the landowner secured options to add more land to his property, application was made to revise the approved PUD to cover 660 acres. The application was approved with a condition that the final plat be recorded within one year after approval of the preliminary plat. However, before the plat could be recorded, the county adopted a comprehensive plan to which the PUD no longer conformed. Before that amendment, the landowner had done substantial work and expended more than $600,000.

The appellate court held that the landowner had a vested right to develop the 440 acres because of the expenditures made, and because the landowner had not abandoned the original development rights.

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113. See Giger v. City of Omaha, 442 N.W.2d 182 (Nebr. 1989) (PUD agreement incorporates off-site public improvements and special assessments for sanitary sewers).


115. City of Tucalosa v. Bryan, 505 So. 2d 330, 336 (Ala. 1987) (approval of proposed PUD null and void; approval not supported by the evidence).


118. Old Tuckaway Assocs., 509 N.W.2d at 322.

119. Id.

120. Id. at 326.

121. Id.

122. Id.

123. Old Tuckaway Assocs., 509 N.W.2d at 332.

124. Id. at 328.

125. Id. at 332.

126. Id. See Ass’n of Rural Residents v. Kitsap County, 4 P.3d 115 (Wash. 2000)(vested rights doctrine applies to the PUD Ordinance in effect at the time of application).

127. See Gray v. Trustees, Monclova Township, 313 N.E.2d 366 (Ohio 1974) (PUD specifications had to be submitted on plat, which became part of zoning regulations).


129. Id. at 963.

130. Id. at 965.

131. Id. at 967.
As for the additional 220 acres, no vested right existed, the court held, because there had been no substantial construction there.\textsuperscript{132} Further, the landowner had not exercised the purchase options involved.\textsuperscript{133}

Vested rights also involve duties. A developer can be obligated to abide by a proposed PUD once the municipality has approved it.\textsuperscript{134} For their part, municipalities can ensure that PUDs are properly executed by using development staging agreements. In Pennsylvania, the third phase of a commercial PUD was denied because the developer had failed to complete improvements in earlier phases of the project.\textsuperscript{135}

In many regulatory takings cases, the landowner or developer is left with no reasonable, beneficial, economic use. Lucas\textsuperscript{136} and Loveladies Harbor v. United States\textsuperscript{137} are good examples. In Lucas, David Lucas owned two lots that he was precluded from building on by a highly restrictive state law.\textsuperscript{138} In Loveladies Harbor, the developer had built most of the project, but was precluded from building on approximately 12.5 acres because of state and federal wetlands restrictions.\textsuperscript{139}

What could have been done in these cases and in others like them to avoid successful takings claims? In both instances, and in many similar cases, if the property owner could have moved the development potential from the restricted parcel or area of the parcel to an unrestricted area, the development potential might have been put to economic use. Transferring density is not always a practical solution because of disparate regulations at the federal, state, and local levels. It also will not work where all of the surrounding developable area is committed to development. But in many instances, the regulatory framework can incorporate the ability to transfer development density from restricted areas.

What density transfer techniques are available and how can they help avoid takings?

The leading technique that has been around for half a century is cluster zoning.\textsuperscript{140} Rather than carving up a landscape into development

of homogeneous density, cluster development concentrates a greater intensity of use in the most buildable areas, saving the sensitive lands or restricted areas for low density or nondevelopment uses such as active and passive recreation, open space, and floodplain protection. A 100-acre parcel, zoned for 2-acre lots, that could be developed into forty lots after reductions for roadways and lot configurations, can still support forty lots even if a large area of the parcel cannot be developed if clustering is allowed. Assume that thirty of the 100 acres were federal and state wetlands that could not be developed. If the parcel were developed conventionally, the developer would subdivide until the wetlands portion was reached. The yield might be thirty lots and the developer would be left with no more development on the remaining thirty wetlands acres.

But with cluster development, the seventy buildable acres would be laid out in lots somewhat smaller than two acres, allowing forty lots to be clustered on the seventy acres. The developer could still build on forty lots, and the thirty acres of wetlands would be preserved. And most importantly, a taking claim would be avoided.

A regulatory process that functions much like clustering with non-contiguous parcels is the transfer of development rights (TDRs), sometimes called transferable development rights or development rights transfer. TDR enables density to be transferred from one site to another parcel that may be abutting, but is often some distance away—maybe a block or a mile, depending on whether the setting is urban or rural. The parcel that "sends" development rights, such as one with a historic landmark on it, is highly restricted. The density, which might be in square feet of floor area or in dwelling units per acre, is transferred to a "receiving" parcel. The receiving parcel is developed at a somewhat higher density than usually permitted.

The sender conveys TDRs to the receiver for a price. The receiving parcel can develop at a higher level; the sending parcel is subject to a restrictive covenant or easement to limit its development after TDRs have been sent to the receiving parcel. In some schemes, there is a development rights "bank" to purchase and resell development rights—a kind of federal reserve for development potential, designed to ensure that a rational market will exist for the orderly sale of development rights at a market price.

Development of the TDR concept largely grew in the face of unsuccessful preservation programs to maintain landmarks and open space.\textsuperscript{141}

\textsuperscript{132} Id.
\textsuperscript{133} Milcrest Corp., 650 P.2d at 965.
\textsuperscript{134} See Gray v. Trustees, Monclova Township, 313 N.E.2d 366 (Ohio 1974).
\textsuperscript{137} 28 F.3d 1171 (Fed. Cir. 1994).
\textsuperscript{138} 28 F.3d 1171 (Dist. Cir. 1992).
\textsuperscript{139} 38 F.3d 1171, 1173–74 (Fed. Cir. 1994).
\textsuperscript{140} 1 Patrick J. Rohan, ZONING AND LAND USE CONTROLS § 1.03(2)[B] (1994); PRINCIPLES AND PRACTICE OF URBAN PLANNING 431 (William I. Goodman & Eric C. Freund eds., 1988).
Begun in New York City in the late 1960s "as part of a plan to avoid the loss of such landmarks as the Grand Central Terminal," 142 TDRs' primary use has proven to be in the area of landmark preservation. 143 However, TDR programs also promote urban redevelopment, preserve agricultural lands or sensitive ecological areas, as well as secure public amenities and low-income housing. 144

The widely accepted landmark case on TDRs is Penn Central Transportation Co. v. New York City although some scholars consider its TDR language dicta. 145 While the Supreme Court never quite said that transferable development rights were property, the Justices saw TDRs as a way to mitigate the impact of the Landmarks Law:

Although the designation of a landmark and landmark site restricts the owner's control over the parcel, designation also enhances the economic position of the landmark owner in one significant respect. Under New York City's zoning laws, owners of real property who have not developed their property to the full extent permitted by the applicable zoning laws are allowed to transfer development rights to contiguous parcels on the same city block. 146

The two issues presented to the Court were whether the restrictions of the Landmarks Preservation Law affected a taking and whether the TDRs were "just compensation." The Court never reached the "just compensation" question because it found no taking. 147 However, the Court had much to say about the concept of TDRs, which was new at the time. For example, the Court said the TDRs available to the appellants had value, even though that value might be less than the rights to construct above the terminal. 148

Part of the notion of development rights, according to the Court, was the treatment of the "parcel as a whole," in this case, the entire city tax block. 149 Importantly, the Court noted that

"[T]aking jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, this Court focuses rather both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole . . . ." 150

142. Id. at 83.
143. Id. at § 6.04(2)[e].
144. 3 ZIEGLER at § 39.02[1].
146. 438 U.S. at 113.
147. Id. at 137.
148. Id. at 130.
149. Id.
150. Id. at 130–31.

The court also pointed out that it is not literally accurate to say that they [appellants] have been denied all use of even those pre-existing air rights. . . . If these rights . . . are made transferable to at least eight parcels in the vicinity of the Terminal, one or two of which have been found suitable for the construction of new office buildings . . . . While these rights may well not have constituted "just compensation" if a "taking" had occurred, the rights nevertheless undoubtedly mitigate whatever financial burdens the law has imposed on appellants and, for that reason, are to be taken into account in considering the impact of regulation. 151

Most TDR and related programs are enacted pursuant to express statutory provisions or state zoning enabling acts. Statutes have been passed in many states, including California, Connecticut, Florida, Hawaii, Idaho, Illinois, Kansas, Louisiana, Maryland, Massachusetts, New Hampshire, New Jersey, New York, North Carolina, Pennsylvania, Rhode Island, South Dakota, Tennessee, Vermont, and Washington, as well as the District of Columbia. 152

The relationship between takings avoidance and TDRs is sometimes reduced to the question of how much economic loss a property owner has suffered. In takings claims based upon either a TDR program denying a property owner "any economically viable use" or "the unfairness of the regulatory burden imposed," the value of the TDR will be considered. 153

The Penn Central decision articulated three major considerations as to whether a taking has occurred: the character of government action, the restriction's reasonable relationship to a legitimate public purpose, and the economic impact of the restriction on the property owner. 154 TDR programs primarily address the third factor. The Penn Central Court found that the law in question allowed the appellants "to obtain a reasonable return on [their] investment." 155 Penn Central remains important principally because it elaborated on the doctrine of reasonable investment-backed expectations. This concept permits establishment of an "economic baseline" to measure the owner's degree of economic loss. 156 A minority of courts consider TDRs relevant only in that they

151. 438 U.S. at 137.
152. 3 ZIEGLER at § 39.02[2].
153. Id. at § 39.03[3][a].
155. 438 U.S. at 136.
might constitute "just compensation" for an already-determined taking.\footnote{157}

Though a TDR is not necessarily viewed as a property interest that can be taken by over-regulation, it is seen as an incident of property ownership—another factor in what courts label as "viable, economically-beneficial uses" of land.

In Nevada, a woman who purchased a lot in 1972 applied to the Tahoe Regional Planning Agency seventeen years later to build a house on it.\footnote{158} The agency denied her application. Although she had a TDR, she didn’t use it and it reverted to the county.\footnote{159} She alleged that the agency’s actions constituted an unconstitutional taking. Both the district court and the Ninth Circuit Court of Appeals found her claim not ripe for review “[b]ecause [she] failed to apply for transfers of development rights through the TDR program and fails to demonstrate that such an application would be futile.”\footnote{160}

The United States Supreme Court reversed both lower courts, holding that Mrs. Sutum’s claim satisfied the finality element of ripeness because the administrative agency had no discretion to change the prohibition against "additional land coverage or other permanent land disturbance" within the Stream Environment Zone that includes Mrs. Sutum’s property.\footnote{161}

The Court also said that an application to transfer development rights wasn’t necessary because "no discretionary decision must be made by any agency official for [Mrs. Sutum] to obtain [TDRs] or offer them for sale."\footnote{162} An argument that because the value of TDRs is not known, the complaint is therefore not ripe was also rejected.\footnote{163}

Although TDRs have value, their value may not be enough to preclude a taking. In New York, a company that wanted to develop two private parks received TDRs in exchange for a restriction limiting use of the land to a public park.\footnote{164} New York's highest court struck down the TDR ordinance, holding that TDRs were not sufficient compensa-

tion.\footnote{165} However, that decision was in 1976, in the infancy of TDRs, and there was an element of physical invasion. Not long after, in 1977, the same Chief Justice, the late Charles Breitel, upheld the use of TDRs in another case.\footnote{166}

Can the inability to use a TDR effect a taking? The short answer is, perhaps. A property owner in New York applied to use its TDRs from the Grand Central Terminal building on a non-adjacent lot, but was denied.\footnote{167} The Supreme Court of New York, Appellate Division, First Department, held that this was not a taking. A pattern of common ownership involving this property and others nearby had been disrupted, thereby removing the property from the class of properties eligible to receive TDRs.\footnote{168} The court rejected constitutional claims because the owner "did not have a property right to the grant of a special permit."\footnote{169}

What about an unwillingness to pay for TDRs? In California, a landowner wanted to develop his land more intensely than the rules allowed.\footnote{170} The property owner could have developed by purchasing the development rights of neighboring land, but was either unwilling or unable to pay for those TDRs.\footnote{171} The taking claim in the trial court was abandoned on appeal to the United States Court of Appeals for the Ninth Circuit, which upheld the county’s TDR program.\footnote{172}

TDRs can help in various contexts, but they are not a cure-all. For example, if a court finds that the right to exclude others or the-right to devise real property has been adversely affected, then a TDR plan would be less relevant or to no effect.\footnote{173} Also, if an individual wants to develop a particular piece of property, a TDR provision might not preclude a takings claim related to elimination of the owner’s investment-backed expectations.\footnote{174}

Many local and some state governments have established TDR programs to preserve agricultural lands and natural resource areas.\footnote{175} In

\footnote{157} Memorandum from John Echeverria & Sharon Dennis, National Audubon Society (Sept. 20, 1993) (on file with author) See also Whitney Benefits Inc. v. United States, 752 F.2d 1554 (Fed. Cir. 1985) (TDR can bear on whether taking has occurred, but does not bar takings claim).

\footnote{158} Sutum v. Tahoe Reg’l Planning Agency, 80 F.3d 359, 361 (9th Cir. 1996).

\footnote{159} Id. at 361.

\footnote{160} Id. at 364.


\footnote{162} Id. at 726.

\footnote{163} Id. at 739–40.

\footnote{164} Fred F. French Investing Co. v. City of New York, 350 N.E.2d 381, 384 (1976).

\footnote{165} Id. at 387.


\footnote{168} 193 A.D.2d at 519.

\footnote{169} Id. at 520–21.

\footnote{170} Barancik v. County of Marin, 872 F.2d 834 (9th Cir. 1989).

\footnote{171} Id. at 835.

\footnote{172} Id. at 836.

\footnote{173} Echeverria & Dennis, supra note 157, at 10.

\footnote{174} Id.

\footnote{175} 3 ZIEGLER, § 39.02(d). Governments of Montgomery County, Maryland, Buckingham Township, Pennsylvania, Marin County, California, and the Pinelands Commission in New Jersey, among others, have enacted such programs. See also Merrit, supra note 141, at 103.
New Jersey, the Pinelands program is a good example of how TDRs can mitigate the effects of a regulatory program, precluding successful taking claims. In 1978, the U.S. Congress "establish[ed] over one million acres as the Pinelands National Reserve." The Pinelands were the first natural resource... protected by the innovative national reserve program," though they had been recognized for decades." The Pinelands are a unique area "of pine-oak forests and wild and scenic rivers," with many "rare, threatened and endangered plant and animal species." In addition, the region lies within the 17-trillion-gallon Cohansay aquifer, which is believed to be one of the largest untapped sources of pure water in the world.

To plan for preserving and protecting these unique resources and to regulate development there, "the federal statute direct[ed] the governor of New Jersey to create a planning commission" (the New Jersey Pinelands Commission). State law enabled the commission to use a variety of land and water protection and management techniques, including TDRs.

The Pinelands Commission created a TDR program under which it allocated Pinelands Development Credits (PDCs) to property owners who would record permanent deed restrictions on their property that limited the use of the property according to a Comprehensive Management Plan. The PDCs would be used to create increased densities in Regional Growth Areas designated under the plan. To facilitate the sale and transfer of the PDCs, Burlington County, New Jersey, has a PDC bank that will pay $10,000 per credit.

The Gardner case provides an example of how this program fared when challenged in an as-applied takings case. In Shamong Township in Burlington County, which encompasses property subject to the Pinelands regulations, the Gardner family had owned and worked a 217-acre farm since 1902; Hobart Gardner had been there for almost seventy years. Gardner, deceased when the case made it to the New Jersey Supreme Court, sought compensation for the restrictions on his farm, ultimately initiating an action for inverse condemnation against the commissioner of the Department of Environmental Protection and the New Jersey Pinelands Commission. The trial court granted summary judgment for the defendants on the inverse condemnation claim, and the Appellate Division affirmed.

In its comprehensive and well-reasoned decision, the New Jersey Supreme Court found that the New Jersey Pinelands Protection Act and accompanying regulations "substantially advance legitimate and important governmental objectives.

The court then considered several principles relevant to upholding a regulatory program against a taking claim, including mere diminution of value does not constitute a taking, reduction in income or profits may not constitute a taking, and no taking occurs unless a regulation substantially destroys beneficial use of the property or allows no adequate or just reasonable return on investment. Then, the court discussed the Pinelands Program in the context of Penn Central, in particular the availability of TDRs. The court pointed out that Gardner could continue the beneficial use of all of his property. As to the development rights, the court said the "[p]laintiff possesses the similar right to [offset] benefits; it may receive Pinelands Development Credits in return for recording the deed restrictions."

Although the court found that the "viable, economically-beneficial uses" still available did not equal the land's former maximum value, there was no right to the most profitable use of the property. Also, the Pinelands program did not sufficiently diminish the value or profitability of the land, or otherwise interfere with a protected ownership interest so as to constitute a taking.

A number of cities and counties have enacted TDR programs largely in response to the dramatic increase in conversion of open space to low-density development. The interplay of open space preservation, highly restrictive regulations, and TDRs was litigated in the California case of Aptos Seascape Corp. v. County of Santa Cruz in the early 1980s. Aptos Seascape owned 110 acres of property, seventy acres of which included a beach, arroyos, and a line of cliffs, or palisades.

The county rezoned the seventy acres, prohibiting development. Sea-

177. Id.
178. Id. at 254 (citations omitted).
179. Id. (citations omitted).
180. Id. at 255 (citations omitted).
182. Id.
183. Id.
184. Id.
185. Id.
186. Id.
187. 3 ZIEGLER, § 39.02[e]. Such places include Malibu and Monterey Counties in California, as well as cities and towns in Florida, New Jersey, Vermont, Montana, and Pennsylvania. See also Merriam, supra note 141, at 77, 103.
188. 188 Cal. Rptr. 191 (Ct. App. 1982). See also City of Hollywood, 329 So. 2d at 10 (developer must dedicate beach area as open space in exchange for TDRs to increase density at other part of development site).
scape claimed a deprivation "of all reasonable use," but the county argued that no taking occurred because Seascape could be given density credits, a form of TDRs, on its other lands to compensate for the restriction. 190 190 "[A] provision allowing some transfer of development rights from the restricted property or awarding compensating densities elsewhere may preclude a finding that an unconstitutional taking has occurred." 191 The court found no taking. 192

Another court has reached a different conclusion on similar facts, however. In an Arizona appellate decision, TDRs were deemed insuffi-

The property owners' claim was a facial challenge, the court said, since no individual appellant-landowner had applied for or been denied development approval, a rezoning request, or a variance. 202 The court applied the test from Keystone Bituminous Coal Association v. De-Benedicts that "[a] statute regulating the uses that can be made of property affects a taking if it 'denies an owner economically viable use of his land.' " 204 The court found no taking "because the regulations permit most existing uses of the property, and provide a mechanism whereby individual landowners may obtain a variance or a transfer of development rights." 205

As previously noted, TDRs have been especially important in landmarks preservation. A few years ago several Broadway theater owners and trade organizations sought to annul the designation of twenty-two Broadway theaters as landmarks and to invalidate both the City of New York's Landmarks Law and the anti-demolition provisions in its zoning resolution. 206 The property owners alleged that Penn Central was not controlling because it did not address the method of designating landmarks. 207 The state appellate court disagreed, finding that the Penn Central Court upheld the Landmarks Law against a takings challenge. The appellate court also found that the takings claim was not ripe without final agency action. 208 In addition, the court noted that the property owners could continue to receive economic benefit from continuing to use their buildings as theaters. 209 As to the TDR issue, the court said "[i]n any event, transferable development rights inure to the owners of these buildings, which, absent a successful challenge, must be presumed to have economic benefit. We note that some of the petitioners, in fact, have made use of these transferable developmental rights." 210

TDRs were also an economic benefit present in the designation of the daguerreotype gallery of Mathew Brady at 359 Broadway in New York City. 211 The court found no taking in the designation of the build-

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190. Id. at 495.
191. Id. at 496.
192. Id. at 499.
195. Id.
196. Id. at 513 n.1.
198. Id. at 1032.
199. Id.
200. Id.
201. Id. at 1033.
202. Glisson, 558 So. 2d at 1036.
204. Glisson, 558 So. 2d. at 1036 (quoting Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc., 452 U.S. 264 (1982)).
205. Id. at 1037.
207. Id. at 122.
208. Id.
209. Id.
210. Id.
ing and noted that the property owner could still "avail herself of transferable development rights."\textsuperscript{212}

TDRs are valuable in takings avoidance because they preserve private property rights. Rather than destroy the property rights by overregulation when the exercise of those rights would damage a greater public good, TDRs preserve and put them to economic use. While TDRs are not without shortcomings, one law professor has suggested that "[p]erhaps the easiest way to inoculate land-use laws against Lucas will be to create limited systems of transferable development rights so that no property in land could ever be considered entirely without economically beneficial use."\textsuperscript{213}

A variant of clustering and the transfer of development rights is the purchase of development rights (PDRs), which, for example, can be important in stopping the loss of millions of acres of prime farmland each year.\textsuperscript{214} In such programs, the government or a nonprofit land conservation group purchases the development rights and extinguishes them—they are not transferred elsewhere.

PDRs, unlike TDRs, usually result in a net loss of development potential within a jurisdiction. Instead, PDR programs offer value to a burdened property owner, value that is approximately the difference between a farm's fair-market value and its agricultural value.\textsuperscript{215} In reality, however, land trusts that have been involved in PDR programs pay only about half the difference between market and agricultural value; the balance is considered a charitable contribution. Farmers get cash from selling their development rights plus a property assessment based on agricultural value, which can reduce real property and inheritance taxes.

Connecticut, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New York, North Carolina, Rhode Island, Vermont, and Washington have PDR programs.\textsuperscript{216} Connecticut has purchased the development rights to 26,000 acres of agricultural land since 1978 at a total cost of $76.32 million.\textsuperscript{217} Also since 1973, the state and three conservation groups have purchased rights in approximately 1,000 acres at a cost of about $2.2 million under a program to preserve the Connecticut River.\textsuperscript{218} Since 1993, Connecticut also has purchased the development rights to fifty-two acres at a total cost of $80,000 under the federal Forest Legacy Program, a federal-state effort to preserve threatened land.\textsuperscript{219}

The State of Washington has a PDR program that has extinguished the development rights on 12,600 acres at a cost of $58 million since the 1970s.\textsuperscript{220} Voters in Pittsford, New York, agreed in July 1996 to preserve 1,200 acres of land by raising $10 million through the sale of municipal bonds.\textsuperscript{221} The cost to an average voter has been estimated at $67 per year over twenty years. Forsyth County, North Carolina, began a Farmland Preservation Program in 1986 that has purchased or leased development rights totaling more than 500 acres, with contracts pending on another 138 acres; cost to the county was $651,571.\textsuperscript{222}

Another type of PDR program is the Migratory Bird Conservation Act,\textsuperscript{223} which authorizes the U.S. Secretary of the Interior to acquire lands to be used as bird sanctuaries, subject to approval of the host state of the sanctuary.\textsuperscript{224} The law was later amended to permit acquisition of wetland easements, "Waterfowl Production Areas."\textsuperscript{225}

Despite the praise for PDRs, criticism also can be found. One potential target is cost. On the other hand, cost savings can be significant because farms require fewer public services than commercial or residential development.\textsuperscript{226} By investing about $50 million in PDRs over

\textsuperscript{212} Id. at 161 (citing Shubert, 166 A.D.2d at 115, and Penn Cent., 428 U.S. at 104).

\textsuperscript{213} John A. Hymbach, Evolving Thresholds of Nuisance and the Takings Clause, 18 COLU. J. ENVTL. L. 1, 28 (1993) (internal footnotes and citations omitted).

\textsuperscript{214} Anne Rayner, Saving the Family Farm Means Giving Up Something, Too, N.Y. TIMES, Oct. 10, 1996, at CI, C4.

\textsuperscript{215} Id. at C4.

\textsuperscript{216} Id.; CONNECTICUT'S FARMLAND PRESERVATION PROGRAM: ANNUAL REPORT (1997).

\textsuperscript{217} CONNECTICUT'S FARMLAND PRESERVATION PROGRAM: ANNUAL REPORT (1999).


\textsuperscript{219} See 16 U.S.C. § 2103c (1997). Sixteen states are participating in the program; however, no additional funding has been provided in the current federal budget. Telephone Interview with Fred Borman, Division of Forestry, Connecticut Department of Environmental Protection (Mar. 4, 1997).

\textsuperscript{220} Putting Dollars to Work to Save Farmland, AM. FARMLAND 11 (Summer 1996) (including a chart on PDR programs in 14 states, including California and New York). See also Keith W. Dearborn & Ana M. Gygi, Planner's Panacea or Pandora's Box: A Realistic Assessment of the Role of Urban Growth Areas in Achieving Growth Management Goals, 16 PUB. POLICy 383 (1993); 1000 Friends of Oregon, Farm and Forest Land Protection, LANDMARK 3–4 (Feb. 1997) (Oregon's effort evaluated).

\textsuperscript{221} Raver, supra note 214, at C4.

\textsuperscript{222} Linda Bozung & Deborah J. Alessi, Recent Developments in Environmental Preservation and the Rights of Property Owners, 20 URB. LAW., 969, 981, 984 (1988).


\textsuperscript{224} Id. at §§ 715a, 715d & 715f.

\textsuperscript{225} Id. at §§ 718d(c) & 715k(S). See also United States v. Johansen, 93 F.3d 459 (8th Cir. 1996) (scope of wetland easements defined).

\textsuperscript{226} AM. FARMLAND, supra note 220, at 10.
the past nineteen years, Montgomery County, Maryland, has saved about half a billion dollars in such avoided costs. Another potential criticism is that PDRs remove a safety net from people who have poured their life savings into land, comfortable that in the event of catastrophic illness, or an inability to pay debts, they could always sell the land and make a substantial profit. Presumably, however, PDRs provide cash to the current landowners if they sell the rights or allow others to buy the rights of a prior owner at a much lower cost.

Nevertheless, PDR programs will expand thanks to federal matching funds authorized by the 1996 Farm Bill. Also, the U.S. Congress has formed a Farmland Protection Caucus. However, PDRs alone may not be sufficient to preserve farmland. A comprehensive package, including agricultural zoning, property tax relief, right-to-farm laws, and PDRs, offers the best solution. “Good agricultural zoning . . . can . . . [keep] development at bay, buying time for PDR to work.”

In recent years, the federal government and private landowners have traded “millions of acres worth hundreds of millions of dollars” to preserve environmentally sensitive areas. Three swaps have brought new attention to the practice. These swaps involved a proposed gold mine near Yellowstone National Park, redwood groves in California, and red-rock area in Utah. In the redwoods swap, a company agreed to transfer thousands of acres for $380 million either in cash, property, or a combination of both. In the gold mine case, the government agreed to offer $65 million worth of land or leases in Montana so that a company would abandon claims.

Despite broad acceptance of land exchanges, there is criticism that the practice “is creating a loophole for important public-lands management decisions to be made with relatively little examination,” according to Phil Hocker of the Mineral Policy Center, an environmental group. Others say the program is too complicated—selecting lands to trade and how to value them are issues that can take months to resolve.

The United States Army Corps of Engineers and the federal Environmental Protection Agency entered into a Memorandum of Agreement (MOA) in 1990 to further implement section 404(b)(1) of the Clean Water Act which establishes a mitigation sequence: (1) avoid potential adverse environmental impacts; (2) minimize potential impacts; (3) mitigate unavoidable impacts (mitigation banking is one possibility).

Imagine a developer going to a wetlands bank and “buying” a hundred acres of protected wetlands to permit the developer to fill in a hundred acres of marginal wetlands in the middle of the site of a proposed shopping mall. A recent, definitive book defines a mitigation bank:

[The practice involves] the creation, restoration, or enhancement of wetlands that will be sold or exchanged to compensate for future wetland losses. Typically, the created, restored or enhanced wetlands are designated as a bank. The value of the wetlands created, restored, or enhanced are somehow quantified and assigned credits, which can be sold or “withdrawn” to compensate for the loss of wetlands or wildlife habitat elsewhere.

“As with wetland mitigation banking, however, some critics charge that [it and the similar practice of] TDRs are little more than “checkbook zoning,” allowing a developer to increase building density to the detriment of some, and presumably, to the benefit of others.”

A fundamental understanding of mitigation banks as a preservation tool is important in avoiding potential takings. Further, various federal laws require mitigation, such as the Fish and Wildlife Coordination Act, which requires the Army Corps of Engineers to obtain the Fish and Wildlife Service’s recommendations on mitigation.

A developer can mitigate the effects of an individual project and, alone, can turn to a mitigation bank and buy development credits. For example, a private developer in Columbus, Ohio, wanted to build forty houses in a subdivision that included three acres of wetlands. He paid $37,500 to a nonprofit organization that runs a mitigation bank to cover improvements and maintenance for five acres of wetlands in an area outside of Columbus. Not only is mitigation banking generally more convenient, but it should also be less costly and more likely to succeed because it can use already created wetlands.

228. AM. FARMLAND, supra note 220, at 9.
229. Id. at 10.
230. Id. (quoting Edward Thompson, Jr., senior vice president for public policy of the American Farmland Trust, a national farmland-preservation group).
232. Id. at A1.
233. Id. at A14.
234. Id. at A14.
236. MITIGATION BANKING: THEORY AND PRACTICE xii (Lindell L. Marsh et al. eds., 1996).
237. Id.
238. Id. at 40.
239. See id. at 41–42 (discussing other related federal laws).
240. Id. at 141. For specific elements of a mitigation banking agreement, see id. at 145–157.
Mitigation has many advantages. One of them is that mitigation occurs before wetlands are disturbed. Another advantage is that smaller wetlands disturbances can be mitigated in larger, off-site compensation projects that can provide habitat for greater numbers of plant and wildlife species. Larger projects are also easier to monitor, and they promote mitigation by allowing owners of sites too small to mitigate, to buy credits for mitigation at a large site. Environmental regulators set performance standards for parcels involved in mitigation credit sales. Each bank must monitor its mitigation site, submit data to regulators, and remedy any deficiencies. Agreements between mitigation managers, users, and government can help ensure that the mitigation site is maintained.

However, only a few mitigation banks have been created. By one count, there were forty-six wetland mitigation banks in various stages of development in seventeen states in 1995. One success story appears to be the Anaheim Bay Mitigation Bank in California. It began in 1985, when the ports of Long Beach and Los Angeles approved a plan requiring 2,600 acres of new filled land in a bay to provide sufficient dock facilities to meet needs through the year 2020. The Port of Long Beach, in particular, needed to increase the capacity of its existing container terminal. That eventually brought together various federal and state agencies, whose task was to formulate a mitigation plan. On-site mitigation was not possible, and many wetlands sites were available nearby for mitigation. After further research, a site about six miles away from the pier was chosen. Studies of both the area to be filled and the compensation area were done. Eventually, the government agencies and the Port of Long Beach entered into a Memorandum of Understanding (MOU) detailing how mitigation would occur. Excess mitigation credits created and banked because of the Anaheim project could be transferred to other projects with written approval of all parties to the MOU.

Some scholars see a bright future for mitigation. For example, banks could provide a regional system of wetlands mitigation, offering an alternative to mitigating single projects. What will promote mitigation? Economics, perhaps. For example, violators of the federal Clean Water Act face a variety of sanctions: administrative, civil, and criminal penalties from government action, and significant judgments from citizen suits. Those increased financial stakes are prompting greater interest in mitigation. The federal Environmental Protection Agency may negotiate consent decrees that reduce a civil penalty assessment in exchange for environmentally beneficial mitigation under the Clean Water Act Penalty Policy. Courts can also order restoration projects, a form of mitigation, when determining the appropriate civil penalty for a violation of the Act. In some cases, a sizable portion of penalties has been remitted when wetlands restoration is completed. Finally, market forces may improve the process of mitigation itself. One potential improvement could be to establish a preference system among types of mitigation. For example, under a mitigation preference system, restoring wetlands is considered more effective than creating wetlands.

In Oregon, a landowner may appeal a decision by a municipal land-use commission to the state Land Use Board of Appeals (LUBA). With limited exceptions, LUBA has “exclusive jurisdiction to review any land use decision or limited land use decision of a local government, special district or a state agency.” LUBA’s jurisdiction is limited to cases in which “the petitioner has exhausted all remedies available by right before petitioning the board for review.” LUBA also does not have jurisdiction over matters that are statutorily delegated to

243. Id. at 136-37.
244. Id. at 137.
245. MITIGATION BANKING, supra note 236, at 120.
246. Id. at 121.
247. Id. at 216-17.
248. Etchart, supra note 235, at 227. See also 38 ME. REV. STAT. ANN. § 480-Z (1998) (authorizing establishment of a program to compensate for “unavoidable freshwater or coastal wetland losses due to a proposed activity”).
249. Etchart, supra note 235, at 228.
250. Id. at 229.
251. Id. at 232.
252. MITIGATION BANKING, supra note 236, at 218.
253. Id. at 218-19.
255. Id. at n.15 (citing United States v. Cumberland Farms of Conn., Inc., 644 F. Supp. 319 (D. Mass. 1986)).
256. Silverstein, supra note 242, at 158.
257. Id.
258. Id. at 156.
261. Id. at § 197.825(2)(a).
other agencies. A county ordinance that purported to allow a landowner to elect whether or not to make a local appeal before appealing to LUBA conflicts with LUBA's grant of jurisdiction.\textsuperscript{262} Statutes also address both the procedure for seeking and for appealing LUBA review. Judicial review of a final order in a LUBA proceeding is available.\textsuperscript{263}

Administrative hearings to consider appeals of local land-use decisions should be part of the local decision process, two commentators have suggested.\textsuperscript{264} They offer four reasons. First, a court trial can present obstructions to telling the story behind an individual case, such as the formal rules of evidence. Second, many state statutes prevent courts from considering additional evidence if an agency decision is reasonably supported by the evidence submitted to the agency. Third, the United States Supreme Court has emphasized that aggrieved landowners generally should exhaust administrative remedies before litigating a takings claim. Fourth, a local appeals process can avoid the need for a community's citizenry to pay damages to a landowner when a court determines that a temporary taking of property has occurred.

Land-use appeals may be made to zoning boards of appeals, according to many statutes. However, those boards may not have the expertise to address takings cases.\textsuperscript{265} Instead, a new entity might be created with members from the planning board, zoning board, and perhaps city council. Enabling legislation is required.

Ordinances used to create preservation commissions may be instructive because some of those commissions deal innovatively with hardship issues.\textsuperscript{266} For example, the Chicago Landmark Commission, through a landmarks ordinance, gives aggrieved landowners an opportunity to apply for a hardship exception "on the basis that the denial of permit will result in the loss of all reasonable and beneficial use of or return from the property."\textsuperscript{267}

This appellate board can overturn an appealed decision.\textsuperscript{268} It can change the zoning or grant a variance. Or it can provide financial aid.

abate property taxes, or allow a transfer of density. If it rejects a taking claim, the property owner can then appeal to the courts.

Much attention recently has been given to alternative dispute resolution, such as mediation, as a means of avoiding expensive, high-risk pitched takings battles in courtrooms. One way that Lucas-type takings claims could be avoided is by requiring that an aggrieved landowner first enter some form of alternative dispute resolution (ADR).

In Maine, the legislation was enacted in 1996 that created a "relatively low-cost" mediation service for landowners who have suffered "significant harm" due to government regulatory acts.\textsuperscript{269} Such mediation stays the judicial appeal process available to challenge state or municipal action under Maine Rules of Civil Procedure 80C and 80B. Aggrieved landowners are not required to enter mediation before going to court; the process merely provides them another option.\textsuperscript{270}

The service is paid for through fees to be assessed equally among the parties unless the court decides otherwise. Waivers are available if necessary.\textsuperscript{271} Among other requirements, a landowner must have "sought and failed to obtain a permit, variance or special exception and has pursued all reasonable avenues of administrative appeal,"\textsuperscript{272} or the landowner must have "sought and failed to obtain governmental approval for a land use . . . and has a right to judicial review . . ."\textsuperscript{273}

Here we address just-compensation legislation and other programs designed to pay claims before they become lawsuits.\textsuperscript{274} Just-compensation legislation cannot restrict the measure of compensation in a takings case because the judiciary is solely responsible for determining the proper measure of compensation.\textsuperscript{275} At the national level, consider the Republicans' Contract with America and how it would

\textsuperscript{262} Lyke v. Lane County, 688 P.2d 411 (Or. Ct. App. 1984).
\textsuperscript{263} OR. REV. STAT. § 197.850 (1995), as amended by 1997 OR. LAWS 733 § 1 (1997). See also UTAH CODE ANN. § 63-34-13(3)(c) (1997 1st Spec. Sess.) (governor approves creating $90,000 position of "private property ombudsman" to "assist the state agency or local government in analyzing actions with potential takings implications").
\textsuperscript{265} Id. at 33.
\textsuperscript{266} Id.
\textsuperscript{267} Id. at 34.
\textsuperscript{268} Id. at 35.
\textsuperscript{269} Fax to Dwight Merriam from Jeff Pilot of the Department of Attorney General, Maine (1996) (on file with the author).
\textsuperscript{270} Telephone Interview with Jeffrey Pilot, Department of Attorney General, Maine (Sept. 26, 1996).
\textsuperscript{271} ME. REV. STAT. § 18-B (1997 Supp.).
\textsuperscript{272} ME. REV. STAT. § 3341.3.C(1) (1997 Supp.).
\textsuperscript{273} Id. § 3341.3.C(2).
have to compensate for "any action that reduces property by more than ten percent of market value."276

Some just-compensation programs benefit billboard owners; others benefit ranchers who lose livestock to wolves. Both programs compensate for property lost by a taking.

Compensation to billboard owners can be traced to the federal Highway Beautification Act of 1965, which required that billboards along federal interstate and primary highways in rural areas be removed.277 Under the act, the federal government paid 75 percent of the cost of compensating owners who lost signs because of the act. A 1978 amendment requires that if signs are removed under local ordinances and zoning, cash compensation must be paid.

Under existing Florida law, government removal of lawful nonconforming signs along the interstate or federal-aid primary highways requires payment of just compensation.278 Signs lose nonconforming status when they are no longer permitted and maintained according to law or applicable regulations. Nonconforming status is not lost through the passage of later local ordinances or regulations.

Lawful existence is a key concept. In one case, a sign violated a 1,000-foot spacing requirement, thus it was not lawfully in existence, and its owner was not entitled to compensation for its removal.279

The compensation to be paid had been limited to the actual replacement value of the materials in such a sign.280 However, the current versions of those statutes specifically discuss payment of just compensation for removal of "a lawful nonconforming sign along any portion of the interstate or federal-aid primary highway system."281 Finally, a greater amount of compensation may be available under federal law.282

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278. FLA. STAT. ch. 479.24(1) (1997); see also relevant outdoor advertising statutes including chs. 479.015 to 05.-07.-10.-12.-14.-15.-15.5.-16.-21.-24.-27, and 28 (1997).


280. 2 FLA. J. ADVERTISING § 15 n 154 (1997) (citing FLA. STAT. ch. 479.24(1)). The current version of that statute (West 1999) makes no reference to actual replacement value; it only discusses just compensation.


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Another factor can be the length of time that a sign owner is given to recoup his investment in nonconforming signs. One city ordinance required removal of nonconforming signs within ten years.283 The ten-year amortization period plus notice that the right to use the signs would expire after that time were sufficient compensation, an appellate court held.284

Another type of just-compensation program is funded by Defenders of Wildlife, a national environmental group.285 The program followed the reintroduction of the gray wolf into Yellowstone Park. The wolves help the ecosystem by reducing the numbers of deer, elk, and buffalo who overuse the land. At the same time, however, the wolves can kill several dozen cows and sheep annually. Livestock loss has prompted some ranchers to seek compensation. And that's where the Defenders group comes in. It can provide some money to compensate aggrieved ranchers.

Reengineering regulations can avoid many takings. Basically, we look first to see whether a particular land-use status, such as a zoning classification, constitutes a protected property interest. Recasting regulatory programs to provide discretion for public decision-makers short of creating a property interest avoids the takings issue.

Vesting moves an otherwise unprotected interest into the protected category. That "defining moment" is one that needs to be addressed by regulation and perhaps by statute. Discretionary government decisions should be made, where possible, short of the vesting threshold.

Assuming that there is a property interest and vesting has occurred or is soon to occur, it is critical to look at methods by which development rights may be moved around on the landscape to preserve them. Clustering, transfer of development rights (TDRs), and the purchase of development rights (PDRs) are ways to capitalize on development potential.

Highly flexible, discretionary techniques, such as planned unit development (PUDs), provide mutual benefits for both the regulators and the regulated community. The flexible techniques have much to offer in establishing a context within which public negotiation of land development can occur.


284. Id. at 1150.

Escape hatches, such as the variance, provide a relief for those whose property rights might otherwise be destroyed by regulation. And once damage to those rights does occur, alternative dispute resolution and other techniques for diverting decisions from full trial offer hope to avoid expensive and protracted litigation.

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