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Innovative Land Regulation and Comprehensive Planning

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INNOVATIVE LAND REGULATION AND COMPREHENSIVE PLANNING*

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Those dealing with land regulation in the United States are finding that many traditional regulatory techniques are failing to inhibit undesirable development or to stimulate needed development. A number of new techniques are being tested; others are just over the horizon. One major objective is to induce particular types and mixes of development and to induce developers to provide various public amenities in connection with construction activity. It is sought to support this objective by (1) stimulating coordinated development of large areas in multiple ownership rather than lot-by-lot development; (2) providing for more flexible administrative reaction to development proposals rather than relying on detailed prestated regulation; and (3) requiring developers to contribute land or money, or to undertake particular development, as a condition for desired permits.

Movement toward this objective is raising a variety of legal worries. Will courts (and legislatures in the first instance) find the supporting techniques reasonable? For instance, is the New York City "theatre district" zone a reasonable exercise of the police power? Is the bonus system as practiced in San Francisco legal? Will courts permit mandatory amalgamation of parcels in separate ownership in selective instances as a prerequisite for development permission?

The conclusion here is that courts should and will find such techniques proper in most instances if the regulation imposed is premised and explained on a rational basis that explains the reasons for the regulatory decisions. "Comprehensive planning" can constitute such a basis.

THE TRADITIONAL LAND REGULATION SYSTEM

The traditional conception of land regulation is mirrored in

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the Standard Zoning Enabling Act (SZEA)[1] which is the basis of most enabling acts in the United States. Zones are established within which certain uses (with attendant height and area restrictions) are permitted "as of right," that is, without need for individualized administrative treatment and merely by proof of compliance with the stated law. Traditionally, the zones were cumulative from single-family homes to relatively unrestricted use. They were also few in number and large in size. A minimum of legislative and administrative flexibility was envisioned. Amendments, especially boundary changes, would occur when conditions changed, but only on an extraordinary vote in the case of protest. An individual administrative variance might be issued for unique hardship cases where the general zoning scheme, though valid and reasonable, nevertheless caused an unintended hardship as applied to a particular parcel of property. A special exception process was mentioned but not spelled out. As noted by Daniel Mandelker:

> What is immediately striking about the American zoning pattern is that the exercise of administrative discretion under the ordinance was conceived as a tangential rather than as an integral phase in administration. As the ordinance was intended to solve most land-use problems in advance, the use of the dispensing power was considered to be exceptional rather than expected.[2]

The traditional form of land regulation created by the Standard Act was considered eminently suitable to satisfy constitutional requirements. Rationality and predictability, ingredients of substantive due process, seemingly were satisfied by the process of creating large zones governed by prestated regulations which segregated inconsistent uses and prevented the creation of common-law nuisances and near nuisances. Large districts with uniformly permitted uses coupled with seemingly limited administrative discretion also assured equality of treatment of owners within each district. Finally, prohibiting particular uses within particular zones was not viewed as a "taking" of property rights, but rather as the regulation of externalities—a process the propriety of which was attested to by the nuisance law.

The traditional form of land regulations, however, has proved to be unrealistic in many respects. It is based on unrealistic as-

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1. The 1926 version of the Act can be found in 3 C. RATHKOPF, ZONING AND PLANNING 100-1 to -6 (3d ed. 1956).

2. Mandelker, *Delegation of Power and Function in Zoning Administration*, 1963 WASH. L.Q. 60, 98 [hereinafter cited as Mandelker]. The analysis in this section is based largely on commentary the author wrote in *A Model Land Development Code* (Tent. Draft No. 1), AMER. LAW INST. 170-3 (1968) [hereinafter cited as ALI DRAFT].

sumptions that the "ideal city" is a pattern of contrasting districts that rigidly separate incompatible uses; that there is a natural tendency for similar uses to congregate in homogenuous areas; that development takes place lot by lot on small parcels; that shifts of social groups and land values come about slowly; that where, when, and how development takes place can be predicted and regulated in advance; and that "the market" will produce desirable development if the more blatant "externalities" are controlled.[3]

As one steps back from the subject of land regulation, three pertinent evolutionary changes can be identified. (1) There are increasing instances of individualized regulation of proposed development. The American system is moving in the direction of the English system which requires special development permission for most development that produces important planning impacts. (2) Various "public" costs created by development are being loaded onto developers who normally shift these costs to consumers. This trend, which began with subdivisions, is being extended to other forms of development. In addition to compulsory cost shifting, land planners are seeking to induce or require developers to provide particular types of desired development.[4] (3) Public authorities are also seeking to stimulate large-area development which can be more carefully designed to reflect higher levels of amenities and to provide more stimulating relationships between different uses.[5]

These evolutionary changes, and the mixed judicial reaction to them, are discussed below. Before addressing them, however, it should be noted that the changes are not unexpected. Increasing population congestion coupled with constantly rising environmental expectations lead to collective demands for higher amenity levels in physical development.[6] Government can seek to meet these demands chiefly by proprietary activities (English New Towns and Swedish suburban developments are examples) or by regulation and subsidy of private developers. America's heavy (although not sole) reliance on regulation and subsidy is understandable given American economic ideology. A large segment of American officialdom, especially at the state and local levels

3. Dukeminier & Stapleton, *The Zoning Board of Adjustment: A Case Study in Misrule*, 50 KY. L.J. 273, 339-40 (1962) [hereinafter cited as Dukeminier & Stapleton].

4. Scrutton v. County of Sacramento, 275 Cal. App. 2d 412, 79 Cal. Rptr. 872 (1969).

5. *See* PALO ALTO, CAL., MUNICIPAL CODE ch. 18.68 *et. seq.* (1955); SAN JOSE, CAL., MUNICIPAL CODE § 9107.23 (1950).

6. *See generally* ENVIRONMENT AND POLICY—THE NEXT FIFTY YEARS (W. Ewald ed. 1968).

where the bulk of physical environmental decisions are made, do not believe that government should be in the real-estate business. Proprietary interventions thus are normally limited to transportation systems, community facilities, public housing, and urban renewal. In each of these cases, private enterprise is supplanted or supplemented because, for a variety of reasons, there is little or no profit in the operation, or a subsidy is necessary to create profit potential. Given these present ideological obstacles to direct governmental participation in the development process, demands for environmental improvement and protection are sought to be met by a series of indirect and often highly complex interventions. Land regulation is one chief form of such intervention.

INDIVIDUALIZED REGULATION

As Jan Krasnowiecki has stated, the traditional system "assumes that most, if not all, development will occur under the preestablished rules" while in reality "land use controls relate to development largely as a series of individual permissions."[7]

The pressure for flexibility has produced two trends. First, the devices built into the traditional system by the SZEA to permit minor administrative discretion have been misused.[8] Zoning amendments have constantly been adopted which constitute "spot zoning;" exceptions, if the play on words can be forgiven, have become the rule; variances have been issued when there is no unique hardship; zoning ordinances have created a multitude of special zone classifications; and zoning maps have often become patchworks of small zones. The second trend has been toward the use of frankly nontraditional devices such as "floating zones," "contract zoning," "holding zones," and planned community development districts.[9]

The land development process is so dependent upon a multitude of relatively unpredictable variables—economic, technological, social, and political—that rigorous prestated development decisions in the form of traditional zoning regulation are often quite impractical. The basic reason for the evolution of explicit and *sub rosa* flexibility is precisely the impossibility of determining at one point in time the combinations of development, the specific circumstances under which it will occur, whether it will

7. THE NEW ZONING: LEGAL, ADMINISTRATIVE, AND ECONOMIC CONCEPTS AND TECHNIQUES 3 (N. Marcus & M. Groves, eds., 1971).

8. *See* Donovan, *Zoning: Variance Administration in Alameda County*, 50 CAL. L. REV. 101 (1962); Dukeminier & Stapleton, *supra* note 3; Wexler, *A Zoning Ordinance Is No Better Than Its Administration—A Platitude Proved*, 1 JOHN MARSHALL J. OF PRAC. AND PRO. 74 (1967) [hereinafter cited as Wexler].

9. ALI DRAFT, *supra* note 2, at 173.

be desirable and feasible, and the locations in which it will or should take place. Moreover, intelligent regulation often focuses on small rather than large features (setback and foliage, for instance, rather than use); individualized treatment, if there is to be any at all, must come through the administrative process.

The Small Parcel Zoning Amendment

Many courts have been uneasy when faced with exercises of regulation that appear to depart significantly from detailed prestatement. This attitude manifests itself, for instance, in judicial review of small parcel zoning amendments in which local legislatures are concerned not with a sweeping rezoning of a relatively large area, but rather, as often occurs, with licensing (or permitting) a specific development by means of rezoning an individual parcel. In effect, the small parcel amendment is a form of flexible regulation in which the legislative body, rather than an administrative agency, makes case-by-case decisions.

The test normally applied to such a change is whether it is in accordance with a comprehensive plan.[10] This test seeks to determine whether the development licensed by the amendment "may be defended as logically related to something broader than and beyond itself."[11] The normal judicial quest is to differentiate between situations where favoritism rather than public good seems to be the motivating event.[12] The New York case of *Udell v. Haas*,[13] which struck down a small area amendment that rezoned property from business to residential, illustrates the point in a reverse context. There a unanimous Court of Appeals concluded that differentiated treatment was improperly discriminatory because it was not based on a previously articulated land use policy which illustrated that the amendatory ordinance was "for the benefit of the community as a whole following a calm and deliberate consideration of the alternatives. . . ."[14] We shall return to this case later.

There are numerous instances, of course, in which courts have found that the rezoning satisfies some implicit or explicit previously articulated policy and have upheld small parcel reclassifications.[15] Analysis of these cases dealing with small parcel

10. *See* Haar, *"In Accordance with A Comprehensive Plan,"* 68 HARV. L. REV. 1154 (1955) [hereinafter cited as Haar].

11. *Id.* at 1167.

12. *Cf.* Silvera v. City of South Lake Tahoe, 3 Cal. App. 3d 554, 83 Cal. Rptr. 698 (1970).

13. 21 N.Y.2d 463, 235 N.E.2d 897, 288 N.Y.S.2d 888 (1968).

14. *Id.* at 469, 235 N.E.2d at 900, 288 N.Y.S.2d at 893.

15. *See, e.g.*, Co-Ray Realty Co. v. Bd. of Zoning Adjustments, 328 Mass. 103, 101 N.E.2d 888 (1951); Biyno v. County Council, 243 Md. 110, 220 A.2d

zoning amendments uncovers the values with which the judiciary is chiefly concerned.[16] Where the amendment is favorable to the applicant landowner, a court is faced with the argument made by neighbors that the development thereby licensed is detrimental to their expectations and discriminatorily favorable to the applicant. In legal language, neighbors are arguing that the amendment is irrational and discriminatorily favorable—it arbitrarily deprives them of just protections and of equal protection of the laws. The applicant (and the zoning authority), on the other hand, argue that the amendment is sensible—it licenses development beneficial to the community—and therefore both substantive due process and equal protection considerations are satisfied. Both of these values are subsumed by the enabling act language that zoning regulation must be "in accordance with a comprehensive plan."[17] If the applicant (and zoning authority) can show how the licensed use is consistent with a previously articulated policy (for instance, a master plan provision or prior ordinance language), the statutory standard is normally satisfied. Although the existence of a conforming master plan is not a prerequisite for validity, "[i]t can be shown with some clarity that the validity of a zoning ordinance can in some measure be insured by a convincing job of planning."[18]

Where the amendment is unfavorable to the developer (his relatively small area is zoned for a use that is less profitable than uses permitted others in his vicinity), similar arguments concerning rationality and equality are made. In the *Udell* case, for instance, a relatively small area was rezoned from business to residential use—an action which reduced the value of the property considerably. The landowner argued, and the court agreed, that the rezoning did not accord with the village's development policy as indicated by a review of its zoning law and map. The amendment was thus irrational—not "in accordance with a comprehen-

126 (1966); Hedin v. Bd. of County Comm'rs., 209 Md. 224, 120 A.2d 663 (1956); Rochester v. Barcomb, 103 N.H. 247, 169 A.2d 281 (1961); Harris v. Skirving, 41 Wash. 2d 200, 248 P.2d 408 (1952).

16. *See* R. ANDERSON, AMERICAN LAW OF ZONING 5.02 (1968) [hereinafter cited as AMERICAN ZONING TREATISE].

17. The New York Statutes are TOWN LAW § 263; VILLAGE LAW § 177 and GENERAL CITY LAW § 20, subd. 24, 25. Subd. 25 which pertains to "the location of trades and industries and the location of buildings designed for special uses," and requires that these regulations be "in accord with a well-considered plan." Subd. 24, which relates to "the height, bulk and location of buildings," contains no similar requirement. Although the significance of the distinction has not been litigated, it is probable that the requirement would be implied. *See generally* Haar, *supra* note 10.

18. R. ANDERSON, ZONING LAW AND PRACTICE IN NEW YORK 90 (1963) [hereinafter cited as NEW YORK ZONING TREATISE].

sive plan."[19] Moreover, the amendment was discriminatory because the village could not show that the subject property warranted dissimilar treatment from that afforded adjacent property.[20]

The court's discussion in *Udell* (and in the other cases involving amendments favorable to the applicant landowner) illustrates judicial reaction to one form of flexible regulation. Review of such cases shows that two interrelated values predominate: rationality and equality. Both values are central in the inquiry whether the amendment is "in accordance with a comprehensive plan." The language in *Udell* indicates what the court is looking for in applying the test. Have local authorities acted for the benefit of the whole community following a deliberate consideration of alternatives?[21] Has forethought been given to the community's land use problems and has it resulted in the articulation of the premises upon which the amendment in question is based?[22] Have the insights of various professionals concerned with urban problems been utilized in analyzing the community's land use problems and in constructing the policies that should be applied for their solution?[23] If such forethought is shown, and if the amendment in question is consistent with it, the rational basis for the regulation is established—the regulation is "in accordance with a comprehensive plan." This suggests strongly that planning activities of the sort explored later in this article will "automatically" provide the assurance of rationality (and to a large extent equality) required in the conventional amendment case, and, because the same principles are applicable, in cases involving more innovative techniques of flexible regulation.

The *Udell* court addressed separately the related question of discrimination—the denial of equal treatment. In its language,

> . . . a claim of discrimination is not just another way of saying that the change does not accord with the comprehensive plan. When the claim is one of discrimination, the focus of inquiry is narrower. The issue is the propriety of the treatment of the subject parcel as compared to neighboring properties.[24]

The court then went on to find that the zoning amendment in question was also discriminatory:

> If we also consider the fact that, aside from the lack of any showing of purpose in distinguishing the two parcels [the

19. 21 N.Y.2d at 476, 235 N.E.2d at 905, 288 N.Y.S.2d at 899.
20. *Id.* at 477, 235 N.E.2d at 905, 288 N.Y.S.2d at 900.
21. *Id.* at 469, 235 N.E.2d at 900, 288 N.Y.S.2d at 893.
22. *Id.* at 469, 235 N.E.2d at 901, 288 N.Y.S.2d at 894.
23. *Id.* at 469, 235 N.E.2d at 900, 288 N.Y.S.2d at 893.
24. *Id.* at 476, 235 N.E.2d at 905, 288 N.Y.S.2d at 899.

> subject one and its neighbor], the substantial loss which appellant will sustain if the zoning change is upheld, the invalidity of the ordinance becomes unquestionably clear.[25]

In these passages, the court may be suggesting that invalid discrimination might occur even if differential treatment is found to be "in accordance with a comprehensive plan," *i.e.*, even though the amendment is based upon and related to a sensible set of public objectives. If the passages do mean this, then the court is saying that an overwhelming case must be established for distinguishing the regulatory treatment of adjacent properties. Merely showing that the differential treatment is justifiable on the basis of a previously articulated set of objectives is insufficient.

Such an analysis, however, is too simplified. The plaintiff in *Udell*, it will be recalled, was the owner of the rezoned property. In cases where neighbors unsuccessfully attacked an amendment favorable to a landowner, the court has not required an overwhelming showing of the type suggested above. It has accepted as adequate the same showing which satisfies equal protection requirements in economic cases, *i.e.*, that the discrimination in treatment has a reasonable basis—it is reasonably related to a permissible goal. In *Twenty-One White Plains Corp. v. Hastings-On-Hudson*,[26] for instance, the amendment permitted a shopping center in the midst of a larger area zoned for multiple-family residential use. The amendment added considerable value to the parcel in question and, at least in the view of the plaintiff corporation which owned two adjacent small apartment houses, detracted substantially from the value of adjacent properties. The distinction in treatment between the two properties was not based upon physical factors of importance, but rather upon a deliberately formulated policy following considerable study which showed that the Village needed supermarket service. The planning board recommended another site, but the Village Board disagreed. The rezoning nevertheless was upheld because in the court's view it was based upon study that illustrated a need. To plaintiff's argument that the rental value of its apartments would be diminished, the court replied, quoting from a prior case:

> Depreciation in value of neighborhood property and special hardship of the owners thereof are insufficient to invalidate a zoning amendment which promotes the general welfare.[27]

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25. *Id.* at 476, 235 N.E.2d at 906, 288 N.Y.S.2d at 901.

26. 14 Misc. 2d 800, 180 N.Y.S.2d 13, *aff'd*, 9 App. Div. 2d 934, 196 N.Y.S.2d 562 (1958).

27. *Id.* at 806, 180 N.Y.S.2d at 19 (quoting from Freeman v. City of Yonkers, 205 Misc. 947, 129 N.Y.S.2d 703, 708 (1954)).

In the court's view, "the ultimate test is whether the amendment unreasonably and arbitrarily discriminates rather than furthers the public welfare."[28] The burden was on those attacking the amendment to meet this test. They failed in view of the prior study and analysis of the Village's needs.

Is there a different test for discrimination in the case, as in *Udell*, where the land regulated by the amendment is treated less favorably economically than its neighbors? There seems to be no persuasive justification for a different test of discriminatory classification although—and this may be the actual message of *Udell*—in such a case the court will scrutinize the evidence with greater care and require a solid showing justifying the differential treatment.[29] Such a distinction seems reasonable in view of two factors: (1) neighbors normally have difficulty in showing actual economic injury; and (2) but for the intervention of government regulation in the first instance, the owner whose property was reclassified favorably could have done what he wished with it.

There is an additional consideration potentially at play in the case where the subject property is regulated more strictly. This can be illustrated by the New York case of *Vernon Park Realty, Inc. v. City of Mount Vernon*.[30] There an 86,000 square foot parcel in the center of town had been owned by a railroad for many years for use in conjunction with the adjacent station. The railroad contracted to sell the property to plaintiff which sought to construct a shopping center. After the application was made, the city rezoned the parcel for parking lot use only to assure the continuance of a needed parking facility and to minimize downtown traffic congestion. Plaintiff was denied permission to build a shopping center there. The Court of Appeals, over the vigorous dissent of Justice Fuld, held the rezoning ordinance invalid despite the fact that parking would produce income for the owner.

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28. *Id.* at 807, 180 N.Y.S.2d at 20.

29. This suggestion is supported by Judge Keating's similar approach for the court in Fulling v. Palumbo, 21 N.Y.2d 30, 233 N.E.2d 272, 286 N.Y.S.2d 249 (1968), which concerned the validity of applying a 12,000 square foot minimum area requirement to a lot located in an area where many structures were situated on nonconforming lots of lesser sizes. The issue in the case was whether a variance had improperly been denied, thus resulting in an unconstitutional application of the regulation. The court ruled in favor of the landowner on the grounds that there had been no showing that the public health, safety, or welfare would be served by upholding the regulation. The reason for requiring this special showing by the locality seems to have been the arbitrary belief that a substantial public objective would be served by restricting this landowner when many others in his vicinity were not similarly restricted.

30. 307 N.Y. 493, 121 N.E.2d 517 (1954). The author discussed this case in M. HEYMAN, POWERS, REGULATION—LEGAL QUESTIONS, SAN FRANCISCO BAY CONSERVATION AND DEVELOPMENT COMM'N REP. 38-39 (1968) [hereinafter cited as BCDC REPORT].

Although the opinion was ambiguous,[31] the most salient reason given for invalidity was:

> However compelling and acute the community traffic problem may be, its solution does not lie in placing an undue and uncompensated burden on the individual owner of a single parcel of land in the guise of regulation, even for a public purpose.[32]

The *Vernon Park* case suggests that a regulation (normally by amendment) is invalid where it strikingly appears that it has singled out the owner of a particular parcel and, to his distinct economic disadvantage, "required" him to use the parcel to solve a community problem not of his making. (Most land use regulation, of course, is viewed as involving the reduction or elimination of "external costs" that would be created by the regulated use.) The discrimination involved in the *Vernon Park* case is not that the differentiation is based on an insufficient or unreasonable linkage between a proper objective and the classification in question, but rather that it is improper to impose solely on this particular landowner the cost of solving a community-generated problem. Under these circumstances, eminent domain rather than regulation is the proper means to assure proper cost sharing.[33]

But one cannot push this analysis too far, for many concededly valid regulations have similar impacts. For instance, zoning that limits the use of land solely to industrial purposes normally is passed because the locality is seeking to increase its tax base and to provide employment opportunities for its citizens. Such zoning has uniformly been upheld as long as it is not "confiscatory."[34] Similarly, in a number of states, restrictions on the use of privately owned land in order to assure airport safety have been upheld in the face of the argument that these regulations unfairly impose community-created costs solely on the basis of location.[35] In a few other states, most notably California,

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31. The Court of Appeals also suggested in one passage that the regulation was invalid because it prevented a use for which the subject parcel was adapted. 307 N.Y. 493, 494, 121 N.E.2d 517, 519 (1954).

32. *Id.* at 549, 121 N.E.2d at 519.

33. *Cf.* Peacock v. County of Sacramento, 271 Cal. App. 2d 845, 77 Cal. Rptr. 391 (1969), where the county imposed a Draconian height restriction on plaintiff's property in contemplation of the acquisition of a private airport for public use. Because the imposed restriction frustrated any efforts of plaintiffs to develop their property for an unreasonably long period of time pending an intended county purchase that was later abandoned, the trial court held a taking by inverse condemnation had in fact occurred.

34. *See* cases and text at notes 137-142, *infra.*

35. *Compare, e.g.,* Smith v. County of Santa Barbara, 243 Cal. App. 2d 126, 52 Cal. Rptr. 292 *with* Yara Engineering Corp. v. City of Newark, 132 N.J.L. 370, 40 A.2d 559 (1945). *See* Comment, 12 U.C.L.A.L. REV. 1451 (1965).

courts have gone even further in rejecting cost allocation arguments by owners who argue that the Constitution requires that costs to solve particular community-generated problems (for instance, the provision of streets) must be socialized through eminent domain.[36]

The purpose of the foregoing is not to exhaust the arguments available on the point (or the readers of this article), but rather to illustrate that the "separate" test of "discrimination" posited in the *Udell* case, where the issue involves unfavorable treatment of a relatively small area, is not essentially or normally different from the equality ingredient of the "in accordance with a comprehensive plan" test applied in all amendment cases. The only potential difference of substance arises in those relatively few cases, like *Vernon Park*, where a single landowner is required to bear costs to solve problems clearly not of his making. That is a relatively rare occurrence. We shall return to a more extensive consideration of this matter in a latter section.

The values at play in the amendment cases—rationality and equality—also apply where courts scrutinize conventional administrative licensing which involves the exercise of discretion. There are two chief forms under zoning, serving different purposes: (1) the variance and (2) the special permit or exception.

Variances

A variance is a license issued to a landowner by an administrative agency (for instance, a board of zoning appeals) to construct a structure or carry on an activity not otherwise permitted under the general regulations. The statutory justification for the issuance is that the owner would suffer unique hardship under the general regulations because his particular parcel is different from the others to which the regulation applies due to topography, size, and the like. The variance was originally viewed as a constitutional safety valve to permit administrative adjustments when application of the general regulation would be confiscatory or produce unique hardship. Ordinances only occasionally contain the

36. *See, e.g.*, Associated Home Builders v. City of Walnut Creek, 4 Cal. 3d 633, 484 P.2d 606, 94 Cal. Rptr. 630 (1971) (ordinance authorizing a requirement of a dedication of land, or a fee in lieu thereof for park or recreational purposes, as a condition to approval of a subdivision map held valid); Southern Pacific Co. v. Los Angeles, 242 Cal. App. 2d 38, 51 Cal. Rptr. 197 (1966), *appeal dismissed* for want of a substantial federal question, 385 U.S. 647 (1967) (approved an ordinance requiring dedications for street widenings in accordance with the street element in the master plan as a condition for the issuance of a building permit in every zone except R-1 and R-2 whether or not the intended use would generate traffic).

verbal standards upon which a variance may be issued.[37] Normally reliance is directly on the state enabling act.[38]

Empirical studies have demonstrated that the statutory standards are often, if not invariably, disregarded where, as is usual, the dispensing agency is a citizen board.[39] Critics of this system therefore advocate granting the power to a zoning administrator.[40]

Judicial review occurs in only a small proportion of cases,[41] nearly all of which are brought by neighbors who argue that the variance was illegally granted and constitutes favoritism which detrimentally affects the values and amenities of their properties.[42]

Many courts, most notably those of New York, have elaborated the statutory standards in a strict fashion.[43] Courts seem to have perceived the enormous power the variance system invests in the citizen agency and have sought to curb the often baseless exercise of discretion by requiring a solid showing of unique hardship, especially for use variances,[44] and compatibility between the use or structure thus licensed and those permitted under the general regulation. The judiciary is concerned with protecting rationality and equality in a system where generalized standards, nonprofessional decisionmakers, and relatively informal procedures,[45] make it probable that there will be arbitrary exercises of administrative power, improperly lax in favor of applicants. Courts, however, review only a small proportion of variance grants. Practically speaking, therefore, the existence of the variance power (especially when coupled with small parcel amendments) undoubtedly has resulted in a regulatory system that is certain in its form but often quite flexible in its performance.[46]

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37. *See, e.g.*, SARATOGA, CAL., ZONING REGULATIONS Appx. B, §§ 17.1-17.11 (1971); SAN JOSE, CAL., MUNICIPAL CODE §§ 9107.1-9107.5 (1950); CITY OF NEW YORK, N.Y., ZONING RESOLUTION § 72-21.

38. *See, e.g.*, CITY OF NEW YORK, N.Y., GEN. CITY L. § 81, subd. 4 (1963).

39. *See, e.g.*, Donovan, *Variance Administration in Alameda County*, 50 CAL. L. REV. 101 (1962); Dukeminier & Stapleton, *supra* note 3. *See also* additional studies cited in G. LEFCOE, LAND DEVELOPMENT LAW—CASES AND MATERIALS 1334-1335 (1966).

40. For a discussion of the desirability of such changes, *see* Fisher, *Land Use Control through Zoning: The San Francisco Experience*, 13 HAST. L.J. 322 (1962); Wexler, *supra* note 8.

41. ALI DRAFT, *supra* note 2, at 174, 180.

42. *See generally* Wexler, *supra* note 8, for a discussion of the difficulties of challenging the granted variance.

43. *See, e.g.*, Otto v. Steinhilber, 282 N.Y. 71, 24 N.E.2d 851 (1939) regarding interpretation of standards for use variances.

44. In New York, for instance, there is a less strict rule for area variances. *See, e.g.*, Bronxville v. Francis, 1 N.Y.2d 839, 135 N.E.2d 724, 153 N.Y.S.2d 220 (1956).

45. Most jurisdictions still do not require a written finding of facts and justification for the grant of a variance. *See generally*, Dukeminier & Stapleton, *supra* note 3.

46. *Id.*

Special Permits or Exceptions

A special permit (sometimes called a special or conditional use or an exception) also calls for licensing of desired development. The discretion vested in the licensing agency (often the citizen board of zoning appeals or, more frequently than in the case of variances, a professionally trained administrative officer) is more circumscribed than in the case of variances. The purpose of the device is to single out for special permit treatment those types or aspects of development which might or might not be compatible with development permitted as of right by the zoning ordinance. An owner desirous of carrying out the development must go through the special permit process which gives the administering agency opportunity to determine whether that development, in the particular location contemplated, will create special problems which can be ameliorated by specially devised conditions or which call for a denial of permission.

The agency's discretion is normally circumscribed by two chief factors: (1) only that development identified in the zoning ordinance as susceptible to special exception treatment may be so processed; and (2) the ordinance often contains criteria, in addition to identification, which are intended to guide the agency in determining whether or not to grant (with or without conditions) the special license.[47]

The form of the special process could provide an enormous amount of flexibility in the regulatory process. For instance, an ordinance could permit only a few uses as of right and subject all other uses to the special permit process under very generalized criteria. Such an approach, of course, poses particular threats to rationality and equal treatment. Only a few instances of such wide-open use of the process have been subject to judicial review. A leading instance occurred in *Rockhill v. Chesterfield Tp.*[48] The New Jersey Supreme Court invalidated a scheme under which all uses other than residential and agricultural required a special permit in accordance with very generalized criteria. Although the court found the approach inconsistent with the enabling act authority, its basic preoccupation was with the failure of the approach to set forth any meaningful set of objectives (*i.e.*, a "comprehensive plan") which would establish the rationality of the regulation and, perhaps more importantly, any meaningful criteria which would guard against arbitrary discrimination.

47. *See, e.g.*, CITY OF SARATOGA, CAL., ZONING REGULATIONS §§ 3.3, 7.3, Appx. B §§ 16, 16.1, 16.1-1, 16.4-7, 17 (1971).

48. 23 N.J. 117, 128 A.2d 473 (1950).

Similarly, in *People v. Perez*,[49] a California Superior Court stressed the limits to which the special use permit could be pressed. In striking down a city ordinance which limited use as of right to agriculture and included vague special permit standards, the court stated:

> To be valid [the special use permit] should be limited to those uses only for which it is difficult to specify adequate conditions in advance, i.e., schools, hospitals, service stations . . . and as to such cases, adequate standards must be laid down by the legislative authority for the guidance of the administrative agency.[50]

The more usual type of case involves a much more definite ordinance that singles out only some uses for special permit treatment. The cases, of course, are numerous, and the approaches of courts in various jurisdictions differ. Moreover, the decisions of courts within the same jurisdiction are often irreconcilable.[51]

Two questions of particular note arise out of cases involving special permits. The first is whether the courts impose any limitations on the type of uses or development that can be subjected to the process other than the limitation implicit in *Rockhill* and *Perez* that a jurisdiction cannot treat most profitable uses (at least under indefinite criteria) in such a manner. The second question is with what specificity the criteria to be used by the agency in its decision-making must be prestated. Both questions relate to rationality and equality. The more restricted the occasions for the use of the process, and the more certain the required criteria, the greater is the similarity between administrative licensing, and normal prestated zoning regulation and the greater is the seeming (or formal) protection of the values at stake.

Some state courts, notably Illinois', have laid down rules that circumscribe the instances in which a special permit process may be used. In the Illinois case of *Kotrich v. County of Du Page*,[52] the court construed the state enabling legislation as allowing use of the device to confront the relatively narrow but difficult problem of regulating types of uses "which are necessary and desirable but which are potentially incompatible with uses usually allowed in residential, commercial and industrial zones."[53] *Kotrich* allowed use of the special permit process for a country club in a single-family residential zone. Other Illinois cases have ruled favorably concerning a telephone exchange in a residential dis-

49. 29 Cal. Rptr. 781 (Super. Ct. 1963).
50. *Id.* at 783.
51. Mandelker, *supra* note 2, at 74-80.
52. 19 Ill. 2d 181, 166 N.E.2d 601 (1960).
53. *Id.* at 183, 166 N.E.2d 603 (1960).

trict[54] and a cemetery.[55] The point, however, is that the special permit process is only available if the use involved is one which, in a court's view, creates a particular regulatory problem. The basic reason for the judically imposed limitation is to require the use of prestated regulation in the "usual" case in order to avoid potential instances of proscribed discrimination.

Many state courts have not imposed categorical limitations, although most uses subjected to the special permit process satisfy at least a broad interpretation of the *Kotrich* language. In California, for instance, a court approved an ordinance that allowed a zoning administrator (subject to appeal to the city council) to permit a number of uses including development of natural resources anywhere within the City of Los Angeles if he determined that the use was "essential or desirable for the public convenience or welfare" and was "in harmony with various elements and objectives of the master plan."[56] In another case, the court approved an ordinance under which the zoning administrator could permit loosely defined "housing projects" in restricted residential zones under similar standards.[57] There are a host of similar California cases upholding the use of this "discretionary" regulatory device.[58]

The same unevenness is detectable in cases involving the adequacy of the particular criteria upon which the administering agency must make its determination. The objection is normally leveled that vague criteria constitute the unlawful delegation of legislative power to the administering agency. The California cases almost uniformly reject the argument. In explaining why such generalized standards as those involved in the *Wheeler* and *Case* cases were sustainable, a California court stated:

> The primary requirement is that conditional uses and variances must be such that they will preserve the integrity and character of the district, the utility and value of adjacent property and the general welfare of the neighborhood. The ordinance then vests in the discretion and judgment of the planning commission the determination of when the applicant has presented a request for a use which is an exception but which will nonetheless preserve the integrity and character of the district, the utility and value of adjacent property, and the general welfare of the neighborhood. To devise

54. Illinois Bell Telephone Co. v. Fox, 402 Ill. 617, 83 N.E.2d 43 (1949).
55. Brown v. County of Lake, 213 N.E.2d 790 (Ill. App. 1966).
56. Wheeler v. Gregg, 90 Cal. App. 2d 348, 203 P.2d 37 (1949).
57. Case v. City of Los Angeles, 218 Cal. App. 2d 36, 32 Cal. Rptr. 271 (1963).
58. BCDC REPORT, *supra* note 30, at 79, 85.

> standards to cover all possible situations that could be exceptions, that is, which would warrant the granting of a conditional use permit or a variance permit, would be a formidable task and one that would tax the imagination. If a legislative draftsman blessed with such omniscience were available and he could draft standards to govern the likely as well as the possible contingencies which a conditional use permit or variance is designed to relieve, there would be no need for a conditional use or a variance. Such detailed standards, when incorporated in the ordinance, would remove them from the conditional use and variance category, making them a part of the zoning ordinance proper. There would be no discretion whatever and anyone meeting the detailed and definite standards would be entitled to a permit without question as his proposed use would be authorized by the ordinance just as much as the uses permitted under the basic zoning ordinance. All of which goes to point up our belief that if the purposes of zoning are to be accomplished, the master zoning restrictions or standards must be definite while the provisions pertaining to a conditional use or a variance, designed to relieve against uncertain eventualities, must of necessity be broad and permit an exercise of discretion.[59]

Daniel Mandelker's review of the cases nation-wide shows that "nuisance standards"—negatively phrased standards directing that uses will not be allowed as exceptions if they create nuisance-type external costs—have been approved overwhelmingly.[60] Ordinances without any standards—simply authorizing an administrative board to issue an exception—generally have been held to delegate legislative authority invalidly. But most zoning ordinances provide general welfare standards, and judicial reaction to them is mixed. (Usually the ordinance allows the board to permit any of the enumerated special uses if such action would be in accord with the purposes and intent of the ordinance and be conducive to the general welfare.) Many cases sustain such standards with no critical comment. Some courts attempt to evaluate such standards and conclude that they are certain enough in view of the technological complexities of zoning administration. A number of cases hold such standards unconstitutional or ultra vires. Confusingly, courts in the same jurisdiction, and even the same courts, render inconsistent opinions on similar standards in different cases.[61]

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59. Tustin Heights Ass'n v. Board of Supervisors, 170 Cal. App. 2d 619, 339 P.2d 914, 924 (1959). *See also* Ward v. Scott, 11 N.J. 117, 93 A.2d 385 (1952), commented on at length in 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE, § 2.08 (1958).

60. Mandelker, *supra* note 2.

61. *Id.*

The New York cases, for example, are summarized in Robert M. Anderson's treatises.[62] Under the New York enabling acts, boards of zoning appeals may be authorized to regulate development through the grant, conditioned grant, or denial of special permits or exceptions. The difference between the two terms is somewhat elusive, and for our purposes, of minor relevance.[63] Although there are no statutory limitations, these special permission devices are used mainly, as in Illinois, "to control uses which are regarded as especially troublesome, and to soften the impact of certain uses upon areas where they will be incompatible unless conditioned in a manner suitable to a particular location."[64] Where the permits are administered by the board of zoning appeals, the ordinance must contain standards as in other jurisdictions. Anderson has found, however, that New York cases "have approved standards of the most general character."[65] Thus, New York courts behave much like those in other jurisdictions, as found in Mandelker's study.

New York departs from the majority view in one significant aspect. Where the legislative body reserves to itself the power to issue or deny a permit, the ordinance need not set forth the standards that are to govern its action, and the legislative determination is vulnerable to very limited judicial review.[66] Even if the ordinance sets forth standards, unless they are stated to be exclusive, "the legislative authority is free to consider matters related to the public welfare but not detailed in the ordinance."[67] The foregoing standard permits quite flexible regulatory treatment of a number of uses in New York, especially where the legislature is the permit-granting agency.

The conclusions to be drawn from the special permit cases are quite similar to those drawn from the amendment and variance cases. Courts are concerned with assuring a modicum of predictability and rationality and with protecting equality of treatment while at the same time recognizing the need for flexibility in view of economic and technological dynamism and the difficulty of pre-ordaining wise regulatory decisions. Some courts restrict the permissible occasions for the use of special permits and require somewhat detailed standards in addition to the prior identification of the use itself and the zoned areas in which, under

62. NEW YORK ZONING TREATISE, *supra* note 18, at ch. 19; 67 NEW YORK JURISPRUDENCE, *Zoning and Planning Laws* §§ 334-348 (1969) [hereinafter cited as NEW YORK JURISPRUDENCE].

63. NEW YORK JURISPRUDENCE, *supra* note 62, at § 334.

64. *Id.*

65. *Id.* at § 339.

66. NEW YORK ZONING TREATISE, *supra* note 18, at 628.

67. *Id.* at 627. *See also*, Green, *Are "Special Use" Procedures in Trouble?*, 12 ZONING DIGEST 73 (1962).

the stated conditions, it may or must be permitted. These courts seek to minimize the opportunities for departing from prestated regulation. Most courts, however, allow liberal use of the devices under quite flexible standards. Rationality, predictability, and equality are still important to these courts, but there seems a greater awareness that case-by-case review in many instances is the only realistic way to channel particular types of development wisely.

"New" Techniques for Individualized Treatment

Professionals involved with land regulation, cognizant of the need for providing means of regulation that permit more individualized treatment than contemplated in the Standard Act, have been dissatisfied with the widespread "misuse" of at least two of the traditional forms: the variance and the small parcel amendment.[68] The variance has simply been uncontrollable. Lay review boards have ignored statutory standards and issued permits that improperly favor applicants to the detriment of their neighbors and that often wreak havoc with carefully devised plans.[69] Traditional small parcel zoning reclassifications sometimes operate similarly. They have two major vices. First, they license new development on a case-by-case basis unrelated to an over-all scheme. The sum of numerous such decisions creates a development mixture that spawns unpredicted problems and fails to take advantage of opportunities that would be available if some sophisticated forethought had been utilized. Second, the traditional reclassification is a gross technique which often cannot address the regulatory problem in sufficient detail. Owners seeking reclassification represent, usually in good faith, that if their property is rezoned (for instance, from residential to commercial), they intend to build a particular development as illustrated by the drawings exhibited to the legislative body. The reclassification they seek, however, is to one of the general zoning districts provided in the ordinance. Once the reclassification amendment is adopted, the owner can do what he wishes within the parameters allowed in such a district. Often, the development that results bears only faint resemblance to the architect's renderings presented during the amendment process.

In response to such shortcomings, "new" techniques that are extensions of traditional forms have evolved. One is the more sophisticated and widespread use of special permits discussed

68. *See, e.g.*, Reps, *Requiem for Zoning* 16 ZONING DIGEST 33, 57 (1964).

69. *See, e.g.*, Broadway, Laguna, Vallejo Assn. v. Bd. of Permit Appeals, 66 Cal. 2d 767, 427 P.2d 810, 59 Cal. Rptr. 146 (1967).

above. Others, examined below, include floating zones, contract and conditional zoning, holding and interim zones, and Planned Unit Developments. The purpose of this examination is to gauge judicial reaction and to uncover the relevant judicial concerns in order to predict judicial reaction to the even newer regulatory techniques on the horizon.

Floating Zoning. A "floating zone" describes a district set up in the zoning ordinance but not, at least at the outset, mapped to a particular location. The regulations for the district spell out, in greater or lesser detail, the variety of circumstances that must exist to enable a landowner successfully to apply for a reclassification to the floating zone. The criteria also typically set forth a variety of performance standards that enable quite individualized treatment of details. The technique normally contemplates locating one or more particular uses in an area devoted to other uses. It has been used for light industry,[70] shopping centers,[71] and apartment houses[72] within areas generally used for relatively low-density residences.

Floating zoning has met with a generally favorable judicial response. Although the Pennsylvania courts have equivocated,[73] those in New York,[74] Connecticut,[75] and Maryland[76] have ruled favorably. According to Jan Krasnowiecki's provocative analysis, initial judicial reluctance to permit use of floating zoning in Pennsylvania was based on the court's recognition that where an ordinance seeks to blend contrasting uses sensitively, the "spot zoning" objection is rationally untenable.[77] The court believed that it would be unable to exercise its reviewing function effectively to guard against favoritism and discrimination.[78] Thus, the entire

70. *See, e.g.*, Huff v. Bd. of Zoning Appeals, 214 Md. 48, 133 A.2d 83 (1957). *But see* Eves v. Zoning Bd. of Adjustment, 401 Pa. 211, 164 A.2d 7 (1960).

71. *Cf.* Pecora v. Zoning Comm. of Trumbull, 145 Conn. 435, 144 A.2d 48 (1958); Bartram v. Zoning Comm. of Bridgeport, 136 Conn. 89, 68 A.2d 308 (1949).

72. *See, e.g.*, Beall v. Montgomery County Council, 240 Md. 77, 212 A.2d 751 (1965); Rogers v. Village of Tarrytown, 302 N.Y. 115, 96 N.E.2d 731 (1951).

73. *Compare* Cheney v. Village 2 at New Hope, Inc., 429 Pa. 626, 241 A.2d 81 (1968) *with* Eves v. Bd. of Zoning Adjustment, 401 Pa. 211, 164 A.2d 7 (1960).

74. Rogers v. Village of Tarrytown, 302 N.Y. 115, 96 N.E.2d 731 (1951).

75. Hawkes v. Town Plan & Zoning Comm'n., 240 A.2d 914 (Conn. 1968).

76. Beall v. Montgomery County Council, 240 Md. 77, 212 A.2d 751 (1965).

77. Krasnowiecki, *Planned Unit Development: A Challenge to Established Theory and Practice of Land Use Control*, 114 U. PA. L. REV. 47, 69-71 (1965). *See also* Haar and Herring, *The Lower Gwynedd Township Case: Too Flexible Zoning or an Inflexible Judiciary?*, 74 HARV. L. REV. 1552 (1961).

78. Eves v. Bd. of Zoning Adjustment, 401 Pa. 211, 164 A.2d 7 (1960).

device, which calls for case-by-case redistricting under carefully drawn criteria evidencing considerable forethought, was suspect.

The judicial fears evidenced in the early Pennsylvania case would stifle most self-conscious attempts to provide in advance for the utilization of discretion in the location of contrasting uses. The fears, however, have been rejected by most courts which have dealt with the device. In fact, a persuasive case can be made to show that the floating zoning technique is more apt to guard against discrimination and irrationality than is reliance on traditional small parcel reclassifications even if subjected to judicial review. The Maryland cases are instructive on this point.

Maryland courts, by their own choosing, operate under the minority view that small parcel zoning amendments are invalid "spot zoning" unless either "original error" or "changed conditions" are shown.[79] The limitations are applied rigorously.[80] In the interests of rationality, predictability, and equality, Maryland courts have sought to limit the power of local governments to deal with development applications on a case-by-case basis. Since *Huff v. Bd. of Zoning Appeals*,[81] however, Maryland courts have looked with favor on the floating zone device, likening it not to the traditional small parcel amendment ("original error" and "changed conditions" are irrelevant limitations), but rather to the special exception which admits of the necessity of case-by-case treatment in many instances. At the same time, they have insisted that the exercise of this form of regulation must have a rational planning basis. For instance, the court approved the location of a floating apartment zone, which permitted accessory retail uses, in the midst of an area zoned for single-family residence largely because the action was based on a well-reasoned report from the technical planning staff that showed the detailed forethought upon which both the original zone and the amendment were based.[82] The court also distinguished a prior case[83] which disapproved a floating zone amendment on the grounds that there the planning staff was opposed.[84]

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79. If the zoning amendment is "comprehensive," the limitation is not applicable. Scull v. Coleman, 251 Md. 6, 246 A.2d 223 (1968).

80. *See, e.g.*, Hunter v. Bd. of Commissioners of Carroll County, 252 Md. 305, 250 A.2d 81 (1969); Chatham Corp. v. Beltram, 252 Md. 578, 251 A.2d 1 (1969).

81. 214 Md. 48, 133 A.2d 83 (1957).

82. Beall v. Montgomery County Council, 240 Md. 77, 212 A.2d 751 (1965).

83. MacDonald v. Bd. of County Commissioners, 238 Md. 549, 210 A.2d 325 (1965).

84. *See also* Aubinoe v. Lewis, 250 Md. 645, 244 A.2d 879 (1968). In Bigenho v. Montgomery County Council, 248 Md. 386, 237 A.2d 53 (1968), on

The Maryland cases most particularly support a thesis of this article that courts should and will approve a flexible regulatory device where it is shown that its use sensibly relates to public objectives identified in advance in a planning process and is justified by a detailed explanation showing the actual relationship between the objective and the action. It is important to note that this process differs considerably from traditional prestated regulation which lays out in detail what is permissible in a particular zone. Here, general types of development are identified as permissible in order to fulfill stated public objectives if generalized performance standards are met. The criteria in themselves permit considerable discretion to be exercised. The planning explanation of the action fleshes out the objectives and shows how they and the supporting criteria are being satisfied. The explanation is not simply an exercise of fitting the "facts" to the previously stated "law," but an act of interstitial rule-making which gives specific meaning to the previously articulated generalized objectives and criteria. The action and the explanation are constrained by the planning processes which precede them. These combinations of statement and process, if carried through in good faith, are powerful guards against arbitrary discrimination and irrationality.

Conditional or Contract Zoning[85] "Conditional zoning" or "contract zoning" characteristically involve the reclassification of a single applicant's property to another zoning district coupled with the imposition of conditions designed to ameliorate the impact of the new district on neighboring properties. For instance, rezoning from low-density residential to shopping center, apartments or light industrial might be conditioned on the owner's willingness to develop according to a particular site plan which provides for buffer strips, density mixes or limitations, special noise standards, off-street parking, and the like.

The cases distinguish between a situation in which the landowner provides his enforceable promise to meet conditions as consideration for the municipality's rezoning or promise to rezone and one in which the zoning reclassification becomes effective only upon satisfaction of the conditions.[86] The former is called

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the other hand, the court upheld the rezoning action based on planning staff and commission approval.

85. *See generally* Shapiro, *The Case for Conditional Zoning*, 41 TEMPLE L.Q. 267 (1968); Comment, *Contract and Conditional Zoning: A Tool for Zoning Flexibility*, 23 HAST. L.J. 825 (1972); Comment, *The Use and Abuse of Contract Zoning*, 12 U.C.L.A.L. REV. 897 (1965); Comment, *"Contract Zoning" Method and Public Policy*, 1972 URBAN L. ANN. 219.

86. *See, e.g.*, State *ex rel.* Zupancic v. Schimenz, 46 Wis. 2d 22, 174 N.W.2d

"contract zoning;"[87] the latter "conditional zoning."[88] "Contract zoning," like "spot zoning," is frequently a judicial pejorative. Six states have at various times disapproved contract or conditional zoning[89] on the grounds that the municipality may not contract away the police power,[90] that it may not compromise its integrity and discretion by making a restrictive agreement in conjunction with a rezoning,[91] or that the restrictive conditions destroy zoning uniformity.[92] Seven states have ruled the devices valid.[93] Although California is not among those states which have unequivocally held contract or conditional zoning valid, in *Scrutton v. County of Sacramento*[94] the court declared that conditional zoning would be appropriate if the conditions were designed narrowly to fulfill public needs.

Courts have upheld contract or conditional zoning where the contract is a unilateral one binding the landowner in consideration of the municipal legislature's passing the rezoning,[95] where the contract is between the landowner and some third party, such as planning commission,[96] where the landowner executes and records a restrictive covenant enforceable by the municipality,[97] or where the passage of the amendment is conditional upon the landowner's fulfilling the conditions in advance.[98]

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533 (1970); Scrutton v. County of Sacramento, 275 Cal. App. 2d 412, 79 Cal. Rptr. 872 (1969).

87. Comment, *Contract and Conditional Zoning: A Tool for Zoning Flexibility*, 23 HAST. L.J. 825, 831 (1972).

88. *Id.* at 831.

89. Hartnett v. Austin, 93 So. 2d 86 (Fla. 1956); Baylis v. City of Baltimore, 219 Md. 164, 148 A.2d 429 (1959); Houston Petroleum Co. v. Automotive Prods. Credit Ass'n, 9 N.J. 122, 87 A.2d 319 (1952); Allred v. City of Raleigh, 277 N.C. 530, 178 S.E.2d 432 (1971); Oury v. Greany, 267 A.2d 700 (R.I. 1970); City of Knoxville v. Ambrister, 196 Tenn. 1, 263 S.W.2d 528 (1953).

90. Hartnett v. Austin, 93 So. 2d 86, 89 (Fla. 1956); Baylis v. City of Baltimore, 219 Md. 164, 170, 148 A.2d 429, 433 (1959).

91. City of Knoxville v. Ambrister, 196 Tenn. 1, 263 S.W.2d 528 (1953).

92. Hartnett v. Austin, 93 So. 2d 86 (Fla. 1956); Baylis v. City of Baltimore, 219 Md. 164, 148 A.2d 429 (1959).

93. Arkenberg v. City of Topeka, 197 Kan. 731, 421 P.2d 213 (1966); City of Greenbelt v. Bresler, 248 Md. 210, 236 A.2d 1 (1967); Sylvania Elec. Prods., Inc. v. City of Newton, 344 Mass. 428, 183 N.E.2d 118 (1962); Bucholz v. City of Omaha, 174 Neb. 862, 120 N.W.2d 270 (1963); Church v. Town of Islip, 8 N.Y.2d 254, 168 N.E.2d 680, 203 N.Y.S.2d 866 (1960); State *ex rel.* Myhre v. City of Spokane, 70 Wash. 2d 207, 422 P.2d 790 (1967); State *ex rel.* Zupancic v. Schimenz, 46 Wis. 2d 22, 174 N.W.2d 533 (1970).

94. 275 Cal. App. 2d 412, 79 Cal. Rptr. 872 (1969).

95. State *ex rel.* Myhre v. City of Spokane, 70 Wash. 2d 207, 422 P.2d 790 (1967); Comment, *Zoning and Concomitant Agreements*, 3 GONZAGA L. REV. 197

96. City of Greenbelt v. Bresler, 248 Md. 210, 236 A.2d 1 (1967).

97. Sylvania Elec. Prods., Inc. v. City of Newton, 344 Mass. 428, 183 N.E.2d 118 (1962); Bucholz v. City of Omaha, 174 Neb. 862, 120 N.W.2d 270 (1963); State *ex rel.* Zupancic v. Schimenz, 46 Wis. 2d 22, 174 N.W.2d 533 (1970).

98. Scrutton v. County of Sacramento, 275 Cal. App. 2d 412, 79 Cal. Rptr.

Conditional zoning and contract zoning, like floating zoning, permit the exercise of considerable discretion on a case-by-case basis. The devices allow a greater degree of incremental decision-making than floating zoning, which requires the prestatement of a number of criteria. Nevertheless, the need for the basic reclassification decision to be "in accordance with a comprehensive plan," if this requirement is sensitively applied, helps guard against arbitrary discrimination and irrationality.

Holding Zones and Interim Techniques Occasionally, communities must deal with a felt need to "freeze" land uses pending additional information on land development trends or the development of a plan. A "holding zone" can satisfy this need by placing the land in question in a classification which limits it to unintensive uses (e.g. agriculture or large lot single family residence) and requires special permits for other uses. Recent legislation[99] enabling classification of land as an "open space zone" will probably increase the use of such holding zones for environmental reasons.

Similarly, "interim zones" allow land to be classified tentatively and temporarily so that developers cannot defeat the planners' objectives between the formulation of a plan and the passage of an ordinance.[100] A few states have authorized interim zoning by enabling acts.[101] Despite early judicial skepticism,[102] reasonable interim ordinances have been upheld even without statutory authority.[103]

Silvera v. City of South Lake Tahoe[104] demonstrates that courts will not allow interim zoning to be abused. In that case the city council passed an interim ordinance which suspended a height limitation, allowing a builder to erect a high-rise for which he had already been denied a variance. The city relied on a California act authorizing emergency stopgap zones.[105] The Court of Appeal held that the act could be used to prohibit unwanted

872 (1969); Hudson Oil Co. v. City of Wichita, 193 Kan. 623, 396 P.2d 271 (1964).

99. *See* CAL. GOVT. CODE §§ 65560-68 (West. Supp. 1972).

100. *See generally* Freilich, *Interim Development Controls: Essential Tools for Implementing Flexible Planning and Zoning*, 49 J. URBAN L. 65 (1971).

101. *See, e.g.*, CAL. GOVT. CODE § 65858 (West. Supp. 1972); COLO. REV. STAT. ANN. § 106-2-20 (1963); UTAH CODE ANN. § 10-9-18 (1953).

102. Alexander v. City of Minneapolis, 267 Minn. 155, 125 N.W.2d 583 (1963); State *ex rel.* Kramer v. Schwartz, 336 Mo. 932, 82 S.W.2d 63 (1935).

103. Miller v. Board of Public Works, 195 Cal. 477, 234 P. 381 (1925); Metro Realty v. County of El Dorado, 222 Cal. App. 2d 508, 35 Cal. Rptr. 480 (1963).

104. 3 Cal. App. 3d 554, 83 Cal. Rptr. 698 (1970).

105. CAL. GOVT. CODE § 65858 (West. Supp. 1972).

development temporarily[106] but not to authorize a single building by a "back-door ruse."[107] While the court does not discuss the purported stopgap measure in terms of comprehensive planning, it is clear that the justification for interim zones is the imminent implementation of a comprehensive plan.

Planned Unit Developments "P.U.D.'s" are areas of land on which multiple building units are developed as a single planned entity.[108] Residential and commercial or industrial uses may be combined.[109] Other terms for this type of land development are "cluster zoning"[110] and "planned community."[111] Minimum acreages may be required.[112] In many respects the P.U.D. is a species of floating zone which requires prior administrative approval of the plan as well as legislative authorization for the uses.

P.U.D.'s have been approved in California,[113] Colorado,[114] Maryland,[115] and Pennsylvania.[116] The Pennsylvania court's rationale is instructive in view of its earlier rejection of floating zones.[117] It corrects the "mistaken belief that a comprehensive plan, once established, is forever binding on the municipality,"[118] and allows zoning amendments such as the one implementing a P.U.D. at New Hope, "provided the local legislature passes the new ordinance with some demonstration of sensitivity to the community as a whole, and the impact that the new ordinance will have on this community."[119] The court distinguishes the P.U.D.

106. Silvera v. City of South Lake Tahoe, 3 Cal. App. 3d 554, 556, 83 Cal. Rptr. 698, 699 (1970).

107. *Id.* at 558, 83 Cal. Rptr. at 700.

108. D. HAGMAN, URBAN PLANNING AND LAND DEVELOPMENT CONTROL LAW 431 (1971) [hereinafter cited as D. HAGMAN]; PLANNED UNIT DEVELOPMENTS AND FLOATING ZONES, 7 REAL PROP. PROB. & TR. J. 61 (1972).

109. D. HAGMAN, *supra* note 108, at 431.

110. *Id.* at 458. *See* Chrinko v. South Brunswick Township Planning Bd., 27 N.J. Super. 594, 187 A.2d 221 (1963).

111. *See, e.g.*, PALO ALTO, CA., MUNICIPAL CODE § 18.68.010-040 (1950).

112. *Planned Unit Developments and Floating Zones*, 7 REAL PROP. PROB. & TR. J. 61, 62 (1972). *See also* SARATOGA, CA., ZONING REGULATIONS Appx. B., §§ 4.4 (1971) (5 acres for "planned development"), 4A.4. (5 acres for "planned community").

113. Orinda Homeowners Committee v. Bd. of Supervisors, 11 Cal. App. 3d 768, 90 Cal. Rptr. 88 (1970). *But see* Millbrae Assn. for Residential Survival v. City of Millbrae, 262 Cal. App. 2d 222, 69 Cal. Rptr. 251 (1968), which requires the plan of the development to fit the criteria of the comprehensive plan for the area in question.

114. Moore v. City of Boulder, 484 P.2d 134 (Colo. App. 1971).

115. Beall v. Montgomery County Council, 240 Md. 77, 212 A.2d 751 (1965).

116. Cheney v. Village 2 at New Hope, Inc., 429 Pa. 626, 241 A.2d 81 (1968).

117. Eves v. Bd. of Zoning Adjust., 401 Pa. 211, 64 A.2d 7 (1960).

118. Cheney v. Village 2 at New Hope, Inc., 429 Pa. 626, 628, 241 A.2d 81, 84 (1968).

119. *Id.* at 628, 241 A.2d at 84.

from the "pre-ordained" spot-zoning it foresaw and condemned in floating zones on the somewhat flimsy ground that the procedure which establishes the P.U.D. zone and at the same time amends the zoning map to include it is less "ad hoc" than a process which defines the zone abstractly but only later sites it.[120] The most probable reason for the Pennsylvania court's about-face is its willingness to see the comprehensive plan as a process rather than merely as a map.

Additional Individualizing Techniques In an effort to deal flexibly with land use, communities have resorted to a variety of other devices.[121] Some of these substitute rational planning schema for what could also be done by a multiplicity of zones, each of which varied only slightly. Whereas numerous small discrete zones risk being condemned as spot-zoning, a systematic approach which accomplishes the same result may be valid. For example, "overlay zoning" defines several classifications consisting of the uses in the overlay plus the uses in the zones which it overlays. These zones may also be used to impose uniform restrictions on a series of disparate zones. Similarly, "sinking zones" may be established so that natural development patterns can narrow the range of permissible uses; for example, land might be zoned either residential or commercial, the final result to depend on which gets started first with the other "sinking" out of existence at that point.

Summary: Flexibility and the Rule of Law[122]

The foregoing review of judicial reaction to the use of both traditional and new techniques for imparting flexibility to land use regulation[123] supports three propositions. First, courts as well as planners are recognizing that prestated regulations under the "Euclidian" model cannot intelligently cope with the problems or maximize the opportunities presented by contemporary urban physical development, and that regulatory devices which more individually and sensitively treat particular development proposals are necessary if physical amenity levels are to be raised. Second, the primary values of rationality and equality are of substantial importance, but they are capable of being protected perhaps to

120. *Id.* at 628, 241 A.2d at 85.

121. D. HAGMAN, *supra* note 108, at 120-21, identifies "transition," "buffer," "potential," "tentative," "qualified," and "overlay" zoning techniques and offers illustrations of each. *See also*, Hagman, *Types of Zones*, CALIFORNIA ZONING PRACTICE 189 (H. Gross, ed. 1969).

122. The title is L. Sullivan's chapter in LAW AND LAND-ANGLO-AMERICAN PRACTICE (Haar ed. 1964).

123. The text has not reviewed subdivision regulation, another more flexible departure from prestated regulation. *See* ALI DRAFT, *supra* note 2, at 176-77.

even a higher degree under other than the traditional regulatory forms. Third, professional planning activity, to be discussed below, can be a very useful ingredient to assure the level of rationality and equality the system should demand. Although "planning" is not an absolute requirement, its presence has tended to mute judicial suspicions of particular exercises of flexible regulatory power.

Responsible flexibility is one evolutionary tendency in the law of American land regulation of crucial importance to new regulatory techniques. A second development, which requires developers to contribute land or money, or to undertake particular development as a condition for a desired permit, is also of importance. We turn to this now.

REQUIRING PARTICULAR DEVELOPMENT OR MONEY OR LAND CONTRIBUTIONS FROM DEVELOPERS AS A CONDITION FOR A DESIRED PERMIT

This trend in land regulation can be illustrated by a number of examples.

(1) City A zones a portion of its land to permit industrial use only. The zoning is based on intensive planning analysis which shows that various industrial establishments can best be attracted if they can be assured ample space near transportation routes in areas free from residential and large commercial development. The City's over-all planning objectives call for the creation of 3,000 new industrial job opportunities and expansion of the municipal revenue base through industrial development.

(2) City B is a rapidly growing suburban community. Its property tax base has been severely strained. A newly adopted ordinance requires subdivider-developers to contribute $500 per lot to a special school and park fund.

(3) City C, a mature regional center, has a thriving downtown office district which will probably develop even more intensively in the future. Congestion is a problem even now, and under the old 16:1 and 20:1 floor area ratio (FAR) limits, increased congestion and low amenity levels are distinct possibilities. The city adopts a sophisticated regulatory system that permits 14:1 FAR as of right, but provides further FAR bonuses as of right for various "public benefits" such as the provision of access corridors to public transit stations, sidewalk widening, and the provision of plazas. The basic 14:1 ratio was based on an intensive analysis of the cost of providing the desired facilities and the capitalized value of the additional floor area permitted by the bonus. A larger basic ratio, it was determined, would render the system ineffective.

(4) City D has designated a relatively small area for special treatment. The core consists of various public buildings devoted to cultural and related activities. Desirous of obtaining a high level of special amenities, the City has passed an ordinance providing, among other things, for FAR bonuses for such features as pedestrian malls, plazas, and subsurface concourses. In addition, the ordinance requires a pedestrian arcade as a condition for new development adjacent to particular streets and provides a FAR "bonus" for its provision.

The analysis of contributory zoning that follows is far from exhaustive. We are dealing with one of the most unsettled areas of land regulation law which means that very few definitive statements are possible. Under such circumstances, useful commentary is either exponential, theoretical, and complex,[124] or it seeks more succinctly to identify value clashes and identify trend lines. This undertaking is of the latter sort.

The legal question can be framed as follows: What are the kinds of situations in which a court, while agreeing that a land regulation is sensible in terms of producing a net social gain and not discriminatory in the strict equal protection sense of being based on an irrational or invidious classification, will nevertheless find the regulation invalid as amounting to a taking for which compensation must be paid? To put the question in somewhat different doctrinal terms: Under what circumstances will a court conclude that a regulation requires the payment of compensation or is blocked by such constitutional provisions as:

> Private property shall not be taken or damaged for public use without just compensation having first been made.[125]

The Externalities Analysis

Analytically, practically any regulation can be viewed as a taking. If we view "property" as a bundle of rights, any law that prohibits the exercise of one or more of those rights has taken them from the owner. A late nineteenth-century Missouri case struck down a setback regulation on precisely such reasoning.[126] The Supreme Court reaction in the *Euclid*[127] case, however, symbolized the more usual analysis. In capsule form, it is permissible

124. *See, e.g.*, Dunham, *A Legal and Economic Basis for City Planning*, 58 COLUM. L. REV. 650 (1958); Michaelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165 [hereinafter cited as Michaelman]; Sax, *Takings and the Police Power*, 74 YALE L.J. 36 (1964) [hereinafter cited as Sax].

125. CAL. CONST. art. 1, § 14.

126. St. Louis v. Hill, 116 Mo. 527, 22 S.W. 861 (1893).

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

to prevent landowners from creating various sorts of external harms, and the legislature has considerable leeway in defining what is a harm. The reasoning proceeds from nuisance doctrine.

Most American land regulation can be explained in externality-preventing terms. The availability of this justification, of course, does not alone mean that a regulation is to be found valid. In the past, for instance, many courts were unwilling to find visual values worthy of protection. Unattractive design, signs, etc., were not treated as producing harms that could be guarded against.[128] In many jurisdictions, a regulation that sterilizes property economically is invalid regardless of how justifiable its aims.[129] In addition, there are other obstacles.[130]

As a general matter, however, the judicial trend has been to expand the categories of harms cognizable by legislatures and to approve innovative means to minimize or prevent such harms.

In recent years, communities have sought to require subdivider-developers to dedicate land or pay in-lieu fees for schools and parks. The theory underlying such exactions is an extension of the theory supporting requirements that subdivider-developers build and dedicate streets, drainage facilities, and the like. Their activities create costs (externalities) which they can be forced to pay as a prerequisite to carrying on these activities. Initial judicial reaction to school and park requirements was unfavorable, many courts finding that requisite enabling legislation was absent.[131] Later cases seemed to impose difficult accounting tests designed to require a showing of the precise relationship between the cost of the exaction and the needs engendered by the development activity.[132] More recently, however, various decisions ap-

128. *But see* the contemporary treatment of this issue in such cases as Cromwell v. Ferrier, 19 N.Y.2d 263, 279 N.Y.S.2d 22 (1967); People v. Stover, 12 N.Y.2d 462, 240 N.Y.S.2d 734, 191 N.E.2d 27 (1963); Manhattan Club v. Landmarks Preservation Comm'n., 51 Misc. 2d 556, 273 N.Y.S.2d 848 (1966).

129. *See, e.g.*, Averne Bay Construction Co. v. Thatcher, 228 N.Y. 222, 232, 15 N.E.2d 587, 592 (1938) in which the court stated: "An ordinance which *permanently* so restricts the use of property that it cannot be used for any reasonable purpose goes, it is plain, beyond regulation, and must be recognized as a taking of the property."

130. These are developed in Heyman & Gilhool, *The Constitutionality of Imposing Increased Community Costs on New Suburban Residents Through Subdivision Exactions*, 73 YALE L.J. 1119, 1122-1130 (1964) [hereinafter cited as Heyman & Gilhool].

131. *See* Heyman & Gilhool, *supra* note 130; Johnston, *The Constitutionality of Subdivision Control Exactions: The Quest for a Rationale*, 52 CORNELL L.Q. 871 (1967).

132. *See, e.g.*, Pioneer Trust & Savings Bank v. Village of Mount Prospect, 22 Ill. 2d 375, 176 N.E.2d 799 (1961); Gulest Associates, Inc. v. Town of Newburgh, 25 Misc. 2d 1004, 209 N.Y.S.2d 729 (1960), *aff'd*, 15 App. Div. 2d 815, 225 N.Y.S.2d 538 (1962), discussed at length in Heyman & Gilhool, *supra* note 131 at 1134-38.

pear to relax this test, requiring only a looser type of "rational nexus" between the service need created by the development and that which is exacted as a condition for development permission.[133] In *Jenad, Inc. v. Village of Scarsdale*,[134] for instance, the New York Court of Appeals approved the application of an ordinance that authorized the planning commission to levy (in lieu of land dedication) a charge of $250 per lot to be "credited to a separate fund to be used for park, playground and recreational purposes in such manner as may be determined by the Village Board of Trustees from time to time."[135] The decision is of particular importance because (a) it overruled a prior Appellate Division decision which had suggested that it was unconstitutional to require the payment of fees for parks unless the money was segregated for expenditure for the "direct benefit" of the subdivision in question,[136] and (b) it did not require any showing that $250 per lot was rationally related to the needs for recreation space created by the subdivision in question. The significance of these determinations is heightened by the presence of a strenuous dissent which argued the contrary of both points.

The subdivision exaction cases suggest that incentive zoning of the sort exemplified in the third hypothetical stated at the outset (City C's FAR bonuses for access corridors, sidewalk widening, and pedestrian plazas) would be held valid on the basis of traditional externalities analysis so long as the FAR permitted as of right bore some reasonable relationship to the prevention of congestion and was not "confiscatory," and there was some "rational nexus" between the density bonuses permitted and the amelioration of congestion provided by the improvements required.

The General Welfare Analysis

The "police power" has characteristically been phrased in terms of protecting health, safety, morals, and the general welfare, and the preceding externalities analysis clusters around the terms health, safety, and morals: persons can be stopped from doing things on their land which threaten these values. The term "general welfare," however, is more open-ended. It can be taken to suggest that regulatory power may be exercised not only to stop harmful occurrences, but also to require actions that enhance the social, economic, and physical environment in a manner determined by governmental institutions. This meaning has

133. *See* text and cases cited in Johnston, *supra* note 131 at 913 *et seq.*
134. 18 N.Y.2d 78, 271 N.Y.S.2d 955 (1966).
135. *Id.* at 78, 271 N.Y.S.2d at 956.
136. Gulest Associates, Inc. v. Town of Newburgh, *supra* note 132.

been embraced by courts in numerous instances lately, as illustrated below. Of course, the potential scope of valid regulation is enlarged considerably if a regulation is not invalid simply because it requires affirmative action rather than mere prohibition or amelioration.

It is possible to analyze the regulations in the examples which follow as preventing externalities in the traditional way. For the reasons stated in connection with each, however, such an analysis would rob the concept of externalities of useful meaning.

In City A, a privately owned tract of land within the City's jurisdiction is zoned to permit only industrial uses. The purpose of the regulation is to create an environment attractive to industry, and to thereby increase revenue and employment potentialities. In most instances, this type of regulation has been upheld,[137] under one of two theories. The first speaks in externality terms. Residences may be barred from areas devoted to industry in order to protect potential residents from fumes, traffic, etc., and to prevent conditions leading to blight.[138] A variant is that such segregation protects industrial development from the harmful effects of proximate residential and commercial location—for instance, pedestrian traffic, the need for community facilities, and the inevitable complaints about noise, smoke, and the like.[139] The second theory, most pertinent here, is well stated in an important New Jersey decision:[140]

> Zoning is one aspect of the sovereign police power. Such power is not limited to measures directly needful to serve the public health, morals and safety. It may also be invoked to serve the public convenience and general prosperity and well-being. . . . The essence of zoning is to provide a balanced and well-ordered scheme for all activity deemed essential to the particular municipality. . . . Subject to the rule of reason, the kind of community and the kind of balance is exclusively a matter for local legislative determination. . . . [A] zoning scheme seeking balanced land use to obtain a sound municipal economy by encouraging industry on which taxes may be levied to help meet the deficit in the

137. *See, e.g.*, Roney v. Board of Supervisors, 138 Cal. App. 2d 740, 292 P.2d 529 (1956); People *ex rel.* Skokie Town House Builders v. Village of Morton Grove, 16 Ill. 2d 183, 157 N.E.2d 33 (1959); State *ex rel.* Berndt v. Iten, 106 N.W.2d 366 (Minn. 1960). *See* AMERICAN ZONING TREATISE, *supra* note 16, at § 8.34.

138. Roney v. Board of Supervisors, 138 Cal. App. 2d 740, 292 P.2d 529 (1956).

139. People *ex rel.* Skokie Town House Builders v. Village of Morton Grove, 16 Ill. 2d 183, 157 N.E.2d 33 (1959).

140. Newark Milk and Cream Co. v. Parsippany-Troy Hills Tp., 47 N.J. Super. 306, 328, 135 A.2d 682, 695 (1957).

> cost of municipal services to homeowners is a proper exercise of the zoning power, subject always to the reasonableness of the classification and regulations enacted to achieve the end both generally and with respect to particular property.

The position suggested in the quotation—that regulatory power can properly be exercised to induce (in fact, "require")[141] private development important to the economic welfare of the community—was foreshadowed in New Jersey in a dissenting opinion by Justice Brennan, then justice of that state's Supreme Court. Writing for three of its seven members in a case that involved the validity of excluding a shopping center from an industrial-only zone,[142] he stated, in part:

> New Jersey has witnessed a marked and salutary change in the judicial attitude toward municipal zoning over the past decade. Long overdue recognition of the legitimate aspirations of the community to further its proper social, economic and political progress, and of the propriety of requiring individual landowners to defer to the greater public good, have replaced the narrow concepts held by former courts.
>
> . . . .
>
> The motivation for the prohibition was the desire to attract non-nuisance industries to the borough to increase tax ratables and support the expanded school needs and greater municipal services incident to the rapid residential growth of the community. . . . It was feared, and with good reason, that taxes to be realized on modest residential properties would be insufficient to support the mounting cost of schooling and borough government without undue hardship to the individual home owner.
>
> Faced with that situation, the governing body intelligently and responsibly gave consideration to ways and means to increase tax revenues without impairment of the borough. They hit upon a program of attracting new non-nuisance industries, thereby augmenting ratables without incurring heavy additional expenses for municipal service.
>
> . . . .
>
> This type of program as part of a comprehensive zoning plan for communities of the character of New Providence is customarily recommended by professional planners. There was expert evidence that not only are residences incompatible in such a zone but that general retail and commercial business should also be recognized as incompatible with a well

141. Exclusive industrial zoning, of course, leaves the landowner with the "option" of selling or developing for industrial use or leaving the land unproductive.

142. Katobimar Realty Co. v. Webster, 20 N.J. 114, 118 A.2d 824, 832-3 (1955).

> planned district designed for non-nuisance industries. Numerous disadvantages from such an intermixture are referred to in the evidence.

The theory suggested by the industrial-only zoning cases is that government, within reasonable bounds to be explored below, is free to use regulatory power for positive as well as prohibitory purposes.

A second example concerns regulation designed to conserve natural resources. Although the subject deserves a volume,[143] this discussion must limit itself to one conflict—the use of regulatory power to bar substantial improvements in order to preserve land or water open spaces. The locale is often rural rather than urban,[144] but the legal questions and considerations are the same. The mixed judicial reaction to this attempt at conservation illustrates the taking-regulation conflict under a circumstance which strongly discourages a finding of validity; that circumstance, of course, is that regulation for such purposes normally prohibits any use of the regulated land for economically meaningful purposes.

In an important New Jersey case, *Morris County Land Improvement Co. v. Parsippany-Troy Hills Tp.*,[145] the local governing body greatly restricted the use of swampland by regulation. Filling and dredging were largely prohibited. Some agricultural uses were permissible as were wildlife sanctuaries and outdoor recreational activities if operated by a government agency. The swampland was owned in part by plaintiff; the remainder was owned by a nonprofit conservation society which was instrumental in the passage of the ordinance. The New Jersey Supreme Court held the regulation invalid. A key paragraph in its opinion stated:

> While the issue of regulation as against taking is always a

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143. We are presently witnessing extensive activity and interest in such subjects as flood plain regulation, shoreline and estuarine protection, timber regulation, open-space preservation and the like. *See, e.g.*, ASSOCIATION OF BAY AREA GOVERNMENTS, CAUTIOUS STEPS TOWARD BOLD OBJECTIVES: THE PHASE II OPEN SPACE ELEMENT (1972); DIVISION OF SOIL CONSERVATION, STATE OF CALIFORNIA, ENVIRONMENTAL IMPACT OF URBANIZATION ON THE FOOTHILL AND MOUNTAINOUS LANDS IN CALIFORNIA (1971); STATE ENVIRONMENTAL QUALITY STUDY COUNCIL, DRAFT REPORT ON LAND USE (1972); URBAN-METROPOLITAN OPEN SPACE STUDY, CALIFORNIA STATE DEVELOPMENT PLAN PROGRAM, OPEN SPACE: THE CHOICES BEFORE CALIFORNIA (1965).

144. Urban locales however, are often involved. The San Francisco Bay Conservation and Development Commission, for instance, has extensive regulatory powers over Bay fill and dredging and shoreline development. CAL. GOV'T CODE §§ 666000 *et seq.* (West Supp. 1972). The Bay is the central feature of a large urban area with a fast-growing population well in excess of 4½ million persons.

145. 40 N.J. 539, 193 A.2d 233 (1963). Much of the discussion in text between notes 145 and 152 is from BCDC REPORT, *supra* note 30 at 26-29.

> matter of degree, there can be no question but that the line has been crossed where the purpose and practical effect of the regulation is to appropriate private property for a flood water detention basin or open space. These are laudable public purposes and we do not doubt the high-mindedness of their motivation . . . [but both] public uses are necessarily so all-encompassing as practically to prevent the exercise by a private owner of any worth-while rights or benefits in the land. So public acquisition rather than regulation is required.[146]

The court identified two factors of apparent relevance: (1) The purpose and effect of the regulation is to appropriate private property for public uses (flood water detention basin and open space); and (2) the regulation prevents the private owner from realizing any economic return. The mention of both factors may mean that the regulation was invalid (1) because it left no economic use, or (2) because its "purpose and effect" was to appropriate private land for public use, or (3) because of both factors coexisting together.[147] We shall return to this question presently.

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146. 40 N.J. at 555-56, 193 A.2d at 241-42.

147. The court repeatedly mentions the two factors. For instance, with respect to "appropriation for public use," the court cited Grosso v. Board of Adjustment of Milburn Township, 137 N.J.L. 630, 61 A.2d 167 (1948) (where the use of plaintiff's property was precluded by placing the lot in the bed of a proposed street on the official map); Hager v. Louisville & Jefferson County Planning & Zoning Comm'n., 261 S.W.2d 619 (Ky. 1953) (where plaintiff's lands were rendered apparently useless by designating them as ponding areas for temporary storage basins in accordance with a flood control plan); Miller v. City of Beaver Falls, 368 Pa. 189, 82 A.2d 34 (1951) (where private utilization of a parcel was made impractical for three years because of its designation under a state statute as a possible area for park acquisition); Yara Engineering Corp. v. City of Newark, 132 N.J.L. 370, 40 A.2d 559 (1945) (where an airport zoning scheme greatly restricted the height of structures on plaintiff's land to protect landing and take-off of aircraft from an adjacent municipal airport); and Joint Meeting of the City of Plainfield v. Borough of Middlesex, 69 N.J. Super. 136, 173 A.2d 785 (1961) (where defendant zoned plaintiff's property exclusively for school, park, and playground use as a method of depreciating its value for purposes of municipal purchase). In each case, the regulation was found invalid. 40 N.J. at 556-57, 193 A.2d at 241.

These citations, and some of the language used by the court in discussing them, seem to indicate that the purposes of the regulation could only be accomplished by eminent domain. If this were true, the possibility of realizing some economic return would not save the ordinance. But in at least three places in the Parsippany-Troy Hills case, the court emphasizes the importance of the fact that the regulation rendered the land worthless to the owner as well as supporting the stated purposes. For instance:

> We cannot agree with the trial court's thesis that, despite the prime public purpose of the zone regulations, they are valid because they represent a reasonable local exercise of the police power in view of the nature of the area and because the presumption of validity was not overcome. In our opinion the provisions are clearly far too restrictive and as such are constitutionally unreasonable and confiscatory. As was said in Kozesnik v. Montgomery Township, 24 N.J. 154, 182, 131 A.2d 1, 16 (1957): "That a restraint against all use

A second case of relevance is *Dooley v. Town Plan and Zoning Comm. of the Town of Fairfield*,[148] where the local legislature created a 404-acre flood plain district limiting uses to parks, playgrounds, marinas, clubhouses, wildlife sanctuaries operated by governmental agencies or nonprofit organizations, and farming and gardening. Ninety-one per cent of the district was tidal marshland subject to overflow during abnormally high tides. The remaining 9 per cent lay below the flood level reached during three hurricanes between 1938 and 1954. Private parties owned 170 of the 404-acres; the remainder was owned by the town and the Federal Government. One of the complainants, Dooley, had contracted to purchase a portion of the acreage rarely inundated. He wanted to build residences, which would require some filling prohibited by the ordinance. Another complainant, Carroll, owned a portion that had been assessed $11,000 for a sewer system. There was some evidence that this portion could be used for residential purposes. It was shown that no demand existed for the land for farming purposes and that marinas could not be constructed on the privately held portions.

The Connecticut Supreme Court held the regulation invalid in an ambiguous opinion which stressed that the private owners were left with no worthwhile rights or benefits. The opinion also suggested, however, that limitations are "suspect" which restrict potential buyers to governmental agencies—*i.e.*, regulations which limit activities to normally conceived "public uses."[149]

[for the benefit of another private landowner] is confiscatory and beyond the police power and statutory authorization is too apparent to require discussion" [insertion ours]. The same result ordinarily follows where the ordinance so restricts the use that the land cannot practically be utilized for any reasonable purpose or when the only permitted uses are those to which the property is not adapted or which are economically infeasible. 40 N.J. at 556-57, 193 A.2d at 242.

148. 197 A.2d 770 (Conn. 1964).

149. The central statement in a rather clouded opinion was:

Although the objective of the Fairfield flood and erosion control board is a laudable one and although we have no reason to doubt the high purpose of their action, these factors cannot overcome constitutional principles. The plaintiffs have been deprived by the change of zone of any worthwhile rights or benefits in their land. Where most of the value of a person's property has to be sacrificed so that the community welfare may be served, and where the owner does not directly benefit from the evil avoided (*see, e.g.*, the old smoke nuisance cases such as State v. Hillman, 110 Conn. 92, 147 A. 294 (1929)), the occasion is appropriate for the exercise of eminent domain. Our statutes empower the flood and erosion control board to purchase or condemn property if it is needed for flood control. 197 A.2d at 774.

In stating that "where most of the value of a person's property has to be sacrificed so that the community welfare may be served, and where the owner does not directly benefit from the evil avoided . . . the occasion is appropriate for the exercise of eminent domain," the court seems to indicate that in some circumstances regulation validly may substantially depreciate the value of prop-

A third case, from Massachusetts in 1965, is *Commissioner of Natural Resources v. S. Volpe & Co.*[150] A Massachusetts statute prohibited dredging or filling of marshlands bordering on coastal water without consent of various authorities. The defendant owned marshlands affected by the statute and intended to develop them as a marina. This necessitated both dredging and filling. After a hearing, the Commissioner of Natural Resources refused to consent to any filling "in the interest of protecting marine fisheries and maintaining the ecological components of this estuarine complex." Defendant began filling despite the notice and was enjoined. The Massachusetts Supreme Judicial Council remanded for further proceedings for reasons explored below.

The trial court found, and the appellate court agreed, that the marsh in question was necessary to preserve and protect marine fisheries in the vicinity. Plants growing in the marsh, as they decayed, released nutrients essential for micro-organisms that provided the primary source of nutrition for shellfish, young finfish, and crustaceans. There was also agreement that protection of marine fisheries is a valid public purpose. But, in the appellate court's view, the trial judge erred in failing to determine whether the regulation deprived the owner of all practical uses of his property. "In this conflict between the ecological and the constitutional, it is plain that neither is to be consumed by the other. It is the duty of the department of conservation to look after the interests of the former, and it is the duty of the courts to stand guard over constitutional rights."[151]

The court accepted the propriety of regulation that seeks to maintain privately owned land in a relatively undeveloped condition beneficial to the public as a breeding ground for nutrients necessary for marine ecological balance. The problem, in the court's view, concerned not the "appropriation of private land for public use" by regulation, but rather whether the regulation goes too far in stifling the landowner's ability to realize economic return. Continuing the injunction against filling until final disposition of the case, the court specified in detail the evidence to be taken and the issues to be considered by the lower court on remand in determining whether the regulation as applied was

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erty. The cited Hillman case involved a city's refusal to permit re-establishment of a partially destroyed smoke-producing activity. The court's elliptical reference to that case apparently means that an activity that causes substantial public detriment affecting the owner as a member of the public as well as others can be barred regardless of the loss occasioned by the regulation.

150. 349 Mass. 104, 206 N.E.2d 666 (1965).

151. *Id.* at 111, 206 N.E.2d at 666.

invalid. The factors to be taken into consideration[152] seem to indicate the court's willingness to permit sizable reduction in market value where the regulation's aim can only be justified under a broad reading of general welfare.

Conventional externalities analysis—if it is to mean anything—is not available in these cases. The regulations were designed not to prohibit or limit activities on the lands in question which would produce external costs elsewhere as is the case, for instance, with air and water pollution controls, density limitations, and the like. Rather, they were designed to limit the owner's use because the continuation of the present condition of the property was necessary to retain the present condition of the environment. The owners were asked to absorb a cost for the benefit of those who, in the *Volpe* case for instance, catch and eat fish and enjoy unimproved shorelines.

The regulations, however, were not struck down for this reason. Rather, in each case the key issue was the extent of the forced contribution. While *Morris County Land Improvement Co.* and *Dooley* are not completely unambiguous on this point, the Massachusetts court in *Volpe* is quite clear. To repeat: "In this conflict between the ecological and the constitutional, it is plain that neither is to be consumed by the other."[153] The relevant issue is the quantum of the burden placed on the landowner, not the propriety of the burden itself.[154]

These cases stand for a proposition quite analogous to that developed in the industrial zoning cases. Regulation can be

152. (1) The precise portions of defendant's 49.4 acres sought to be improved, the costs of such improvement, and the uses that can be made of the property in its natural state both independently and in conjunction with other land of the owner.

(2)) The assessed value of the property for the five years preceding suit, the cost of it to the defendant, and the fair market value with and without the imposed restrictions.

(3) Whether a "taking" would occur if with the restrictions the property would not yield a fair return on the amount of the owner's investment in the property *or* the fair market value of the property without the restrictions.

(4) The relevance of:

(a) the possibility, if any, of using the property with restrictions profitably in connection with other unrestricted land of the owner;

(b) the fact that the property is not suitable in its present state (i.e., without filling) for residential or commercial use; and

(c) the fact that the proposed filling will change coastal marshland subject at times to tidal flow into upland.

153. 349 Mass. at 111, 206 N.E.2d at 671.

154. In the California case of Consolidated Rock Products Co. v. City of Los Angeles, 57 Cal. 2d 515, 370 P.2d 342, 20 Cal. Rptr. 638 (1962), *appeal dismissed,* 371 U.S. 36 (1962), a regulation barring quarrying was upheld despite a finding that this left the owner with no economic use whatsoever. *See also* Candlestick Properties, Inc. v. San Francisco Bay C. & D. Comm'n, 11 Cal. App. 3d 557, 89 Cal. Rptr. 897 (1970).

used to require that land be devoted to particular uses because it is in the general interest of the community that this be done. There are limitations, to be sure, but the potential scope for intervention is considerable. Similar doctrinal trends and conflicts are evident in other lines of cases.[155]

The examples developed above illustrate increasing judicial receptivity to regulations that require or induce particular development to be undertaken. Receptivity to these devices is understandable if government is to play an active role in meeting collective demands for higher amenity levels in physical development.[156] Throughout this discussion, reference was made to limitations on the demands that regulation can make . Earlier, reference was made to the line between improper "taking" and valid regulation. What tests determine whether the line has been crossed? The question is vexing because there is little logical consistency between the variety of tests or approaches that have been utilized by courts to determine whether compensation is required. Frank Michaelman's splendid analysis of these tests, however, is particularly useful.[157]

Conventional Limitations on Exactions

1. *The "Physical Invasion" test.* Michaelman reviews the four conventional tests that have been utilized to determine whether the regulation/taking line has been crossed. The first of these is the "physical invasion" test. "At one time it was commonly held that, in the absence of explicit expropriation, a compensable 'taking' could occur *only* through physical encroachment and occupation."[158] Few courts, of course, maintain this as an exclusive test today even though it still has potency in a number of situations.[159] The inadequacies of the test, in both

155. *See, e.g.*, the very interesting case of Manhattan Club v. Landmarks Preservation Comm'n., 51 Misc. 2d 556, 273 N.Y.S.2d 848 (1966) where the New York Supreme Court upheld the designation of plaintiff's building as an historical monument and refused to interfere with ordinance and statutory requirements that required that the outside of the building be preserved. *See also,* City of New Orleans v. Levy, 223 La. 14, 64 So. 2d 798 (1953); City of Santa Fe v. Gamble-Skagmo Inc., 73 N.M. 410, 389 P.2d 13 (1964).

156. *See* text accompanying note 6 *supra.*

157. Michaelman, *supra* note 124. Note that Michaelman's analysis of the conventional tests is built upon the premise that "designed redistribution by government action will surely be regarded as arbitrary unless it has a general and apparent 'equalizing' tendency—unless its evident purpose is to redistribute from the better off to the worst off." *Id.* at 1182.

158. Michaelman, *supra* note 124 at 1184.

159. A characteristic situation involves air flights where a number of courts still determine whether compensation is payable under a "taking" theory on whether or not the planes pass over the claimant's land. *Id.* at 1187, 46. The increasing number of air flights and their resultant adverse effects have

doctrinal and policy terms, are clear. It can lead to compensation in situations where little actual harm has resulted, yet fail to require compensation where great harm has ensued.[160] But the test has practical utility; it "combines a capacity to hold down settlement costs—both as to determining liability and as to measuring damages—with at least some tendency to draw the line so that compensable losses do, as a class, exceed in magnitude those deemed non-compensable."[161] The value pointed to by these cases is simply this: The "taking" test, whatever it is to be, should be based on a theory that conveniently groups together those instances where regulation requires compensation, lest all regulation be seriously suspect or inordinate efforts be required to determine whether compensation is necessary.

2. *The "Diminution of Value" test.* The second conventional test is "diminution of value." "Compensability is often said to depend on the amount or degree of harm inflicted on the claimant."[162] This test was illustrated above in the open-space cases. Viewed in isolation it also has serious inadequacies. It is not always applied (as, for instance, in nuisance-type cases),[163] and great confusion attends the identification of the property to be considered in the calculation of value before and after the imposition of the regulation.[164] The test, nevertheless, helps to determine "whether or not the measure in question can easily be seen to have practically deprived the claimant of some distinctly perceived, sharply crystallized, investment-backed expectation."[165] An additional value thus appears: regulation is suspect as a "taking" if its application results in an enormous decline in market value.

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created a series of complex and difficult legal problems. Courts have allowed or denied compensation upon a wide variety of theories and circumstances. *Compare* Peacock v. County of Sacramento, 291 Cal. App. 2d 845, 77 Cal. Rptr. 391 (1969); Sneed v. County of Riverside, 218 Cal. App. 2d 205, 32 Cal. Rptr. 318 (1963) *with* Nestle v. City of Santa Monica, 6 Cal. 3d 920, 496 P.2d 980, 101 Cal. Rptr. 568 (1972). *See also* Van Alstyne, *Inverse Condemnation*, 44 S. CAL. L. REV. 1, 26 (1972).

160. For instance, compensation is required for the actual appropriation (and subsequent use) of a 5-foot strip to widen a street which on balance adds rather than subtracts value from the whole parcel, but is denied if the government builds a highway elsewhere which drains traffic from an adjacent street thus drastically reducing the value of abutting parcels in commercial use.

161. Michaelman, *supra* note 124 at 1227.

162. *Id.* at 1190. *See also* Turner v. County of Del Norte, 23 Cal. App. 3d 311, 101 Cal. Rptr. 93 (1972).

163. *See, e.g.*, Hadacheck v. Sebastian, 239 U.S. 394 (1915); Consolidated Rock Products Co. v. City of Los Angeles, 57 Cal. 2d 515, 370 P.2d 342, 20 Cal. Rptr. 638 (1962), *appeal dismissed* 371 U.S. 36 (1962); Candlestick Properties, Inc. v. San Francisco Bay C. & D. Comm'n, 11 Cal. App. 3d 557, 89 Cal. Rptr. 897 (1970).

164. *See* text accompanying notes 150-153 *supra*.

165. Michaelman, *supra* note 124 at 1233.

3. *The "Balancing" test.* The third test involves "balancing social gains against private losses."[166] Although this test fastens attention on the efficiency of a regulation (whether it produced a net social gain), it alone is hardly adequate to determine whether compensation should be required. The primary question at issue concerns the redistributive effects of the regulation. Nevertheless, the balancing approach suggests another consideration of importance to the compensation question: does the regulation produce so obvious a social gain "as to quiet the potential outrage of persons 'unavoidably' sacrificed in its interest"?[167]

4. *The "Harm and Benefit" test.* The last test concerns harm and benefit.[168] The questions raised by it were treated in the sections devoted to externalities and general welfare where it was argued that there has been a noticeable judicial trend away from the strict externalities analysis. Despite its conceptual ambiguities, the test has a strong intuitive appeal because any regulation viewed as a proscription against "creating trouble" is justified not simply on grounds of efficiency but on deeply felt notions of commutative justice as well.[169] Michaelman analogizes the nuisance producer to the thief—"we control thievery not because the transfer is necessarily inefficient, but because such activity threatens stable and productive social existence."[170] This psychological justification does not exist or at least not in the same intensity if a regulation is viewed as requiring a contribution.

The problem with the harm/benefit approach is that it is not primarily a "test" but rather a statement of a psychological reaction. The reaction in turn is based on certain ideological assumptions. To the extent, for instance, that land is viewed as a societal rather than a private asset, the context for viewing the owner who fails to use the land "properly" in an unfavorable light (*e.g.*, as a thief) increases. One way of putting this is that as demands for higher amenity levels increase, the harm/benefit line shifts, and the analysis above in the section on general welfare becomes particularly pertinent.

Perhaps better than the others, the harm/benefit test centers attention on the central problem sought to be addressed by the regulation/taking line—under what circumstances should a reg-

166. *Id.* at 1193.
167. *Id.* at 1235.
168. This test is developed at length in Dunham, *A Legal and Economic Basis for City Planning*, 58 COLUM. L. REV. 650, 670 (1958). It is criticized in Heyman & Gilhool, *supra* note 130 and Sax, *supra* note 124.
169. Michaelman, *supra* note 124 at 1237.
170. *Id.*

ulation be struck down because it redistributes values or imposes costs on an unfair basis?[171]

Synthesis. The considerations that emerge from the conventional tests, and from judicial trends important in determining whether or not redistributions or cost impositions that flow from land regulations are fair *or* reasonable and thus do not require compensation, seem to be as follows:

(1) All land regulations redistribute wealth, and it is impossible to devise a system where all significant benefits are captured and losses compensated.

(2) An approach that requires compensation in a significant number of cases will frustrate regulatory innovation and result in failure to meet the mounting desire for improvement in the physical environment. Hence, all landowners and users must be vulnerable to considerable redistributive effects if government is to play a successful role in arresting deterioration and stimulating amenities.[172]

(3) It is unfair to impose a substantial cost on an individual or small class of landowners or developers where no net social gain will result.

(4) Similarly, it is unfair to require such contributions where a feasible alternative system exists to accomplish the desired goals.

(5) Finally, it is unfair to single out an individual or small class either to forfeit substantial development opportunities afforded others who own relatively similar parcels or to forego all substantially renumerative uses, unless circumstances existed in the past that warned of the special vulnerability.

The Regulation/Taking Line as Applied to Innovative Regulation

The thesis of this section is that we are witnessing an evolutionary trend in land regulation (and judicial responses) that permits governments to require developers to contribute land or money, or to undertake particular development, as a condition for a development permit.[173] The scope of what may be required, however, is constrained either by the externalities analysis or, if the general welfare analysis is applied, by identified consid-

171. *See* Heyman & Gilhool, *supra* note 130 at 1126-30.

172. This was stressed by Justice Brandeis in his dissent in Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 422 (1922).

173. *See also,* CAL. BUS. & PROF. CODE § 11546 (West Supp. 1972); Associated Home Builders v. City of Walnut Creek, 11 Cal. App. 3d 1129, 90 Cal. Rptr. 663 (1970).

erations of fairness.[174] Further understanding of these constraints can be gained by seeing how they would operate in particular contexts.

The fourth hypothetical stated at the outset of this section involved the identification of a small area for special planning treatment as a center for cultural and related activities. Among the salient features of the district were FAR bonuses provided for various features—pedestrian malls, plazas, subsurface concourses—but the regulations also required the provision of a pedestrian arcade as a condition for new development adjacent to particular streets and provided a special FAR bonus for this feature. Presume that an owner of land bounding the street where the arcade is to be located objects and demands the FAR bonus without providing the arcade. He argues that the arcade is unrelated to the additional increment of density (it will not reduce congestion, etc.) and that the requirement for the expenditure constitutes a "taking" of his property; if the city wants an arcade, it should buy the strip and build it itself. Moreover, he argues that the density limitation without the bonus is arbitrary because it cannot be justified on externalities grounds.

Under the preceding analysis, the landowner who goes to court is in an untenable position. The arguments that overcome his contentions can be outlined as follows:

(1) Regulatory power can be used for positive general welfare purposes.

(2) The existence of a cultural center of the type designed in the area specified is important to the social and economic well-being of the city, as illustrated by the reports and other documents produced in the comprehensive planning process that preceded the adoption of the regulations and, in this instance, by the expenditure of public funds for cultural facilities in the area.

(3) The planned pedestrian arcade is a sensible component of the over-all plan for the area. It can be justified in concrete terms analyzed and presented in the reports and other documents that make up the particular plan for the area. For stated reasons, it was not capriciously located and the burden of its cost will be negated by the value of the additional floor area permitted in the building.

(4) There are no other feasible ways to finance the arcade. The city has a very limited funding base for all capital improvements and recognizes as a priority the enormous demands on the

174. *See* Comment, *Bonus or Incentive Zoning—Legal Implications*, 21 SYRACUSE L. REV. 895 (1970).

city's tax base for programs designed to alleviate poverty, substandard housing conditions, and the like.

(5) The cost of the arcade (in land and improvements) required of each owner is small in relation to the value of the development permitted as of right. In addition, the seeming extent of the burden has been minimized in two ways. First, a portion of the value of the development permitted as of right is due to the public expenditures for the cultural center and supporting neighborhood improvements already constructed. Second, the applicant's net cost is reduced appreciably by the density increment afforded him over that permitted as of right in the area.

(6) There is nothing arbitrary in providing for the density increment in question. The general density limitations in the area are rationally based on conventional externalities analysis. Government should be permitted to relax these standards (even if, as may or may not be the actual case, congestion over that which otherwise would be desirable is produced) if it rationally determines that this is a necessary way for producing a net social gain. As a planning question, moreover, it may be demonstrable that the inclusion of this amenity—and the total complex of amenities forecasted for the district—makes possible a density level otherwise inappropriate to the area.

(7) The fairness and reasonableness of a regulation is a matter of degree requiring the consideration of a number of factors. On balance, the requirement for an arcade is fair and reasonable.

Summary: How Far Can Government Go?

The foregoing analysis of cases involving measures that require developers to contribute land or money, or to undertake particular development, as a condition for a desired permit supports a number of propositions.

First, there is no blanket prohibition on such regulations.

Second, in many contexts they can be justified on traditional externalities analysis. This is true, for instance, concerning a variety of subdivision exactions and typical density bonuses. Moreover, the emerging judicial rules give local legislatures and administrative agencies considerable leeway in relating costs to exactions.

Third, regulations can be justified on a basis that is broader than "harm preventing." Within reason, developers can be required to undertake particular activities (or to forego others)

because of a responsible judgment that such acts are required for the general welfare.

Fourth, the probabilities that a regulation will be upheld under externalities and, especially, general welfare analyses are increased significantly if government can show that the regulations are necessary to accomplish desirable social objectives. Planning helps considerably to do this.

Fifth, in addition to rationality, a basic issue posed by many new innovative regulatory techniques is whether the costs they impose on those regulated are fairly allocated. This raises the question of what standard of equality of treatment is required, recognizing that the system of land regulation is constantly redistributing wealth and that extraordinary judicial sensitivity to the issue will frustrate the use of regulatory power to satisfy understandable demands for a more livable physical environment. The guidelines that have emerged to resolve the conflict between understandable demands for equality of treatment of individuals, on the one hand, and the need of the society, on the other, are threefold:

(1) The importance of the social gain, and the lack of feasible alternatives, should be clearly demonstrated when only a few are asked to pay a considerable cost.

(2) In most instances, an owner ought not to be asked to forego all substantially remunerative uses unless he had meaningful advanced warning.

(3) Whenever an individual owner (or a small class of owners) is asked to forego development opportunities afforded others who appear to be similarly situated, the regulating authority should be required to demonstrate with specificity the necessity and rationality of its determination.

Sixth, judicial enforcement of these values must give regulating agencies considerable leeway whenever intelligent and even-handed forethought is demonstrated lest governments are rendered powerless to meet emerging problems spawned by technology and population increase with innovative techniques of intervention.

INNOVATIVE REGULATION AND THE PLANNING PROCESS

How Planning Saves Innovation

Repeated mention has been made of the values sought to be protected by courts in dealing with both the forms and substance of land regulation. Two values predominate—rationality and equal treatment. This section seeks to show how a realistic

planning process creates the framework for innovative regulatory techniques within which both of these values can be afforded substantial protection while allowing governments the tools necessary to combat environmental deterioration and to stimulate higher amenity levels. It is a great deal more likely than not, in fact, that these values are better protected by use of innovative techniques based on planning analysis than by use of traditional regulatory forms.

Court responses have reflected the optimism just exhibited. The Maryland experience with floating zoning is one example.[175] Another is contained in Judge Hall's opinion in the 1957 New Jersey case of *Newark Milk and Cream Co. v. Parsippany-Troy Hills*,[176] which involved an innovative regulatory technique that combined individualized treatment with requirements for particular types of development needed by the township to provide employment revenues. The large township in question, located in the New York City metropolitan area, was growing rapidly but was then only 25-30 per cent developed. Most development was middle-income, single-family residential. The township supported a professional planning department aided by well-known and able consultant planners. It had adopted a master plan that stated as objectives the continuance of the relatively low-density residential character which would require, among other things, the encouragement of light industrial development for revenue and employment purposes.[177]

The regulation at issue in the case was passed to implement this latter objective. It created three classes of "special economic development districts" which differed from one another only in required minimum lot sizes and street frontages. These districts were mapped—there were four in all—and plaintiff's property comprised all of one of the districts. The regulation contained a statement of its purposes. Among these were to "provide primary employment for the labor supply that is resident in the township and vicinity." Another was to "yield a fair and reasonable share of municipal revenue."[178] The regulation permitted five uses: offices, laboratories, fabrication and assembly plants, processing plants, and agriculture. It detailed a number of performance

175. *See* text accompanying notes 79-86 *supra; see also* Orinda Homeowner's Committee v. Bd. of Supervisors, 11 Cal. App. 3d 768, 90 Cal. Rptr. 88 (1970); Costonis, *The Chicago Plan: Incentive Zoning and the Preservation of Urban Landmarks*, 85 HARV. L. REV. 574 (1971).

176. 47 N.J. Super. 306, 135 A.2d 682 (1957).

177. Extensive portions of the master plan are quoted in the opinion. 47 N.J. Super. at 312-13. 135 A.2d at 692-4.

178. *Id.* at 310, 135 A.2d at 684.

standards respecting these uses mainly involving smoke, odor, noise, water pollution, traffic generation, and physical hazards. It also contained precise requirements concerning minimum lot sizes, street frontages, yard dimensions, and heights. In addition, it set forth four generalized requirements involving landscaping, buffer strips, screening of storage facilities, parking space, and signs, and required that building plans be prepared by a licensed architect.

Under the ordinance, a landowner within a specialized economic development district would determine which of the permitted uses he intended to develop on particular lots within his parcel and then would prepare a site plan for each such lot for planning commission review. The commission was not given the authority to specify which of the permitted uses could be undertaken, but it had the authority, under the quite generalized criteria stated above, to determine the adequacy of the developer's plans for drainage, driveways, parking facilities, loading yards, landscaping, screening, water and sewage facilities, and signs. In addition, the planning commission was charged with determining:

> . . . the appropriateness of site plan and design of buildings in relation to the site itself and the neighborhood, present and future, after a report from the township engineer and any other municipal officials with respect to the effect on existing municipal services and utilities, and a possible contract between the township council and the applicant regarding the development of necessary municipal facilities.[179]

Judge Hall reacted quite favorably to the ordinance. Before examining his reaction, however, we should note how significantly the regulatory technique embodied in the ordinance departs from the traditional mode. First, it frankly sought to induce new types of development for broad general welfare purposes—employment and revenue. Second, it singled out very few properties for differentiated treatment. As applied in this case, an entire district included only one owner's land. Third, it permitted a number of potentially remunerative uses as of right, but hedged all of them in by a series of quite generalized performance standards. Fourth, it vested considerable discretion in an administrative agency—the planning commission—to shape the development that was allowed. The ordinance thus provided for quite individualized regulatory treatment of a particular owner's land, and frankly was justified on a general welfare rather than an externalities theory of the police power.

Judge Hall upheld most of the features of the ordinance in

179. *Id.* at 314, 135 A.2d at 687.

the face of plaintiff's arguments that it unconstitutionally excluded "higher uses" (plaintiff wanted to be able to develop the property for residential subdivision), did not support any permissible purpose of zoning, improperly depreciated the value of the property, and singled out plaintiff's property for discriminatory treatment. One aspect of the regulation was held invalid—the power of the planning commission to determine "the appropriateness of site plan and design of buildings in relation to the site itself and the neighborhood, present and future."[180] The judge found that this standard was too open-ended and constituted an improper delegation of legislative power. Site-plan review, however, for the other enumerated purposes was upheld as were the basic use limitations for the stated purposes. Central to Judge Hall's holding was his statement:

> [T]here has been a definite and continuing close correlation of planning and zoning in this township, and the zoning amendment under attack must be considered with that fact always in mind. Where such close correlation exists, zoning is peculiarly a tool and implementation of planning. The latter always embraces or should embrace the former, but it is much broader and has been defined in a leading case as "a systematic development contrived to promote the common interest in matters that have from the earliest times been considered as embraced within the police power."[181]

This was followed by the determination that where planning provides a sensible and detailed basis for regulation, regulation can properly be used to enhance the physical, social, and economic welfare of the community as well as to prevent blight and deterioration.[182]

Disputes Concerning Planning Processes

What are the constituents of a realistic planning process that have led (and will lead) to favorable judicial treatment of innovative regulations? To answer this question, it is first desirable to outline some of the issues that are vexing the city planning profession currently.[183]

The more conventional view of planning has centered around the preparation and maintenance of a long-range master (or general) physical development plan. The planner examines the present physical setting, makes long-range projections of population

180. *Id.* at 333, 135 A.2d at 698.
181. *Id.* at 324, 135 A.2d at 692.
182. *Id.* at 327, 135 A.2d at 694-95.
183. The author develops much of what follows in ALI DRAFT *supra* note 2, at 157-69.

and employment, forecasts land and facility demands to be generated, and, applying professional judgments as to desired future physical conditions, prepares a plan locating activities and specified facilities for consideration by legislative and executive decisionmakers.

This conception of "planning" appears to provide the framework for a land regulation system that is rational (in terms of net social gains). It also seems to provide a substantial basis for explaining differentiated treatment of various lands. Thus, it seems to be a useful basis for flexible regulatory forms and innovative exactions. Its usefulness for these purposes is heightened if other governmental activities, especially expenditures for capital items, are made consistently with the plan.[184]

The conventional view of planning, however, is under considerable attack within the planning profession, especially as a model for densely populated urban centers. Some argue that it is harmfully simplistic to view cities as physical structures and that planning that is oriented around physical development never realistically grapples with the social and economic problems that are the central concerns to be addressed by governments.[185] In their view, municipal planners should be involved with building an interim system of information gathering and short-term programing to solve pressing municipal problems until a mature planning theory emerges based upon more realistic theories that explain how urban systems function.[186]

Other critics are not willing to jettison physical planning but argue that long-range (end state) master plans have little demonstrable impact on development and that much of the planners' activities should be devoted to relatively short-term programing to solve presently perceived problems.[187] They argue that long-range master plans are ineffective for a number of reasons. First, it is extraordinarily difficult to foresee changes in technology, economic conditions, and the like over a long period of time. Second, master plans have generally failed to take explicit account of the social and economic impact of the stated physical design, and when the time comes to implement the design by undertaking specific development or regulatory programs, the efforts fail

184. *See* CAL. GOV'T CODE § 65860 (West Supp. 1972) which requires that cities and counties furnish a master plan by January 1, 1973.

185. *See, e.g.*, Wheaton, *Operations Research for Metropolitan Planning*, 29 J.A.I.P. 250 (1963).

186. Webber, *The Roles of Intelligence Systems in Urban Systems Planning*, 31 J.A.I.P. 289 (1965).

187. *See, e.g.*, Meyerson, *Building the Middle-Range Bridge for Comprehensive Planning*, 22 J.A.I.P. 58 (1956); Robinson, *Beyond the Middle-Range Planning Bridge*, 31 J.A.I.P. 304 (1965).

because the now-perceived impacts make the programs politically unrealistic. Third, master plans do not undertake to address the most difficult problem—how its objectives are to be achieved—and this deficiency makes the objective-stating process unrealistic. Fourth, the classic formulation of the planning and decision-making process is unrealistic. Edward Banfield summarized the process as follows:

> 1. The decision-maker considers all of the alternatives (courses of action) open to him; i.e., he considers what courses of action are possible within the conditions of the situation and in the light of the ends he seeks to attain; 2. he identifies and evaluates all of the consequences which would follow from the adoption of each alternative; i.e., he predicts how the total situation would be changed by each course of action he might adopt; and 3. he selects that alternative the probable consequence of which would be preferable in terms of his most valued ends.[188]

Banfield recognized the impossibility of identifying all alternative courses of action and possible consequences but suggested that the model represented an ideal toward which the planner should strive. Martin Meyerson suggested an operational framework of continuous market analysis and middle-range action programs with testing of consequences.[189] The Community Renewal Program largely adopted the Meyerson approach. There is some doubt that even this process is realistic.[190] It is difficult for a legislature (or an executive) to make coordinated decisions from a "central command post" in view of the multitudes of separate interest groups participating separately in decisions that affect their central interests. More fundamentally, it is questionable whether in operation government decision-making can be comprehensive. Charles Lindblom at Yale argues that governments can only hope to take small, marginal actions to relieve undesired conditions as they arise.

The Evolving Planning Process

The considerations outlined above, and others,[191] are leading some theoreticians to jettison physical planning as a central concern and to focus on social planning with some physical planning

188. MEYERSON & BANFIELD, POLITICS, PLANNING AND THE PUBLIC INTEREST 324 (1955).

189. Meyerson, *Building the Middle-Range Bridge for Comprehensive Planning*, 22 J.A.I.P. 58 (1956).

190. Webber, *The Roles of Intelligence Systems in Urban Systems Planning*, 31 J.A.I.P. 289 (1956).

191. *See* Bolan, *Emerging Views of Planning*, 33 J.A.I.P. 223 (1967).

ingredients.[192] In most American cities (and some regions), however, comprehensive physical planning is continuing and the process that is emerging stresses four types of activities.[193] The first is the compilation of considerable information clustering around major problems relating to physical development and physical deterioration. The effort is being made to analyze these problems (and thus to identify relevant data) in terms of social and economic indicators and to project the probable nature and rate of change for the reasonably foreseeable future, discounting major governmental actions.

The second activity is the statement of a framework of objectives respecting the problems that formed the basis for the data collection. Continual effort will be made to describe these objectives in social and economic terms, rather than in physical terms, and to explore the interrelationships between the various objectives. The statement that emerges is a generalized framework of long-run objectives within which to locate the third important activity of the emerging process.

This third activity is the formulation of a comprehensive short-term program plan designed to begin achieving selected long-range objectives.

The program plan (perhaps a five-year plan) identifies public actions (including particular governmental development, enactment of development control ordinances, and preparation of precise physical development plans) which, in the view of the planners, ought to be undertaken, and seeks to analyze why these actions are the most optimal for this period. To the extent possible, justifications are made in terms of how this particular package of undertakings are interrelated. The net gain thus is more than a sum of the programs, what these programs mean in social and economic terms, and why the programs are feasible.

The fourth activity is the precise design and implementation of the short-term programs.

Although plan documents are involved throughout each stage, what has been described is a planning/implementation process because it contemplates periodic evaluations of achievements and failures under the short-term program plan, the formulation of successive program plans, and the periodic re-evaluation and amendment of the long-range statements of objectives in light of changing conditions constantly uncovered in the sequence

192. *See* HOLLEB, SOCIAL AND ECONOMIC INFORMATION FOR URBAN PLANNING (1969).

193. The process here described is incorporated in ALI DRAFT, *supra* note 2, at Article 2 ("Land Development Plans").

of program plans. The long-range objectives thus provide only the direction; it is clear from the outset that they will provide goals that will be changed prior to their realization.

The foregoing, of course, is an idealized outline of an emerging planning process. It is improbable that any jurisdiction will provide for each of the steps described. Moreover, the outline does not address a number of problems with which most local governments should cope—how, for instance, to provide opportunities for some neighborhood self-determination and for community participation.[194]

Has the proposition been established that the planning process here described provides the framework for innovative regulatory techniques within which the values of rationality and equality of treatment can be afforded substantial protection? To test whether rationality and equality are protected where more innovative regulatory techniques are premised on a thorough planning process, let us presume, as an example, a very "free-swinging" ordinance in a large metropolitan city which authorizes an administrative agency to permit mixed residential/commercial/industrial developments on large parcels of land in most locations within the city. The ordinance sets forth a number of purposes that were developed in the short-term program plan. These include the desirability of stimulating the development of in-town "new communities" which can provide job locations and thus work opportunities near moderate and low-income housing. The ordinance also provides "incentives" and performance standards. Among the incentives are certain cash subsidies for low-income dwelling units, density bonuses, and use preferences (*e.g.*, a regional shopping center location) for development mixes which satisfy the enumerated purposes. Performance standards identify matters of concern such as traffic flows, pedestrian ways, provision for open space and outdoor recreational opportunities, provision for utilities, methods of assuring desired rent schedules, the relocation of site residents, if any, etc. The standards, however, are not precisely stated. The ordinance requires the agency to prepare a detailed report, after prescribed hearings, justifying the approval of a development application in terms of the objectives and analysis contained in the planning documents that preceded the ordinance and in terms of the purposes and standards contained in the ordinance itself.

194. The text does not address, for instance, "advocacy planning" or such innovative ideas as those contained in Babcock & Bosselman, *Citizen Participation: A Suburban Suggestion for the Central City*, 32 LAW & CONTEMP. PROB., 220 (1967).

Could this scheme withstand attacks from neighbors who contest the validity of a permitted development? Their arguments would be phrased in terms of "in accordance with a comprehensive plan," "delegation of legislative power," the "antithesis of zoning," "improper interference with just expectations," and the like. All of these arguments are ways of stating the position that the development decision lacks a rational basis and improperly discriminates in favor of the successful applicant. But does it?

The protestors should lose if there are solid planning bases for the agency decision clearly and persuasively stated in the agency's report. The program plan upon which the ordinance is based should show how the regulatory scheme supports long-range objectives stated in the development plan and why the approach was adopted. It should also suggest the relationships between development permissible under the ordinance and conceived problems and social and economic objectives. Neither the long-range objectives nor the program plan, of course, dictates the agency's decision under the ordinance respecting a particular development application. The agency's report, however, should show how its decision supports the objectives and purposes there provided; in other words, how it sensibly fits within the generalized framework. The agency's decision, of course, gives explicit content to the generalized criteria upon which it is based. Moreover, realistically, it is the occasion when conflicting objectives contained in plans and programs are weighed and resolved in a particular context. This fact ought not to be unduly threatening if the report that is required exposes the conflicts and gives the reasons for supporting the particular resolution arrived at. In this way, the agency's decision is not only quasi-judicial, but involves interstitial policy-making which provides another basis for decisions yet to come. Good faith conformity to a system of decision-making that embodies the principles stated above would provide both a level of rationality lacking today and a basis for discriminating between different landowners on a more reasoned basis than normally exists at present. It is probable, for instance, that the forethought and analysis produced under this system would be much deeper than that which accompanies present-day "floating" and "conditional" zoning actions. Moreover, it would do this while at the same time permitting a more flexible system of regulation better designed to cope with the dynamic nature of the development process.

The example given above permitted reflection on a flexible regulatory scheme from the vantage point of protesting neighbors. We must also be concerned, perhaps more so, with potential

objections voiced by landowners subjected to innovative regulation. Suppose, for instance, that the purposes outlined in the example were to be accomplished in part by local legislative (or agency) demarcation of parcels that could only be developed as in-city "new communities" in accordance with development plans approved by the agency under the same kind of generalized criteria. I believe that the arguments in favor of the validity of such regulation would be as strong as they are respecting the more voluntary (or incentive) procedure outlined above, so long as the exactions are viewed as reasonable in accordance with the analysis here developed. Judge Hall's opinion in the *Newark Milk and Cream Co.* case, analyzed above, provides a substantial basis for this prediction.

Summary: A Planning Basis for Regulation

The foregoing suggests that a physical planning process that seeks to formulate flexible long-range objectives based upon problem-oriented analysis and stated not only in physical terms but also in relation to social and economic problems and goals provides a reasoned basis for short-term program plans and particular implementing programs. This on going process further provides the basis for illustrating the rationality of implementing programs that rely on the exercise of regulatory power and for the differing treatments afforded property owners under such exercises. In sum, from the lawyer's vantage point, the planning process provides both the ingredients for a "Brandeis brief" and the detailed arguments necessary to distinguish the treatment of what might otherwise appear to be similarly situated property owners.

CONCLUSION

We are constantly demanding higher amenity levels in physical development. This is a product of increasing population congestion coupled with higher income levels, greater knowledge, and a dawning realization that government can be made responsive to collective demands. For a variety of reasons, state and local jurisdictions will rely more heavily on regulatory rather than proprietal means for satisfying these demands. Courts have been, and should continue to be, sensitive that majoritarian desires are not realized by sacrificing fair treatment of individuals. Fairness, however, is not synonymous with greatest economic return or unfettered choice. Fairness simply demands that limitations on choice be founded on a solid base and that no person, or class of persons, be asked, arbitrarily, to shoulder substantially more of the

general burden than others. If we are to foster higher amenity levels, the dynamics of land development require flexible governmental response; the reluctance of governments, for good reasons, to become large urban landowners and developers requires that power be vested in them to require particular development in particular places. Both flexibility and particularized requirements threaten fairness. Detailed and wise comprehensive physical planning, however, can provide the basis for muting that threat.