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Property Rights and Land Use Controls: Balancing Private and Public Interest

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INTRODUCTION

Among the many competing interests in the field of land use controls, there is perhaps none more fundamental than the potential conflict between the rights of private property owners and the rights of the more general public. Indeed, at bottom land use controls can be viewed as limitations on the rights of private property owners in order to advance broader social concerns. Thus, though it is important to give attention to the variety of interest group conflicts in the land use field, any serious effort at "building cooperation across communities" must pay particular attention to the relationship of private and public rights.

Restrictions on private property rights have long been controversial, of course, with landowners claiming unfairness and constitutional infringements since land use controls began in earnest earlier this century.¹ In recent years the debate has taken on new intensity, however, with a growing property rights movement in this country.² This has in part been fueled by the evolving nature of land use regulations, especially as regards what might be called environmentally sensitive lands. Whereas earlier land use regulations typically permitted some development, newer controls often prohibit development on all or most of a property. This includes efforts to preserve wetlands, coastal zones, habitats for endangered species, open space, and farmland from development.³

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1. For discussion of some of the early challenges to zoning, see DANIEL R. MANDELKER ET AL., *PLANNING AND CONTROL OF LAND DEVELOPMENT: CASES AND MATERIALS* 193-94 (4th ed. 1995) (noting that prior to *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926), state courts split as to constitutionality of zoning).

2. See, e.g., Gerald Torres, *Taking and Giving: Police Power, Public Value, and Private Right*, 26 ENVTL. L. 1 (1996); Ellen Perlman, *Property Rights: A Revolt Under Construction*, GOVERNING, Oct. 1995, at 28; David Helvarg, *Legal Assault on the Environment: "Property Rights" Movement*, NATION, Jan. 30, 1995, at 126; Marianne Lavelle, *The "Property Rights" Revolt*, NAT'L L.J., May 10, 1993, at 1.

3. For an indepth analysis of the issues relating to protection of environmentally sensitive lands, see LINDA MALONE, *ENVIRONMENTAL REGULATION OF LAND USE* (1998); see also Eric T. Freyfogle, *The Owning and Taking of Sensitive Lands*, 43 UCLA L. REV. 77 (1995).

The property rights movement has found expression in various forms, including several significant judicial decisions at the Supreme Court⁴ and lower court levels.⁵ It has also pursued an aggressive agenda at the state and federal level to expand legislatively the scope of compensable takings,⁶ which has met with only limited success. Nonetheless, the rhetoric of property rights remains a strong force in society today, and particularly in the area of land use controls. Its basic assertion continues to be that land use restrictions, especially those protecting environmentally sensitive land, are violating private property rights of landowners to develop property, for the purpose of bestowing benefits to the more general public. According to property rights proponents, this is both unconstitutional and unfair, and at a minimum, compensation should be provided to affected landowners to shift the cost of regulation from landowners back to the public.⁷

This article will examine the issue of the balance between private and public interests in land from three perspectives. Part I will first examine what the current balance is as reflected in federal constitutional protection of property rights under the Takings Clause. Part II will then discuss five principles of property jurisprudence that should inform any discussion of the public/private balance in use of privately-owned land. Finally, part III will discuss whether the current balance of private and public interests is a reasonable one and whether fairness requires compensation when land use restrictions cause a substantial diminution in value of the regulated property.

4. See *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992); *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987); *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987).

5. See *Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171 (Fed. Cir. 1994); *Florida Rock Indus. v. United States*, 18 F.3d 1560 (Fed. Cir. 1994).

6. Almost all states have considered some type of "takings" legislation in recent years. Most common have been "assessment" statutes, which require government officials to assess whether their actions constitute a taking under current judicial standards. To date about fifteen states have adopted such statutes. See, e.g., DEL. CODE ANN. tit. 29, § 605 (Supp. 1996); IND. CODE ANN. §§ 4-22-2-31 to 4-22-2-32 (West Supp. 1996); UTAH CODE ANN. §§ 63-90-1 to 63-90-4 (Supp. 1996). A number of states have also considered compensation statutes, which would require government regulation that reduces the value of land by a certain percentage, such as fifty percent. To date such compensation statutes have been passed in only five states. For a discussion of state takings legislation, see Mark W. Cordes, *Leapfrogging the Constitution: The Rise of State Takings Legislation*, 24 *ECOLOGY L.Q.* 187 (1997). For a discussion of proposed federal takings legislation, see Frank I. Michelman, *A Skeptical View of "Property Rights" Legislation*, 6 *FORDHAM ENVTL. L.J.* 409 (1995).

7. See Michael M. Berger, *Dollars and Damages: A Debate: Yes! It's the Fair Thing to Do*, *PLAN.*, Mar. 1996, at 22; Nancie G. Marzulla, *State Private Property Rights Initiatives as a Response to "Environmental Takings"*, 46 *S.C. L. REV.* 613, 636 (1995).

I. THE CURRENT LEGAL BALANCE BETWEEN PRIVATE AND PUBLIC INTERESTS

Legal protection of property rights may, of course, be grounded in various places, including local ordinances, state legislation, or common law. As a practical matter, however, people on both sides of the property rights issue tend to look to the Federal Constitution as the primary source of property rights. This makes some sense, since constitutional safeguards provide the bedrock of any recognition of property rights and are frequently the focal point of judicial analysis of property right challenges in both federal and state courts. Thus, even though state law at times expands the protection afforded landowners, the Constitution remains the starting point for any discussion of what the law recognizes as the current balance of public and private interests in land.

Although constitutional protection for property might come from several different constitutional sources, such as the First Amendment,⁸ the two primary grounds for property rights are substantive due process and the Takings Clause.⁹

The basic substantive due process protection is the same as that provided in regard to other social/economic legislation: that the regulation in question must substantially advance legitimate state interests. This was first applied to zoning restrictions in the seminal decision of *Village of Euclid v. Ambler Realty Co.*¹⁰ In later years this has appeared as the first prong of the Court's two-prong articulation of takings, first stated in *Agins v. City of Tiburon*¹¹ and

8. Land use controls implicate First Amendment concerns primarily when regulating churches, adult uses, and signs and billboards. See, e.g., *City of Ladue v. Gilleo*, 512 U.S. 43 (1994) (striking down sign prohibition as violating First Amendment); *Members of the City Council v. Taxpayers For Vincent*, 466 U.S. 789 (1984) (upholding sign regulation); *City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 41 (1986) (upholding zoning restrictions on adult uses); *Congregation of Jehovah's Witnesses, Inc. v. City of Lakewood*, 699 F.2d 303 (6th Cir. 1983) (upholding church zoning restriction), *cert. denied*, 464 U.S. 815 (1983).

9. The Court has not always been clear in explaining how the substantive Due Process and Takings Clauses relate to each other. Indeed, in recent years the Court has often blurred the two together. In a line of cases beginning with *Agins v. City of Tiburon*, 447 U.S. 255 (1980), the Court has stated that a regulation will be a taking if "it does not substantially advance legitimate state interests or denies an owner economically viable use of his." *Id.* at 260. The first prong of this test appears to in fact be the traditional substantive due process standard applied to social and economic legislation. For a discussion of the Court's confusing of the two tests in *Agins*, see ROGER A. CUNNINGHAM ET AL., *THE LAW OF PROPERTY* 519 (2d ed. 1993).

10. 272 U.S. 365 (1926).

11. 447 U.S. 255, 260 (1980).

frequently stated in subsequent cases.¹² Despite this blending with takings concerns, the first prong more properly concerns substantive due process.¹³

The second and more fundamental protection is that found in the Fifth Amendment Takings Clause, which prohibits government from taking property without just compensation.¹⁴ Whereas the primary focus of substantive due process is whether the regulation makes sense, the primary focus of the Takings Clause is whether it is fair.¹⁵ Though receiving substantial attention from the Supreme Court in recent years, as well as an outpouring of academic commentary, the precise parameters of takings jurisprudence remain, in the minds of many, quite confusing.¹⁶ Nevertheless, in recent years the Court has identified what might be viewed as three types of "takings" concerns that might trigger constitutional protection.

First, the Court has clearly established that the physical invasion of private property by government is a near per se taking, no matter how minimal the economic impact.¹⁷ This includes not only instances where the government itself invades the property, but also instances where it gives permission to third parties to do so.¹⁸ Thus, required easements for the public and similar instances where others would be granted access to private land would almost always constitute a taking.¹⁹ Although the precise reasons for this type of taking are not clear, the Court has indicated that the right to exclude others is

12. See, e.g., *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992); *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 495 (1987).

13. See *supra* text accompanying note 9.

14. The Fifth Amendment's Takings Clause states, "nor shall private property be taken for public use, without just compensation." U.S. CONST. amend. V.

15. The Supreme Court has noted on a number of occasions that the Takings Clause is "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." See, e.g., *Armstrong v. United States*, 364 U.S. 40, 49 (1960); *Dolan*, 512 U.S. at 384 (quoting *Armstrong*).

16. See, e.g., Andrea L. Peterson, *The Takings Clause: In Search of Underlying Principles*, 77 CAL. L. REV. 1301, 1303-04 (1989) ("doctrinal and conceptual disarray"); J. Peter Byrne, *Ten Arguments for the Abolition of the Regulatory Takings Doctrine*, 22 ECOLOGY L.Q. 89, 102 (1995) ("an unworkable muddle"); James L. Huffman, *Dolan v. City of Tigard: Another Step in the Right Direction*, 25 ENVTL. L. 143, 144 (1995) ("takings jurisprudence is a jumble of confusing holdings with little in the way of coherent principles").

17. See *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) (holding that law requiring landlords to permit cable companies to run cable wires on property constitutes a taking); *Kaiser Aetna v. United States*, 444 U.S. 164 (1979) (navigation servitude imposed on private marina constitutes a taking); *United States v. Causby*, 328 U.S. 256 (1946) (finding that overhead flights by military constitutes a taking); see also *Lucas*, 505 U.S. at 1015 (holding that physical invasions by government are a categorical taking).

18. See *Loretto*, 458 U.S. 419 (1982) (law giving access to cable companies).

19. See *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987) (required public easement would be a taking).

at the heart of property ownership and must be given considerable protection.²⁰

The second type of taking recognized by the Court in recent years is where government uses the discretionary approval process to extort excessive exactions from developers. Referred to by some commentators as "take title" takings,²¹ this type of taking was first recognized by the Court in *Nollan v. California Coastal Commission*.²² There the Court held that development exactions involving the physical dedication of land would be valid only if there is an "essential nexus" between the required dedication and the asserted state interest that would justify denial of development in the first instance.²³ The Court clarified and expanded this requirement several years later in *Dolan v. City of Tigard*,²⁴ where it stated that there must be "rough proportionality" between the required exaction and the adverse effects of the proposed development.²⁵

Nollan and *Dolan* thus established that a taking might occur where government seeks a physical dedication of land for reasons unrelated to the impact of the development in question. In recognizing this, the Court in both decisions predicated its analysis on its longstanding concern for physical invasions, thus making the "take title" takings derivative of the physical invasion cases.²⁶ Although *Nollan* and *Dolan* confirmed the right of government to seek reasonable exactions in the development process, the cases made clear that the exactions must relate to and flow from the development itself. This makes unconstitutional the common practice of using the development process as an excuse to capture interests the government does not want to pay for.

The third and most significant type of taking is that based on the economic impact of a land use regulation. Unlike the physical invasion and "take title" takings, which are limited to unique scenarios, takings based on economic impact are potentially applicable to any land use restriction. For this reason, economic impact analysis is properly viewed as the real heart of the takings issue, and forms the core of what might be viewed as constitutionally recognized property rights.

20. See *Loretto*, 458 U.S. at 433 (stating that right to exclude others is "one of the most essential sticks in the bundle of rights"); *Nollan*, 483 U.S. at 831 (same, quoting *Loretto*).

21. See Robert H. Freilich & David W. Bushek, *Thou Shalt Not Take Title Without Adequate Planning*, 27 URB. LAW. 187, 201-05 (1995).

22. 483 U.S. 825 (1987).

23. *Id.* at 837.

24. 512 U.S. 374 (1994).

25. *Id.* at 391.

26. See *id.* at 385; *Nollan*, 483 U.S. at 831-32.

A taking based on economic impact alone was first recognized in the seminal decision of *Pennsylvania Coal v. Mahon*,²⁷ in which the Supreme Court struck down as a taking a state statute prohibiting the mining of anthracite coal when subsidence damage would take place. Although the Court acknowledged that government could not go on if it had to pay every time it regulates the use of land,²⁸ it stated that if a "regulation goes too far it will be recognized as a taking."²⁹ The Court concluded that the statute in question had "gone too far" and constituted a taking, but failed to explain that conclusion other than to state that the statute made the mining of anthracite coal "commercially impracticable."³⁰

Whatever else its meaning, *Pennsylvania Coal* established that the mere regulation of property for otherwise legitimate purposes might constitute a taking if the economic impact is too severe.³¹ Despite this holding, the Court has struggled considerably over the years to identify the point at which a taking occurs. Indeed, in recent years the Court has frequently acknowledged that its takings analysis is an ad hoc process involving a number of considerations.³² As a practical matter, however, the Court has generally rejected takings challenges based on economic impact alone.

The Court's current approach to takings based on economic impact emanates from two cases, *Penn Central Transportation Co. v. New York City*³³ and *Lucas v. South Carolina Coastal Council*.³⁴ In the first case, *Penn Central*, the Court upheld New York City's Landmarks Preservation Law against a takings challenge. In beginning its analysis, the Court noted there was no clear formula for resolving takings issues, but that it instead typically proceeded on an ad hoc basis, considering a variety of factors.³⁵ It indicated, however, that particularly significant in assessing economic impact was the degree of interference with investment-backed expectations.³⁶ On that basis the Court held there was no taking, noting that the Landmarks Law permitted Penn Central a reasonable return on the property. The Court also stressed that the regulation did not interfere with Penn Central's primary expectation in the property, since it permitted the property to be used as it had for the preceding

27. 260 U.S. 393 (1922).

28. *Id.* at 413.

29. *Id.* at 415.

30. *Id.* at 414.

31. See *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 127 (1978).

32. See, e.g., *id.* at 124; *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015 (1992) (quoting *Penn Cent.*).

33. 438 U.S. 104 (1978).

34. 505 U.S. 1003 (1992).

35. *Penn Cent.*, 438 U.S. at 124.

36. *Id.*

65 years and only limited more intensive development.³⁷ Thus, although the Court did not necessarily limit its interference with investment-backed expectations analysis to only current, developed land uses, it did seem to draw a distinction between expectations in established as opposed to potential uses.

The Court expanded its economic impact analysis in the more recent decision of *Lucas v. South Carolina Coastal Council*,³⁸ where it recognized a categorical taking for lack of economic viability. Although acknowledging that takings analysis usually proceeded on an ad hoc basis, it stated that it had recognized a categorical taking in two previous situations. First, as noted earlier, are physical invasions. Second, the Court noted a categorical taking also occurs "where the regulation denies all economically beneficial or productive use of land,"³⁹ unless it prevents a common law nuisance.⁴⁰ This standard had in fact been stated as dictum in a number of earlier decisions, although the Court had actually never found a taking on that ground.⁴¹ In stating this standard the Court did not give much guidance in how economic viability was to be determined, since it relied on a trial court finding that the property in question was "valueless," but it noted in dictum that the most obvious instance of no economic viability is where the property had to be left in its natural, undeveloped state.⁴²

In recognizing that the loss of economic viability constituted a categorical taking, the Court was careful not to preclude the possibility of a taking when a regulation reduces but does not altogether eliminate economic viability. In a footnote, the Court reaffirmed that such a restriction might still constitute a taking under the Court's balancing test established in *Penn Central*.⁴³ It noted that under that standard "[t]he economic impact of the regulation on the claimant and . . . the extent to which the regulation has interfered with distinct investment-backed expectations are keenly relevant" in determining whether a taking exists.⁴⁴

Thus, in *Lucas* the Court established what might be viewed as a two-fold test for analyzing whether the economic impact of a regulation constitutes a taking. First, if the regulation leaves the owner with no economic viability,

37. *Id.* at 136.

38. 505 U.S. 1003 (1992).

39. *Id.* at 1015-16.

40. *Id.* at 1031.

41. *See, e.g.,* *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 834 (1987); *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 495 (1987); *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 295-96 (1981); *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980).

42. *Lucas*, 505 U.S. at 1018.

43. *Id.* at 1019-20 n.8.

44. *Id.* (quoting *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978)).

it is a categorical taking, unless the regulation was prohibiting a common law nuisance. Second, even if some economic viability remains, a court is to determine if the interference with investment-backed expectations constitutes a taking under *Penn Central*. The Court has yet to develop the full parameters of this *Penn Central* standard, though it arguably applies most forcefully to interferences with current land uses reflecting actual development expenditures as opposed to potential uses.

One issue critical to either approach is how the property is defined in evaluating the economic impact of the regulation, and in particular whether the property can be segmented to create partial takings. Although in a footnote in *Lucas* the Court suggested the issue was not yet resolved,⁴⁵ as a practical matter the Court has consistently resisted attempts to segment property for purposes of analyzing economic impact. Rather, it has consistently examined the entire contiguous parcel in assessing the economic impact of a regulation.⁴⁶ Under this approach the economic impact of a restriction on only a portion of land must be evaluated in terms of how it affects the economic viability of the entire parcel. Similarly, any interference with investment-backed expectations must also be analyzed in reference to the entire contiguous parcel.

Therefore, the federal substantive Due Process and Takings Clauses would prohibit land use restrictions in four instances. First is where the restriction is not substantially related to a legitimate state interest, a rather deferential standard. Second is where the state physically invades the property or grants permission to a third party to invade it. Third is where the state seeks to use the development process to get an exaction not related to and flowing from the development in question. Fourth is where the economic impact of the restriction is too severe, most clearly seen in the unusual situation where it deprives the landowner of all economic viability.

45. *See id.* at 1016-17 n.7. The Court stated:

Regrettably, the rhetorical force of our "deprivation of all economically feasible use" rule is greater than its precision, since the rule does not make clear the 'property interest' against which the loss of value is to be measured. When, for example, a regulation requires a developer to leave 90% of a rural tract in its natural state, it is unclear whether we would analyze the situation as one in which the owner has been deprived of all economically beneficial use of the burdened portion of the tract, or as one in which the owner has suffered a mere diminution in value of the tract as a whole.

46. *See Concrete Pipe & Prods. v. Construction Laborers Pension Trust of S. Cal.*, 508 U.S. 602, 644 (1993) (stating that property was to be viewed as whole and not broken into discrete segments); *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 497-99 (1987) (same); *Penn Cent.*, 438 U.S. at 130-31 (rejecting segmentation argument).

Based on this analysis, the current balance between the rights of private property owners and the public as reflected in Supreme Court jurisprudence might be summarized in the following manner. With regard to a landowner's right to exclude others, the current balance weighs very heavily in favor of private interests. This is seen in the Court's near per se rule regarding physical invasions, which the Court will almost inevitably consider a taking.⁴⁷ Moreover, the "rough proportionality" standard for exactions serves to further protect private interests in this area by prohibiting use of discretionary approvals in the development process as an excuse to unjustifiably capture property interests.

With regard to restrictions on the use of land, a distinction should be drawn between restrictions on current uses and restrictions on future or potential uses. Although the constitutional analysis is not totally clear, it would appear that with regard to restrictions on current uses, the law again leans very heavily in favor of private interests. This is most clearly seen with the investment-backed expectation standard from *Penn Central*, which most sensibly protects against interferences with actual development expenditures, where the investment is clearest and most defined. Thus, if nothing else, *Penn Central*'s focus on investment-backed expectations would appear to greatly limit restrictions on current development uses, absent a showing of nuisance. Indeed, this comports with vested rights and nonconforming use doctrine in zoning law, in which state courts have long protected established uses of property.⁴⁸

It is only in the instance of restrictions on potential uses, often on undeveloped land, that the balance generally weighs more heavily in favor of public rights.⁴⁹ Here, government can place substantial restrictions on property without paying just compensation, as long as the restriction furthers legitimate government interests and some economic viability remains. This arguably views the future, as opposed to current, uses of land as a public resource that can be largely guided by public concerns. The next section of this article will briefly examine five principles that help illuminate the balance and provide guidance for future decisions that must be made.

47. Even here, of course, the Constitution does not prohibit the invasion, but simply requires that it serve a public purpose and just compensation be provided.

48. See generally DANIEL R. MANDELKER, *LAND USE LAW* 213-23 (2d ed. 1988).

49. See Freyfogle, *supra* note 3, at 134 ("[i]n the law of takings, a considerable difference exists between a regulation that interferes with a current land use and one that bans a prospective land use"); John A. Humbach, *Law and a New Land Ethic*, 74 *MINN. L. REV.* 339, 365-66 (1989) (arguing that the Takings Clause does not and should not require compensation for interference with potential uses of property).

II. THE PUBLIC - PRIVATE BALANCE IN LAND USE LAW

Private land ownership in this country has long involved both private and public components. As suggested by the above analysis, how this balance is drawn depends on several variables, including the nature of the public interest served and the impact on the property owner. It is fair to say, however, that the law has never gone to one extreme or the other, rejecting notions of absolute private interests on the one hand, and complete subjection of private interests to the public on the other. Rather, the law has long held the public and private dimensions of land ownership in some tension with each other.

Despite this tension, it is important to note that the private and public interests in land are not inevitably in conflict, but to a large extent are mutually supportive. That is, recognition of private property interests play an important function in supporting broader public interests, while protection of public interests through land use regulation provides significant protection of private concerns. Thus, even though tension exists between private and public concerns, the mutually supportive nature of the interests must also be recognized.

This part of the article will explore five principles that should give shape to how the balance between public and private interests are drawn.⁵⁰ These are certainly not the only principles that exist, or the only way to look at the relationship of public and private interests in land. But they are five important concepts that are grounded in our legal history, and should help to guide both courts and policy makers in how the balance should be drawn.

A. THE PROTECTION OF PRIVATE INTERESTS IN LAND IS ESSENTIAL TO THE PUBLIC GOOD

The beginning point for any discussion of the public and private balance in land use is to recognize the essential role private property interests play in societal welfare. On one level, of course, the public is nothing more than the aggregate of private interests. Thus, by maximizing private interests the public welfare is furthered. As noted earlier, however, this idea has substantial limits, since land uses often conflict with each other, and allowing one owner to maximize that person's interests might impose significant costs on

50. The work of several scholars has been particularly helpful in formulating these principles and especially influenced my thinking on the first three principles. Each of the following articles more fully develop the themes discussed here. See Carol M. Rose, *A Dozen Propositions on Private Property, Public Rights, and the New Takings Legislation*, 53 WASH. & LEE L. REV. 265 (1996); Myrl L. Duncan, *Property as a Public Conversation, Not a Lockean Soliloquy: A Role for Intellectual and Legal History in Takings Analysis*, 26 ENVTL. L. 1095 (1996); Freyfogle, *supra* note 3; Humbach, *supra* note 49.

others. Yet it is important to recognize that at least on some level the broader public interest partially reflects the aggregate of individual interests.

More specifically, however, protection of private interests serves several critical concerns for the well-being of society. First, private property is necessary for personal autonomy and privacy, which serves an important mediating function in society. This privacy and autonomy function of private property has been noted by courts and commentators. The Supreme Court strongly voiced this position in *Carey v. Brown*,⁵¹ where it stated:

Preserving the sanctity of the home, the one retreat to which men and women might repair to escape from the tribulation of their daily pursuits, is surely an important value. Our decisions reflect no lack of solicitude for the right of an individual 'to be let alone' in the privacy of the home, 'sometimes the last citadel of the tired, the weary, and the sick.' . . . The State's interest in protecting the well-being, tranquility, and privacy of the home is certainly of the highest order in a free and civilized society.⁵²

A second and equally important way in which recognition of private interests enhance the public good is the role they play in providing essential services and goods to society, including housing and economic growth. This can be seen in several ways. First, there would be little reason to improve resources and property if property owners could not exclude others from enjoyment of such improvements.⁵³ It is the expectation that people can "enjoy the fruits of their efforts"⁵⁴ which provides incentives for development and resource improvement, which in turn provides services and goods to society.

The critical role protection of private property interests plays in providing essential societal goods cannot be overemphasized. This is perhaps most pronounced with housing, which undeniably is an essential public good. Unless owners and land developers have "reasonably secure expectations of continued ownership,"⁵⁵ there is little reason to build housing. Similarly, secure expectations of ownership and recouping the fruit of one's labors drives our economy more generally, providing the basis on which jobs are created and goods provided. To severely threaten the private interests involved arguably reduces the incentive to produce those goods.

51. 447 U.S. 455 (1980).

52. *Id.* at 471 (citations omitted).

53. *See* Rose, *supra* note 50, at 267-68.

54. *See* Humbach, *supra* note 49, at 347.

55. *Rose, supra* note 50, at 268.

Beyond the right to exclude others from the rewards of one's labors is the need to protect private investments in resources. This is particularly important in the land development field, where the development of property to meet market demand for particular uses often takes substantial expenditures in a staged process. If developers are not secure that development expenditures will be protected, there would be an enormous chilling effect on land development. That, in turn, would greatly limit the production of valuable "land resources," such as housing and commercial uses that create jobs and produce goods and services. Thus, the protection of private property interests helps insure the provision of critical societal goods and services in two ways, both by the right to exclude others from the fruits of one's efforts, as well as by making landowners secure in reasonable investments.

B. AMERICAN PROPERTY LAW HAS ALWAYS VIEWED PRIVATE PROPERTY RIGHTS AS BEING LIMITED BY BROADER PUBLIC CONCERNS

Although American property law has long emphasized the importance of private property, it has never viewed it as being absolute. Rather, private property has always been viewed as subject to broader social and public interests, and that the private use and enjoyment of land is limited by public concerns.⁵⁶ This recognition of a strong public interest in privately owned land is not a recent invention of the Supreme Court or a product of environmentalism in the last half century, but traces its origins back to the beginning of our country.⁵⁷

On one level, of course, private property has long been limited by nuisance principles, which provide that a landowner cannot use property in such a way as to harm the property rights of another.⁵⁸ This recognizes that the effects of property use inevitably extend beyond land boundaries and often conflict with neighboring uses, necessitating a reasonable accommodation of interests. What that accommodation is has depended on social values and

56. A large number of commentators have noted that private property is subject to public interests. See, e.g., Rose, *supra* note 50, at 271-82; Jerry L. Anderson, *Takings and Expectations: Toward a "Broader Vision" of Property Rights*, 37 U. KAN. L. REV. 529, 535 (1989) (treating property rights "as a balance between social and individual interest" is the best way to resolve takings issues); Torres, *supra* note 2, at 5 (discussing "social function" of property); Humbach, *supra* note 49, at 345 ("legal property rights are shaped and limited by the many competing needs of the general welfare").

57. See Duncan, *supra* note 50; see also Lucas v. South Carolina Coastal Council 505 U.S. 1003, 1055-60 (1992) (Blackmun, J., dissenting).

58. See RESTATEMENT (SECOND) OF TORTS §§ 826-28.

norms, but has always understood that property rights must be limited by the rights of others.⁵⁹

More significantly, the recognition of a strong public interest in privately owned land has also been recognized with regard to public restrictions on land. Early America often regulated property use for the public good,⁶⁰ including not only various restrictions on perceived noxious activity, but also the taking of undeveloped land for public use without compensation.⁶¹ William Treanor, a leading scholar in this area, has noted that "colonial governments adopted innumerable regulations that constrained the use of property" including restrictions on use, density, and location of development.⁶² Moreover, restrictions were at times placed on what crops could be grown⁶³ and even affirmative obligations that property be developed in a manner consistent with the public good. Treanor notes that landowners might forfeit mineral rights if not exploited or lose property if not developed. For example, "a Maryland law required owners of good mill sites to develop the sites or run the risk of losing it to someone else who would develop the site."⁶⁴

In many respects, of course, these early land use restrictions were not as well-developed or elaborate as those today, reflecting both the abundance of land as a resource and the less complex regulatory state that existed at that time. Moreover, the affirmative obligations imposed on landowners at times reflected the societal concern in promoting land development, rather than the more current emphasis on preservation. Nonetheless, those affirmative obligations demonstrate the substantial limitations often imposed on landowners to promote the public good. In particular, land was viewed as a public as well as a private resource, the use of which could be clearly and substantially guided by public concerns.

59. See Freyfogle, *supra* note 3, at 104-05.

60. See, e.g., FRED BOSSELMAN ET AL., THE TAKING ISSUE: A STUDY OF THE CONSTITUTIONAL LIMITS OF GOVERNMENTAL AUTHORITY TO REGULATE THE USE OF PRIVATELY-OWNED LAND WITHOUT PAYING COMPENSATION TO THE OWNERS 84 (1973); William Michael Treanor, *The Original Understanding of the Takings Clause and The Political Process*, 95 COLUM. L. REV. 782, 787-89 (1995).

61. Although colonial practice was to on occasion provide compensation for the taking of improved property for roads and public facilities, compensation was not given for the taking of undeveloped land. See Leslie Bender, *The Takings Clause: Principles or Politics?*, 34 BUFF. L. REV. 735, 751-52 (1985); Treanor, *supra* note 60, at 788.

62. WILLIAM MICHAEL TREANOR, ENVIRONMENTAL POLICY PROJECT, GEORGETOWN UNIVERSITY LAW CENTER, *THE ORIGINAL UNDERSTANDING OF THE TAKINGS CLAUSE* 8 (1998).

63. See Duncan, *supra* note at 50, at 1135 (discussing restrictions during colonial period on what crops could be grown).

64. TREANOR, *supra* note 62, at 9.

The public dimension of private property ownership has also received longstanding and consistent recognition by courts. When reviewing land use restrictions designed to further public interests, courts have usually not only upheld such restrictions, but have consistently suggested that private property ownership is inherently limited by such public needs. For example, in several mid-nineteenth century cases the Massachusetts Supreme Court strongly emphasized the public component of land ownership. Thus, in *Commonwealth v. Tewksbury*,⁶⁵ where it upheld a statute which prohibited owners of private beaches from removing any sand or gravel, the court stated “[a] property is acquired and held under the tacit condition that it shall not to be so used to injure the equal rights of others, or to destroy or greatly impair the public rights and interests of the community”⁶⁶ Several years later it expanded on this idea in *Commonwealth v. Alger*,⁶⁷ where it said:

We think it is a settled principle, growing out of the nature of well ordered civil society, that every holder of property, however absolute and unqualified may be his title, holds it under the implied liability that his use of it may be so regulated, that it shall not be injurious to the equal enjoyment of others . . . nor injurious to the rights of the community. All property in this commonwealth . . . is derived directly or indirectly from the government, and held subject to those general regulations, which are necessary to the common good and general welfare.⁶⁸

Other courts of this period similarly recognized that private land interests are not absolute and must at times yield to public concerns when conflicts arise. Indeed, the United States Supreme Court acknowledged this principle in a number of cases, beginning with its earliest land use decisions. For example, in *Mugler v. Kansas*⁶⁹ the Court stated that “all property in this country is held under the implied obligation that the owner’s use of it shall not be injurious to the community.”⁷⁰ Indeed, though recognizing a regulatory taking in *Pennsylvania Coal*, the Court stated, “[a]s long recognized, some values are enjoyed under an implied limitation and must yield to the police power.”⁷¹

65. 52 Mass. (2 Met.) 55 (1846).

66. *Id.* at 57.

67. 61 Mass. (7 Cush.) 84-85 (1851).

68. *Id.*

69. 123 U.S. 623 (1887).

70. *Id.* at 665.

71. *Pennsylvania Coal v. Mahon*, 260 U.S. 393, 413 (1922). *See also* *Hudson County*

Our nation, therefore, has long recognized that private property interests are limited by public needs, a position consistently upheld by courts. Although the law has certainly protected private interests to a large degree, it has at the same time consistently held such private property interests subject to public concerns.

C. PUBLIC LIMITS ON PROPERTY USE NECESSARILY CORRESPONDS TO CHANGING SOCIAL VALUES AND CONDITIONS

As the previous discussion indicates, American law has always viewed private property interests to be limited by public concerns, often in very significant ways. What constitutes the public interest, however, and, correspondingly, how it might limit private property use, necessarily changes over time. Society is not static, and the values and perceived social interests sufficient to limit property use will vary with changing social conditions. Moreover, our knowledge and understanding of nature and land has changed considerably over the years, leading to new understandings of how we view land and the role it might play in meeting societal needs.⁷²

The most obvious and dramatic change from earlier American eras to the present is the shift in focus from conquering the land to preservation. Although there have always been efforts at preserving important resources, there is little doubt that the focus for much of our nation's history has been promoting the development and use of land.⁷³ The growth and economic expansion of the new country required conversion of property to intensive land uses. Land was viewed as a valuable resource only when put to use. Moreover, raw land appeared to be in abundant supply, so its consumption was not threatening. Together this led to an understandable perspective that the public interest was best served by conquering undeveloped land and developing it for economic gain.

The focus on land development as a preeminent societal value has shifted this century, and particularly in the last fifty years. To be sure, development continues to be an important societal value and critical to meeting basic human needs, such as housing. But at the same time American

Water Co. v. McCarter, 209 U.S. 349, 355 (1908) (private property use limited by public interests, including exercise of police power "to protect the atmosphere, the water and the forests"); Hadacheck v. Sebastian, 239 U.S. 394, 410 (1915) (stating that private property interests must at times "yield to the good of the community").

72. See Freyfogle, *supra* note 3, at 78 ("the new wisdom of ecology is altering old ways of imagining the land and relating to it").

73. See *id.* at 95-97 (discussing frontier ethic that dominated much of American history).

society and policy have increasingly recognized the importance of land use planning, and in particular, the preservation of land as a resource. This includes not only limits on the rate, pattern and intensity of development, but also the need to preserve some land in its natural state because of the important functions it serves.

This changing perspective on land use values arguably has occurred for several related reasons. First, the perceived abundance of land, air and water resources of an earlier era has been replaced with the reality of increasing scarcity of those sources.⁷⁴ This, in turn, has led to a need to more carefully allocate those resources and understand the impacts that development might have on them. Second, society has increasingly come to understand the important ecological role played by certain lands. In particular, the lessons of ecology have increasingly demonstrated the interdependence of land uses, and how certain lands serve society in their natural state.⁷⁵

These changing societal values and understandings have led to increased limits on land development, including the recognized need to protect what might be loosely called environmentally sensitive land uses, such as wetlands, coastal zones, habitat for endangered species, farmland, and open space.⁷⁶ Each of the above have emerged in recent years as serving important societal values. Thus, wetlands, once considered worthless unless developed are now seen as serving critical environmental functions. Similarly, the need to preserve prime farmland has emerged as an important societal goal as conversion rates threaten reserves and important questions are raised concerning future "food security."⁷⁷

74. *See id.* at 96-97 ("[b]y the late twentieth century, this expansionist, market-oriented, tame-the-land ethic would collide noisily with [the ethic] that humans are part of the land community and have responsibilities to fellow community members").

75. Joseph Sax writes of the "ecological view of property":

Land is not a passive entity waiting to be transformed by its landowner. Nor is the world comprised of distinct tracts of land, separate pieces independent of each other. Rather, an ecological perspective views land as consisting of systems defined by their function, not by man-made boundaries. Land is already at work, performing important services in its unaltered state. For example, forests regulate the global climate, marshes sustain marine fisheries, and prairie grass holds the soil in place. Transformation diminishes the functioning of this economy [of nature] and, in fact, is at odds with it.

Joseph L. Sax, *Property Rights and the Economy of Nature: Understanding Lucas v. South Carolina Coastal Council*, 45 STAN. L. REV. 1433, 1442 (1993).

76. *See Freyfogle, supra* note 3, at 78.

77. *See* Luther Tweeten, *Food Security and Farmland Preservation*, 3 DRAKE J. AGRIC. L. 237 (1998).

As noted by various commentators, the changing public interests that limit private property can at times work hardships on landowners caught in transitions.⁷⁸ Thus, if property is acquired at a time when development is valued, only for society to change its perspective and value preservation, it might interfere with the legitimate expectations of some landowners. To an extent such concerns are mitigated by the gradual nature of such shifts with few owners being caught in an overnight change.

Despite the adjustments that might at times be required as values change, the core principle remains the same: private property interests are necessarily limited by public concerns. Indeed, land, and especially undeveloped land, is a public resource whose use must be guided by public concerns. At times those public concerns have required that landowners develop land, at other times that they preserve it. This focus on public needs must always be held in tension with the critical role played by private interests, with the balance between the two changing in accord with new understandings of the public interest.⁷⁹

D. A PRIMARY FUNCTION OF PUBLIC LAND USE RESTRICTIONS IS TO PROTECT PRIVATE PROPERTY

The current property rights debate focuses on the manner in which public land use controls limit private property rights and often results in substantial diminution in property values. There is undoubtedly an element of truth in that assertion. Yet in discussing the relative public and private balance in land use it is important to also understand and acknowledge the significant manner in which public restrictions protect private interests and enhance property values. Indeed, a longstanding and significant function of zoning and other land use controls is to protect private property.

The primary manner in which land use restrictions protect private interests is through the elimination or at least minimization of conflicting land uses. The core justification for public controls at all is the realization that land uses often conflict with each other, and, if left uncontrolled, a landowner's activity will often impose significant costs on neighbors. Thus, although zoning typically deprives landowners of some development opportunities, by doing so it provides protection against harms that come from neighboring property. To the extent a property owner values the protection

78. See Rose, *supra* note 50, at 284; Sax, *supra* note 75, at 1450-51.

79. See, e.g., Sax, *supra* note 75, at 1447 ("[p]roperty law has always been functional, encouraging behavior compatible with contemporary goals of the economy").

from conflicting uses more than the loss of development opportunities, there is a sum gain.

It is this property protecting, rather than property restricting, dimension of zoning and other public controls that form the core justification for zoning. By minimizing conflicting harms, zoning in fact increases the private property interests of many landowners. This is not to suggest that all landowners are net gainers or have enhanced property rights as a result of zoning, which is not necessarily always the case. But there is no doubt that zoning serves to significantly protect private interests and values in the big picture. Indeed, protection of property interests appears to be one of the original rationales for zoning and a significant reason for the Supreme Court to uphold zoning as constitutional in *Village of Euclid v. Ambler Realty Co.*⁸⁰

For this reason zoning restrictions have positive as well as negative impacts on land values. In some instances, of course, imposition of zoning restrictions will decrease land values as compared to alternative, more intensive uses of the land. Thus, limiting the number of houses on property, or prohibiting development altogether, will typically lessen the value of property compared to more intensive development. Yet the greater value in alternative uses themselves will often reflect the protections afforded by zoning. For example, the increased value of farmland in alternative, residential use in part reflects that government zoning would protect any residential development from conflicting industrial and commercial uses. As recently noted by several leading land use scholars, "much of the value that some advocates today want to protect against regulation exists in significant part because of the protection of the regulatory system they challenge."⁸¹

It is therefore important that discussions of the balance between private and public interests in land recognize the manner in which public controls protect land and enhance property values. The Supreme Court has itself acknowledged this in its occasional references to reciprocity, which in part recognizes that regulations often have reciprocal burdens and benefits.⁸²

80. 272 U.S. 365 (1926). In their text on land-use law, Professors Robert Ellickson and Dan Tarlock discuss the history of the *Euclid* decision, and how Justice Sutherland, a strong defender of economic rights, had originally written an opinion finding zoning unconstitutional. He became convinced, however, that zoning in fact protected private rights, leading him to rewrite the opinion to uphold zoning. See ROBERT C. ELICKSON & A. DAN TARLOCK, LAND-USE CONTROLS 50-51 (1981).

81. See Daniel Mandelker et al., *Good Planning, Consistent Regulation, and Fair Decision-Making: A Prescription for Avoiding Takings Challenges* at 10 (1996) (paper prepared for American Planning Association's Property Rights Task force, on file with author).

82. See, e.g., *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1017-18 (1992); *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104 (1978); *Pennsylvania Coal v. Mahon*, 260 U.S. 393, 415 (1922). For a general discussion of "reciprocity of advantage" in the

Although the benefits bestowed do not always equal the burdens imposed, they nevertheless are a factor in assessing the legitimacy and fairness of the public/private balance in land use controls.

E. THE PRIVATE/PUBLIC BALANCE MUST ALSO BE SEEN IN BROADER REGULATORY CONTEXTS

Finally, any understanding of the public/private balance in land use controls must also be assessed in broader regulatory contexts. This simply means that any assessment of the regulatory impact of restrictions on property owners should consider the manner in which owners benefit from broader government regulations. Thus, even if the burdens of a particular regulation might adversely affect a property owner, that same owner might well be a net gainer when seen in the context of general government activity and regulations.

The manner in which landowners benefit from more general government activity can be seen in two ways. First is the idea of government "givings" to landowners, as opposed to "takings." As noted by various commentators, much of the value of land, especially as valued for development, is the result of government "givings," actions by government which enhance the value of regulated land.⁸³ This might occur in various ways, such as subsidy programs for farmers and mortgage deductions for homeowners, both of which indirectly yet substantially enhance property values.⁸⁴ Also, as noted in the previous subsection, land use restrictions themselves enhance property values.

One of the most significant types of government "givings" in regard to land values is through basic infrastructure support that makes land developable at all. This includes the building of public facilities and sewer lines that makes land developable and thus adds significantly to its value for development purposes. Although property owners increasingly are asked to pay for some infrastructure through exactions,⁸⁵ such exactions typically reflect the cost of the infrastructure and not the value it adds to the land. Perhaps most significant are road systems which makes land developable and often results in a disproportionate increase in value to benefitted land.

Supreme Court's takings jurisprudence, see Raymond R. Coletta, *Reciprocity of Advantage and Regulatory Takings: Toward A New Theory of Takings Jurisprudence*, 40 AM. U. L. REV. 297 (1990).

83. See Edward Thompson, Jr., *The Government Giveth*, ENVTL. F., Mar./Apr. 1994, at 22; Donald L. Elliot, *Givings and Takings*, LAND USE L. AND ZONING DIG., Jan. 1996, at 3.

84. See Thompson, *supra* note 83, at 23.

85. See generally ALAN A. ALTSHULER & JOSE A. GOMEZ-IBANEZ, REGULATION FOR REVENUE, 19-20, 35-39 (1994).

Edward Thompson has insightfully demonstrated the idea of government givings in the context of the *Lucas* decision, noting how Mr. Lucas's property values were substantially increased by such givings. He states:

Whether or not one agrees with the decision in this case, the fact remains that both Lucas's ability to build on the beach and the value of his beachfront lots were augmented by government action. Public authorities had constructed a bridge to provide access to the island, roads to drive on, water and sewage systems to serve the houses, and beach protection measures to prevent them from washing away. On top of that, the government had helped underwrite flood insurance to cushion the loss when those measures fail. All of these taxpayer-financed improvements contributed to the value of Lucas's property and in all likelihood spelled the difference between being attractive for development and a financially worthless strip of shifting sand. In effect, much of the government's financial exposure for taking the Lucas property was attributable to the government itself.⁸⁶

The idea of givings suggests that much of the value of privately owned land is in fact created by public activity. Thus, in understanding the balance between public and private interests in land, the enhanced value of property values by government must be acknowledged. This is not meant to ignore the role of private enterprise in creating land value; certainly property worth reflects substantial private as well as public initiative. But in discussing the public component in land and justifications for limiting private property for the public good, it is important to recognize that much of the diminution in property values that might result from land restrictions was placed there by government activity in the first place.

Closely related to the idea of givings is the concept of reciprocity, and in particular "general reciprocity." Whereas specific reciprocity concerns the reciprocal benefits flowing from the regulation creating the burden, general reciprocity considers the reciprocal benefits and burdens of regulatory life in general. Thus, even if a particular restriction might not provide significant specific reciprocity for an affected party, there are other instances where the regulated party receives benefits at the expense of others. Over the long run, such benefits and burdens tend to even out. Therefore, as noted by the Supreme Court on several occasions, it is usually fair to assume that a

86. Thompson, *supra* note 83, at 22.

particular regulatory burden is simply "adjusting the benefits and burdens of economic life" to secure an "average reciprocity of advantage."⁸⁷

The concept of "general reciprocity" further suggests that concerns with regulatory impacts on private property interests must be considered in light of the benefits landowners receive in other contexts. To focus only on the burdens imposed by a particular regulation distorts the regulatory equation. Government could hardly function if it were held accountable for burdens imposed by its actions, but never given credit for the significant benefits they create. In this way society must view the losses imposed on some by land use restrictions as part of government's broader regulatory actions within our nation's social and economic life, in which it is reasonable to anticipate that losses in some contexts are offset by benefits in others.⁸⁸

III. STRIKING A FAIR BALANCE BETWEEN PUBLIC AND PRIVATE INTERESTS

The idea of a fair balance between public and private interests in land really concerns the issue of when compensation should be provided for private losses pursuant to government actions. There is no doubt the Fifth Amendment permits, and the public interest at times requires, government to "take" private property. However, the question is when should interferences with private interests be protected by compensation on the one hand, and when should the public be free to assert an interest in property without paying compensation on the other. At bottom, therefore, the property rights debate is not so much over the desirability of certain land use controls, but rather over who should bear the costs of controls.⁸⁹ Conceived in this way, the property issue is simply one of fundamental fairness, a point frequently emphasized by the Supreme Court in its own takings analysis.⁹⁰

87. See *Lucas*, 505 U.S. at 1017-18; *Penn Cent.*, 438 U.S. at 124.

88. See Frank Michelman, *Property, Utility and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1225 (1967) (stating that it is reasonable to believe that "over time the burdens associated with collectively determined improvements will have been distributed 'evenly' enough so that everyone will be a net gainer.").

89. This point is often emphasized by property rights proponents. One leading proponent puts it this way: "The property rights movement is not seeking less environmental protection; it asks only that a few unlucky landowners no longer be forced to bear an unfair share of the burden imposed by such regulations." Marzulla, *supra* note 7, at 639.

90. The Court has often stated that the takings clause is "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." See *Armstrong v. United States*, 364 U.S. 40, 49 (1960); see also *Dolan v. City of Tigard*, 512 U.S. 374, 384 (1994) (quoting *Armstrong*); *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 123-24 (1978) (quoting *Armstrong*).

As noted in part one, current Supreme Court analysis largely limits compensation to three situations: (1) when there is a physical invasion of land; (2) when there is an interference with actual development expenditures absent a nuisance; and (3) when there is no economic viability left in the property as restricted. Although the *Penn Central* test would also allow a finding of a taking even if economic viability remains if the interference with investment backed expectations is too great, as a practical matter this will rarely occur. Thus, as noted in part I, the balance is toward private interests with regard to physical invasions and interference with actual development expenditures, but toward the public side with restrictions on potential uses of property as long as some economic viability remains.

For the most part this would appear to be a reasonable accommodation of the competing private and public concerns at stake. On the one hand, the prohibition on physical invasions provides significant protection of autonomy and privacy concerns, while providing compensation for interference with actual development expenditures protects development incentives necessary for provision of housing and other development needs. On the other hand, recognizing a strong public interest in restricting future or potential uses, including development on environmentally sensitive land, comports with the traditional view that private land is limited by public concerns. In particular, it protects the public interest in sensitive land when it can do the most good—prior to development—and avoids interfering with landowner expectations based on actual development expenditures.

Nevertheless, property rights proponents have argued in recent years that fairness requires that compensation be provided when land use restrictions on undeveloped land result in a substantial diminution in value. This argument has been particularly made with regard to restrictions on environmentally sensitive lands, such as wetlands, coastal lands, habitat for endangered species, and farmland, which in effect preclude development and thus results in substantial economic impacts as compared to alternative uses. In particular, the argument is made that since the benefits of such restrictions typically go to the public in general, the cost of the restriction should be placed on the public through compensation payments to the affected landowner.⁹¹

The issue of when compensation should be paid to landowners above and beyond that constitutionally required is a difficult one, and one to be taken seriously. Even if not constitutionally required, local governments should no doubt strive to treat citizens, including landowners, in a fair and just manner.

91. See Michael M. Berger, *Dollars and Damages: A Debate: Yes! It's the Fair Thing to Do*, PLAN., Mar. 1996, at 22.

For this reason compensatory schemes such as Purchase of Development Rights (PDR) programs⁹² and Transferable Development Rights (TDR)⁹³ programs might be appropriate responses to help alleviate the potential harshness of land use restrictions, especially those which largely prohibit development. Yet when, and under what circumstances fairness dictates resort to such schemes, remains unclear.

As a beginning point of analysis, however, it is important to understand why uncompensated restrictions on environmentally sensitive land, even when they result in substantial diminution in value, should not be viewed as inherently unfair. First, as noted in the previous section, much of the lost value in the property was placed there by government "givings" in the first place. For government to enact subsequent restrictions designed to serve the public which adversely impacts some of the value it has itself created can hardly be considered unfair. Similarly, diminution in value is often based on increased values in alternative uses, such as residential, which themselves reflect the protection from other uses afforded by zoning. Thus, a substantial part of any lost value was bestowed by government in the first instance.

Second, as suggested by the Supreme Court's own analysis, fairness in part turns on the reasonableness of the landowner expectations being interfered with. This, of course, most clearly suggests the fairness of zoning restrictions when a landowner took property subject to such restrictions and is now seeking an upzoning. Although refusal to rezone in such a situation might result in significant loss of potential profit, maintaining current restrictions can hardly be considered an unfair interference with landowner

92. In PDR programs government typically will purchase the development rights on the land, paying the landowner the difference between the property's value if more intensive development is allowed and its value if limited to its more natural state, such as wetlands, farmland, or open space. Although PDR programs have the advantage of more evenly distributing the burden of preserving environmentally sensitive lands and are arguably more resistant than zoning to development and political pressure, their cost limits their utility. For a general discussion of the use of conservation easements and PDR programs to preserve environmentally sensitive lands, see LINDA A. MALONE, ENVIRONMENTAL REGULATION OF LAND USE § 6.11 (1998).

93. In TDR programs landowners are compensated for loss of development opportunities by being given development rights that can be used elsewhere to exceed applicable restrictions in that "receiving area." In effect, the TDRs involve a shifting of potential development from one area to another, with the result that sensitive land is preserved. TDR programs will often also allow the TDRs to be sold to other property owners with eligible property, providing a source of income to the restricted property owner. However, their effectiveness is contingent on the right mix of ingredients, including appropriate "receiving areas" to succeed. They also require stability of zoning restrictions so that the value of the TDRs is not undermined. For a discussion of TDR programs, see Julian Juergensmeyer et al., *Transferrable Development Rights and Alternatives After Suitum*, 30 URB. LAW. 441 (1998).

expectations. Even where the purchase price reflects the potential for more intensive development, this is speculation on possible change and hardly unfair when denied.⁹⁴

Even when property which previously permitted development is downzoned with more restrictive regulations, the idea of regulatory risk tempers unfairness concerns. As noted by various commentators, to the extent people perceive that property is subject to certain public interests, then any reasonable expectations in the land must take into account the possibility of regulation.⁹⁵ This was noted by the Supreme Court itself in *Lucas*, where, in describing the nature of ownership interests in land, the Court stated “[i]t seems to us that the property owner necessarily expects the uses of his property to be restricted, from time to time, by various measures newly enacted by the State in legitimate exercise of its police powers.”⁹⁶ This is a theme established in other Supreme Court cases concerning the risk of regulation,⁹⁷ and has been noted by numerous commentators. As stated by one of the country’s leading property scholars, “regulation [is] an ordinary part of background risk and opportunity, against which we all take our chances . . . as investors in property.”⁹⁸

Taken to an extreme this would justify all and any state interferences with property on the theory that property owners should have had the foresight that regulation might occur, an obviously unacceptable result. As noted earlier, however, the protection of land investment is most reasonably expected when based on actual development expenditures rather than speculation on future uses. Where a landowner has actually spent money developing land, there is a strong public policy to protect such expenditures; otherwise incentives for land development, critical to our well-being, are jeopardized. But where the investment is merely the purchase of land for future development, expectations must be considered contingent at best.

A third reason why uncompensated restrictions are not necessarily unfair, even when resulting in substantial diminution in value, is that they

94. See Humbach, *supra* note 49, at 366-67; Lynda J. Oswald, *Cornering the Quark: Investment-Backed Expectations and Economically Viable Uses in Takings Analysis*, 70 WASH. L. REV. 91, 115-16 (1995).

95. See, e.g., Humbach, *supra* note 49, at 367; Daniel Mandelker, *Investment-Backed Expectations in Taking Law*, 27 URB. LAW. 215, 233-36 (1995).

96. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1027 (1992).

97. See, e.g., *FHA v. Darlington, Inc.*, 358 U.S. 84, 91 (1958) (“[t]hose who do business in the regulated field cannot object if the legislative scheme is buttressed by subsequent amendments to achieve the legislative end”); *Concrete Pipe & Prods. v. Construction Laborers Pension Trust of S. Cal.*, 508 U.S. 602, 645 (1993) (quoting *Darlington*); *Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211, 227 (1986) (quoting *Darlington*).

98. Michelman, *supra* note 6, at 415.

must be seen in the context of general reciprocity as noted earlier. This means that to a certain degree losses pursuant to any regulation must be seen in a broader regulatory context in which fairness of restrictions hopefully evens out to some extent in the long run. This does not mean that the impact of a particular restriction might not be so unfair as to require compensation, but the perceived unfairness from a particular restriction must always be considered in a broader context.

Taken together, the notions of givings, regulatory risk, and general reciprocity suggest that most uncompensated land use restrictions, even when substantial diminution in value results, should not be viewed as unfair. Certainly fairness is quite subjective, however, and necessarily an elastic concept, with varying degrees of comparative fairness or unfairness that might be perceived in any situation. For this reason the case for some compensation becomes relatively stronger in some cases than in others, and use of PDR or TDR programs to offset the impact of regulation is sometimes appropriate. Thus, it makes sense for local governments to consider some limited use of PDR and TDR programs for those situations in which perceptions of unfairness might be greatest.

In this respect it seems that the case for compensation is strongest when several factors converge in a particular restriction. First is the degree of diminution in value. While this in itself has never been nor should be enough to justify compensation,⁹⁹ the degree of regulatory impact as measured by diminution must certainly be considered. Second is the extent to which the affected landowner is singled-out for the restriction or is one of many similarly restricted. Again, this factor cannot be dispositive, but fairness concerns are exacerbated when the costs of regulation are concentrated on a few landowners rather than spread more broadly. Moreover, compensation is more feasible when only a few people are affected.

The final and most important consideration is the foreseeability of restrictions which help shape landowner expectations. As noted earlier, the idea of regulatory risk, especially regarding investment in undeveloped land, must certainly shape investment expectations and minimize fairness concerns. Yet the validity of the regulatory risk argument must in part turn on the foreseeability of possible regulations. Where property is acquired with restrictions in place there is little room to argue interference with expectations. Even if unrestricted at the time of acquisition, if property had attributes which would put the owner on notice of possible regulation, the foreseeability

99. See *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 131 (1978) (stating that diminution in value, "standing alone, [cannot] establish a taking").

of possible restrictions temper the need for compensation. For example, the owner of prime farmland, even if not yet zoned, should foresee the possibility of restrictions, both because of the nature of the property and the growing societal concern for preserving farmland.

Contrasted to this are situations where the restriction is largely unanticipated, such as discovery of an endangered species on land, which prohibits development. Although at one level such risk can still be taken account of, as a practical matter it is typically unanticipated and highly concentrated on a few landowners. As noted by Barton Thompson, this is somewhat "akin to an Act of God," since, absent actual notice of the species on the land, there is little reason to suspect such a restriction on the property.¹⁰⁰ If the restriction eliminates all or most opportunities for development, there would appear to be a strong case for some compensation.

A restriction might also be unforeseeable where the attributes to be protected are obvious, but the societal value of the land has not yet been identified. This, of course, describes all environmentally sensitive land at some point, since there is typically a transition period between old and new understandings of how we see the public interest in particular lands, and which will likely catch some people in the transitions.¹⁰¹ Yet the real issue is whether owners are given adequate time to adjust their plans to the changing societal values and public interests in their property. Where a near term development opportunity is abruptly stopped because of emerging societal understandings of the public interest in land, compensation might be justified if the restriction is substantial and concentrated on a few owners. To the extent a reasonable period exists between emergence of the new societal value and subsequent restrictions on development, then landowners are being provided sufficient protection such that compensation should not be required.

In summary, the current balance in takings jurisprudence, which generally protects against interference with actual development expenditures but views potential uses as being substantially limited by public needs, is a reasonable one. Moreover, charges that restrictions on potential land development which result in substantial diminution in value are inherently unfair are also unfounded. This is not to say that compensatory approaches to preserving environmentally sensitive land might not be appropriate in some cases, especially where landowners are abruptly caught in unforeseeable changes in public policy directed toward preservation. But where efforts to

100. See Barton H. Thompson, *The Endangered Species Act: A Case Study in Takings and Incentives*, 49 STAN. L. REV. 305, 360-61 (1997).

101. See Sax, *supra* note 75, at 1450-51; Rose, *supra* note 50, at 284.

protect sensitive lands are pursued through a thoughtful planning process that provides notice to landowners, fairness concerns should be largely met.

CONCLUSION

The protection of private interests in property is essential to societal welfare and has long been protected in our legal system. Yet private land ownership has at the same time always been subject to the broader public interest, especially as it concerns the future or potential uses of property. What that public interest is has necessarily evolved over time, with the earlier emphasis on development giving way in more recent years to an equal emphasis on sensible planning and protection of environmentally sensitive lands. Yet the core principle has always remained the same: land, and especially undeveloped land, is a public resource whose use must be guided by public concerns.

In effectuating the balance between private and public concerns, current Supreme Court takings jurisprudence leans heavily toward protection of private interests when government invades property or interferes with actual development expenditures on land, while it leans toward the public interests in restricting potential uses of property. Although this at times results in substantial economic impacts on affected landowners, especially when protecting environmentally sensitive lands, the general balance is one consistent with principles that have long informed our understanding of property. Moreover, concepts of government "givings," general reciprocity and regulatory risk all indicate that this balance is not inherently unfair, even when it results in substantial diminution in property values. Government should be sensitive to landowners who could not reasonably have foreseen the possibility of regulation, however, and consider compensation in appropriate circumstances.

