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A CONSTITUTIONAL SAFETY VALVE: THE VARIANCE IN ZONING AND LAND-USE BASED ENVIRONMENTAL CONTROLS

*Jonathan E. Cohen**

I. INTRODUCTION

When, in late 1993, the voters of Houston rejected a proposed zoning ordinance for their city, it was national news.[1] Zoning opponents were heard to proclaim that they had struck a blow for freedom.[2] "Houstonians in their heart want freedom. They don't want regulation," reported an anti-zoning activist.[3] "We're the only free city in the country," boasted another.[4] It was a clear case of the exception proving the rule: zoning is a nearly universal feature of land-use regulation in the United States.[5] Doubts as to zoning's legitimacy have long since been transformed into general acceptance.

But the anti-regulatory sentiments expressed by the zoning opponents in Houston no doubt strike a responsive chord in those rankled by environmentally based restrictions on their ability to develop land. The legitimacy of such requirements as sensitive area setbacks is less secure. Challenges to such land-use based environmental controls,[6]

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* Executive Editor, 1994–1995, BOSTON COLLEGE ENVIRONMENTAL AFFAIRS LAW REVIEW.

[1] *See Houston Voters Again Reject Zoning*, WASH. POST, Nov. 6, 1993, at F1.

[2] *See id.*

[3] *Id.*

[4] Mike Tolson, *Zoning Fails for Third Time in Houston*, MIAMI HERALD, Nov. 7, 1993, at 17G.

[5] ROBERT J. MASON, CONTESTED LANDS: CONFLICT AND COMPROMISE IN NEW JERSEY'S PINE BARRENS 23 (1992).

[6] As used in this Comment, "land-use based environmental controls" refers to those laws, regulations, and ordinances that restrict or limit the type of use, or the physical aspects of the use of land, in order to preserve or enhance predominantly naturally occurring features such as ecosystems, wetlands, and dunes.

the benefits of which may be less obvious than zoning's, are likely to continue.

In the wake of *Lucas v. South Carolina Coastal Council*, questions regarding the proper scope of government regulation of natural resources have received a great deal of legal scholarly attention.[7] The question of whether land-use regulations will be deemed a "taking" without compensation under the Fifth Amendment has been central to the inquiry. As the dust has settled, a key question for land-use regulators has been how to protect the environment responsibly and, at the same time, avoid unintentionally taking a landowner's property. In answering this question, regulators have learned that one way to do so is to incorporate so-called "safety valves" into regulations.[8] These are procedures designed to prevent governmental restrictions from operating in such a manner that the burden on an individual landowner amounts to a taking. One such safety valve has been a feature of zoning ordinances practically since their inception early in this century. That device is the variance.

The zoning variance works by empowering a local body with the authority to make a quasi-judicial determination with respect to the burden that strict application of a land-use restriction or limitation would impose on a landowner.[9] Where, under the applicable standard, this burden is sufficiently severe, the body may vary the terms of the ordinance. That is the theory. The history of the variance in practice tells quite another story. Local decisionmaking bodies have been found frequently to base decisions to grant or deny variances on inappropriate and substantially irrelevant factors.[10] As these variance decisions were challenged in court, clear rules emerged. Courts held that the variance-granting function was to be exercised sparingly; it was not a dispensing power but a safety valve. For a landowner to be eligible for an exception from a comprehensive zoning scheme's use restrictions,[11] prevailing doctrine requires a showing of a burden that would amount to a denial of all reasonable use of the property—the equivalent of a constitutional taking.[12]

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[7] Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886 (1992). The Court's recent decision in Dolan v. City of Tigard, 114 S. Ct. 2309 (1994), will no doubt also be scrutinized. *See infra* notes 94–109 and accompanying text.

[8] Commonly suggested measures for ensuring that a restriction will not constitute a taking include performance standards and special permits, use of flexible standards, transferable development rights, amortization procedures, voluntary measures by landowners, and taxes.

[9] *See infra* notes 150–75 and accompanying text.

[10] *See infra* notes 176–77 and accompanying text.

[11] Some courts will allow deviation from area restrictions upon a lesser impact. *See infra* notes 158–59, 219–30 and accompanying text.

[12] *See infra* section IV.B.

Commentators have noted that the variance, in addition to its use in zoning, is also an important component of environmental land-use regulation.[13] Given the increased awareness that a land-use restriction may be judged a taking, the question may arise of how a local or state decisionmaking body is to assess an application for a variance from an environmentally based land-use restriction. This Comment examines, and attempts to learn from, the law of the zoning variance in order to determine the standard that a court will apply in reviewing such a decision. The Comment suggests that, based on the zoning variance experience, courts will generally approve the grant of a variance where the landowner would otherwise be denied the reasonable use of his or her property. Courts that have considered the question recognize that properly enacted land-use based environmental restrictions, no less than—and perhaps more than—traditional zoning restrictions, constitute widely applicable legislative rules of substantial public importance. Courts have turned to zoning caselaw and have begun to import some of the doctrines developed in that area. For agencies and others who administer environmental land-use programs, the application of zoning variance law suggests that in typical situations, they need only grant a variance from environmental restrictions upon a showing that denial would leave the owner with no reasonable use for the land and would be tantamount to a taking without compensation. This standard, and related doctrines, are rooted in a well-developed body of caselaw that arose under the traditional zoning variance. In reviewing variance decisions in environmental land-use cases, courts have turned to this caselaw, and have found it both useful and applicable.

Section II of this Comment provides a background history of federal takings analysis, highlighting those Supreme Court decisions that are especially pertinent for zoning and environmental land-use regulation.[14] Section III outlines the current state of federal takings law, again focusing on land-use regulation.[15] Section IV recounts the origins, development, operation, and caselaw of the variance in the context of traditional zoning.[16] Section V surveys the use of the variance in land-use based environmental controls such as wetland protection legislation and regulations.[17] The section proceeds to examine how courts, faced with challenges to variance decisions made in the con-

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[13] *See infra* note 250.

[14] *See infra* notes 20–76 and accompanying text.

[15] *See infra* notes 77–149 and accompanying text.

[16] *See infra* notes 150–249 and accompanying text.

[17] *See infra* notes 250–83 and accompanying text.

text of environmental land-use controls, have reviewed the decisions, in particular, how they have interpreted the variance standard. Section VI assesses the use of zoning caselaw in the environmental context, and concludes that in most circumstances courts have treated the variance in land-use based environmental controls much as they have treated the zoning variance: as a narrow takings safety valve.[18] At the same time, the principles that have been developed in the zoning context to justify the imposition of substantial restrictions on landowner freedom are found to provide strong support for proper environmental land-use controls.[19] A few observations are offered with respect to particular cases of the use, and misuse, of zoning variance caselaw in the review of environmental land-use variances.

II. Brief History of Takings Analysis

This discussion of the variance in land-use based controls such as environmental programs takes place against the backdrop of the Constitution's "takings clause." The clause provides that if the government takes private property for a public use, the government must justly compensate the person from whom it is taken.[20] Throughout United States history, property owners have raised objections to government interferences with their ability to do what they want with their property. In this century, landowners have set up the takings clause in their challenges to zoning and other restrictions on the use of property. The role of the variance in zoning and environmental land-use controls are best understood in light of the fundamental tensions between public and private rights played out in the Supreme Court's major land-use regulatory takings cases over the past century.

In the landmark *Lucas* decision, Justices Scalia and Blackmun engage in a debate over the proper function of the takings clause.[21] As will be seen, their disagreement incorporates elements of a debate that underlies much of the history of the Supreme Court's regulatory takings jurisprudence. The view espoused by Justice Blackmun en-

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[18] *See infra* section V.B.

[19] This Comment does not explicitly respond to the decision in Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886 (1992), by developing a theory of environmental land-use regulation based on traditional tort and property concepts. A number of commentators have undertaken this worthy task.

[20] U.S. Const. amend. V ("[N]or shall private property be taken for public use without just compensation.").

[21] *See* Lucas v. South Carolina Coastal Council, 112 S. Ct. at 2886–904, 2904–17 (Blackmun, J., dissenting).

compasses a conception of the clause as a protection only against arbitrary assertions of government power. In this view, government has expansive powers to take actions on behalf of the public interest under the police or commerce powers.[22] Justice Scalia's view, by contrast, conceives of the takings clause as the fundamental econo-constitutional bulwark against government regulation of private property. Taken to its logical extreme, this view requires that the government pay just compensation any time a regulation reduces property values.[23]

A consistent unifying theory of the takings clause has thus far proven elusive.[24] Perhaps the clause can be understood as expressing the idea that government actions that result in deprivations of property should be constitutionally bound, in order to ensure that the individual is not called upon to bear an unduly disproportionate burden in furtherance of a public good.[25] In this view, the takings clause protects expectations rooted in custom and necessity, not in legislatively manipulable positive statements of law. Reliance on such norms ensures that we do not fall back on a conception of rights delimited by legislative grant.[26] Despite the current vitality of the debate, for the first century and a quarter of its existence, the takings clause was

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[22] *See, e.g.*, Joseph L. Sax, *Takings, Private Property and Public Rights*, 81 YALE L.J. 149, 155–61 (1971) (arguing for broad conception of police power to regulate where "public rights" are involved).

[23] For the quintessential, and controversial, expression of this viewpoint, see generally RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN (1985).

[24] Some have suggested that the search is misguided. *See generally* Jeremy Paul, *The Hidden Structure of Takings Law*, 64 S. CAL. L. REV. 1393 (1991).

[25] *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 9-7 (2d ed. 1988). See also Armstrong v. United States, 364 U.S. 40, 49 (1960), which is often cited for the proposition that the Takings Clause was designed "to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." While *Armstrong* is increasingly cited in land-use contexts, see, for example, Dolan v. Tigard, 114 S.Ct. 2309, 2316 (1994), the facts of the case are rarely mentioned. The case involved a taking of intangible legal rights—mechanics' liens on personal property—title to which had been transferred from a contractor to the federal government. *Armstrong*, 364 U.S. at 48. The Court held that the liens constituted a property interest requiring compensation. *Id.* The Court distinguished between "takings," which require compensation, and "consequential" destructions of property, which do not. *Id.* The Court found a taking had occurred because before the government action the plaintiffs had a compensable property right. *Id.* The government had unilaterally extinguished the plaintiffs' liens and was the "direct, positive, beneficiary" of the action. *Id.* *Armstrong* is thus in line with those later cases in which the Court would identify inviolate categories of intangible property rights. *See infra* notes 77–79 and accompanying text.

[26] This has been denoted the "bitter-sweet" concept, based on Justice Rehnquist's majority opinion in *Arnett v. Kennedy*: "where the grant of a substantive right is inextricably intertwined with the limitations on the procedures which are to be employed in determining that right, a

applied only to physical takings—that is, actual physical invasions of a landowner's property.

A. *Pre*–Pennsylvania Coal: *1789–1922*

At the time of Constitutional ratification, the takings clause was probably envisioned as applying only to direct, physical appropriation of property.[27] During the first half of the nineteenth century, as states adopted takings clauses of their own, most takings clause litigation occurred at the state level.[28] Courts regularly denied compensation to landowners who, by force of government action, were denied the use—even the sole economically viable use[29]—of their property, and generally deferred to legislative prohibitions on uses.[30] By mid-century, courts established that compensation was only required for physical takings tantamount to a fee interest.[31]

After the Civil War, as the federal judiciary became involved in the review of state actions under the federal Constitution, its decisions respected an expansive conception of state and local government's ability to regulate land use under the police power, even where the limits on a landowner's freedom were substantial. In 1887, the Supreme Court adhered to a limited reading of the takings clause as a limit on land-use regulation in *Mugler v. Kansas*.[32] The Court held that when the state acts under its police power to ban a "noxious" use that the state deems injurious to the public health, no compensation is required.[33] Subsequent cases followed the rationale of *Mugler*.[34]

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litigant . . . must take the bitter with the sweet." 416 U.S. 134, 153–54 (1974); *see* TRIBE, *supra* note 25, § 9-5, at 602 & n.19.

[27] *See* Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886, 2892 (1992). This view is discussed in William Michael Treanor, *The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment*, 94 YALE L.J. 694, 711 (1985).

[28] The federal Constitution's takings clause applied only to the federal government until 1897. *See* Chicago, B. & Q.R.R. v. Chicago, 166 U.S. 226, 241 (1897).

[29] *See* Coates v. Mayor of New York, 7 Cow. 585, 592 (N.Y. Sup. Ct. 1827).

[30] *See* Comment, *Land Use Regulation and the Concept of Takings in Nineteenth Century America*, 40 U. CHI. L. REV. 854, 855 (1973) (identifying isolated early-1800s cases in which compensation was paid for less than fee takings).

[31] *Id.* at 857.

[32] 123 U.S. 623, 668–69 (1887). At issue in *Mugler* was a liquor prohibition that forced breweries to cease operation. *Id.* A group of brewery owners challenged the law on an economic diminution theory. *Id.* That is, they claimed that the regulation so diminished the value of their property as to violate the Fifth Amendment. *See id.*

[33] Id. at 669.

[34] *See* Reinman v. City of Little Rock, 237 U.S. 171, 176–77 (1915) (upholding ordinance prohibiting livery stables); Hadacheck v. Sebastian, 239 U.S. 394, 409–12 (1915) (upholding ordinance that forced brick factory to shut down), *see also* Miller v. Schoene, 276 U.S. 272, 279–80

A series of late-nineteenth and early-twentieth-century cases employed the concept of "average reciprocity of advantage" to sustain a range of social and economic programs under a broadening police power.[35] Generally, these cases reflect the notion that the greater and more widespread the public benefit derived from a measure, the greater the private burden that will be tolerated without a compensation requirement.[36] Despite some opposition and criticism,[37] the Supreme Court employed the reciprocity concept to uphold various regulatory schemes that imposed a burden on individual landowners.[38]

B. Pennsylvania Coal *and* Euclid

It was not until 1922, in *Pennsylvania Coal Co. v. Mahon*, that the Supreme Court specifically found that the Constitution required direct compensation to a landowner whose use of property was not physically taken, but rather was restricted by regulation.[39] At issue was the state of Pennsylvania's Kohler Act,[40] which required mining companies to leave pillars of coal in place to prevent subsidence underneath structures, roads, or waterways.[41] The Pennsylvania Coal Company had conveyed surface rights to Mahon, a landowner, but had reserved the mining estate, which is given special recognition under

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(1928) (upholding uncompensated destruction of infected cedar trees); Lawton v. Steele, 152 U.S. 133, 136–37 (1894) (upholding uncompensated destruction of personal property, and setting forth classic statement of substantive due process test).

[35] *See* Raymond R. Coletta, *Reciprocity of Advantage and Regulatory Takings: Toward a New Theory of Takings Jurisprudence*, 40 AM. U. L. REV. 297, 304–19 (1990) (discussing evolution of the concept in Jackman v. Rosenbaum Co., 260 U.S. 22 (1922), Plymouth Coal Co. v. Pennsylvania, 232 U.S. 531 (1914), Fallbrook Irrigation District v. Bradley, 164 U.S. 112 (1896), and Wurts v. Hoagland, 114 U.S. 606 (1885)).

[36] *See id.* at 319; *see also* Thomas A. Hippler, Comment, *Reexamining 100 Years of Supreme Court Regulatory Takings Doctrine: The Principles of "Noxious Use," "Average Reciprocity of Advantage," and "Bundle of Rights" from* Mugler *to* Keystone Bituminous Coal, 14 B.C. ENVTL. AFF. L. REV. 653, 678–79 (1987) (discussing economic justification for regulations in these cases).

[37] Some criticism came from state courts. *See, e.g.*, Hoagland v. Wurts, 41 N.J.L. 175, 177–78, 181 (1879) (striking down marshland drainage provision), *rev'd*, 114 U.S. 606 (1885).

[38] Coletta, *supra* note 35, at 315.

[39] 260 U.S. 393, 412, 415–16 (1922). The view that government action short of physical invasion may amount to a taking of property was not born in *Pennsylvania Coal*. *See* Hippler, *supra* note 36, at 656–80 (examining three modes of analysis in pre–*Pennsylvania Coal* Supreme Court cases).

[40] 1921 Pa. Laws 1198 (May 27, 1921).

[41] *Pennsylvania Coal*, 260 U.S. at 412–13. In fact, the Court had recently upheld a measure requiring coal companies to leave a pillar of coal in place along the border with adjoining mines in Plymouth Coal v. Pennsylvania, 232 U.S. 531, 540 (1914). Holmes spilled little ink distinguishing *Plymouth Coal*, classifying the challenged requirement in that case as having been to protect mine employees and thus providing an average reciprocity of advantage. *Pennsylvania Coal*, 260 U.S. at 415.

state law, to itself.[42] The company asserted that the Kohler Act, as applied to the Mahon property, deprived it of the reserved right to mine coal. In finding that a taking had occurred, the Court concluded that the Kohler Act, as applied to the property in question, sought to prevent only a minimal, private harm.[43] Justice Holmes, speaking for the Court, set this purpose against "the extent of the taking" which, he found, was "great."[44] While a diminution in the value of land is a necessary byproduct of governmental regulation, diminution is a factor that a court must consider in determining whether a particular regulation goes "too far."[45] Here, the Court concluded, the Kohler Act's prohibition effectively destroyed the "mining estate," and thus crossed the line between proper regulation and improper regulatory taking.[46]

While the Court recognized that certain aspects of property ownership may be subject to governmental restrictions enacted pursuant to an implied police power servitude,[47] Justice Brandeis's dissent truly adhered to this *Mugler* rationale. For Brandeis, deprivation of an economic use resulting from proper health and safety measures does not constitute a taking.[48] The Kohler Act did not constitute an appropriation, but merely barred a "noxious use."[49] Further, the proper focus for determining the Act's economic impact on Pennsylvania Coal, asserted Brandeis, was the property as a whole, not just the mining estate.[50] Thus, the coal that Pennsylvania Coal was required to leave in place was of relatively little value.[51]

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[42] *See generally* Hugh G. Montgomery, *The Development of the Right of Subjacent Support and the "Third Estate" in Pennsylvania*, 25 TEMP. L.Q. 1 (1951).

[43] "This is the case of a single private house." *Pennsylvania Coal*, 260 U.S. at 413. Holmes also asserted that the fact that the Kohler Act would not apply where the surface and mining rights are owned by the same party evidenced its limited public purpose. *Id.* at 413–14. Holmes chided the legislature for having acquired rights of way without acquiring the necessary support estate. *Id.* at 415. Justice Stevens would seize on this portion of *Pennsylvania Coal* in his opinion in *Keystone Bituminous Coal v. DeBenedictis* in distinguishing the subsidence law at issue in that case. *See infra* notes 134–43 and accompanying text.

[44] *Pennsylvania Coal*, 260 U.S. at 414.

[45] *Id.* at 413, 415.

[46] *See id.* at 416.

[47] *See id.* at 413.

[48] *Id.* at 417 (Brandeis, J., dissenting).

[49] *Id.* (Brandeis, J., dissenting). "The State merely prevents the owner from making a use which interferes with paramount rights of the public." *Id.* (Brandeis, J., dissenting). Brandeis scolded the Court for second-guessing the judgment of the local legislature and courts as to the best way to achieve this purpose. *Id.* at 420–21 (Brandeis, J., dissenting).

[50] *Id.* at 419 (Brandeis, J., dissenting).

[51] *Id.* (Brandeis, J., dissenting).

Four years later, in the seminal case of *Village of Euclid v. Ambler Realty Co.*, the Court upheld a comprehensive zoning ordinance against due process and equal protection attacks.[52] *Euclid* involved a facial challenge to the validity of a comprehensive zoning ordinance. Despite the fact that the ordinance diminished the plaintiff's property values substantially by barring industrial uses in residential zones,[53] the Court upheld the ordinance as a proper exercise of the police power.[54] While the Court emphasized the many benefits that flow from a comprehensive zoning scheme, it did not uphold the ordinance simply because the ordinance restricted a "noxious use" nor because the zoning scheme provided an average reciprocity of advantage.[55] Rather the Court's inquiry was one of substantive due process.[56] The legal focus of Justice Sutherland's majority opinion was on the legitimacy of the municipality's purposes and the means chosen to achieve them.[57]

In the wake of *Pennsylvania Coal* and *Euclid*, the Supreme Court rested. The Court did not address the takings issue with regard to land-use regulations for half a century. But the basic elements of the debate seen in Justices Blackmun and Scalia's opinions in the *Lucas* case were nascent in the Holmes-Brandeis opinions in *Pennsylvania Coal*. On the one hand was Holmes's intuitive, ad hoc approach in which traditional, state law–derived common law conceptions are highly relevant to the definition of property interests, and the focus is on the property "taken." Brandeis's approach, by contrast, allowed an expansive and flexible police power which justifies a public right to prohibit undesirable uses, focuses on the claimant's broader property interest for determining the pre-regulation value of the landowner's property, and allows prohibitions even where the effect on the use—and therefore the economic viability—of land, is extreme.

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[52] 272 U.S. 365, 395–97 (1926).

[53] Ambler claimed that the Euclid zoning ordinance reduced the value of its property by about 75%. *Id.* at 384.

[54] *Cf.* Nectow v. City of Cambridge, 277 U.S. 183, 188–89 (1928). In *Nectow*, the landowner's property was split by a zoning boundary line, thereby diminishing its value appreciably. The Court held that absent a showing that the ordinance bore a substantial relation to a proper public purpose, it was unconstitutional as applied to the property. *Id.*

[55] *See Euclid*, 272 U.S. at 391–95; Hippler, *supra* note 36, at 690; *see also infra* note 242.

[56] The Court followed the rationale of Lawton v. Steele, 152 U.S. 133 (1894), and other due process cases instead of the *Pennsylvania Coal* test, thus shifting its analysis from elimination of a noxious use to the question of public need.

[57] Courts now recognize the validity of zoning for health and safety related purposes. *See* ROBERT M. ANDERSON, AMERICAN LAW OF ZONING § 7.03 (3d ed. 1986). Zoning ordinances are upheld if they tend to reasonably serve the public health, safety, morals, or general welfare. But judicial acceptance of zoning for purposes related solely to protection of the general welfare, aesthetics being the classic example, has been slower. *See infra* section IV.D.

While the Court had largely withdrawn from the field, these approaches would eventually resurface as landowners challenged government's increasingly pervasive regulation of land as uncompensated takings of property.

C. *The Debate Renewed*: Penn Central

After a half-century interlude, the Supreme Court revisited the land-use regulatory takings issue in *Penn Central Transportation Co. v. New York City*.[58] *Penn Central* set the stage for 1980's takings law and continues to be influential.[59] The ordinance at issue in *Penn Central* was New York City's Landmarks Preservation Law.[60] The law created a commission to designate landmark properties.[61] The law also contained provisions that were intended to enable property owners to achieve a "reasonable return" on their investment and give them the flexibility to use their property in ways not inconsistent with the law's goals.[62] When Grand Central Terminal was designated a landmark, Penn Central, the owner of the property, sought to take advantage of these provisions in order to redevelop the terminal property, including the airspace above the famous terminal building. The company applied for certificates of "no exterior effect" and "appropriateness"; both were denied.[63] Rather than seek review of the denials, or seek approval for an alternate approach, the company filed suit claim-

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[58] 438 U.S. 104 (1978). The Court had issued relatively narrow decisions concerning regulatory takings in the interim. *See* Goldblatt v. Town of Hempstead, 369 U.S. 590 (1962); United States v. Central Eureka Mining. Co., 357 U.S. 155 (1958); United States v. Kansas City Life Ins. Co., 339 U.S. 799 (1950); United States v. Causby, 328 U.S. 256 (1946); United States v. General Motors Corp., 323 U.S. 373 (1945).

[59] *See infra* section III.

[60] *Penn Central*, 438 U.S. at 108–09.

[61] *Id.* at 110. Interested parties were given an opportunity to be heard before designation and such designation was subject to approval by the city's Board of Estimate. *Id.* at 110–11. The owner of a designated property was required to keep the property "in good repair" and obtain commission approval to alter exterior architectural features. *Id.* at 111–12. Three procedures were available. First, the property owner could apply to the commission for a certificate that the proposed change would not effect the property's protected features. *Id.* Second, the owner could apply for a certificate of "appropriateness," which was issued if the commission concludes that the proposed change would not burden preservation of the site. *Id.* Both of these procedures were subject to judicial review. Third, the property owner could claim insufficient return, in which case mechanisms were available to prevent an economic hardship. *Id.* at 112.

[62] *Id.* at 110. Under the city's zoning ordinance, the owner of a designated site who had not developed the property to the fullest extent allowed under zoning provisions could transfer development rights to nearby parcels under provisions more liberal than for sites not so designated. *See* Norman Marcus, *The New York City Experience*, *in* TRANSFERABLE DEVELOPMENT RIGHTS 3 (Planning Advisory Service Report 3 (1975)).

[63] *Penn Central*, 438 U.S. at 116–18.

ing that the law as applied to its property constituted a taking without compensation.[64]

In denying the landowner's claim, the Supreme Court articulated three independent factors that courts must consider in determining whether a government regulation that diminishes the value of property amounts to a taking: the character of the government action, the economic impact of the action on the landowner, and the effect of the action on the landowner's reasonable investment-backed expectations.[65] As articulated in *Penn Central* and subsequent decisions, the character of the action and the economic impact prongs are sufficient in some cases to establish a taking.[66] The concept of reasonable investment-backed expectations is less well developed, particularly in land-use cases.[67]

With respect to the economic impact prong, the Court, echoing Brandeis, announced that the inquiry "does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated."[68] Rather, the inquiry focuses on the "nature and extent of the interference with rights in the parcel as a whole."[69] Turning to the specific economic impact of the landmark law on Penn Central, the Court observed that not only could the company continue to use the property as it historically had been used—which the Court assumed to be in accord with the landowner's "primary expectation"—but the company could also, under the landmark law's provisions, obtain a "reasonable return" on its investment.[70] The Court deemed significant the fact that Penn Central could apply for approval of a different structure than the company had in fact proposed, and thus had not, as a matter of fact, been denied all use of even the airspace.[71] Finally, the Court emphasized that Penn Central could transfer development rights to other parcels.[72] Thus,

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[64] *Id.* at 118–19.

[65] *Id.* at 124.

[66] *See infra* section III.

[67] For a recent case, see Resolution Trust Corp. v. Town of Highland Beach, 18 F.3d 1536 (11th Cir. 1994).

[68] *Penn Central*, 438 U.S. at 130.

[69] *Id.* at 130–31. The Court also rejected Penn Central's arguments that it was unduly and uniquely burdened and insufficiently benefitted by the ordinance. In so doing, the Court pointed to the law's wide applicability and the legislative conclusion that landmark preservation confers a broad public benefit. *Id.* at 134–35.

[70] *Id.* at 136.

[71] *Id.* at 136–37.

[72] *Id.* at 137. The Court noted that the law's transfer of rights provision was probably not alone sufficient to mitigate a taking, but on the facts of the case found that the provision mitigated the burden on Penn Central and must be taken into account. *Id.*

the Court found, Penn Central had not been denied the reasonable use of its property nor had the landmark law interfered with its reasonable investment-backed expectations.

Justice Rehnquist's dissent asserted a position closer to Holmes's *Pennsylvania Coal* opinion. Drawing on the concept of average reciprocity of advantage, Justice Rehnquist distinguished the landmark law from zoning ordinances which, he stated, similarly benefit and burden all property owners who are similarly situated.[73] Rehnquist also distinguished land-use regulations which merely bar a narrow set of noxious uses.[74] Citing Holmes, Rehnquist claimed that an average reciprocity of advantage did not exist under the landmark law.[75] Penn Central was "singled out" at substantial cost, "with no comparable reciprocal benefits."[76]

The *Penn Central* decision marks a turning point in the Supreme Court's regulatory takings jurisprudence. The decision precedes a period in which the Court continued to uphold land-use regulations despite their economic impact on certain property owners, while also taking on cases in which the Court would affirm the existence of inviolate spheres of property interests. The Court would also begin to engage in more frequent and more demanding scrutiny of the legislative and administrative details of land-use regulation.

III. Current Regulatory Takings Caselaw

Takings law since *Penn Central* has been characterized by a retreat from the type of deferential, substantive, multi-factoral analysis seen in that case. In its place, the Court has paid renewed attention to categorical, traditional, common-law–based attributes of property ownership, the infringement of which constitute per se takings requiring compensation.[77] For example, the Court has identified property

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[73] *Id.* at 139–40 (Rehnquist, J., dissenting). Justice Rehnquist would have remanded the case for a determination of whether the transferable development rights provided adequate compensation for the taking. *Id.* at 151–52 (Rehnquist, J., dissenting).

[74] *Id.* at 146 (Rehnquist, J., dissenting).

[75] *Id.* at 140 (Rehnquist, J., dissenting).

[76] *Id.* (Rehnquist, J., dissenting).

[77] *See* Frank Michelman, *Takings, 1987*, 88 Colum. L. Rev. 1600, 1621–25 (1988); Susan Rose-Ackerman, *Against Ad-Hocery: A Comment on Michelman*, 88 Colum. L. Rev. 1697 (1988); *see also* Peter W. Salsich, Jr., *Life After the Takings Trilogy—A Hierarchy of Property Interests?*, 19 Stetson L. Rev. 795, 805–06 (1990) (identifying consistently stronger protection for property rights associated with personal liberties than for those associated with wealth accumulation).

rights in the interest earned on amounts temporarily deposited with a court,[78] and in the right to devise real property interests.[79]

Challenges to limitations on landowner property rights can be categorized according to the legal basis of the challenge. Three categories are identifiable in the recent caselaw.[80] First are cases challenging government assertions of power that interfere with the physical integrity of property. Second are challenges to limitations on attributes of title such as rights of disposition. Third, and most important for present purposes, are economic challenges, those based on interference with the landowner's freedom to exploit property economically.

A. *Physical Integrity*

The cases in which a landowner alleges that a government action violates the physical integrity of property ownership have led to one of the few bright-line rules in takings jurisprudence. *Kaiser Aetna v. United States* is one of the post–*Penn Central* cases in which the Court has identified and attempted to define inviolable spheres of property interests.[81] In *Kaiser Aetna*, the Court found a taking in the Army Corps of Engineers's attempt to require a property owner to allow the boating public to use an artificial navigational channel created by the landowner.[82] The Court declared that the right to exclude is "universally held" and is a "fundamental element of the property right."[83] Any interference with the right categorically requires compensation. The Corps of Engineers's demand, if complied with, would have constituted an "actual physical invasion," not a mere assertion of regulatory power.[84]

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[78] Webb's Fabulous Pharmacies, Inc., v. Beckwith, 449 U.S. 155, 164 (1980).

[79] Hodel v. Irving, 481 U.S. 704, 716–17 (1987). For a case limiting municipal discretion in zoning on the basis of alienability, see Sanderson v. City of Willman, 162 N.W.2d 494 (Minn. 1968).

[80] This classification appears in Robert H. Freilich & Elizabeth A. Garvin, *Takings After Lucas: Growth Management, Planning, and Regulatory Implementation Will Work Better than Before*, 22 STETSON L. REV. 409, 411 (1993).

[81] 444 U.S. 164, 179–80 (1979).

[82] *Id.* at 167–69, 179–80. The equities of the case seem to have run in the landowner's favor, as the Corps of Engineers had approved the dredging with virtually no conditions and then turned around and sought to require a servitude. *See id.* at 167–69. The decision suggests that the government could have required Kaiser to allow access when it issued the permit, but not when "petitioners have proceeded as far as they have." *Id.* at 180. Justice Marshall, who would author the Court's opinion in Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982),—which extended the category of physical invasion as categorical taking—here joined Justice Blackmun's dissent. *See infra* notes 85–88 and accompanying text.

[83] *Kaiser*, 444 U.S. at 179–80.

[84] *Id.* at 180.

Again resting on the traditional interest in exclusive possession, the Court, in *Loretto* v. *Teleprompter Manhattan CATV Corporation*, carved out one of the clearest categorical takings rules.[85] *Loretto* involved a New York statute that required landlords to allow cable television companies to install certain transmission equipment on their property in order to facilitate access to cable television services.[86] The Court held that where there exists a permanent physical presence on the subject property, then there is a taking per se.[87] The Court distinguished permanent occupations, which "absolutely dispossess the owner of his rights to use, and exclude others from, his property," from "temporary limitations on the right to exclude."[88]

B. *Interference with Title*

Landowners have alleged that government imposed land-use restrictions, such as exactions and permit conditions, interfere with ownership rights associated with title.[89] In these cases, land-use restrictions such as development conditions, impact fees, or exactions limit or narrow the landowner's freedom to exercise traditional rights of fee ownership. The Supreme Court's decision in *Nollan v. California Coastal Commission* called for a level of increased scrutiny of the relation, or "nexus," between land-use restrictions and the purpose of such restrictions.[90] The decision indicated that the nature of the restriction influences the level of scrutiny: where the restriction has attributes of a physical invasion the scrutiny will be even higher than otherwise.[91]

The regulation in *Nollan* would have required that an oceanfront landowner grant a permanent public easement of passage along the

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[85] 458 U.S. 419 (1982).

[86] *Id.* at 423–24. Procedures established under the statute awarded landlords a one-time nominal payment—a presumptive award—for the invasion. *Id.*

[87] *Id.* at 426.

[88] *Id.* at 435 n.12. The Court distinguished Pruneyard Shopping Center v. Robins, 447 U.S. 74 (1980), in which it upheld a California Supreme Court decision barring a shopping center owner from completely denying access to persons engaged in First Amendment- protected speech. *See* 447 U.S. 74, 82–84 (1980); *see also* Dolan v. Tigard, 114 S. Ct. 2309, 2321 (1994) (distinguishing *Pruneyard*).

[89] *See* Freilich & Garvin, *supra* note 80, at 414. Such interferences may involve a forced physical invasion or a restriction that causes economic diminution. Thus, there is some conceptual overlap among the categories in terms of the type of imposition on the landowner. The nature of this type of challenge, however, is unique.

[90] *See* 483 U.S. 825, 834–42 (1987). The question of what judicial standard should govern this relationship had been addressed by many state courts. At the time of *Nollan*, the "reasonable relationship" standard appeared to be emerging as a majority position.

[91] *Id.*

beach edge of the landowner's oceanfront property in order to receive a permit to construct a replacement house.[92] The Court found that there the nexus was insufficient because the negative public impact of the activity for which the permit was sought—diminished visual access to the ocean caused by the construction of the Nollan house—was simply not alleviated by the easement requirement.[93]

The Court revisited *Nollan* in 1994. In *Dolan v. City of Tigard*, the Court held that there must exist an individualized showing of rough proportionality between permit conditions, and other development exactions, and the state interest that the exactions are supposed to advance.[94] The property at issue in *Dolan* was a 1.67-acre improved commercial parcel located partially within the hundred-year floodplain of a waterway.[95] The landowner applied for a permit to expand an existing commercial use and to pave a portion of the property.[96] As a condition of filling or building within the floodplain, which the owner intended to do, the city of Tigard required the owner to dedicate the land within the floodway for a "greenway" and an adjacent strip for a pedestrian/bicycle path right of way.[97] The landowner sought and was denied a hardship variance.[98] The city based its decision on its findings that the proposed development would have a negative impact on the waterway and on traffic congestion.[99]

The Supreme Court began by distinguishing the land-use restrictions at issue in *Euclid*,[100] *Pennsylvania Coal*,[101] and *Agins v. City of Tiburon*.[102] Those cases, the Court found, involved "essentially legislative determinations classifying entire areas."[103] In addition, none of those cases required a landowner to actually dedicate land to the

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[92] *Id.* at 828.

[93] *Id.* at 837. It should be noted that the Court was especially swayed by the interference with the landowner's exclusive possession. *See id.* at 831–32.

[94] 114 S.Ct. 2309 (1994).

[95] *See id.* at 2313.

[96] *Id.* at 2313–14.

[97] *Id.* at 2314 n.2.

[98] *Id.* at 2314. The ordinance authorized a variance in cases of "undue or unnecessary hardship" where the following five conditions were met: 1) the variance will not be detrimental to the city's plans and policies; 2) there are unique circumstances; 3) the proposed use is otherwise permitted; 4) there will be no adverse effect on existing "physical and natural systems;" and 5) the hardship is not self-imposed and the variance is the minimum needed to alleviate the hardship. *Id.* at 2314 n.3. The landowner also appealed the variance decision. *Id.* at 2315.

[99] *Id.* at 2314–15.

[100] *See supra* notes 52–57 and accompanying text.

[101] *See supra* notes 39–51 and accompanying text.

[102] 447 U.S. 255 (1980); *see infra* notes 115–21 and accompanying text.

[103] *Dolan*, 114 S. Ct. at 2316–17.

government.[104] The government conduct in *Dolan*, the Court noted, was also distinguished from zoning in that the conduct involved an adjudicative decision attaching conditions to development of a single parcel.[105] The Court found that the minimal theoretical nexus between the development impact and the permit condition, lacking in *Nollan*, here existed.[106] Rather than adopt the "reasonable relationship" test used in many states, the Court chose to adopt a different formulation—"rough proportionality."[107] The Court held that the condition must be supported by an individualized determination, though not with mathematical precision, that the condition in question is roughly proportional to the impact of the proposed development.[108] The Court found that the city had failed to make specific findings sufficient to justify the floodway and right-of-way dedications as a development condition.[109] *Dolan* thus requires that governments be able to establish that land-use restrictions not only serve legitimate purposes, but that they are crafted in such a way as to support a showing that the specific restriction placed on a given landowner is well grounded in fact.

Landowners have also challenged restrictions based on interference with attributes of title in another area of government regulation. These are cases where the land-use restrictions serve primarily socioeconomic ends.[110] Such challenges have been less successful than those attacking resource-based restrictions. Courts have been willing to allow government interference with traditional property rights where government regulates to further the general social welfare.[111]

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[104] *Id.*

[105] *Id.* at 2320 n.8.

[106] *Id.* at 2317–18.

[107] *Id.* at 2319. The Court adopted this formulation in order to avoid confusion with the "rational basis" test employed in its Equal Protection jurisprudence. *Id.*

[108] *Id.* at 2319–20

[109] *Id.* at 2320. Specifically, the Court found that the city failed to show why a *dedication* of the floodway was needed, which would deprive the landowner of her right to exclude. *Id.* In addition, the city's finding that dedication of the right of way "could"—as opposed to "will" or "is likely to"—mitigate traffic demand created by the expansion of the landowner's business was insufficient. *Id.* at 2321–22.

[110] Regulations governing the landlord-tenant relationship have been a fertile source of controversy. *See, e.g.*, Seawall Assocs. v. City of New York, 542 N.E.2d 1059, 1064 (N.Y.) (holding that ordinance establishing moratorium and requiring rehabilitation of certain residential properties and rental at controlled rates is a facial physical taking), *cert. denied*, 493 U.S. 976 (1989); *see also* Freilich & Garvin, *supra* note 80, at 415.

[111] Despite the decision in *Seawall*, 542 N.E.2d 1059, the Supreme Court has upheld a mobile home rent control ordinance which prevented reoccupation by the landlord after the tenant vacates and allowed the tenant to assign or devise the tenancy interest. Yee v. City of Escondido, 112 S. Ct. 1522, 1531 (1992). The ordinance did allow the landlord to withdraw the rental

C. *Economic Impact*

The third category of takings challenges to land-use regulations are those based primarily on a regulation's economic effects.[112] These

property from the market. *Id.* at 1528. Though plaintiffs argued that the regulation required the landowner to suffer a physical invasion, the Court distinguished physical from regulatory takings and declined to apply the *Loretto* rule. *Id.* at 1528–30. The public purpose behind direct social and economic regulation of property thus appears to warrant a higher constitutional stature than is accorded to measures whose public benefits are less direct, such as those protecting natural resources. Thus the *Yee* court cited Heart of Atlanta Motel, Inc., v. U.S., 379 U.S. 241, 261 (1964), in noting that parties who engage in commerce cannot be heard to object to legitimate social and economic regulation. *Id.* at 1530. *See also* Pennell v. City of San Jose, 485 U.S. 1, 13–14 (1988) (upholding rent control ordinance as legitimate exercise of police power).

[112] Ripeness or "finality" requirements, and exhaustion of remedies, are important thresholds in such challenges, with implications for the use of variance procedures. The prevailing rationale for imposing ripeness requirements is that an application must be reviewed and an ordinance applied before a takings assessment can be meaningful. *See* MacDonald, Sommer & Frates v. Yolo County, 477 U.S. 340, 348–53 (1986). Ripeness requirements are the most impervious and frequently encountered bar to the challenging party. *But see* David L. Callies, *The Lucas Case: Regulatory Takings Past, Present, and Future*, LAND USE L. & ZONING DIG., Sept. 1992, at 4. The party challenging a land-use restriction must receive a final determination with regard to a development proposal before a court will hear the case because the court cannot tell if a regulation goes "too far" until it knows how far the regulation goes. The party challenging the regulation must determine what use can be made of the property, and must pursue state remedies so as to determine whether "just compensation" will be forthcoming. *See MacDonald*, 477 U.S. at 350–53 (holding that rejection of plans does not make a taking claim ripe); Williamson County Regional Planning Comm'n. v. Hamilton Bank, 473 U.S. 172, 190 (1985) (finding case not ripe where plaintiff had not requested a variance nor sought compensation through local and state procedures); Kinzli v. City of Santa Cruz, 818 F.2d 1449, 1453 (requiring a "final and authoritative determination" before a regulatory taking claim may be heard), *amended*, 830 F.2d 968 (9th Cir. 1987), *and cert. denied*, 484 U.S. 1043 (1988). Unlike exhaustion, which focuses on whether the plaintiff pursued available procedures, the focus of the ripeness inquiry is on the nature of the determination below.

In the wake of the *Lucas* decision there has been some debate over the vitality of the ripeness doctrine in land-use cases. *See* Callies, *supra* at 4; *see also* Thomas E. Roberts, *Ripeness After Lucas*, *in* AFTER *LUCAS V. SOUTH CAROLINA COASTAL COUNCIL:* LAND USE REGULATION AND THE TAKING OF PROPERTY WITHOUT COMPENSATION 11, 23 (David L. Callies ed., 1992) [hereinafter AFTER LUCAS] (arguing that *Lucas* de-constitutionalizes ripeness, which is no longer a prerequisite for federal subject-matter jurisdiction, but is merely a matter of Article III case or controversy concern). The *Lucas* Court rejected South Carolina's argument that because the state had added a variance procedure to its regulations after Lucas filed his claim, the claim was not ripe. The Court's decision, however, was based on the fact that the South Carolina Supreme Court had made a final determination on the merits of Lucas's takings claim. *See* Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886, 2890–91 (1992). While federal courts generally have been consistent in applying the ripeness requirement in as-applied takings challenges, some courts have carved out a futility exception and have reviewed a decision where it appears to be futile for the challenging party to continue to seek a remedy through available procedures. *See* Loveladies Harbor, Inc., v. United States, 15 Cl. Ct. 381, 387 (1988) (refusing to require plaintiff to submit alternative applications for a wetlands dredge and fill permit because regulations provided only a limited exception). State courts have begun to apply finality doctrine as developed in the federal courts. *See, e.g,* Port Clinton Assoc. v. Board of Selectmen, 587 A.2d 126, 133

constitute the most frequently litigated cases in the field of regulatory takings.[113] The traditional caselaw governing the grant of a zoning variance will be seen to be closely related to the standards developed in economic regulatory takings claims. These standards are thus highly relevant to environmental land-use regulation takings analysis. The essence of the rule in regulatory takings requires that an owner be compensated where he or she is denied the economically viable use of the property. This rule, rooted in the Court's *Penn Central* decision,[114] has remained intact as the Court has revisited the takings issue since that decision.

An economic challenge to a zoning regulation formed the basis for the Supreme Court's first major pronouncement on regulatory takings in land use after *Penn Central*. *Agins v. City of Tiburon* involved a challenge to a municipality's open-space protective zoning ordinance.[115] In response to a state mandate, the city of Tiburon, California, amended its zoning ordinance, placing certain ridgetop land in an open-space zone. This led the landowners to claim that the amendments rendered their property valueless.[116] Under the test announced by the Court, a restriction amounts to a taking if the restriction either fails to substantially advance a legitimate state interest or denies an

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(Conn.) (applying finality rule to landowner's claim that denial of permit to expand docks constituted a regulatory taking), *cert. denied*, 112 S. Ct. 64 (1991); Wilson v. Commonwealth, 597 N.E.2d 43, 45 (Mass. 1992) (applying finality rule where landowner terminated administrative appeal from denial of permission to build revetment).

Exhaustion of remedies may also bar a challenger's claim. *See generally* DANIEL R. MANDELKER, LAND USE LAW §§ 8.08–8.10 (3d ed. 1993). Generally, where a landowner alleges in state court that a land-use regulation as applied to his or her property constitutes a taking, the claim is barred unless the landowner has exhausted available administrative remedies. This means that before a court will hear an as-applied taking claim, the landowner must pursue avenues for relief provided in the applicable law. The primary exception to the exhaustion requirement is the futility doctrine. Under this exception, a court will hear a case if the landowner can show that relief is unavailable under the existing administrative procedures because the permit- or variance-granting authority has made it clear that it will deny the request. *See, e.g.*, Karches v. City of Cincinnati, 526 N.E.2d 1350, 1355–56 (Ohio 1988) (applying futility exception); *see also* Gilbert v. City of Cambridge, 932 F.2d 51, 61 (1st Cir. 1991) (adopting rule that challenging party must have made at least one meaningful application before court will consider futility exception), *cert. denied*, 112 S. Ct. 192 (1992). *But see* Presbytery of Seattle v. King County, 787 P.2d 907, 916–17 (Wash.) (finding futility exception disfavored and not applying it), *cert. denied*, 498 U.S. 911 (1990).

[113] Freilich & Garvin, *supra* note 80, at 417.

[114] *See supra* section II.C.

[115] 447 U.S. 255 (1980).

[116] *Id.* at 257–58. The zoning limited the number of residences that could be built on the five-acre tract to between one and five. Agins also asserted that an aborted eminent domain action against the property constituted a temporary taking. *Id.* at 258 n.3.

owner economically viable use of the land.[117] The Court observed that "the question necessarily requires a weighing of private and public interests."[118] In weighing these interests, the Court found that, in light of the legislative purposes and the shared benefits and burdens upon Agins and adjacent landowners, the ordinance substantially advanced a legitimate state interest,[119] and that the ordinance did not prevent Agins from developing the land.[120]

The two-part *Agins* analysis has guided much of the inquiry in subsequent economic diminution–based takings claims.[121] Courts have tended to focus on the purpose advanced to support a land-use restriction and the resulting economic impact on the landowner.

In scrutinizing legislative purpose, the Supreme Court's post–*Penn Central* takings jurisprudence has, with one notable exception,[122] been characterized by less deference to, and increased skepticism of, legislative and administrative justifications for limitations on land use. The *Lucas* and *Dolan* decisions conceptually narrowed the realm in which the state may assuredly regulate land use without being required to monetarily compensate the landowner.[123] In practice, government maintains the ability to implement appropriate land-use regulations.[124]

Much of the debate among commentators has focused on the inquiry into economic impact on the landowner. To constitute a presumptive economic taking, a restriction must leave the landowner with no economically viable use of the land, that is, virtually no ability to eco-

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[117] *Id.* at 260. The precise relationship between the *Agins* two-step and *Penn Central* three-part tests has been the subject of some analysis. *See, e.g.*, Ann T. Kadlecek, *The Effect of* Lucas v. South Carolina Coastal Council *on the Law of Regulatory Takings*, 68 WASH. L. REV. 415, 420, 434 (1993) (noting lack of congruity between the two tests, but concluding that in the wake of *Lucas*, tests are synthesized).

[118] *Agins*, 447 U.S. at 261.

[119] *Id.* at 261–62.

[120] *Id.* at 262–63.

[121] Most takings litigation occurs at the state rather than the federal level. The *Agins* test has been influential on state court analysis. For a brief overview of state court takings analysis, see MANDELKER, *supra* note 112, § 2.25–2.31.

[122] Keystone Bituminous Coal Ass'n. v. DeBenedictis, 480 U.S. 470 (1987); *see infra* notes 134–46 and accompanying text.

[123] *See* Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886, 2899, 2901 (1992) (asserting that mere legislative recitation of public purpose is insufficient to justify a complete ban on use of property).

[124] *See, e.g.*, Fran M. Layton, *For Public Agencies, an Ounce of Prevention Is Worth a Pound of Cure*, LAND USE F., Winter 1993, at 58; *see also* Richard C. Ausness, *Wild Dunes and Serbonian Bogs: The Impact of the* Lucas *Decision on Shoreline Protection Programs*, 70 DENV. U. L. REV. 437 (1993); Todd D. Brody, Comment, *Examining the Nuisance Exception to the Takings Clause: Is There Life For Environmental Regulations After* Lucas*?*, 4 FORDHAM ENVTL. L. REP. 287 (1993); William Funk, *Revolution or Restatement? Awaiting Answers to* Lucas' *Unanswered Questions*, 23 ENVTL. L. 891 (1993).

nomically exploit, through alteration of or improvements to, a parcel of land.[125] Although the Supreme Court has refrained from giving lower courts extensive guidance on precisely how to make the determination,[126] a restriction that prevents the landowner from putting the property to any use that can be fairly described as economically viable or beneficial probably falls into the category of a taking based on economic deprivation.[127] If, as the Court held in *Lucas*, no economically viable or beneficial use remains in the property, the restriction must be valid based on background principles of property and tort law in order to avoid being adjudged a taking.[128]

If economically viable or beneficial uses do remain, courts, as in prior cases, will balance the public interest put forth to justify the restriction against the economic impact on the landowner. Sometimes the analysis includes explicit consideration of the restriction's interference with the landowner's investment-backed expectations, though again, the Court has not given lower courts extensive guidance on how to conduct this inquiry.[129] The *Lucas* decision suggests that courts must try to assess how the landowner's expectations of property use

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[125] *See Lucas*, 112 S. Ct. at 2893–95.

[126] *See* Fred P. Bosselman, *Scalia on Land, in* AFTER *LUCAS*, *supra* note 112, at 82 n.94 (listing 20 different formulations of total deprivation concept in the *Lucas* decision alone).

[127] A number of pre-*Lucas* cases found no taking unless "all use" of the property was denied. *See* Freilich & Garvin, *supra* note 80, at 420 n.51.

[128] *Lucas*, 112 S. Ct. at 2900. While traditional nuisance doctrine recognizes harm to public land and resources, there is disagreement as to whether nuisance concepts can provide an adequate grounding for modern land-use restrictions. *See id.* at 2901 (including "degree of harm to public lands and resources, or adjacent private property" as factor in analysis). *But see* Joseph L. Sax, *Regulating Land and Resources in the Post-Lucas Era*, LAND USE F., Winter 1993, at 39, 42. Professor Sax suggests that the *Lucas* majority decision's idea of what constitutes a nuisance is narrow, a view shared by Justice Stevens in his dissent. *See Lucas*, 112 S. Ct. at 2922 (Stevens, J., dissenting).

One area in which courts generally uphold natural resource–related restrictions is floodplain zoning, particularly where some uses are allowed, because of the human hazard in allowing construction in flood prone areas. *See* First English Evangelical, Lutheran Church v. County of Los Angeles, 258 Cal. Rptr. 893, 905 (Cal. Ct. App. 1989) (upholding, on remand, city's moratorium on building in floodplain because of public hazard and fact that ordinance allowed landowner some use), *cert. denied*, 493 U.S. 1056 (1990); Fortier v. City of Spearfish, 433 N.W.2d 228, 231 (S.D. 1988).

[129] What guidance there is has arisen in areas other than land-use. *See, e.g.*, Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1005–14 (1984) (finding company's submission of trade-secret data to government in order to register product under federal law, where company knew conditions under which public disclosure could occur, not an interference with reasonable investment-backed expectations); Webb's Fabulous Pharmacies, Inc. v. Beckwith 449 U.S. 144, 161 (1980) (identifying "unilateral expectations" and "abstract need" as outside the scope of protectable property interests); *see also* Richard A. Epstein, Lucas v. South Carolina Coastal Council: *A Tangled Web of Expectations*, 45 STAN. L. REV. 1369 (1993).

are shaped by the state's property laws and traditional tort concepts such as nuisance.[130]

Two distinct sets of questions have arisen in the analysis of value diminution. These concern the proper geographic and temporal parameters of the inquiry.[131] In other words, courts ask *where* the property owner's land holding physically begins and *when* the government restriction on his or her use of the property begins. A brief excursion into Supreme Court precedent points out the magnitude and significance of how these inquiries are conceptualized.

Since *Pennsylvania Coal v. Mahon*, the Court has struggled with the critical issue of how to determine the proper "baseline value"—the value of the parcel before a regulation has worked its effects—to be used in assessing the economic effect of a land-use restriction on the property owner.[132] The prevailing rule is that the value is based on a parcel's totality, not just the part that is restricted.[133] This rule, central to the Court's *Penn Central* decision, was reaffirmed in *Keystone Bituminous Coal v. DeBenedictis*, one of the 1987 "Trilogy" of Supreme Court takings cases.[134]

Keystone involved a facial challenge to Pennsylvania's Bituminous Mine Subsidence and Land Conservation Act.[135] The Subsidence Act prohibited mining that causes subsidence damage to public buildings, houses, and cemeteries.[136] Regulations under the Act required coal companies to leave half the coal in place in these areas, though the percentage could be waived or made more stringent under the circumstances.[137] The plaintiff coal companies asserted that the regulations effectively destroyed their rights in the "support estate."[138]

In denying the coal companies' claim, the Court stressed that the Act served a legitimate public purpose: prevention of subsidence.[139]

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[130] *Lucas*, 112 S. Ct. at 2901.

[131] *See* Freilich & Garvin, *supra* note 80, at 421–29; *infra* text accompanying notes 132–49.

[132] 260 U.S. 393, 413–16 (1922). The phrase "baseline value" is from ZYGMUNT J.B. PLATER ET AL., ENVIRONMENTAL LAW AND POLICY: NATURE, LAW, AND SOCIETY 461–63 (1992).

[133] *See* Freilich & Garvin, *supra* note 80, at 420–21

[134] 480 U.S. 470 (1987). The other cases were First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304 (1987), and Nollan v. California Coastal Commission, 483 U.S. 825 (1987).

[135] 52 PA. CONS. STAT. ANN. §§ 1406.1–1406.21 (Supp. 1993).

[136] *See Keystone*, 480 U.S. at 476.

[137] *Id.* at 477 n.7.

[138] *Id.* at 496–97. Under traditional Pennsylvania law, the support estate—the right to subjacent support—is distinct from the mining estate. *See generally* Montgomery, *supra* note 42.

[139] *Keystone*, 480 U.S. at 485, 492–93. Justice Stevens went to great lengths in attempting to

The Court found that the support estate alone is not the proper measure of the baseline value.[140] Rather, the baseline value properly includes the value of the surface and mining estates as well.[141] The coal companies had not shown the extent to which the Act reduced the value of the support estate.[142] The Court thus concluded that there was no showing that the Act denied the coal companies the economically viable use of their property.[143]

Keystone thus holds that courts should consider property as a whole—not merely the area subject to the restriction—for purposes of determining the baseline value. Should courts adopt an approach in which they consider only the restricted portion,[144] the diminution in value or ability to use the property would of course be more severe. The possibility that courts will conduct land-use takings analysis in this manner may have been increased in light of Justice Scalia's *Lucas* dictum questioning the baseline value affirmed in *Penn Central*.[145] Courts thus far have not embraced such an approach.[146]

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distinguish the Mine Subsidence Act from the Kohler Act invalidated in *Pennsylvania Coal*. *See id.* at 485–93. *But see id.* at 509–11 (Rehnquist, J., dissenting) (arguing that the Kohler Act was invalidated not because it failed to promote a public purpose but because it failed to provide compensation).

[140] *Id.* at 480. The district court had rejected Keystone's argument that the support estate was the most valuable strand in its bundle of rights, the destruction of which constitutes a taking. *See id.* at 479. Keystone apparently had rested this argument on the Supreme Court's holding in Andrus v. Allard, 444 U.S. 51, 64–68 (1979), in which the Court rejected a claim that the prohibitions on trade in certain artifacts pursuant to the Eagle Protection Act and Migratory Bird Treaty Act constituted an uncompensated taking.

[141] *Keystone*, 480 U.S. at 500–01.

[142] *Id.*

[143] *Id.* at 499.

[144] Some commentators have termed this approach "conceptual severance." *See* Margaret Jane Radin, *The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings*, 88 COLUM. L. REV. 1667, 1674 (1988).

[145] 112 S. Ct. at 2894 n.7. There is life in the *Penn Central* approach. *See* Concrete Pipe & Prod. of Cal., Inc., v. Construction Laborers Pension Trust for S. Cal., 113 S. Ct. 2264, 2290 (1993) (citing *Penn Central* for proposition that property is not divided into "what was taken and what was left" in order to demonstrate a compensable taking of the former) (unanimous section of opinion).

[146] *See, e.g.*, McAndrews v. New Bank of New England, 796 F. Supp. 613, 616 (D. Mass. 1992), *aff'd*, 989 F.2d 13 (1st Cir. 1993) (assessing impact of Federal Financial Institutions Reform, Recovery and Enforcement Act on lessor's rights and finding no taking where lessor retained "full bundle" of common-law rights of landlord except right to terminate when Federal Deposit and Insurance Corporation was appointed receiver); Bevan v. Brandon Township, 475 N.W.2d 37, 42–43 (Mich. 1991) (holding that two contiguous parcels owned by same parties though purchased at different times are viewed as a whole for takings analysis), *cert. denied*, 112 S. Ct. 941 (1992); Bernardsville Quarry Inc. v. Borough of Bernardsville, 608 A.2d 1377, 1389 (N.J. 1992) (rejecting claim that local ordinance limiting quarry operation deprived landowner of a separate estate or interest in property); *see also infra* notes 193–95 and accompanying text. *See generally* Michelman, *supra* note 7, at 1614–21.

With respect to the temporal dimensions of a land-use restriction, the Court addressed the question of *when* a restriction effects a taking in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles.*[147] The *First English* Court established the rule that a landowner must be compensated for a temporary taking. In that case, the plaintiff claimed that a temporary construction ban, enacted after a forest fire created a flood hazard on part of its property, denied all use of the land and therefore constituted an uncompensated taking.[148] The Court remanded the case for a determination of whether the plaintiff had been denied all use of its property for the period in which the ban was in effect.[149] Thus, to the extent that a land-use restriction has worked a taking, the government must compensate the landowner for the taking from the time the restriction took effect.

Land-use controls—environmentally based controls in particular—must operate against this constitutional backdrop and within these constitutional limits. Environmental regulation has developed over the past quarter century in response to our increased scientific knowledge and expanding awareness of the value of existing features of our environment. These regulations have increasingly conflicted with traditional landowner beliefs in the freedom to use legally owned land as they wish. Many landowners have reacted by asserting that land-use restrictions and limitations violate the Constitution's prohibition on uncompensated takings. The Supreme Court, and lower courts, have attempted to clarify the situations that amount to takings. Regulatory and planning communities fear that courts will more readily find their actions constitute takings. Such communities seek greater predict-

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[147] 482 U.S. 304, 321 (1987). The Court thereby adopted a position that Justice Brennan had been urging since his well-known dissent in San Diego Gas & Electric Co. v. City of San Diego, 450 U.S. 621, 636 (1981).

[148] *See First English*, 482 U.S. at 308.

[149] *Id.* at 322. On remand, the state court found that the building restriction was a proper safety measure and did not constitute a taking. First English Evangelical, Lutheran Church v. County of Los Angeles, 258 Cal. Rptr. 893 (Cal. Ct. App. 1989). The general rule is that time required for processing permit and variance applications does not constitute a taking. *First English*, 482 U.S. at 321; *see also* Agins v. City of Tiburon, 447 U.S. 255, 263 n.9 (1980) (noting that fluctuations in value during government decisionmaking are necessary attributes of ownership of real property). The subjects of what constitutes a temporary taking, and how compensation for such takings is to be determined, are beyond the scope of this Comment. *See generally* Joseph LaRusso, Comment, *"Paying for the Change":* First English Evangelical Lutheran Church of Glendale v. County of Los Angeles *and the Calculation of Interim Damages for Regulatory Takings*, 17 B.C. ENVTL. AFF. L. REV. 551 (1990); Jay Harris Rabin, Note, *It's Not Just Compensation, It's a Theory of Valuation as Well: Valuing "Just Compensation" for Temporary Regulatory Takings*, 14 COLUM. J. ENVTL. L. 247 (1989).

ability as to when a taking will occur, so as to avoid taking property in the first place.

One time-tested means for avoiding takings is the variance. When courts review variance decisions in the context of environmental land-use regulations, they will not be entering uncharted waters. Courts have been conducting similar assessments in the traditional land-use area of zoning for some time. Courts have reviewed local decisions granting and denying zoning variances against a constitutional backdrop for over half a century. The next section of this Comment outlines the development of this caselaw of the zoning variance.

IV. The Variance in Zoning

The variance in land-use regulation emerged in the context of what has come to be known as traditional Euclidean zoning.[150] Because the variance was originally conceived as a means to ensure the constitutionality of zoning ordinances, the caselaw that has developed around the variance reflects the background concerns articulated in the Supreme Court's *Pennsylvania Coal* decision.[151] Zoning ordinances would remain constitutional by building in a mechanism that would avoid imposing hardship on individual landowners.[152] The variance would thus operate as comprehensive zoning's constitutional "safety valve."[153] Additionally, the variance process would create a solid decisional foundation and an adequate record in the event of litigation.[154] In practice, however, the variance has a history of misuse and inconsistent application at the local level.[155] As a result, courts have developed a comprehensive body of law identifying and limiting the circumstances under which a variance may properly be granted.[156]

A. *Variance Administration and Procedure*

Two types of variances are generally recognized: the use variance, which allows a landowner to engage in a land use otherwise disallowed by the applicable rules, and the area variance, which grants the land-

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[150] "Euclidean zoning" refers to that type of zoning characterized by the identification of use-based zones, traditionally residential, business, and industrial. Uses are typically allowed hierarchically, that is, uses allowed in a "higher" zone are permitted in a "lower" zone, but not vice versa.

[151] *See supra* notes 39–51 and accompanying text.

[152] Anderson, *supra* note 57, § 19.

[153] *Id* §§ 19.07–19.12.

[154] *Id.* § 19.08.

[155] *See infra* notes 176–77 and accompanying text.

[156] *See infra* sections IV.B. and IV.C.

owner an exception from strict compliance with physical standards such as setbacks.[157] Courts traditionally have been less willing to uphold use variances, which they believe pose a greater threat to the integrity, and fairness, of a zoning scheme than area variances.[158] The judiciary's reluctance to grant use variances is primarily intended to reinforce the fundamental means by which zoning operates: segregation of uses. Moreover, compared to an area variance, a use variance generally possesses a greater potential to enable a landowner unfairly to receive a substantially larger return on property than a similarly situated landowner who cannot engage in the use. Thus, in some states, courts have not allowed use variances at all, even in the absence of a prohibition in the enabling statute or zoning ordinance.[159]

The grant is usually referred to as a "variance," though some statutes refer to "special exceptions."[160] Despite the similarity in language, the true variance must be distinguished from the so-called "special permit." Under traditional zoning practice, the special permit is another method for providing flexibility in land-use regulation. While a variance enables the landowner to deviate from generally applicable standards, the special permit is issued where the landowner demonstrates compliance with applicable performance standards.[161] In the absence of such a showing, the permit is denied.

Under the typical variance procedure, a landowner who has been denied a permit may apply to a reviewing body, typically an appeals board, which is authorized to grant the exception under a set of guidelines or standards.[162] The statute may also specify that the reviewing body must hold a hearing or make findings of fact to support

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[157] *See infra* notes 219–32 and accompanying text.

[158] For example, it was only in 1986 that the Missouri Supreme Court, in the case of Matthew v. Smith, 707 S.W.2d 411, 413 (Mo. 1986), recognized the validity of use variances.

[159] *See, e.g.*, Zoning Bd. of Appeals v. Planning and Zoning Comm'n., 605 A.2d 885, 890 (Conn. App. Ct. 1992).

[160] Many statutes use the term "special exception" in the context of provisions that authorize a board to grant variances in classes of cases. *See, e.g.*, N.C. GEN. STAT. § 153A-345(c) (1991). Some statutes use the term generically to refer to mechanisms such as the variance. *See, e.g.*, NEV. REV. STAT. ANN. § 278.315 (Michie 1990).

[161] *See* ANDERSON, *supra* note 57, § 20.03.

[162] Under section 7 of the Standard State Zoning Enabling Act, the board of adjustment has the power:

> To authorize upon appeal in specific cases such variance from the terms of the ordinance as will not be contrary to the public interest, where, owing to special conditions, a literal enforcement of the provisions of the ordinance will result in unnecessary hardship, and so that the spirit of the ordinance shall be observed and substantial justice done.

STANDARD STATE ZONING ENABLING ACT § 7 (1926) [hereinafter SSZEA].

its decision.[163] More commonly, however, the courts impose such requirements.[164] Provisions such as these facilitate deliberative analysis and decisionmaking, constrain discretion, and provide a record for judicial review.[165]

Judicial review of the appeals board's decision is normally available. The Standard State Zoning Enabling Act (SSZEA) allows judicial review through a writ of certiorari.[166] The level of scrutiny is nominally low. Courts have not refrained, however, from scrutinizing the actions of local appeals boards.[167] In addition, some states allow a reviewing court to receive additional evidence.[168]

The enabling statute's standards governing the board or body's decision are usually drawn broadly, with more specific criteria left for incorporation into regulations, local ordinances, or articulation by reviewing courts.[169] The original drafters of zoning ordinances sought to ensure that appeals bodies had sufficient discretion to enable the variance procedure to serve its safety-valve function, but not so much discretion as to constitute an impermissibly vague delegation.[170] The "unnecessary hardship" standard adopted in the SSZEA has become the most common standard used in the zoning context.[171] The standard authorizes the appeals board to grant a variance where, owing to "special conditions," literal enforcement of the regulation would constitute an unnecessary hardship.[172] Despite some early findings that such a standard granted too much discretion to appeals boards,[173] the standard has come to be widely upheld.

The SSZEA, and some statutes and ordinances, also explicitly require that the grant of the variance not be detrimental to the public

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[163] 65 ILL. ANN. STAT. ch. 65, paras. 5/11-13–11 (Smith-Hurd 1993).

[164] *See* Topanga Ass'n. for a Scenic Community v. County of Los Angeles, 522 P.2d 12, 15–16 (Cal. 1974).

[165] In a seminal case, the California courts read such a requirement into the criteria for granting variances. *See Topanga*, 522 P.2d at 16 (holding that grant of variance must be based on findings and that reviewing court must scrutinize record for substantial evidence to support grant).

[166] SSZEA, *supra* note 162, § 7.

[167] *See Topanga*, 522 P.2d at 19; Cook v. Town of Sanbornton, 392 A.2d 1201 (N.H. 1978) (adopting less deferential standard of review than formerly used).

[168] Section 7 of the SSZEA allows a reviewing court to receive new evidence.

[169] By way of contrast, Indiana's dual standards are more detailed than typical statutory criteria. *See* IND. CODE ANN. §§ 36-7-4-918.4, 36-7-4-918.5 (Burns 1989) (use and area variance criteria).

[170] *See* Note, *Administrative Discretion in Zoning*, 82 HARV. L. REV 668 (1969).

[171] SSZEA, *supra* note 162, § 7. The term "undue hardship" has also been used in some cases. *See generally* ANDERSON, *supra* note 57, § 20.09.

[172] SSZEA, *supra* note 162, § 7.

[173] *See, e.g.*, Speroni v. Board of Appeals, 15 N.E.2d 302, 303 (1938).

interest.[174] Consideration of health, safety, and welfare may be required.[175] Some courts have read such a general requirement into the variance criteria.

The judicial process of filling out the contours of the unnecessary hardship standard has been driven by the need to reign in and standardize the issuance of variances by local appeals boards.[176] Despite the narrowness of the circumstances in which variances should be granted under the enabling act and ordinance, appeals boards have been willing to grant or deny variances for a variety of other reasons. Two 1960s studies demonstrated that the variance-granting process has been transformed from its original intended purpose as a constitutional safety valve and has been subject to abuse.[177]

B. Otto *and its Progeny*

Courts early established that the applicant for a variance must satisfy a difficult burden in order to show that an unnecessary hardship exists.[178] In the seminal 1939 case of *Otto v. Steinhilber*, the New York State Court of Appeals set forth a statement of the showing required to satisfy the burden.[179] Under the test established by the court in *Otto*, a variance applicant must show (1) that the land in question cannot yield a reasonable return if used only for a purpose

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[174] SSZEA, *supra* note 162, § 7; N.H. REV. STAT. ANN. § 674.33(b) (1986); VA. CODE ANN. § 15.1-495(2) (Michie Supp. 1993).

[175] *See infra* notes 205–07 and accompanying text.

[176] A classic study examined the variance in practice in Baltimore and Boston. *See* Ronald M. Shapiro, *The Zoning Variance Power—Constructive in Theory, Destructive in Practice*, 29 MD. L. REV. 3 (1969). After reviewing the theoretical underpinnings of the variance power and noting the strict construction courts have imposed on zoning boards, Shapiro found that the zoning boards in his study had performed miserably. *Id.* at 3–9. The variance procedure, he found, conceived as a safety valve, had "ruptured into a steady 'leak.'" *Id.* at 9. The author documents confusion, disregard of harmful consequences, improper influence, and other operational maladies. *Id.* at 11–19 *passim*; *see also* Jesse Dukeminier, Jr. & Clyde L. Stapleton, *The Zoning Board of Adjustment: A Case Study in Misrule*, 50 KY. L.J. 273 (1962). Misuse of the variance has been noted in a more socially critical vein. For one of the more venerable examples, see RICHARD F. BABCOCK, THE ZONING GAME 7 (1966) (alleging deliberate misuse of variance by insular suburbs attempting to defeat planning goals).

[177] One study found that despite New Hampshire's strict variance standard, variances have been routinely granted: In each of the ten cases in which the New Hampshire Supreme Court reviewed variance applications between 1987 and 1992, the Court found that a variance should not be granted. *See* David L. Kent, *The Presumption in Favor of Granting Zoning Variances*, N.H. B. J., June 1993, at 29.

[178] See, for example, Norcross v. Board of Appeal, 150 N.E. 887, 890 (Mass. 1926), an oft-cited pre-*Euclid* case in which the court stated that "the power of authorizing variations from the general provisions of the statute is designed to be sparingly exercised."

[179] 24 N.E.2d 851 (N.Y. 1939).

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.[180] A variance applicant must satisfy each part of the test. Many states employ similar tests for assessing variances,[181] and have adopted restrictive readings of the required showing.[182]

Under the "reasonable return" prong, most courts invalidate grants of variances unless the landowner has met the burden of showing that the land will be otherwise rendered valueless or unusable for any permitted purpose.[183] The courts' focus is thus more on remaining value as opposed to diminution in value from a baseline. Courts consistently hold that financial impact alone is insufficient to establish unnecessary hardship and that the landowner must show that there is no profitable use for the land.[184] A decision of the Michigan Court of Appeals underscored how difficult it can be to show that there is no reasonable return, approvingly citing authority that the landowner must show no reasonable return, hardship amounting to confiscation, or the deprivation of all reasonable use.[185] Other courts, along with an enabling statute,[186] have noted this anti-confiscatory role.[187]

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[180] *Id.* at 853.

[181] It should be noted that the *Otto* test has not been universally adopted. ROGER A. CUNNINGHAM, THE LAW OF PROPERTY § 9.7 (1984). The test has, however, been widely influential and is generally recognized as the "classic statement" of the unnecessary hardship test. MANDELKER, *supra* note 112, § 6.44. It thus forms an accurate framework for an exposition of variance law.

[182] *See, e.g.*, Gullickson v. Stark County Bd. of Comm'rs, 474 N.W.2d 890 (N.D. 1991); Chacona v. Zoning Bd. of Adjustment, 599 A.2d 255 (Pa. Commw. Ct. 1991). For detailed treatment of caselaw development of the *Otto* test in New York, see Phyllis A. Erikson, Comment, *Variance Law in New York: An Examination and Proposal*, 44 ALB. L. REV. 781 (1980).

[183] O'Keefe v. Zoning Bd. of Appeals, 192 N.W.2d 509, 512 (Mich. Ct. App. 1971); Commons v. Westwood Zoning Bd. of Adj., 410 A.2d 1138, 1143 (N.J. 1980) (noting that compensation is due where denial of variance renders property unusable); Philadelphia Zoning Bd. of Adjustment v. Earl Scheib Realty Corp., 301 A.2d 423, 425–26 (Pa. Commw. Ct. 1973). The burden on the landowner is to show that there is no reasonable return under any of the permitted uses of the property. *See, e.g.*, Holasek v. Village of Medina, 226 N.W.2d 900, 903 (Minn. 1975) ("The allowance of a variance is compelled only where there has been an unlawful taking of property in a constitutional sense, demonstrated by the landowner's inability to put his land to any beneficial use unless the variance is granted.").

[184] *See, e.g.*, OK Properties v. Zoning Bd. of Review, 601 A.2d 953, 954–55 (R.I. 1992); Houston v. Memphis & Shelby County Bd. of Adj., 488 S.W.2d 387 (Tenn. Ct. App. 1972).

[185] Puritan–Greenfield Improvement Ass'n. v. Leo, 153 N.W.2d 162, 166–69 (Mich. Ct. App. 1967).

[186] Under the Virginia zoning enabling statute, a landowner who makes a showing that denial would impose a "hardship approaching confiscation" is eligible for a variance. VA. CODE ANN. § 15.1-495 (Michie Supp. 1993).

[187] Sapero v. City of Baltimore, 200 A.2d 74, 75–76 (Md. 1964) (would-be taking required to

That a variance is not to be granted merely to avoid a negative financial impact on the landowner runs mantra-like through the history of the variance cases.[188] Nevertheless, courts in limited instances have allowed a variance—generally an area variance[189]—to issue even where the burden is well short of confiscation.[190] These courts have shown a willingness to balance the financial burden on the landowner against such factors as the impact on neighboring properties, the spirit and purposes of the zoning ordinance, and the public interest generally.[191] For example, one court sustained the grant of an area variance in order to prevent destruction of a mature stand of pine trees.[192] This flexible approach to variances remains exceptional and is rarely used to allow the grant of use variances because of the transformative impact on neighborhood character and the potential to undermine the integrity of the zoning scheme.

As in the cases discussed previously,[193] the issue of how a court should assess a land-use restriction's economic impact on the landowner and the reasonableness of remaining uses has also arisen in zoning cases. The most important questions regarding fairness to the landowner and the integrity of zoning through administration concern

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allow variance); Ouimette v. City of Somersworth, 402 A.2d 159, 161 (N.H. 1979); Pondfield Rd. Co. v. Village of Bronxville, 150 N.Y.S.2d 910 (App. Div.) (upholding zoning ordinance against challenge because variance enables avoidance or mitigation of taking), *aff'd without opinion*, 135 N.E.2d 725 (1956).

[188] *See* ANDERSON, *supra* note 57, § 20.22 (collecting cases). Similarly recited is the rule that a variance is not warranted simply because it will render the property more profitable. *See, e.g.*, Perrin v. Town of Kittery, 591 A.2d 861, 863 (Me. 1991) ("We have repeatedly recognized that a reasonable return is not the maximum return."); Glennon v. Zoning Hearing Bd. of Lower Milford, 529 A.2d 1171, 1174 (Pa. Commw. Ct. 1987) ("[T]he hardship required to support an entitlement to a variance cannot be purely economic or financial."); Baum v. Lunsford, 365 S.E.2d 739, 741 (Va. 1988) ("[F]inancial loss, standing alone, is not sufficient to justify the granting of a variance.").

[189] *See infra* notes 219–30 and accompanying text.

[190] *See, e.g.*, Board of Adj. v. Murphy, 591 So. 2d 505, 506–07 (Ala. Civ. App. 1991) (upholding jury finding of no feasible use under ordinance and allowing multi-factoral assessment; evidence indicated that property was on the market for 30 years without serious purchase offers or inquiries); Nelson v. Board of Zoning Appeals, 162 N.E.2d 449, 453 (Ind. 1959); Kruvant v. Cedar Grove, 414 A.2d 9, 14 (N.J. 1980) (allowing variance where zoning ordinance had been declared unconstitutional).

[191] *See, e.g.*, Torello v. Board of Zoning Appeals, 16 A.2d 591 (Conn. 1940). But such cases are exceptional; Carter v. City of Nashua, 308 A.2d 847, 855 (N.H. 1973) (where a financial hardship becomes unduly oppressive because of unique conditions, a use or area variance may be warranted, provided it does not adversely affect the public interest). 83 AM. JUR. 2D *Zoning and Planning* §§ 880–81 (1992); *see also* A.M.S. Corp. v. Zoning Bd. of Appeals, 206 A.2d 833, 834 (Conn. 1965) (refusing to grant variance where applicant invested $135,000 in use not permitted under ordinance).

[192] Holmes v. Zoning Hearing Bd. of Kennett Township, 396 A.2d 859, 861 (Pa. Commw. Ct. 1978).

[193] *See supra* part III.C.

a landowner who has multiple adjacent or proximate holdings. Courts have consistently approached such questions by viewing a landowner's holdings in the aggregate and have not felt bound by the arbitrary and manipulable drawing of lot lines.[194] It was thus early established that zoning's setback requirements, which completely deny the freedom to build on a substantial portion of the landowner's property, do not constitute a "partial" taking.[195]

A landowner must not only show that the land is left with no other reasonable use, but usually must produce objective financial evidence that no reasonable return is possible under permitted uses.[196] Sustained unsuccessful efforts to sell a property for permitted uses are often deemed a sufficient basis upon which to find that a reasonable return is not possible.[197] The New York State Court of Appeals has identified several factors that a landowner should address in showing whether he or she can achieve a reasonable return on the property at issue.[198] These factors are: (1) the amount the applicant paid for the entire parcel; (2) the present value of the parcel or part of it; (3) maintenance expenses; (4) taxes on the land; (5) mortgages and encumbrances; (6) income; and (7) other relevant factors, including the applicant's estimate of what constitutes a reasonable return.[199]

The other requirements of the *Otto* test, uniqueness of the burden on the landowner and absence of an impact on the area, serve different purposes and focus on different factors than the reasonable return requirement. The unique burden requirement, which is embodied in some statutes,[200] requires that a landowner show that the burden is

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[194] *See, e.g.*, Blow v. Town of Berlin, 560 A.2d 378, 379 (Vt. 1989) (in assessing variance criteria, court looks to all of the landowner's property, not simply parcel for which variance is sought). The "checkerboarding" cases provide one of the more well known examples. In such cases a landowner subdivides a parcel into smaller parcels in a checkerboard fashion so that adjacent lots are not owned by the same record owner in order to circumvent zoning or subdivision rules that apply to contiguous lots under common ownership. *See* Baldiga v. Board of Appeals, 482 N.E.2d 809, 812 n.4 (Mass. 1985) (describing practice of checkerboarding).

[195] Gorieb v. Fox, 274 U.S. 603 (1927).

[196] A leading formulation requires that the landowner produce "dollars and cents" evidence of such an impact. Crossroads Recreation, Inc. v. Broz, 149 N.E.2d 65, 67 (N.Y. 1958).

[197] *See, e.g.*, Sheeley v. Levine, 538 N.Y.S.2d 93, 96 (App. Div. 1983) (upholding grant of variance where realtor offered property to 41 potential buyers).

[198] *Crossroads Recreation*, 149 N.E.2d at 67; *see also* Northern Westchester Prof'l. Park Assoc. v. Town of Bedford, 458 N.E.2d 809, 814–15 (N.Y. 1983) (citing *Crossroads*, 149 N.E.2d at 65). *But see* Village Bd. of the Village of Fayetteville v. Jarrold, 423 N.E.2d 385, 389 (N.Y. 1981) (Wachtler, J., dissenting) (criticizing rigid application of *Crossroads* in denial of use variance).

[199] *See Crossroads Recreation*, 149 N.E.2d at 67. The factors comprise what could be a partial list of the factors that would go into an assessment of the reasonable use inquiry required in takings analysis.

[200] *See, e.g.*, MASS. GEN. L. ch. 40A, § 10 (1993).

unique to the subject property.[201] The requirement reflects the fact that the variance is essentially an administrative mechanism. Finally, the requirement reflects the judiciary's acceptance of the fact that legislatively crafted zoning necessarily imposes burdens on landowners. The underlying rationale of the unique burden requirement is that where a zoning restriction imposes a burden on a number of similarly situated landowners, the proper remedy is a generally applicable amendment of the ordinance.[202] Thus, courts must focus not only on the individual landowner but on the general impact of the regulation on similarly situated landowners.

There is one type of exceptional case in which some courts have found the unique burden requirement met in circumstances that do not strictly satisfy the requirement. The typical case occurs where a property is surrounded by uses which cause the subject property to be unable to achieve a reasonable return without a variance.[203] In these circumstances, some decisions have allowed a variance to issue so that the landowner may obtain a reasonable return.[204]

The third *Otto* prong requires that a landowner show that the variance will not injure other landowners or undermine the purposes of the ordinance.[205] Like the unique burden requirement, this requirement also looks to the nature of the regulation. Here, however, courts focus not so much on the impact, but on the purpose of the regulation and the interests and values sought to be protected. Courts are consistently deferential to zoning's traditional purposes: protection of health and safety, and preservation of neighborhood character and values.[206] The more directly related an ordinance's or a regulation's purposes are to tangible human health and safety impacts, the more weight courts give them and the greater the burden which courts will require an individual landowner to bear under the zoning scheme.[207]

In assessing the variance's impact on the ordinance under the third *Otto* prong, courts look to the ends to be achieved through zoning and

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[201] Courts have been willing to consider not just the land but improvements in this context. ANDERSON, *supra* note 57, § 20.37. Verbal formulations of the test frequently turn on a showing that the property is "uniquely burdened" or "peculiarly effected."

[202] Otto v. Steinhilber, 24 N.E.2d 851, 852 (N.Y. 1939).

[203] *See* PATRICK J. ROHAN, ZONING AND LAND USE CONTROLS § 43.02[4][i] (1994).

[204] *See, e.g.*, Board of Adjustment v. Murphy, 591 So. 2d 505, 507 (Ala. Civ. App. 1991) (noted *supra* note 190).

[205] *Otto*, 24 N.E.2d at 853.

[206] Such tangible impacts as traffic and safety are paramount in courts' consideration. *See* Pennell v. City of San Jose, 485 U.S. 1, 20 (1988) (Scalia, J., concurring in part) (noting that zoning's setback and street dedication requirements are constitutional because they prevent traffic congestion); Bell Savings and Loan Ass'n. v. Zoning Hearing Bd, 301 A.2d 436, 437-38 (Pa. Commw. Ct. 1973) (deferring to fear of pedestrian-auto hazard).

[207] Given the general judicial willingness to scrutinize local variance decisions, a reviewing

the means chosen to achieve such ends.[208] Generally deferential to the goals and means of zoning, and mindful of how variances can singly and cumulatively prevent the zoning ordinance from achieving its aims, courts consistently deny variances to landowners. Landowners thus experience a significant constraint on their ability to use property. At the same time, all property owners under the ordinance are believed to benefit from the advantages that flow from the zoning ordinance.

C. *Other Variance Caselaw Doctrine*

In addition to the three-part analysis under *Otto*, courts employ other doctrines to assess the appropriateness of a decision to grant or deny a zoning variance.[209] The most pervasive of these doctrines is the self-created hardship, which is essentially an equitable doctrine.[210] Courts typically apply self-created hardship rules in situations where the landowner has purchased with knowledge of zoning restrictions, or conveyed or subdivided property in such a way as to create a non-complying parcel.[211] State zoning enabling statutes may themselves identify self-created hardship as an impermissible basis for granting a variance.[212] Many state courts completely bar claims to a variance in such cases.[213] On rare occasions, courts have granted a

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court assessing this prong of the test would probably be disposed not to second-guess a local body that has denied a variance based on its conclusion that the use would potentially harm the public. Conversely, courts appear to scrutinize conclusions that no harm will occur. In New Jersey, where the public harm prong is codified, the courts have spelled out in detail the inquiry that a board of adjustment must follow in assessing harm to the area. *See* Medici v. BPR Co., 526 A.2d 109, 121–22 (N.J. 1987); Homes of Hope, Inc. v. Mount Holly Township, 566 A.2d 575, 578 (N.J. Super. Ct. 1989).

[208] *See infra* part IV.D.

[209] A common exception allows utilities to receive variances because they have no other reasonable use for the land and any negative effects of their activities on neighbors is outweighed by the overall community benefit.

[210] *See, e.g.*, Aitken v. Zoning Bd. of Appeals, 557 A.2d 1265, 1270 (Conn. App. Ct. 1989) (stating general rule); Stotts v. Wright County, 478 N.W.2d 802, 805 (Minn. Ct. App. 1991) (charging landowner with knowledge of whether zoning ordinance allows construction).

[211] *See, e.g.*, Elwyn v. City of Miami, 113 So. 2d 849, 852–53 (Fla. Dist. Ct. App.) (explaining general rule and citing cases from other jurisdictions), *cert. denied*, 116 So. 2d 773 (1959); Sanchez v. Board of Zoning Adjustments, 488 So. 2d 1277, 1279–80 (La. Ct. App.), *cert. denied*, 491 So. 2d 24, *and cert. denied*, 479 U.S. 963 (1986); LeBlanc v. City of Barre, 477 A.2d 970 (Vt. 1984).

[212] *See, e.g.*, N.Y. TOWN LAW § 267-b (McKinney Supp. 1994). Under the New York statute, if a hardship is self-created, a zoning board must not grant a use variance, though it may grant an area variance.

[213] ANDERSON, *supra* note 57, § 20.44 n.12.

variance where a landowner has done no more than purchase with knowledge of a land-use restriction.[214]

In applying the components of the hardship tests, courts focus primarily on the parcel, as opposed to the applicant. Accordingly, they consider unique physical features of the subject property that may cause the parcel to be unusable under the ordinance,[215] but not peculiar personal circumstances of the applicant.[216] Variance applicants have generally been unsuccessful in raising arguments based on the fact that an adjacent property owner engages in the proposed use—whether on a nonconforming status or on the basis of a variance—or that the property is near a district boundary.[217] Courts have taken into account the effect of adjacent uses on the subject property's amenability to permitted uses.[218]

As noted above, in many states the standard governing issuance of area variances is lower than that governing use variances.[219] The distinction has enabled variance-granting boards and reviewing courts to achieve some flexibility in the administration of zoning ordinances without threatening the zoning ordinance's use scheme. The most common standard, derived from the language of many ordinances, allows an area variance to be granted upon a showing of "practical difficulties or unnecessary hardship."[220] This standard reflects the general policy disfavoring use variances.[221] Courts that have adopted dual standards generally did so on the grounds that rigorous enforcement of area requirements was not as essential to

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[214] *See, e.g.*, Chirichello v. Zoning Bd. of Adj., 397 A.2d 646, 651 (N.J. 1979) (finding knowledge irrelevant because purchaser "stand[s] in shoes of predecessor[] in title").

[215] *See, e.g.*, Szelega Enter., Inc. v. Vestal, 320 N.Y.S.2d 963, 966 (App. Div. 1971) (upholding finding that thin topsoil made property unusable for certain permitted uses).

[216] *See, e.g.*, St. Clair v. Skagit County, 715 P.2d 165, 168 (Wash. Ct. App. 1986) (holding that evidence of hardship or difficulty must relate to land, not to owner-applicant).

[217] *See, e.g.*, Taylor v. District of Columbia Bd. of Zoning Adj., 308 A.2d 230, 235 (D.C. 1973) (holding that proximity to boundary does not warrant variance, in a case involving a denial of a residential variance).

[218] *See, e.g.*, Stevens. v. Town of Huntington, 229 N.E.2d 591, 594 (N.Y. 1967) (finding, over dissent, no reasonable use where predominantly commercial area was downzoned to residential); Valley View Civic Ass'n. v. Zoning Bd. of Adjustment, 462 A.2d 637, 640 (Pa. 1983).

[219] *See supra* note 157 and accompanying text; *see also* Ivancovich v. City of Tucson Bd. of Adj., 529 P.2d 242, 250 (Ariz. Ct. App. 1975) (adopting lesser standard for area variance); Board of Adj. v. Kwik-Check Realty, Inc., 389 A.2d 1289, 1291 (Del. 1978) (offering rationale for dual standards); Matthew v. Smith, 707 S.W.2d 411, 414–16 (Mo. 1986) (discussing difference between use and area variances, examining language of enabling acts, and adopting lower standard for area variances).

[220] *See, e.g.*, MO. ANN. STAT. § 89.090 (Vernon 1989); TENN. CODE ANN. § 13-7-207(3) (1992).

[221] *See Matthew*, 707 S.W.2d at 416.

zoning's purpose as use variances.[222] The dual standard is seen with varying degrees of clarity and explicitness in the caselaw.[223]

Under a typical lowered standard, a landowner applying for an area variance generally must show that strict application of the restriction would result in economic injury. For example, New York courts have employed a less stringent test for area variances than for use variances.[224] Under the test, a court looks to the economic impact on the landowner, the extent of the variance, the effect on the neighborhood, and whether the landowner could pursue alternative means.[225] That the difficulty might have been self-imposed is also relevant.[226] If the landowner shows that denial of the variance would simply cause economic harm, the burden shifts to the municipality to show that application is necessary to advance the purpose of the ordinance or prevent injury to the public.[227] By contrast, some courts have been unwilling explicitly or categorically to lower the burden for granting area variances.[228] This position is based on the recognition that area variances may in fact be more harmful than at least certain use variances to the integrity and purposes of a comprehensive plan.

The fact that some courts and legislatures assess use and area variances differently reflects their appreciation for the underlying policies and purposes advanced by a zoning scheme. Thus, in reviewing the grant of area variances, courts appear to display a more flexible approach in which they assess and weigh the types of factors articulated in the New York caselaw.[229] Where the deviation from the ordinance is minimal and will not result in any significant impairment of the goals of the ordinance, courts may allow the grant of a variance.

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[222] *See, e.g., Ivancovich*, 529 P.2d at 248; *Kwik-Check Realty*, 389 A.2d at 1291; *Matthew*, 707 S.W.2d at 416.

[223] *See* ANDERSON, *supra* note 57, § 20.49.

[224] *See* Village of Bronxville v. Francis, 150 N.Y.S.2d 906 (App. Div.) (adopting use-area distinction), *aff'd*, 135 N.E.2d 724 (1956); Wachsberger v. Michalis, 191 N.Y.S.2d 621 (Sup. Ct. 1959) (suggesting criteria for area variance determination), *aff'd*, 238 N.Y.S.2d 309 (App. Div. 1963). The dual standards developed in the caselaw have been codified. N.Y. TOWN LAW § 267-b (McKinney Supp. 1994).

[225] *Wachsberger*, 191 N.Y.S.2d at 624.

[226] *See supra* notes 210–14 and accompanying text.

[227] *See* Fulling v. Palumbo, 233 N.E.2d 272, 274 (N.Y. 1967) (property owner who shows that denial would result in significant economic harm is entitled to relief unless municipality shows that ordinance serves public health, safety, and welfare), *overruled in part by* Doyle v. Amster, 594 N.E.2d 911, 914 (N.Y. 1992). For a history of the difficulties New York courts experienced employing the distinction, see Erikson, *supra* note 182, at 796–803.

[228] *See, e.g.*, Snyder v. Waukesha County Zoning Bd. of Adj., 247 N.W.2d 98, 102, 104 (Wis. 1976) (finding no distinction between "unnecessary hardship" and "practical difficulties" and rejecting lesser burden on applicant for area variance).

[229] *See Wachsberger*, 191 N.Y.S.2d at 624; *supra* notes 225–27 and accompanying text.

If, however, the deviation is substantial and the potential for undermining the ordinance is deemed to be greater, courts are less likely to allow the variance.[230]

Even where the use and area variance standards differ, courts employ still other doctrines to deny variances. Matters such as personal difficulties or inconvenience are generally insufficient to warrant either a use or an area variance. Similarly, if a hardship is deemed self-created, courts tend to treat an area variance application under rules as stringent as those applied for use variances.[231] Courts do, however, find other means to meet unusual circumstances. For instance, where the practical difficulty is related to a unique physical attribute of the land, an area variance is often allowed.[232]

D. *The Purposes of Zoning and Land-use Controls*

In their review of zoning variance decisions, courts are required to consider the purposes of the zoning ordinance. They must do so in order to assess the uniqueness of the burden on the applicant and other landowners and the potential impact of variances on neighborhood character, the public interest, and the integrity of the zoning scheme. As we have seen, courts display substantial deference to the overall goals of zoning and the traditional means employed to attain them. Courts have acquiesced in the choice of means employed to achieve zoning's purposes—separation of incompatible uses—since *Euclid*. Courts have done so despite zoning's individual and aggregate burdens and potential unfair impact.[233] Zoning's acceptance stems in part from its purported rationality and comprehensiveness, qualities which were originally touted as an improvement over the unpredictable, ad hoc nuisance suit.[234]

The history of judicial scrutiny of the proper objects of zoning since *Euclid* chronicles a gradual, though sometimes grudging, acceptance of zoning to achieve goals not directly or clearly related to health and

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[230] *See, e.g.*, Wolf v. District of Columbia Bd. of Zoning Adj., 397 A.2d 936, 941–43 (D.C. 1979). *But see* Gilmartin v. District of Columbia Bd. of Zoning Adj., 579 A.2d 1164, 1172 (D.C. 1990) (rejecting and remanding grant of variance for parking where alternative means might have been available). *Gilmartin* also illustrates the sometimes blurred line between use and area variances.

[231] *See supra* notes 210–12 and accompanying text.

[232] *See, e.g.*, U-Haul Co. of N.H. & Vt. v. City of Concord, 451 A.2d 1315, 1317 (N.H. 1982) (finding fact that property was located in a less populated part of zone constituted a hardship arising from the uniqueness of the property, both the building and land).

[233] *See* Zygmunt J.B. Plater, *The Takings Issue in a Natural Setting: Floodlines and the Police Power*, 52 TEX. L. REV. 201, 252 (1974).

[234] *See* BABCOCK, *supra* note 176, at 4.

safety, usually under the power to promote the general welfare. Recreational measures, for example, which are included in some enabling statutes, have gained acceptance.[235] Aesthetically directed zoning has not fared as well,[236] though the nexus between aesthetic regulation and safety[237] and property values has helped sustain some aesthetic zoning restrictions.[238] Courts have been more willing to uphold zoning enactments that aim to preserve "neighborhood character."[239] In doing

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[235] In fact, section 3 of the SSZEA, and most enabling acts, include provision of adequate parks among the proper purposes. See, for example, OKLA. STAT. ANN. tit. 19, § 863.13 (West 1988), which specifically identifies provision of recreational facilities as a proper purpose.

[236] The tortuous path of judicial acceptance of zoning for "aesthetic" purposes is well chronicled. *See, e.g.*, Beverly A. Rowlett, *Aesthetic Regulation Under the Police Power: The New General Welfare and the Presumption of Constitutionality*, 34 VAND. L. REV. 603, 609–38 (1981).

[237] While early courts scoffed at the notion of zoning for aesthetics, some courts managed to find safety and health concerns provided a sturdy enough peg on which to hang approval of architectural requirements. *See, e.g.*, Gorieb v. Fox, 274 U.S. 603, 610 (1927) (building line requirements upheld based on purposes stated in SSZEA).

[238] See SSZEA, *supra* note 162, which lists preservation of property values as an object of zoning. *See also* Comment, *Zoning for Aesthetics Substantially Reducing Property Values*, 27 WASH. & LEE L. REV. 303 (1970). BABCOCK, *supra* note 176, finds a transformation of zoning's theoretical basis from protection of property value to advancement of planning values. Babcock criticizes slavish adherence to the master plan, which "enshrines" a set of static and narrow community goals. *See* BABCOCK, *supra* note 176, at 123. The economic justification for zoning, which posits a Pareto-optimal notion of maximization of aggregate value, is also questionable. *See* William C. Wheaton, *Zoning and Land Use Planning: An Economic Perspective*, *in* ZONING AND THE AMERICAN DREAM: PROMISES STILL TO KEEP 319 (Charles M. Haar & Jerold S. Kayden eds. 1989). *Compare* Soble Construction Co. v. Zoning Hearing Bd. of E. Stroudsburg, 329 A.2d 912, 917 (Pa. Commw. Ct. 1974) (rejecting stabilization of property values as sufficient basis upon which to sustain denial of permit, where board denied permit on basis of effect on value of neighboring properties) *with* Saturley v. Hollis, 533 A.2d 29, 30 (N.H. 1987) (prohibiting grant of any variance that would diminish value of surrounding property).

[239] *See, e.g.*, Curtiss–Wright Corp. v. East Hampton, 442 N.Y.S.2d 125, 129 (App. Div. 1981) (finding preservation of "natural and rural qualities" of an area are legitimate goals of zoning); Petersen v. Dane County, 402 N.W.2d 376, 380 (Wis. Ct. App. 1987) (zoning to preserve agricultural character of area). The court in *Curtiss–Wright* may have been comforted by the fact that protection of water supplies provided a basis for the challenged ordinance. *See* 442 N.Y.S.2d at 129. The lot-size cases also illustrate zoning to preserve character. *See, e.g.*, Simon v. Town of Needham, 42 N.E.2d 516, 518–19 (Mass. 1942) (displaying broad deference, despite skepticism, to municipal use of minimum lot sizes to promote general welfare). *But see* Aronson v. Town of Sharon, 195 N.E.2d 341 (Mass. 1964) (invalidating use of large-lot zoning where dominant purpose was to establish preserves without direct link to health or safety). The constitutional high-water mark of zoning to preserve character was reached in Village of Belle Terre v. Boraas, 416 U.S. 1 (1974), where the Court put its imprimatur on zoning to preserve "family values, youth values, and the blessings of quiet seclusion and clean air." *Village of Belle Terre*, 416 U.S. at 9. Courts have subsequently subjected zoning ordinances that are alleged to interfere with civil rights—"exclusionary zoning"—to greater scrutiny. See the landmark case of Southern Burlington County NAACP v. Township of Mt. Laurel, 336 A.2d 713 (N.J. 1975) (*Mt. Laurel I*), in which the New Jersey Supreme Court held that local zoning enactments must reflect a broad concept of the general welfare. Though the court, in so holding, questioned the recitation of environmental purposes as justification for zoning that has exclusionary effects, the court

so, courts have recognized that zoning stabilizes the expectations of landowners, whose property values depend on the zoning restrictions.[240]

Localities began to incorporate comprehensive modern environmental protection measures into land-use ordinances in the 1970s.[241] The legal framework was, however, already in place. In fact, one commentator finds that Justice Sutherland's opinion in *Euclid* reflects a concern for a broad range of environmental planning concerns that can be constitutionally pursued through legislation.[242] Environmental land-use planning,[243] and protection and conservation of natural resources, have been among the legitimate purposes that courts have sanctioned under the zoning power and through local ordinances and regulations at least since the 1972 case of *Just v. Marinette County*.[244] In *Just*, the Wisconsin Supreme Court upheld a shoreland zoning ordinance against a facial takings challenge.[245] The court's reasoning incorporated the *Mugler* "noxious use" concept.[246] Since *Just*, courts have generally sustained zoning-based regulations to protect sensitive areas and to limit construction in unsuitable areas such as floodplains and steep slopes.[247] Statewide, resource-specific programs are

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ultimately strongly affirmed the propriety of environmental controls. *Mt. Laurel I*, 337 A.2d at 731; *see infra* notes 284–88 and accompanying text.

[240] This point was not lost on the *Otto* court. *See* Otto v. Steinhilber, 24 N.E.2d 851, 853–54 (N.Y. 1939).

[241] Indeed, zoning's failure to protect ecological resources has fueled arguments for regional, state, and federal land-use regulation. MASON, *supra* note 5, at 36–37; *see also* Arthur E. Palmer, *Environmentally Based Land Use Planning and Regulation*, 2 PACE ENVTL. L. REV. 25, 63 (1984).

[242] *See* Earl Finbar Murphy, Euclid *and the Environment*, *in* ZONING AND THE AMERICAN DREAM, *supra* note 238, at 154, 156. Murphy argues that *Euclid* embraced a sufficiently broad concept of the "environment" to encompass not just the built environment (a concern seen in the opinion's characterization of apartment buildings as "parasites"), but natural amenities such as light, open space, and air. *Id.* at 159.

[243] The term refers to the approach to land-use planning which attempts to objectively identify natural constraints on development and steer development toward the most appropriate areas. See IAN MCHARG, DESIGN WITH NATURE (1969), a seminal work in the field of environmental land-use planning.

[244] 201 N.W.2d 761 (Wis. 1972). The ordinance did allow a variance where changes to the resource would not inflict harm, though the court did not rely on it in upholding the ordinance. For a brief case study of the transition from traditional zoning to "environmentally based" zoning, see Palmer, *supra* note 241. For a more critical view of recent changes in land-use law, see MASON, *supra* note 5, at 36–38.

[245] *Just*, 201 N.W.2d at 772. *Just* is also significant for its incorporation of public trust concepts into private property ownership. *See id.* at 768.

[246] *See* Cunningham, *supra* note 181, § 9.21, at 616.

[247] *See, e.g.*, Franchise Developers v. City of Cincinnati, 505 N.E.2d 966, 971 (Ohio 1987) (sustaining municipal use of overlay zoning to protect sensitive environmental areas).

frequently administered at the local level through the existing zoning apparatus.[248] Indeed, the use of zoning as an administrative vehicle for environmental based land-use controls has been reinforced as local authorities are increasingly required to adopt a regional perspective in zoning enactments.[249]

Zoning restrictions to protect health and safety and to preserve and enhance neighborhood value and character—the urban and suburban environment—are a common feature on the legal landscape. While some of the more intangible goals that localities have sought through zoning have not gained universal acceptance, courts recognize the broad range of community goals that are properly within zoning's ambit. Thus, in reviewing a variance decision, they accordingly weigh such purposes carefully in determining whether the proposed variance will be injurious to the public or will undermine the purposes of the ordinance.

V. The Variance in Land-use Based Environmental Controls

Legislators have recognized the wisdom of implementing land-use based environmental controls through the existing system of zoning.[250] Rather than create programs that are implemented primarily at the state or regional level, lawmakers have often provided for the integration of environmental resource–protective requirements into pre-existing, locally administered, zoning ordinances.[251] Land-use based environmental controls implemented in this way thereby arrive swaddled in the familiar cloth of zoning.

When variance decisions under such programs are appealed, courts have tended to frame decisions much as they have in traditional zoning cases. In the process, courts have begun selectively to incorporate and refine the extensive body of caselaw developed in the traditional zoning context in considering the propriety of a variance or permit denial in environmental land-use controls.[252]

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[248] *See infra* part V.A.1.

[249] *See generally* Michael F. Reilly, *Transformation at Work: The Effect of Environmental Law on Land Use Control*, 24 Real Prop. Prob. & Tr. J. 33 (1989).

[250] Plater, *supra* note 132, at 974. Similarly, Professor Tribe suggests that the fact that the restrictions in *Agins v. Tiburon* were contained in a zoning ordinance may have saved them. Tribe, *supra* note 25, § 9.4.

[251] *See supra* notes 241–49 and accompanying text.

[252] *See, e.g.*, Chase Manhattan Bank, N.A. v. State, 479 N.Y.S.2d 983 (App. Div. 1984) (importing zoning variance requirement that landowner must prove, by "dollars and cents" evidence, economic impact of restriction).

Not all land-use based environmental controls are implemented through pre-existing zoning structures. Land-use controls and permit and variance procedures are also found in such programs as wetland protection acts, coastal zone management programs, dune protection programs, critical or sensitive area protection, floodplain provisions, and regional protection programs.[253] The primary administering authority may exist at the federal, state, county, or regional levels, or at multiple levels. Accordingly, the substantive provisions and administrative structure of the programs vary widely.[254] Courts have also tended to review decisions under these programs in a manner similar to that employed in traditional zoning cases.

A. *Adminstration and Standards Governing the Variance*

1. Adminstration and Procedures

Variance procedures may be specified in the governing statute or regulations of a state-administered program.[255] Where the program provides for local government administration,[256] such as implementation through zoning, the procedure may be found in the state's zoning enabling statute.[257] The variance-granting body may be designated as the local zoning appeals body[258] or a state-level body created under the governing statute.[259] Where a local body is authorized to grant variances, a state-level entity may have the power to review its decisions for compliance with substantive standards and consistency with the regulatory purposes.[260]

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[253] For a survey of such measures, see NICHOLAS A. ROBINSON, ENVIRONMENTAL REGULATION OF REAL PROPERTY (1993), especially sections 5, 11, and 13.

[254] Most common are use-triggered review and permit procedures that incorporate use- and area-based rules. These limitations and restrictions may consist of performance standards tied to natural conditions, as in some wetland or dune protection statutes. The program may take the form of use regulations that apply across a region, such as in New York's Adirondack Park or New Jersey's Pine Barrens. An extensive discussion of the variety of regulatory provisions is beyond the scope of this Comment.

[255] *See, e.g.*, New York Tidal Wetlands Act, N.Y. ENVTL. CONSERV. LAW §§ 25-0101 to -0602 (McKinney 1984 & Supp. 1994).

[256] *See, e.g.*, Connecticut Coastal Management Act, CONN. GEN. STAT. ANN. §§ 22a-105, 22a-109 (West 1985 & Supp. 1994).

[257] Wisconsin's shoreland zoning, which imposes setbacks around certain waterbodies and wetlands, takes this approach. *See* WIS. STAT. ANN. § 61.351 (West. 1988) (imposing shoreland zoning requirements in villages); *Id.* at § 62.23(e) (authorizing boards of appeals to grant variances).

[258] This is the case under the Wisconsin statutes cited *supra* note 257.

[259] *See, e.g.*, N.Y. ENVTL. CONSERV. §§ 25-0402 (McKinney 1984) (provisions under New York Tidal Wetlands Act); N.C. GEN. STAT. §§ 113A-120.1 (1992) (provisions under North Carolina Coastal Area Management Act).

[260] For example, the Connecticut Coastal Management Act requires local governments to

Often, environmental controls are permit based, thus the variance may consist of the power to modify permit criteria. For example, provisions may authorize the decisionmaking body to vary, modify, or waive the permitting criteria upon a specified showing by the applicant.[261] Aggrieved applicants, as well as abutters or other interested parties, normally have recourse to judicial appeal of the body's decision. Such procedures generally envision a more active role for the variance body, and provide for greater administrative flexibility than may exist where the power is merely to grant or deny a variance.

2. Variance Standards and Criteria

The variance standards and criteria reflect the administrative structure of the particular scheme. There are two common types of criteria: hardship standards similar to those used in zoning, and explicit anti-takings standards.

Hardship standards are typically employed where the restrictions and limitations are built into local zoning. The criteria will normally be the same as under the zoning ordinance.[262] As with zoning criteria, these standards generally adhere to the constitutional safety-valve purpose and may incorporate caselaw refinements.[263] Even where the variance is governed by provisions apart from those governing zoning, the variance standards are still usually similar. For example, the New Jersey Freshwater Wetlands Act requires a waiver if necessary to avoid a substantial hardship to the applicant caused by circumstances peculiar to the property.[264] Similarly, the criteria in the North

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implement the Act's provisions consistently with statewide policies. CONN. GEN. STAT. ANN. § 22a-104 (West 1985). Florida's Beach and Shore Preservation Act provides for beach and shore preservation on a local or county basis, but allows variances only with state approval. FLA. STAT. ANN. § 161.053(4) (West 1990).

[261] Connecticut Inland Wetlands and Watercourses Act, CONN. GEN. STAT. ANN. §§ 22a-36 to -45 (West 1985 & Supp. 1994). The local variance review board may grant a permit with any terms, conditions, limitations, or modifications. *Id.* § 22a-42a(d).

[262] *See, e.g.*, WIS. STAT. ANN. § 62.23(7) (West 1988) (authorizing city boards of appeals to grant special exceptions); *Id.* at § 62.231 (requiring cities to enact shoreland zoning of wetlands).

[263] *See, e.g.*, N.J. STAT. ANN. § 13:9B-18 (West 1991) (incorporating uniqueness requirement).

[264] *Id.* at § 13:9B-18(a) (West 1991). Compare New Jersey's zoning variance standard, which authorizes the grant of variance on the basis of unique physical conditions or "extraordinary and exceptional" conditions that would result in "peculiar and exceptional practical difficulties" or "exceptional and undue hardship." Use variances are explicitly barred. And variances must not result in substantial detriment to the public good or substantial impairment of the intent and purpose of the plan and ordinance. N.J. STAT. ANN. § 40:55D-70 (West Supp. 1993). Similarly strict are the variance criteria under Ohio's Lake Erie coastal management program. The criteria require, among other conditions, that an applicant suffer "exceptional hardship" before

Carolina Coastal Area Management Act are based on those in the state's zoning enabling act.[265] Two of the three prongs under the North Carolina Act parallel the *Otto* criteria, and the third reinforces the legislative nature of generally applicable land-use rules. The test allows the Coastal Commission to vary restrictions if the applicant satisfies the following three-part test: (1) practical difficulties or unnecessary hardship would result from strict application; (2) the difficulty or hardship would result from conditions "peculiar" to the property; and (3) the conditions could not reasonably have been anticipated when the restrictions were adopted or amended.[266]

In contrast to traditional zoning's focus on land uses generically, many environmental programs employ specific performance criteria which a developer must meet in order to obtain a permit. These programs may not separately authorize a variance per se, but rather may allow the permit-granting body to vary the performance criteria if necessary. Such a procedure may also reflect a legislative judgment that the devise is to operate primarily as a tool to provide administrative flexibility, rather than as a constitutional safety valve. Thus, the criteria may direct the decisionmaking body to consider a broad range of factors, which the body must weigh in its discretion.[267]

As in many zoning ordinances,[268] the statute may limit discretion by directing the board, or a reviewing court, to deny a variance or other relief to avoid harming the public.[269] This requirement is particularly common where the potential harms posed by the regulated activity are direct and clear, as in the case of ordinances regulating construction in floodplains.[270] Where the potential harm is less tangible, the criteria may require consideration of the underlying public interests

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an exception to normal permit process may be granted. OHIO REV. CODE ANN. § 1506.07(B) (Baldwin 1990).

[265] N.C. GEN. STAT. § 113A-120.1 (1989).

[266] *Id.*

[267] For example, New York's Coastal Erosion Hazard Areas Act regulations allow the department of environmental conservation to modify permit requirements if the applicant demonstrates that (1) no reasonable, prudent, alternative site is available; (2) the applicant has included all responsible means and measures to mitigate adverse impacts on resources; (3) the development will be reasonably safe from flood-erosion damage; and (4) the variance sought is the minimum necessary. N.Y. COMP. CODES R. & REGS. tit. 6, § 505.13 (1992).

[268] *See supra* notes 174–75, 205–08 and accompanying text.

[269] This may occur whether the particular procedure is a variance or special permit.

[270] For example, the statute governing Arizona's floodplain regulations directs the local board to adopt variance procedures that will deny variances that could result in danger or damage. ARIZ. REV. STAT. ANN. § 48-3609(B)(7) (West 1988).

in natural resource values.[271] Public harm provisions are also seen in many zoning variance standards.[272]

While takings concerns underlie virtually all variance procedures, some procedures expressly employ an "anti-takings" standard. Such a standard requires the variance-granting body to consider the possibility that a variance denial will constitute a taking. In some cases, the standard directs that the variance must be granted where application would constitute a taking.[273] New York's tidal wetlands law adopts a middle ground. The law instructs a reviewing court that finds a permit denial constitutes a taking to allow the administering agency to grant the permit or acquire the property rights found to have been taken.[274] Such a provision raises issues regarding "temporary takings," in particular, the issues of when precisely the compensation period begins and what constitutes non-compensable "normal" administrative delay.[275] These issues remain unsettled.[276]

Anti-takings standards, and other standards that explicitly address the possibility of a regulatory taking, reflect the ad hoc character of regulatory takings law.[277] Such standards typically provide little substantive guidance as to precisely when a variance-granting body or reviewing court is to find that a taking has occurred. However, some

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[271] N.Y. COMP. CODES R. & REGS. tit. 6, § 661.11(a). A variance under New York's tidal wetland regulations must not have an "undue adverse impact" on tidal wetland values, must observe the spirit and intent of the act, secure the public safety and welfare, and do substantial justice. But the standard incorporates a "practical difficulties" test and allows a variance where strict application would be contrary to the purposes of the act, thus suggesting that the test is not overly stringent. *Id.; see also* N.J. STAT. ANN. § 13:9B-11 (West 1991) (identifying factors to determine if an activity proposed near freshwater wetland is in the public interest).

[272] *See supra* notes 174–75 and accompanying text.

[273] The proposed Massachusetts River Protection Act would take this approach. *See* Massachusetts River Protection Act, S.B. 1620, 1993 Reg. Sess. § 3, § 4(b) (1993) [hereinafter MRPA]. The statute may require a reviewing court to order the agency or municipality to order the variance issued where a would-be taking is found. *See id.* Under various state acts, if a reviewing court determines that a taking has occurred, the court must order the regulator to compensate the owner for the lost value, purchase the property, or modify its acts to minimize the detrimental affect on the property's value. *See, e.g.*, DEL. CODE ANN. tit. 7, § 6613 (1991). On the potential use of an administrative takings variance, see Jonathan S. Klavens, *At the Edge of Environmental Adjudication: An Administrative Takings Variance*, 18 HARV. ENVTL. L. REV. 277 (1994) (urging legislature, courts, and agencies to provide for and sustain use of administrative takings variance in large statewide environmental programs).

[274] N.Y. ENVTL. CONSERV. LAW § 25-0404 (McKinney 1984).

[275] First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 321 (1987); *see* Wilson v. Commonwealth, 597 N.E.2d 43, 45 (Mass. 1992) (entertaining claim that administrative delay constituted temporary taking where complaint alleges that delay caused total destruction of property).

[276] *See generally* LaRusso, *supra* note 149.

[277] *See supra* section III.

standards attempt to define the baseline, that is, the appropriate measure of the property that forms the pre-diminution value for purposes of assessing the economic effect of a regulation.[278]

A related procedure, which incidentally demonstrates the difficulty of articulating categorical takings or takings formulas, is the takings impact analysis (TIA). TIAs require regulators to assess the impact of their actions on property owners' interests, and to refrain from regulatory actions that would constitute takings. The executive branch has thus either required,[279] or been required to conduct,[280] such analyses. But while a predictable takings formula would be welcome by the planning and regulatory community,[281] and while some commentators have suggested useful formulations,[282] categorical takings remain limited to physical invasions and deprivations of all economically beneficial use.[283]

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[278] *See supra* notes 132–46 and accompanying text. These legislative efforts reflect the orientation of their sponsors toward government control of land use. A bill introduced in Florida would have adopted a conceptual severance approach, effectively denying *Penn Central*, and expanding the scope of takings by directing that the economic impact of a restriction be based on the regulation's effect only on the restricted portion of a landowner's property. *See* H.B. 1437 (1993). Such an approach does not examine the reasonableness of uses that remain and disregards the purpose of a land-use restriction. The MRPA by contrast, incorporates zoning principles and would require that economic hardship be assessed in relation to the value of the entire parcel and any adjacent parcel the petitioner owns or has an option to purchase. MRPA, *supra* note 273, §§ 3, 4(b).

[279] *See* Charles R. Wise, *The Changing Doctrine of Regulatory Takings and the Executive Branch*, 44 ADMIN. L. REV. 403 (1992) (critiquing federal Executive Order No. 12630, which required agencies to conduct takings impact analyses and finding that its government-wide approach to takings law could result in greater confusion than currently exists, because articulation and definition of standards governing such factors as investment backed expectations and definition of baseline, which require policy judgments, are lacking).

[280] A few state efforts have required the attorney general to issue guidance for identifying potential takings. Arizona has enacted an especially restrictive review statute. ARIZ. REV. STAT. ANN. §§ 37-221 to -223 (West 1993). The statute instructs the Attorney General to adopt guidelines to ensure that proposed health and safety measures are closely tailored to the threat to health and safety and are processed expeditiously. *Id.* at § 37-222. State agencies must prepare assessments of takings implications including the likelihood that an action may constitute a taking, alternatives to the proposed action that might reduce the risk, and an estimate of the cost to the agency, including the source of payment from within the agency's budget, if a taking is found. *Id.* at § 37-223(B). Prior to taking an action restricting property use, the agency must document the risk created by the use, that the action substantially advances the public health and safety, that the restrictions are proportionate, and the potential cost if a taking is found. *Id.* at § 37-223(C).

[281] *See, e.g.*, Eric Damian Kelly, *A Challenge to Planners: Solve the Takings Problem*, LAND USE L., Sept. 1993, at 3, 4–5 (urging legislators to define when a regulation "goes too far").

[282] *See, e.g.*, James J. Brown, *Takings: Who Says it Needs to be So Confusing?*, 22 STETSON L. REV. 379 (1993).

[283] *See supra* section III.

B. *Judicial Treatment of the Environmental Land-use Variance*

The number of cases in which courts have considered the propriety of the grant or denial of a variance in cases involving land-use based environmental controls is limited. Those courts that have reviewed such variance decisions have mostly recognized that environmentally based restrictions embody broad public interests that also underlie traditional zoning ordinances. Faced with arguments that setbacks and use restrictions should not be enforced if doing so would curtail a landowner's use of his or her property, these courts have respected the basic legitimacy of environmental controls rooted in protection of the public health, safety, and welfare. In so doing, these courts have begun to make explicit the connection between the traditional zoning variance and the variance in land-use based environmental controls. They have also begun to incorporate the law of zoning variances into their decisions. The prevailing judicial approach thus far treats environmentally based variance requests similarly to those under traditional zoning. This is particularly the case where the restrictions are implemented through a local zoning ordinance or other local ordinance.

1. The Underlying Connection: The Public Interest in Zoning and Environmental Protection

The underlying issue of whether environmental controls, such as natural resource-based setbacks and use conditions, should be treated similarly to traditional local zoning restrictions has been explicitly addressed. In *Chirichello v. Zoning Board of Adjustment*, the New Jersey Supreme Court specifically considered the issue of whether environmentally based zoning restrictions should be assessed differently than traditional zoning restrictions.[284] The court discussed the relation of the variance to the purposes of zoning.[285] It stated that the zoning variance decision involves a discretionary weighing of the public interest, the interest of the landowner, and of nearby landowners.[286] The court observed that a deprivation of all use of property under a zoning restriction amounts to a taking.[287] But, the court

[284] 397 A.2d 646, 652–53 (N.J. 1979). *Cf.* State v. Johnson, 265 A.2d 711, 716 (Me. 1970) (distinguishing a statewide wetland protection measure, which secures a benefit to the entire state, from "conventional zoning for town *protection*," and finding taking of property where, in absence of permit, land was "commercially valueless") (emphasis added).

[285] *Chirichello*, 397 A.2d 652–53.

[286] *Id.* at 652.

[287] *Id.* at 652–53.

opined, a different, more demanding, calculus might apply in the case of certain environmental land-use controls: where environmental controls protect widespread and important public interests, a deprivation of all use may not require that a variance be granted.[288] The *Chirichello* court's view that total deprivations of use do not require compensation is perhaps less likely to gain adherents in a post-*Lucas* world. Nonetheless, the decision is noteworthy for making explicit the importance of the goals of environmental land-use controls. Even more important is the decision's recognition that environmental controls may protect interests at least as broadly-rooted in the public health, safety, and welfare as the interests that have long supported traditional zoning controls.

2. Environmental Protection Cases Explicitly Importing Zoning Caselaw

As more cases presenting questions about the grant or denial of a variance in the environmental land-use context have emerged, other courts have begun to explicitly note the connection between environmental controls and traditional zoning. In a 1993 case, *Strafach v. Durfee*, the Rhode Island Supreme Court noted this connection in considering the application of a variance standard contained in state regulations that governed environmentally sensitive coastal areas.[289] Regulations of the Rhode Island Department of Environmental Management (DEM) required minimum setbacks from the high water mark for sewage disposal systems located in areas that were designated as prone to erosion under Rhode Island's coastal management program.[290] The landowner sought a variance in order to install a septic system to service a proposed commercial development on an oceanfront property.[291] The regulations authorized the Agency to grant a variance upon a showing of unnecessary hardship.[292] The DEM denied the request, but the trial court reversed.[293] The supreme court addressed the propriety of the trial court's reversal. In so doing, the

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[288] *Id.* at 653 (citing AMG Associates v. Township of Springfield, 319 A.2d 705, 711 n.4 (N.J. 1974) (noting that in zoning variance context, "vital ecological and environmental considerations" that have lead to land-use restrictions to protect public interests "wide in scope and territory," such as coastal wetlands protection, may require a different calculus)).

[289] 635 A.2d 277 (R.I. 1993).

[290] *See id.* at 279.

[291] *Id.* at 278.

[292] Specifically, the regulations required that the applicant show that "literal enforcement of the rules will result in unnecessary hardship, and that a variance will not be contrary to the public interest and the public health." *See id.* at 280.

[293] *Id.* at 279–80.

court noted that the DEM's hearing officer did not reach the question of hardship, instead basing the denial on the failure of the variance applicant to satisfy the public interest and public health prongs of the standard.[294] The court found that the trial court had erroneously based its decision not on a finding of hardship, but on a finding that the landowner "experienced more than a mere inconvenience."[295] The DEM advanced the position that the regulation's unnecessary hardship standard required that there be a deprivation of all beneficial use of the parcel before a variance could issue.[296] But the court, citing shortcomings in the record, reserved the question of the proper application of the unnecessary hardship standard in the context of an environmental program.[297]

Strafach v. Durfee illustrates an instance in which there is a relatively clear connection between protection of public health and safety and a regulation that on its face is responsive to "environmental" concerns. Septic system regulations typically are a relatively non-controversial health-based aspect of zoning and subdivision regulations. Minimum lot-size requirements for individual sewage systems are a common feature of local zoning ordinances. However, as happened in this case, a state or regional program may also include such requirements.[298] Where, however, such requirements become more closely tailored to prevailing natural conditions, the potential for landowners to object to what appears to be a unique burden increases. In addition, where the regional program is more stringent than the local ordinance, fertile ground for claims of regulatory takings, based on perceived unfairness, may exist. Nonetheless, the standard for granting a variance from the regional program should be assessed under similar principles as apply in the zoning context.[299] Regulations that protect public interests by tailoring performance criteria to natural conditions have at least as great a claim to enforcement as traditional zoning restrictions. The DEM's position that the unnecessary hard-

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[294] *Id.* at 283.

[295] *Id.*

[296] *Id.*

[297] *Id.* The variance applicant had apparently not adduced evidence of a hardship at the agency hearing.

[298] A recent New York case involved regulations under a regional groundwater protection program that were more stringent than those under local zoning. *See* Kierni Construction Corp. v. Suffolk County Dep't of Health Serv., 607 N.Y.S.2d 53 (App. Div. 1994).

[299] *See, e.g., id.* at 55 (affirming denial of variance under county groundwater management program where landowner sought to construct second dwelling on parcel, which would be allowed under local zoning, because the landowner was able to obtain a reasonable return on its investment and the economic value of the property was not destroyed).

ship standard requires a deprivation of all beneficial use before a variance should issue is a proper application of longstanding zoning caselaw in an environmental land-use context.

Other cases have shown how courts may weigh the public interest heavily in variance decisions that involve potential environmental harm with a close connection to protection of public health. For example, the clear public interest in protection against pollution of drinking water supplies weighed heavily in the decision of the Supreme Court of Oklahoma in *Eason Oil Co. v. Uhls*.[300] Oklahoma City had designated certain areas of the city "nondrilling" zones.[301] The plaintiff sought and was denied an application to engage in oil and gas well drilling.[302] The denial was based on the potential threat to the city's water supply.[303] The court held that the "reasonable probability" that the water supply might be contaminated was of sufficient gravity to warrant a denial of the variance on the grounds of contrariness to the public interest.[304] Here, the particular restrictions are nearly identical to traditional zoning restrictions. Nonetheless, the case shows that the denial of a variance under a less traditional program that seeks to protect the public interest in natural resources should not pose a difficult question.

In addition to recognizing the importance of such specific, performance-based, and clearly health-related measures, courts have also noted the validity of comprehensive, generally applicable, natural resource–protective environmental land-use restrictions. The underlying connection to zoning lies in the legislature's comprehensive identification of broad classifications for applicability of general use restrictions and performance criteria, such as minimum buildable area requirements and setbacks. As in zoning, even though the harm of a single variance is not obvious, the simple desire of a landowner to do whatever he or she wants is an insufficient reason to deviate from a comprehensive plan to protect the public health, safety, and welfare.

A recent case from Maryland, *North v. St. Mary's County*, is illustrative. This case involved a seemingly innocuous proposal under a geographically broad critical area protection program.[305] The owner of the property at issue applied for a use variance to build on a 4.3-acre parcel of land which had been designated as a critical area pursuant

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[300] 518 P.2d 50, 52 (Okla. 1974).

[301] The ordinances had previously been sustained against constitutional objections. *Id.* at 50.

[302] *Id.* at 52.

[303] *Id.*

[304] *Id.*

[305] 638 A.2d 1175, 1176 (Md. Ct. Spec. App. 1994).

to Maryland's Chesapeake Bay Critical Area legislation.[306] The landowner sought to construct a gazebo, which was an unpermitted use under the county's program, and the county board of appeals granted the variance.[307] The Chairman of the Chesapeake Bay Critical Area Commission appealed.[308]

The land-use restrictions enacted under the Chesapeake Bay program have encountered criticism. But, the court reminded the parties, its function was not to review the legislation or the county program implementing it, including the terms of the variance standard.[309] Rather, the court's function was to assess, under a "fairly debatable" standard, the county board's decision to grant the variance.[310] The court looked to Maryland zoning caselaw, under which a variance requires a showing of unnecessary hardship and practical difficulties, as well as a showing that the variance is required for reasonable use, meaning that the hardship must be the equivalent of a constitutional taking.[311] The critical areas ordinance at issue employed a different, multi-part variance standard, including an "unwarranted hardship" requirement.[312] The court agreed with the landowner that the ordinance was sufficiently strict to have prevented Thoreau from building his hut.[313] This was, of course, beside the point. The proper focus of the inquiry was the landowner's use of his entire four-acre holding. The property already featured the landowner's 1,100 square-foot home, outbuildings, and appurtenances, including a dock.[314] "Thus," held the court, "the property already is subject to a reasonable use."[315] Finally, the court noted, while there was minimal evidence that the proposed gazebo would cause environmental damage, there was no evidence of an unwarranted hardship, or that the variance would not constitute a special privilege.[316] As in the traditional zoning case, the proper remedy in the absence of a unique burden is a legislative

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[306] *Id.*

[307] *Id.*

[308] *See id.* at 1177–78.

[309] *Id.* at 1176.

[310] *Id.* at 1176, 1178, 1184.

[311] *Id.* at 1179–80 (discussing Anderson v. Board of Appeals, Town of Chesapeake Beach, 322 A.2d 220 (Md. Ct. Spec. App. 1974)).

[312] *Id.* at 1180. The ordinance required that the board find (1) special circumstances, and unwarranted hardship without the variance; (2) deprivation of the landowner's "common" rights without the variance; (3) absence of special privilege if the variance is granted; (4) that the variance request is not based on a self-created circumstances; and (5) that the variance will not have an adverse environmental impact. *Id.*

[313] *Id.* at 1180 n.5.

[314] *Id.* at 1176, 1182.

[315] *Id.* at 1182.

[316] *Id.* at 1183.

change in the general use restrictions, not a case-by-case ad hoc set of administrative or judicial exceptions.[317] The Maryland Court of Special Appeals thus recognized that variance decisions under environmental land-use controls are adjudged under the same principles and caselaw as zoning and should pose no greater difficulty than cases that arise in the traditional zoning context.

Where the nexus between the environmental controls and public health is less clear, and where a restriction is based on less tangible values, the variance decision may raise more difficult problems. A recent case from Indiana, *Town of Beverly Shores v. Bagnall*, is illustrative.[318] In this case, promotion of the general welfare through a dune preservation ordinance formed the basis for denial of a variance. The town of Beverly Shores, Indiana, passed an ordinance to preserve the sand dunes adjacent to Lake Michigan.[319] The variance standard under the ordinance authorized a variance where practical difficulties existed and where the variance would neither injure the public nor affect adjacent property in a substantially adverse manner.[320] The Indiana Court of Appeals labelled the local variance board's finding that destruction of a sand dune would be injurious to the public "vague" and insufficient to sustain the denial of a variance.[321] On appeal, the Indiana Supreme Court viewed the matter differently. Though the court opined that there was no connection between the ordinance's restrictions on destruction of the dunes and the public health and safety, the court did find that the damage that the applicant's proposed excavation would have caused to the dune would be injurious to the public welfare.[322]

Where land-use restrictions are closely tied to a unique resource that is not widely distributed geographically, the burden on the landowner may appear to constitute a unique burden attributable to the land itself, thus suggesting satisfaction of *Otto*'s uniqueness requirement. Measures linked to particular natural features thus carry the appearance of unfair impact on a small number of landowners. None-

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[317] *See supra* notes 200–02 and accompanying text.

[318] 590 N.E.2d 1059, 1062 (Ind. 1992).

[319] *Id.* The stated purposes of the ordinance were "conservation of natural contours, vegetation, wild life and all the scenic qualities of the area of the sand dunes and all associated and related geographical elements which are so unique and valuable to the balance of nature." *Id.* The ordinance contained a series of mitigating performance requirements. *Id.*

[320] *Id.* at 1063.

[321] Town of Beverly Shores v. Bagnall, 570 N.E.2d 1363, 1366–67 (Ind. Ct. App. 1991), *rev'd*, 590 N.E.2d 1059 (1992). The trial court judge believed that the finding of no practical difficulty "border[ed] upon being ludicrous." *See Beverly Shores* 570 N.E.2d at 1367.

[322] *Id.* In so doing, the court quoted Carl Sandburg, who wrote admiringly of the dunes. *Beverly Shores*, 590 N.E.2d at 1061 n.2.

theless, such natural feature–specific restrictions must be assessed in view of their general applicability to similarly situated landowners. Where the controls are instituted pursuant to a regional or state-wide program, the legitimacy of such measures is generally strengthened. It should be noted, however, that such measures may reflect political, economic, and social considerations in addition to their more purely ecological bases. Such measures thus may have a more explicit redistributive component than their strictly environmental and health-and-safety based counterparts.

3. A Cautionary Tale: Environmental Protection Cases Misapplying Zoning Caselaw

Wholesale importation and application of traditional zoning variance doctrine to environmental land-use cases is not necessarily appropriate. A key premise underlying traditional zoning—in particular, that preservation of neighborhood character warrants the imposition of use restrictions—does not translate directly into environmental land-use cases. The problem may occur where the ordinance seeks to preserve an intricate, pervasive, and perhaps invisible, but ultimately more tangible resource than character, such as groundwater. An underlying tension between adherence to the principles that support zoning's restrictions and antagonism to environmental land-use restrictions may be apparent.

The underlying tension is evident in the majority opinion and a dissenting opinion in a recent case that arose in the state of Maine, *Perrin v. Town of Kittery*.[323] The case concerned a denial of a variance from a wetland setback provision of a local zoning ordinance. The Perrins built a home on a two-acre lot and then subdivided the lot into two one-acre lots.[324] The Perrins next applied for a permit to build a second dwelling, but the application was denied based on proximity to the wetland. The Perrins sought and were denied a variance.[325] The statutory variance standard followed the *Otto* test, and incorporated a self-created hardship provision.[326] On appeal, the Maine Supreme Judicial Court, applying its "well-established" rules, found that the

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[323] 591 A.2d 861, 862–63 (Me. 1991).

[324] *Id.* at 862.

[325] *Id.* at 862–63.

[326] *Id.* at 863. The requirements for a variance are set out under the state enabling statute. They are reasonable return, uniqueness, and no alteration of "essential character of locality." In addition, self-created hardships—hardships that are the "result of action taken by the applicant or a prior owner"—are excluded. ME. REV. STAT. ANN. tit. 30A, § 4353(4) (West 1992).

Perrins had not met the burden of showing that no reasonable return was possible.[327] In crafting its decision, the court looked to zoning when it relied, in part, on the fact that the variance applicant owned, and lived on, the abutting lot.[328] A dissenting opinion objected to this aspect of the majority's decision. The dissenting justice argued that under zoning law principles, only where an owner of contiguous nonconforming lots can combine the lots and thereby meet physical standards may a variance be granted.[329] Further, argued the justice, granting the variance could not possibly alter the character of the neighborhood.[330] The applicant's hardship was simply not self-created within the statute's meaning.[331]

The dissenting justice's point regarding the character of the neighborhood is an inappropriate importation of zoning doctrine into environmental land-use law. This test, the third *Otto* prong, is primarily concerned with the underlying purposes of traditional zoning and potential public harm.[332] The dissent misconstrues the purpose of this aspect of the variance test. While a wetland variance may not disturb the character of the neighborhood in the traditional sense of introducing a different use, the variance may disturb the natural features of an area. More importantly, granting such variances ultimately fails to adequately protect the public health and welfare. Thus, the applicant for a variance in a case such as this fails to satisfy the unique burden requirement.

Tension may arise when traditional zoning principles are introduced in the environmental context, as a recent Florida case illustrates. In *Vatalaro v. Department of Environmental Regulation*, the Florida District Court of Appeal found that a permit denial amounted to a regulatory taking where the denial left the owner with only passive recreational uses of a property upon which she intended to construct two dwellings.[333] In order to refute the Department's argument that the hardship, if it existed, was self-created, the court attempted to distinguish between self-created hardships under traditional zoning

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[327] *Perrin*, 591 A.2d at 863–64.

[328] *Id.*

[329] *Id.* at 865 (Brody, J., dissenting).

[330] *Id.* at 866 (Brody, J., dissenting).

[331] *Id.*

[332] *See supra* notes 205–08 and accompanying text.

[333] 601 So. 2d 1223, 1229 (Fla. Dist. Ct. App. 1992). Approximately half of the 11-acre parcel was part of a lake. It is not entirely clear from the decision whether the agency argued that it might have issued the permit had the landowner submitted alternate plans. The court thus may have bypassed the finality issue. *See supra* note 112.

variance applications and permit denials.[334] The court found that an owner who purchases with knowledge of a zoning restriction with the expectation of obtaining a change in zoning, which is then unfulfilled, has not suffered a taking, but that when land-use restrictions are implemented on a permit basis, "the land is purchased with future development legitimately anticipated and with no existing bar thereto."[335] The court acknowledged that uses injurious to the public could have been barred.[336] On the facts, however, the court found that the permit denial, which came after a lengthy and ultimately futile application process, constituted a taking.[337] While the variance is not specifically addressed, the court's distinction between an expectation of rezoning and expectation of a permit approval is questionable. The expectation that accompanies a permit application is that the applicant must satisfy certain conditions. Here, the landowner does not appear to have attempted to do so. Perhaps the decision may be explained by the difficulty of the application process and the unique facts of the case, coupled with a favorable political climate.[338]

Even where state law imposes stringent requirements for granting zoning variances, and even though reviewing courts typically are not confined to the record in zoning variance cases,[339] courts may defer to a local body's questionable variance decision. No less so than in the typical zoning context, unique local factors may drive the variance decision under an environmental regulation. This seems to have occurred in *Krmpotich v. City of Duluth*, a recent case in which the Minnesota Court of Appeals upheld a variance allowing a developer to fill a degraded wetland.[340] In this case, the applicant obtained a variance from the terms of the city of Duluth's water resource ordinance, which was incorporated into its zoning ordinance, and third-

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[334] *Vatalaro*, 601 So. 2d at 1229. The court ignored Florida precedent with respect to self-created hardships. *See, e.g.*, Thompson v. Planning Commission of Jacksonville, 464 So. 2d 1231, 1237–38 (Fla. Dist. Ct. App. 1985); Elwyn v. Miami, 113 So. 2d 849, 852–53 (Fla. Dist. Ct. App.), *cert. denied*, 116 So. 2d 773 (1959).

[335] *Vatalaro*, 601 So. 2d at 1229.

[336] *Id.*

[337] *Id.*

[338] The court found the facts favorable to the landowner. The property owner was "an elderly woman in declining health" who wanted to build a home for her daughter "because she needed someone nearby to look after her." *Id.* at 1225. The court chronicles at length the property owner's efforts to comply with local regulations. *See id.* In addition, the property rights movement is active in the state of Florida. *See supra* note 278.

[339] *See supra* notes 166–68 and accompanying text.

[340] 474 N.W.2d 392, 394 (Minn. Ct. App. 1991), *rev'd*, 483 N.W.2d 55 (1992).

party citizen groups challenged the variance.[341] Minnesota law provides two different standards governing the grant of zoning variances. Under the state's local zoning enabling provisions, a landowner must show undue hardship.[342] The statute codifies a three-part test and specifically denies the sufficiency of economic considerations for the grant of a variance.[343] Counties and regional authorities operate under a slightly different standard, and may grant a variance on the basis of "practical difficulties or particular hardship."[344] Again, a three-part test is incorporated.[345] But while the codification liberalizes the stringent *Otto* test, use variances are prohibited and economic considerations are insufficient to justify a variance, provided there is a reasonable use for the property. The city ordinance, by contrast, incorporated a more lenient standard, allowing a variance "to the minimal extent necessary to give the applicant a reasonable use of said site and . . . only upon a showing of hardship."[346]

The court was especially deferential to the city in this case. Reviewing the municipality's decision under a reasonableness standard, the appellate court declined to reverse the variance decision.[347] The citizens' groups argued that because the present owner's cement plant operation constituted a reasonable use of the property, the owner was not entitled to a variance. The appellate court labelled this argument "perverse," noting that the owner was discharging into the wetland.[348] Thus, the court appears to have treated the case more deferentially than a typical zoning variance.[349]

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[341] *See Krmpotich*, 474 N.W.2d at 395–96; Telephone Interview with William P. Dinan, City Attorney, Duluth, Minn. (Oct. 28, 1994) [hereinafter Dinan Interview].

[342] MINN. STAT. ANN. § 462.357(6) (West. 1991).

[343] *Id.* The statute empowers local boards of appeals to grant variances where "the property in question cannot be put to a reasonable use if used under conditions allowed by the official controls, the plight of the landowner is due to circumstances unique to the property not created by the landowner, and the variance, if granted, will not alter the essential character of the locality." *Id.*

[344] MINN. STAT. ANN. § 394.27(7) (West. Supp. 1994).

[345] *See id.*

[346] *See id.* This standard differs from the standard under the zoning enabling acts because it is contained in the city's zoning ordinance. The zoning ordinance's hardship standard was grandfathered in when the state adopted its uniform planning act. Dinan interview, *supra* note 340.

[347] *Krmpotich*, 474 N.W.2d at 396–97

[348] *Id.*

[349] The appellate court's cursory review of the variance decision and unusual deference to the local board is explainable by unique local factors such as the hardship standard; the degraded condition, current use, and small size of the wetland; and a pro-development local climate. Also enlightening is the fact that the court would ultimately find that the proposed development

4. Summary

This review of cases in which courts have had to consider the propriety of the grant or denial of a variance or permit in cases involving modern land-use based environmental controls suggests that in typical circumstances, courts import the caselaw developed under traditional Euclidean zoning. Zoning caselaw in the form of stringent *Otto*-type tests often points directly to the denial of a variance from environmental land-use controls. Courts have sometimes distinguished between the underlying purposes of traditional zoning and modern environmental restrictions. But where environmental controls are implemented through local zoning ordinances, courts have tended to treat the requirements for a variance under the same standards and subject to the same body of caselaw that applies to traditional zoning variances.

The cases also suggest, however, that blind application of zoning caselaw may not always be appropriate. The interests and values protected by environmental land-use controls may be more tangible than those that often support traditional zoning. Nonetheless, the zoning caselaw appears to have provided useful and appropriate guidance for courts confronting various questions with regard to the variance decision. The caselaw thus can also serve as a guide and predictor to planners and resource managers.

VI. The Variance and Land-use Based Environmental Controls

Since at least *Euclid*, courts generally recognize that broad public purposes in safety, health, and welfare and the comprehensive nature of zoning justify zoning's rigid, and at times arbitrary, drawing of lines and segregation of uses.[350] Courts have acquiesced despite the fact that many of the purported benefits of zoning are indirect while the costs that zoning imposes on individual landowners, and perhaps society in the aggregate, may be substantial.[351] Zoning has become a

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violated the Minnesota Environmental Rights Act, a finding which was then overturned by the state supreme court. *See Krmpotich*, 483 N.W.2d. at 57.

[350] *See supra* notes 52–57, 233–49 and accompanying text.

[351] For a discussion of the failure of local zoning to achieve economic efficiency, see generally William C. Wheaton, *supra* note 238, in which the author argues that zoning fails to alleviate the problems that occur in the land market due to externalities. This is found to stem from zoning's political and parochial orientation and its failure to compensate restricted landowners. At the same time, any resultant increases in property values accrue, in the first instance, to the landowner. In short, zoning's private costs outweigh its public benefits.

nearly universal feature of land-use planning in populated areas of the United States despite the fact that zoning places substantial limits on property owners' freedom to use and economically exploit their land. A zoning ordinance may require a residential landowner to leave most of a residential lot as open space. Seemingly innocuous uses may be barred. Similarly, a zoning ordinance may allow a commercial owner to operate one type of enterprise but not another, seemingly similar and unobjectionable, enterprise. Despite zoning's longstanding and widespread acceptance, the constitutional limits are always present in the background.[352] Courts accordingly recognize that strict adherence to the zoning scheme may have such a drastic financial or other impact on a landowner as to rise to the level of a taking, or constitute a denial of due process.

Designed to provide a constitutional safety valve in the zoning context, the unnecessary hardship variance has a history of malleable and sometimes corrupt use by local reviewing bodies.[353] Variances are often arbitrarily granted by local boards of appeal, undermining comprehensive planning efforts and other purposes of the ordinance. Yet when variance decisions are reviewed on appeal, courts scrutinize them closely in order to confine use of the variance to the unusual circumstance where denial would constitute a taking.[354] The doctrinal devices that courts have developed attempt to preserve the integrity of the zoning scheme from piecemeal deterioration through unsupportable and inconsistent grants of variances. Accordingly, the showing required to sustain the grant of a variance under *Otto*-like tests is generally strict.[355]

Judicial review of the grant of zoning variances has consistently respected the comprehensive planning context zoning is supposed to serve. Such purposes as promotion of the public health, safety, and welfare through segregation of uses and setback and other performance criteria figure substantially in the decisions.[356] Many courts also have allowed localities to enact land-use restrictions through zoning or otherwise, based on a municipality's desire to preserve such "soft" public interests as neighborhood character, orderliness, and uniformity.[357]

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[352] *See supra* § II, III.

[353] *See supra* notes 155–56 and accompanying text.

[354] *See supra* section IV.B.

[355] *Id.*

[356] *See supra* section IV.B–D. *passim.*

[357] *See supra* section IV.D.

To the extent that courts have addressed the issue of whether to sustain or deny a variance in land-use based environmental controls, they have begun to incorporate the analysis developed during nearly a century's worth of zoning variance caselaw.[358] This incorporation of the law of variances from the municipal zoning context is generally appropriate. There is a well-established and evolving body of caselaw that has addressed many of the policy issues that underlie land-use controls and the variety of factual and equitable circumstances that may arise under a land-use regulatory program. Courts need not re-invent the wheel, and thus may make use of this body of law where appropriate in developing an approach to environmental regulation and the regulatory takings issue.[359]

There is, however, hazard in the careless importation of zoning doctrine. As the New Jersey Supreme Court suggested in *Chirichello*, environmental restrictions may have a greater claim to the public interest than traditional zoning.[360] It may simply be incorrect, for example, that use variances pose a greater threat than area variances to the underlying purpose of an environmental restriction. Similarly, a court that allows a variation from a wetland setback ordinance—i.e., an area variance—because the variation will not change the "essential character" of a neighborhood fails to appreciate the fundamentally different nature of environmental regulations. In short, the caselaw concepts that have emerged may reflect zoning's traditional parochial focus and therefore may fail to coincide with the broader and more concrete concerns that underlie many land-use based environmental controls.

Comparison to the traditional zoning hardship variance suggests that the standard for granting a variance under a broad-based environmental land-use restriction should be at least as stringent as that for the traditional zoning variance. Under the first *Otto* prong, courts should limit the grant of variances to those situations which would leave no reasonable use for the property and thus constitute a taking.[361] Where, however, the statute vests an expert administrative agency with substantial discretion under a performance linked permit program,[362] it may be appropriate for a court to show greater defer-

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[358] *See supra* section V.B.

[359] *Cf.* Klavens, *supra* note 273, at 339–40 (noting that courts, in adjudicating takings cases, engage in common-law reasoning, which requires delicate balancing of interests).

[360] *See supra* notes 284–88 and accompanying text.

[361] *See supra* section IV.B.

[362] *See supra* text accompanying note 261.

ence to the variance decision. The *Otto* unique burden requirement[363] is also appropriate in order to ensure that variances are not granted unless a burden is unfairly borne. Land-use based environmental controls are designed to prevent direct injury to the protected resource. Thus, as suggested by the third prong of the *Otto* inquiry,[364] a number of courts have recognized not simply the individual financial harm to the property owner but the public risk and harm to the resource and ecosystem that the regulatory program is intended to protect.[365] As courts have recognized, where the effects of non-compliance can readily be shown to constitute a direct harm to public resources, such scrutiny is highly appropriate.[366] Adherence to an *Otto* type of test will help vindicate the broad underlying public interests behind properly enacted environmental land-use controls.

In addition to the *Otto* analysis, other doctrines employed in the zoning cases can play a role in assuring that variances are granted where appropriate. The self-created hardship is such a doctrine.[367] Courts may employ this doctrine to prevent intentional landowner manipulation of parcel lines in order to conceptually sever property and claim that the diminution in value or prevention of use resulting from a land-use restriction is extreme. The clearest example is the landowner who knowingly divides a parcel near a protected resource so as to create a parcel that is all or mostly within the setback area, and then claims no use is possible without a variance.[368] As in the zoning context, self-created hardship rules should prevent a variance from issuing in such cases.

Zoning variance caselaw does not insulate environmental protection measures from scrutiny. Land-use restrictions must, of course, conform to other applicable state and federal law. Legislators and regulators must be mindful of the proper objects of land-use regulation and must be sure that there is a sufficiently close connection between the goals of a regulatory program and the specific land-use restrictions employed to achieve them.

Nonetheless, the zoning experience does provide a lens through which we may assess the impact of modern environmental land-use controls. Courts should be encouraged to recognize the differences

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[363] *See supra* notes 200–04 and accompanying text.

[364] *See supra* notes 178–99 and accompanying text.

[365] *See supra* notes 241–49 and accompanying text.

[366] *See supra* notes 289–317 and accompanying text.

[367] *See supra* notes 210–14 and accompanying text.

[368] The landowner in Perrin v. Town of Kittery, see *supra* notes 323–31 and accompanying text, may have attempted such a result. *See* 591 A.2d 861 (Me. 1991).

between traditional zoning and the purposes underlying land-use based environmental controls. So far, there have been only suggestions by some courts that a different calculus may be required when considering whether to allow an exception from a use restriction in, for example, a built-up commercial area, or an undeveloped river corridor. Advocates for landowners and regulators should encourage courts to recognize the similarities—and the differences—between traditional zoning and modern environmental land-use controls. Such recognition, by making explicit the broad public interest in the preservation of a healthy environment, will help vindicate and strengthen those land-use restrictions that are necessary to protect such vital features as wetlands and other sensitive areas. We may also gain a better appreciation for the basic legitimacy of both types of restrictions. At the same time, the zoning experience can help us to see when a restriction may go too far, by unfairly forcing a small number of landowners to bear a unique burden that should be borne by all.

VII. Conclusion

For better or worse, zoning has become a nearly universal feature of land-use regulation in the United States. While the citizens of Houston remain free, much of the country has long accepted that restrictions on what we may do with our property provide benefits to all of us sufficient to warrant the imposition. Even Justice Scalia recognizes the validity of resource protection and zoning restrictions.[369] Modern land-use regulation has developed techniques to provide needed flexibility so as to properly protect and preserve vital natural resources without unduly and unnecessarily imposing burdens. Yet it is equally clear that a regulation can go too far. It is against the background of such a possibility that the zoning variance and much of the caselaw of zoning developed. Environmental controls serve fundamentally different, and often broader, purposes than traditional zoning regulations. In most circumstances, courts can apply zoning variance caselaw where variances from land-use based environmental controls are at issue. To the extent that the application does not undermine the intent and purpose of the regulation, importation of other aspects of the caselaw is not only useful, but appropriate.

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[369] *See supra* note 206.