1972

Open Space Zoning: Valid Regulation or Invalid Taking

Jon A. Kusler

Open Space Zoning: Valid Regulation or Invalid Taking†

Jon A. Kusler*

TABLE OF CONTENTS

---

† Extracted in part from the author's contribution to *Regulation of Flood Hazard Areas to Reduce Flood Losses*, Vol. 1, U.S. Water Resources Council *et al.*, 1972.

* Lecturer, University of Wisconsin Environmental Studies Department; President, J.A. Kusler Associates; Member Wisconsin Bar.

I. INTRODUCTION

An increasing awareness of environmental problems and dwindling supplies of open land have resulted in the adoption of land use regulations to preserve open space for a variety of broad public objectives in many communities throughout the nation. The regulations include flood plain zoning, wetland and conservancy zoning, lakeshore and coastal protection districts, agriculture and forestry zones, and scenic preservation zones, all of which prevent or severely restrict structural development.[1] State agencies[2] as well as local governmental units have been empowered to adopt regulations to preserve private land in an open or semi-open condition. Invariably the question arises whether these regulations validly control or unconstitutionally "take" private property without payment of just compensation.

Principally because this is a developing area of constitutional law, no clear cut judicial test exists for determining whether a

1. Over the past four years the author examined approximately 350 local ordinances establishing special flood plain, conservancy, wetland, scenic protection, and shoreland protection regulations.

2. State agencies in several states have been authorized to control flood plain use. *E.g.*, CONN. GEN. STAT. ANN. §§ 25-3 to 25-4g, 25-7b to 25-7f (1958 and Supp. 1972) (encroachment lines); HAWAII REV. STAT. § 205-2 (Supp. 1971) (conservation districts); IND. ANN. STAT. §§ 27-1115, 27-1117, 27-1119 (1970) (floodway areas); IOWA CODE ANN. § 455A.35 (Supp. 1969) (flood plain areas); KY. REV. STAT. §§ 151.220-.320 (Supp. 1968) (floodway areas); Mass. Acts and Resolves 1961, ch. 548, 554 (encroachment lines and flood plain zones); NEB. REV. STAT. §§ 2-1506.01 to .14 (1970) (commission floodways); VT. STAT. ANN. tit. 24, § 4348 (Supp. 1972) (flood plains); WASH. REV. CODE ANN. §§ 86.16.010-.900 (1962) (flood control zones); WIS. STAT. ANN. § 87.30 (1972) (flood plain areas).

State agencies have been authorized to adopt regulations for preservation of coastal wetlands in other states. *E.g.*, CONN. GEN. STAT. ANN. §§ 22-7h to 22-7o (Supp. 1972); ME. REV. STAT. ANN. tit. 12, § 4701 to 4709 (Supp. 1972); MD. ANN. CODE art. 66, §§ 718-730 (1970); MASS. ANN. LAWS ch. 130, § 105 (1972); N.H. REV. STAT. ANN. § 483-A:1 to A:5 (1968 and Supp. 1971); R.I. GEN. LAWS ANN. §§ 2-1-13 to 17 (Supp. 1972).

State agencies have been authorized to supervise and assist local adoption of shoreland regulations in Minnesota and Wisconsin. MINN. STAT. § 105.485 (1971); WIS. STAT. ANN. §§ 59.971, 144.26 (Supp. 1972).

particular regulation validly controls or invalidly "takes" private property. The Supreme Court has noted that no rigid rules are available.[3] Yet planners, lawyers, legislators, town councilmen, and administrators, who draft, adopt, and enforce regulations, lack information about both the factors which may be relevant to a reviewing court and the probability of favorable or unfavorable judicial reaction in a particular circumstance. This lack of information results in unrealistic planning, misallocation of resources, and inequity to landowners. A planner may recommend that a community preserve open spaces for flood storage, recreation areas, or wildlife preserves through a plan incorporating unconstitutionally stringent regulations. By the time the regulations are held unconstitutional, scarce public funds may have already been allocated to other purposes and be unavailable for public purchase of these areas. Landowners may be unfairly deprived of use of their lands and required to resort to expensive litigation to protect their constitutional rights.

This Article is designed to clarify factors considered by courts in determining whether particular open space regulations "take" property. It is based upon a detailed examination of cases contesting the constitutionality of open space and other land use controls.[4] Hopefully, it will aid planners, lawyers and others in

3. United States v. Caltex, Inc., 344 U.S. 149, 156 (1952).

4. The author collected at random approximately 500 cases contesting the constitutionality of zoning regulations, subdivision controls, officials maps, building setbacks, subdivision regulations and special regulations such as wetland controls, regulations for extraction of sand and gravel, public nuisance laws, and sign board controls on the ground that the regulations took private property without payment of just compensation. The survey was part of a 30-month study conducted for the United States Water Resources Council and other federal agencies. The study resulted in a two volume report, "Regulations to Reduce Flood Losses", in the process of publication by the U.S. Government Printing Office.

Although landowners contesting land use controls often argued that the regulations took private property, surprisingly few land use control regulations were invalidated explicitly on that ground. A careful review of zoning treatises, law review articles, legal encyclopedias, and case digests revealed only about 200 zoning cases having "taking" as an explicit basis for invalidation. A statistical analysis of 140 of these cases selected at random revealed the following:

1. Cases before 1950 45
   1950-1960 53
   1960-1970 42
2. Explicit "taking" language used by the court
   "Confiscation" of property 72
   "Taking" of property 47
   "Deprivation" of property 55

(Some opinions described the taking in several ways.)

3. Cases with one or more explicit grounds in addition to

drafting constitutionally sound regulations and deciding when compensation should be paid to achieve particular planning objectives.

"taking"

"Unreasonable"	100
"Arbitrary"	67
"Discriminatory"	20
"Invalid objective"	14

(Many decisions cited several reasons for invalidating in addition to "taking". For example, 40 held regulations unreasonable and arbitrary. Only 29 cited taking as a ground.)

4. Cases with some sort of cost analysis

Before 1950	19
1950-1960	22
1960-1971	27
total	68
Cases mentioning restricted and unrestricted values	31
Weighted mean reduction in values for cases mentioning restricted and unrestricted values	72%
Cases mentioning initial cost of land	10
Cases mentioning rent value	6

For a basis of comparison 110 additional cases *validating* regulations were collected which involved some sort of cost analysis.

1. Date of case

Before 1950	5
1950-1960	29
1960-1971	30

2. Cases mentioning restricted and unrestricted values — 24
3. Weighted mean reduction in value for cases mentioning restricted and unrestricted values — 60%

The cases suggest that: (1) arguments that regulations "take" property continue to be a principal constitutional attack, particularly for the more stringent controls; (2) "taking" as a basis for invalidation is usually combined with one or more additional grounds; (3) courts commonly undertake some sort of cost analysis (this is most common with Illinois and New York courts); (4) weighted mean reductions in value for cases invalidating and validating restrictions suggest that, on the average, valid regulations do not reduce values more than 60 to 70 per cent. However, the average 60-70% reduction is quite misleading since the averaged values varied greatly from the mean.

It is interesting that 233 out of 250 cases randomly selected and statistically examined as part of this study validating or invalidating regulations involved residential zoning. Sometimes the landowner was dissatisfied with the specifications for residential uses because he wished to construct a residence on a smaller lot, at a greater height, or without meeting the other requirements of the ordinance. More often he contested the residential classification because he wished to construct an industrial or commercial building on his land. A few cases contested the zoning of a residential area for commercial, industrial or open space uses.

It is also interesting that courts undertook broad discussions concerning the role of police power in regulating lands in only ten of 110 cases validating regulations, but in 24 out of the 140 invalidating the regulations.

First, open space regulations and general judicial approaches to the issue of taking are discussed. Second, open space cases and regulations are analyzed in light of specific factors and judicial "tests" for taking. Finally, tax incentives and compensation schemes which ease the burden on a regulated landowner are analyzed as methods of preserving the constitutionality of regulatory schemes.

The Article does not attempt to propose a new or exclusive test to determine whether a particular regulation takes property. Taking has and should depend upon a balancing of the societal benefit of a particular regulation against the impact on individual ownership of land. Many competing equities enter into that balancing. Most importantly, regulations can be carefully devised in light of these factors to maximize public welfare benefits while permitting some private economic uses.

II. CONSTITUTIONAL GUARANTEES

A. Open Space Regulations vs. Traditional Zoning

Open space regulations[5] are often designed to serve a wide range of land use management and resource protection objectives.[6] Whatever the specific regulatory objectives, the regulations have the common characteristic of preventing or stringently controlling structural development in particular areas. Most regulations permit open uses such as agriculture, forestry, parks, and wildlife sanctuaries.[7] Although structures accessory to these uses are sometimes permitted, permanent structures used for habitation are usually prohibited.[8]

5. The term "open space zoning" is used in this article to refer not only to traditional zoning but to a range of special wetland, flood plain, floodway, lakeshore, coastal, scenic preservation, and other protection districts as well as building setbacks, official mapping, and parkland dedication requirements in subdivision regulations. The objectives of each of these regulations differ but all are designed to prevent building construction on whole lots or portions of lots.

6. Common objectives include preservation of prime agricultural or forestry lands, preservation of inland and coastal wetlands and areas of special scientific interest, prevention of flood losses which would result from the location of damage-prone uses in coastal or inland flood areas, preservation of floodways for passage of flood flows and flood storage areas, protection of areas of special scenic, cultural, or archaeological interest, control of urban sprawl and premature subdivision, prevention of water pollution or unsanitary conditions which would result from the location of domestic sewage disposal and water supply facilities on inadequate soils, and protection of park and recreation areas.

7. *See* the ordinance provisions cited in notes 132, 141, 145 *infra*.

8. *See* the cases cited in notes 132, 141, 145 *infra*.

Zoning has traditionally separated incompatible land uses by establishing geographical areas for industrial, commercial and residential use. Today, however, zoning promotes the broad public welfare by encouraging the most appropriate land use throughout a municipality.[9] But the most appropriate use for the municipality is often not the most advantageous for the landowner. Allocation of lands for agriculture, parks, conservation or other open space uses may be consistent with broad county and state needs and yet fail to allow economically feasible private uses. It may be that an ordinance, instead of controlling the use that can be made of property, "deprives the property of any use."[10]

All land use controls reduce to some extent the number and types of land use possible, often with an accompanying reduction in land values. The courts have made it clear that regulations need not permit the most profitable use of lands.[11] However, there are significant distinctions between the more traditional residential, commercial, or industrial zoning and open space zoning classifications. First, since open space regulations usually prohibit all permanent structural uses, they reduce land values much lower than does conventional zoning.[12] Second, open space regulations are usually designed to protect scenic beauty,

9. In Robinson v. Los Angeles, 146 Cal. App. 2d 810, 814, 304 P.2d 814, 816 (1956), the court commented upon zoning as an exercise of police powers:

> The principles upholding zoning ordinances as valid exercise of the police power in furtherance of the *general welfare* are well established in this state. . . . "As our civic life has developed so has the definition of 'public welfare' until *it has been held to embrace regulations 'to promote the economic welfare, public convenience, and general prosperity of the community.'* " (emphasis added, citations omitted)

In Cobble Close Farm v. Board of Adjustment, 10 N.J. 442, 452-53, 92 A.2d 4, 9 (1952) the New Jersey Supreme Court noted that:

> Zoning regulations are not to be formulated or applied . . . with a design to encourage the most appropriate use of *plaintiff's property* but rather with reasonable consideration, among other things, to the character of the district and its peculiar suitability for particular uses, and with a view of conserving the value of property and encouraging the most appropriate use of land *throughout such municipality.*

10. Morris County Land Improvement Co. v. Parsippany-Troy Hills Tp., 40 N.J. 539, 193 A.2d 232 (1963). Plaintiff's brief at page 7 argued that "The instant regulation, rather than controlling the use that can be made of property, deprives the property of any use."

11. *See* cases cited in notes 128, 129 *infra.*

12. *See, e.g.,* Chevron Oil Company v. Beaver County, 22 Utah 2d 143, 449 P.2d 989 (1969) upholding a grazing district zoning classification for land apparently worth 20-30 dollars per acre for grazing purposes but 10,000 dollars per acre as "highway service land."

preserve wildlife, and control water pollution and watershed protection, rather than the traditional objectives of protecting public health and preventing nuisances. Far less precedent can be found for the use of police power regulations to serve these special objectives, particularly when land values are severely reduced.[13] Third, unlike other land use controls which provide reciprocal benefits,[14] open space regulations benefit the regulated landowners little, if at all. Fourth, areas placed in open space zones are often subject to steep slope limitations, erosion, high ground water, or flooding problems, all of which naturally limit profitable uses. Regulations which permit only uses with minimal return for these lands may render reclamation uneconomic.[15]

Since sources of public funding are limited, all private lands needed for open space can not be purchased. Further, many lands are in private uses which are compatible with open space objectives. For example, private agricultural and forestry lands can produce goods essential to local and regional economies and still provide recreation and wildlife areas, reduce fire hazards, and help preserve natural scenery. Where land is in productive use and the regulations result in only partial restriction of private use, regulations are clearly appropriate. But where lands are to be used for active public purposes such as parks the use of negotiated public purchase or eminent domain rather than police power regulation is clearly desirable. Where property is not actually appropriated, but where private uses are substantially restricted, with resulting severe diminution in land value, the choice between eminent domain and regulation becomes more difficult. The choice should depend not only upon constitutional limits of police powers but also upon basic notions of property,

13. *See* cases cited in notes 52, 99 *infra* and accompanying text.

14. Traditional zoning has been, to a considerable extent, aimed at the preservation of existing uses: *e.g.*, protection of residences from construction of industries. *See, e.g.*, Euclid v. Ambler Realty Co., 272 U.S. 365 (1926); Hobart v. Collier, 3 Wis. 2d 182, 87 N.W.2d 868 (1958). Ordinances do not prevent all economic structural uses on undeveloped lands, only inconsistent uses. The existing uses are protected from incompatible uses and so are the new ones. In contrast, open space regulations, which severely restrict private development to protect scenic beauty, wildlife, and shore cover, often prevent uses similar to the cottages, resorts, and residences present in an area. There is little or no reciprocal advantage to the open lands. If no economic uses are possible for high value and heavily taxed open space areas in their existing condition, an ordinance can hardly be said to preserve existing use values of the undeveloped lands. It is one matter to protect or preserve high value existing uses and another to preserve uses which have no economic value.

15. *See generally* notes 150-79 *infra* and accompanying text.

privacy, and justice.[16] Most cases to date dealing with highly restrictive open space zoning have invalidated the regulations.[17] However, there are rays of hope in some of the cases,[18] and intriguing directions suggested for valid regulations.[19]

B. CONSTITUTIONAL PROHIBITIONS

Generations of American lawyers have been raised on the exalted view of private property held by the great English jurist Blackstone.[20] While a man's land was not his "sole and despotic dominion" to use in a manner harmful to neighboring lands or society even in Blackstone's time,[21] private land remains today a valuable interest protected by both state and federal constitutions. The fifth amendment of the Constitution provides that "private property [shall not] be taken for public use, without

16. *See generally* Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165 (1967); Sax, *Takings and the Police Power*, 74 YALE L.J. 36 (1964).

17. *See, e.g.*, cases cited in notes 53, 99 *infra*.

18. *See generally* cases cited in notes 166-78 *infra*. *See also* Chevron Oil Company v. Beaver County, 22 Utah 2d 143, 449 P.2d 989 (1969) (grazing district upheld); Norbech Village Joint Venture v. Montgomery County Council, 254 Md. 59, 254 A.2d 700 (1969) (zoning plan preserving open spaces and protecting watershed areas upheld).

19. *See, e.g.*, MacGibbon v. Board of Appeals, 347 Mass. 690, 200 N.E.2d 254 (1964), 356 Mass. 635, 255 N.E.2d 347 (1970), in which the court gave qualified endorsement to wetland preservation regulations if the regulations permit some economic use of lands; Spiegle v. Beach Haven, 46 N.J. 479, 218 A.2d 129 (1966), in which the court refused to find that denial of a use in a zone of hurricane activity prevented reasonable uses; Lomarch Corp. v. Mayor of Englewood, 51 N.J. 108, 237 A.2d 881 (1968), which upheld regulations preventing development for one year in a mapped park or playground area if the municipality paid for a one year option to purchase; and Chevron Oil Company v. Beaver County, 22 Utah 2d 143, 449 P.2d 989 (1969), sustaining a grazing district classification against attack by a landowner who had purchased lands for use contrary to existing zoning classification.

20. Blackstone stated:

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

1 COOLEY'S BLACKSTONE 321 (Book II, Ch. I of W. BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND).

21. *See* J. BEUSCHER, LAND USE CONTROLS—CASES AND MATERIALS 1-8 (1966), in which statutes and other resource control legislation which preceded Blackstone are reproduced. For discussion of the evolving concept of property *see* Cribbet, *Changing Concepts in the Law of Land Use*, 50 IOWA L. REV. 245 (1965); Cross, *The Diminishing Foe*, 20 LAW & CONTEMP. PROB. 517 (1955).

just compensation,"[22] while the fourteenth amendment states that no "state [shall] deprive any person of life, liberty, or property, without due process of law."[23] The Constitution also guarantees the "right to acquire, use, and dispose" of property.[24] Similar provisions exist in state constitutions.[25]

C. JUDICIAL APPROACHES

Courts and legal commentators have for many years struggled to distinguish between the valid use of police powers and unconstitutional "takings" which require compensation.[26] The tests which have evolved are neither clear nor simple. The plaintiff has the burden of showing unconstitutionality.[27] Courts

22. U.S. CONST. amend. V.

23. *Id.*, Amend. XIV, § 1.

24. The United States Supreme Court, in Buchanan v. Warley, 245 U.S. 60, 74 (1917), used the following language to describe Constitutional protections:

> Property is more than the mere thing which a person owns. It is elementary that it includes the right to acquire, use, and dispose of it. The Constitution protects these essential attributes of property.

25. *E.g.*, in Long Island Land Research Bureau v. Young, 7 Misc. 2d 469, 471, 159 N.Y.S.2d 414, 417 (Sup. Ct. 1957) the court stated:

> Any complete sterilization of private property by legislative fiat without compensation to the owner is confiscatory and violative of article I, (§ 7, subd. [a]) of the New York State Constitution and the Fifth Amendment of the United States Constitution.

26. *See* the following articles which discuss distinctions between valid power regulations and unconstitutional "takings" of private property: Dunham, *Griggs v. Allegheny County in Perspective: Thirty Years of Supreme Court Expropriation Law*, 1962 SUP. CT. REV. 63; Havran, *Eminent Domain and the Police Power*, 5 NOTRE DAME LAW. 380 (1930); Kratovil & Harrison, *Eminent Domain—Policy and Concept*, 42 CALIF. L. REV. 596 (1954); Merrill, *Zoning—Eminent Domain Versus Police Power*, 50 N.J.L.J. 40 (1927); Michelman, *Property, Utility and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165 (1967); Netherton, *Implementation of Land Use Policy: Police Power vs. Eminent Domain*, 3 LAND & WATER L. REV. 33 (1968); Ryckman, *Eminent Domain—Conservation*, 6 NAT. RES. J. 8 (1966); Sax, *Takings and the Police Power*, 74 YALE L.J. 36 (1964); Sax, *Takings, Private Property and Public Rights*, 81 YALE L.J. 149 (1971); Comment, *Landmark Preservation Laws: Compensation for Temporary Taking*, 35 U. CHI. L. REV. 362 (1968); Note, *The Police Power, Eminent Domain, and the Preservation of Historic Property*, 63 COLUM. L. REV. 708 (1963); Comment, *Distinguishing Eminent Domain from Police Power and Tort*, 38 WASH. L. REV. 607 (1963); Comment, 11 CALIF. L. REV. 188 (1922); Comment, 35 COLUM. L. REV. 938 (1935).

27. *See, e.g.*, Spiegle v. Beach Haven, 46 N.J. 479, 218 A.2d 129 (1966). The court in that case noted that to maintain a contention that a regulation is unconstitutional as a taking of private property, a landowner must prove that an "ordinance unduly burdens his beneficial

confine their determination of the constitutionality of a restriction to the specific circumstances presented. A statute, administrative rule, or local ordinance may be unconstitutional when applied to a particular parcel of land,[28] yet constitutional other-

---

use of the land. . . . It follows that an essential element of plaintiff's proof is the existence of some present or potential beneficial use of which he has been deprived." *Id.* at 491-92, 218 A.2d at 137.

See also Vartelas v. Water Resources Commission, 146 Conn. 650, 153 A.2d 822 (1959), in which the Connecticut Supreme Court discussed the issue of taking but held that the plaintiff, under the record as presented, was not in a position to raise such a constitutional objection. The Connecticut Water Resources Commission, a state agency, had established lines along the Naugatuck River beyond which no structure or encroachment could be placed without permission of the Commission. The plaintiff challenged the constitutionality of the statute and attacked the validity of the administrative action of the Commission on the ground that failure to issue a permit for a proposed use deprived the plaintiff of all economic use of his property.

Although an exhibit showed that the plaintiff had filed an application to build a retail market fifty feet square and constructed of cinder blocks on a poured concrete cellar and foundation, such an application had not been established in the record before the court. Based on the record, the court noted that "we cannot say that the plaintiff has exhausted the remedy [of obtaining a permit] available to him. . . ." *Id.* at 656, 153 A.2d at 825. The court went on to say:

> We need not, however, rest our decision on the inadequacy of the record. The commission has, at most, refused its permission for the erection of a particular structure. Whether the plaintiff could build another type of structure—for example, one on piers or cantilevers—which would not impair the capacity of the channel in time of flood is a matter which the commission was not asked to, and did not, pass upon.

Id.

As to the refusal by the Commission to allow construction of a proposed market, the court stated:

> [T]his action was, under the circumstances of this case, justifiable. . . . It did not necessarily mean that no structure which would serve the plaintiff's purposes and permit the economic utilization of the property in his control would be allowed. Until it appears that the plaintiff has been finally deprived by the commission of the reasonable and proper use of the property, it cannot be said that there has been an unconstitutional taking of property without just compensation.

Id. at 657-58, 153 A.2d at 825-26.

Vartelas might be interpreted to stand for the proposition that until the owner of restricted lands has submitted several permit applications for potentially beneficial uses (assuming more than one such use is allowed under the terms of the state level regulations or local ordinances) and the owner has been refused permission for each of the uses, he cannot claim to have been deprived of all reasonable use of his land. How many applications he would need to submit is unclear. He might be required to submit one for each of many potentially beneficial uses, or if there was only one economic use, he might be required to submit more than one application for variations on that use.

28. *See, e.g.*, Nectow v. Cambridge, 277 U.S. 183 (1928). *But see* Morris County Land Imp. Co. v. Parsipanny-Troy Hills Tp., 40 N.J. 539,

wise. A successful attack on an ordinance will, however, discourage a regulatory body from attempting to enforce restrictions in closely analogous situations.

Landowners attacking regulations as a taking of property usually present a great mass of factual data and a variety of additional constitutional attacks including assertions of invalid regulatory objectives, unreasonableness, and discrimination.[29] Consequently trial judges face a complex decision, and yet written opinions too often reflect only a portion of the facts which may be relevant. Since courts commonly cite multiple constitutional grounds for invalidating zoning regulations without clearly distinguishing the factual basis for each, decisions are often of limited precedential value.

In balancing public rights and private property interests, courts have traditionally given great weight to regulations designed to protect public safety or prevent nuisances, while aesthetic, wildlife, and recreational values have been afforded less weight. The impact of regulations upon the usability of private property is carefully examined if regulated uses lack nuisance characteristics. Important factors in the balancing process are purchase costs, rental value, reclamation cost, whether proposed uses would constitute nuisances, whether proposed uses threaten the landowner or his guests, whether an entire property or only a portion of a property is affected by restrictions, whether the economic deprivation is short or long term, whether existing uses and "vested" rights or only proposed uses are involved, and tax structure.

Although diminution in value is an important consideration, the primary concern is whether the regulations prevent *all* economic use of the land. The value of a particular site depends in large part upon the ability of the landowner to use or dispose of the site consistent with market demands. Generally, the greater the number of potential uses for a site, the greater the probability that one or more may meet a market demand, and consequently the higher the value of land. Land use controls which restrict use options reduce market values of land by often preventing most profitable uses. However, as will be noted later, courts have focused increasingly upon the effect of land use controls in preventing *recoupment* of investment and less upon the diminution in *potential* use or development value over and

193 A.2d 232 (1963), in which an entire ordinance provision was held invalid.

29. *See* note 4 *supra*.

above such investment. The reduction in potential use of free market value of property is a reduction in the wealth or the worth of an individual and, if potential use value is recognized as a vested property right, regulations which reduce potential use value do in fact "take" property. But courts appear increasingly unwilling to require compensation for reductions in value if some economic uses (*i.e.*, uses yielding some return over recoupment of investment) remain for the land.

Although a variety of tests have been posed by courts and legal commentators for determining whether regulations validly restrict or unconstitutionally "take" property,[30] no single test appears to be wholly satisfactory. A single test would be philosophically gratifying and would ease the task of landowner, legislator, or judge in deciding what is and what is not a taking. Nevertheless, oversimplification might on the one hand unduly limit the power of government to regulate private conduct for the common good, or on the other hand too severely restrict the range of circumstances in which a private property owner would be free to use his property without fear of uncompensated government interference. Scholarly attempts to define precisely the outer constitutional limits for police power regulations in restricting private property without compensation are perhaps doomed to failure as long as the role of government in guiding conduct continues to expand and the attributes of private property are in a state of flux. A balancing test incorporating all these tests or competing equities provides both the most reliable guide to the constitutionality of an open space regulation and the most equitable solution.

30. Commentators and courts have suggested simplified tests for determining a "taking" if (1) government physically enters and uses private land (see discussion accompanying notes 100-107 *infra*); (2) government requires landowners to bestow a public benefit (see discussion accompanying note 60 *infra*); (3) government substantially diminishes land value (see discussion accompanying notes 115-22 *infra*); (4) regulations prevent all reasonable use of land (see discussion accompanying notes 123-29 *infra*); (5) public harm threatened by a use outweighs landowner detriment resulting from the regulations (see discussion accompanying notes 67-69 *infra*; (6) there is no reciprocity in benefits for regulated landowners or the regulated landowner does not benefit from the evil sought to be avoided (see note 85 *infra*); (7) government is functioning in a proprietary rather than arbital capacity in regulating private uses (see text accompanying note 92 *infra*).

It has been suggested that no taking occurs if (1) government is preventing threats to public health or safety (see discussion accompanying notes 70-79 *infra*); (2) government prevents a landowner from making a nuisance of himself (see discussion accompanying notes 83-96 *infra*).

D. MULTIPLE CONSTITUTIONAL ATTACKS

A property owner with land zoned for open space "conservancy" for wildlife protection might argue that the regulations violate due process and equal protection guarantees since similar areas are not regulated or because similar areas are purchased rather than regulated,[31] that the regulations violate due process guarantees because the allocation of private land to wildlife use for public benefit is an invalid regulatory objective,[32] that the regulations violate due process guarantees because the regulations are unreasonable in failing to promote the regulatory objective since the land cannot naturally sustain wildlife,[33] and that the regulations so severely restrict the use of the property that they constitute a taking.[34] Of the cases selected at random as part of this study, in the 140 in which regulations were invalidated on taking grounds, the courts found discrimination in 20, arbitrariness in 67, invalid regulatory objectives in 14, and unreasonableness in 100.[35]

Professor Joseph Sax's leading article on the distinctions between valid regulation and invalid taking discussed at length the rationale for constitutional prohibitions against taking without compensation,[36] concluding that fears of arbitrary governmental action and discrimination were at the source of the prohibition.[37] Discrimination is of course prohibited by the due process and equal protection guarantees of the fourteenth amendment.[38]

31. *See* cases cited in note 49 *infra* and text accompanying notes 36-49 *infra*.

32. *See* cases cited in notes 34, 49 *infra*.

33. *See generally* note 62 *infra* and accompanying text.

34. *See, e.g.*, Morris County Land Improvement Co. v. Parsippany-Troy Hills Tp., 40 N.J. 539, 193 A.2d 232 (1963).

35. *See* note 4 *supra*.

36. Sax, *Takings and the Police Power*, 74 YALE L.J. 36 (1964). *See also* Sax, *Takings, Private Property and Public Rights*, 81 YALE L.J. 149 (1971).

37. *Id.* at 57. In discussing the compensation provision of the fifth amendment of the United States Constitution, Sax noted that "the English and American authorities writing at about the time of the adoption of the fifth amendment also viewed the provision as a bulwark against unfairness, rather than against mere value diminution."

38. The fourteenth amendment of the United States Constitution states that "[n]o state shall deny to any person within its jurisdiction the equal protection of the laws." In the words of the Supreme Court, "Our whole system of law is predicated on the general, fundamental principle of equality of application of the law. 'All men are equal before the law'. . ." Truax v. Corrigan, 257 U.S. 312, 332 (1921). Subject to natural imperfections in any system of classification, persons in like circumstances must be treated alike. *E.g.*, Yick Wo v. Hopkins, 118 U.S. 356 (1886); Anderson v. Forest Park, 239 F. Supp. 576 (W.D. Okla.

Open space regulations commonly allocate private lands to uses traditionally provided by government through purchase after negotiation or exercise of the power of eminent domain. Examples of such uses are floodwater storage areas, parks, recreation areas, parking lots, and wildlife areas. A combination of severe restrictions and the allocation of private lands to uses which are customarily provided through public purchase presents particularly strong "taking" arguments.

Understandably courts have been sensitive where governmental units pay in one situation and regulate without payment in analogous situations. For example, in *Plainfield v. Middlesex Borough*[39] a New Jersey court invalidated an ordinance which zoned land exclusively for school, park, or playground use because it found the plaintiffs could not use the property themselves and could sell it only to "the very party imposing the restrictions."[40] Similarly, in *Greenhills Home Owners Corp. v. Village of Greenhills*,[41] an Ohio court invalidated an attempt to restrict land to the "greenbelt" uses of public parks and playgrounds, public recreation buildings, gardens, farms, nurseries, public utilities, and bus passenger stations. Several courts have invalidated attempts to zone private land for parking lot uses.[42] In the most recent of the cases, *Sanderson v. City of Willmar*,[43] the Minnesota Supreme Court in 1968 invalidated an ordinance which rezoned property from business and commercial use to automobile parking and required that the property owners extend first right of purchase to the city. The restriction was invalidated since the "city can, of course, acquire the property for public parking by condemnation proceedings."[44] Several cases have also invalidated on similar grounds attempts to hold lands open to preserve flood storage.[45]

1965): Executive Television Corp. v. Zoning Bd. of App., 138 Conn. 452, 85 A.2d 904 (1952); Ronda Realty Corp. v. Lawton, 414 Ill. 313, 111 N.E.2d 310 (1953).

39. 69 N.J. Super. 136, 173 A.2d 785 (L. Div. 1961).

40. *Id.* at 142, 173 A.2d at 788.

41. 202 N.E.2d 192 (Ohio Ct. App. 1964), *rev'd*, 5 Ohio St. 2d 207, 215 N.E.2d 403 (1966), *cert. denied*, 385 U.S. 836 (1967).

42. *See* Sanderson v. City of Willmar, 282 Minn. 1, 162 N.W.2d 494 (1968); Vernon Park Realty v. Mount Vernon, 307 N.Y. 493, 121 N.E.2d 517 (1954). *Cf.* New Orleans v. Leeco, Inc., 226 La. 335, 76 So. 2d 387 (1954) (compelling parking lot for landowner's own activities). *See* Dunham, *A Legal and Economic Basis for City Planning*, 58 COLUM. L. REV. 650, 666-67 & nn. 34-45 (1958).

43. 282 Minn. 1, 162 N.W.2d 494 (1968).

44. *Id.* at 7, 162 N.W.2d at 498.

45. The Kentucky Court of Appeals in Hager v. Louisville and Jef-

The question of equal protection will continue to grow in importance in judicial attempts to distinguish valid regulation from invalid taking. In many states, both regulations and scenic or conservation easements are being used to preserve scenic and

---

ferson County Planning & Zoning Comm'n, 261 S.W.2d 610 (Ky. Ct. App. 1953), held that the Planning Commission's zoning resolution, which would ultimately have the effect of incorporating private property into ponding areas in accordance with a flood control plan for the protection of the city and county, was unconstitutional because it took property for public use without compensation.

In what may be considered a leading case dealing with zoning to preserve open space, wildlife areas, and flood storage, the New Jersey Supreme Court in Morris County Land Improvement Co. v. Parsippany-Troy Hills Tp., 40 N.J. 539, 193 A.2d 232 (1963), invalidated a "conservancy" zone which prohibited practically all development, including filling, in part to preserve a naturally marshy area as a water detention basin in aid of flood control. The court stated:

> It is equally obvious from the proofs, and legally of the highest significance, that the main purpose of enacting regulations with the practical effect of *retaining the meadows in their natural state was for a public benefit.* This benefit is twofold . . .: *first, use of the area as a water detention basin in aid of flood control in the lower reaches of the Passaic Valley* . . . and second, *preservation of the land as open space for the benefits which would accrue to the local public from an undeveloped use.* . . .

Id. at 553, 193 A.2d at 240 (emphasis added).

> The court noted and apparently accepted testimony that *the ordinance provisions were soundly conceived from the scientific standpoint to accomplish this flood alleviation purpose.* He [Chief Engineer and Acting Director of the Division of Water Policy and Supply of the State Department of Conservation and Economic Development] said that *artificial filling of natural retention storage areas automatically increases the magnitude and volume of flood downstream and that limiting excavation to the area would result in retention of the capacity for natural storage.*

Id. (emphasis added).

Turning specifically to the taking question, the court, in a sweeping statement, held:

> While the issue of regulation as against *taking is always a 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 such factors cannot cure basic unconstitutionality.

Id. at 555, 193 A.2d at 241 (emphasis added).

However, the court made it clear that the case did not remove flood hazard regulations on the lower reaches of a river and were not encroachment regulations:

> There is no substantial evidence in this case that the matter of intra-municipal flood control had any bearing on the adoption of the . . . regulations. It does not appear that the rise in the water level in the meadows in times of heavy rainfall affected any other area in the township. The emphasis was on permitting that rise within the area as a detention basin for the benefit of lower valley sections rather than on any effort

wildlife areas.[46] For example, the Wisconsin Highway Department had by July 1967 acquired 601 parcels of scenic easements covering 6,223 acres of land along the Great River Road which parallels the Mississippi River.[47] The easements restrict lands to residential, agricultural, or forestry use, prohibit new signs and require the removal of existing ones, limit the density of development, control tree cutting, and proscribe public entry onto lands. The degree of restriction is no greater than that of some zoning regulations. These essentially negative easements designed to protect the natural view from the highway were held in *Kama-*

---

to prevent or channel it. *This case, therefore, does not involve the matter of police power regulation of the use of land in a flood plain on the lower reaches of a river by zoning, building restrictions, channel encroachment lines or otherwise and nothing said in this opinion is intended to pass upon the validity of any such regulations.*

Id. at 556, 193 A.2d at 242, n.3 (emphasis added).

Consistent with *Parsippany* is Baker v. Planning Board, 353 Mass. 141, 228 N.E.2d 831 (1967), in which the Supreme Judicial Court of Massachusetts held that a town could not disapprove a subdivision plan on the ground that it would be in the best interest of the town to maintain the private land as a water storage area. A drainage ditch crossed the land in the proposed subdivision. After heavy rainstorms and thaws the land became flooded on both sides of the ditch and the land consequently served as "a flood control or 'retention area' for the town, to the extent of 16,200 cubic feet of water . . . ." *Id.* at 143, 228 N.E.2d at 832.

The planning board had refused the subdivision plan for reasons relating to the sewerage and water drainage. The sewerage system proposed in the plan would have required the town to construct a lift or pumping station, and the proposed water drainage system, as the court noted, "although adequate for the subdivision, would deprive the town of the retention area on Baker's land and, in consequence, would overtax the downstream draining system outside the subdivision." *Id.*, 228 N.E.2d at 833. The board disapproved on the additional ground that approval would not be in the best interest of the town, since it would negate the purposes of MASS. ANN. LAWS, ch. 41, § 81(M) (Supp. 1971) (Subdivision Control Law) with special reference to "securing safety in the cases of . . . flood, . . . securing adequate provision for water, sewerage, drainage and other requirements where necessary in a subdivision." *Id.*

The *Baker* court held that it was beyond the planning board's authority to disapprove the plan for such a reason and noted:

> Obviously a planning board may not exercise its authority to disapprove a plan so that a town may continue to use the owner's land as a water storage area and thereby deprive the owner of reasonable use of it.

353 Mass. at 145, 228 N.E.2d at 833.

46. *See* articles cited in note 280 *infra*.

47. DEPARTMENT OF TRANSPORTATION, STATE OF WISCONSIN, Special Report No. 5, A MARKET STUDY OF PROPERTIES COVERED BY SCENIC EASEMENTS ALONG THE GREAT RIVER ROAD IN VERNON AND PIERCE COUNTIES 1 (October, 1967).

rowski v. State[48] to involve sufficient public use of lands to justify exercise of eminent domain powers. In light of these "scenic easements" which compensate for control of development, use of uncompensated regulation in similar circumstances to protect scenery is discriminatory and subject to attack as an unconstitutional "taking."[49]

Although the Supreme Court has made it clear that the role of the legislature is broad in defining the scope of police power objectives,[50] regulations are occasionally invalidated as not serving valid objectives.[51] Until recently land use controls directed primarily at aesthetic protection have commonly been invalidated.[52] Many open space zoning cases in which courts have detected improper objectives involve attempts to allocate lands for public uses or to uses which are usually provided through public purchase such as parking lots and flood storage and wildlife areas.[53] Attempts to zone to reduce property values for future condemnation have also been held invalid.[54] But official mapping[55] which prohibits structures in the beds of future streets in order to reduce the cost of future land acquisition has been upheld.[56] The willingness of courts to uphold official mapping of

48. 31 Wis. 2d 256, 142 N.W.2d 793 (1966).

49. In State v. Becker, 215 Wis. 564, 255 N.W. 144 (1934), a somewhat analogous case, the Wisconsin Supreme Court held that special hunting restrictions imposed on private property to create a game refuge was a "taking" of private property since establishment of a wildlife territory was putting land to a public use. Game refuges were ordinarily created through the exercise of eminent domain powers. *See also* State v. Herwig, 17 Wis. 2d 442, 117 N.W.2d 335 (1962).

50. *E.g.*, Berman v. Parker, 348 U.S. 26, 32 (1954).

51. *See* cases cited in notes 52, 54, 99 *infra*.

52. *See, e.g.*, Barney & Carey Co. v. Milton, 324 Mass. 440, 87 N.E.2d 9 (1949); Cooper Lumber Co. v. Dammers, 2 N.J. Misc. 289, 125 A. 325 (Sup. Ct. 1924).

53. *See, e.g.*, Sanderson v. City of Willmar, 282 Minn. 1, 162 N.W.2d 494 (1968) (parking lot purposes); Morris County Land Impr. Co. v. Parsippany-Troy Hills Tp., 40 N.J. 539, 193 A.2d 232 (1963) (flood storage, open space, wildlife purposes); City of Plainfield v. Borough of Middlesex, 69 N.J. Super. 136, 173 A.2d 785 (L. Div. 1961) (school, park, or playground use); Vernon Park Realty v. Mount Vernon, 307 N.Y. 493, 121 N.E.2d 517 (1954) (parking lot purposes); Greenhills Home Owners Corp. v. Village of Greenhills, 202 N.E.2d 192 (Ohio Ct. App. 1964), *rev'd*, 5 Ohio St. 2d 207, 215 N.E.2d 403 (1965), *cert. denied*, 385 U.S. 836 (1967) (greenbelt and park purposes).

54. *See* 1 R. ANDERSON, AMERICAN LAW OF ZONING, § 7.32 at 556 *et seq.* (1968) [hereinafter cited as ANDERSON]. *See* Long v. Highland Park, 329 Mich. 146, 45 N.W.2d 10 (1950) and cases cited in notes 199, 262 *infra*.

55. *See generally* Kueirck & Beuscher, *Wisconsin's Official Map Law*, 1957 WIS. L. REV. 176 and note 197 *infra*.

56. *See, e.g.*, cases cited in note 198 *infra*.

roads but not zoning to achieve similar open space objectives may be explained in part by the variance provisions of official mapping laws which permit landowners to petition boards of adjustment for building permits if reasonable rates of return cannot be earned on lands absent construction.[57] Unquestionably the fact that official mapping of roads often precludes building construction only on a narrow portion of each lot while zoning of broader areas is likely to prevent construction on whole properties is important.[58]

Commentators have suggested that valid regulations can be distinguished from invalid regulations through a functional description of the benefit conferred by the regulations.[59] It has been argued that a taking occurs when a public benefit is provided at private expense, but not when the public requires only that a private citizen "stop making a nuisance of himself."[60] Yet this test is difficult to apply to specific facts. Consider attempts to stringently regulate the development of lands which serve as natural flood storage areas.[61] The use of the police power here is in a "twilight" zone where the regulations can be considered as either preventing the landowner from harming the public or requiring the landowner to bestow an uncompensated benefit upon the public. While the filling of natural storage areas may increase flood heights on other lands and therefore result in certain nuisance-like effects, regulations which prevent such filling require one owner to maintain his land as a storage area to benefit other owners and the public. Thus far attempts to prohibit land development to preserve storage areas have been invalidated. A somewhat analogous situation is the regulation of lands to preserve scenic beauty. Although development of lands may destroy the view from the public waters, neighboring lands, or a nearby highway, regulation precluding such development requires the landowner to bestow an uncompensated benefit upon the public and his neighbors.

In drafting local open space regulations planners and attorneys would do well to avoid regulation or allocation of lands for public uses such as public parks or express zoning to hold land

57. *See* note 229 *infra.*

58. *See generally* discussion accompanying notes 193-224 *infra.*

59. *See* Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law,* 80 HARV. L. REV. 1165, 1196 (1967). *See also* Dunham, *A Legal and Economic Basis for City Planning,* 58 COLUM. L. REV. 650, 663-69 (1958).

60. Michelman, *supra* note 59, at 1196.

61. *See* cases cited in note 45 *supra.*

open for future condemnation. But in view of the Supreme Court's recognition of broad legislative discretion in the selection of regulatory objectives, it seems likely that state courts will increasingly examine regulations not so much in terms of the validity of the objectives as in terms of whether the regulatory means chosen to implement the objectives are discriminatory, unreasonable, or unduly affect the usability of lands.

Regulations are most commonly attacked on the ground that they are "unreasonable." Although this term is often used to assert that the regulations contravene requirements of due process, equal protection, or "taking without compensation," it most properly connotes the argument that regulations (the means) do not promote the regulatory objectives (the ends).[62]

---

62. It is well established by the courts that a regulation will be declared arbitrary and unconstitutional unless the regulation (the means) is reasonably related to the accomplishment of the regulatory objectives (the ends). A clear statement of this requirement may be found in Welch v. Swasey, 214 U.S. 91, 105 (1909), in which the United States Supreme Court stated the applicable principles:

> The statutes have been passed under the exercise of so-called police power, and *they must have some fair tendency to accomplish, or aid in the accomplishment of some purpose,* for which the legislature may use the power. If the statutes are not of that kind, then their passage cannot be justified under that power. These principles have been so frequently decided as not to require the citation of many authorities. *If the means employed, pursuant to the statute, have no real, substantial relation to a public object which government can accomplish; if the statutes are arbitrary and unreasonable and beyond the necessities of the case; the courts will declare their invalidity.* (emphasis added)

Generally the role of the courts is small in determining the reasonableness of regulations. *See, e.g.,* Stephenson v. Bruford, 287 U.S. 251, 272 (1932). However, successful attacks on zoning ordinances are commonly based upon the claim that regulations are not reasonably related to the regulatory objectives. *See, e.g.,* Tews v. Woolhiser, 352 Ill. 212, 185 N.E. 827 (1933); Pleasant Ridge v. Cooper, 267 Mich. 603, 255 N.W. 371 (1934). The Supreme Court in Nectow v. Cambridge, 277 U.S. 183 (1928), the last major zoning decision of that court, held unconstitutional a residential zoning classification as applied to a particular parcel of land. The Court noted that the land was not suited for residences and was of "comparatively little value for the limited uses permitted by the ordinance." The Court further stated:

> The governmental power to interfere by zoning regulations with the general rights of the land owner by restricting the character of his use, is not unlimited, and other questions aside, such restriction cannot be imposed if it does not bear a substantial relation to the public health, safety, morals, or general welfare.

Id. at 188. The Court found

> [t]hat the invasion of the property . . . was serious and highly injurious . . . and, since a necessary basis for the support of that invasion is wanting, the action of the zoning authorities

For example, in *La Salle National Bank v. Highland Park*,[63] the Illinois Supreme Court rejected arguments that three acre minimum lot sizes were needed to preserve the amount of earth available to absorb flood waters and prevent increases in the rate of runoff. Although small lot sizes would increase runoff to some degree in normal rainfall, they would be of minor significance when the land was "drenched by flood producing downpours and, moreover, plaintiff's land would contribute but an insignificant amount of the total waters in the ditch, no matter which zoning prevails."[64] The court held that the requirement was not necessary to lessen or avoid flood conditions and that "its application to plaintiff's land is arbitrary and confiscatory without substantial public benefit or purpose."[65] The degree of restriction on the use of land and diminution in property values will determine the scope of examination. The Connecticut Supreme Court has noted that where property value is seriously diminished by a zoning regulation there is a judicial obligation "carefully to consider . . . whether the regulation does in fact tend to serve the public welfare and the recognized purposes of zoning."[66]

III. FACTORS RELEVANT TO THE QUESTION OF TAKING

The typical judicial test balances the harm posed to society by uncontrolled land use against the impact of the regulations upon the usability of the parcel:[67] "If the gain to the public by the ordinance is small when compared with the hardship imposed upon the individual property owner by the restrictions of the ordinance, no valid basis for the exercise of the police power exists."[68] Those factors relevant to the question of whether the

---

comes within the ban of the Fourteenth Amendment and cannot be sustained.

Id. at 188-89.

63. 27 Ill. 2d 350, 189 N.E.2d 302 (1963).

64. *Id.* at 354, 189 N.E.2d at 305.

65. *Id.*

66. Strain v. Mims, 123 Conn. 275, 286, 193 A. 754, 759 (1937).

67. 1 ANDERSON, § 2.19, at 80-81 states:

> Many of the constitutional cases reflect an earnest judicial attempt to weigh and balance the private and public interests which are involved in every zoning case. The courts appear to balance the public benefit which the regulation is intended to confer, against the economic impact of the regulation upon the land of the complaining litigant. . . . This accommodation of public and private interests is implicit in many of the decisions, but some courts have articulated it.

68. Town of Caledonia v. Racine Limestone, 266 Wis. 475, 479, 63

particular zoning classification is reasonably related to the accomplishment of community objectives are also relevant to the question of whether the particular regulation is so restrictive that a "taking" or "confiscation" may be said to have occurred.[69]

A. PUBLIC HARM

1. *Protection of Public Safety*

In the balancing of public needs and private detriment, courts have not given equal weight to accomplishment of all regulatory objectives. Courts have sanctioned the use of the police power to prohibit the use of private property or the destruction of it without compensation where that use threatens public health, safety, or morals. Regulations preserving public safety are afforded a special presumption of constitutionality.[70] Since protection of the public health and safety, which is the underlying objective of most criminal, traffic, and food and drug laws, is considered a primary and essential function of government, regulations which are reasonably related to that objective are almost invariably sustained. In fact, it has long been established that, subject to later judicial review, the state may summarily seize and destroy private property which may be distributed to the injury of the public or for illegal purposes.[71] Examples include diseased cattle, contaminated food, obscene publications, illicit intoxicants, narcotics, prohibited weapons,

---

N.W.2d 697, 699 (1954). *See also* Miller Bros. Lumber Co. v. Chicago, 414 Ill. 162, 111 N.E.2d 149 (1953).

69. In La Salle Nat'l Bank v. Cook County, 60 Ill. App. 2d 39, 51, 208 N.E.2d 430, 436 (1965), the court enumerated some of the factors which are to be taken into account:

(1) existing uses and zoning of nearby property;
(2) *the extent to which property values are diminished by the particular zoning restrictions;*
(3) the extent to which the restriction of property values of the plaintiffs promotes the health, safety, morals or general welfare of the public;
(4) *the relative gain to the public, as compared to the hardship imposed upon the individual property owner;*
(5) the suitability of the subject property for the zoned purposes; and
(6) the length of time the property has been vacant as zoned, considered in the context of land development in the area in the vicinity of the property. (emphasis added)

These factors are cited in 1 ANDERSON, § 2.19, at 83.

70. *See generally* Cleaners Guild v. Chicago, 312 Ill. App. 102, 37 N.E.2d 857 (1941).

71. *See* State Plant Bd. v. Smith, 110 So. 2d 401 (Fla. Sup. Ct. 1959).

gambling devices, "and other property that menaces the public health, safety or morals."[72] Cases sustain police power regulations ordering the uncompensated destruction of diseased trees,[73] animals,[74] and crops.[75] The Supreme Court, in *Denver & Rio Grande R.R. Co. v. City of Denver*,[76] upheld the constitutionality of an ordinance which required the removal of railroad track from a busy intersection of two streets in Denver. Although the railroad had a contract to construct the tracks and the right granted was a vested property right,[77] the Court nonetheless held the ordinance constitutional because the power to adopt and enforce regulations was reasonably necessary to protect public safety,[78] and " 'is inalienable even by express grant' and its legitimate exertion contravenes neither the contract clause of the Constitution nor the due process clause of the Fourteenth Amendment."[79]

Specific provisions in open space regulations which prohibit or severely restrict uses posing threats to public safety are likely to be upheld. These may include regulations of industrial uses which cause air or water pollution; of domestic waste disposal systems which may cause water pollution; of dikes, dams, or levees which may burst in time of flood; and of the storage of explosive materials in flood plain areas. However, open space regulations which prohibit or regulate uses which do not pose substantial threats to public safety, such as residential use, will encounter greater judicial resistance.

2. *Prevention of Nuisances*

The prohibition or destruction of nuisances or nuisance-like uses which threaten the health, safety, or welfare of a broad segment of society, as well as those which may have substantial detrimental effects on a neighborhood or neighboring lands have generally been sustained.

72. *Id.* at 408.

73. *See, e.g.*, State v. Main, 69 Conn. 123, 37 A. 80 (1897); State Plant Bd. v. Smith, 110 So. 2d 401 (Fla. Sup. Ct. 1959); Balch v. Glenn, 85 Kan. 735, 119 P. 67 (1911); Louisiana State Bd. of A. & I. v. Tanzmann, 140 La. 756, 73 So. 854 (1917).

74. *See, e.g.*, Jones v. State, 240 Ind. 230, 163 N.E.2d 605 (1960), and cases cited therein.

75. *See, e.g.*, Van Gunten v. Worthley, 25 Ohio App. 496, 159 N.E. 326 (1927); Wallace v. Feehan, 206 Ind. 522, 190 N.E. 438 (1934); Wallace v. Dohner, 89 Ind. App. 416, 165 N.E. 552 (1929).

76. 250 U.S. 241 (1919).

77. *Id.* at 244.

78. *Id.*

79. *Id.*

In a 1916 case, *Northeast Laundry v. City of Des Moines*,[80] the Supreme Court sustained an ordinance which declared the emission of dense smoke in sections of a city to be a nuisance and prohibited uses which might cause it. While emissions of smoke may affect large areas, other cases have sustained prohibition of uses with less widespread effects. In 1915 in *Hadacheck v. Los Angeles*,[81] the Supreme Court sustained a city ordinance which proscribed the use of brick kilns in a residential neighborhood, thereby reducing the value of a tract on which the kilns stood from $800,000 to $60,000. There was evidence that emissions from petitioner's brickmaking factory had caused sickness to those living in the surrounding area.[82] In another 1915 case, *Reinman v. Little Rock*,[83] the Supreme Court sustained an ordinance which prohibited livery stables in shopping areas although the livery stable was not a "nuisance *per se*" at common law; and in a 1919 case, *Pierce Oil Corp. v. City of New York*,[84] the Supreme Court sustained an ordinance which prohibited the storing of oil and gasoline within 300 feet of a dwelling.

It is interesting that in each of these four early cases involving a laundry, a brickyard, a livery stable, and oil tanks, the uses had been lawful when the affected buildings were constructed. Changed conditions resulting from growth of the cities placed the uses in conflict with new neighbors. In sustaining the use of police powers to minimize conflicts between neighboring uses of property, the Court recognized an extension of the common law doctrine of nuisance.

Prohibitions against nuisance-like uses place a financial burden on the owner of the prohibited brickyard, livery stable, or oil tanks. But at least in theory he is able to use his land for a variety of purposes not inconsistent with the public welfare or neighboring uses. The regulations will impose a degree of restriction on his lands no greater than that on similarly situated surrounding lands which are occupied by the incompatible uses. The landowner is denied the use of his land for the nuisance-like use, but he may retain a large number of practical uses or uses like those on nearby properties. In addition, the landowner enjoys a reciprocal benefit from the restrictions which prohibit others from creating nuisances. In contrast, open space zones are often designed to preserve scenic beauty or a wildlife area for the

80. 239 U.S. 486 (1916).
81. 239 U.S. 394 (1915).
82. *Id.* at 408.
83. 237 U.S. 171 (1915).
84. 248 U.S. 498 (1919).

benefit of neighboring developed private or public lands. This results in more stringent restriction of the affected parcels than neighboring lands. Further, it is questionable whether the severely regulated landowner desires a reciprocal benefit from the restrictions, since a landowner is hardly benefited by restrictions if he is prevented from making any economic use of his land. Restrictions have occasionally been invalidated where there was no reciprocity in the benefits and burdens of the regulations.[85]

85. In evaluating the reasonableness of land use regulations, courts occasionally suggest that there must be reciprocity of benefits and burdens among landowners. This may be true even though one of the landowners is a governmental unit, since regulations cannot restrict one class to benefit another. In Dooley v. Town Plan & Zoning Comm'n, 151 Conn. 304, 197 A.2d 770 (1964), the Connecticut Supreme Court struck down as confiscatory a flood plain zoning ordinance severely limiting land uses, apparently in order to preserve the flood plain in a natural state. Although there was no evidence to suggest that the land was regulated to confer a positive benefit on the community, the court stressed the lack of benefit to the landowner of such a classification. The court proposed the following test:

> Where most of the value of a person's property has to be sacrificed so that 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. (emphasis supplied)

Id. at 312, 197 A.2d at 774.

The reciprocity of benefits approach is taken in several early Wisconsin cases. In Piper v. Ekern, 180 Wis. 586, 194 N.W. 159 (1923), the Wisconsin court invalidated a statute which prohibited buildings exceeding 90 feet in height around Madison's Capital Square. The plaintiffs wished to construct a hotel in excess of the permissible height and claimed a loss on the value of the real estate in the sum of $50,000 and an annual loss in the income of $35,000. Although the court cited cases upholding the general principle of limiting height of buildings, it explained those cases in the following manner:

> Such regulation affecting the owners of property in a certain area, to a large extent is founded upon the mutual and reciprocal protection which owners of property derive from a general law, and while in a sense a material diminution in value may result, *nevertheless a reciprocal advantage accrues* which in many instances it is impossible to estimate from a financial standpoint, but which nevertheless constitutes a thing of value and a compensating factor for the interference by the public with property rights.

180 Wis. at 591, 194 N.W. at 161 (emphasis added).

The court found that the act was not designed to promote the public welfare of the property owners abutting upon the Capital Square, but for the protection of state property from fire. The court stated that the act was "designed solely for the protection of the Capitol building," and not to achieve reciprocal benefit and protection of owners of buildings within the area. *Id.* at 599, 194 N.W. at 164.

A later statute (Wis. Laws 1923, ch. 424) which limited the height of all buildings in first class cities to 125 feet and to 100 feet in other cities was upheld by the Wisconsin court in the *Building Height Cases,*

Moreover, unsightliness does not constitute a nuisance. Pro-

181 Wis. 519, 195 N.W. 544 (1923), without discussion of the reciprocity problem. The court in a later case, State *ex rel.* Ekern v. Milwaukee, 190 Wis. 633, 209 N.W. 860 (1926), held that limitation of the maximum height of buildings in a city was a local affair within the legislative power granted to cities by sec. 3, art. XI, of the Wisconsin Constitution, as amended. While the rigid "reciprocity" test raised by the court in *Piper* would not likely be used today, a similar focus upon benefits and burdens seems likely for regulations which severely limit land uses such as flood plain zones, open space zones, scenic protection zones, and the like.

Several cases have considered arguments that regulations restricting development benefit the private landowners by providing a more pleasing environment. In Simon v. Town of Needham, 311 Mass. 560, 42 N.E.2d 516 (1942), the Supreme Judicial Court of Massachusetts upheld a zoning ordinance which required one acre minimum lot sizes in a residential suburb of Boston. The countryside consisted of undeveloped woodland, tillage, swampland and lakes and streams. The court pointed out the advantages of large lot sizes to both the general public and the regulated landowners:

> The advantages enjoyed by those living in one family dwellings located upon an acre lot might be thought to exceed those possessed by persons living upon a lot of ten thousand square feet. More freedom from noise and traffic might result. The danger from fire from outside sources might be reduced. A better opportunity for rest and relaxation might be afforded. Greater facilities for children to play on the premises and not in the streets would be available. There may perhaps be more inducement for one to attempt something in the way of the cultivation of flowers, shrubs and vegetables. There may be other advantages accruing to the occupants of the larger lots. *The benefits derived by those living in such a neighborhood must be considered with the benefit that would accrue to the public generally who resided in Needham by the presence of such a neighborhood.*

Id. at 563-64, 42 N.E.2d at 518 (emphasis added).

In a second case, Aronson v. Town of Sharon, 346 Mass. 598, 195 N.E.2d 341 (1964), the Massachusetts court cited and distinguished *Needham.* The case involved a zoning ordinance classifying an area for single family use on lots containing 100,000 square feet and having a width of not less than 200 feet. The town of Sharon was a rural area with a large lake near the center. The land to which the disputed residential district applied consisted of a mixture of loam, glacial hills and swampy areas. Since the area was somewhat separated from the rest of the town by lack of adequate transportation facilities, the town considered the situation "as creating an opportunity to cause the land in this area to be kept open and used for conservation purposes." *Id.* at 601, 195 N.E.2d at 343. A proposed plan outlined a two-fold program maintaining the land at as low residential density as possible, and establishing a positive program of land acquisition. The court quoted extensively from *Needham* but distinguished the case and rejected the town's arguments that:

> The physical characteristics of the district, considered in conjunction with those of the town, a town of residences, large camps, a retreat house, fish and game clubs, a wildlife sanctuary, and large recreation and conservation areas, indicate that all that has made Sharon beautiful . . . will best be maintained by the lot size requirements of its zoning by-law. The zoning here in question will encourage leaving land in the natural

hibited nuisance[86] uses often interfere in a physical sense with

> state, which will provide the inhabitants, and those who come to Sharon, with a community which has the living and recreational amenities that are fundamental to mental and physical health.

Id. at 603-04, 195 N.E.2d at 345.

The language of the court in distinguishing *Needham* is particularly interesting since it might indicate the approach of a court considering shoreland regulations which restricted private property to benefit both the private land and the general welfare. The court held that a point of diminishing return to the landowner is reached with regulations which restrict private land uses to preserve amenity:

> In *Simon v. Needham* . . . are enumerated certain possible advantages of living upon an acre lot as compared with one of 10,000 square feet. While initially an increase in lot size might have the effects there noted, the law of diminishing returns will set in at some point. As applied to the petitioner's property, the attainment of such advantages does not reasonably require lots of 100,000 square feet. Nor would they be attained by keeping the rural district undeveloped, even though this might contribute to the welfare of each inhabitant. *Granting the value of recreational areas to the community as a whole, the burden of providing them should not be borne by the individual property owner unless he is compensated.*

Id. at 604, 195 N.E.2d at 345 (emphasis added, citation omitted). Similar arguments might be made that the open space restrictions control development not to bestow reciprocal benefits upon land-owners, but to bestow a benefit upon the public.

While a showing of reciprocity of benefits may not now be essential to establish validity of restrictions, such reciprocity will add weight to arguments for sustaining severe restrictions. The owner of open space property may, if he is able to make some practical use of his land, be benefited in a variety of ways by high quality adjacent waters and lands. The waters may be scenic and can be used for swimming, boating, and fishing. Beautiful and spacious adjacent shoreland property maintains the attractiveness and value of all property in the area.

The basic concept of nuisance law—that a landowner should not by his own land use impose burdens upon adjacent lands or the community—has been expanded and applied in new contexts. For example, courts evaluating the validity of conditions imposed upon subdivision plot approval such as construction of roads, installation of sewer and water, or provision of parks have generally supported subdivision requirements only if they are designed to reduce burdens specifically attributable to the subdivision. The Illinois Supreme Court in Pioneer Trust & Sav. Bk. v. Village of Mt. Prospect, 22 Ill. 2d 375, 380, 176 N.E.2d 799, 802 (1961), stated:

> If the requirement is within the statutory grant of power to the municipality and if the burden cast upon the subdivider is specifically and uniquely attributable to his activity, then the requirement is permissible; if not, it is forbidden and amounts to a confiscation of private property in contravention of the constitutional prohibitions rather than reasonable regulation under the police power.

See Jordan v. Menominee Falls, 28 Wis. 2d 608, 617, 137 N.W.2d 442, 447 (1965), which quoted this language with approval. *See also* Johnson, *Constitutionality of Subdivision Control Exactions: The Quest for a Rationale*, 52 CORNELL L. Q. 871 (1967).

86. Whether a use was or was not a common law nuisance de-

public health or nearby properties by the creation of noise, dust, odor, glare, heat, and so forth. Courts have often sanctioned regulations designed to prevent these common-law nuisances. As stated by the California Supreme Court: "The primary purpose of comprehensive zoning is to protect others, and the general public, from uses of property which will, if permitted, prove injurious to them."[87] In *Euclid v. Ambler Realty Co.*,[88] the landmark case in which the Supreme Court approved comprehensive zoning, the Court relied on the common law of nuisance as an analogy for sustaining zoning.[89] However, mere unsightliness of premises was not considered a nuisance at common law even though unsightliness might annoy a neighboring landowner and detract from the value of his lands.[90] It is to be noted that only

---

pended upon the (1) sort of interferences, W. PROSSER, LAW OF TORTS 583-86 (4th ed. 1971), (2) whether the interference resulted in substantial damage, *id.* at 577-80, (3) whether the interference and damages were reasonable, considering the uses of surrounding land, *id.* at 580-82, and (4) other circumstances. Industries which interfered with surrounding lands by unpleasant odors, smoke or dust or gas, loud noises, or high temperatures were often considered nuisances. *Id.* at 584. *See generally* cases cited therein. So were cases that resulted in physical damage to nearby lands, such as vibration from blasting, destruction of crops, flooding, or pollution of a stream. *See, e.g.*, Johnson v. Fairmont, 188 Minn. 451, 247 N.W. 572 (1933).

87. Consolidated Rock Products Co. v. Los Angeles, 57 Cal. 2d 515, 524, 370 P.2d 342, 348, 20 Cal. Rptr. 638, 644 (1962).

88. 272 U.S. 365 (1926).

89. *Id.* at 387-88. The Court stated:

> *In solving doubts* [*as to whether a zoning ordinance would be valid in a particular circumstance*], *the maxim sic utere tuo ut alienum non laedus* [*use your own property in such a manner as not to injure that of another*], *which lies at the foundation of so much of the common law of nuisances, ordinarily will furnish a fairly helpful clew.* And the law of nuisances, likewise, may be consulted, not for the purpose of controlling, but for the helpful aid of its analogies in the process of ascertaining the scope of, the power. Thus the question whether the power exists to forbid the erection of a building of a particular kind or for a particular use, like the question whether a particular thing is a nuisance, is to be determined, not by an abstract consideration of the building or of the thing considered apart, but by considering it in connection with the circumstances and the locality. . . . A nuisance may be merely *a right thing in the wrong place*, —like a pig in the parlor instead of the barnyard. If the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control. (emphasis added and citation omitted)

90. *See, e.g.*, Metzger v. Hochrein, 107 Wis. 267, 83 N.W. 308 (1900); Livingston v. Davis, 243 Iowa 21, 50 N.W.2d 592 (1951). In many instances the common law recognized as actionable nuisances only physical interferences with the use of adjacent lands. In Janesville v. Carpenter, 77 Wis. 288, 297-98, 46 N.W. 128, 131 (1890) the court noted:

> [T]here must be *material* annoyance, inconvenience, discomfort, or hurt, and the violation of another's rights in an *essential*

a limited number of the usual land uses impose such direct and substantial harm on neighboring lands or the community as to constitute public or private nuisances. The long lines of private and public nuisance cases sustaining regulation of activities which cause substantial third party effects form a direct analogy for regulating these "harmful" activities but not others. Rarely would all structural uses which open space zoning proscribes be nuisance-like. Residences located outside of flood hazard areas and equipped with adequate onsite waste disposal systems might detract from beauty but are not common-law nuisances.

The various theories which have been suggested to explain why prohibition or destruction of nuisance-like uses should not result in a finding of a taking do not lend support to open space zoning. One line of reasoning suggests that nuisance uses are not in fact property[91] and are therefore not subject to the constitutional guarantees. Sax suggests a second reason—since the governmental unit is acting in an arbitral capacity in regulating nuisance uses and resolving land use conflicts between property owners, the regulations are to be viewed as noncompensable.[92] He argues that when government is a party in a land use conflict situation rather than an impartial observer government should pay. In establishing open space regulations, the governmental unit often is not merely intervening in a dispute between private landowners, but rather is an active participant. The government is hardly an arbitrator in establishing a scenic view, for example.

---

degree. Wood, Nuis. 1, 3, 4. The law gives protection only against *substantial injury,* and the injury must be *tangible,* or the comfort, enjoyment, or use must be *materially* impaired. (original emphasis)

91. Mr. Justice Harlan in Mugler v. Kansas, 123 U.S. 623 (1887) used this analysis when he spoke for the Supreme Court in sustaining the constitutionality of a statute prohibiting the manufacture of alcoholic beverages. Such regulations had the effect of closing down a brewery:

> The exercise of the police power by the destruction of property which is itself a public nuisance, or the prohibition of its use in a particular way, whereby its value becomes depreciated, is very different from taking property for public use, or from depriving a person of his property without due process of law. In the one case, a nuisance only is abated; in the other, unoffending property is taken away from an innocent owner.

Id. at 669.

92. *See* Sax, *Taking and the Police Power,* 74 YALE L.J. 36, 63 (1964).

3. *Promotion of Aesthetics*

Protection of aesthetic values alone has not been considered a sufficient objective for regulation of private land uses,[93] since "[a]esthetic considerations are a matter of luxury and indulgence rather than of necessity, and it is necessity alone which justifies the exercise of the police power . . . ."[94] Two fundamental problems are presented by regulations enacted to achieve aesthetic protection: (1) What is "beautiful"? and (2) What weight should be given to amenity protection as a regulatory objective? Courts have most often expressed concern with the first issue since beauty has been considered a subjective matter incapable of precise definition and dictated by individual taste.[95] Although the second problem has not been subject to extensive discussion in the decisions, it is tacitly considered. For example, in 1966 in *Bismark v. Bayville*,[96] a lower New York court invalidated an amendment to a residential zoning ordinance which increased lot sizes from 15,000 square feet to 40,000 square feet, partially because the protection of aesthetic values was not felt to justify the severe reduction in property values caused by the lot size increase. The plaintiff owned an undeveloped and attractive parcel of shoreland property with 2,550 feet of frontage on Long Island Sound. The court found that there was neither need nor demand for 40,000 square foot lots in the area and that nearby properties had been developed at much higher density.

---

93. *See, e.g.*, Barney & Carey Co. v. Milton, 324 Mass. 440, 87 N.E.2d 9 (1949), and cases cited therein.

94. Passaic v. Paterson Bill Posting Co., 72 N.J.L. 285, 287, 62 A. 267, 268 (1905).

95. An Ohio court in City of Youngstown v. Kahn Bros. Bldg. Co., 112 Ohio St. 654, 661-62, 148 N.E. 842, 844 (1925), stated the problem:

> [A]uthorities in general agree as to the essentials of a public health program, while the public view as to what is necessary for aesthetic progress greatly varies. Certain Legislatures might consider that it was more important to cultivate a taste for jazz than for Beethoven, for posters than for Rembrandt, and for limericks than for Keats. Successive city councils might never agree as to what the public needs from an aesthetic standpoint, and this fact makes the aesthetic standard impractical as a standard for use restriction upon property. The world would be at continual seesaw if aesthetic considerations were permitted to govern the use of the police power.

Regulations to protect "natural" beauty seem to be less subject to criticism as attempting to codify personal taste than regulations designed to protect "beauty." "Natural" beauty might be said to refer to the diverse elements in the natural landscape which combine to produce a pleasing view. Of course, not all individuals believe the same elements or combination of elements in the landscape are beautiful.

96. 49 Misc. 2d 604, 267 N.Y.S.2d 1002 (Sup. Ct. 1966).

Considering the arguments of the village that aesthetics alone could justify enactment of an ordinance,[97] it held that the ordinance which reduced property values by 58 per cent to serve aesthetic purposes deprived the owner of reasonable use of his property.[98] Other cases suggest that while protection of wildlife may be a valid police power objective, regulations cannot prevent all economic use of lands to serve this objective.[99]

B. PRIVATE PROPERTY INFRINGEMENT

In determining whether a taking has occurred, courts focus upon the effects of regulations in restricting the usability of property. Several common queries include: (1) Has there been a physical invasion of the land? (2) Are existing uses regulated; and, if only future uses are regulated, for how long? (3) To what extent do the regulations diminish the value of the land? (4) Do the regulations prevent all reasonable use of the land?

1. *Physical Invasion*

Where there is a physical appropriation or invasion of land, it is almost universally held that a taking occurs.[100] Physical invasion of lands by a governmental unit not only precludes many uses but violates the territorial sovereignty of private property. If a governmental unit takes land for a road, hotel, post office, or school it must pay for it. Courts have held that a taking occurs where an irrigation channel is widened with resulting destruction of private property.[101] The Supreme Court

97. The village cited People v. Stover, 12 N.Y.2d 462, 191 N.E.2d 272, 240 N.Y.S.2d 734 (1963), *appeal dismissed,* 375 U.S. 42 (1963), which gave limited endorsement to regulations adopted to protect aesthetic values. However, the regulations prevented only a few uses. There was no evidence they reduced property values. The court admitted that "[c]ases may undoubtedly arise . . . in which the legislative body goes too far in the name of aesthetics. . . ." *Id.* at 468, 191 N.E.2d at 275, 240 N.Y.S.2d at 738.

98. The court held that "[c]learly the village did go too far in violating plaintiff's rights in the name of aesthetics." 49 Misc. 2d 604, 267 N.Y.S.2d 1002 (Sup. Ct. 1966).

99. *See generally* State v. Johnson, 265 A.2d 711 (Me. 1970); Commissioner of Nat. Res. v. Volpe and Co., 349 Mass. 104, 206 N.E.2d 666 (1965) (remanded); MacGibbon v. Board of Appeals, 347 Mass. 690, 200 N.E.2d 254 (1964), 356 Mass. 635, 255 N.E.2d 347 (1970); Sibson v. State, 110 N.H. 8, 259 A.2d 397 (1969); Morris County Land Imp. Co. v. Parsippany-Troy Hills Tp., 40 N.J. 539, 193 A.2d 232 (1963).

100. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law,* 80 HARV. L. REV. 1165, 1184 (1967).

101. "[I]t should be obvious that the police power doctrine cannot

has held that where land is flooded by a dam the landowner is entitled to damages,[102] since "taking" includes invasions of property which "effectually destroy or impair its usefulness . . . ."[103] In *Lorio v. Sea Isle City*[104] the Army Corps of Engineers entered onto private coastal land and constructed a large sand dune for protection of the surrounding area against hurricane damage. It was held that such uncompensated interference with the use of private property to achieve a governmental objective was unconstitutional. Similarly, decisions requiring that compensation be paid for damage due to aircraft noise recognize that intense noise substantially interferes with most residential or commercial uses, or agricultural uses involving the raising of animals.[105]

A narrow limitation exists for destruction of property for emergency protection of the public during fire, earthquake, or war.[106] And in at least several jurisdictions lands adjacent to a navigable watercourse are subject to broad navigable servitude.[107] A governmental unit may even enter private land to undertake channel maintenance or to build roads or levees.

There can be little argument with cases holding that public flooding of lands, construction of dunes, and similar invasions of land take property, since these uses substantially interfere with private land uses. Although land values are not in all

---

be invoked in the taking . . . of private property in the construction of a public improvement. . . . To hold otherwise would in effect destroy the protection guaranteed by our Constitution. . . ." Podesta v. Linden Irrigation Dist., 141 Cal. App. 2d 38, 51, 296 P.2d 401, 409 (1956). *See also* Wolf v. Second Drainage Dist., 180 Kan. 312, 304 P.2d 473 (1956).

102. Pumpelly v. Green Bay Co., 80 U.S. (13 Wall.) 166 (1871).

103. *Id.* at 181.

104. 88 N.J. Super. 506, 212 A.2d 802 (L. Div. 1965).

105. *See, e.g.*, Griggs v. Allegheny County, 369 U.S. 84 (1962), and discussion in Durham, *Griggs v. Allegheny County in Perspective: Thirty Years of Supreme Court Expropriation Law*, 1962 SUP. CT. REV. 63.

106. *See, e.g.*, United States v. Caltex, Inc., 344 U.S. 149 (1952) (destruction during war); Bowditch v. Boston, 101 U.S. 16 (1880) (right of state to destroy a building without compensation to prevent spread of conflagration); Surocco v. Geary, 3 Cal. 69 (1853) (destruction of building to prevent the spread of a conflagration). *See also* Annot., 149 A.L.R. 1451 (1944).

107. Louisiana cases based upon a unique constitutional provision are common. *See, e.g.*, Jeanerette Lumber & Shingle Co. v. Board of Comm'rs, 181 So. 2d 415 (La. Ct. App. 1965); Board of Comm'rs v. Baron, 236 La. 846, 109 So. 2d 441 (1959); Delaune v. Board of Comm'rs, 230 La. 117, 87 So. 2d 749 (1956). For cases from another jurisdiction *see* Andrews v. State, 19 Misc. 2d 217, 188 N.Y.S.2d 854 (Ct. Cl. 1959); Bacorn v. State, 20 Misc. 2d 369, 195 N.Y.S.2d 214 (Ct. Cl. 1959).

instances significantly reduced by governmental invasions, any physical entry onto lands violates the primary and essential attributes of sovereignty associated with private land ownership.

Decisions dealing with physical invasion of land are peripherally germane to some open space zoning objectives. The cases suggest at a minimum that governmental attempts to permit the public use of private lands for parks, parking lots, golf courses and other areas without compensating the landowner are likely to fail as unconstitutional takings. Attempts to require that private lands be held open for flood water storage may be subject to similar objections particularly if the regulations prevent all private economic uses.

2. *Vested Rights and the Regulation Period*

Since landowners are often considered to enjoy "vested" rights in existing uses, regulations restricting future developments have an easier time than those affecting present uses.[108] While the Supreme Court[109] and other courts[110] have approved attempts to abate existing uses of a noxious nature, attempts to summarily abate existing uses through open space regulations have not been well received by the courts or legal commentators.[111] The duration of the restriction on future development is also relevant to the question of taking.[112] While "interim" regulations which freeze development for several years have been sustained,[113] regulations which prohibit development of

108. *See, e.g.*, Town of Hillsborough v. Smith, 276 N.C. 48, 170 S.E.2d 904 (1969); Gibson v. City of Oberlin, 171 Ohio St. 1, 167 N.E.2d 651 (1960).

109. *E.g.*, Hadacheck v. Sebastian, 239 U.S. 394 (1915); Reinman v. Little Rock, 237 U.S. 171 (1915). The Court has also sustained regulations requiring modification of existing structures. *See, e.g.*, Queenside Hills Realty Co. v. Saxl, 328 U.S. 80 (1946); Adamec v. Post, 273 N.Y. 250, 7 N.E.2d 120 (1937).

110. *See generally* Annot., 22 A.L.R.3d 1134 (1968).

111. *See generally*, 1 ANDERSON § 6.64, at 445-46, § 6.06, at 319-23; Katarincic, *Elimination of Non-Conforming Uses, Buildings, and Structures by Amortization Concept Versus Law*, 2 DUQUESNE U.L. REV. 1 (1963). However, courts have approved some "amortization" provisions in zoning ordinances which require the termination of a nonconforming use within a specified period of time. *See, e.g.*, Los Angeles v. Gage, 127 Cal. App. 2d 442, 274 P.2d 34 (1954); 1 ANDERSON, § 6.65, at 447-48, and cases cited therein.

112. *See, e.g.*, Arverne Bay Constr. Co. v. Thatcher, 278 N.Y. 222, 15 N.E.2d 587 (1938). The court held that the zoning ordinance in question took private property because it prevented the reasonable or profitable use of property at present or in the immediate future.

113. *See, e.g.*, Fowler v. Obier, 224 Ky. 742, 7 S.W.2d 219 (1928);

whole properties for long or indefinite periods have with little exception been disapproved.[114]

3. *Diminution in Value*

Mr. Justice Holmes, speaking for the majority of the Supreme Court in *Pennsylvania Coal Co. v. Mahon*,[115] formulated the classic "diminution" test for taking when he stated that in determining the limits of the police power

> [o]ne fact for consideration in determining such limits is the extent of the diminution. When it reaches a certain magnitude, in most if not in all cases there must be an exercise of eminent domain and compensation to sustain the act. So the question depends upon the particular facts.[116]

The Supreme Court in a 1962 case, *Goldblatt v. Town of Hempstead*,[117] upheld an ordinance which prohibited a long-term practice of mining below the water table and imposed an affirmative duty to refill mined areas. Although the record is unclear, the land apparently had no reasonable use subject to such restrictions. The Court in dictum observed that "[t]here is no set formula to determine where regulation ends and taking begins. Although a comparison of values before and after is relevant . . . it is by no means conclusive . . . ."[118]

Although widely cited, the diminution in value test has not been satisfactory in determining if a taking has occurred. Apparently no court has been bold enough to suggest a blanket rule that a taking occurs where restrictions reduce values by 50, 75, or 100 per cent. It is interesting to note, however, that in 50 cases collected as part of this study in which regulations were found invalid as a taking and which contained a cost analysis, the weighted mean reduction in value was 73 per cent.[119] In comparison, 50 cases validating regulations showed a weighted mean reduction in value of 60 per cent.[120] Landowners arguing

Campana v. Clark Tp., 82 N.J. Super. 392, 197 A.2d 711 (L. Div. 1964); Walworth County v. Elkhorn, 27 Wis. 2d 30, 133 N.W.2d 257 (1965). *See also*, Note, *Stopgap Measures to Preserve the Status Quo Pending Comprehensive Zoning or Urban Redevelopment Legislation*, 14 CASE W. RES. L. REV. 135 (1962).

114. *See, e.g.*, Henle v. City of Euclid, 97 Ohio App. 258, 118 N.E.2d 682, 125 N.E.2d 355 (1954); Miller v. Beaver Falls, 368 Pa. 189, 82 A.2d 34 (1951).

115. 260 U.S. 393 (1922).

116. *Id.* at 413.

117. 369 U.S. 590 (1962).

118. *Id.* at 594.

119. See note 4 *supra*.

120. *Id.*

that regulations take their land often enter court with detailed cost analysis of the initial price of land, rent values, sale value of their land before and after the restrictions, and taxes. Most often they are successful in arguing that a taking has occurred if they can show that the regulations prevent all reasonable use of land. The *effect* of the diminution in value, not the amount, seems to be the crucial factor even though the two are interrelated.

It is interesting to note that occasionally the *source* of the land value may be determinative in the decision whether a taking has occurred. A reduction in value argument is less likely to be accepted if a governmental activity or right contributes to the initial property value. For example, in *Kelbor v. Myrich*[121] the Vermont Supreme Court upheld the regulation of signs on the theory that display of signs along a public highway was not a property right but a privilege. The court stressed that the value of the property for sign-board use was derived in part because of the proximity of the property to the public thoroughfare from which signs could be seen. The reasoning of the court might be extended to common open space zoning which regulates shoreland uses. Land values in shoreland areas arise in part from their location adjacent to public waters. Therefore, a more severe reduction in land values is justified in the case of shoreland regulations which protect the view and quality of public waters.[122] Of course distinctions do exist between highways and navigable waters. Newly constructed highways benefit present adjacent landowners by increasing land values. In contrast, navigable lakes and streams have long been in existence. The higher value of shoreland property due to the adjacent navigable waters may have been reflected in the price paid by a present owner to his predecessor. To some extent, however, the state may continue to enhance shoreland property values by programs such as wildlife management and fish-stocking which maintain public waters.

---

121. 113 Vt. 64, 30 A.2d 527 (1943). *See also* New York State Thruway Auth. v. Ashley Motor Ct., 10 N.Y.2d 151, 176 N.E.2d 566, 218 N.Y.S.2d 640 (1961); Perlmutter v. Greene, 259 N.Y. 327, 182 N.E. 5 (1932). *See generally* Williams, *Legal Techniques to Protect and to Promote Aesthetics Along Transportation Corridors*, 17 BUFF. L. REV. 701 (1968).

122. *See generally*, David, *The Exploding Demand for Recreational Property*, 45 LAND ECON. 206 (1968); Comment, *Components of Rural Land Values in Northern Wisconsin*, 40 LAND ECON. 87 (1964).

4. *Denial of All Reasonable Use*

A fourth formula, already mentioned and often articulated in the cases, focuses specifically upon the effect of regulations in preventing the economic use of private land. Where the restrictions deny all "reasonable", "practical" or "beneficial" use of the land the restrictions are unconstitutional.[123] Generally the test is invoked in instances where the zoning or other regulations severely restrict the number and manner of uses. If the land is physically but not economically suited for the permitted uses, the landowner may have no practical use.

"Denial of reasonable use" has been interpreted to mean denial of any profitable use rather than any possible use. Perhaps the most often quoted language is found in *Arverne Bay Construction Co. v. Thatcher*,[124] in which the New York Court of Appeals, in holding invalid a residential classification as applied to a parcel of vacant land, noted that

> the plaintiff's land cannot at present or in the immediate future be profitably or reasonably used without violation of the restriction. 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.[125]

Concern with diminution in value often arises from the question whether some practical use is possible for lands. Some courts have interpreted the reasonable use test in strictly dollars and cents terms. In *Town of Hempstead v. Lynne*,[126] a New York court held a residential zoning classification confiscatory and invalid because development as a residential area would have re-

123. *See, e.g.*, Little Rock v. Hocott, 220 Ark. 421, 247 S.W.2d 1012 (1952); Corthouts v. Town of Newington, 140 Conn. 284, 99 A.2d 112 (1953); Hammond v. Carlyon, 96 So. 2d 219 (Fla. 1957); Forde v. Miami Beach, 146 Fla. 676, 1 So. 2d 642 (1941); Tews v. Woolhiser, 352 Ill. 212, 185 N.E. 827 (1933); Hamilton Co. v. Louisville & Jefferson County Planning & Zoning Comm'n, 287 S.W.2d 434 (Ky. 1956); Baltimore v. Cohn, 204 Md. 523, 105 A.2d 482 (1954); Robyns v. Dearborn, 341 Mich. 495, 67 N.W.2d 718 (1954); Grand Trunk Western R.R. v. Detroit, 326 Mich. 387, 40 N.W.2d 195 (1949); Oschin v. Township of Redford, 315 Mich. 359, 24 N.W.2d 152 (1946); Pleasant Ridge v. Cooper, 267 Mich. 603, 255 N.W. 371 (1934); Morris County Land Imp. Co. v. Parsippany-Troy Hills Tp., 40 N.J. 539, 193 A.2d 232 (1963); Summers v. City of Glen Cove, 17 N.Y.2d 307, 217 N.E.2d 663, 270 N.Y.S.2d 611 (1966); Town of Hempstead v. Lynne, 32 Misc. 2d 312, 222 N.Y.S.2d 526 (Sup. Ct. 1961); Brockman v. Morr, 112 Ohio App. 445, 168 N.E.2d 892 (1960).

124. 278 N.Y. 222, 15 N.E.2d 587 (1938).

125. *Id.* at 232, 15 N.E.2d at 592.

126. 32 Misc. 2d 312, 222 N.Y.S.2d 526 (Sup. Ct. 1961).

sulted in over $90,000 loss of investment, thereby preventing economic use.[127]

Other decisions undertake a "denial of reasonable use" analysis without so clearly articulating that "reasonable use" means an economic use. It is generally agreed that the landowner need not be allowed to make the most profitable use of his land.[128] And an otherwise valid regulation is not rendered unconstitutional because it deprives property of its most beneficial use.[129]

Three cases employing the test are of special import. In *Dooley v. Town Plan and Zoning Commission*[130] the Connecticut Supreme Court held invalid as "confiscatory" as applied to plaintiffs' land a zoning amendment which reclassified the land from residential to "flood plain district". The district included land along a creek in Fairfield County, Connecticut, and was apparently subject to both flooding by the creek and hurricane flooding from Long Island Sound.[131] The ordinance permitted only open space uses[132] and provided that uses not specifically listed were not permissible.[133] It further forbade the excavation, filling and removal of soil, earth or gravel within the flood plain district except as authorized by a special exception permit, which was available only under stringent conditions and

---

127. The court stated:

> The owner's right of user [*sic*] here is so limited by the restrictive ordinance that there is in reality an *economic taking* of his property, even though he is left with title, possession and a possibility of use for the restricted purpose. The amendment is thus confiscatory in that it precludes the use of the property for any purpose to which it is reasonably or economically adapted.

Id. at 319-20, 222 N.Y.S.2d at 534 (original emphasis).

128. *See generally* 1 ANDERSON, § 2.21 at 85 *et seq.*, and many cases cited therein. *See also* § 2.23 at 101 *et seq.*

129. *See* Goldblatt v. Hempstead, 369 U.S. 590 (1962); Reinman v. Little Rock, 237 U.S. 171 (1915); Mugler v. Kansas, 123 U.S. 623 (1887).

130. 151 Conn. 304, 197 A.2d 770 (1964).

131. Approximately 91 per cent of the district was at or below the elevation considered as tidal marshland. Most of the remaining land was below the flood levels reached by hurricanes of 1938, 1944 and 1954. *Id.* at 307, 197 A.2d at 771-72 n.2.

132. The ordinance permitted the following flood plain uses:

1. Parks, playgrounds, marinas, boathouses, landings and docks, clubhouses, and necessary uses.
2. Wildlife sanctuaries operated by governmental units or non-profit organizations.
3. Farming, truck and nursery gardening.
4. Motor vehicle parking as an accessory to a permitted use in this district or an adjacent district.

Id. at 306, 197 A.2d at 771 n.1.

133. *Id.*

for a limited time.[134] The court concluded that the zoning rendered the use of plaintiffs' land impossible,[135] accepting the testi-

134. *Id.* at 310, 197 A.2d at 773.

135. The court examined the uses and stated:

> An analysis of the uses permitted under § 22.2 of the zoning regulations in a flood plain district clearly demonstrates that the *use* of the plaintiffs' land *has been, for all practical purposes, rendered impossible.*

Id. at 309, 197 A.2d at 772 (emphasis added).

In holding the flood plain district unconstitutional as applied to the properties of the plaintiffs the court noted:

> Where most of the value of a person's property has to be sacrificed so that 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.

Id. at 312, 197 A.2d at 774.

The reasons given by the court explaining why the permitted uses did not allow any practical use of the land are worth quoting since a similar rationale may well be applicable to many other flood plain situations. For simplicity of analysis, the reasons are numbered and given headings:

> (1) *Public parks and playgrounds.*
> "First, to restrict the use of privately owned property to parks and playgrounds bars the development of land for *residential or business* purposes and raises serious questions as to the constitutionality of the restriction. . . . The practical effect of this limitation on use is to restrict potential buyers of the property to town or governmental uses, *thus depreciating the value* of the property."
> (2) *Marina, boathouse or a landing dock.*
> "Second, the property of the plaintiffs is about half a mile from Long Island Sound, and consequently, the property could not be used for a marina, a boathouse or a landing and dock."
> (3) *Clubhouse.*
> "Third, the . . . zoning regulations contain no definition of a clubhouse. . . . Although the term 'clubhouse' may be construed broadly, the presence of one on the plaintiffs' land, considering the acreage involved, would have little effect in preventing substantial diminution in the value of the land."
> (4) *Wildlife sanctuaries.*
> "Fourth . . . the regulations [permit] the use of the property for wildlife sanctuaries operated by governmental units or nonprofit organizations. Obviously, such a use does not provide the landowner with any *reasonable or practical means of obtaining income* or *a return from his property.* Again, this use contemplates a diminution in land value and subsequent acquisition by some governmental agency, either by purchase or by condemnation."
> (5) *Farming, truck and nursery gardening.*
> "Fifth, the regulations also permit farming, truck and nursery gardening. At the public hearing, a real estate expert testified that farming has long since been ruled out in this area."
> (6) *Motor vehicle parking.*
> "Finally, the regulations also permit motor vehicle parking as an accessory to a permitted use in the flood plain district or adjacent district. But under § 22.3 of the regulations, the land cannot be filled or paved except by special exception granted by the defendant under stringent conditions, and then only for a limited time."

Id. at 309-10, 197 A.2d at 772-73.

mony of the plaintiffs' real estate expert that the regulations had depreciated the value of his land at least 75 per cent.[136]

Several additional factors were noted by the court which may have contributed to the holding of invalidity. First, it was noted that some of the property was under contract for sale and could be used for houses readily salable in the "price range of $15,000 to $17,000 per unit"[137] after needed filling. Second, the city had levied a sewer assessment of over $11,000 against some of the properties. The court found that because the regulations prohibited any building on the land other than the permitted uses, the sewer system could be utilized "for no practical purpose so long as the property is privately owned."[138] The city was in the contradictory position of charging the landowners for services to serve development and yet prohibiting development. Third, the absence of a provision allowing permanent fill to raise the elevation of the land may have been important,[139] since without permanent fill to protect against flooding the land could not be economically used.

A later lower court case held that an ordinance permitting an even larger number of uses in a flood-prone area was nonetheless invalid since it prevented all practical use of the land. The case of *Hofkin v. Whitemarsh Township Zoning Board of Adjustment*[140] strongly disapproved as applied to plaintiff's land regulations which prohibited all structures.[141] The court held

136. *Id.*
137. *Id.*
138. *Id.*
139. *See* Comment, 4 NAT. RES. J. 445 (1965).
140. 88 Montg. 68, 42 Pa. D.&C.2d 417 (Pa. C.P. 1967), cited and discussed in Hess, *The Present Status of Flood Plain Zoning in Pennsylvania*, 40 PA. B. ASS'N Q. 578 (1969).
141. The court stated:

> We, therefore, have no hesitation in holding that the excessive regulations and prohibitions of the flood plain ordinance are so restrictive and confiscatory, when applied to appellants' tract, that they are tantamount to the exercise of the powers of eminent domain. They effectively exclude any type of structure upon the land, or any practical use of the land designated Flood Plain Conservation District.

88 Montg. at 72, 42 Pa. D.&C.2d at 423. The ordinance permitted the following uses in the Flood Plain Conservation District:

1. Cultivation and harvesting crops according to recognized soil conservation practices.
2. Pasture and grazing land.
3. Outdoor plant nursery.
4. Recreational use such as: Park, day camp, picnic grove, golf course, hunting, fishing, and boating club, excluding structures.

that this was tantamount to the exercise of the powers of eminent domain.[142] The court did not, however, base its decision solely on the fact that there were no profitable uses available to the landowner. It felt that the regulations did not bear a reasonable relation to the public health or safety.[143]

A third case, which considered at length the practicality of permissible uses, must be deemed a leading case in the area because of the clarity of the court's reasoning and extensive treatment of issues. In *Morris County Land Improvement Co. v. Parsippany-Troy Hills Township*,[144] the New Jersey Supreme Court held invalid in its entirety a Meadow Development Zone which applied to certain swamp lands in the township of Parsippany-Troy Hills in New Jersey. The issue was not only prohibition of most structural uses, but, like *Dooley*, the strict regulation of reclamation or improvement of the land. Although the

---

5. Forestry, lumbering and reforestation, excluding storage and mill structures.
6. Harvesting of any wild crops such as marsh hay, ferns, moss, berries, or wild rice.
7. Game farm, fish hatchery (excluding rearing structures), hunting and fishing reserves.
8. Wildlife sanctuary, woodland preserves, arboretum.
9. Outlet installations for sewage treatment plants and sealed public water supply wells.
10. Utility transmission lines.

Id. at 70, 42 Pa. D.&C.2d at 419-20.

142. With regard to the uses listed in note 141 *supra*, the court stated:

> We have carefully studied the record . . . . In our opinion the agricultural and kindred uses permitted are utterly impractical and completely *profitless*. The hunting and fishing uses permitted on this tract, and particularly 'a boating club,' approach the fantastic. The only practical, *but profitless*, permitted uses of the land are 'park' and 'wildlife sanctuary'. The *profitable* and practical permitted use for 'sealed public water supply wells' is probably rendered impractical for this tract by reason of the nearby facility of the Philadelphia Suburban Water Company. The permitted use for 'utility transmission lines' may have some practicable and *profitable* application to the tract.

Id. at 70, 42 Pa. D.&C.2d at 420 (emphasis added).

143. The court stated:

> We cannot see any way in which the residential development would endanger public health or impair public safety. The entire area is served by a public water system and by public sanitary sewers. Neither on-site sewage disposal systems nor wells would be relied upon. Any threat to life or property by periodic floods could be quickly and effectively eliminated by piping the small stream across the tract to a properly designed culvert . . ., and by some regrading of the tract which is entirely feasible.

Id. at 72, 42 Pa. D.&C.2d at 422.

144. 40 N.J. 539, 193 A.2d 232 (1963).

regulation permitted a wide range of open space uses,[145] and additional uses were permitted as special exceptions by the Board of Adjustment, reclamation was severely limited by impossibly stringent provisions. The court stated that the evidence made it clear that the prime object of the regulations was to "retain the land substantially in its natural state."[146] The court discussed at length the permitted uses and objected to the public nature of many of those uses,[147] holding that a regulation is confiscatory and beyond the police power where the regulation restricts use to the extent that 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."[148] The court noted that the only real dif-

145. The court described the following permitted uses:

> [A]gricultural uses; raising of woody or herbaceous plants; commercial greenhouses; raising of aquatic plants, fish and fish food (with a one-family dwelling as an adjunct to any of these uses, provided its lowest floor was a specified distance above flood level); outdoor recreational uses operated by a governmental division or agency; conservation uses "including drainage control, forestry, wildlife sanctuaries and facilities for making same available and useful to the public"; hunting and fishing preserves; public utility transmission lines and substations; radio or television transmitting stations and antenna towers; and township sewage treatment plants and water supply facilities.

Id. at 545, 193 A.2d at 236.

146. *Id.* at 551, 193 A.2d at 239.

147. In examining the permitted uses the court noted that:

> [M]any of the previously listed permitted *uses* in the zone are public or *quasi-public* in nature, rather than of the type available to the ordinary private landowner as a reasonable means of obtaining a return from his property, *i.e.*, outdoor recreational uses to be operated only by some governmental unit, conservation uses and activities, township sewage treatment plant and water facilities and public utility transmission lines, substations and radio and television transmitting stations and towers. All in all, about the only practical use which can be made of property in the zone is a hunting or fishing preserve or a wildlife sanctuary, none of which can be considered productive.
>
> . . . .
>
> It is equally obvious from the proofs, and legally of the *highest significance, that the main purpose of enacting regulations with the practical effect of retaining the meadows in their natural state was for a public benefit.* This benefit is twofold, with somewhat interrelated aspects: *first, use of the area as a water detention basin in aid of flood control in the lower reaches of the Passaic Valley far beyond this municipality; and second, preservation of the land as open space for the benefits which would accrue to the local public from an undeveloped use such as that of a nature refuge by Wildlife* (which paid taxes on it).

Id. at 553, 193 A.2d at 240 (emphasis added).

148. *Id.* at 557, 193 A.2d at 242.

ference between such regulations and a physical taking was that the former left the owner with the onus of taxation.[149] Throughout the opinion the court emphasized and reemphasized the effect of the restrictive special exception provisions was to prevent any improvement of land. Like *Dooley* and *Whitemarsh, Parsippany* suggests that permission of a large number of uses may not save a zoning scheme where all of the permitted uses are uneconomic.

Open space restrictions in both urban and rural areas commonly limit land uses to activities such as camping, private parks, wildlife sanctuaries, and recreation. These may, in fact, enable economic uses for rural areas with low land values. However, it is doubtful that such uses allow an economic return for recreational lands located along lakes and rivers where property values and taxes are often high. Further, farming in urban areas may be undesirable as well as uneconomic because of divided ownership, insufficient acreage, lack of adequate access, or because agricultural uses conflict with neighboring uses.

a. Fill or Other Land Reclamation

Parsippany and *Dooley* raise questions concerning the constitutionality of regulations which restrict land to low value uses where natural limitations of lands require expensive fill or other reclamation techniques before structural use can be made of the lands. Without such fill, no practical use may be possible. However, the placement of fill in swampy areas may destroy duck-nesting grounds and fish-spawning grounds, and if placed in floodways may obstruct flood flows and cause serious damage to other lands.

Few cases deal specifically with regulations which attempt to prevent fill or other reclamation to protect resource values or prevent obstruction to flood flows, but a relatively large number of traditional zoning cases have considered the reasonableness of zoning classifications (such as residential zoning) applicable to lands with erosion problems, steep slopes, swampiness, flooding, or other physical limitations.[150] In these cases the costs of reclamation have been considered one element relevant to the reasonableness of the classifications.

149. *Id.*

150. *See generally* cases cited in notes 161-95 *infra* and accompanying text.

The *Parsippany* decision suggests that if an ordinance or statute prohibits or severely restricts fill which is necessary for some economic use of land and the fill will not cause serious and substantial off-site harm, the regulation is unconstitutional as depriving the land of all reasonable use. The court recognized that a landowner cannot ordinarily be prevented from improving his land if improvements are necessary before the landowner can make *some* economic use of this land, discussing at length the controls upon reclamation.[151] Dissatisfaction with the prohibition against reclamation appears to underlie the entire decision, which invalidated the ordinance *in toto*. The court noted that "so-called permitted uses" were severely limited by impossibly stringent reclamation provisions.[152] The court concluded that where land improvement was possible which would make feasible productive uses otherwise impossible, a regulation practically prohibiting all reclamation was unconstitutional.[153]

In the 1966 case of *Commissioner of Natural Resources v.*

---

151. The court stated:

> *These so-called permitted uses amounted, for the most part, to strict regulation of land reclamation in aid of uses allowed as of right.* Thus, a special exception, with particular conditions, was required for any permitted use which involved a change in any drainage ditch, for the removal of earth products, such as gravel, sand, fill-dirt and peat, and for the diking, damming or filling of any land within the zone with an existing elevation of less than 175 feet above sea level (apparently this limitation would encompass practically all the land in the zone). The standards and conditions for exceptions to permit removal of earth products and filling included intricate site plan approval by the Planning Board together with studies and reports by other township officials and agencies before favorable action could be taken by the Board of Adjustment. *Moreover, no filling was allowed except by the use of material taken from land within the zone.* In addition, approval was required of ponds and lakes which would inevitably be created by a filling operation (since the fill had to come from within the zone and the only suitable material was the sand and gravel found below the first two strata of soil).

Id. at 546-47, 193 A.2d at 236-37 (emphasis added; citation omitted).

152. The court used the following language in referring to provisions preventing reclamation:

> We need not repeat the nullifying effect of the use and soil reclamation restrictions on any productive use of property in the zone, which is apparent on the face of the ordinance when viewed in the light of the explanatory testimony. *Without reclamation, nothing but a passive use is possible.* Land improvement is rendered practically impossible by the almost prohibitory filling and removal regulations, and, even if it could be attained, permitted private owner uses are most narrow indeed. The case is unique in that reclamation is necessary before any worthwhile use is possible, except the commercial removal of the sand and gravel natural resource.

Id. at 557-58, 193 A.2d at 243 (emphasis added).

153. *Id.* at 558, 193 A.2d at 243.

Volpe & Co.,[154] the Supreme Judicial Court of Massachusetts considered the constitutionality of an order prohibiting the filling of a salt marsh. The approach of the court is interesting even though no decision was reached on the merits and the case was remanded for further findings. The defendant in this case was the owner of about 50 acres of salt marsh adjacent to the coast of Wareham, Massachusetts. He wished to dredge a channel through the marsh and to fill portions for the construction of houses and had notified the appropriate authorities of his intention pursuant to a Massachusetts statute. After a hearing, the Director of Marine Fisheries ordered that "in the interest of protecting marine fisheries and maintaining the ecological components of this estuarine complex . . . no fill of any type be placed upon that area known as Broad Marsh."[155] The defendant ignored the order and the Commissioner of Natural Resources and the Director of Marine Fisheries brought action to enjoin violation of the order and to require removal of fill placed in the marsh in violation of the order. On appeal, the Supreme Judicial Court of Massachusetts acknowledged that protecting marine fisheries was a valid public objective but stated that regulations to achieve such an objective must not deprive defendant of all practical use of his land. Finding the trial record insufficient to decide the taking issue, the court remanded for further findings with respect to the economic impact of the regulations upon the landowner.[156]

Several Michigan cases also suggest that a landowner has a right to fill to provide some economic use for his lands. In *Plum Hollow Golf & Country Club v. Southfield*[157] the denial of a permit for the use of dry rubbish (the only economic fill material

154. 349 Mass. 104, 206 N.E.2d 666 (1965). *See* discussion in Comment, 6 NAT. RES. J. 8 (1966).

155. Commissioner of Nat. Res. v. S. Volpe & Co., 349 Mass. 104, 106, 206 N.E.2d 666, 668 (1965).

156. The court directed specific findings concerning:

[1] The uses which can be made of the locus in its natural state (a) independently of other land of the owner in the area; (b) in conjunction with other land of the owner.

[2] The asserted value of the locus for each of the [preceding] five years . . . .

[3] The cost of the locus to the defendant.

[4] The present fair market value of the locus (a) subject to the limitations imposed by the Commissioner; (b) free of such limitations.

[5] The estimated cost of the improvements proposed by the defendant.

Id. at 111-12, 206 N.E.2d at 671-72.

157. 341 Mich. 84, 67 N.W.2d 122 (1954).

in this instance) to fill a marshy area along a stream was invalidated since the land otherwise had no practical use. In *Keller v. Township of Farmington*[158] a court invalidated a similar denial which prevented fill in flood plain areas adjacent to the Rouge River. The application for a fill permit had been refused by the town board partially on the grounds that filling would remove a flood plain of the river and "thus have a tendency during high water to cause the river to back up and possibly flood other areas of the township."[159]

Other decisions, though not dealing with a prohibition of filling, have considered the reasonableness of traditional zoning classifications in light of physical limitations on the land.[160] Zoning classifications must permit sufficiently remunerative uses to allow economic reclamation and developent for areas with resource limitations. For example, in *Forde v. Miami Beach*,[161] the Florida Supreme Court held invalid as applied to plaintiff's property a zoning ordinance which classified certain properties facing the Atlantic Ocean in the City of Miami Beach for single-family residential use. The plaintiff's ocean front lots had an average depth of 240 feet at the time the ordinance was adopted. Subsequent to passage of the ordinance, hurricanes, storms, and ocean currents eroded the lots and reduced their average depth to only 60 or 70 feet. The plaintiff agreed that the original zoning had been correct at the time the ordinance was adopted but argued that because of the subsequent storm damage and erosion the classification of the land for single-family residences was no longer reasonable since the classification prevented any beneficial use of the land. The plaintiff argued that the land would require extensive reclamation including the building of seawalls, refilling, and building of groins in order to make any use of the property for either private estates or hotels or apartments. The estimated reclamation cost of between $7,500 and $15,000 per lot rendered construction of single-family residences uneconomic. There was also evidence that there was no present demand for single-family estates but that a demand did exist for multiple-family dwellings. The court held the ordinance invalid since under the restrictions the property would remain unimproved and unproductive because the cost of improving the land could not be recouped with residential use of

158. 358 Mich. 106, 99 N.W.2d 578 (1959).
159. *Id.* at 109, 99 N.W.2d at 580.
160. *See* cases cited in notes 161-95 *infra*.
161. 146 Fla. 676, 1 So. 2d 642 (1941).

the property.[162] The court implicitly recognized that the landowner had a right to restore and improve his property and that a regulatory classification must permit sufficiently remunerative uses so that reclamation can be economically undertaken. Other cases take the same line of reasoning.[163]

---

162. *Id.* at 685, 1 So. 2d at 647.

163. For example, the Arkansas Supreme Court, in Little Rock v. Hocott, 220 Ark. 421, 247 S.W.2d 1012 (1952), ordered reclassification of an area with rough terrain and steep slopes from a one-family residential district to an apartment district, apparently because the area could not be economically developed for single family residences. Grading, paving, terracing, and other improvements to prepare the site for apartment purposes would have cost $50,000. *Id.* at 423, 247 S.W.2d at 1013.

Zoning regulations which apply to swamp lands or other areas with high ground water have quite often been litigated. These areas in their natural state are usually not suitable for structural development and must be filled with gravel or similar materials. Usually courts have held that permitted uses must be sufficiently lucrative to permit such reclamation. For example a New York Court in Town of Hempstead v. Lynne, 32 Misc. 2d 312, 222 N.Y.S.2d 526 (Sup. Ct. 1961), invalidated a residential zoning classification for a marshy area. The landowner had spent $140,000 for hydraulic fill to bring the marshland to a permissible level for development as a shopping center prior to the time the area was rezoned for residential purposes. This court, in a detailed cost analysis, noted the cost of the parcel, the cost of the fill and other expenses associated with preparation of the site for use as a shopping center, and the cost of new fill needed to bring the site to a higher elevation required for residential use by a town building code.

The costs were so great that if the site were developed for residences, a net loss of investment of over $90,000 could be expected. This the court found to be an "economic taking" of private property and was confiscatory. The original intended use for the lots as a shopping center was allowed, permitting the user a reasonable rate of return on the land.

Similar cases may be cited where the cost of improvement or the natural unsuitability of a marshy area for permitted uses has resulted in a finding that the use classification is unreasonable or a "taking". *See, e.g.,* Baltimore v. Cohn, 204 Md. 523, 105 A.2d 482 (1954) (residential zoning for property covered with weeds, brush, and stagnant water held unreasonable and issuance of permit for construction of truck terminals ordered); Fenner v. Muskegon, 331 Mich. 732, 50 N.W.2d 210 (1951) (residential classification for marshy lands subject to flooding invalidated); North Muskegon v. Miller, 249 Mich. 52, 227 N.W. 743 (1929) (a primarily residential zoning classification for marshy lowlands invalidated). *Contra,* Hodge v. Luckett, 357 S.W.2d 303 (Ky. Ct. App. 1962) (residential classification for a swampy area upheld despite a showing that it was not suited for residences); Anderson v. Wilmington, 347 Mass. 302, 197 N.E.2d 682 (1964) (residential zoning for a swampy tract upheld in spite of high improvement costs; evidence indicated 25% of the town swamp land); Filister v. Minneapolis, 270 Minn. 53, 133 N.W.2d 500 (1964), *cert. denied,* 382 U.S. 14 (1965) (residential classification for a swampy area upheld).

A number of cases have considered flooding threats relevant to a zoning classification. Usually the courts have held that uses allowing a high rate of return must be allowed to justify the costs of improve-

These cases present an enigma to the municipal planner who recommends that lands with severe physical limitations be zoned for single family residences, forestry, recreation, or other low density uses. Such uses may be the most appropriate use of lands for the community as a whole if there is need for open space or low density uses. Large private expenditures to im-

---

ment.

Prospective costs of land improvement were noted in Kracke v. Weinberg, 197 Md. 339, 79 A.2d 387 (1951), where the Maryland Court of Appeals held invalid, as applied to plaintiff's land, an ordinance which reclassified land from commercial to residential uses. The land had streams running through it and was rough; leveling off the land to build houses would have required a prohibitive expenditure of money. The court noted that rezoning to residential use prevented the owners from using it, "not only for its most suitable use, but for any practical use at all." *Id.* at 346, 79 A.2d at 391.

The prohibitive costs of improving land otherwise unsuited for residential development were also considered in *In re* Garbev, Inc., 385 Pa. 328, 122 A.2d 682 (1956), in which the Supreme Court of Pennsylvania held invalid a residential classification as applied to a thirteen acre tract of rough land that was traversed by a stream. This stream drained approximately 3.675 square miles and caused considerable flash flooding in case of heavy rains. A chancellor found that costs to confine, relocate, or control the stream would be great and the land could not be prepared for residential use except at "prohibitive expense" and even then conditions (such as a nearby railroad) "would prevent the sale of houses sufficiently expensive to permit recoupment of the cost of rendering the land usable." *Id.* at 334, 122 A.2d at 684. In light of this evidence, the court found that the residential classification was confiscatory.

The Illinois Supreme Court, in La Salle Nat'l Bank v. Highland Park, 27 Ill. 2d 350, 189 N.E.2d 302 (1963), held unconstitutional as arbitrary and confiscatory a *three acre minimum lot size*, " 'A' Country Estate District," as applied to a *20 acre tract of land.* The land was diagonally traversed by a drainage ditch described as being a branch of one fork of the Chicago River. Part of the tract was below the flood line and water from the ditch occasionally flooded plaintiff's land.

While the suit was pending the city enacted a "flood plain ordinance" which declared a flood plain to be " 'that continuous land area adjacent to a water course whose elevation is equal to or below the flood base elevation.' " *Id.* at 353, 189 N.E.2d at 304. The ordinance provided that no new building could be erected within the flood plain unless the lowest floor was at least two feet above the base elevation for the site. Further, the ordinance specified that if fill or construction would displace waters in the flood plain, a flood reservoir should be constructed equal in volume to the fill or construction deposited below the flood base elevation.

While the court technically was not considering the validity of the floodplain ordinance, but only the classification of the country estate district, the court clearly felt that the flooding issue was vital in the disposition of the case. On the issue of improvement, the court noted that the same amount of fill would be required for three acre lots as for one-half acre lots, and observed that in spite of the strenuous arguments of the city to the contrary, the same effect would be felt on the flood-

prove these lands may be contrary to the economic interests of the community and in addition, it may be difficult and expensive for the community to extend roads, sewers, and water supply facilities to such properties. On the other hand, because the lands are subject to severe natural limitations, landowners may be without economic uses unless their properties are zoned for high density multi-family residential, commercial, or industrial uses which are sufficiently remunerative to economically justify land improvement. While strong public policy arguments might be made to regulate shoreland areas with development limitations to low density development, attempts may face considerable adverse legal precedent.

b. Where All Economic Uses are Nuisance-Like

As mentioned earlier, courts have been very receptive to regulations which prevent the establishment of nuisance-like uses or require the abatement of existing ones.[164] Usually a restriction on nuisance-like uses will prevent only one of many potential uses which can be made of land. However, in some situations all practical uses may be nuisance-like. A few cases have considered regulations which restrict only nuisance-like uses and yet the effect of the restrictions is to deprive the owner of all practical use because all practical uses are nuisance-like. Generally the regulations have been sustained.[165]

Consider, for example, areas with high ground water, swamps, areas subject to flooding, or steep slopes in the midst of a residential district. Lands subject to resource limitations may require expensive fill or improvements before any sort of structural use is possible. The costs of improvement might not be recouped by residential use, yet industrial or commercial uses might be incompatible and nuisance-like in the surroundings. Even residential uses might have nuisance-like effects if the resi-

plain below, in light of the reservoir requirements. *Id.* at 353-54, 189 N.E.2d at 304-05. The court rejected arguments that the greater density of residence would significantly decrease the amount of available land to absorb the flood waters and would increase the rate of runoff.

In Board of Adjustment v. Shanbour, 435 P.2d 569 (Okla. 1967), the Oklahoma Supreme Court ordered a variance issued to allow construction of a drive-in movie theater in an area zoned for residential use on parcels that were subject to flooding. The land was lower than adjoining property and it was economically impractical to correct the flooding and develop the tract for residential purposes.

164. *See* cases cited and text accompanying notes 70-89 *supra.*

165. *See* cases cited in notes 166-79 *infra.*

dences obstructed flood flows, created erosion problems, or caused water pollution due to inadequately operating onsite sewage disposal systems.

In *Consolidated Rock Products Co. v. Los Angeles*,[166] the California Supreme Court upheld agricultural and residential zoning regulations aimed at restricting nuisance-like gravel operations on lands subject to flooding. The land had few or no other economic uses due to the flooding. The plaintiff owned 348 acres of land composed of rock, sand, and gravel to a depth of 30 feet and generally situated in a watercourse. The trial court found that this property had substantial value for sand and gravel operations but not for other uses.[167] Two residential communities adjoined the properties and the trend of land development was in the direction of the properties. The area had a reputation as a haven for sufferers of respiratory ailments and was inhabited by many such sufferers. There was substantial evidence that extraction of sand and gravel, even if conducted with all possible safeguards, would create quantities of dust which would be carried to the residences and sanitariums. The court endorsed regulations designed to prevent uses injurious to the general public,[168] holding that since the local legislative body had concluded that the prohibited use could not be had without injury to others, and since this was a question upon which reasonable minds could differ, the local legislative determination was conclusive.[169] In considering the issue of denial of all reasonable use, the court observed that there had been testimony before the legislative body that the property could be devoted to certain other uses such as certain types of horticulture, recreation, stabling horses, cattle feeding and grazing, chicken raising, dog kennels, fish hatcheries, and golf courses. However, the economic value of the lands for these uses was minimal because of the flooding threat.[170] The court sustained the restriction despite the severe diminution in value.

---

166. 57 Cal. 2d 515, 370 P.2d 342, 20 Cal. Rptr. 638, *appeal dismissed*, 371 U.S. 36 (1962).

167. The trial court noted that the land had value for

> rock, sand and gravel excavation but *'no appreciable economic value'* for any other purpose, and in view of the *'continuing flood hazard and the nature of the soil'*, any suggestion that the property has economic value for any other use, including those uses for which it was zoned, 'is preposterous'.

Id. at 519, 370 P.2d at 344, 20 Cal. Rptr. at 640 (emphasis added).

168. *Id.* at 524, 370 P.2d at 348, 20 Cal. Rptr. at 644.

169. *Id.*

170. The court noted:

> It must be conceded that in relation to its value for the ex-

In *Walker v. Board of County Commissioners*,[171] the Maryland Court of Appeals upheld a county ordinance which zoned a section of land for agricultural and residential use. The plaintiff gave evidence that his land was swampy and could not profitably be used for any of the uses permitted by the ordinance. Income from existing uses had not equalled taxes on the property and plaintiff proposed to sell the land for use as an oil refinery site. But an industrial use would have been inconsistent and nuisance-like in the residential and farming area. Avoiding an economic test for "reasonable" use, the court adopted a "possible" use criterion, holding that the ordinance does "not deprive the appellants of many uses for which their property is reasonably adapted . . . ."[172]

Courts in several more recent decisions involving proposed rezoning of swamp lands have refused to sanction reclassification despite evidence that an existing classification offered little or no economic return on the land. In each case the decision was based upon the ground that the proposed uses would harm other lands and that the plight of the landowner was at least in part self-created. In the most interesting of the decisions, the Supreme Court of Minnesota in *Filister v. Minneapolis*[173] refused to hold "confiscatory" a residential classification for swamplands. Evidence was introduced showing that the cost of piling, filling, and other improvements to prepare the site for residential use

---

traction of rock, sand and gravel the value of the property for any of the described uses is relatively small if not minimal, and that as to a considerable part of it seasonal flooding might prevent its continuous use for any purpose.

Id. at 530, 370 P.2d at 351, 20 Cal. Rptr. at 647.

171. 208 Md. 72, 116 A.2d 393 (1955).

172. *Id.*, 116 A.2d at 404-05.

173. 270 Minn. 53, 133 N.W.2d 500 (1964), *cert. denied*, 382 U.S. 14 (1965). *See also* Hodge v. Luckett, 357 S.W.2d 303 (Ky. Ct. App. 1962), where the Kentucky Court of Appeals refused to approve the change in zoning for an 18.5 acre tract from residential to light industrial. Substantial evidence was introduced to show that the area, which was low and frequently covered by water, was unsuited for residential use but suited for industrial use. The court refused to find that the area was totally unsuited for residences since "its suitability for residential purposes is a relative proposition." *Id.* at 305. The court found that such a change would be spot zoning not consistent with a sound land use plan. Further, the court held that "[t]he time for the owner to speak was when the unfortunate classification of his property was first proposed or put into effect." *Id.* Most significantly, the court stated that in order to justify a reclassification a landowner must "show by clear and convincing proof that there will be no substantial resulting detriment to others." *Id.* the evidence introduced suggested that residential property in the community would have been adversely affected.

was so great that the existing classification was confiscatory. The court went beyond the conclusion of the lower court that some economic use of the lands for residential use did exist, observing that the proposed apartment buildings would adversely affect residential buildings in surrounding areas. It further noted that the owners of the swamp should have complained at the time the residential classification was imposed and not waited until other nearby landowners had relied upon the classification. The court held that a landowner must show not only "confiscation", but also that the relief sought would not result in substantial detriment to neighboring property.[174] The holding has broad implications for any case contesting the validity of open space classifications which severely limit land use in order to prevent off-site effects such as obstructions to flood flows or water pollution.

In *Hamer v. Town of Ross*[175] the Supreme Court of California upheld a single-family residential classification for certain flooded areas despite evidence that improvement costs would be prohibitively expensive. The California decision, like *Filister*, was partially based upon the ground that the landowner should have complained of the classification earlier and was estopped from doing so later. In this case, a creek which periodically flooded traversed the plaintiff's lands. To render the property suitable for erection of dwellings the plaintiff would have had to expend $12,500 for flood control devices and $30,000 for site improvement.[176] The remaining undeveloped portion of the property could not profitably be developed for single-family residences "because the costs of flood control and other site improvements would be greater than the value of the improved lots."[177] The court noted that the proposed multiple-family dwellings would have detrimental effects on surrounding residential properties. Rejecting plaintiff's claim that the classification confiscated her property, the court held that since a portion of the whole land was utilized by the plaintiff as a residence, she could only contend that the ordinance rendered the remaining portion

174. The court stated:

> [I]t was not only incumbent on the plaintiffs to show that the ordinance was confiscatory, but they had the burden of proving by clear and convincing evidence that the relief they sought would not result in any substantial detriment to neighboring property improved in reliance on the validity of the ordinance.

270 Minn. at 60, 133 N.W.2d at 505.

175. 59 Cal. 2d 776, 382 P.2d 375, 31 Cal. Rptr. 335 (1963).

176. *Id.* at 779, 382 P.2d at 377, 31 Cal. Rptr. at 337.

177. *Id.* at 788, 382 P.2d at 383, 31 Cal. Rptr. at 343.

valueless. A showing that only a portion of the whole area was rendered valueless was not sufficient to show confiscation. The court in refusing to invalidate the single-family classification observed that the plaintiff purchased her land with full knowledge of its topography.[178] But although the court refused to invalidate the use classification as applied to plaintiff's property, it was not wholly unsympathetic to her plight. The court invalidated the one acre minimum lot size requirement as applied to plaintiff's lands and endorsed the granting of additional variances and exceptions from the local zoning which would be necessary to allow construction of single-family residences on lots not smaller than 10,000 square feet.[179]

c. Unsafe Uses

Most cases upholding stringent regulations have involved situations where the proposed development posed threats to public safety or neighboring lands. A few cases, however, have involved circumstances where there was evidence that the proposed uses would harm the user, his guests, or purchasers of his property. In *McCarthy v. Manhattan Beach*[180] the California Supreme Court sustained a zoning ordinance which restricted ocean-front property to beach recreation purposes. The ordinance had been adopted to implement a comprehensive plan and allowed only the operation of beach recreational facilities for an admission fee. The only structures permitted were "lifeguard towers, open smooth wire fences and small signs."[181] The owners claimed that this classification was confiscatory, arbitrary, and had not been passed in good faith and had been conceived to depress property values so that the land could be inexpensively acquired for park purposes. The court failed to detect bad faith in adopting the ordinance despite considerable evidence to the

178. The court stated:

> [P]laintiff's contention is that the topography of her land should enable her to place structures upon her property which her neighbors could not put upon their property. A right accorded to plaintiff to construct multiple dwellings upon her property would result in her foisting upon her neighbors the detriment of the loss of a one-family dwelling area in order to relieve her from disadvantages inherent in the composition of her land. Yet she purchased her property with full knowledge of its topography.

Id.

179. *Id.* at 791, 382 P.2d at 385, 31 Cal. Rptr. at 345.

180. 41 Cal. 2d 879, 264 P.2d 932 (1953), *cert. denied*, 348 U.S. 817 (1954).

181. *Id.* at 884, 264 P.2d at 934-35.

contrary. In considering the confiscation question, the court acknowledged that plaintiffs did not receive any income from the property but had paid substantial taxes on it.[182] One plaintiff introduced testimony that he had attempted to fence the beach for private use but that the fence was torn down by the public and that the fence could not be successfully maintained around the beach property because of the threat of mob violence. Nonetheless, the court did not accept the considerable evidence that there was no practical use for the land and held that plaintiffs failed to prove that they could not put the property to beneficial use in conformity with the zoning regulations.[183]

While the court's conclusion that there were beneficial uses for the land permitted by the ordinance was not well supported in light of the facts presented, the decision may be explained by the court's view that it should not substitute its judgment for that of the city council where the propriety of the zoning classification is fairly debatable.[184] And while the zoning classification did not in fact permit reasonable use of the land, the decision is supported by the "unsafe use" rationale. The plaintiffs introduced testimony that they wished to build residences within the present beach area. There was evidence that the property was from time to time covered by storm waters and was subject to erosion. Although a witness testified that the residences would be constructed on pilings to protect them against water damage and erosion, the lower court had concluded that the "safety of the proposed construction of houses thereon was 'a question upon which reasonable minds might differ.' "[185] The court held that the question was not whether it was humanly possible to build safe houses but whether the ones in the proposed plan would be safe.[186] One may well wonder what would have been the result if the plaintiffs had wanted to establish a substantial commercial structure which would be more extensively protected.

McCarthy may be interpreted as holding that unless an individual can show that a safe use can be made of land he has not met the burden of showing that restrictions deny some reasonable use. This reasoning proceeds on the premise that no man has a right to use his property in a manner unsafe to himself or

182. *Id.*, 264 P.2d at 935.
183. *Id.* at 891-92, 264 P.2d at 939.
184. *Id.* at 890, 264 P.2d at 938.
185. *Id.* at 889, 264 P.2d at 937.
186. *Id.* at 888, 264 P.2d at 937.

others who may use it. If the threat were simply to himself, some courts might hold that regulation would not be sufficiently in the public interest.[187] In the *McCarthy* situation justification could be found in protecting others who might purchase the residences. Protection of innocent purchasers has been cited in other cases as a valid objective for flood plain regulations.[188]

In *Spiegle v. Beach Haven*[189] the New Jersey Supreme Court sustained dune and fence ordinances for a beach area subject to severe storm damage. No construction was allowed between the mean water line and a building line except for fences, sand fences, boardwalks, steps to permit access to the beach, pavilions or similar small platforms, and bulkheads. The building line bisected several of plaintiffs' lots, and apparently prevented construction of any building on two of the lots, one of which was almost entirely oceanward of the building line and the other completely oceanward.[190] The plaintiffs argued that the ordinance was unconstitutional because it deprived the lands of any beneficial use. The court noted that since the burden of demonstrating undue restriction on beneficial use was upon the plaintiffs, an essential element of any plaintiff's case was the existence of "some present or potential beneficial use of which he has been deprived."[191] While the court did not define a sufficient showing of a potentially beneficial use, it noted the unrebutted proof that it would be unsafe to construct buildings oceanward of the building line, and suggested that unless plaintiffs could show that some safe as well as economic use could be made of the lands, they would not meet their burden of showing that the regulations prevented some reasonable use.[192]

187. *See, e.g.*, Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922), in which the Court held that the contested regulations affected a limited class of individuals and were therefore not sufficiently in the public interest to justify their enactment. Also, the regulations too severely diminished the value of private property.

188. *See, e.g.*, American Land Co. v. City of Keene, 41 F.2d 484, 490 (1st Cir. 1930) (dissenting opinion).

189. 46 N.J. 479, 218 A.2d 129 (1966).

190. *Id.* at 489, 218 A.2d at 135.

191. *Id.* at 491-92, 218 A.2d at 137.

192. The court noted:

> Plaintiffs failed to adduce proof of any economic use to which the property could be put. The borough, on the other hand, adduced unrebutted proof that it would be unsafe to construct houses oceanward of the building line (apparently the only use to which lands similarly located in defendant municipality have been put), because of the possibility that they would be destroyed during a severe storm—a result which occurred during the storm of March 1962. Additionally, defendant submitted proof that there was great peril to life and health

d. Partical Restriction

Building lines, encroachment lines, floodway limits, buffer zones, and other types of restrictions which severely restrict construction of structural uses on relatively narrow strips of land present less critical constitutional problems than similar regulations which restrict development in broader areas, since these generally affect only a portion of each lot and portions remain available for construction. The issue is not often raised in zoning cases because most district boundaries follow roads, alleys, waterways, or property lines, and therefore portions of parcels or lots are rarely placed in separate zones. But the district lines of special shoreland districts, wetland areas, floodway or flood fringe districts, pollution control areas, or scenic protection zones reflect natural features and may cross lot lines, streets, or other such artificial features. If lots or parcels extend some distance back from a lake, river or stream or are of substantial size, it is possible that only small portions will be within the building setback or other highly restricted area.

If a court chooses to focus on the effect of the regulations on entire properties rather than on each square foot within special shoreland district limits, it may discover potentially beneficial uses. In *Gignoux v. Kings Point*[193] a New York court upheld an ordinance which required 40,000 square foot minimum lot sizes for a residential zone containing some low and swampy ground. The landowner wished to subdivide the property into smaller lots and claimed the 40,000 square foot minimum was unreasonable as to the swampy areas. Rather than considering the impact of the regulations upon the swampy lands, the court took a broader view and noted that since people would not choose to build on swampy land, the most advantageous use of the low land would be to absorb it into plots of larger dimensions.[194] One court has held that where a regulation affects multiple parcels, they must be considered together in applying the "denial of

---

arising through the likely destruction of streets, sewer, water and gas mains, and electric power lines in the proscribed area in an ordinary storm. *The gist of this testimony was that such regulation prescribed only such conduct as good husbandry would dictate that plaintiffs should themselves impose on the use of their own lands. Consequently, we find that plaintiffs did not sustain the burden of proving that the ordinance resulted in a taking of any beneficial economic use of their lands.*

Id. at 492, 218 A.2d at 137 (emphasis added).

193. 199 Misc. 485, 99 N.Y.S.2d 280 (Sup. Ct. 1950).

194. *Id.* at 490, 99 N.Y.S.2d at 285.

use" test.[195] Generally the suitability of land for a permitted use under an ordinance should be judged in terms of the proposed use of the whole land.[196] Concentrating on the effect on one particular parcel distorts the total impact the regulations have on the landowner.

(1) Building setbacks and official maps

Several groups of cases involve challenges to restrictions imposed on portions of lots. These cases contest the constitutionality of setback lines, side yards, rear yards, and official mapping as applied to specific properties. Each of these devices is used to maintain small areas free from structural development.

Although the effect of official maps, setback lines, side-yard requirements, floodway encroachment lines, and setback lines along lakes may be quite similar—keeping areas free from development—the reasons for employing each are different. Official maps are utilized to prevent construction which may add to condemnation costs when a new street is opened or an existing street is widened.[197] Apparently this is the only device which has been judicially approved to achieve this objective.[198] Attempts to zone or use setback lines to reduce condemnation costs have sometimes been disapproved.[199]

Building setback lines and side-yard requirements have often been imposed to meet broad public welfare objectives. The Supreme Court in *Gorieb v. Fox*[200] sustained a building ordinance with a street setback of approximately 35 feet intended

195. Chicago Title & Trust Co. v. Village of Wilmette, 66 Ill. App. 2d 326, 214 N.E.2d 336, 341 (1966).

196. *See generally* 1 ANDERSON § 2.24, at 108.

197. *See generally* 3 ANDERSON § 20.02, at 513; Kucirek & Beuscher, *Wisconsin's Official Map Law*, 1957 WIS. L. REV. 176.

198. *E.g.*, Headley v. Rochester, 272 N.Y. 197, 5 N.E.2d 198 (1936); State *ex rel.* Miller v. Manders, 2 Wis. 2d 365, 86 N.W.2d 469 (1957).

199. *See, e.g.*, Miami v. Romer, 73 So. 2d 285 (Fla. 1954) (2d appeal); Galt v. Cook County, 405 Ill. 396, 91 N.E.2d 395 (1950).

200. 274 U.S. 603 (1927) (Court relied on an analogy to side-yard requirements). The Court agreed with the reasons given by the city for preservation of such front-yards:

> [F']ront-yards afford room for lawns and trees, keep the dwellings farther from the dust, noise and fumes of the street, add to the attractiveness and comfort of a residential district, create a better home environment, and, by securing a greater distance between houses on opposite sides of the street, reduce the fire hazard; [and] that the projection of a building beyond the front line of the adjacent dwellings cuts off light and air from them, and, by interfering with the view of street corners, constitutes a danger in the operation of automobiles,

Id. at 609.

primarily to preserve light and air. The West Virginia Supreme Court in *Welch v. Mitchell*[201] stated that 30 foot building setbacks from the center of a stream could be constitutionally adopted to preserve flow capacity. Setback regulations have been attacked on a variety of grounds, including lack of valid police power objectives[202] and, most commonly, denial of all reasonable use of a specific parcel.[203] Often lots subject to setback restrictions are also subject to side-yard and rear-yard restrictions which are intended to provide open spaces along the margins. Understandably, if lots are small and setbacks are large, the setbacks may by themselves, or in combination with the rear-yard and side-yard requirements, allow little or no building room on the lots.[204] Almost invariably, a setback is held invalid as applied to a restricted parcel if no buildable space remains on the parcel. This held true where the useful area of a lot was reduced to 10 square feet,[205] where a property had an effective depth of only 36 feet because of a 25 foot front-yard and 20 foot rear-yard requirement,[206] where the restrictions on a corner lot reduced the usual lot width to about 12 feet,[207] and where a 90 foot setback limited the useable width of a lot to one foot on one end of the lot and eight feet on the other.[208] Courts generally look at the entire property to determine if a reasonable rate of return is possible despite the restriction. Deep setbacks have been sustained where the regulated property has been large enough to provide building space outside of the setback area. Setbacks of 25,[209] 30,[210] 50,[211] and 60[212] feet have been upheld. The United States District

201. 95 W. Va. 377, 121 S.E. 165 (1924).
202. Galt v. Cook County, 405 Ill. 396, 91 N.E.2d 395 (1950).
203. *See, e.g.*, Galt v. Cook County, 405 Ill. 396, 91 N.E.2d 395 (1950); Faucher v. Bldg. Inspector, 321 Mich. 193, 32 N.W.2d 440 (1948); Oschin v. Redford, 315 Mich. 359, 24 N.W.2d 152 (1946).
204. *See, e.g.*, Galt v. Cook County, 405 Ill. 396, 91 N.E.2d 395 (1950).
205. *See* Hoshour v. Contra Costa County, 203 Cal. App. 2d 602, 21 Cal. Rptr. 714 (1962).
206. *See* Oschin v. Tp. of Redford, 315 Mich. 359, 24 N.W.2d 152 (1946).
207. *See* Faucher v. Bldg. Inspector, 321 Mich. 193, 32 N.W.2d 440 (1948).
208. *See* Householder v. Grand Island, 36 Misc. 2d 862, 114 N.Y.S.2d 852 (Sup. Ct. 1951), *aff'd*, 280 App. Div. 874, 114 N.Y.S.2d 262 (1952), *aff'd*, 305 N.Y. 805, 113 N.E.2d 555 (1953).
209. *See* Flinn v. Treadwell, 120 Colo. 117, 207 P.2d 967 (1949).
210. *See* State *ex rel.* McKusick v. Houghton, 171 Minn. 231, 213 N.W. 907 (1927).
211. *See* Gitlin v. Rowledge, 36 Misc. 2d 933, 123 N.Y.S.2d 812 (Sup. Ct. 1953) (50 feet on a lot 150 feet deep).
212. *See* Sierra Constr. Co. v. Board of App., 12 N.Y.2d 79, 187 N.E.2d 123, 236 N.Y.S.2d 53 (1962).

Court of Maryland, in upholding the application of several zoning and official mapping ordinances which restricted 26 per cent of a lot, noted that the restriction was valid because the plaintiff had failed to prove that he could not receive "a reasonable return from a building constructed on the unrestricted area alone."[213]

(2) Minimum lot sizes

Large lot sizes can be used to achieve a variety of open space objectives. First, they indirectly reduce the area which will be placed in pavement, concrete, buildings, and other impermeable surfaces at the expense of natural cover.[214] Second, they protect health and safety in areas lacking public water supply and waste disposal by providing room for safely spaced onsite facilities.[215]

213. Symonds v. Bucklin, 197 F. Supp. 682, 686 (D. Md. 1961).

214. Large lot sizes alone cannot assure that an area will not be paved or placed entirely in building development. However, a combination of large lot sizes and a maximum percentage requirement for buildings or paving could effectively assure this objective.

215. Near-surface ground water and impermeable soils are commonly found in wetlands, flood plains, and other shoreland areas. These may prevent the proper functioning of on-site waste disposal systems. Improperly operating systems located too near wells may result in health hazards. Large lot sizes help assure that adequate distances will be provided between wells and on-site waste disposal facilities.

In Zygmont v. Planning and Zoning Comm'n, 152 Conn. 550, 210 A.2d 172 (1965), the Connecticut Supreme Court of Errors emphasized the importance of adequate waste disposal capabilities for a site to prevent water pollution and prevent health hazards. The court held that denial of plaintiff's application for change of zoning from a four acre single residential to a 20,000 square foot single residential classification was justified and not arbitrary or an abuse of discretion. Four to five acres of the 13 acres of plaintiff's parcel were swampy and covered by silt—a situation commonly found on the flood plain or swamp areas. In order to develop the lot, the swamp needed to be drained and the ground level raised five feet.

Referring to plaintiff's proposal to develop the area into lots of 20,000 square feet each, the court stated, "[o]n its face, the plan is impractical." *Id.* at 553, 210 A.2d at 174. There was evidence that the southern portion could not be economically developed. Further, there was evidence that on-site wells and sewage disposal systems presented a definite public health question. A Greenwich Sanitary Code provided that no well be placed within 75 feet of a sewage drainage field. The court was apparently concerned that the 20,000 foot minimum lot sizes would not allow sufficient separation distances between the wells and sewage drainage fields. It noted that under the proposed plan there could be only one possible location for the necessary well on each lot. *Id.* at 554, 210 A.2d at 174.

The same court in Corsino v. Grover, 148 Conn. 299, 170 A.2d 267 (1961) upheld a 10,000 square foot minimum for lot sizes in a shorefront area in Old Lyme. The court noted:

Even if diminutive lots would make possible the greatest use

Third, large minimum lot sizes provide adequate building room in an area of variable topography where only a portion of each lot is subject to stringent zoning restrictions or contains flooding threats, high ground water, steep slopes, or unique scenic or wildlife values such as fish-spawning or duck-nesting grounds.[210]

---

which could be made of the plaintiff's land for shore cottages, with possible future year-round use, the commission could reasonably decide, on the ground of lack of adequate water supply and sewage facilities, let alone other dangerous conditions which could result from congested housing, that the plaintiff's proposed use would be inimical to the public welfare.

Id. at 312-13, 170 A.2d at 273.

216. Arguments can be made that where land, because of natural limitations, is partially unsuitable for development, it should be classified in large enough lot sizes so that some space suitable for building sites may be available. For example, the New York Court in Gignoux v. Kings Point, 199 Misc. 485, 99 N.Y.S.2d 280, 285 (Sup. Ct. 1950), noted that the "best possible use . . . [of marshy area] would be in connection with its absorption into plots of larger dimensions."

In Honeck v. Cook County, 12 Ill. 2d 257, 260, 146 N.E.2d 35, 37 (1957), the Illinois Supreme Court upheld a five acre minimum residential lot size for land that was "hilly, rolling, and full of ravines." The case was decided partially on the ground that this land was not suited for the more intense development which the landowner contemplated.

While some courts have agreed that natural limitations on lots may justify large minimum lot sizes, other decisions have held that if these natural limitations must be overcome by expensive improvements before development can occur, small lots which offer a higher rate of return are needed. *See, e.g.*, La Salle Nat'l Bank v. Highland Park, 27 Ill. 2d 350, 189 N.E.2d 302 (1963). The crucial factor is whether large lot sizes prevent economic use of land. Costs of improvement are one consideration.

Large lots may contain both undevelopable marshland and steep slope areas and also some suitable building sites on upland areas. Smaller lots lacking upland areas might require expensive reclamation. The Court of Appeals of Ohio in State *ex rel.* Grant v. Kiefaber, 114 Ohio App. 279, 181 N.E.2d 905 (1960), *aff'd*, 171 Ohio St. 326, 170 N.E.2d 848 (1960), upheld the reasonableness of a residential zoning classification, as applied to plaintiff's land, which required 80,000 square foot minimum lot sizes for land that included some areas subject to flooding. The plaintiff wished to subdivide his property in 20,000 square foot residential lots. A creek, subject to occasional flooding, bisected the 350 acre proposed subdivision. One section of the planning commission's regulations provided that the commission should not approve any subdivision in an area subject to periodic flooding unless the developer agreed to perform necessary improvements to render the area safe for residential use.

The court noted that the requirement that the lands be made safe from flood hazards prior to subdivision

> poses an additional serious problem confronting relator incident to subdividing his property into half-acre lots, and in our opinion substantially *detracts* from the profit which relator contends would inure to him as a result of being permitted to subdivide his farm into half-acre lots.

Id. at 289, 181 N.E.2d at 912-13 (emphasis added).

Fourth, large minimum lot sizes can reduce the effect of development upon the natural scenery.[217] Although large minimum lot sizes alone may not be sufficient to maintain natural beauty, they can be important if combined with restrictions on filling and grazing, setbacks from shoreline, maximum building area requirements,[218] and minimum flood area requirements.[219]

The court held that the plaintiff had not shown that the regulations were arbitrary, unreasonable, or confiscatory.

217. One of the most significant cases dealing with large lot zoning of shoreland property to preserve amenity is County Comm'rs v. Miles, 246 Md. 355, 228 A.2d 450 (1967), decided by the Maryland Court of Appeals. The court sustained a residential five acre minimum lot size classification for three high quality waterfront districts which consisted of 50 properties with an average area of 320 acres, comprising 6.7% of the land area of the county and 29.80% of the total water frontage. The court reviewed a large number of significant minimum lot sizes cases and noted that the results of the cases "turn on the various economic, physical and sociological factors involved in the particular case." *Id* at 368-69, 228 A.2d at 457. The court felt that in light of these factors the five acre minimum was not unreasonable.

While minimum lot sizes may be helpful in preserving natural beauty, several courts have disapproved large minimum lot sizes based primarily upon aesthetic objectives. *See, e.g.,* Hitchman v. Okland Tp., 329 Mich. 331, 45 N.W.2d 306 (1951); *but see* Bilbar Constr. Co. v. Bd. of Adj., 393 Pa. 62, 141 A.2d 851 (1958). A New York court disapproved large lot sizes for a high value shoreland area not because aesthetic protection was an invalid objective but because the court did not feel that aesthetic considerations justified severe restrictions which substantially reduced land values. Bismark v. Bayville, 49 Misc. 2d 604, 267 N.Y.S.2d 1002 (Sup. Ct. 1966).

218. *See generally* Annot., 27 A.L.R. 443 (1923).

219. Minimum floor area requirements in combination with minimum lot sizes might help protect the quality of shoreland areas since larger and higher quality structures appear, within limits, to be more compatible with a high quality environment than small, single-room shacks which are often poorly maintained. The New Jersey Supreme Court in a controversial case, Lionshead Lake, Inc. v. Wayne Tp., 10 N.J. 165, 89 A.2d 693 (1952), sustained a rural zoning ordinance fixing minimum size of dwellings. For a discussion *see* Harr, *Zoning for Minimum Standards: The Wayne Township Case*, 66 HARV. L. REV. 1051 (1953). A considerable number of residences in the area had been built for seasonal occupancy. The ordinance required that a one story dwelling have at least 768 square feet living floor space and a two story dwelling have at least 1,000 square feet if accompanied by an attached garage, and 1,200 square feet if not. Despite arguments that a dwelling house for year round occupancy would cost $10,000 to $12,000 and would be financially out of the reach of 70% of the population, the court sustained the regulations with the following rationale, which may be applicable to regulations for many rural recreation areas:

> The Township of Wayne is still for the most part a sparsely settled countryside with great natural attractions in its lakes, hills and streams, but obviously it lies in the path of the next onward wave of suburban development. . . . It requires as much official watchfulness to anticipate and prevent suburban blight as it does to eradicate city slums.

The precedent behind official mapping laws and setback provisions lend support to tight restrictions placed only upon portions of lots. Zoning regulations requiring a minimum lot size area are authorized by most zoning enabling acts.[220] Although such large lot zoning often results in financial hardship to landowners, large minimum lot sizes have been widely approved.[221] The reason for such approval may lie in the fact that such restrictions are enacted to achieve a wide variety of objectives which defy precise valuation. A court is in a difficult position to evaluate the benefit of a lot size classification enacted to achieve a variety of objectives including allocation of lands to most

---

Id. at 173, 89 A.2d at 697.

The court further explained its holding:

> If some such requirements [minimum living floor space] were not imposed there would be grave danger in certain parts of the township, particularly around the lakes which attract summer visitors, of the erection of shanties which would deteriorate land values generally to the great detriment of the increasing number of people who live in Wayne Township the year round. The minimum floor area requirements imposed by the ordinance are not large for a family of normal size. Without some such restrictions there is always the danger that after some homes have been erected giving a character to a neighborhood others might follow which would fail to live up to the standards thus voluntarily set. This has been the experience in many communities and it is against this that the township has sought to safeguard itself within limits which seem to us to be altogether reasonable.

220. *See, e.g.*, WIS. STAT. § 59.97(4)(j) (1967), which provides that ordinances may regulate "the density and distribution of population."

221. *See* 1 A. RATHKOPF, THE LAW OF ZONING AND PLANNING, ch. 34, § 2, at 34-7, nn. 12-13 (3rd ed. 1962, Supp. 1971); 2 C. YOKLEY, ZONING LAW AND PRACTICE, § 17-11 n.60 (3rd ed. 1965, Supp. 1971); 2 ANDERSON § 8.47, at 48-49. The following are a few of the many cases upholding large minimum lot sizes: *One acre minimum upheld:* Simon v. Town of Needham, 311 Mass. 560, 42 N.E.2d 516 (1942); Harrison Ridge Associates Corp. v. Sforza, 6 App. Div. 2d 1051, 179 N.Y.S.2d 547 (1958); Gignoux v. Kings Point, 199 Misc. 485, 99 N.Y.S.2d 280 (Sup. Ct. 1950); Bilbar Constr. Co. v. Bd. of Adj., 393 Pa. 62, 141 A.2d 851 (1958). *Two acre minimum:* Young v. Town Planning & Zoning Comm'n, 151 Conn. 235, 196 A.2d 427 (1963); Levitt v. Sands Point, 6 N.Y.2d 269, 160 N.E.2d 501, 189 N.Y.S.2d 212 (1959). *Three acre minimum:* Flora Realty & Inv. Co. v. City of Ladue, 362 Mo. 1025, 246 S.W.2d 771 (1952), *appeal dismissed,* 344 U.S. 802 (1952). *Four acre minimum:* Senior v. Zoning Comm'n, 146 Conn. 531, 153 A.2d 415 (1959). *Five acre minimum:* Honeck v. Cook County, 12 Ill. 2d 257, 146 N.E.2d 35 (1957); Fischer v. Bedminster Tp., 11 N.J. 194, 93 A.2d 378 (1952). *But see* Aronson v. Town of Sharon, 346 Mass. 598, 195 N.E.2d 341 (1964); National Land & Inv. Co. v. Bd. of Adj., 419 Pa. 504, 215 A.2d 597 (1965); Bd. of County Supervisors v. Carper, 200 Va. 653, 107 S.E.2d 390 (1959). *See also, e.g.,* Marquette Nat. Bank v. Cook County, 24 Ill. 2d 497, 182 N.E.2d 147 (1962); State *ex rel.* Rice v. Village of Woodmere, 172 Ohio St. 359, 176 N.E.2d 421 (1961).

suitable uses,[222] regulation of population density, provision for light and air, reduction of congestion, preservation of property values, and protection of wildlife. Only rarely do large lot sizes prevent all economic use of the land. In *Aronson v. Town of Sharon*[223] the Supreme Judicial Court of Massachusetts invalidated lot size requirements for a single-family residential district requiring 100,000 square feet minimum lot sizes and lot width of 200 feet. The area was wooded, quite rocky, wet, and had some steep grades. Although the court conceded advantages in large lot sizes, it noted that at some point the law of diminishing returns sets in and lot sizes become excessive. While large minimum lot sizes may be used to maintain low density development in an area, low density increases the cost of roads, sewer and water for each lot.

A better approach than large lot size requirements is to encourage intense development of some areas and preserve others in a wholly natural state. The problem with such an approach is that the owners of smaller parcels in the stringently regulated areas may have no practical uses for their lands. However, if open space areas are in large parcel ownership, use of "cluster" subdivisions may provide both intensely developed areas and open areas within one ownership unit.[224]

IV. EVALUATION AND RECOMMENDATIONS

A. Evaluation

A moderate number of cases have considered the validity of regulations allocating lands to low density or open space uses. These decisions somewhat clarify the twilight zone between valid

222. For an excellent discussion of the importance of natural features to the validity of a zoning classification see Bogert v. Washington Tp., 25 N.J. 57, 135 A.2d 1 (1957), in which the court sustained a one acre minimum lot size for an undeveloped area with steep terrain. The court noted:

> There are many considerations which may validly apply to influence the way property in a district may be classified. Important among these are the prior existing uses in the district, the natural contours and topographical features of the land, in some instances the geological strata of the land with particular relation to the effect of drainage and seepage upon water and sewage problems.

Id. at 61-62, 135 A.2d at 3.

223. 346 Mass. 598, 195 N.E.2d 341 (1964).

224. Cluster subdivisions place multi-family units around commonly owned open spaces. For articles relating to cluster subdivisions and other planned unit developments *see* Kusler, *Artificial Lakes and Land Subdivisions*, 1971 Wis. L. Rev. 368, 407-08 nn.137-38.

police power regulations and unconstitutional confiscation. There is some reasoning in the group of cases as a whole to suggest that courts are now more receptive to more severe land use restrictions to achieve public objectives than they were twenty years ago.[225] But the "taking" question is by no means a dead issue.

In conclusion, cases considering the confiscation issue reveal some broad principles:

1. Courts are highly receptive to regulations which prevent land uses which threaten public safety or pose nuisance threats to other lands. While courts are now more willing to sustain regulations which protect aesthetics and other broad public welfare objectives, they have not yet sustained severe restrictions to serve these objectives.

2. A more substantial relationship between regulations and the regulatory objectives is required when land uses and values are considerably diminished. For example, stringent regulation of land uses in floodway areas adjacent to a stream channel may be justified to reduce flood losses since single uses may substantially block flood flows and discharge water onto other lands. However, absolute prohibition of uses in outer flood plain areas with minor flood threats may not be justified to preserve flood storage and reduce flood losses.

3. Since the constitutional proscription against uncompensated taking exists not only to protect property rights against uncompensated interference but to prevent arbitrary or discriminatory governmental action, discrimination is a major consideration. If the government pays in one instance for a park, flood storage area, or game preserve but attempts in a second instance to achieve the identical use and benefits through regulation without compensation, a finding of taking as well as discrimination is inevitable. There is far less judicial concern with severe burdens upon private land use where all similarly situated individuals are treated equally. Courts have often disapproved regulations designed to allocate lands to public or quasi-public uses which ordinarily involve public purchase rather than regula-

225. Courts are clearly more receptive to stringent regulations than in the 1920's. Courts have with some reluctance gradually come to accept broader police power objectives such as protection of aesthetic values. *See* discussion accompanying notes 93-98 *supra*. However, the judicial trend to accept more stringent regulations has apparently slowed since the early 1950's.

tion; courts have almost invariably disapproved physical use of private lands for a public purpose.

4. In the balancing process, courts are sensitive to regulatory benefits and burdens. Courts generally support regulations which involve a reciprocity of benefit and burdens although the benefits may not always be equal to the burdens. While invariably there is support for regulations which prevent the nuisance use of lands, open space regulations which impose serious burdens without compensating benefits are held unconstitutional. The prohibition of development on one parcel of land to protect the scenery when viewed from an adjacent private development or public road may impose substantial private burdens and yet yield little compensating benefit. The adjacent private development or road destroys the reciprocal view from the regulated parcel and prohibition of all development may prevent all of the landowner uses which might be benefitted by the view. Many open space regulations such as flood plain zoning, building setbacks, and grazing districts do, in fact, involve reciprocity of benefits and burdens.

5. Courts simultaneously apply many tests in determining the issue of taking. While diminution in value is relevant to the question of taking, it is not usually considered determinative. Rather, courts are focusing with increasing sophistication on a less subjective test—whether regulations deny all economic use of property. Regulations are usually found invalid if it is shown that absent the regulations there will be economic uses which do not threaten other lands or the public.

6. Regulations affecting swamps, steep slopes, erosion areas and flood hazard areas may be invalidated if the permitted uses are not sufficiently remunerative to allow economic reclamation of the lands. These are the most difficult cases to accept from a planning viewpoint. Costs of improvement for lands unsuitable for development due to flooding threats, high groundwater, erosion, or steep slopes, are considered relevant to the question of reasonable use. In some instances only small lot industrial or commercial uses will economically justify reclamation. These uses may make no sense in terms of broader community planning and may result in use of lands for their most inappropriate economic uses since roads, sewers, water and other facilities are particularly expensive for these areas. Recreational use is much more sensible.

7. Courts are less concerned with diminution in value where land is purchased with knowledge of restrictions. The cases de-

nying relief on grounds of self-created hardship are most interesting because in the usual zoning context self-created hardship is generally not considered to estop constitutional attacks.[226] Despite a showing of no economic use in light of the purchase costs, no taking is found. Hopefully this reflects a growing refusal by courts to recognize speculative value as a necessary consideration.[227] As cities gradually expand and open land grows scarce, skyrocketing land values are inevitable. Little land near urban areas may be economically suited for open space uses if unrestricted sale value is the determinative consideration. Courts would go far in aiding community planning by refusing to recognize a right to continued increases in land value and by basing their taking analysis upon a denial of all reasonable use rather than upon diminution in potential development value.

No single court test for taking provides a wholly satisfactory standard for gauging whether compensation is or is not due a landowner. The weighing of private and public harm in each case is perhaps the most satisfactory approach since many competing equities are taken into consideration. But this weighing process is difficult to quantify or embody in an objective standard. A single test would simplify judicial evaluation and aid government and landowners in determining when compensation is or is not due. On the other hand, a single test might work injustice when applied to a wide range of diverse situations. Despite common criticism of the courts for reaching seemingly inconsistent results in the taking cases, this study found a considerable degree of logical consistency in the cases where all factors were taken into account.

Existing precedent interpreting federal and state constitutional guarantees against taking property offers little hope that courts will suddenly begin to endorse impossible restrictions. Unfortunately, the number of cases adverse to the employment of land use controls for protection of scenic beauty and wildlife is likely to increase due to lack of sophistication in the drafting of open space regulations. Regulatory approaches are less likely

226. *See* 1 ANDERSON § 2.30 at 121, citing Bright v. Evanston, 57 Ill. App. 2d 414, 206 N.E.2d 765 (1965). But purchase with knowledge of restrictions is often given some weight. *Id.* § 2.30 at 122 and cases cited therein.

227. In certain circumstances, of course, inequity can result from refusal to recognize speculative value. This is particularly true if the landowner has given purchase price consideration for development value or has paid substantial taxes on land value which includes development value.

subject to constitutional attack if they simultaneously permit private landowners some economic uses for their lands and yet considerably restrict uses in order to achieve public objectives. The key to constitutionality appears to be in this balance.

B. Innovative Approaches

There are several approaches available which would both increase the likelihood of constitutionally valid regulations and insure a more complete consideration of competing equities. The first of these, modifications in ordinances, would not require new legislation but could be implemented through an effort by local planners, lawyers, and councilmen to provide more flexibility in open space zoning ordinances. The second, a statutory test for taking, would require new legislation. The third, permitting preferential real estate tax assessment for open space lands, would require new legislation and in some states a constitutional amendment. The fourth, regulations in conjunction with compensation or purchase, would require new legislation and a source of substantial public funding.

1. *Ordinances with Special Exception Permits*

The drafters of open space zoning regulations often have not made sincere attempts to provide economic private land uses.[228] In a situation where open space uses such as agriculture or forestry are not economic, single-family residences should be added as carefully controlled special exceptions to the list of open space uses permitted by an ordinance. Although this would be less than ideal if residences were not desired in an area, some concession to private property rights is justified to preserve constitutionality. An ordinance might establish requirements for residences to minimize adverse impact including (1) large minimum lot size requirements (perhaps three to five acres), (2) maximum percentage of the lot occupied by the building, parking area and roads, (3) building setbacks from roads and water, (4) height restrictions and perhaps architectural controls for areas of special scenic beauty, (5) a showing that safe water supply and waste disposal can be provided, (6) construction with protection against flooding and other natural threats, and (7) siting of the building and the use of plantings and screenings to protect wildlife and natural beauty.

228. This observation is based upon the author's examination of several hundred open space zoning regulations and discussions with many planners.

Landowners might be required to show economic hardship like that required for a special building permit under official mapping laws.[229] These could include a showing that he could not earn a fair rate of return on his entire property and he would be damaged by placing his building or use outside the protected area.[230] The hardship requirements for issuance of this special exception would resemble those for a zoning variance.[231] However, the special exception would not contravene the ordinance as would a similar "use" variance.[232] In addition, the landowner would not need to show uniqueness in his situation, as he would for the granting of a more traditional "variance."[233]

Courts would not be faced with regulations which per se prevent all development.[234] Courts have generally been unsympathetic to regulations which prevent use of land for dwelling purposes. Residential uses located in zones designed to protect

229. Official map statutes focus upon the problem of denying all reasonable use of land. *E.g.*, WIS. STAT. § 62.23(6)(d) (1967). A landowner may request permission from a zoning board of adjustment to construct a building in the bed of a mapped street. The board may grant permission if the landowner can show he will be substantially damaged by placing his building outside the mapped street, that the land within the mapped area is not earning a fair rate of return, and that the building will "as little as practicable increase the cost of opening such street . . . or tend to cause a change of such official map. . . ." The board "may impose reasonable requirements as a condition of granting such permit, which requirements shall be designated to promote the health, convenience, safety, or general welfare of the community."

230. *Id.*

231. *See generally* discussion of variances in 2 ANDERSON, ch. 14 and 3 ANDERSON, ch. 14. The classic requirements for a variance are stated in Otto v. Steinhilber, 282 N.Y. 71, 76, 24 N.E.2d 851, 853 (1939):

> Before the Board may exercise its discretion and grant a variance upon the *ground of unnecessary hardship*, the record must show that (1) the land in question cannot yield a reasonable return if used only for a purpose allowed in that zone; (2) that the plight of the owner is due to *unique circumstances* and not to the general conditions in the neighborhood which may reflect the unreasonableness of the zoning ordinance itself; and (3) that the use to be authorized by the variance *will not alter the essential character of the locality.* (emphasis added)

232. A "use" variance permits a use, such as an industrial use, in a zone where the use is not allowed by the ordinance. Courts often object to or examine critically the issuance of use variances. *See generally* 3 ANDERSON § 14.68 to 57 *et seq.* and cases cited therein.

233. *See* 2 ANDERSON § 14.32 at 669 and cases cited therein. *See, e.g.*, Murphy, Inc. v. Bd. of Zoning App., 147 Conn. 358, 161 A.2d 185 (1960); Bd. of Adj. v. Kremer, 139 So. 2d 448 (Fla. App. 1962).

234. The regulations litigated in Morris County Land Improvement Co. v. Parsippany-Troy Hills Tp., 40 N.J. 539, 193 A.2d 232 (1963), prohibited on their face almost all development. The court found the conservancy district regulations unconstitutional *in toto*. *See* notes 144-49 *supra* and accompanying text.

special scenery, wildlife, or so forth might be said to benefit from the special amenity of the area,[235] a benefit that could hardly be argued to accrue to open land. The special permit approach has met with judicial favor.[236] The device provides greater assurance to landowners that their economic plight will be taken into account and provides planners and administrators with some standard whereby the economic effect on the landowner would be a real factor in planning and administration. The Maryland courts have several times sustained similar stringent requirements for special exceptions under the zoning regulations for the city of Baltimore.[237]

In some areas, of course, open space uses such as agriculture and forestry will be economic, and provision for single-family residences will not be required to preserve constitutionality. This will be the case for many rural lands where land values and taxes are low. In other areas such as floodways, steep slopes, or areas with inadequate soils for onsite waste disposal, single family residences will be clearly inappropriate due to special hazards or problems. Here courts may be receptive to arguments that structural uses should be prohibited because they are nuisance-like or are unreasonable in that they threaten the safety of the user, his guests or a purchaser. But in other instances where all structural development must be prohibited to meet planning goals, and property taxes are high, effective regulations will likely be held unconstitutional. Tax incentives in combination with regulations, compensable regulations, or public purchase of easement or fee interests seem appropriate.

2. *A Statutory Test for "Taking"*

Severe restrictions with explicit review procedures for aggrieved landowners combined with a statutory test for "taking" should receive judicial favor.[238] A statutory amendment to zon-

235. *See, e.g.*, Simon v. Town of Needham, 311 Mass. 560, 42 N.E.2d 516 (1942), discussed in note 85 *supra*.

236. *See, e.g.*, Vartelas v. Water Resources Comm'n, 146 Conn. 650, 153 A.2d 822 (1959), discussed in note 27 *supra*.

237. *See* Mayor v. Polakoff, 233 Md. 1, 194 A.2d 819 (1963); Heath v. Mayor, 190 Md. 478, 58 A.2d 896 (1948).

238. Courts appear more willing to sanction stringent regulations of property where express provision is made for administrative or judicial review to protect property interests. *E.g.*, the Wisconsin Supreme Court, in Miller v. Manders, 2 Wis. 2d 365, 86 N.W.2d 469 (1957), upheld an official mapping law which authorized municipalities to prohibit most structures in the beds of mapped streets. In upholding the law, the court stressed the importance of a variance procedure which per-

ing enabling acts could provide statutory criteria for taking which would codify usual court tests for determining a taking. It could also provide that any landowner could appeal to a court for relief from the restrictions if the court found the restrictions unreasonable in that (1) the uses permitted by the ordinance, including "special exception" uses, would not offer a fair rate of return on petitioner's whole property, or (2) the petitioner had been denied permission for all practical uses, or (3) the owner would be damaged by placing his building or use outside the special protection area, or (4) the proposed use would not have nuisance-like effect or threaten the health and safety of the public, the landowner, his guests, or purchasers, or (5) the proposed use would offer economic return and would be conducted in a manner which would minimally detract from the statutory objectives. In the event of a finding of unreasonableness, the local unit would have 30 days in which to make an exception which would permit an economic use to the satisfaction of the court. Such legislative tests for "taking" are given considerable deference by a court but are not considered conclusive.[239]

---

mitted a landowner to appeal to a board of appeals for a building permit if the landowner was substantially damaged by the map restrictions. The court noted that "[w]ithout such a saving clause it is extremely doubtful if an Official Map Statute would be constitutional." *Id.* at 372, 86 N.W.2d at 473. The court also stressed the availability of court review if a permit was denied.

239. The deference courts accord to legislative constructions of constitutional provisions varies among the jurisdictions. In Wilson v. City of High Point, 238 N.C. 14, 20, 76 S.E.2d 546, 550 (1953), the court stated that "[t]he legislative construction of the Constitution is entitled to great weight, but it is not binding upon the Court." The Supreme Court of Appeals of Virginia, in Harrison v. Barkesdale, 127 Va. 180, 207, 102 S.E. 789, 798 (1920), expressed a similar viewpoint:

> While [a legislative construction of a constitutional provision] would be entitled to great consideration and respect, we cannot consider it as controlling upon us. The judicial department of the government is especially charged with responsibility of construing the constitutional provision in question. . . ."

Other courts have more jealously guarded their powers in interpreting constitutional provisions. *E.g.*, in Parkin Printing & Stationery Co. v. Arkansas Printing & Lithographing Co., 234 Ark. 697, 706, 354 S.W.2d 560, 565 (1962), the court stated that:

> It is the duty of the Judicial Department to interpret the constitution, and we cannot abrogate our duty by adopting interpretations made by either of the other Departments in conflict with plain language. Legislative and/or Executive interpretations are to be given consideration *only* when the Constitutional provision is ambiguous. . . .

The Supreme Court of South Dakota also expressed unwillingness to defer to legislative constructions except in limited cases:

> [I]t is not within the proper functions of a legislative body to define a term that may be used in a Constitution; and, if we

English land use controls presently incorporate such a statutory test. Compensation must be paid if planning regulations render property "incapable of reasonably beneficial use."[240] A Massachusetts statute[241] for preservation of coastal wetlands provides that a landowner affected by a special order regulating a coastal wetland may petition a court for relief within 90 days if "such order so restricts the use of his property as to deprive him of the practical uses thereof and is therefore an unreasonable exercise of the police power because the order constitutes

---

were to consider the use of the term "public securities" in section 2055, Pol. Code, as merely an effort to define "property" such definition of the term would be entitled to no weight unless it appeared that it was of such long standing and had been so generally accepted and acted upon as to show an approval thereof by the people. . . .

National Surety Co. v. Starkey, 41 S.D. 356, 360, 170 N.W. 582, 583 (1919).

240. Section 19 of the 1947 Act authorizes landowners to serve "purchase notices" on local authorities if they allege that their land, because of a denial of planning permission, "has become incapable of reasonably beneficial use in its existing state." Town and Country Planning Act of 1947, 10 & 11 Geo. 6, c. 51, § 19.

Reenacted in the 1962 Act as § 129, the section provides that a landowner may serve a purchase notice under the following conditions, Town and Country Planning Act of 1962, 10 & 11 Eliz. 2, c. 38, § 129(a)-(c):

(1) Where, on an application for planning permission to develop any land, permission is refused or is granted subject to conditions, then if any owner of the land claims—
   (a) that the land has become incapable of reasonably beneficial use in its existing state, and
   (b) in a case where planning condition was granted subject to conditions, that the land cannot be rendered capable of reasonably beneficial use by the carrying out of the permitted development in accordance with those conditions, and
   (c) in any case, that the land cannot be rendered capable of reasonably beneficial use by the carrying out of any other development for which planning permission has been granted or for which the local planning authority or the Minister has undertaken to grant planning permission.

While the language seems to state a test resembling the "denial of all reasonable use" test of the American courts, a second provision qualifies the first section by providing that if any question arises as to what would:

> [i]n any particular circumstances be a reasonably beneficial use of that land, then, in determining that question for that purpose, no account shall be taken of any prospective use of that land which would involve the carrying out of new development.

Id., § 129(2). This qualification creates confusion and limits applicability of the test. If new development cannot be considered, then the question would seem to be simply whether previously existing use value had been destroyed.

241. MASS. ANN. LAWS ch. 130, § 105 (1972).

the equivalent of a taking without compensation."[242] Maryland[243] and Rhode Island[244] have adopted similar acts for protection of coastal wetlands. These acts provide for court review within a specified period of time based on a denial of practical use or property damage test.[245] While this statutory deadline for administrative or judicial review may be desirable in defining respective rights and minimizing later responsibility of the state, the effectiveness of final administrative review,[246] or the constitutionality of a deadline for court review is questionable.[247]

---

242. *Id.*

243. MD. ANN. CODE art. 66C, §§ 718-30 (1970 and Supp. 1971).

244. R.I. GEN. LAWS ANN. §§ 2-1-13 to 24 (Supp. 1971).

245. MD. ANN. CODE art. 66C, § 725 (1970) provides that if the landowner

> is dissatisfied with the decision of the board, he may, within thirty days after receiving notice thereof, petition the circuit court in the county in which the land is located to determine whether such rules or regulations so restrict the use of his property as to deprive him of the practical uses thereof and are therefore an unreasonable exercise of the police power, because the order constitutes the equivalent of a taking without compensation. . . .

R.I. GEN. LAWS ANN. § 2-1-16 (Supp. 1971) provides that "[i]f by the adoption of an order under the preceding section any owner of the land subject to such order suffers damage, such owner may recover compensation for such damage in an action filed in the superior court within two (2) years from the date of recording of such order. . . ."

246. Courts have sometimes insisted upon judicial review of administrative action even when statutes have provided that administrative action is final or that it shall not be reviewed. *See, e.g.*, Rudges v. Wixon, 326 U.S. 135 (1945); Blanchard Mach. Co. v. RFC Price Adj. Bd., 177 F.2d 727, *cert. denied,* 339 U.S. 912 (1949).

The Supreme Court noted in Monongahola Bridge Co. v. United States, 216 U.S. 177, 195 (1910), that

> the courts have rarely, if ever, felt themselves so restrained by technical rules that they could not find some remedy, consistent with the law, for acts, whether done by government or by individual persons, that violated natural justice or were hostile to the fundamental principles devised for the protection of the essential rights of property.

Courts have been particularly insistent upon judicial review when constitutional rights are involved. *See, e.g.,* Ludecke v. Watkins, 335 U.S. 160 (1948); State v. Finch, 79 Idaho 275, 315 P.2d 529 (1957).

247. A judicial determination of taking depends upon the circumstances existing at a point in time including practical uses for land, land values, taxes and other factors. The cultivation of marsh hay may be an economic use for a rural wetland with low land values and low rates of taxation. But as a city expands into surrounding areas, farming or forestry uses may become impractical with increased land values and taxation. Courts in zoning cases have recognized that the reasonableness of particular regulations applied to a parcel may vary over time as surrounding circumstances change. *See* 1 ANDERSON § 2.12 at 59, citing Louisville Timber and Wooden Products Co. v. Beechwood Village, 376 S.W.2d 690 (Ky. 1964); Leutenmayer v. Mathis, 333 S.W.2d 774 (Ky. Ct. App. 1959). Similarly, what is not in fact a taking at one point

An act like the one suggested herein which would allow the owner to contest regulations which deny all economic use of land would force planners to be aware of the limitations on the police power. Of course a legislative standard incorporating a denial of all "economic uses" test of the sort proposed can be criticized from several points of view. First, the standard is necessarily ambiguous. Although the standard is phrased in terms of "economic" use, which is somewhat more explicit than "denial of all reasonable use," which might be interpreted to mean any possible use rather than any profitable use, economic use may connote the original price of the property, the resale value, the cost of

---

may become a taking at a later date. Any attempt to make a final determination as of a specific point in time would fail to recognize changing conditions.

The Supreme Court, in United States v. Dickinson, 331 U.S. 745 (1946), stressed the importance of changing conditions in the determination of taking. In this case the court considered the application of a federal statute authorizing property owners to bring suit against the federal government to recover the value of property taken within six years of the date of taking. The property owners had initiated a compensation suit for flood and erosion damage caused by construction of a federal dam more than six years after the original flooding. The Court held that the statute could not cut off rights prematurely. It noted that "[t]he Fifth Amendment expresses a principle of fairness and not a technical rule of procedure enshrining old or new niceties regarding 'causes of action'—when they are born, whether they proliferate, and when they die." *Id.* at 748. The Court noted that flood and erosion damage would be a continuing process and stated:

> An owner of land flooded by the Government would not unnaturally postpone bringing a suit against the Government for the flooding until the consequences of inundation have so manifested themselves that a final account may be struck.
>
> When dealing with a problem which arises under such diverse circumstances procedural rigidities should be avoided. All that we are here holding is that when the Government chooses not to condemn land but to bring about a taking by a continuing process of physical events, the owner is not required to resort either to piecemeal or to premature litigation to ascertain the just compensation for what is really "taken."

Id. at 749.

Courts might adopt a similar approach to attempts to terminate judicial review of the taking issue after a brief period of time as provided by wetland preservation statutes. Courts might simply refuse to abide by the review deadlines. 4 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 28.18 (1958), in analyzing the question whether due process of law requires opportunity for judicial review of issues of law in administrative action, concluded at 93-94 that

> The Court's technique for leaving the constitutional question open is simply to review to the extent that the Constitution might require review, no matter how clear the statute may be in cutting off review. The somewhat surprising result is that, except for three cases requiring independent judicial determination of both law and fact, not a single Supreme Court case holds a statute unconstitutional on the ground that judicial review is denied or restricted.

improvements, or the annual income as compared with expenses. While a statute could spell out all factors to be taken into account and thereby reduce ambiguity, it seems advisable to leave the economic use determination somewhat flexible to be worked out on a case by case basis.

Second, a test which evaluates all development in economic terms may force a court to approve an unsound or dangerous development where all practical uses constitute nuisances. For example, structural uses and filling in a floodway will back up water and cause damage. The economic use test should be qualified by a proviso that uses with nuisance-like effects are not to be taken into account. A similar qualification is necessary for self-induced hardship—purchase with knowledge of the restriction.

A third objection to such a test is that it reflects only the availability of minimal economic return and not the actual damage to the landowner. Although the test may be difficult to defend philosophically, many recent cases do not in fact focus upon the amount of diminution but rather upon the impact the regulations have upon all economic uses.

3. *Regulations in Conjunction with Tax Adjustments*

In invalidating specific severe zoning restrictions as unconstitutionally "taking" private property, courts have quite often noted that landowners must continue to pay substantial taxes despite severe police power restrictions.[248] A New York court in *Arverne Bay Construction Co. v. Thatcher*[249] observed that when regulations prevent all economic use of lands the only distinction between restriction and confiscation is the continued burden of taxation in the former case.[250]

Taxation policies which reflect potential development values rather than use value under zoning are likely to undercut any open space regulation program. Lands are usually assessed to reflect the potential development values without regard to existing land use regulations. One commentator has noted that such assessment policies arise from the belief that if the market re-

248. *See, e.g.*, Forde v. Miami Beach, 146 Fla. 176, 1 So. 2d 642 (1941); Morris County Land Imp. Co. v. Parsippany-Troy Hills Tp., 40 N.J. 539, 193 A.2d 232 (1963); Averne Bay Construction Co. v. Thatcher, 278 N.Y. 222, 15 N.E.2d 587 (1938).

249. 278 N.Y. 222, 15 N.E.2d 587 (1938).

250. *Id.* at 232, 15 N.E.2d at 592.

quires more intensive use "the zoning will in time be changed."[251] Yet it is inconceivable that long-term open space regulations will be sustained where land is subject to high tax rates reflecting potential development value. The right and left hands of government cannot be working against one another with the landowner in the middle.

One method of lessening the burden on severely regulated landowners is to adjust property taxation to take into account the lessened development potential of his lands. Tax adjustments involving some form of preferential treatment for open or undeveloped lands have been adopted in several states. Maryland in 1956 became the first state to adopt a broad tax adjustment plan to encourage preservation of open spaces; since then at least eight other jurisdictions have enacted legislation authorizing comparable tax schemes.[252] Several tax adjustment approaches are available. (1) A statute can establish assessments based upon regulated use value under the assumption that land use controls applied to property are permanent in the absence of clear proof to the contrary. (2) A statute might utilize simultaneous valuation of property at regulated use value and at potential development value but assess taxes upon the regulated use value unless lands are subsequently developed. At that time all or a portion of the deferred tax on the development value would be due. (3) Another approach deferring tax on development value is most attractive for use in combination with those open space regulations having a quasi-public benefit such as preservation of natural flood storage areas. If a landowner is subsequently permitted to develop his lands, only a percentage of the total deferred taxes, rather than all, need be paid to compensate for the benefit derived from open space use of the lands.

While preferential tax treatment is an attractive device to lessen the burdens on severely restricted land owners and to encourage preservation of open space uses, a number of political, administrative, constitutional, and other legal barriers beyond the scope of this discussion often stand in the way of its use.[253]

251. Hagman, *Open Space Planning and Property Taxation—Some Suggestions*, 1964 WISC. L. REV. 628.

252. Moore, *The Acquisition and Preservation of Open Lands*, 23 WASH. & LEE L. REV. 274, 291 (1966). *See also* Note, *Property Taxation of Agricultural and Open Space Land*, 8 HARV. J. LEGIS. 158 (1970), which discusses land taxation at use value and lists the special tax incentive statutes of 19 states.

253. *See generally* Hagman, *supra* note 251, at 638-45.

4. *Regulations in Conjunction with Compensation or Purchase*

The police power can be used to guide and limit land use, but it cannot be used to allocate private lands to active public uses.[254] Government purchase and eminent domain powers must be utilized to provide land for public parks, swimming beaches, flood storage areas, public parking lots, major wildlife areas, and other public uses. The major objection to purchase is the expense. Costs, however, can be reduced through official mapping, compensatory regulations, and easement purchase.

a. Official Mapping

Although official mapping is designed to restrict the construction of houses or other improvements which would increase purchase costs,[255] it is also an attractive regulatory technique for preserving open space areas needed for future reservoir sites,[256] parks, or other public uses. While some existing statutes authorize official mapping not only of streets but of future park and drainage systems,[257] the constitutionality of official mapping for areas other than streets[258] is as yet uncertain. Courts have generally invalidated regulations as applied to specific properties if the regulations prevent all structural development.[259] Often the relatively narrow strips of land needed for streets occupy small portions of lots, with considerable "buildable" space remaining on each lot. On the other hand, official maps for parks, reservoir sites, wildlife areas or other uses will often affect whole properties. The Pennsylvania Supreme Court in the well-known case of *Miller v. Beaver Falls*[260] held invalid a statute authorizing a park mapping plan and an accompanying ordinance which froze development for three years prior to public purchase. The

254. *See generally* cases cited in notes 100-06 *supra* and accompanying text.

255. *See generally* Kucirek and Beuscher, *Wisconsin's Official Map Law*, 1957 WIS. L. REV. 176; Waite, *The Official Map and the Constitution in Maine*, 15 MAINE L. REV. 3 (1963).

256. *See* IND. ANN. STAT. § 27-1901 *et seq.* (Supp. 1970). For discussion of other laws *see* C. OLSON, PRESERVATION OF RESERVOIR SITES (1964).

257. *See, e.g.*, N.Y. VILLAGE LAW § 179-e (McKinney 1966).

258. Constitutionality as applied to streets is unquestioned. *See* cases cited in note 198 *supra*.

259. *See, e.g.*, Roer Constr. Corp. v. New Rochelle, 207 Misc. 46, 136 N.Y.S.2d 414 (Sup. Ct. 1954). Generally the statutes allow issuance of variances for structural uses if the official map prevents economic use of land.

260. 368 Pa. 189, 82 A.2d 34 (1951).

New Jersey court in *New Jersey Lomarch Corp. v. Mayor of Englewood*[261] displayed a somewhat less critical attitude in upholding the constitutionality of a statute which granted a municipality a one year period to decide to purchase mapped parks and playgrounds. However, the court read into the statute an obligation of the municipality to pay for this one year "option" to purchase.

Attempts to authorize official mapping of broad open space areas might encounter similar difficulties. Several attempts to map flood hazard areas have been invalidated by courts which detected that a reduction in condemnation costs was among the regulatory objectives.[262]

b. Compensable Regulations

The concept of "compensable regulations" has been developed elsewhere.[263] They are as yet only a proposed method of lessening the burden of severe regulations on landowners. Several courts have approved early zoning statutes[264] which pro-

261. 51 N.J. 108, 237 A.2d 881 (1968).

262. The trial court in *Vartelas v. Water Resources Comm'n* held that a Connecticut encroachment law was unconstitutional because the court felt that it had been enacted to save the government money in the acquisition of rights of way for flood control works. (The trial court opinion is cited in Dunham, *Flood Control Via the Police Power*, 107 U. PA. L. REV. 1098, 1124 n.96 (1959), as "Unpublished opinion of Dube, J., Court of Common Pleas, Judicial District of Waterbury, Conn., Docket No. 16,018, decided July 18, 1958.") This regulation and statute was subsequently upheld by the Connecticut Supreme Court, which reversed the lower court. Vartelas v. Water Resources Comm'n, 146 Conn. 650, 153 A.2d 822 (1959). The Supreme Court did not consider reduction in condemnation costs to be the objective of the statute or regulations. *See also* Globe Realty Company v. Omaha, Doc. 569, No. 339 (Dist. Ct. of Douglas County, Nebraska, April 1967), in which the court invalidated a setback ordinance which was enacted to depress land values along creeks.

263. *See* Krasnowieki & Strong, *Compensable Regulations for Open Space: A Means of Controlling Urban Growth*, 29 J. AM. INS. PLANNERS 87 (1963); Krasnowieki and Paul, *The Preservation of Open Space in Metropolitan Areas*, 110 U. PA. L. REV. 179 (1961).

264. In addition to the cases cited in note 265 *infra*, *see* Kansas City v. Kindle, 446 S.W.2d 807 (Mo. 1969), in which the court upheld an ordinance which restricted a district to residential use and provided compensation to damaged landowners by means of a special assessment levied upon benefited landowners within the district. The court held that "[i]t is not necessary that the whole community or any large part of the community be benefited by the condemnation. It is sufficient if there is a benefit to any considerable number. . . ." *Id.* at 815.

In Attorney General v. Williams, 174 Mass. 476, 55 N.E. 77 (1899), the court upheld a legislative act that prohibited erection of buildings

vided compensation for damage done by restrictions.[265] Appar-

over 90 feet high on streets adjoining public parks and provided compensation for affected landowners. In *In re* City of New York, 57 App. Div. 166, 68 N.Y.S. 196 (1901), a law which widened a street 20 feet on each side for use as ornamental courtyards, and which provided compensation to landowners, was held constitutional. The court stated:

> Conceding that the Legislature has the power to increase the width of Clinton Avenue, that it would be justified in taking possession of private property for this purpose upon the payment of just compensation, we are of opinion that it has a right to take a lesser estate in the property than would be necessary for a complete dedication to the use of the public, and that the use is none the less public to the extent to which the property is taken because it is left in the partial control of the present owners.

Id. at 172-73, 68 N.Y.S. at 200.

265. *See, e.g.*, MINN. STAT. § 462.12 *et seq.* (1971), which was initially enacted by Minn. Laws 1915, ch. 128. The statutory scheme permits 50% of the landowners in a section of a first class city to petition the city council to establish regulations prohibiting a range of nonresidential uses including apartment buildings and billboards. *Id.* § 462.12. The council is authorized to determine, through the use of appraisals, the damages and benefits arising from the restrictions. Damaged landowners are to be paid by special assessments against benefited properties: "If the damages exceed the benefits to any particular piece, the excess shall be awarded as damages. If the benefits exceed the damages to any particular piece, the difference shall be assessed as benefits, but the costs of the proceedings, including [fee, etc.] shall be added to the amount to be assessed." *Id.* § 462.14(5). Assessments are to be included in the next general tax list and collected in a separate account. They may be collected in one to five equal installments. *Id.* § 462.15. Buildings constructed in violation of the regulations may be abated as public nuisances. *Id.* § 462.17.

The Minnesota Supreme Court first disapproved the statutory scheme on the ground that payment of compensation to damaged property owners was not for a valid public purpose. State *ex rel.* Twin City Bldg. & Inv. Co. v. Houghton, 144 Minn. 1, 174 N.W. 885 (1919). Later, the court reversed its decision and held that such condemnation of development rights to nonresidential uses was for a valid public purpose. State *ex rel.* Twin City Bldg. & Inv. Co. v. Houghton, 144 Minn. 1, 176 N.W. 159 (1920). The court later sustained a Minneapolis ordinance which excluded four-family buildings from a restricted residential district. State *ex rel.* Berry v. Houghton, 164 Minn. 146, 204 N.W. 569 (1925). This was affirmed per curiam by the United States Supreme Court. Berry v. Houghton, 273 U.S. 671 (1927).

In a 1954 case, the owner of a parcel in a restricted residential district created between 1917 and 1922 brought suit to have a building permit issued by the City of St. Paul for a fourplex dwelling declared invalid and to enjoin remodeling of a structure as a fourplex. Burger v. St. Paul, 241 Minn. 285, 64 N.W.2d 73 (1954). The court noted that the board of zoning had recommended construction of the fourplex in the restricted district. However, it held that the initial districting scheme with the assessment of benefits and award of damages created a species of property resembling negative equitable easements created by contract. *Id.* at 299, 64 N.W.2d at 81. These property rights could not be nullified or superseded by subsequent zoning and could not be taken without payment of compensation.

ently no state, however, has authorized a scheme of compensable regulations under which open space lands would be mapped and regulated in a manner similar to that for conventional zoning. The zoning would constitutionally impose more stringent restrictions on land uses than would ordinarily be possible under zoning by providing compensation to property owners for a portion of the loss in land value caused by severe restrictions. Property owners would be guaranteed a price for their lands at least equal to the market value at the date of regulation. If actual sales prices, after imposition of the regulation, were less than the guaranteed prices, the governmental unit which had imposed the restrictions would pay the difference. The amount of the guarantee price, reduced by the payment of compensation to previous owners, would remain as a guaranteed sale price for a new owner.

This approach embodies an underlying assumption of the 1947 English Town and Country Planning Act that compensation for development value must be determined as of the date of initial regulations.[266] One of the biggest stumbling blocks in the way of open space regulation is that in balancing the extent of the property owner's harm against the societal benefit, courts measure loss in speculative value. The Act squarely faced the problem of gradually increasing potential development values by "nationalizing" development rights as of 1947.[267] All increments in land value attributable to presently practical development as of 1947 were to be paid for by the state;[268] increments in value due to need for land and changed conditions after that date were to be the property of the state. This was to be the end of claims that denial of development permission took prop-

266. Town and Country Planning Act of 1947, 10 & 11 Geo. 6, c. 51. For a comparison of English planning controls and American land use controls *see* C. HAAR, LAND USE PLANNING IN A FREE SOCIETY (1951). For a general discussion of English planning controls *see* Megarry, *Town and Country Planning in England: A Bird's Eye View*, 13 CASE W. RES. L. REV. 619 (1962). Planning controls have been successfully used to preserve open spaces. *See* D. MANDELKERR, GREEN BELTS AND URBAN GROWTH (1966). For a discussion of the compensation provisions of the English controls *see* Mandelkerr, *Notes from the English: Compensation in Town and Country Planning*, 49 CALIF. L. REV. 699 (1961).

267. Town and Country Planning Act of 1947, 10 & 11 Geo. 6, c. 51, § 61.

268. *Id.* Landowners were to submit claims for loss of development value defined as the difference between the value of land for any potential use and the value for uses specified in Schedule III of the Act (limited to existing uses). A once-and-for-all payment of such claims was to be paid out of a global sum.

erty without compensation.[269] The Act contemplated that when planning permission was granted for a specific development proposal the landowner would pay the government the full value attributable to such permission. When land was sold the portion of the sale price of land which reflected potential development value of that land was also due the government. The whole scheme was designed to assure equal treatment: the landowner who was permitted to develop his land was to pay all the development value over and above the present development value as of 1947. This nicely conceived scheme discouraged land development and was subject to serious administrative problems. It was several times subjected to sweeping modifications.[270] By 1970, a

269. There are no constitutional provisions in the English law comparable to the fifth and fourteenth amendment guarantees of the U.S. Constitution which prohibit the taking of private property without payment of just compensation. However, the English legal traditions of property and individual autonomy have often given rise to strong political and judicial opposition to laws abridging property rights without payment of compensation.

270. Acts adopted in 1953 and 1954 substantially modified the compensation schemes. Town and Country Planning Act of 1953, 1 & 2 Eliz. 2, c. 16 abolished the development charge. Town and Country Planning Act of 1954, 2 & 3 Eliz. 2, c. 72 authorized payment of claims for compensation under Part VI of the 1947 Act only if a refusal of planning permission caused damage.

Only a small percentage of claims for development value filed under the 1947 Act had been paid by 1954. The 1954 Act recognized these unpaid claims but established a procedure whereby new claims needed to be submitted for payment of the balance of unpaid 1947 claims. Section 19 of the 1954 Act was reenacted as Town and Country Planning Act of 1962, 10 & 11 Eliz. 2, c. 38, § 100. New claims were to be submitted if applications for specific new development were refused. The claimants under the 1954 Act must have filed under the 1947 Act and the ceiling amount for their compensation was limited to the 1947 claims. In essence the 1954 Act said "You have filed a claim once, now you must file again under conditions of actual damage (refusal of development permission) to receive the sum you once claimed." This 1954 Act replaced the "all at once" scheme for payment for development values as of 1947 by a scheme for case by case payment. Provisions of the 1954 Act further restricted compensable claims where applications had been refused or conditionally approved in a wide variety of circumstances. See § 20 of the 1954 act, reenacted as § 101 of the 1962 act. Conditions may be attached to grants of planning condition without giving rise to claims of compensation if the conditions relate to:

(a) the number or disposition of buildings on any land;
(b) the dimensions, design, structure or external appearance of any building, or the materials to be used in its construction;
(c) the manner in which any land is to be laid out for the purpose of the development, including the provision of facilities for the parking, loading, unloading or fuelling of vehicle on the land;

landowner who was granted development permission needed to pay 50 per cent or more of the value attributable to the permission, but not 100 per cent as with the earlier schemes.[271]

Unless American courts discontinue giving considerable weight to speculative increases in land value in their determinations of whether a "taking" has occurred, it may be necessary to follow the English example and compensate for development values accruing at a fixed point in time and then to recognize no further increases in such values.

While no state has enacted a sophisticated statute authorizing compensatory regulations, a statute embodying an important element of this approach has been adopted and subjected to judicial review. An Arizona court invalidated a statute authorizing purchase of lands by the Arizona state highway department within two years of the time the department passed a resolution stating that a property was needed for highway purposes.[272] Land values were to be calculated as of the date of initial designation.

c. Purchase

(1) When regulations are invalid

An imaginative 1965 Massachusetts act for the protection of wetlands authorizes the Commissioner of Natural Resources to adopt orders for the protection of coastal wetlands.[273] The statute authorizes landowners to appeal as of right to a court within 90 days of the order. If the court determines that the owner cannot make practical use of his land, the court is directed to

---

(d) the use of any buildings or other land; or
(e) the location or design of any means of access to a highway, or the materials to be used in the construction of any such means of access.

Town and Country Planning Act of 1962, 10 & 11 Eliz. 2, c. 38, § 101(2)(a)-(c). Of interest are other sections which deny compensation where the reasons stated for denial are that the proposed development would be "premature" in terms of order of priority indicated in the development plan, or if existing water or sewage services are inadequate but deficiencies are expected to be overcome within a reasonable period of time. *Id.*, § 101(3)(b). A further provision states that compensation is not payable for a refusal if the stated reason is that "the land is unsuitable for the proposed development on account of its liability to flooding or to subsidence." *Id.*, § 101(4).

271. *See* 1967 Land Commission Act of 1967, 11 Eliz. 2, c. 1, which reinstated the development charge. *See* D. HEAP, INTRODUCING THE LAND COMMISSION ACT (1967).

272. State v. Griggs, 89 Ariz. 70, 358 P.2d 174 (1960).

273. MASS. ANN. LAWS ch. 130, § 105 (1972).

find that the order does not apply to the specific land. The commissioner may then take a fee or lesser interest in land by eminent domain.[274] This approach deserves careful consideration since it does not force government acquisition of lands but gives government the option to purchase.

(2) To satisfy landowners

A later Massachusetts statute for the preservation of inland wetlands has purchase provisions geared to landowner preferences rather than to the validity of restrictions.[275] Landowners may object to preservation orders within 90 days of their adoption and the Commissioner of Natural Resources has 90 days in which to amend the order to the satisfaction of the applicant or to purchase all or a part of the applicant's interest.[276]

(3) Threat of acquisition

In 1961 Congress demonstrated imagination and innovation in establishing the Cape Cod National Seashore.[277] Much of the land in the proposed seashore area was in private ownership; acquisition of all these properties would have been expensive and subject to political opposition, and would have removed lands from township tax roles. To avoid these problems Congress authorized the National Park Service to establish standards for township land use regulations for private lands within the seashore area. The Secretary of Interior was further authorized to acquire lands if townships failed to adopt and enforce regulations meeting federal standards. Affected townships have enacted and enforced adequate regulations.[278] The successful "Cape Cod formula" has been applied in other national park areas.[279]

(4) Easements acquisition

Easements are increasingly being used to prevent development incompatible with public land use management objectives

274. *Id.*
275. MASS. ANN. LAWS ch. 131, § 40A (1972).
276. *Id.*
277. *See* Act of Aug. 7, 1961, Pub. L. No. 87-126, 75 Stat. 284.
278. *See, e.g.*, Town of Chatham, Mass., Protective By-law for Chatham, § 3.5 Residence-Seashore Conservancy District 10 (1969); Town of Provincetown, Mass., Zoning By-laws, § III-a, Class S, Seashore District 5 (1968). Similar regulations have been adopted by the towns of Truro, Wellfleet, Eastham, and Orleans which also have lands within the National Seashore.
279. This formula has also been used in the Fire Island National

while permitting continued private use and ownership. The literature on techniques for less than fee acquisition is rapidly growing.[280] Conservation, scenic, and flood control easements may be appropriate for open space areas where little or no private development is desirable and lands are not to be put to active public use. Of course, discrimination arguments will undoubtedly arise if one land owner is regulated without compensation and another in a similar situation is compensated through easement purchase.

V. CONCLUSION

It is hoped this article will aid in the drafting of open space regulations that will withstand constitutional attack. At present, there are a number of factors and competing equities which courts take into account in distinguishing between valid regulation and taking. Drafting bodies should do likewise and should also consider the various schemes available to ease the burden on the regulated landowner. Open space zoning is significantly different than traditional zoning. Particularly because courts are more hesitant to recognize the legitimacy of the exercise of the police power to promote aesthetic objectives than others, and because governmental units are increasingly discriminating by paying some property owners to achieve these objectives while regulating others, drafters of open space zoning regulations should be conscious of the constitutional limitations.

Park and Olympia National Park. Similar regulations have been proposed for Whiskey Town, California, and Indiana Dunes, Indiana.

280. *See* the following articles cited in Netherton, *Implementation of Land Use Policy: Police Power vs. Eminent Domain*, 3 LAND & WATER L. REV. 33, 47 n.30 (1968); Wisconsin Department of Resources Development, *Proceedings of Conservation Easements and Open Space Conference* (1961); Jordahl, *Conservation and Scenic Easements: An Experience Resume*, 39 LAND ECON. 343 (1963); University of Wisconsin, *Workshop Manual for Conference on Scenic Easements in Action* (December 16-17, 1966); California Department of Public Works, *The Scenic Route: A Guide for the Designation of an Official Scenic Highway* (1966); U.S. Department of Commerce, *Report on Recommendations for Land Acquisition, Scenic Easements, and Control of Access for the Great River Road in Wisconsin* (1966) (prepared for the President's Council on Recreation and Natural Beauty).